



NSW Ombudsman

# Review of Emergency Powers to Prevent or Control Disorder

September 2007



Review of Emergency Powers to  
Prevent or Control Public Disorder

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Any correspondence relating to this review should be sent to:

**Review of Emergency Powers to  
Prevent or Control Public Disorder**  
NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

Phone (02) 9286 1000  
Toll free (outside Sydney Metro Area): 1800 451 524  
Facsimile: (02) 9283 2911  
Telephone typewriter: (02) 9264 8050  
Website: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)  
Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

ISBN 978-1-921131-76-9

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NSW Ombudsman

September 2007

Level 24 580 George Street  
Sydney NSW 2000  
Phone 02 9286 1000  
Fax 02 9283 2911  
Tollfree 1800 451 524  
TTY 02 9264 8050  
Web [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

The Honourable John Hatzistergos MLC  
Attorney General  
Level 33, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Attorney

Under section 87O of the *Law Enforcement (Powers and Responsibilities) Act 2002* I have been required to keep under scrutiny the exercise of powers conferred on police officers under the Part 6A emergency powers.

I am pleased to provide you with my report, which details the activities undertaken, and my findings and recommendations that result from this review.

I draw your attention to section 87O(5) of the Act that requires you to table this report in both Houses of Parliament as soon as practicable.

Yours sincerely

Bruce Barbour  
**Ombudsman**



NSW Ombudsman

September 2007

Level 24 580 George Street  
Sydney NSW 2000  
Phone 02 9286 1000  
Fax 02 9283 2911  
Tollfree 1800 451 524  
TTY 02 9264 8050  
Web [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

The Honourable David Campbell MP  
Minister for Police  
Level 35, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

Under section 87O of the *Law Enforcement (Powers and Responsibilities) Act 2002* I have been required to keep under scrutiny the exercise of powers conferred on police officers under the Part 6A emergency powers.

I am pleased to provide you with my report, which details the activities undertaken, and my findings and recommendations that result from this review.

I note the NSW Police Force was provided with a draft of the report. Where appropriate, the police comments have been incorporated into the final report.

I draw your attention to section 87O(5) of the Act that requires the Attorney General to lay a copy of this report before both Houses of Parliament as soon as practicable.

Yours sincerely

Bruce Barbour  
**Ombudsman**

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# Foreword

The Part 6A emergency powers to prevent or control public disorder were enacted in direct response to mob violence that occurred at Cronulla, Sydney on 11 December 2005 and the reprisal attacks in Sydney's southern and eastern suburbs in the days that followed. The unexpected intensity of the violence and the speed and unpredictability of the attacks presented acute challenges for police. There were few precedents for policing this kind of apparently indiscriminate violence on such a large scale.

Our review of the few occasions that police have used these extraordinary powers to date has found that police acted in a responsible and appropriate manner. The available evidence indicates that authorisations to use the powers were only granted in circumstances where senior police were genuinely of the view that other, less intrusive policing measures would be insufficient to restore order or prevent further attacks.

An obvious difficulty in providing Parliament with information about and analysis of the practical application of these kinds of emergency powers is that they are seldom used, reflecting the fact that public disorder on this scale is fortunately very rare. Some of the powers are yet to be used at all. This means the potential operational value of the provisions and the extent of possible shortcomings will not be fully tested unless and until the laws are used in a range of circumstances.

When introducing these exceptional police powers, Parliament took special care to ensure detailed oversight of their use. Until the community can be confident they will work in practice, and in a range of emergency situations, detailed annual reporting and some form of independent scrutiny of future police uses of the powers would seem to be an essential safeguard.

I trust that this report will assist the Parliament in considering the future of the Part 6A emergency police powers.



Bruce Barbour  
**Ombudsman**

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# Glossary

CAN	Court Attendance Notice
CCTV	Closed circuit television
COPS	Computerised Operational Policing System, the primary NSW Police Force computer system for recording and retrieving information
FCAN/Field CAN	Field Court Attendance Notice
EAFZ	Emergency alcohol-free zone
ECLO	Ethnic Community Liaison Officer, a NSW Police Force position
Emergency Powers	Refers to the police powers throughout Part 6A
HWP	Highway Patrol, a NSW Police Force unit
LAC	Local Area Command
LGA	Local Government Area
Liquor Powers	Refers to the liquor powers or restrictions in Division 2 of Part 6A
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
MLA / MLC	Member of the Legislative Assembly / Member of the Legislative Council
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debates (Hansard)
OSG	Operations Support Group, a NSW Police Force unit
POI	Person of Interest
Special powers	Refers to the powers in Division 3 of Part 6A
SOPs	Standard Operating Procedures
Part 6A	The Part inserted into the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> to create emergency police powers to prevent or control public disorder

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# Executive Summary

On 15 December 2005, a new part was inserted into the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), providing police with emergency powers to deal with actual or threatened large-scale public disorder. Further amendments commenced in December 2006.

The Part 6A emergency powers were enacted against a background of unprecedented public disorder that erupted in the Sydney beachside suburb of Cronulla on 11 December 2005 and continued for a number of days. There was a perception that police needed additional powers to control the well-coordinated and highly mobile attacks.

Parliament required the Ombudsman to keep under scrutiny the police use of these new powers and report as soon as practicable after 18 months.

Since then, the Part 6A powers have been used on just four occasions. The first involved limited uses of the powers on specified roads for a few hours on 15 December 2005. The second was a major operation — part of Operation Seta — authorising the use of powers across a wide area with 1.3 million residents for most of the following weekend. The third use — part of Operation Aroona — was in Dubbo on 1 January 2006. The fourth occasion was a purported use of powers without authorisation for approximately 30 minutes on a road in Sydney's southern suburbs in March 2006. Some of the provisions under review are yet to be used at all.

## Key provisions

The legislation gives police significant additional powers to control or prevent 'large-scale public disorder'. Part 6A is divided into four divisions: Division 1 defines key terms; Division 2 sets out police powers regarding liquor restrictions; Division 3 establishes special 'lockdown' powers and the process for authorising their use; and Division 4 outlines the review provisions and repeals the powers in December 2007.

## Defining 'large-scale public disorder'

Although the legislation defines 'public disorder' as *'a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations,'* there is no definition of 'large-scale'. A particular concern, voiced by the Legislation Review Committee and in certain submissions to our review, was the potential for police to use the powers in relation to demonstrations, assemblies and protests. In practice the powers have not been used to police such events to date. We have suggested additional guidance for police officers about what might constitute a 'large-scale public disorder', and that Parliament consider this issue when reviewing the emergency power laws.

## Liquor controls

Excessive alcohol consumption was a significant contributor to the crowd violence at Cronulla on 11 December 2005. Division 2 of Part 6A provides emergency powers that enable police to close licensed premises or prohibit or restrict alcohol sales (section 87B) and to establish emergency alcohol-free zones in public places (section 87C). Senior police of or above the rank of Superintendent may authorise the use of these powers for up to 48 hours if they reasonably believe there is an actual or threatened large-scale public disorder occurring in the vicinity, and are satisfied that imposing liquor controls will assist in preventing or controlling the disorder. There are no mechanisms for reviewing or appealing police directions to close licensed premises or restrict liquor sales, and no guidance on what should happen if orders are needed for longer than 48 hours.

Police are yet to formally use the section 87B powers to close licensed premises or impose an emergency prohibition on the sale or supply of liquor. The only restrictions to date have involved a handful of voluntary closures for short periods.

However, police decisions have the clear potential to impact on licensees' livelihoods. We have recommended that police processes provide for regular review of these decisions, and advice as to what should happen if there is a need for the prohibitions or restrictions beyond 48 hours.

Similarly, police use of section 87C to establish emergency alcohol-free zones has also been limited. A few emergency alcohol-free zones were established on 18 December 2005. Parliament enacted some changes in December 2006 enabling police to require the immediate removal of alcohol from emergency alcohol-free zones and strengthening police powers to seize alcohol from drinkers. These enhanced powers are yet to be used.

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For the liquor controls generally, given their limited use or no use, we consider ongoing scrutiny of any future uses is required to assess police practice and the effectiveness of the provisions.

## Authorising the use of ‘special powers’

The authorisation process that must generally precede any police use of the special powers in Division 3 is an important safeguard. Use of the special powers may only be authorised by the Commissioner of Police, or by a Deputy or Assistant Commissioner. An authorisation to use the powers can only be granted if the authorising officer reasonably believes there is an actual or threatened large-scale public disorder, and is satisfied that the exercise of the powers is reasonably necessary to prevent or control the disorder. Use of the powers is only to be authorised within a specified geographic area or road and must not extend beyond 48 hours without Supreme Court approval. During the review, 14 authorisations connected with three separate police operations were made. Most (10 of the 14 authorisations) were in place for the maximum 48 hours allowed. The other four lasted from between 51 minutes and nine hours.

Submissions to our review supported the current two-tiered authorisation process, with immediate decisions by senior police and an independent judicial check after a defined period. However, we note the judicial safeguard is yet to be used. The most significant practice issue we identified was ‘rolling’ authorisations on three roads in southern Sydney. There is a question as to whether this use is consistent with the statutory scheme.

However, until or unless the circumstance arises where these provisions are further tested, it is difficult to determine whether changes are needed to broaden the ability of police to invoke the powers at short notice or for longer periods, or whether the safeguards built into the authorisation process should be further strengthened. Careful review of future uses is required in relation to these issues.

In the meantime, we have recommended strengthening police guidelines to require proper documenting of decisions, regular reviews of authorisations, and revocation as soon as the authorisations are no longer required.

## Defining ‘public place’

The emergency alcohol free zones and Division 3 core powers can only be used in a ‘public place’.<sup>1</sup> Although ‘public place’ is defined broadly, police raised concerns about whether the powers could be exercised in circumstances such as those seen in Cronulla on 11 December 2005, where groups of drinkers gathered in the front yards of blocks of flats and contributed to the escalating trouble.

The legal advice we obtained suggests that officers may exercise emergency powers when on private property in circumstances similar to those raised by police. There is no compelling argument at this time for further extending the definition of public place under Part 6A to include private property generally. This would be a very substantial expansion of powers provided to police, particularly given that authorisations to date have covered very wide areas with substantial populations.

## Core powers

Division 3 provides ‘special powers to prevent or control public disorders’, notably extensive powers for police to lock down areas, search persons and vehicles, require identity details, seize vehicles and telephones, and disperse groups.

### The roadblock and cordon power — section 87I

Section 87I allows police to set up cordons and roadblocks anywhere within a target area or on a target road. When the powers were authorised for Operation Seta, police made wide and effective use of these powers to set up roadblocks. The legislation provides police with significant flexibility concerning both the form and placement of cordons and roadblocks.

Section 87I states that police must not refuse permission for anyone wishing to leave an area to do so unless ‘it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety.’ However, people can be refused entry to an area for any reason. Because people such as residents, business owners or workers would be unnecessarily affected if refused entry to their homes or businesses where there is no immediate threat to safety, we have recommended that a similar test be applied to persons wishing to enter an area.

### The stop and search powers — sections 87J and 87K

Police are also empowered to stop and search vehicles and people within a target area or on a target road. Whereas standard police stop and search powers require an officer to reasonably suspect a person of involvement in some

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kind of wrongdoing before searching them, there is no such test for these search powers. If an authorisation is in place, mere presence in a target area or on a target road is enough to provide a lawful basis to search. This means police were entitled to search any of the 1.3 million people living in authorised target areas during a major operation on 17-19 December 2005 if those residents went out in public that weekend.

Our review found there were strongly held concerns about the random nature of these search powers, their potential to be exercised arbitrarily and the prospect of such arbitrary use undermining community support for police. The concerns were strongest with respect to people being stopped and searched, which is more invasive than vehicle searches. We have recommended that prior to exercising the personal search power in section 87K, an officer should be required to reasonably suspect that the person has been or is likely to be involved in a public disorder. This is similar to the test that already applies to requests for identification details.

Introducing a 'reasonable suspicion' requirement for personal searches should encourage better targeting of police powers, reduce the likelihood that people such as residents and workers who have no involvement or intended involvement in any kind of wrongdoing will be searched, apply a threshold test that police are already familiar with, and help address concerns about the potential for police to use the search powers arbitrarily.

This recommendation only applies to searches of persons. All vehicle searches at roadblocks, on target roads or inside target areas would remain random under the proposed change.

### **Request identification details — section 87L**

Section 87L allows police to request identification details from anyone inside a target area or in a vehicle on a target road if the officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder. Failure or refusal to comply without reasonable excuse may lead to a \$5,500 fine and/or 12 months in prison. The same penalties apply to anyone who provides false particulars. Analysis of police records indicates that many people appear to have simply cooperated with police requests of this nature.

Many submissions raised concerns about the size of the penalties. However, as no charges were laid or penalties imposed, it is difficult to comment further. It may be prudent to continue to monitor the use of this power to determine if there is any basis to the concerns.

### **The power to seize and detain things — section 87M**

The ability for police to seize items such as prohibited drugs, weapons or items that may provide evidence of an offence is a standard part of policing. However, section 87M provides police with special powers to seize communication devices and vehicles for up to seven days without any warrant or charge, if the seizure 'will assist in preventing or controlling a public disorder'. Police may apply to the Local Court for further extensions of this time.

During the use of the powers in Operation Seta, police records show 287 items were seized including 56 mobile phones, 16 vehicles and a variety of weapons such as knives, spears and swords. We found that where detailed guidelines were provided to frontline police regarding when to seize an item, as was the case for mobile phones, a consistent approach was adopted. In the absence of detailed guidelines, as occurred for vehicles, there is some evidence to indicate that similar situations led to entirely different outcomes. We recommend better guidance for frontline police regarding the kinds of factors that might support a decision to seize a vehicle or other item.

Seizing a person's mobile phone and vehicle can impact significantly on their work and family obligations. However, there is no requirement for vehicles or communication devices to be returned sooner than seven days, even if the public disorder or threat of public disorder has ended. We have recommended that a procedure be developed for the early return of these items if police are satisfied that the threat of public disorder has passed. We have also recommended procedures to allow a review by more senior officers of seizure decisions, and the waiver of towing and impound costs in appropriate circumstances.

Our review found that police seized numerous items from the public when they considered the items might inflame community tensions, even though there was no apparent legislative basis for many such seizures. We recommend that consideration be given to amending section 87M(1)(a) to provide a clear legislative basis for seizing and detaining items considered inflammatory or potentially dangerous, and where an officer believes this action will assist in preventing or controlling an actual or threatened public disorder.

### **The power to disperse groups — section 87MA**

The power to disperse groups within a target area was added in December 2006, and is yet to be used. There is no threshold test – the persons need only be inside a target area. Our review found there were concerns about the breadth of this power, the size of the fine (up to \$5,500), and the potential for it to be used to move on residents or bystanders.

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Until the provision is used it is difficult to determine how well it will satisfy police operational objectives or whether anticipated concerns will be realised. This situation again highlights the need for ongoing monitoring of these powers.

## **Exercising powers without an authorisation — section 87N**

Section 87N was intended to allow any police officer to use the emergency powers in urgent circumstances to deal with ‘a brewing riot while formal authorisation is sought’.<sup>2</sup> During our review, only one incident — a concern about a large group of cars heading towards Cronulla in March 2006 — resulted in the purported use of section 87N powers and the establishing of a roadblock.

The test for invoking the section is complex and the circumstances in which it can be used are very limited — more limited than appears the intention of government. In particular, the current provision does not provide a specific police power to stop vehicles. We recommend that section 87N be redrafted to simplify the test for invoking the section, and to add a specific power to stop vehicles. We also recommend that Parliament set a maximum time frame for using the power before an authorisation must be sought, require approval of a senior officer as soon as practicable, and require any use to be properly documented, including the reasons for invoking the power.

## **Record keeping**

Proper record keeping is an essential part of accountability and provides information needed for future operations and ongoing improvements. Our review identified deficiencies in police record keeping. These included the creation of detailed records for little or no reason in some instances, and failure on other occasions to record important information about the use of coercive powers and authorisations.

When coercive powers are used or suspicious activity or threats detected, the details should be recorded. On the other hand, recording too much detail about people simply because they were stopped at a roadblock or cordon can undermine the quality of police intelligence gathered during a disorder, waste police time in creating unnecessary records, and potentially prejudice a person’s future interaction with police by inaccurately linking their identity to some form of suspected wrongdoing.

We recommend that the NSW Police Force establish clear standards to govern record keeping during a disorder, to specify when records are and are not required, and to streamline procedures for making records.

## **Other practice issues**

### **Notifying the public**

There is no formal legal requirement for police to notify the public when declaring an emergency alcohol-free zone or authorising the use of the public disorder powers in a target area or road.

There are clear operational advantages for police in keeping the public informed. Extensive publicity before a lockdown can help persuade large numbers of people to stay away while authorisations are in place. This eases the pressure on frontline officers staffing cordons and roadblocks and reduces the size of crowds within a lockdown area, making it easier for police to maintain order and protect public safety. Knowing that special powers apply might also encourage at least some would-be trouble-makers to stay home.

It is important for members of the public to know about the effect of an authorisation, and that the failure to comply with police requirements may result in very significant penalties. We recommend that police include specific public information strategies in their planning for local emergency management, to maximise police effectiveness in the event of disorder.

### **Economic impact**

Our review also considered the economic impact of the police use of the powers. A number of factors, including the use of the lockdown powers, appeared to contribute to the enduring economic impact on businesses in the areas most affected by the Cronulla riots and retaliatory attacks, making it hard to distinguish the influence of one factor over the others. Further, it is likely that a failure to contain public disorder would likely have had a far greater economic impact.

However, the potential for police decisions to affect livelihoods is another reason for rigorous and accountable processes to apply to the Part 6A powers.

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## Training and operational readiness

A key challenge for the NSW Police Force is to ensure appropriate systems and training are in place so that the powers can be used effectively anywhere at short notice should the need arise.

The challenges apply to officers at all levels, from the senior commanders who may be called on to decide whether or not the powers should be used and how police resources will be deployed, through to the general duties and specialist officers required to exercise these powers at cordons and roadblocks, in patrols and other similar situations. NSW Police Force reviews of previous public order incidents, such as the disorder in Redfern in 2004 and at Macquarie Fields in early 2005, has led to initiatives to improve police capabilities in responding to large-scale public disorder. This process has continued following review of the police response to the Cronulla riots and revenge attacks.

## Conclusion

We have identified a number of procedural and legislative changes which, if adopted, should improve the operation of the Part 6A emergency powers. Our review has also identified key issues that should be kept under scrutiny to ensure that, if or when these powers need to be used, Part 6A operates both fairly and effectively.

An obvious difficulty in providing Parliament with information about the practical application of the Part 6A powers is that there were so few police operations that necessitated the use of the provisions. This is fortunate – it underlines the fact that public disorder on this scale is rare and that police are able to address most situations without having to resort to extraordinary powers. Any conclusions, however, about the potential operational value of the provisions and the extent of possible shortcomings, must be qualified by the fact that we are yet to see how the new laws will work in a range of situations.

When first providing police with these new powers, Parliament took special care to ensure detailed oversight of their use. Until the community can be confident about how the Part 6A provisions will work in practice, and in a range of emergency situations, detailed annual reporting and some form of continuing independent scrutiny of future police uses of the powers are an essential safeguard.

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## Endnotes

<sup>1</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s 87E(1).

<sup>2</sup> Premier Morris lemma, NSWPD, Legislative Assembly, 15 December 2005, p260621.

# Summary of Recommendations

	Recommendation	Report reference
1	The NSW Police Force amend Part 6A procedures to include the factors officers should take into account when considering whether a 'large-scale public disorder' is occurring or imminent.	p12
2	Parliament consider whether further safeguards are required in Part 6A of LEPRA to provide an assurance of the right to peaceful assembly, similar to that set out in section 200 of LEPRA.	p12
3	The NSW Police Force amend Part 6A procedures as they concern section 87B directions to: <ul style="list-style-type: none"> <li>(a) provide licensees an avenue to have such directions reviewed after a certain period</li> <li>(b) provide police with guidance on what should happen if a closure order or some other restriction needs to be extended beyond 48 hours, and</li> <li>(c) consider whether officers of or above the level of Assistant Commissioner should be involved in the decision-making.</li> </ul>	p15
4	The NSW Police Force amend Part 6A procedures to provide guidelines with respect to the form, duration and review of Division 3 authorisations, to ensure that: <ul style="list-style-type: none"> <li>(a) a statement of reasons be provided with any written authorisation</li> <li>(b) the need for an authorisation is reviewed at regular, specified intervals while in place</li> <li>(c) any authorisation is revoked as soon as it is no longer needed, and</li> <li>(d) the reasons for retaining, extending or revoking an authorisation are documented.</li> </ul>	p28
5	Parliament consider amending section 87I of LEPRA so that police officers may not refuse permission for persons, in particular residents or those who work in a target area, to enter the target area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person's own safety.	p55
6	The NSW Police Force amend Part 6A procedures to: <ul style="list-style-type: none"> <li>(a) provide guidelines about the circumstances in which police officers might refuse permission for persons, in particular residents or those who work in a target area, to enter a target area, and</li> <li>(b) require police officers to make a record (such as in a running sheet or a brief notebook entry or other record) of any decision to refuse a person entry to a target area.</li> </ul>	p56
7	Parliament consider amending section 87K of LEPRA to require an appropriate 'reasonable suspicion' test for any searches of persons under the Part 6A powers.	p56
8	Parliament consider amending section 87M of LEPRA to allow a police officer to seize and detain any item where the officer reasonably believes this is likely to assist in preventing or controlling a public disorder.	p58

9	<p>The NSW Police Force amend Part 6A procedures to:</p> <ul style="list-style-type: none"> <li>(a) provide to officers relevant factors to consider in deciding whether to seize and detain a vehicle</li> <li>(b) require officers to record the reasons for the seizure and detention of any thing, including in COPS</li> <li>(c) provide for an avenue of review of any decision by a police officer to seize and detain things, and</li> <li>(d) facilitate the prompt return of things seized and detained where a large-scale public disorder is no longer occurring or threatened.</li> </ul>	p58
10	<p>Parliament consider amending section 87N of LEPR to:</p> <ul style="list-style-type: none"> <li>(a) simplify the test for its invocation</li> <li>(b) include a specific power to stop vehicles</li> <li>(c) set a maximum time frame for using the power before an authorisation must be sought</li> <li>(d) require documentation of the reasons for invoking section 87N, and</li> <li>(e) require approval of a senior officer as soon as practicable.</li> </ul>	p59
11	<p>The NSW Police Force amend Part 6A procedures to provide guidelines to officers about balanced record keeping requirements, including:</p> <ul style="list-style-type: none"> <li>(a) those circumstances where COPS records will be required, including: seizure and detention of vehicles, mobile phones and other items; exercise of powers without authorisation; and initiating action for Part 6A offences, and</li> <li>(b) those circumstances where less formal records (eg. running sheet, police notebook entry) may be sufficient including: for roadblocks and cordons, where persons are refused entry or exit; for nil-find searches; and for compliance with identity checks.</li> </ul>	p60
12	<p>The NSW Police Force develop good practice guidelines to assist officers in informing the public during local emergency management responses.</p>	p70
13	<p>The NSW Police Force review Part 6A procedures, training materials and other guides provided to officers that deal with the emergency powers:</p> <ul style="list-style-type: none"> <li>(a) to ensure these materials reflect the law (including the December 2006 amendments) and good practice, and</li> <li>(b) having regard to the amendments recommended in this report to improve police practice.</li> </ul>	p76
14	<p>Should Parliament determine to continue Part 6A of LEPR in its present or some amended form, consideration be given to appropriate ongoing accountability including:</p> <ul style="list-style-type: none"> <li>(a) detailed police reviews each time the Part 6A powers are used, to assess the effectiveness of the police response and look for opportunities for improvement</li> <li>(b) a requirement for detailed annual reporting by the Commissioner of Police about the use of Part 6A powers, including outcomes of reviews undertaken following particular uses, or (if the powers are unused) details of training and other preparations to ensure operational readiness to use the powers at short notice</li> <li>(c) some form of external and independent review, and</li> <li>(d) periodic Ministerial reviews to determine whether the policy objectives of Part 6A of LERPA remain valid.</li> </ul>	p86





# Chapter 1. Introduction

## New Part 6A emergency powers for police

On 15 December 2005, an emergency session of the NSW Parliament debated and passed extraordinary new powers to assist police to prevent and defuse large-scale public disorder. The *Law Enforcement Legislation Amendment (Public Safety) Act 2005* inserted a new Part 6A into the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), giving police wide powers to deal with emergencies such as the riot and reprisal attacks that occurred in Cronulla and other Sydney beachside suburbs a few days earlier. There was bilateral support for the new powers, which were first used within hours of being passed.

The new 'Emergency powers — public disorder' provisions empower police to restrict sales of alcohol, close liquor outlets, establish emergency alcohol-free zones, and authorise the use of 'special powers' in target areas or on target roads to prevent or control public disorders, including powers to:

- establish roadblocks or cordons and prevent persons or vehicles from entering or leaving
- stop and search persons or vehicles
- require certain persons to disclose their identity, and
- seize vehicles, mobile phones and other communication devices.

The *Law Enforcement Legislation Amendment (Public Safety) Act 2005* amended the *Crimes Act 1900* to create a new offence of assault during a public disorder<sup>3</sup>, and increase the penalty for riot from 10 years to 15 years<sup>4</sup> and, for affray, from 5 years to 10 years.<sup>5</sup> In addition, the *Bail Act 1978* was amended to create a presumption against bail for riot and other serious offences linked with large-scale public disorders, or in connection with the exercise of police powers to prevent or control such a disorder or the threat of such a disorder.<sup>6</sup>

Further amendments to the Part 6A police powers came into effect on 15 December 2006, a year after the initial changes. The *Crimes Legislation Amendment (Gangs) Act 2006* and *Police Powers Legislation Amendment Act 2006* introduced a number of changes, including new powers enabling police to require the immediate removal of alcohol from emergency alcohol-free zones and new police powers to disperse groups in a target area.

There is a full copy of Part 6A at Appendix A. In the following chapters we discuss in detail the relevant legislative provisions.

## Our role and this report

The changes introduced by *Law Enforcement Legislation Amendment (Public Safety) Act 2005* required the NSW Ombudsman 'to keep under scrutiny the exercise of powers conferred on police officers' under Part 6A and provide a report to the Attorney General and Minister for Police as soon as practicable after 15 June 2007.<sup>7</sup> There is also a sunset clause that repeals the new powers in December 2007.<sup>8</sup> The then Minister for Police explained these provisions to Parliament by noting: 'Given the extraordinary powers that we are giving the police, I think it is appropriate to have oversight by the Ombudsman and a sunset period.'<sup>9</sup>

As required, our report focuses on the police uses of the Part 6A provisions, noting where they were used, why they were used, their effectiveness, and the impact of their use on the community and police. We also consider implementation issues, any difficulties that emerged and ongoing preparations to ensure police are ready to use the powers effectively in the future should the need arise. There are also findings and recommendations for police and Parliament to consider in determining the need for similar provisions into the future.

As we were not required to review the offence and bail provisions introduced in conjunction with the new police powers, these matters are not discussed further in the report.

## Chronology of events

The new powers were enacted as a direct response to the riot that occurred in Cronulla, Sydney on 11 December 2005 and subsequent retaliation attacks in Sydney's southern and eastern beach suburbs. The following chronology of events provides a background for the issues that were under consideration during the development of Part 6A.

## Chronology of events

2005	Events
Sunday 4 December	Abusive exchange between three off-duty surf lifesavers and young men from Middle-Eastern backgrounds at North Cronulla beach escalates, leads to fighting and injuries.
Monday 5 December	Incident widely reported as an unprovoked bashing of two lifesavers said to have been 'set upon' by 'a large number of Middle-Eastern males'. In fact, a later analysis of police records shows: <i>'The incident was started by two young men who objected to the other staring at him. An argument took place, insulting and indecent remarks were made by both young men. A fight followed and was over in a short space of time. The reporting and later publicity given to the incident was significantly out of proportion with what actually occurred.'</i> (Strike Force Neil, Executive Summary, p8.)
Tuesday 6 December	Surge in SMS text messages urging 'Aussies' to take revenge on 'Lebs and wogs' at 'Cronulla's 1 <sup>st</sup> wog bashing day' on Sunday to protest against the 'attacks' on local lifesavers. Similarly inflammatory text messages among Middle-Eastern Australians incite confrontation with 'skips' at North Cronulla.
Wednesday 7 December	Tensions flare as racist comment triggers a brawl between Middle-Eastern and Caucasian groups at North Cronulla. Incidents, including assault on a photographer, widely reported.
Saturday 10 December	The Premier foreshadows tougher penalties for assaults on lifesavers. Police step up patrols at Cronulla to prevent further violence. Text messages continue to incite violence. Later inquiries estimate that more than 270,000 messages were sent in the days preceding the riot.
Sunday 11 December	<p>An estimated 5,000 people gather at Cronulla. Carnival atmosphere turns ugly in early afternoon as crowd, affected by heat, alcohol and agitators, seek out and attack people perceived to be of Middle-Eastern or Arabic appearance in a series of violent assaults. Police and ambulance officers are injured while trying to protect or evacuate victims. Graphic images of the mob violence widely broadcast via news bulletins.</p> <p>Police called to St George Hospital at 5.20pm to deal with Middle-Eastern men gathering to support those injured at Cronulla. At 7.45pm, 20 to 30 Middle-Eastern men — some carrying baseball bats — walk along The Promenade, Sans Souci. Another 60 gather in Arncliffe Park. At 7.48pm, police called to Punchbowl Park where a 'volatile' crowd of about 100 young men are gathering. The crowd scatters when police arrive, driving off in all directions.</p> <p>In the evening, convoys of Middle-Eastern males in cars suddenly converge on Cronulla, Maroubra and Brighton-Le-Sands, attacking people and property in apparent retaliation for the earlier violence at Cronulla. Cars, shops and other property smashed and unsuspecting victims attacked at random. One man stabbed in the back in Woolooware, Cronulla. The speed and mobility of the assailants make it difficult for police to contain the attacks. Highly mobile convoys escape before police can respond.</p>
Monday 12 December	<p>Police seize crates of bricks and other potential weapons at Maroubra and other locations. Text messages threaten attack on Lakemba Mosque. Up to 4,000 people rally in early evening to protect mosque. Police and community leaders successfully calm the crowd.</p> <p>Police intercept cars and respond to reports of harassment as convoys launch fresh wave of attacks on people and property in Brighton-Le-Sands, Arncliffe and Cronulla. People going to the aid of victims themselves become victims. Extra police deployed but the coordination, mobility and random nature of the violence enables many assailants to evade arrest. Later analysis indicates that text messaging was a critical factor in organising these attacks and helping assailants evade police.</p>

2005	Events
Tuesday 13 December	Senior police meet to develop strategies to prevent further public disorder. Government approves police request for stronger powers to 'lock down' riot-affected suburbs, disable rioters by seizing their cars and mobile phones, and remove alcohol as part of major police operation. No major public disorder.
Wednesday 14 December	Church hall at Auburn set alight. Police prepare for resurgence in violence the following weekend.
Thursday 15 December	Parliament recalled for emergency session and passes the <i>Law Enforcement Legislation Amendment (Public Safety) Act 2005</i> . The new Part 6A emergency powers are first used a few hours later to establish roadblocks at three points leading into Sutherland Shire to prevent an expected attack on a shopping centre in Miranda.
Saturday and Sunday, 17–18 December	Police use 'target area' authorisations to lock down wide areas of Sydney, Wollongong, the Central Coast and Newcastle for up to 48 hours, covering an area with population of 1.3 million residents. Threats of public disorder successfully averted.

Source: Information from analysis of NSW Police Force COPS events, media reports and *Cronulla Riots: Review of the Police Response*, Strike force Neil (September 2006).

## Methodology

We relied on a range of sources and research activities for our review, including:

- Analysis of information provided by the NSW Police Force, such as:
  - Data and records from the Computerised Operational Policing System (COPS) — see 'Our analysis of COPS data', below.
  - Training, educational and briefing materials relating to the Part 6A powers.
  - Operational orders and situation reports.
  - Other background material such as audits, risk analyses, local emergency management plans, video footage and photographs of operations.
  - Copies of police debriefs and operational reviews following the unrest and use of the Part 6A powers in Sydney, Wollongong, the Central Coast, Newcastle and Dubbo.
- Interviews with senior police involved in the implementation and planning of the operations where the Part 6A powers were used.
- Participation as an observer in a working group convened by the NSW Police Ministry to review the initial uses of Part 6A and recommend further amendments.
- Meetings and presentations to a range of community organisations to discuss our review and seek feedback.
- Meetings and discussions with Aboriginal community leaders, emergency services personnel and police in Dubbo.
- Surveys of:
  - 48 business owners and managers in Cronulla and Brighton-Le-Sands, and
  - Nine of the 16 drivers who had cars seized in operations using Part 6A powers.
- Auditing exhibits and miscellaneous property records of the Eastern Beaches, Flemington and Miranda local area commands, the three commands that had responsibility for managing and storing many of the items seized by police in operations using the Part 6A powers on 17–19 December 2005. We also examined property records at Orana Local Area Command, Dubbo, after the operation using Part 6A powers there.
- Parliamentary Hansard records.
- Expert legal advice from senior counsel on certain aspects of the Part 6A powers.
- Court transcripts from prosecutions arising from operations using the Part 6A powers.
- Media reports on the Cronulla and Dubbo riots and their aftermath.

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- Commentary and analysis of the Part 6A powers.
  - Examination of public order legislation in other jurisdictions and commentary on this legislation.
  - Complaints and an audit of local management issues relating to police uses of the Part 6A powers.

## Issues paper and submissions

In December 2006 we published an Issues Paper setting out a number of questions for consideration and inviting comments. In response, we received 24 detailed submissions expressing views on specific aspects of the powers and proposed improvements, including submissions from advocacy groups, industry associations, the Minister for Police, senior police, local councils in lockdown areas, and departments and authorities such as the Department of Community Services, Privacy NSW, Legal Aid and the Commission for Children and Young People. These were in addition to 18 submissions received earlier in the review period.

## Our analysis of COPS data

COPS is the primary computer system used by police officers to record and retrieve information in their day-to-day work. For any given incident, a police officer can record some or all of the following information on COPS: date, time, location, offence detected (if any), and offender and victim details. A police officer may also record further information about the incident in the free text 'narrative' field, including a description of the incident in the officer's own words.

We required the NSW Police Force to provide all COPS records relating to police uses of the Part 6A powers in locations where target roads or areas were authorised on 15–16 December 2005 and on the weekend of 17–19 December 2005. Of the 1,450 records provided, we found 357 indicating possible uses of the Part 6A powers. The majority of the remainder related to incidents outside of lockdown areas, at times or dates where no lockdown had been authorised, where the record explicitly stated that police relied on other powers, or it primarily related to another policing activity such as checks of licensed premises, responding to 'suspicious activity' or issuing of traffic infringement notices. Although many of these 'non Part 6A' records may have arisen from police operations to prevent further public disorder, our focus was on records that contained some indication the powers were used.

## NSW Police Force feedback

On 18 July 2007 we provided a consultation draft of this report to the Commissioner of Police, inviting him to identify any matters that, if published, could jeopardise the operational safety of police officers, and to identify any errors in the report and provide any comments that could assist. Comments were provided on 16 August 2007, and have been incorporated into relevant sections of this final report.

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## Endnotes

<sup>3</sup> *Crimes Act 1900* s 59A.

<sup>4</sup> *Crimes Act 1900* s 93B.

<sup>5</sup> *Crimes Act 1900* s 93C.

<sup>6</sup> *Bail Act 1978* s 8D.

<sup>7</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s 87O(4).

<sup>8</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s 87P states: 'This Part is repealed on the second anniversary of the commencement of this Part.'

<sup>9</sup> The Hon. Carl Scully MP, NSWPD, Legislative Assembly 15 December 2005, p20626.

# Chapter 2. Implementing the Act

In later chapters, we provide detailed information about the police uses of the new Part 6A emergency powers. Below, we have briefly summarised all authorised uses of the powers in the first 18 months after the legislation commenced to provide a background to our review. We have also outlined several situations where police considered use of, but did not use, Part 6A powers.

## Operation Seta

The period of time between Parliament introducing new police powers and the first use of those powers can vary enormously. In some cases police have months or years to put systems and procedures in place, and to train and equip officers.

The speed with which police were required to prepare for the Part 6A emergency powers was unprecedented. The legislation was passed on Thursday 15 December 2005, four days after the Cronulla riots. The new laws were first used later that day to establish several roadblocks in the Sutherland area.

### Case study A

#### First roadblocks (15 December 2005)

Part 6A was first used within hours of being passed to establish roadblocks on the main access roads to the Sutherland area in Sydney's southern suburbs. Police involved in Operation Seta, an operation to restore order and prevent further rioting, had intercepted text messages and other information indicating that groups were planning to reignite large-scale violence in the area by converging on and wrecking a large shopping centre at Miranda, in Sutherland.

Two 'target road' authorisations enabled police to establish roadblocks on arterial roads in Sans Souci and Blakehurst from 7pm. There was a further authorisation to close Menai Road in Woronora at 8.15pm, but this was revoked at 9.06pm and replaced by an authorisation for River Road, Woronora, where cars could be stopped, searched or turned away more safely. All of the authorisations expired at 4am the following morning. There was no damage to the shopping centre.

There were just six recorded uses of the Part 6A powers at or near these roadblocks. However, other police records and sources such as our interviews of police commanders indicate that many people and vehicles were stopped and searched, and many drivers and passengers were asked to provide their names and other details. There were two seizures of small amounts of cannabis and a number of infringement notices for traffic offences. No alcohol restrictions were imposed.

Police were faced with significant threats of a likely resurgence in racist violence over a wide area on the weekend following the Cronulla riots. In response to this threat, the Part 6A powers were invoked. By the morning of Saturday, 17 December 2005, there were nine authorisations in place allowing use of the new powers across much of Sydney, Newcastle and Wollongong, and in parts of the Central Coast.

### Case study B

#### First major use of the Part 6A powers (17–19 December 2005)

Widespread threats of an escalation in further racist violence the following weekend prompted the first substantial use of the Part 6A powers. The police initiative, Operation Seta, sought to prevent further disorder by boosting police numbers in areas considered at highest risk with an extra 1,500 officers on Saturday and 2,000 on Sunday (more than 10% of all officers in NSW).

The nine 'target area' authorisations effectively gave police the power to 'lock down' an area with 1.3 million residents (20% of the population of NSW) for up to 48 hours. Police established at least 81 roadblocks to protect areas at risk and appealed to the public to stay away from beaches in Sydney's eastern suburbs, Cronulla, the Central Coast, Newcastle and Wollongong. At roadblocks and within target areas, numerous people and vehicles were stopped and searched, and identification details required. The next day these

measures were enhanced in some areas through police establishing emergency alcohol-free zones at Bondi, Coogee, Maroubra, Newcastle and Terrigal.

A total of 285 items were seized, including 16 vehicles, 56 mobile phones, 57 weapons or potential weapons (knives, swords, arrows, spears, box-cutters etc), illicit drugs, alcohol, tools, sporting equipment, and items considered inflammatory such as offensive T-shirts and Australian flags. There were no charges relating to Part 6A offences, but there were charges laid and infringement notices issued as a result of police using the powers. Most related to custody of offensive implements, traffic offences and drug possession.

By Sunday evening, the operations in all areas were wound down as the likelihood of unrest subsided. All nine target area authorisations stayed in place until they expired on the Monday morning.

## NSW Police Force preparations for using the powers

Two factors characterised the initial police preparations for using the new powers.

Firstly, there was an urgent need to create new command structures to coordinate and manage major policing operations in the broad areas identified as being at risk of further unrest, and to task and train all staff involved in these operations. This required the preparation and dissemination of new procedures, training materials and guidelines to clarify officers' respective roles and the ambit of their new powers.

Secondly, there were enormous logistical challenges associated with amassing the staff, vehicles and other resources needed for these operations at short notice. There were 1,500 officers deployed for these operations on 17 December 2005, and 2,000 the following day. Leave was cancelled and officers were brought in from other commands, including country areas.

The timeframe for police to develop and implement these operations was very short. Even after the initial uses of the powers, there were ongoing pressures for the NSW Police Force to be ready for further uses of the powers at very short notice. As the policing operations moved to a more sustainable footing, 792 officers were seconded to Operation Seta for the rest of December 2005 and most of January 2006.

## Other recorded uses of Part 6A

In addition to using the emergency powers during the early stages of Operation Seta, police advised us that they have used the powers on two other occasions:

- 1–3 January 2006: to prevent further unrest following public disorder in Dubbo on 1 January 2006, and
- 19 March 2006: to prevent what police perceived to be a threatened public disorder within Miranda LAC.

### Case study C

#### Dubbo Incident (1–3 January 2006)

In recent years, the Gordon Estate in West Dubbo experienced recurring problems of vandalism, arson and social disorder. The estate has a predominantly Aboriginal population. In the early hours of New Year's Day 2006, there was a disturbance involving up to 200 people following the arrest of a young Aboriginal man. Bricks, bottles and broken tiles were thrown at police. A police car and a stolen car were set alight. Two police officers were injured, one seriously, and all officers had to withdraw for their own safety. Police set up a command post at the main entrance to the estate. Tensions lasted until morning. Police called in from other areas were sent in at dawn to remove the burnt-out cars and clear the area of any items that could be used as missiles.

Senior Dubbo police believed that further unrest was likely. This belief was based on the level of violence the previous night, an escalating pattern of serious incidents, rumours of a likely influx of people from other areas, an increase in feuding between two families on the estate, and concerns about how residents might react to news of an unrelated incident earlier that day in which a young Aboriginal man was seriously injured in a fall. They asked for an authorisation to 'lock down' the estate, primarily to prevent weapons and potential troublemakers from entering.

The target area authorisation covered most of Dubbo for up to 48 hours from 7pm on 1 January 2006. When the authorisation came into effect, highway patrol officers and police with specialist riot-training closed the

four roads into the estate. Volunteer rescue personnel provided lighting. Two specialist police teams patrolled the estate from 6pm until 5am the next day. Police commanders, other officers and ambulance, fire and volunteer rescue personnel remained at the command post.

Anyone entering the area had to provide proof of residency. Police said 22 vehicles were searched and potential missiles and weapons removed — including rocks, planks of wood and a machete. Some cars were prevented from entering and one was seized while driving within the estate, along with the large knife and alcohol found in it. The vehicle was later returned. No-one was prevented from leaving the estate.

As there was no further violence or unrest, police removed the roadblocks at 4.30am. Although local police decided the Part 6A powers were no longer required, the authorisation stayed in place until it expired at 7pm on 3 January 2006.

The liquor powers were not needed as licensed premises in the West Dubbo area had voluntarily agreed not to sell takeaway liquor. There were no charges for Part 6A offences, but the driver who had his car seized was fined for possession of the knife found in his car. A few people were charged with affray and other offences relating to the initial unrest.

The only other reported use of the Part 6A emergency powers relates to police advice that the section 87N 'powers exercisable without notification' provision was used to briefly establish a roadblock to intercept a convoy of vehicles headed towards Cronulla on 19 March 2006.

## Case study D

### 19 March 2006

At 10.15pm on Sunday 19 March 2006, large groups of young men and about 200 vehicles had gathered at a foreshore car park north of Brighton-le-Sands. Just as police were preparing to enter the car park to check for vehicle defects, dozens of cars departed en masse, many containing three or four young Middle Eastern Australian men. The car park exit required the vehicles to initially turn south towards Cronulla.

The large number of vehicles, the apparent ethnic background of the occupants, their general southerly bearing and previous violence in the area, sparked police concerns that there was the risk of a large-scale public disorder in the Cronulla area. The duty officer at Cronulla advised his commander that he was invoking the provisions of section 87N and, by 10.39pm, had established a roadblock to check southbound traffic on Taren Point Road, the most direct route from Brighton-le-Sands to Cronulla.

An estimated 100 vehicles passed through the roadblock while it was in place. One vehicle was stopped. The roadblock was removed at 11.01pm when it became apparent that the vehicles that had earlier exited the Brighton-le-Sands car park had dispersed and were not bound for Cronulla. So far as can be determined, none passed through the roadblock. There were no further reports of large gatherings of persons or vehicles that evening in the area.

## Incidents where police chose not to use the emergency powers

As the Part 6A powers require police to exercise crucial judgements about whether a large-scale public disorder is occurring, or threatening to occur, and that invoking the emergency powers will assist in preventing or controlling the disorder, our review extended to situations in which police considered using the powers, but opted not to. The following case studies illustrate the kinds of circumstances whereby this occurred during our review of the powers.

## Case study E

### Gang violence in a coastal town

One situation where police closely considered invoking the Part 6A provisions involved police efforts to prevent a potential riot following a violent confrontation between a local Aboriginal group and an outlaw motorcycle gang in a coastal NSW town in January 2006. The conflict started with a brawl apparently sparked by a racially motivated incident at a local hotel, and flared again outside the local hospital where those injured at the hotel had been taken for treatment. Later a young Aboriginal man had his arm broken in another attack, prompting Aboriginal leaders to start rallying support for a confrontation with the motorcycle gang the following night. The motorcycle gang leaders responded by rallying their supporters.



As tensions escalated, senior police met the leaders of both parties, warning them against vigilante action and explaining that the Part 6A powers were likely to be invoked. (The region commander had already indicated a willingness to authorise use of the emergency powers if needed.) Both groups acknowledged that police could block the roads to prevent an influx of antagonists and seize motorcycles, cars and mobile phones, and agreed to call off the confrontation. In the meantime police diverted additional officers to patrol the town and local hotels voluntarily agreed to close early. There was no further violence and the situation was resolved without having to invoke the Part 6A powers. The earlier assaults were investigated and suspects were charged.

## Case study F

### Incidents at an inner-city trouble spot

Police in an inner-city Sydney command seriously considered invoking the emergency powers in response to violent incidents on 1 January 2006 and a few weeks later on Australia Day. Both incidents occurred in a location with a history of public disorder, and involved volatile, angry crowds where excessive alcohol consumption was a contributing factor. However, both were successfully defused through negotiation and conventional policing measures. On each occasion licensees in nearby hotels readily agreed to police requests to close early and did so immediately. One local commander told us that when incidents such as these suddenly flare, local knowledge is a critical factor in distinguishing a potential riot from a mere neighbourhood dispute taking place in the street, and added: *'Someone needs to know what's going on, needs to know the feel of the place'*.<sup>10</sup>

## Case study G

### Threats of trouble at a Sydney hotel

Police also considered using the Part 6A powers to close a hotel in western Sydney in mid-2007 following serious incidents at the hotel, including an alleged discharge of firearms into the street and severe damage to the hotel interior after an impromptu wake for a barman who had died in a traffic accident. The deceased man apparently had links to an outlaw motorcycle gang.

Police learnt of plans for a formal wake at the hotel after the man's funeral, with possibly up to 250 family, friends and motorcycle gang members attending. The local police commander formed the view that if the wake were held at the hotel, there was a substantial risk of large-scale public disorder occurring in the vicinity. He believed that it might be necessary to use the Part 6A emergency liquor powers to close the hotel to help prevent or control the disorder, and prepared closure orders in case they were required and advised his region commander.

He also considered that, depending on how events unfolded, a target area authorisation might be needed to enable police to lock down the area around the hotel.

The commander said that the threat of motorcycle gang members attending the planned wake was a factor in determining whether the powers might be warranted, but only in combination with other factors. These included the large numbers expected, the volume of alcohol likely to be consumed, the 'mood' of the group, the recent discharge of firearms and damage to the hotel, and the hotel's proximity to a busy commercial area. Without these other factors, the mere presence of motorcycle gang members would not normally warrant the police use of the emergency powers.<sup>11</sup>

The situation was monitored on the day of the funeral. There was no wake held at the hotel, so the Part 6A powers were not needed.

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## Endnotes

<sup>10</sup> Commander interview, 2 February 2007.

<sup>11</sup> Commander interview and email comments, May 2007.

# Chapter 3. Emergency powers for emergency situations

As Parliament requires the Ombudsman to 'keep under scrutiny the exercise of powers conferred on police officers' under Part 6A,<sup>12</sup> this section of the report will focus on practical issues affecting police use of the emergency powers — both the Division 2 liquor restrictions and the Division 3 special powers to prevent or control public disorders.

The public disorder witnessed in Cronulla on 11 December 2005 and the reprisal attacks that followed, posed new and unexpected challenges for police who were suddenly caught in the middle of an escalating and widespread cycle of violence. After battling to contain the spontaneous mob violence at Cronulla during the day, authorities were then suddenly confronted with sporadic attacks by carloads of assailants upon people and property in quiet, residential neighbourhoods and backstreets. These sudden attacks on unwary targets were coordinated by the use of mobile phones by the assailants, who would then quickly disperse before police could react. The speed and violence of the attacks presented new and immediate challenges:

*The attacks were well planned and coordinated. They were carried out in the dark of night fuelled by racial prejudice and anger. The rioters showed no fear of authority and no mercy for their unsuspecting victims. Because of the level of co-ordination, mobility and the random nature of attacks, [the] responding police had to use initiative and courage to protect victims and stop the attacks. The level of violence displayed in this public disorder was unprecedented in Australia. The command of such an operation was challenging. Commanders found themselves in a difficult situation because the mobile assailants were changing the location of attacks to avoid police. It was impossible for commanders to predict where the next attack would occur.*<sup>13</sup>

The police response included an urgent request for emergency powers to regain control and prevent further attacks. The introduction of the Part 6A powers significantly extended the ability of police to lock down main roads and neighbourhoods in response to sudden public order crises and impose controls akin to declaring a state of emergency.

## Defining 'large-scale public disorder'

In introducing the legislation to Parliament, the then Minister for Police said the Act contained conditions to ensure that Part 6A powers could only be used in exceptional situations:

*They are emergency measures in emergency times. We do not lightly empower the police with significant powers of search, seizure and confiscation in the absence of very difficult circumstances.*<sup>14</sup>

Before invoking any of the Part 6A powers, police must have reasonable grounds for believing that there is a large-scale public disorder occurring or about to occur, and that use of the powers is reasonably necessary to prevent or control the disorder.<sup>15</sup>

Public disorder is defined in Part 6A as 'a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations.'<sup>16</sup> The legislation is silent on what may constitute 'large-scale'.

The Premier explained in his second reading speech:

*The disorder need not be constituted by one single incident but can be constituted by several smaller incidents in different locations. This gives police freedom to nip in the bud any developing situation.*<sup>17</sup>

Submissions on this issue showed there was broad support for the principle of reserving uses of the emergency powers to crises involving serious risks to public safety. Some felt that the current definition was adequate, giving police the flexibility to apply the powers in a variety of situations yet containing appropriate safeguards. The NSW Police Force 'acknowledged that the powers in Part 6A are extraordinary and were developed to apply to major incidents', but argued that the present definition of 'public disorder':

*... is couched in terms that leave no doubt it does not apply to everyday incidents and to that extent provides a safeguard against the Part's inappropriate use.*<sup>18</sup>

The police spokesperson on public order management said the definition of 'public disorder' was 'more than adequate', creating an appropriate link between the powers and the police role in protecting people and property:

*Serious risk to public safety requires immediate and lawful action by police to prevent or mitigate that risk. The primary role of police is the protection of life and property.*<sup>19</sup>

On the other hand, there was some disquiet about the Act's failure to define the kinds of situations that might constitute disorder that is 'large-scale', the breadth of the definition of 'public disorder', the application of the part to situations where disorder is not actually occurring but merely threatened, and thus how widely the emergency provisions could be applied.

In its submission Redfern Legal Centre stated :

*We submit that among the principal defects of the Act is the broad definition of 'public disorder'. It is too ambiguous and uncertain and may allow for the abuse of the Part. It also does not reflect the primary intention of Parliament that the Part be used in the most serious public disorder situations — that is, riot situations. We also principally object to the 'threat' of a public disorder as being a ground for authorisation. When important civil liberties are at stake, the making of authorisations on the basis of predictions about future behaviour is inappropriate.<sup>20</sup>*

Police procedures to guide decision-making about when the powers should be invoked acknowledge the lack of definition of 'large-scale' and state:

*Note that under the definition, there does not have to be a single site of the disorder — a number of incidents at different locations can be considered together to decide whether a 'large-scale public disorder' is threatened or is occurring.<sup>21</sup>*

The Commission for Children and Young People said although there were police guidelines stating, for example, that fighting between opposing fans at an event such as a football match would not amount to a 'large-scale public disorder', this was at odds with the *Crimes Act 1900* definition of 'riot' as situations:

*Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety...<sup>22</sup>*

The Commission recommended that 'the definition be clarified and that the police guidelines include examples of situations that amount to large-scale public disorders'. The Aboriginal Justice Advisory Council and Shopfront Youth Legal Service also argued that the current definition was too broad and should be clarified. It was suggested that substituting Part 6A's references to 'public disorder' with the more clearly defined *Crimes Act 1900* definition of 'riot' may provide a solution. Alternatively, it was argued that the Act may benefit from the inclusion of a list of situations that would not normally warrant application of the powers.

## Policing public demonstrations and protests

In the Parliamentary debate on the Part 6A emergency powers, there were unequivocal assurances that they would not be used to police peaceful rallies and demonstrations. The Premier's opening remarks noted:

*These powers are not intended to be used in respect of peaceful protests, union demonstrations and the like.<sup>23</sup>*

The Special Minister of State repeated these assurances in the Legislative Council and, in response to arguments that police could perceive some peaceful demonstrations as disorderly<sup>24</sup> or use the powers to quell civil disobedience and industrial disputes,<sup>25</sup> added:

*... the Government has made quite clear in the second reading speech that these new powers are in no way designed to target any peaceful protest, union marches, or the like. I reiterate that to put at rest the concern in the mind of the honourable member and others who might be concerned about that aspect of the legislation.<sup>26</sup>*

The Legislation Review Committee, whose role includes considering whether legislation introduced by Parliament unduly trespasses on personal rights and liberties,<sup>27</sup> reviewed Part 6A after it was introduced, and later reviewed the *Crimes Legislation Amendment (Gangs) Act 2006* that inserted into Part 6A the section 87MA power for police to disperse groups.<sup>28</sup> The Committee found that the right to peaceful assembly and the right to privacy were affected,<sup>29</sup> and referred two questions to Parliament for further consideration:

- whether the terms of the legislation unduly trespass upon the right to peaceful assembly,<sup>30</sup> and
- whether the absence of any reasonable suspicion requirement in the search powers constitutes an undue trespass on a person's right to privacy.<sup>31</sup>

The Committee noted that the right to peaceful assembly is a 'right established by long custom at common law' and recognised by statute in NSW. It is also a core principle in international law.<sup>32</sup>

In its submission on whether the powers could be used to police protests and assemblies, the NSW Police Force argued that the current provisions effectively precluded this possibility:

*It is difficult to see how a peaceful assembly could ever fit into the definition of 'public disorder'. A peaceful assembly could never be categorised as a 'riot or other civil disturbance giving rise to a serious risk to public safety'. The limited occasions on which the powers have been used, and the circumstances in which they were, indicate the fear of police misuse to deal with legitimate protests has not been realised.*<sup>33</sup>

The police spokesperson for public order issues added: 'Peaceful assemblies do not pose a serious risk unless such assembly becomes unlawful.'<sup>34</sup>

The NSW Police Force guidelines for officers considering the appropriateness of seeking or granting an authorisation include the following advice:

*The second reading speech makes it clear that 'public disorder' is not intended to include peaceful protests. It is restricted to riots or similar situations. The mere fact that there are a lot of people at an event, such as a football match, where there may be fights between opposing fans, would not be sufficient to amount to a large-scale public disorder.*<sup>35</sup>

It is important to note that the prohibition on using the powers in protest situations is police policy, not a legislative requirement. By way of contrast, the standard police 'powers to give directions' elsewhere in LEPR (Part 14) explicitly preclude police from using the standard move-on powers<sup>36</sup> in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession or an organised assembly.<sup>37</sup>

NSW has laws that protect participants in public assemblies if the organisers obtain police authorisation for the assembly in advance, and the event proceeds as planned.

Part 4 of the Summary Offences Act outlines the procedure that a person seeking to organise a lawful demonstration, procession or protest in a public place may use. The Act requires organisers to notify the Commissioner of Police of various pertinent aspects of the proposed assembly and provides for a procedure that involves both negotiation between organisers and police and a role for the Local Court should the parties fail to reach an agreement. Information about the statutory framework and procedures are set out in greater detail at Appendix C of this report.

The advantage to organisers of complying with the statutory framework in Part 4 is that, provided the assembly or protest happens largely as agreed, participants should not be prosecuted for participating in an unlawful assembly,<sup>38</sup> or for minor public order offences such as causing a nuisance, failing to obey police directions, obstructing thoroughfares and other disruption that can occur when protests take place. In practice, organisers of almost all large-scale assemblies and demonstrations seek a police authorisation for their activity, even though there is no formal requirement for them to do so.

Advantages to police are manifold, as advance notice of aspects of the lawful assembly assist greatly in contingency planning and resource management. In many cases, this might include police seeking organisers' assistance with crowd control and ensuring the protest is conducted peacefully.

The NSW Police Force advised that local area commands independently manage smaller protests and assemblies within their own resources. This generally consists of small-scale or spontaneous assemblies, many of which are unauthorised. For larger rallies and assemblies, commands can request assistance from the relevant Region Command Planning Unit.<sup>39</sup>

As part of our review of the Part 6A powers, we sought advice from the NSW Police Force Central Metropolitan Region on the number of authorised protests, rallies and public demonstrations that occurred in the inner Sydney area in the 12 months following the introduction of Part 6A. In the period 15 December 2005 to 15 December 2006, the Central Metropolitan Region's planning unit advised that it dealt with 54 applications providing 'notice of intention to hold a public assembly'. All were authorised. None required the use of Part 6A powers. This is in addition to an estimated 250 protests, rallies and demonstrations in the CBD authorised by local commanders without seeking help from the Region Command Planning Unit.<sup>40</sup>

Despite police assurances that Part 6A powers would not be used to police genuine protests and demonstrations, and evidence confirming that the Part 6A powers were not used to in relation to any protests and demonstrations, some concerns persist. Several submissions on this issue agreed that police had used the powers responsibly to date, but feared that the powers could be misused to inhibit or curtail the right to peaceful assembly in the future.

## Summary

In theory, there is clearly the potential for the laws to be applied in circumstances not necessarily reflecting the intention of government in passing Part 6A. In practice, this has not occurred to date. Use has been confined

to circumstances that could in no way be characterised as peaceful protests. Police procedures largely reflect Parliament's intention.

At the end of this report, we make recommendations for ongoing arrangements to ensure monitoring of these extraordinary laws — providing some assurance the laws will continue to be used in accord with Parliament's intention.

We agree the test should be as simple as it reasonably can be, so that officers are not required to wrestle with legal niceties in the face of complex and fast-unfolding riot situations. We believe there may be some advantage in revising police procedures to include an outline of factors to consider when seeking to distinguish 'large scale public disorder' from other events, to assist officers in making application for authorisation or determining those authorisations.

We are also of the view that Parliament may wish to consider carefully if any further safeguard is required to provide an absolute assurance of the right to peaceful assembly, similar to that set out in section 200 of LEPR.

## Recommendation 1

**The NSW Police Force amend Part 6A procedures to include the factors officers should take into account when considering whether a 'large-scale public disorder' is occurring or imminent.**

## Recommendation 2

**Parliament consider whether further safeguards are required in Part 6A of LEPR to provide an assurance of the right to peaceful assembly, similar to that set out in section 200 of LEPR.**

## Endnotes

- <sup>12</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s 87O.
- <sup>13</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response*, Vol. 1, p9.
- <sup>14</sup> The Hon. Carl Scully MP, NSWPD, Legislative Assembly, 15 December 2005, p20626.
- <sup>15</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87D.
- <sup>16</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87A(1).
- <sup>17</sup> The Hon. Morris Lemma, NSWPD, Legislative Assembly, 15 December 2005, p20620.
- <sup>18</sup> NSW Police Force submission, 7 February 2007.
- <sup>19</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>20</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>21</sup> *Public Order Management Handbook*, Legal Services NSW Police.
- <sup>22</sup> *Crimes Act 1900* s 93B.
- <sup>23</sup> The Hon. Morris Lemma, NSWPD, Legislative Assembly, 15 December 2005, p20621.
- <sup>24</sup> Mr Ian Cohen, NSWPD, Legislative Council, 15 December 2005, p20602: 'I understand the Leader of the House mentioned peaceful demonstrations, union demonstrations and such like. I have seen many situations in which peaceful demonstrations can be perceived as disorderly and therefore the police are allowed to act. I have real concerns that whilst this provision is put in place with the best of intentions, it could be abused at some later date in other circumstances.'
- <sup>25</sup> Ms Lee Rhiannon, NSWPD, Legislative Council, 15 December 2005, p20587: 'How can we be sure that these laws will not, even within two years before the sunset clause take effect, be used to quell legitimate civil disobedience, such as large rallies in the city on industrial relations issues?...Will these laws allow the police to lock down the entire city of Sydney? We must ensure that police do not have access to emergency powers for everyday events, for example, protestors converging on Lucas Heights.'
- <sup>26</sup> The Hon John Della Bosca MLC, NSWPD, Legislative Council, 15 December 2005, p20607.
- <sup>27</sup> *Legislation Review Act 1987* s 8A.
- <sup>28</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87MA came into effect in December 2006.
- <sup>29</sup> *Legislation Review Digest* No. 1 (2006), p 10.
- <sup>30</sup> *Legislation Review Digest* No. 1 (2006), p 47; and No. 10 (2006) p 57.
- <sup>31</sup> *Legislation Review Digest* No. 1 (2006) p 54.
- <sup>32</sup> *Legislation Review Digest* No. 10 (2006) p 14. See also *Commissioner of Police v Rintoul* [2003] NSWSC662, the *Summary Offences Act 1988*, and the International Covenant on Civil and Political Rights, Article 21.
- <sup>33</sup> NSW Police Force submission, 7 February 2007.
- <sup>34</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>35</sup> *Public Order Management Handbook*, Legal Services NSW Police.
- <sup>36</sup> *Law Enforcement (Powers and Responsibilities) Act* s 197.
- <sup>37</sup> *Law Enforcement (Powers and Responsibilities) Act* s 200(a)–(d).
- <sup>38</sup> *Crimes Act 1900* s 545C.
- <sup>39</sup> NSW Police Force advice, 14 May 2007.
- <sup>40</sup> NSW Police Force advice, 14 May 2007.

# Chapter 4. Liquor Controls

Excessive alcohol consumption was identified as a significant contributor to the crowd violence at Cronulla on 11 December 2005.

*... the day at North Cronulla Beach started with the presence of a large crowd behaving in an orderly fashion. The prediction of public disorder was realised when the predominantly Caucasian Australian crowd, fuelled by racial prejudice and excessive alcohol consumption, became violent. People of ethnic appearance were attacked on sight.<sup>41</sup>*

The emergency liquor provisions in Division 2, Part 6A allow police to:

- impose immediate controls over alcohol outlets, and
- establish emergency alcohol-free zones.

This can only be done in the vicinity of an area experiencing 'large-scale public disorder' or where there is an immediate threat of such a disorder occurring. These measures can remain in place for up to 48 hours.

The emergency liquor controls are regarded as central to reducing the contribution of alcohol consumption to any future public disorder similar to that which occurred at Cronulla on 11 December 2005. As one Member of Parliament observed:

*There is no doubt that alcohol played a considerable role in the shameful events of last Sunday. Preventing access to alcohol in such situations is a sensible way to reduce the potential for harm that does not significantly curtail anyone's rights.<sup>42</sup>*

To date, the liquor provisions appear to have been used sparingly. There have been no formal uses of the power to restrict the sale or supply of alcohol, and only a few emergency alcohol-free zones have been established.

## Emergency prohibition on the sale or supply of liquor

Police have considered using the section 87B powers to authorise the closure of licensed premises or restrict alcohol sales on numerous occasions, but are yet to formally do so. To date, all prohibitions or restrictions on the sale or supply of alcohol have been voluntary.

### Preparing to use the liquor controls

Our review of police records and interviews with senior officers responsible for public order operations in the weeks following the introduction of the Part 6A powers found several instances of licensees and managers agreeing to accept voluntary restrictions.

For example, police planning for a major public order operation at Wollongong on 17 and 18 December 2005 included detailed assessments of whether prevailing race-related tensions following the Cronulla riots could lead to violence at Wollongong's busier licensed premises. In preparing for an operation to prevent disorder, police contacted the licensees of the hotels identified as being at greatest risk:

*All licensees have been contacted by Sergeant [name] and advised of potential problems arising over the weekend. Each premise has increased their security numbers on Sunday and made them aware of potential volatile situations that may arise. Each venue has the licensing police mobile phone number and have been advised to contact if any trouble or unrest occurs. They have also been advised of new police powers allowing the closure of premises under specific circumstances if required.<sup>43</sup>*

Operation logs and situation reports created by police show the hotels were monitored closely for any signs of trouble throughout the weekend, and specially trained Operations Support Group (OSG) officers were deployed to monitor premises with larger crowds. Police operations log entries for Wollongong on 18 December included the following notes on licensed premises:

*6.10pm: From Insp [name] — patrol of licensed premises revealed — The [Hotel A] closed; [Hotel B] has a moderate crowd; [Hotel C] is full @ the back with a moderate crowd @ the front.*

*7pm: ... [Hotel C] has the potential to blow up ... discussion re placing a permanent crew @ the [name] hotel. [Hotel B] open till 2am...*

*8pm: C/Insp [name] tasked OSG 13 to patrol and canvas [Hotel C]. [Two other officers] also tasked to attend.*

*8.30pm: ... All licensed premises quiet. OSG 13 tasked to stay at [Hotel C]...*

9.40pm: Tasked OSG 12, 13, 14, 15 [to attend Hotel C] re closing time. Monitor crowd behaviour.

10.05pm: ... [Hotel B] spoken to regarding patrons [and] any possible problems...

10.35pm: Sitrep [situation report] from OSG 12. [Hotel C] closed. Patrons heading for CBD.<sup>44</sup>

There were no incidents, but it is clear police were ready to respond quickly if trouble did emerge. An updated situation report prepared about an hour later summarised the 'phased shutdown' of the public order operation in Wollongong and noted: *'The [Hotel C], which was the main source of concern has been shut down without incident.'* It is not clear if the hotel was asked to close early or did so voluntarily. No formal authorisation was issued.

Police preparations for a public order operation at Terrigal on 18 December adopted a similar approach. The police operation in that area was aimed at countering threats of *'racially motivated civil unrest at Terrigal Beach'*.

The records indicate that the licensed premises would agree to close at short notice without the need for police to formally invoke an authority under section 87B if the threats of violence eventuated.

As a further example, the NSW Police Force advised that as part of an effort to help prevent further violence in West Dubbo on 1 January 2006, officers approached licensees and managers of licensed premises near the Gordon Estate. All agreed to close early or restrict sales.

## Requesting voluntary closures or restrictions

In at least some cases, it seems very likely outlets would have been ordered to close if the licensees had not agreed to close or restrict sales, as some commanders had already drafted authorisations to that effect.

In Cronulla on Australia Day 2006, almost seven weeks after the riots, police requested two bottle shops to close early because of concerns about the large volume of takeaway alcohol being sold. One outlet closed immediately. The manager of the other spoke with the proprietor and decided to remain open, partly because closing early would affect sales. After further discussions in which police set out their concerns about the potential for drinking to exacerbate the risk of public disorder and explained the likely detriment to business generally if there was another riot, the licensee agreed to close. Police had drafted section 87B authorisations requiring the outlets to close, but did not need to invoke them.<sup>45</sup>

In our interviews and meetings with police commanders, several emphasised the value of planning for the possible use of section 87B liquor controls when preparing for events where public order incidents could occur such as local festivals, football carnivals, demonstrations and large gatherings for funerals. Redfern police said it was important to try to anticipate when trouble might occur and to prevent problems by negotiating with event organisers and visiting nearby hotels and bottle shops. They said many alcohol-related problems can be prevented by reinforcing responsible service of alcohol provisions and the terms of local Liquor Accord agreements,<sup>46</sup> but that it was also useful to plan for the possible use of the section 87B powers and let licensees know that emergency restrictions could be used if necessary.

As noted in the case studies earlier in this report, police also contemplated using the emergency powers to temporarily close a Sydney hotel that was expected to host a large wake for the funeral of a man who apparently had links to an outlaw motorcycle gang. Police concerns were triggered by a series of incidents at the hotel, including extensive damage to the hotel interior following an impromptu wake immediately after the man's death and the discharge of firearms in the street outside the hotel. Police drafted a section 87B closure notice and made preparations to serve it, including rostering experienced officers to monitor the hotel. No disorder or threat of disorder eventuated, as there was no wake held at the hotel. Consequently, police did not need to use the draft section 87B authorisation.

## Measures to limit police use of the powers to emergencies

Through our Issues Paper, we invited submissions on the emergency liquor controls. Most agreed that police use of the powers had been responsible and there was overwhelming support for retaining these measures in their current form. The Commissioner of Police and the Police Association stated that the power to curb the sale or supply of alcohol in emergency situations is appropriate and should be retained.

The Australian Hotels Association (NSW) noted that the Part 6A powers are additional to *Liquor Act 1982* provisions that already enable licensed premises to be closed for various breaches.<sup>47</sup> It agreed that the Part 6A provisions were necessary and had been used responsibly to date, but emphasised that restricting their use to emergency situations was a necessary safeguard against potential abuse. The association said the conditions in section 87B(1) effectively restricting use of the powers to situations involving 'large-scale public disorder' or the threat of such disorder occurring in the near future were appropriate and should be retained.

At present officers who are 'of or above the rank of Superintendent', such as local commanders, are responsible for deciding whether to authorise (and revoke) a prohibition on the sale or supply of alcohol. One question raised in our Issues Paper was whether it was appropriate for superintendents to have this responsibility, or whether these decisions should be made by a smaller group of more senior officers of or above the rank of Assistant Commissioner.

The Police Minister's submission simply states that the existing provisions are satisfactory. Similarly, the NSW Police Force submission on this provision notes: *'this core power is necessary to help deal with large-scale public disorder, and is appropriate in its current form'*.

Although no authorisations have been made, local commanders interviewed for this review advised that such decisions would normally be made in consultation with an Assistant Commissioner — usually their region commander. Even if the situation was so urgent an authorisation had to be made without consulting the region commander or other senior officer, they said advice on the authorisation would be passed up the chain of command at the earliest opportunity.

The Australian Hotels Association noted that as police had *'not attempted to close hotels under these emergency provisions the Association can hardly be critical of their approach'*, but argued that 'ideally' such powers should be exercised by an Assistant Commissioner or other more senior officer. The association argued that making an Assistant Commissioner responsible for such authorisations would have the advantage of putting the decision-making at arm's length from the officers responsible for enforcing closures or other restrictions.

It is important to note that Part 6A gives police considerably stronger powers than those under the *Liquor Act 1982*, the legislation normally used to close or restrict liquor trading. Closure orders under the *Liquor Act* are normally issued by a court, or are at least subject to judicial review, and generally relate to breaches in licensing conditions. The Part 6A powers enable police to close licensed premises for up to 48 hours, provide no clear mechanisms for licensees to have a closure order reviewed and impose heavy penalties for any failure to comply.<sup>48</sup> There may be strong grounds for the police decision to order emergency restrictions or closures, but no practical way for licensees to have police decisions affecting their livelihood reviewed.

On the other hand, all agree that police have exercised appropriate restraint to date. Police have always sought the voluntary cooperation of licensees and managers on the occasions that closures or other restrictions were deemed necessary to deal with public disorder, or the threat of public disorder. In most cases licensees and managers agreed to close early and were allowed to resume trading the following day. We are not aware of any voluntary closures exceeding 24 hours. Most closures were considerably shorter, indicating a willingness by police to minimise the impact on businesses. As such, there is no compelling case for change.

An authorisation or successive authorisations to close licensed premises or restrict liquor sales or supply must not exceed 48 hours. The legislation does not indicate what happens if there is a need to extend a section 87B authorisation beyond that period. The Australian Hotels Association submission argued that decisions to extend such a prohibition beyond 48 hours should require an authorisation by a District Court judge. This would still enable police to make initial decisions to close licensed premises in emergencies, but subject ongoing authorisations to review should the circumstances require continued closures or restrictions beyond 48 hours.

As local commanders' directions under section 87B have the potential to impact on licensees' livelihoods, there may be a need to:

- provide licensees with some avenue to have such directions reviewed after a certain period
- provide police with guidance on what should happen if a closure order or some other restriction needs to be extended beyond 48 hours, and
- consider whether officers of or above the level of Assistant Commissioner should be involved in the decision-making.

On the other hand, police are yet to formally use the section 87B powers to impose an emergency prohibition on the sale or supply of liquor, and the only restrictions to date have involved a handful of voluntary closures for short periods. As such, there is no case for change other than to consider enhancing police procedures to address these issues.

### Recommendation 3

**The NSW Police Force amend Part 6A procedures as they concern section 87B directions to:**

- (a) provide licensees an avenue to have such directions reviewed after a certain period**
- (b) provide police with guidance on what should happen if a closure order or some other restriction needs to be extended beyond 48 hours, and**
- (c) consider whether officers of or above the level of Assistant Commissioner should be involved in the decision-making.**



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## Emergency alcohol-free zones

The section 87C provision enabling police to establish emergency alcohol-free zones provides a practical way for police to stem the flow of alcohol into areas affected by large-scale public disorder, or the threat of such disorder, and creates a mechanism for removing alcohol that is already in the zone. In explaining the provision to Parliament, the Minister for Police argued that the loutish behaviour of hooligans involved in the Cronulla riot on 11 December 2005 was ‘*certainly exacerbated by intoxication*’ and:

*‘The bill will also enable police to declare emergency alcohol-free zones. Once warned, if people possess alcohol in that area they will face a hefty fine. These measures will minimise the risk that alcohol will aggravate riotous... behaviour.’<sup>49</sup>*

The only emergency alcohol-free zones to date all appear to have been established on 18 December 2005, when concerns about the risk of further mob violence in the wake of the Cronulla unrest a week earlier remained high. The NSW Police Force notified us of emergency alcohol-free zones established in areas adjacent to Bondi beach, Coogee beach and Maroubra beach from 8.30am on 18 December 2005 until 6am the following morning, in conjunction with major public order operations in those areas. In reviewing other police documentation, we found at least two more emergency alcohol-free zones were established on 18 December — one in central Newcastle from 9am until 8am the next day, and the other in Terrigal from midday. Police records note provisions relating to alcohol-free zones were also enforced at Cronulla, Wollongong and Dapto on 17 and 18 December, but the references to alcohol-free zones in those police records appear to refer to existing zones established by local councils rather than under the emergency section 87C provisions.

The emergency alcohol-free zone powers under section 87C were not used in West Dubbo on 1 January 2006 even though alcohol was a factor in the earlier disorder. The decision not to use section 87C was a practical one. In interviews with senior police, we were told that police considered the option of declaring an emergency alcohol-free zone and seizing alcohol but were concerned that this could provoke further violence in the riot-affected area. Despite this, there was at least one seizure of alcohol following a vehicle search in the lock-down area. The grounds for that seizure are unclear.

From the information provided by police, it appears that no-one has been charged with any offence under section 87C since the Part 6A powers have been in place. Furthermore, although there were alcohol seizures during major public order operations following the Cronulla riots and retaliatory attacks, the information provided to us indicates that only one of these seizures was within an emergency alcohol-free zone.

## Removing alcohol from emergency alcohol-free zones

When the legislation was first introduced, it enabled police to ‘warn people possessing or drinking alcohol that drinking in the zone is prohibited and that any liquor in their possession may be confiscated’.<sup>50</sup> A critical weakness was that there was no capacity for police to require the removal of alcohol from a zone unless the person who was warned continued to consume alcohol or refused to put the alcohol away.

Key amendments to section 87C(3) and section 87C(7) took effect on 15 December 2006, a year after Part 6A was introduced. Whereas previously people found with alcohol in an emergency alcohol-free zone could respond to a police warning by putting their drinks away, the revised provisions provide for the ‘immediate’ removal of liquor from a zone. This gives police a much simpler mechanism to seize alcohol if the person ‘does not immediately remove the liquor from the zone’ and the officer is satisfied that seizing the liquor ‘will assist in preventing or controlling the public disorder’.<sup>51</sup> Anyone found drinking liquor in the zone after being warned can also be fined up to 20 penalty units (\$2200).

The need for these changes was identified by a working group convened by the Police Ministry just a few weeks after the first uses of Part 6A. The amendments proposed by this group, and later adopted by Parliament, provide a practical and effective way for police to exclude alcohol from emergency alcohol-free zones or require its immediate removal. Although the revised provisions are yet to be used, they appear to address a critical flaw in the legislation. Monitoring any future uses of these provisions will test their effectiveness.

Creating a mechanism enabling police to require the immediate removal of alcohol from an emergency alcohol-free zone appears to have addressed a further concern regarding the requirement for police to first warn drinkers in emergency alcohol-free zones before they can act. When Part 6A was introduced, one MP noted the impracticality in public disorder situations of requiring officers to warn people to stop drinking or ask them to remove their alcohol:

*I am concerned that police must specifically warn individuals or groups of individuals before deeming them to have committed an offence by drinking in a particular place... There must be some way that a general warning can be given for a particular area once, and once only, so that thereafter the police can deal with anyone who is drinking in the vicinity. Otherwise it will become a justiciable issue and lawyers will*

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*be able to argue about whether a particular individual found drinking in a restricted zone was given a warning. We should be able to avoid that problem. The concept of a general warning should be introduced after which the police will have absolute power to deal with anybody who is found drinking in a particular area.<sup>52</sup>*

As failure to comply with a police request to immediately remove alcohol from a zone can now result in the alcohol being confiscated, it is considerably easier for police to reduce the volume of alcohol in the vicinity of a potential trouble spot. Individuals still have to be warned against drinking in an emergency alcohol-free zone before they can be charged with a drinking offence, but this seems appropriate if zones are established at short notice and people using the area might not know that drinking in that location has temporarily become a punishable offence.

Submissions from NSW Police and the Minister for Police indicate they are happy with the revised provision and state that it is appropriate in its current form. However, one senior commander who was involved in the initial police response to the mob violence at Cronulla on 11 December 2005 provided a submission arguing that the provision could be strengthened by creating a mechanism to bar alcohol from entering an emergency alcohol-free zone in the first place. He stated:

*The power to prohibit alcohol from entering an [emergency alcohol-free zone] is essential. Public disorder such as that experienced at Cronulla was very much alcohol driven. Had police had the power on the day to prohibit alcohol in the [emergency alcohol-free zone] the behaviour, mood and size of the crowd would have been considerably different.<sup>53</sup>*

The current provisions enabling police to require the immediate removal of alcohol would seem to make anyone trying to bring alcohol into an emergency alcohol-free zone potentially liable to lose their alcohol as soon as police at the boundary of the zone warn them against doing so. However, a provision explicitly barring people from bringing alcohol into the area could strengthen the hand of police trying to turn alcohol away at the boundary of a zone. This may reduce the potential for conflicts within the zone associated with attempts to confiscate alcohol from individuals in an unruly crowd where such measures may worsen the situation and possibly further incite the crowd.

Police effectively have the ability to prevent alcohol from entering an emergency alcohol-free zone by positioning officers just inside the boundary of the zone to stop anyone carrying alcohol in. Any failure to comply with a police direction to immediately remove the alcohol would become an actionable offence.

Parliament has implemented other key changes enabling police to require the immediate removal of alcohol that is already within emergency alcohol-free zones and strengthening police powers to seize alcohol from drinkers. As these enhanced powers are yet to be used, scrutiny of any future uses is required to assess police practice and the effectiveness of the provisions.

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## Endnotes

<sup>41</sup> Strike Force Neil *Review of the Police Response — Report and Recommendations*, Vol. 1, p8.

<sup>42</sup> Ms Lee Rhiannon, NSWPD, Legislative Council, 15 December 2005 p20588.

<sup>43</sup> Police risk assessment dated 16 December 2005.

<sup>44</sup> Extracts from police operations log sheets for Wollongong, dated 18 December 2005.

<sup>45</sup> Commander interview, 30 March 2006.

<sup>46</sup> Liquor accords generally refer to codes of practice or other cooperative arrangements between licensees, police, local councils and other local stakeholders to improve safety and amenity, and reduce alcohol-related violence and anti-social behaviour — see the *Liquor Act 1982* (s.104E) and the *Registered Clubs Act 1976* (s.76A).

<sup>47</sup> See *Liquor Act* s 104A, 104C and 105.

<sup>48</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87B(6) provides maximum penalties of 50 penalty units and/or 12 months imprisonment.

<sup>49</sup> The Hon. Carl Scully MP, NSWPD, Legislative Assembly, 15 December 2005, p20624.

<sup>50</sup> The Hon. Morris Iemma MP, NSWPD, Legislative Assembly, Second Reading Speech, 15 December 2005, p20622.

<sup>51</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87C(7).

<sup>52</sup> Mr Andrew Tink MP, NSWPD, Legislative Council, 15 December 2005, p20624.

<sup>53</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.



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# Chapter 5. Authorising the use of ‘special powers’

The special powers in Division 3 of Part 6A were introduced in December 2005 to help police to prevent or control incidents of ‘large-scale public disorder’ in public places. They give police responding to such incidents significantly broader powers to:

- establish cordons and roadblocks
- stop and search vehicles and people
- require individuals to disclose details of their identity, and
- seize and detain vehicles, mobile phones and other items.

The commencement of additional provisions a year later further extended police powers. These include new powers to disperse groups gathered in target areas and impose fines of up to \$5500 for anyone refusing or failing to comply with a police direction to disperse immediately.

The special powers significantly expand the options available to police when responding to large-scale public disorder or threats of disorder. Part 6A includes provisions enabling police to prevent people from entering and, in some cases, leaving authorised target areas without police permission, and powers to seize vehicles and mobile phones for up to seven days if an officer determines that this will assist in preventing or controlling a public disorder. People in target areas can be stopped and searched at any time. There is no requirement for police to turn their minds to whether the person might have been involved in wrongdoing — mere presence in a public place of an authorised area or road is enough to establish a legal basis to stop and search. The kinds of safeguards that would normally apply to these and other Part 6A powers have been removed or modified to give police broader powers to act.

In suspending basic safeguards at specified locations for limited periods, Parliament is recognising that there may be a need for police to adopt extraordinary measures to restore peace during civil emergencies. These are exceptional powers to deal with exceptional circumstances.

## The authorisation provisions

The removal or narrowing of certain safeguards normally associated with the use of police powers was offset by the inclusion of other key provisions. In practice, the primary safeguards are requirements that limit any uses of the special powers to:

- authorised ‘target areas’ or ‘target roads’, and
- only for the period that a special authorisation is in place.

Without an authorisation permitting use of the provisions at specified locations and within specified times, the special powers generally cannot be used.

Another key safeguard is the rank of the police officers entitled to authorise use of the special powers.<sup>54</sup> Only the Commissioner of Police, the two Deputy Commissioners or the 13 Assistant Commissioners can authorise the use of the powers, other than in certain urgent circumstances described in section 87N. Minimising the number of officers who can approve the use of special powers was intended as a precaution against inappropriate invocation of the emergency provisions.<sup>55</sup> Whereas about 130 officers have the authority to invoke the Division 2 liquor restrictions, only the most senior NSW Police Force officers have the authority to put the ‘more draconian’ Division 3 measures in place.<sup>56</sup>

Section 87D specifies the basis for making an authorisation. The officer can only authorise the exercise of powers if he or she:

- (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and*
- (b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the disorder.*

Section 87E requires those giving an authorisation to consider how the powers will be used. It provides that an authorisation may permit the use of the special Division 3 powers in a public place:

- (a) for the purpose of preventing or controlling a public disorder in a particular area described in the authorisation, or*
- (b) for the purpose of preventing persons travelling by a road specified in the authorisation to an area to create or participate in a public disorder.*

An authorisation must describe the general nature of the public disorder or threatened public disorder to which it applies. It must also describe the area or specify the road targeted by the authorisation, and where the powers can be used (s 87F(4)(c)). While ‘target area’ authorisations are ‘for the purpose of preventing or controlling a public disorder in a particular area described in the authorisation’ (s 87E), there is no upper limit on the geographical size of a ‘target area’. In introducing the legislation, the Premier explained that the onus is on authorising officers to exercise commonsense when defining target areas:

*Proposed section 87E provides that the target area for a lockdown can be either the place where the riot is actually occurring or a road that may be used by people travelling to participate in the riot or both. Obviously, we cannot define in legislation the maximum size for a lockdown area. The senior police who authorise a lockdown will exercise commonsense in keeping the lockdown area as small as necessary to do the job.<sup>57</sup>*

Other important elements of the Division 3 authorisation requirements include:

- The duration of an authorisation must not exceed the period considered reasonably necessary for the purpose for which it is given, and must not exceed 48 hours (s 87G).
- Authorisations can be made orally or in writing. If made orally, the authorisation must be recorded in writing as soon as possible (s 87F).
- The authorisation ceases to have effect at the end of the period specified in the authorisation, unless it is revoked earlier (s 87G(1)). The Commissioner, a Deputy Commissioner or an Assistant Commissioner can revoke the authorisation at any time (s 87G(4)).
- The period of an authorisation can only be extended beyond the 48-hour maximum if the Supreme Court determines that a further authorisation is warranted (s 87G(3)).
- The powers can only be exercised in a public place (s 87E).

This section of the report will review police uses of the authorisation process to date, the adequacy of the provisions in supporting the responsible use of the emergency powers set out in Division 3, and the scope for any further improvements.

## Use of authorisations

In the first 18 months since the new provisions were introduced, authorisations were granted on three separate occasions.

The **first use of the powers** arose from target road authorisations put in place within hours of the laws being passed by Parliament on 15 December 2005. Table 1 lists the authorisations.

**Table 1: Target road authorisations, 15–16 December 2005**

Target of authorisation	Date & time commenced		Date & time ended		Revoked	Period of authorisation
Rocky Point Road Sans Souci	15/12/2005	7pm	16/12/2005	4am		9 hours
Princes Highway Blakehurst	15/12/2005	7pm	16/12/2005	4am		9 hours
Menai Road Woronora	15/12/2005	8.15pm	16/12/2005	4am	9.06pm	51 minutes
River Road Woronora	15/12/2005	9.06pm	16/12/2005	4am		7 hours

There were initially two target road authorisations, enabling police to establish roadblocks and check vehicles at two busy access points to the Sutherland Shire. A third authorisation was created, but then revoked within an hour of being approved because of concerns about placing a roadblock at that location. It was immediately replaced by a fourth authorisation, enabling police to establish a roadblock at a safer, more suitable location. The nature of the threatened public disorder that the roadblocks were intended to prevent was described in all four ‘target road’ authorisation notices as:

*Reliable police reports indicate on the evening of 15.12.2005 public disorder offences including assaults with weapons and malicious damage to property will occur at Miranda Fair [Shopping Centre], Kingsway, Miranda<sup>58</sup>*

Table 2 lists the authorisations put in place for the **second use of the powers** a day later, enabling police to use the new powers in conjunction with major operations across broad areas of Sydney, Newcastle, the Central Coast and Wollongong from the morning of 17 December until the early hours of 19 December.

**Table 2: Target area authorisations, 17–19 December 2005**

Target of authorisation	Population in target area*	Date & time commenced		Date & time ended		Period of authorisation
Randwick LGA	125,994	17/12/2005	6am	19/12/2005	5.59am	48 hours
Waverley LGA	62,290	17/12/2005	6am	19/12/2005	5.59am	48 hours
Tuggerah Lakes LAC	130,536	17/12/2005	6am	19/12/2005	5.59am	48 hours
Newcastle LAC	136,413	17/12/2005	6am	19/12/2005	5.59am	48 hours
Terrigal Beach (part of Gosford LGA)	6,654	17/12/2005	6am	19/12/2005	5.59am	48 hours
Sutherland Shire	215,084	17/12/2005	7.15am	19/12/2005	7.14am	48 hours
Rockdale LGA	94,155	17/12/2005	7.15am	19/12/2005	7.14am	48 hours
Bankstown, Flemington & Campsie LACs	411,251	17/12/2005	7.30am	19/12/2005	7.29am	48 hours
Wollongong LGA	191,602	17/12/2005	11am	19/12/2005	10.59am	48 hours
	<b>1,373,979</b>					

\* based on 2001 ABS Census data

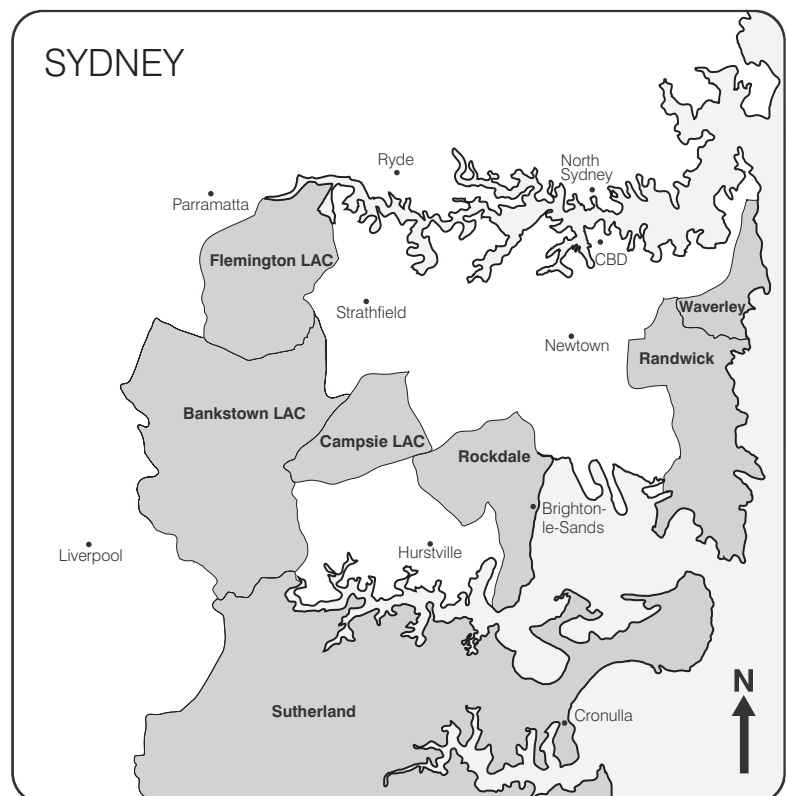
There were nine target area authorisations for major policing operations over a two-day period. Although police records indicate that policing activity in each of the target areas was significantly wound back on the evening of Sunday 18 December, there were no formal revocations. All of the authorisations remained in place for the maximum permitted period of 48 hours.

The size of the geographical area covered by each authorisation varied widely, from a small area adjacent to Terrigal Beach to a single target area incorporating the whole of the Bankstown, Flemington and Campsie local area commands. The shaded areas in Figure 1 show the parts of Sydney included in the target area authorisations, an area with a total population of 910,000 residents.

The nature of the threatened public disorder differed for each authorisation, but most notices referred to information about specific threats to people and property within the authorised area. For instance, the notice authorising uses of the powers in the Wollongong local government area summarised the general nature of the threat as:

*A large-scale confrontation at Wollongong Beach between Middle Eastern males, person attending the Surf Club and others involving unlawful violence on the weekend of 17–18 December 2005.<sup>59</sup>*

**Figure 1: Authorised target areas in Sydney, 17–19 December 2005**



The shaded areas show the parts of Sydney where police could use the emergency powers during the lock downs on 17–19 December 2005.

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The threat identified at Newcastle was described in the authorisation as:

*A large scale confrontation at Nobbys Beach (located in Newcastle) involving unlawful violence between members of the public on the weekend of 17–18 December 2005. Further unlawful violence is threatened at Newcastle Beach and the Newcastle CBD on the weekend of 17–18 December 2005.*<sup>60</sup>

Our review of police records found that each authorisation was supported by intelligence information and other analysis specifying the nature of the anticipated threats and the likelihood of violence occurring if preventive measures were not put in place.

The **third use of the powers** involved a target area authorisation on the evening of 1 January 2006 covering much of the regional city of Dubbo. It commenced at 7pm and remained in place for 48 hours. Although the policing operation associated with the authorisation focused on preventing further unrest following earlier violence in a public housing estate in West Dubbo, the target area authorisation covered most of the Dubbo urban area.<sup>61</sup> The only streets not included were small neighbourhoods at the eastern and western ends of Dubbo.

Our analysis of the authorisations granted since 15 December 2005 highlights the following information about the process:

- The number of authorisations made has been very limited, indicating that the powers have not been invoked as a matter of course.
- On each occasion there was no large-scale public disorder actually occurring at the time the authorisations were granted. All were invoked to support police operations aimed at preventing further violence.
- Supporting documentation associated with each of the authorisations highlighted the impact of earlier violent incidents and intelligence indicating a high likelihood of further violence. Each noted specific threats and the kinds of emergency powers needed to address those threats.
- Assistant Commissioners granted all of the authorisations.
- These officers had the benefit of specialist legal, intelligence and tactical advice provided by staff at the Police Operations Centre, a temporary central command post established to coordinate the responses of police and other emergency services following the riots at Cronulla.
- The only authorisations for 'target roads' were those granted just hours after the legislation commenced. All authorisations sought and granted since then have related to 'target areas'.

No further authorisations have been granted since early 2006.

## Where authorisations were considered but not used

The NSW Police Force routinely includes scenarios featuring uses of the Part 6A powers in training simulations designed to prepare commanders with responsibilities for managing major emergencies.<sup>62</sup> Police have advised that if a central command post such as the Police Operations Centre is not already in place, decisions on whether to grant an authorisation to use the Division 3 emergency powers would usually be the responsibility of a region commander. The six current region commanders all hold the rank of Assistant Commissioner.

In considering whether the authorisation procedures provide an appropriate check against inappropriate uses of the special powers, we have considered a number of occasions where police commanders considered, or were encouraged to consider, using the powers but opted not to — see *Case Studies E, F and G* in *Chapter 2*. These considerations generally related to tactical discussions about how best to respond to serious incidents involving volatile, angry crowds or an escalating pattern of violent incidents. All were successfully defused or subdued through negotiation and local policing measures without police having to resort to using the emergency powers.

For example, one involved steps taken by police to prevent a riot amid escalating tensions between local Aboriginal residents and a motorcycle gang in a coastal NSW town — see *Case Study E: Gang violence in a coastal town*. In that instance a police threat to use the emergency powers if necessary, in combination with more conventional policing measures such as increased police patrols, discussions with the antagonists and asking local hotels to close early, prevented further violence without police having to resort to the emergency powers. There were also numerous instances of licensees or managers agreeing to close early or restrict sales without police having to invoke emergency liquor controls.

The fact that police considered whether to authorise uses of the special powers on a number of occasions, but opted not to, provides some evidence that police have exercised appropriate restraint in their uses of the provisions to date.

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## Issues associated with authorising the use of the emergency powers

Despite the limited number of occasions when authorisations have been sought and granted, some practical issues related to the authorisation process have emerged.

### Police decisions to invoke the use of the powers

A principal safeguard is the requirement that only the Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner can authorise initial uses of the emergency provisions. Judicial approval or oversight is only required if there is a need to extend an authorisation beyond 48 hours. When the legislation was introduced, the then Minister for Police noted:

*I think we have got the balance right in terms of how these powers will be used and the seniority of the officers who will be authorised to enforce them.*<sup>63</sup>

These measures attracted little comment when the legislation was considered by Parliament. There was no debate on possible alternatives such as requiring judicial approval to put the emergency powers in place, similar to the current provisions for the issuing of search warrants,<sup>64</sup> or referring the matter to a minister for approval, as is required before the provisions of the *Terrorism (Police Powers) Act 2002* can be used.<sup>65</sup>

Our Issues Paper included questions about whether police officers should be charged with the final decision to put an authorisation in place and about the adequacy of the current provisions. The NSW Police Force submission argued that any provision requiring police to refer to a third party for permission to use the powers could undermine the ability of police to respond quickly as threats emerge in rapidly changing circumstances:

*These situations will often mean action needs to be taken swiftly as information comes to hand or changes. The very nature of the situations to which Part 6A is aimed means that formal applications to some third party (be it a judge, magistrate, or other 'authorised' officer) will unduly hamper the Part's operation. As these situations unravel, it would be unreasonable to expect a police commander to 'down tools', prepare any necessary application, and then contact and try to explain the circumstances to someone else so that other person can decide (in whatever time that takes) whether to give the authorisation. In short, the nature of the situations to which the Part applies dictates that a police officer is the best person to judge whether the powers are needed.*<sup>66</sup>

There was general support in the submissions for the view that limiting the number of senior officers able to authorise use of the powers was a useful safeguard. Even those who favoured a requirement that police should seek judicial or ministerial approval before using the powers conceded that there was merit in providing police with quick access to the powers in urgent situations. The Australian Privacy Foundation said:

*We would normally argue for... powers such as these to be subject to judicial approval from the outset... However, we acknowledge the public interest arguments for allowing police discretion to authorise the use of the powers... in 'emergency' situations of sudden public disorder.*<sup>67</sup>

The Police Association went further, arguing for the removal of the current provision requiring police to seek Supreme Court approval to extend an authorisation beyond 48 hours. The Association said any process needed for a Supreme Court review 'would most likely be lengthy or cumbersome', could force police to have to justify the reasons for the original authorisation and — if an extension was refused — could leave police without the necessary powers to deal with any sudden resurgence of violence.<sup>68</sup>

However, most submissions, including submissions from some senior police, argued that some form of judicial oversight was essential. One commander said the current provisions strike an appropriate balance:

*It is appropriate that the Supreme Court determine an application for extension of an authorisation. It provides an appropriate transparent safeguard with judicial oversight. In exigent circumstances, police must be able to extend an authorisation to protect the community. The Assistant Commissioner who authorises any extension will be held accountable and will no doubt document this decision for examination at a later date.*<sup>69</sup>

Several other submissions expressed concerns about a perceived lack of accountability in the current authorisation process, arguing that police should have to document and explain their grounds for invoking the powers either before the authorisation is granted, or soon after. Redfern Legal Centre argued that 'giving the Supreme Court the power only to extend the period of the authorisation is an insufficient safeguard on the use of the powers'.<sup>70</sup>



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It said the judiciary, not police officers, should have the ultimate responsibility for authorising the use of such intrusive powers and that court processes could be adapted to expedite applications:

*This is essential in preserving accountability and ensuring that serious incursions upon civil liberties are only allowed after the independent assessment of the situation. We submit that Local Court magistrates would be the most appropriate persons to authorise the use of these powers, with this decision reviewable by the Supreme Court... the court is able to hear matters expeditiously (outside of normal working hours if necessary).<sup>71</sup>*

The limited use of the provisions to date makes it difficult to assess the adequacy of the current safeguards built into the process for authorising uses of the emergency powers. The handful of authorisations granted in the first 18 months were all for police operations to prevent further violence some hours or days after the original public disorder incidents. None have been invoked to subdue ongoing rioting. Nor has there been a need to extend the authorisations beyond the initial 48-hour maximum period; thus the provisions requiring police to seek Supreme Court approval for extensions are yet to be tested.

Also, although the total period of an authorisation or series of authorisations must not exceed 48 hours unless the Supreme Court approves an extension, it seems to be open to police to grant a new authorisation within a very short period without seeking court approval. This occurred in the Sutherland area when target road authorisations ceased at 4am on 16 December 2005. Target area authorisations covering the whole of Sutherland Shire were put in place the following morning and stayed in place for a further 48 hours. In effect, authorisations were in place for parts of the Sutherland Shire for up to 57 hours over a 3½-day period. There is a question as to whether this is consistent in principle with the statutory scheme.

Unless the circumstances arise where these provisions are tested, it is difficult to determine whether changes are needed to broaden the ability of police to invoke the powers at short notice and for longer periods, and whether the safeguards built into the authorisation process should be further strengthened, especially as they concern the possibility of 'rolling' authorisations with brief periods between each. Although the current safeguards have been adequate to date, careful review of future uses is required in relation to these issues.

### **'Target roads' and 'target areas'**

Although the Act provides for the powers to be used in relation to either 'target areas' or 'target roads', some commanders have argued that the target road provisions are less flexible and are unlikely to be widely used. One view was that the authorisations granted on the evening of 15 December 2005 are likely to be the only uses of the target road provisions. As noted earlier, on that occasion three authorisations were granted enabling police to establish roadblocks at key entry points to the Sutherland Shire to prevent criminal damage on a shopping centre at Miranda. The target road for the third roadblock was described as Menai Road, Woronora. It was only when police went to put a roadblock in place that they realised it would be safer to place it on the eastern side of the river. As the name of the road to the east of the bridge is known as River Road, Woronora, a further authorisation had to be sought to approve uses of the powers at that location. Had there been a target area authorisation covering roads on both sides of the bridge, this would not have been an issue.

One senior officer involved in the first uses of the powers commented on the relative inflexibility of specifying particular roads: 'You don't need to be thinking about that kind of thing. The area authorisations are better in that respect.'<sup>72</sup> The 10 authorisations granted since those initial uses of the powers have all referred to target areas. No further target road authorisations have been made.

### **Defining the size of target areas**

There is no legislative guidance regarding how large an authorised target area can be. Senior police authorising lockdowns are expected to 'exercise commonsense in keeping the lockdown area as small as necessary to do the job'.<sup>73</sup>

The smallest target area on the weekend of 17–19 December 2005 was an authorisation for Terrigal beach where police identified threats relating to a specific beach and adjacent businesses with limited road access, making it easy to define a small area for roadblocks and other police operations.

By contrast, another authorisation covered the whole of the Bankstown, Campsie and Flemington local area commands, an area in western Sydney about 10km across and more than 15km from north to south, and including more than 400,000 residents. We were advised that the flat geography, the grid layout of the streets and the variety of potential assembly points and targets contributed to the size of this target area. A key concern was to define an area that gave police a realistic opportunity to identify and intercept highly mobile convoys of vehicles carrying potential rioters in circumstances where vehicles could quickly disperse and take a variety of alternative routes.

In practice, minimising the size of a target area is easier on a peninsula with a handful of entry and exit points than in an area with few natural boundaries. Police have argued that the current flexibility in defining the size of a target area enables them to establish roadblocks and use other powers where they are needed to deal with situations such as where a crowd moves or where convoys of cars can take alternative routes. However, a large target area also means that potentially more people will be subject to and likely to be affected by the use of the powers.

Authorised areas are further expanded in practice by the terms of section 87A(3), which allows police to use Division 3 powers in relation to any person or vehicle 'about to enter' or having 'recently left' a target area. This extends the circumstances that the special powers can be used outside the physical boundaries of a target area. It is not clear how far a person or vehicle can travel before the powers no longer apply. Senior counsel's advice on this issue acknowledged a 'degree of uncertainty attaching to the operation of s 87A(3)', noting:

*Rather than providing for a geographic criterion (eg 100 metres outside an authorised area), the provision adopts a temporal restriction ('about to enter' or 'recently left'). Both expressions provide little guidance as to their outer limits. Nor do they provide a yardstick by which a calculation of time can be made.<sup>74</sup>*

Almost all of the target area authorisations have been defined to cover entire local government areas or police local area command boundaries, even though the focus of police operations was usually in a much smaller area. The NSW Police Force submission said this was a deliberate choice. It argued that using boundaries of well-known existing entities such as local government areas helped reduce the likelihood of police inadvertently using the powers outside a target area and provided police with the flexibility to move their operation if the disorder shifted. Trying to define a more confined area could be cumbersome and potentially confusing.<sup>75</sup>

One senior officer involved in planning for the operations to prevent civil unrest in Bondi, Coogee, Maroubra and Brighton-le-Sands on 17–18 December 2005, said commanders considered using police local area command boundaries to define the target areas for their operations, but thought that most members of the public would not know those boundaries. He said the decision to use the Waverley, Randwick and Rockdale local government area boundaries to define the target areas in eastern Sydney was influenced by the need for a familiar description that could be easily communicated to police and the public.

Some submissions expressed concerns about the lack of legislative guidance on how broad a target area can be. The Aboriginal Justice Advisory Council argued that it would be inappropriate to use police local area command boundaries to define target areas in regional NSW, as the large size of country commands meant this could be used to limit the mobility of people 300 kilometres from the anticipated trouble spot 'for the purpose of preventing an escalation of the risk that a public disorder would occur'.

The concern about defining target areas to cover too wide an area is legitimate, and many of the target area boundaries to date appear to have included broad areas that were not under threat and where exercise of the powers was unlikely to be needed to prevent or control a public disorder. While this potentially, and arguably unnecessarily, exposes many thousands of members of the public entirely unconnected with any actual or threatened public disorder to arbitrary uses of the special powers, experience to date suggests that police operations using the powers generally focus on specific locations within a target area — usually a very small portion of the target area. While it might be preferable for police to confine their target area authorisations to reflect, as far as possible, the area of operations, there can be practical difficulties in doing this and making those boundaries clear to both police and members of the public.

While we acknowledge concerns raised in submissions about the lack of legislative or procedural guidance to require that lockdown areas be no larger than is necessary for police to run effective public order operations, it is difficult to be critical of police decision-making in this regard — especially as the provisions have been so seldom used.

Careful monitoring of any future police uses of 'target area' authorisations is required to assess the adequacy of the current provisions.

## **Congregating in one area to cause disorder in another**

One issue that arose was whether target area authorisations can be declared for areas where there is no disorder or threat of disorder but where people are congregating prior to travelling elsewhere to cause trouble.

Where persons are gathered in a particular area where an actual public disorder is occurring or imminent, or where persons are travelling by a road to an area to create or participate in an actual or threatened public disorder, the power for police to act under Part 6A, and invoke special powers is clear. However, if people gather in a park or other public place before heading elsewhere to cause trouble, and there is no actual or threatened public disorder where they are gathered, it is not clear whether Part 6A can apply.

A working group convened by the Police Ministry noted the potential for confusion about this provision but stopped short of recommending an amendment.<sup>76</sup> Our Issues Paper invited submissions on whether the Act provided police with sufficient flexibility to deal with persons congregating in one place to participate in a public disorder elsewhere.

The NSW Police Force responded by stating that 'Part 6A does not provide police with sufficient flexibility to deal with actions of people congregating in one place to participate in a public disorder elsewhere',<sup>77</sup> but provided no practical examples of how this had constrained police operations to date or might hamper future operations. Nor did the Police Force suggest how the provision could be amended.

Conversely, some senior police said the emergency powers, used in conjunction with other powers, provided ample scope to intercept potential rioters at staging points away from the areas threatened with public disorder. One commander argued: 'Part 6A [powers] coupled with previously existing powers provide sufficient flexibility and afford officers the discretion necessary to exercise the relevant power lawfully in the interests of public safety'.<sup>78</sup>

We sought legal advice from counsel on whether the legislation permitted an authorisation to be made for an area outside the area in which a public disorder is occurring or imminent. The advice concluded:

*With the exception of an authorisation directed to blocking use of a road so as to prevent public disorder occurring at another location, it is unlikely that an authorisation may be made for an area other than that in which the public disorder is occurring or imminent. However, the terms of the legislation are not entirely consistent and a contrary view is open.*<sup>79</sup>

Counsel's interpretation appears to be consistent with the view expressed in the Premier's second reading speech where he stated: 'Proposed section 87E provides that the target area for a lockdown can be either the place where the riot is actually occurring or a road that may be used by people travelling to participate in the riot or both.'<sup>80</sup> Police education and training materials are also consistent with this approach.<sup>81</sup>

A key benefit of the current approach is that police are encouraged to focus their efforts on protecting areas identified as being at greatest risk of large-scale disorder. The target road provisions and the section 87N powers to act without an authorisation, in combination with general police powers, give police substantial flexibility to act outside of the target areas. They achieve this without locking down wide areas where there are no direct threats of disorder. As the Redfern Legal Centre submission warned:

*To amend the Part to extend the use of the powers to people outside a target area, who may or may not be intending to participate in a public disorder, extends the scope of the powers to have almost indefinite geographical reach.*<sup>82</sup>

Any further extension of the target area provisions to locations where there is little or no likelihood of disorder occurring should be carefully qualified. This might include a test requiring police to provide clear grounds demonstrating how a target area authorisation in one location is likely to address a serious threat of large-scale public disorder in another.

On the other hand, there is no evidence indicating the need for such a change at this time, and information suggesting existing powers are sufficient. Given this, we do not recommend further extension of the special powers in this respect.

## Form of an authorisation

Under the legislation, an authorisation can be made orally or in writing. If oral, it must be confirmed in writing as soon as practicable. It must describe the general nature of the public disorder or threatened public disorder, describe the areas or specify the roads to be targeted, and note the time it ceases to have effect.

There is no legislative requirement that an authorisation include a statement of reasons setting out the grounds for the authorisation. Although all target road and target authorisation notices to date have described in general terms the nature of the threatened disorder, only one specifically noted the grounds for the Assistant Commissioner's belief that a large-scale public disorder was likely, and why the powers were needed to prevent or control the disorder — as noted earlier, section 87D requires that both of these elements exist before authorisations can be approved. However, there were many other written records created by police that outlined the basis for the authorisations, including evidence and analysis demonstrating the risk of public disorder and the need to authorise the powers.

In the Issues Paper, we invited comment on whether senior police should be required to set out the grounds for authorising uses of the emergency public disorder powers. There was general support for such a requirement. Comments included:

*In the absence of any such statement [of reasons], it will continue to be difficult to determine whether the use of the Act's powers has been justified, or have achieved what was intended when the powers were invoked.*<sup>83</sup>

and,

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*The fact that the powers are only intended to be exercised in exceptional circumstances is an argument for each occasion on which they are authorised to be recorded and a report on the reasons to be made publicly available. In this way the concerns raised by the existence of the powers can be subject to informed debate, and their impact properly assessed.<sup>84</sup>*

Several police sources pointed out that officers involved in these kinds of decisions routinely document their reasoning as a matter of course. One senior officer interviewed for this review supported the giving of reasons as a way of demonstrating that all necessary requirements were factored into the decision-making process. He said this was to 'stop any problems two years down the track where you can't remember why you made the decision'.<sup>85</sup>

As the legislation already specifies the grounds for an authorisation that senior police must consider before approving a use of the emergency powers, and since it appears this reasoning is already being documented, consideration should be given to requiring that a brief statement of reasons be included in the written authorisation. Such a requirement could be satisfied in part by annexing copies of existing records relied upon in the decision-making process to the authorisation notice. In addition to improving the accountability and transparency of the decision-making process, there may be scope to use the statement of reasons in briefings for officers involved in frontline operations to encourage the more effective, better-targeted use of the emergency provisions.

## Duration and revocation of authorisations

An authorisation to create a target area or road must not exceed the period that is reasonably necessary for the purpose for which it is given, but in any event cannot exceed a total of 48 hours. If the public disorder is not under control or resolved within the 48 hours allowed, an application must be made to the Supreme Court seeking approval for any further authorisation.<sup>86</sup>

The NSW Police Force spokesperson for public order management issues summarised the practical effect of these requirements:

*The period of 48 hours is reasonable and affords police sufficient time to execute the powers conferred by the authorisation and plan for the period at the expiration of the 48 hours. Should a further authorisation be required, there is scope for this to occur.<sup>87</sup>*

To date, there have been no applications to the Supreme Court for an extension, so that part of the process remains untested.

The requirement that the initial maximum authorisation period not exceed 48 hours is an important safeguard. Although all of the target area authorisations granted to date have been for the full 48-hour period, none exceeded that time limit.

Conversely, the requirement that an authorisation be made for as long as is considered 'reasonably necessary for the purpose for which it is given' appears to have had little practical impact on the duration of authorisations. With the exception of the initial target road authorisations, there appears to be little evidence that consideration was given to whether a shorter period than the initial 48-hour maximum would suffice. A significant practical difficulty for police making that kind of a determination at the outset would have been uncertainty about whether the measures they put in place would succeed in preventing the anticipated disorder.

Nor does the section 87G(4) provision giving police the option of revoking an authorisation seem to have reduced the duration of authorisations. The only authorisation revoked to date was a target road authorisation on 15 December 2005 for a location that police subsequently realised was inappropriate for roadblocks. In practice, authorisations were allowed to lapse without revocation, often long after operations had ended and police stopped using the powers. In Dubbo, police removed the roadblocks and stopped using the emergency powers after 10 hours because the risk of public disorder had abated significantly, yet opted to keep the authorisation in place for a further day and a half in case trouble flared again. In Terrigal, the roadblocks were removed at 8pm on 18 December 2005 but the powers remained in force until the following morning. In Wollongong, there was a phased shut-down of operations. Police records indicate the public order operation ended at 11pm on 18 December 2005, but the authorisation remained in place until the following morning. Detailed police records indicate that commanders continually monitored the ongoing risk of a large-scale public disorder. Where the likelihood of public disorder abated, police stopped using the emergency powers but did not formally revoke them.

In considering the provisions relating to the duration and revocation of authorisations, it is important to note that the 48-hour time limit is the only measure that appears to have had an influence on the duration of authorisations. Although all of the target area authorisations were for the maximum period permitted, no police operations exceeded the 48-hour limit.

The submissions put forward a variety of views on the practicability of these provisions. Although there was wide support for maintaining the capacity of officers of or above the rank of Assistant Commissioner to authorise use of the powers in emergency situations, views diverged on how long the initial authorisation could remain in place before requiring some form of judicial or ministerial review. Police submissions thought the current 48-hour limit was appropriate.<sup>88</sup> However, a number of others argued that courts should be required to review the police decision sooner than 48 hours. The Aboriginal Justice Advisory Council said there should be an independent judicial review within eight hours, and a further review every 24 hours that the authorisation was in place. The Australian Privacy Foundation argued for Supreme Court involvement after 24 hours. The Australian Hotels Association said 48 hours was appropriate for the first authorisation, but that no further authorisations should not be granted without court approval. Only one submission argued that the current limit should be extended,<sup>89</sup> and only the Police Association argued that police should be able to extend an authorisation beyond 48 hours without any form of independent review.

We are concerned that the maximum permissible time for police-determined authorisation became, in effect, the time limit for any authorisation granted. Even in circumstances where the special powers were apparently no longer required, the authorisations remained in force.

Reducing the maximum time allowed for initial authorisations could provide additional oversight in relation to police decision-making without adversely impacting on the police ability to respond quickly to civil emergencies. On the other hand, although all of the target area authorisations to date remained in place for the maximum period allowed, the evidence indicates that police applied appropriate rigour in determining whether to grant an authorisation in the first place.

There are other possible variations to increase accountability and assist in decision-making, including:

- Reducing the period of any initial authorisation, and requiring police to reconsider the need for the authorisation at regular intervals to a maximum of 48 hours, and
- Retaining the present 48-hour maximum period, but formally requiring reconsideration at regular intervals — including documenting of reasons.

These measures could easily be incorporated into police procedures regardless of any legislative change. The case for legislative change is less clear. At this time, and given the very limited uses to date, in our view further scrutiny of any future uses of the powers is required in order to determine whether there is a need for legislative change.

## Recommendation 4

**The NSW Police Force amend Part 6A procedures to provide guidelines with respect to the form, duration and review of Division 3 authorisations, to ensure that:**

- (a) a statement of reasons be provided with any written authorisation**
- (b) the need for an authorisation is reviewed at regular, specified intervals while in place**
- (c) any authorisation is revoked as soon as it is no longer needed, and**
- (d) the reasons for retaining, extending or revoking an authorisation are documented.**

## Defining a ‘public place’

The emergency alcohol free zones and Division 3 public disorder powers can only be used in a public place,<sup>90</sup> including roads and schools.<sup>91</sup>

In Cronulla on 11 December 2005, the disorder was concentrated in three areas: Dunningham Park, Cronulla Railway Station and Prince Street. Many problems started with groups of drinkers gathered in the yards in front of the Prince Street flats and escalated.

Should a similar situation arise again, police could now rely on the Part 6A powers and declare a target area authorisation for Cronulla. In public places within this target area, police would be able to stop, search, seize items from and request identification of members of the public in a disorder situation or in order to prevent a disorder. Dunningham Park, Cronulla Railway Station and Prince Street are public places. However, it is less clear whether police would be able to exercise these powers in the front yards and other common areas of private blocks of apartments in Prince Street. Can the unfenced or poorly secured front yards be considered a ‘public place’? Could police declare an emergency alcohol-free zone to cover the front yards in Prince Street and then stop people drinking in these yards?

The NSW Police Force is concerned that the Part 6A powers may not be able to be used in such a situation. In its submission, it referred to the situation that occurred in Cronulla where people gathered or 'spilled over' into public places and stated:

*Had Part 6A been available to police at Cronulla at the time of the riot and an authorisation been given, it would have produced the result that a person standing on the footpath was subject to Part 6A powers, but a person standing a metre away on a front lawn was not. Of course, there may always be arguments of whether certain private places become public places due to them being 'used by the public' thereby falling within the definition of 'public place' within section 3 of LEPR.*<sup>92</sup>

In its submission, the NSW Police Association raised concerns about how the public place requirement could limit police powers to control alcohol consumption:

*[D]uring the Cronulla riots, those involved were able to stand in their yards holding bottles of alcohol (in effect, safe and protected) whilst police were powerless to do anything about it. Police need to be granted more power in the form of being able to confiscate alcohol etc from individuals who are party to the violence, even if they are in a park or standing in their own front yards.*<sup>93</sup>

Against that background, we requested legal advice as to whether and to what extent police are entitled to exercise Part 6A powers on private property. The advice noted:

*Private property may fall within the definition of 'public place' under the Law Enforcement Act depending upon the use to which the property is, or has been, put at the time of an authorisation. To that extent, the powers conferred by Pt 6A may be exercised on private property. In addition, Div 3 powers may be exercised outside a 'public place' that is the subject of an authorisation in certain limited circumstances.*<sup>94</sup>

In relation to where the Part 6A powers can be used, the advice stated:

- The alcohol restrictions provided for in section 87C can only be exercised in a 'public place' that has been declared an emergency alcohol-free zone.
- The Division 3 powers can be exercised where a person is within an area of a 'public place' that is the subject of an authorisation under s 87D.
- It is likely that Division 3 powers could be exercised in respect of individuals who have 'spilled over' the boundary of a public place authorised under section 87D, provided the individuals are about to enter or have recently left the public place.

In relation to what constitutes a public place, counsel advised:

- The law is complicated but a public place is not restricted to a place that is generally used by the public — and in certain circumstances it can include private property being used by members of the public for the first time.
- Where a crowd occupies not only public property but also the front gardens of adjacent houses, the latter area falls within the definition of 'public place' from the moment of first use.
- Members of the public must be using the private property in order for it to amount to a 'public place'. While this requirement will likely be satisfied if a crowd of people moves onto private property en masse, it may not be satisfied merely when the owner of the property, or a member of the owner's immediate family, stands in the front yard drinking alcohol.

Counsel also noted that whether an area amounts to a public place may not be easy for a police officer to identify when making operational decisions and that the consequences of a police officer entering private property without lawful justification is that the entry may amount to trespass.

Given this advice, it appears that in the situation described by the NSW Police Force, police would be able to use the Part 6A powers because the crowd, although it is on private property, is using it as a public place.

However, in the scenario described by the Police Association where people are drinking in their own yards, it may not be open to police to use the Part 6A powers unless the yards are also being used by members of the public.

## Discussion

Although the Part 6A powers are restricted to use in a public place, there are other powers available to police in a disorder situation. The offences relating to public order — riot, affray and violence disorder — can be committed on private property. Police also have the power to enter private property to prevent a breach of the peace<sup>95</sup> or to effect an arrest.<sup>96</sup>

A number of submissions argued that these powers were sufficient to deal with public disorder on private property.<sup>97</sup>

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The NSW Police Force submission also acknowledged that these powers were available to police in some circumstances and that police could sometimes use the Part 6A powers on private property, but said, '*[I]t would be better for police and the public to know with certainty the powers that can be exercised in these types of situations.*'<sup>98</sup>

The legal advice we have obtained suggests that there are a range of situations where police can exercise Part 6A powers on private property. In the situation such as the Prince Street apartments where a number of unfenced or partly fenced yards adjoined the street, it appears the crowd spilled over onto the yards, turning them into a public place, and therefore could have been subject to the Part 6A powers had they been available. This would seem to address the concerns of the NSW Police Force — although it may be operationally difficult in certain circumstances for police to determine whether the Part 6A powers can apply in a particular situation.

One recommendation made by officers involved in Operation Seta was to amend Part 6A so that the powers can be exercisable at or *near* a public place,<sup>99</sup> similar to criteria for certain offences in the *Summary Offences Act*.

However, given:

- the relatively broad definition of a public place
- that it will generally include property adjacent to a public place occupied by a crowd
- that existing powers in LEPRA may be sufficient for police to deal with issues on private property, and
- the lack of demonstrated clear need for change to date,

there does not appear to be a compelling argument for extending the definition of public place in Part 6A at this stage. Extending the definition of public place under Part 6A to include private property generally would be a very substantial expansion of powers provided to police, particularly given that authorisations to date have covered very wide areas with substantial populations, and many of the Part 6A powers can be exercised in relation to an individual without requiring evidence of wrongdoing by that person.

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## Endnotes

- <sup>54</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87F(1).
- <sup>55</sup> The Hon. Mr Carl Scully, NSWPD, Legislative Assembly, 15 December 2005 p20626. 'To ensure that the powers are used appropriately I insisted during the drafting of the bill that a minimum number of police officers be authorised to put those powers in place'.
- <sup>56</sup> The Hon. Mr Carl Scully, NSWPD, Legislative Assembly, 15 December 2005 p20626. 'These are onerous and what some would call draconian measures. They are emergency measures in emergency times... As to the more draconian measures, authority will be given to officers of the rank of Assistant Commissioner and above.'
- <sup>57</sup> The Hon. Morris Iemma MP, NSWPD, Legislative Assembly, Second Reading Speech, 15 December 2005, p20621.
- <sup>58</sup> The same reason is cited in each of the four 'target road' authorisations, dated 15 December 2005.
- <sup>59</sup> Target area authorisation for Wollongong Local Government Area, dated 17 December 2005.
- <sup>60</sup> Target area authorisation for Newcastle Local Area Command, dated 17 December 2005.
- <sup>61</sup> The area was defined in the authorisation as: 'the roads within the boundaries of Sheraton Road to the east, Newell Highway in the north, Obley Road in the south and the intersection of Bunglegumbie Road and Mitchell Highway in the west'.
- <sup>62</sup> Minerva training materials, Learning Technology Systems, NSW Police Force, April 2007.
- <sup>63</sup> The Hon. Mr Carl Scully, NSWPD, Legislative Assembly, 15 December 2005 p20626.
- <sup>64</sup> *Law Enforcement (Powers and Responsibilities) Act* s 48.
- <sup>65</sup> For instance, the *Terrorism (Police Powers) Act 2002* confers special powers to prevent and investigate terrorist acts such as the power to cordon areas, search persons, vehicles and premises, seize and detain things, and obtain a person's details. *Law Enforcement (Powers and Responsibilities) Act* s 9(1) states that to exercise these powers an authorisation may only be given by the Commissioner of Police or by a Deputy Commissioner and must also have the concurrence of the Minister for Police.
- <sup>66</sup> NSW Police Force submission, 7 February 2007.
- <sup>67</sup> Australia Privacy Foundation submission, February 2007.
- <sup>68</sup> Police Association of NSW submission, February 2007.
- <sup>69</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>70</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>71</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>72</sup> Commander interview, 2 February 2007.
- <sup>73</sup> The Hon. Morris Iemma MP, NSWPD, Legislative Assembly, Second Reading Speech, 15 December 2005, p20621.
- <sup>74</sup> Tim Game SC & Tony Payne, Memorandum of advice, 3 May 2007, at paragraph 20.
- <sup>75</sup> NSW Police Force submission, 7 February 2007.
- <sup>76</sup> Police Ministry Working Group, *Law Enforcement Amendment Legislation (Public Safety) Act 2005* Final Issues Paper, unpublished, January 2006.
- <sup>77</sup> NSW Police Force submission, 7 February 2007.
- <sup>78</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>79</sup> Tim Game SC & Tony Payne, Memorandum of advice, 3 May 2007, at paragraph 33.
- <sup>80</sup> The Hon. Morris Iemma MP, NSWPD, Legislative Assembly, Second Reading Speech, 15 December 2005, p20621.
- <sup>81</sup> See summary in *Policing Issues and Practice Journal*, Vol. 14, No. 2, April 2006.
- <sup>82</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>83</sup> NSW Commission for Children and Young People submission, 2 February 2007.
- <sup>84</sup> Legal Aid Commission submission, 1 February 2007.
- <sup>85</sup> Commander interview, 9 February 2007.
- <sup>86</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87G(2) and (3).
- <sup>87</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>88</sup> Notably submissions from the NSW Police Force, the police spokesperson for public order issues, and the Northern Region Commander.
- <sup>89</sup> Submission No. 6, 24 January 2007 argued that the 48-hour limit should be 72 hours.
- <sup>90</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87E(1).
- <sup>91</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87A(1) defines a public place to include a school.
- <sup>92</sup> NSW Police Force submission, 7 February 2007.
- <sup>93</sup> Police Association of NSW submission, February 2007.
- <sup>94</sup> Tim Game SC & Tony Payne, Memorandum of advice, 3 May 2007, at paragraph 3.
- <sup>95</sup> *Law Enforcement (Powers and Responsibilities) Act* s 9.
- <sup>96</sup> *Law Enforcement (Powers and Responsibilities) Act* s 10.
- <sup>97</sup> eg. Northern Region Commander submission 27 February 2007; Legal Aid submission 1 February 2007.
- <sup>98</sup> NSW Police Force submission, 7 February 2007.
- <sup>99</sup> *Debriefs: Operation Seta — Cronulla Riots and Related Incidents*, NSW Police Force, May 2006.





# Chapter 6. Core powers

This chapter will consider issues relating to the special powers to prevent or control public disorders as set out in Division 3 of Part 6A — that is, the special police powers to:

- Establish cordons or roadblocks
- Stop and search vehicles and people
- Require the disclosure of identity
- Seize and detain vehicles, mobile phones and other items
- Use the emergency powers to disperse groups, and
- Exercise powers without an authorisation in certain circumstances.

These are widely regarded as the core powers of Part 6A, and lie at the heart of police strategies to restore order and prevent further violence during public disorder crises.

Although our observations regarding police practice in relation to each of the core powers will be considered in turn, the conclusions and recommendations regarding the core powers will be discussed at the end of this chapter. As change to any of the core powers has the potential to affect the police use of others, recommendations regarding this part of the legislative scheme will be considered as a whole.

## Establishing cordons and roadblocks

Part 6A enables police to establish roadblocks and cordons to restrict or prevent people entering or leaving an area without police permission, and to stop and search people and vehicles.

Once a target area or target road authorisation is in place, police can establish a roadblock or cordon anywhere within that area or on that target road. A cordon or roadblock may consist of any appropriate form of physical barrier that is designed to prevent, limit or obstruct passage.<sup>100</sup> The breadth and inclusive nature of this definition, combined with other aspects of these powers such as the identity, search and seizure provisions, ensure that police have great flexibility when using roadblocks and cordons.

Police had the ability to set up roadblocks and cordons and the power to ‘stop and search’ vehicles and people prior to the enactment of Part 6A. For instance, section 37 of LEPR allows police to stop certain vehicles if they reasonably suspect them of being involved in the commission of an indictable offence,<sup>101</sup> or if there is a serious risk to public safety in the vicinity.<sup>102</sup>

LEPRA also includes broad powers enabling police to set up roadblocks and give reasonable directions for the safe and efficient regulation of traffic.<sup>103</sup> The NSW Police Force advised that this was the legislative basis relied upon for the erection of roadblocks during the Cronulla riot and retaliatory attacks prior to the commencement of Part 6A.

The key difference between standard roadblock powers and those in Part 6A is that the latter allow police to set up roadblocks and cordons anywhere, at any time, for any reason and to stop and search all vehicles and people, and to prevent persons entering or leaving an area. The only pre-requisites are that an authorisation is in place and the roadblocks and cordons are within the authorised target area or target road.

Police advised us that they used roadblocks in at least two different ways during Operation Seta:

- Hard roadblock: police stop all vehicles and all occupants are checked, and
- Soft roadblock: police restrict traffic flow to assess passing vehicles, and stop only those they believe may be involved or are likely to be involved in a public disorder

Senior police have advised that the decision about who to stop and search at these roadblocks and cordons will be determined by the officer’s judgement as shaped by the local circumstances and intelligence holdings. On this issue, Deputy Commissioner Andrew Scipione stated:

*‘This is very much a call for the officer on the ground, again, based on where they are and the intelligence that we’re managing, what [it] is that we’re seeing by way of behaviour and the way people are conducting themselves certainly give some indication as to whether in fact we should look at them.’<sup>104</sup>*

In addition, Part 6A provides that a police officer must not refuse permission for a person to *leave* the area unless it is reasonably necessary to do so to avoid a risk to public safety or the safety of the person.<sup>105</sup> There are no similar provisions for persons seeking permission to enter a target area. Police may stop anyone entering, even if they live or work in the area and there is no immediate threat to their safety.

Police planning documents in relation to the proposed roadblocks and cordons for Operation Seta for the period 17–19 December 2005 describe the police uses of the Part 6A roadblock powers in a variety of ways, including:

- ‘Closures and traffic diversions’ (Brighton-le-Sands)
- ‘Close proximity cordons’ and ‘expanded cordons’ (Cronulla)
- ‘Surveillance of access points’ (Sutherland Shire)
- ‘Proximity closures’ (Bondi), and
- ‘Road closures’ (in and around Campsie).

## How the roadblock powers were used — Operation Seta

In preparing for a major operation to prevent further disorder on the weekend following the Cronulla riots in December 2005, police prepared plans to erect some form of roadblock in at least 81 different locations.

A police executive briefing to local area commanders on 16 December 2005<sup>106</sup> outlined the police intention to use the powers on that weekend. The minutes of that briefing show that operations were to be conducted in Cronulla, Maroubra, Bondi, Lakemba, Campsie, Brighton-le-Sands, Terrigal, the Entrance, Newcastle and Wollongong, as police were concerned about a high risk of disorder and violence in each of those locations. No information is available about the roadblocks and cordons used in Newcastle and Wollongong, although situation reports and other police records indicate that roadblocks and ‘filtration points’ were widely used in those locations.

Operationally, police divided the affected areas of Sydney into three zones.<sup>107</sup> Zone 1 was the police local area commands of Cronulla, Miranda, St George, Hurstville and Sutherland. Zone 2 consisted of the local area commands of Eastern Beaches, Eastern Suburbs, Rose Bay and Botany Bay. Zone 3 was comprised of the commands of Bankstown, Auburn, Flemington and Campsie.

Police documentation for Operation Seta<sup>108</sup> indicates that the Highway Patrol provided support to Major Incident Response Teams in each of the zones during 17–19 December 2005. It shows that 130 highway patrol vehicles and 190 highway patrol officers were deployed on each day of the weekend operation. One of two key operational roles for the highway patrol was ‘to facilitate roadblocks and to identify and stop entry of prohibited persons/vehicles into hot spots.’<sup>109</sup>

Assistant Commissioner Goodwin told local area commanders that roadblocks and cordons were to be used to lock down areas, randomly search vehicles and people, seize items of concern, and to prevent the entry of large numbers of people interested in creating public disorder into any specific area. He stated that there would be a visible police presence on ‘bridges, [and] main road entries... and their purpose will be to shut down incoming swarms of Middle Eastern vehicles and Caucasians as well.’<sup>110</sup>

Assistant Commissioner Goodwin also highlighted the kinds of factors police might consider in determining whether to grant members of the public permission to enter an area that is in lockdown:

*White supremacists are involved — they are recognisable by their Eureka Stockade flags and insignia. Other indicators are Aussie flags and references to Christmas spirit. They are hard core agitators...*

*If legitimate residents or people (are) on a genuine outing, (then) entry will be permitted. People carrying or wearing Aussie flags or the Eureka Stockade flag must be stopped. Police will have to use their discretion when making these decisions.*<sup>111</sup>

The minutes show that Assistant Commissioner Goodwin advised the commanders that ‘recent unverified intelligence suggests there are bus loads of Lebanese coming from Melbourne’ to participate in public disorder.

Police Legal Services told the assembled commanders that under Part 6A, cordons or roadblocks could be used between two groups of people to prevent them getting together and this could include bystanders.<sup>112</sup>

The roadblocks and cordons locking down areas were to be simultaneously supported by alcohol-free zones and random breath test sites to be set up from 11am each day in the vicinity of Captain Cook Bridge, Tom Ugly’s Bridge and Alford’s Point Bridge in the Sutherland Shire.

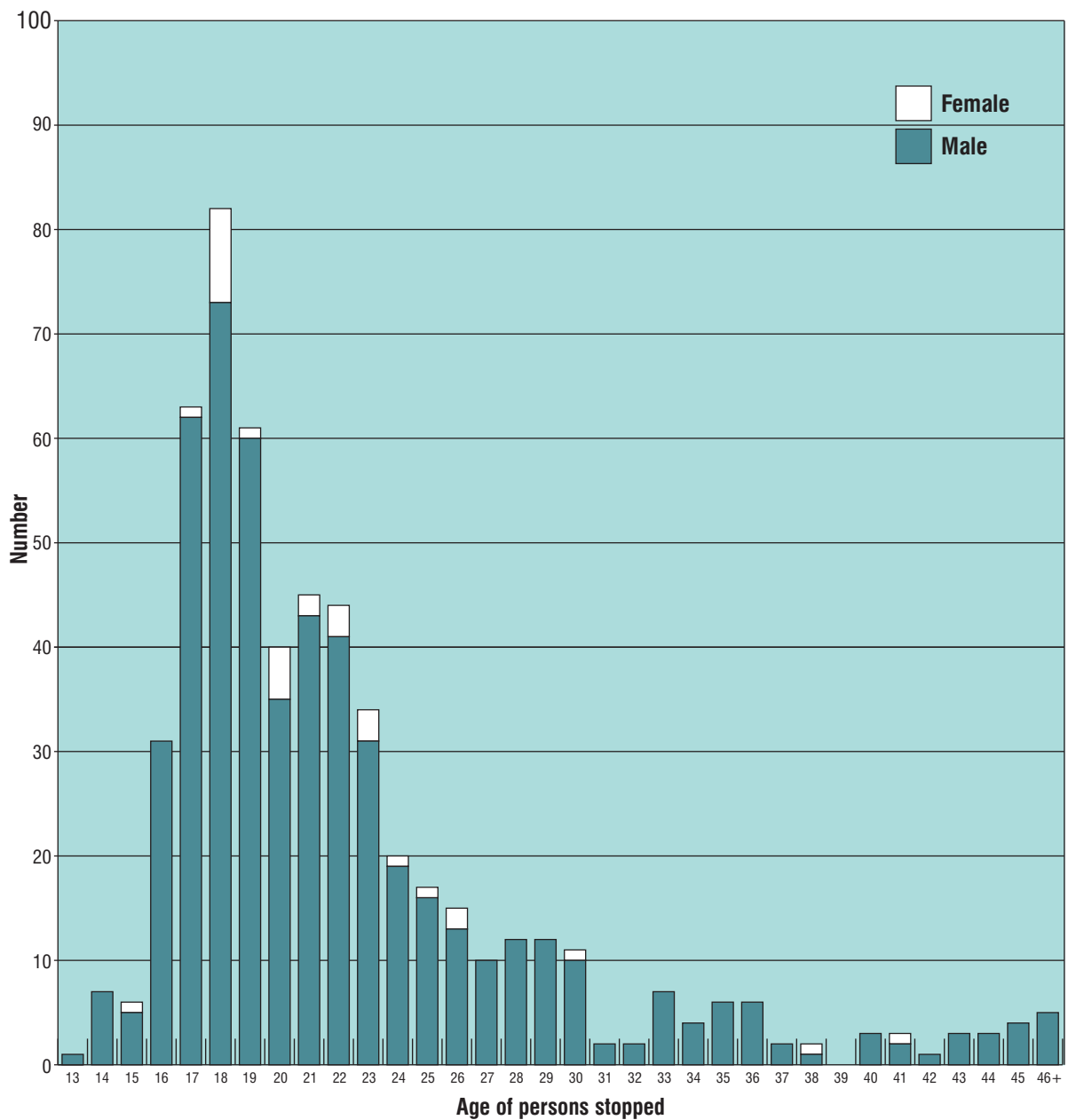
Information provided by the NSW Police Force relating to police uses of the Part 6A powers on 15 December 2005 and on the weekend of 17–19 December 2005 shows:

- **Number of roadblocks** — Police data showed three roadblocks were set up in Sutherland Shire on 15 December 2005.

There were plans for 81 roadblocks to be set up in target areas in Sydney and the Central Coast on 17–19 December, and an unspecified number of others planned for Wollongong and Newcastle, but police were unable to specify how many were actually put in place or for what periods. Nor did police maintain a record of the total number of vehicles stopped, or how many were refused permission to enter or leave.

- **Number of records** — of the 357 records noting uses of the powers in or near target areas or roads, 6 records related to stops on 15–16 December 2005, and the remaining 351 related to stops in target areas on 17–19 December.
- **Number of people stopped** — the 357 records show that a total of 625 people were stopped: 258 at roadblocks, 343 by patrols within or near target areas and 24 by police responding to reports.
- **Circumstances of people stopped** — 477 (76%) were in vehicles, 90 (14%) were on foot, and 6 (1%) were on bicycles or public transport. The circumstances of the remaining 52 were not clear from the records provided.
- **Gender of people stopped** — gender was recorded in relation to 569 of the people who were stopped, comprising 537 males (94%) and 32 females (6%).
- **Ages of people stopped** — the ages of 564 people (532 males, 32 females) were recorded. Figure 2 sets out the age profile of people stopped at roadblocks or in or near target areas.

**Figure 2: Age of individuals stopped by police using Part 6A powers**



n=564. Analysis excludes 61 people whose ages were not recorded.

The figure shows that the most common ages of people stopped were 17 years (62 males, 1 female), aged 18 years (73 males, 9 females), and 19 years (60 males, 1 female). The youngest person stopped was a boy aged 13 years. Only four people aged 46 or older were stopped.

## Use of roadblocks and cordons in three different metropolitan areas

To give a sense of how the roadblocks were used and the flexibility of the Part 6A provisions, it is useful to compare police operations planned for the Bondi, Campsie and Sutherland areas.

### Bondi

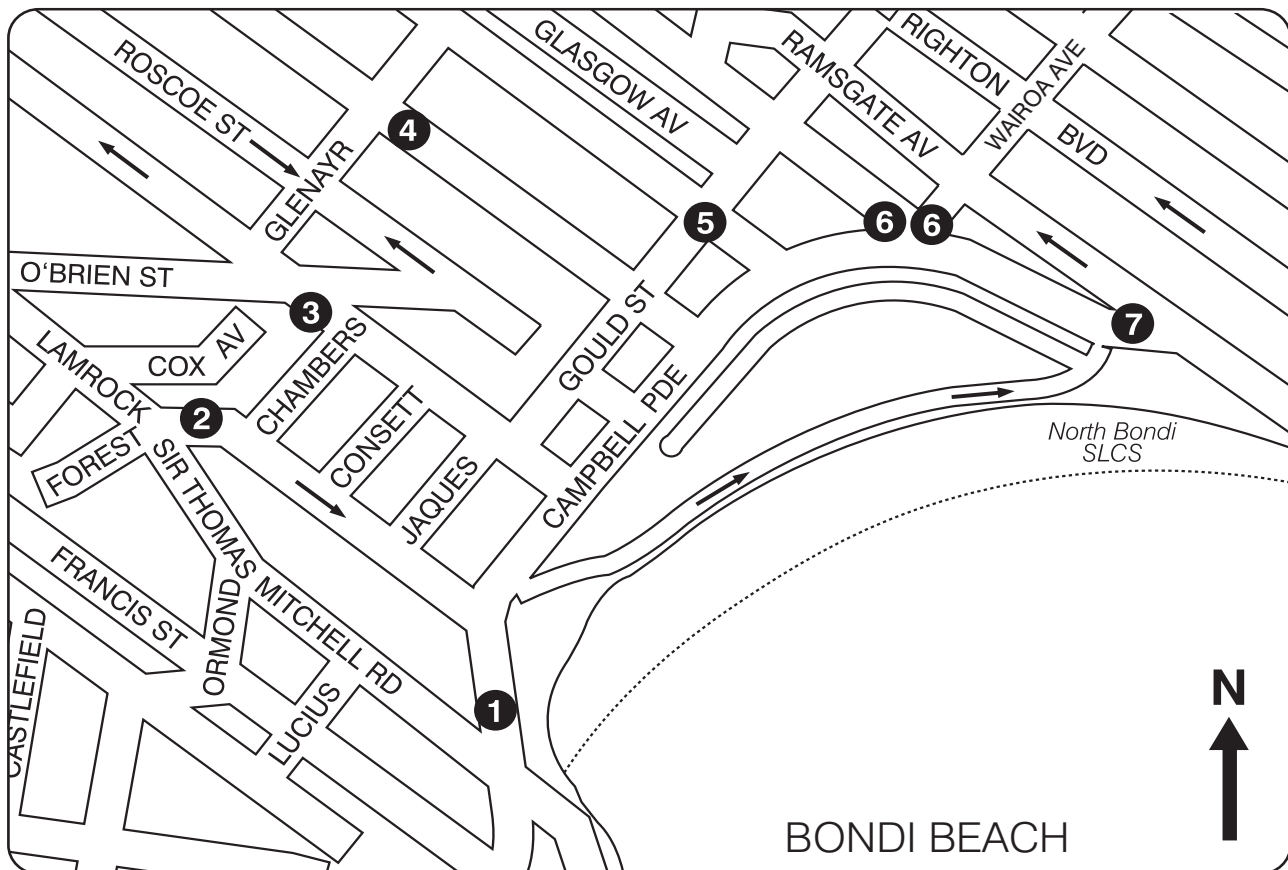
Police proposed a 'proximity closure' of the Bondi Beach area in the case of riot on 17–19 December 2005.<sup>113</sup> As shown in Figure 3, seven roadblocks were planned which would create a highly visible police presence and block vehicular access to Bondi Beach, including Campbell Parade. The roadblocks and cordons created a perimeter encompassing the main part of the beach, Campbell Parade and the adjoining shopping area. No cars were to be allowed within this perimeter. The ocean created the Eastern border of this cordon.

In police evidence in criminal proceedings arising out of the operation, the practical effect of the lockdown of the Bondi Beach area was canvassed. A police officer stated in evidence:

*'There were a number of streets, including Campbell Parade, closer to the beach (that) were cordoned off with barricades. Police were assigned to the intersections surrounding Bondi Beach, and... all vehicles were stopped and searched.*

*... It didn't prevent persons, pedestrians from entering Bondi Beach and it didn't prevent public transport from entering Bondi Beach.'*<sup>114</sup>

**Figure 3: Roadblock plan for Bondi Beach area**



**Seven roadblocks formed a 'proximity closure' of streets adjacent to Bondi beach.**

### Campsie

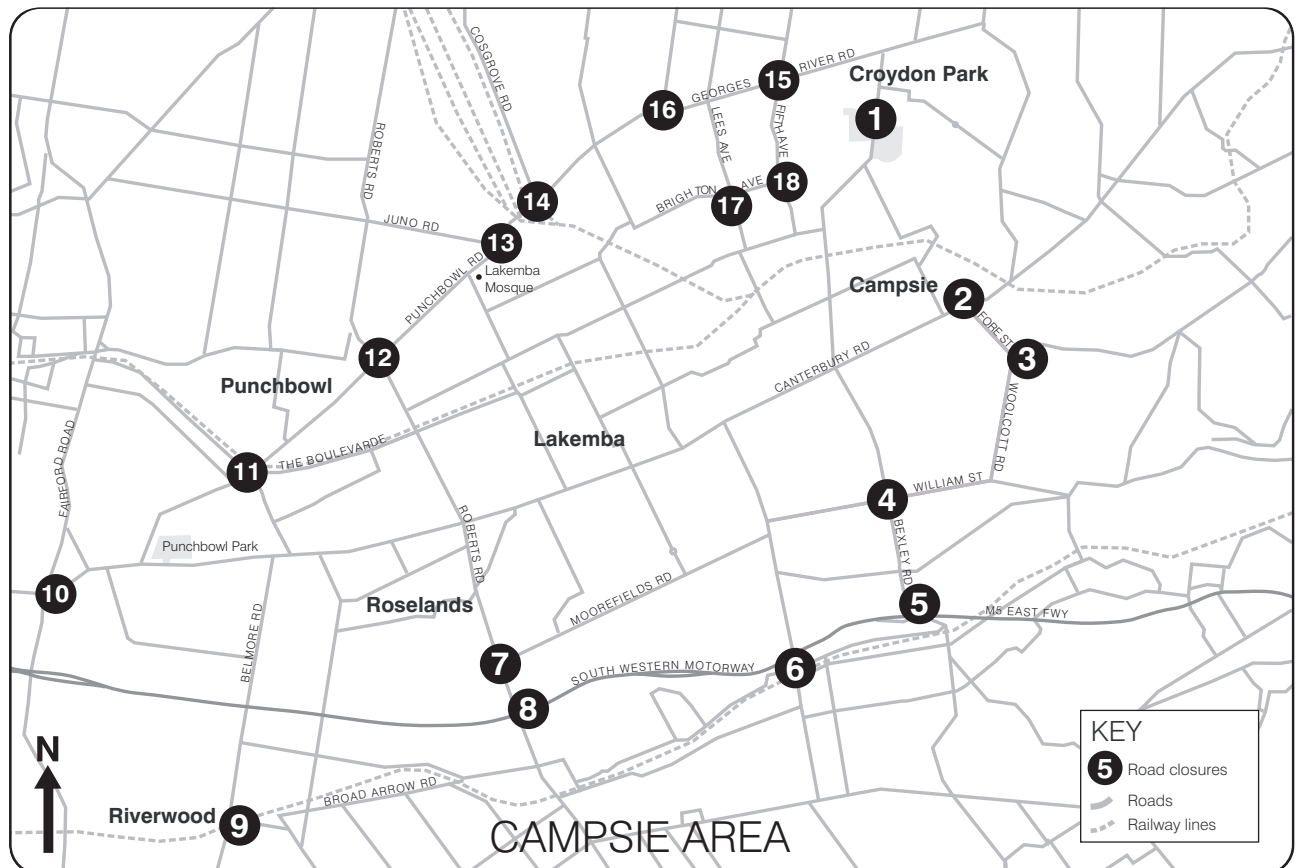
A different approach was adopted in the Campsie and Lakemba area. When attempting to control entry and exit to an area, inland suburbs such as Campsie pose different logistic challenges than beachside suburbs. Figure 4 shows the 18 road closures planned for the lockdown at Campsie. Police also prepared separate plans for Bankstown CBD, Revesby CBD and Chullora Market Place.

Roadblocks were set up in the vicinity of locations identified as being at particular risk such as the Lakemba Mosque and on roads leading to places where local young people were known to gather, such as Punchbowl Park.

Police were concerned about text messages and other reports indicating a risk that groups of 'Aussies' may assemble at Maroubra and Cronulla before moving together 'to Lakemba and Bankstown, causing havoc and damage to Mosques, shops and "ghettos".<sup>115</sup>

As the map shows, police did not create cordons around these potential places of interest, nor set up roadblocks on all road entrances to the area. However, the 18 roadblocks created a visible police presence in the area and police occupied roadblocks along major arterial roads such as Punchbowl Rd, Georges River Rd and the M5 East.

**Figure 4: Roadblock plan for Campsie area**



**The placement of roadblocks on arterial roads in the Campsie area created a visible police presence during operations to prevent public disorder.**

### Sutherland

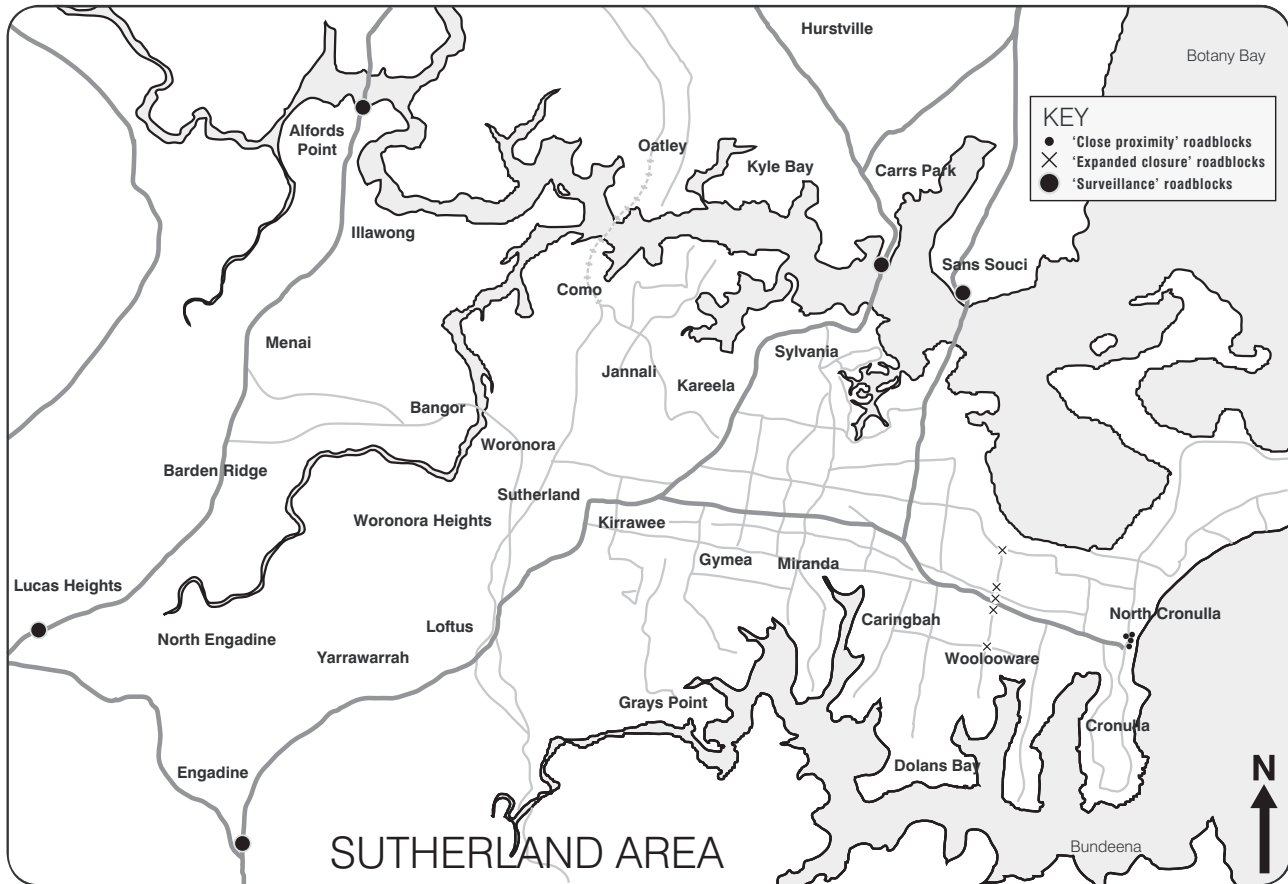
In Cronulla, the target area authorisation started from 7.15am on Saturday 17 December and was in place for 48 hours. There were two plans regarding the establishment of roadblocks and cordons in Cronulla. The first plan detailed four roadblocks that created a 'close proximity' closure of North Cronulla Beach, the North Cronulla Surf Life Saving Club, Dunningham Park, and the Prince Street flats. These roadblocks completely blocked vehicular access to the area bounded by the cordon.

This was to be supported by an 'expanded closure' plan that aimed to close wider Cronulla to vehicle access in the case of rioting or major incident. The expanded closure plan proposed a further five roadblocks along Gannon Rd South/Gannon Rd at each cross street between Burraneer Bay Rd and Captain Cook Drive. According to police plans for Operation Seta, no traffic was to be allowed east of these sites.

As a result of this expanded closure plan, some tourists with accommodation in the area were forced to leave their cars outside the cordon and walk to where they were staying. The owner of another business advised he was stopped at a roadblock by police who sought to prevent his access to the area. He eventually persuaded police that he had a legitimate reason for entering Cronulla and was allowed through the roadblock.<sup>116</sup>

These two plans for Cronulla were supported by a wider one for Sutherland Shire that allowed for the surveillance of road access points to the shire. Two police highway patrol vehicles were required at each of the five key road entrances as shown at Figure 5. This plan also detailed where suspect vehicles could be diverted to at each of the surveillance points so that police could search or inspect the vehicle and its occupants as desired.

**Figure 5: Roadblock plan for Sutherland area**



**The lock-down plans to prevent disorder in the Sutherland area involved a combination of ‘close proximity’ roadblocks in Cronulla, an ‘expanded closure’ to restrict vehicle access to Cronulla generally, and ‘surveillance’ roadblocks at access points to the Sutherland area.**

Each roadblock had the additional benefit of creating a highly visible police presence in areas considered potentially volatile.

At the end of Chapter 6, we set out our conclusion that the cordon and roadblock powers are an essential part of the Part 6A scheme, and our recommendation to align the thresholds for refusing persons to enter or leave target areas, and to improve record keeping in this area.

## Stopping and searching vehicles and people

Section 87J provides that police may stop and search any vehicle and section 87K provides that a police officer may stop and search any person within a target area or on a target road.

In contrast to standard police stop-search powers, Part 6A search powers do not require an officer to suspect a person of involvement or potential involvement in any wrongdoing. Mere presence in a target area or road is enough to establish a lawful basis to search.

Many personal searches are conducted by police with the consent of the person being searched. Consent policing is not reliant on any common law or legislative power, but rather on the cooperation of the person searched.

Search powers generally are subject to a number of safeguards that are intended to preserve the privacy and dignity of the person being searched and implicitly recognise the invasive nature of a search.<sup>117</sup> Section 87K(2) requires police to apply these same safeguards to Part 6A searches. Part 6A does not authorise strip searches.

Police must ‘as far as is reasonably practicable in the circumstances’ comply with the safeguards while searching.<sup>118</sup> For example, the officer conducting the search must be of the same sex as the person searched. An officer should request the person’s cooperation, ensure reasonable privacy for the person, conduct the least invasive search required and do so as quickly as is reasonably practicable. If clothing is required to be removed, this must be explained to the person being searched. If clothing is seized, appropriate replacement clothing is to be provided if required. The genital area of a person, or the breasts of a female or transgender person identifying as female, are generally not to be searched by a police officer. A search must not be conducted while questioning a person.<sup>119</sup>

Section 201 requires an officer to identify themselves, to provide their place of duty, the reason for the search and to warn the person to be searched that failure to comply with a lawful request to be searched is an offence.

## Who may be searched

These search powers are unusual in the sense that they are unfettered by the standard requirement for police to form some kind of reasonable suspicion or belief of a person's involvement in wrongdoing prior to conducting a stop and search.

During the parliamentary debate on 15 December 2005, a number of speakers raised concerns about this aspect of the Bill. The Hon. Mr Peter Breen proposed an amendment to the search powers so that an officer must first reasonably suspect a person or occupant of a vehicle 'has been or is likely to be involved in a public disorder'.<sup>120</sup> Mr Breen was concerned at the prospect of police exercising the search powers with respect to people who were simply bystanders or residents and who had no involvement in any public disorder.

The amendments were not supported by the Government. The Hon Mr John Della Bosca stated :

*The Government does not support the amendments, although it supports the sentiment and concern behind them. The amendments are not acceptable because the Government has taken a policy decision that the powers contained in proposed sections 87J and 87K are random powers not to be fettered by reasonable suspicion. The Government has put in place a general test encapsulated in proposed section 87D that that section requires the most senior police in this state to make the decision about whether to lock down a particular area.*<sup>121</sup>

The Legislation Review Committee reported in February 2006 that sections 87J and 87K represent a significant trespass on the personal right to privacy and referred the following query to Parliament for consideration:

*Whether the absence of any reasonable suspicion requirement in s87J and s87K constitutes an undue trespass on a person's right to privacy.*<sup>122</sup>

The Redfern Legal Centre and the Australian Privacy Foundation agreed with the analysis of the Legislation Review Committee that these search powers represent a significant trespass on the personal right to privacy.

Organisations such as the Department of Community Services have expressed concern at the scope of the search powers and their possible impact on young people. In another submission received, a private citizen stated that an area bordered by roadblocks and cordons, with random searching of people either inside it or trying to enter it, was akin to a 'large open prison'.<sup>123</sup>

Submissions from the Police Association and the NSW Police Force express support for the random nature of the search powers. There is clear operational value in police having random search powers during large-scale public disorder situations such as that seen in Sydney in December 2005. The Police Force submission reasoned:

*The majority of police powers... are designed to deal with a situation of an individual police officer ... dealing with one person... The police officer is aware of all the circumstances surrounding the encounter with the individual and makes his or her decisions based on the circumstances. Large-scale disorder does not lend itself to this sort of 'interaction'. Rather, a large group of police have to act on material known to a small number of senior officers. In this sense they are more like military operations than traditional police work. Part 6A is geared toward this situation by allowing decisions made by senior officers to be carried into effect 'on the ground' by other police officers without the necessity for the other officers to themselves have any particular state of mind.*<sup>124</sup>

Operations to address large-scale public disorder are likely to require the deployment of large numbers of police. For Operation Seta, police officers were brought in from commands across NSW to assist. A consequence of this is that a proportion of officers 'on the ground' did not have any local knowledge about the people or the area they were temporarily stationed in. As the police submission states:

*Very rarely will the individual officers know much of the overall picture. This knowledge will reside in the commanders and will be ever changing.*<sup>125</sup>

## Records of people and vehicles searched

Our analysis of information provided by police of the recorded uses of the Part 6A powers in or near target areas or roads on 15–16 December 2005 and on the weekend of 17–19 December 2005 showed:

- 349 (56%) of the 625 people stopped were searched.
- Of the 349 people searched, 333 (95%) were male and 16 (5%) were female.



- 150 people (43% of those searched) were searched at roadblocks, 192 (55%) were searched after being stopped by patrols within or near target areas, and seven (2%) were searched by police responding to reports.
- 242 vehicles were searched.
- The contents of 113 mobile phones were checked.

Narratives attached to some of the records indicate there were numerous other searches that were not documented on COPS. For instance, one of the six recorded uses of the Part 6A powers in an operation at Sutherland Shire on 15–16 December notes:

*About 1.15am on Friday the 16th December, 2005, police working as part of Operation SETA, were given authorisation... to conduct a road block on south bound traffic, on the Princes Highway, Blakehurst about 50m north of Tom Ugly's bridge, under the provisions of the LEPPA Public Order Management, section 6A for 48 hours. Police then set up a roadblock causing a number of vehicles attempting to enter the Sutherland Shire to be stopped, and searched. During this process, other police were conducting enquiries on the in car mobile data terminals.<sup>126</sup>*

A further example can be found in a police record relating to a roadblock set up at the corner of Alban Street and Parramatta Road, Auburn:

*Police set up a roadblock at the intersection of Parramatta Road, and Alban Street AUBURN for the purpose of stopping and searching each vehicle and every person carried in the vehicle as per the new lawislation [sic] introduced under LEPPA.<sup>127</sup>*

In our surveys of nine of the 16 people whose cars were seized during 17–19 December 2005, most people (7 of 9) stated that they were provided with a reason for being stopped and searched prior to their vehicle being seized. No strip searches were conducted and all police who conducted the stop/searches were in uniform and advised the drivers of their place of duty.

All of the nine people spoken to raised concern about the length of time they were detained during the search and seizure process. Each person advised they thought the time taken by police was too long. The legislation provides that an officer may detain a vehicle or person 'for so long as is reasonably necessary to conduct' the search in question.<sup>128</sup> The drivers we surveyed estimated that the time taken between being stopped in their car and leaving the scene on foot ranged from 1 to 4 hours. The majority of respondents also advised that nearly all police were professional in their dealings with them.

In light of the allegations of lengthy delays and the fact that so few of the survey respondents were charged despite their vehicles being searched and seized, further monitoring of future uses of these emergency provisions may be required.

## The random nature of the search powers

As stated above, a key feature of the Part 6A search powers is their ability to be applied randomly to anybody within a certain area. However, public disorder incidents involving large numbers of people will require police to focus their resources on certain types of people or vehicles depending on the nature of the threat. The logistics of large-scale operations over broad areas necessitates that police make choices about who to stop and search and where to position officers in order to have the most effective impact. Under sections 87J and 87K, this *choice* regarding who will be stopped and searched is not guided by the legislation, nor is there any available grounds upon which a person may challenge an officer's decision to conduct the search.

The Redfern Legal Centre submission states:

*We strongly submit that officers should be required to form some reasonable suspicion before being permitted to exercise these powers... The searches power must not be exercised arbitrarily, but rather only when it might be useful in preventing or controlling a public disorder.<sup>129</sup>*

When making a decision about who to stop and/or search, senior police have indicated that this decision is a discretionary one and it is up to the intuition and judgement of individual officers informed by available intelligence.

The available statistics regarding who was stopped during 17–19 December 2005 indicate that police time was focused on males aged between 16 and 23 years of age. While the existence of such a clear age and gender profile may be indicative of discriminatory police practices, it also appears to be indicative of the profile of the significant majority of people who participated in the public disorder of the previous weekend, or who considered participating in the public disorder.

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## Racist element to the violence

Perceptions of racial background and race-related prejudice were factors in the threats of public disorder that police were trying to prevent. As one report on the police response to the Cronulla riots and retaliatory attacks noted:

*Racial violence adds yet another dimension to public disorder as it is charged with emotion brought about by perceived discrimination. Pride in one's background or a sense of loyalty to a particular race or culture can be a motivating factor for people with no previous criminal record or history of violence becoming involved in a riot. In addition, racial tension has the potential to bring into conflict opposing groups within a community which again adds to the problems of police in trying to restore order.*<sup>130</sup>

Some of the text messages sent during the period provide stark examples of the role of racial prejudice as a factor in the conflict:

*Every fucking aussie. Go to Cronulla Beach Sunday for some Leb and wog bashing Aussie pride ok.*<sup>131</sup>

*Today in the jungle the lion sleeps. Wake up. Wake up oh lions of Lebanon 'retaliate' take action for we are the king of the jungle. Show them we have awoken this Sunday we will all meet at Brighton and together exterminate the enemy at Cronulla. Send this to every lion of Lebanon...*<sup>132</sup>

These two examples were very common. There are repeated references to both of these messages in many COPS entries relating to personal searches and the seizure of phones. Other variations on these messages include references to 'Arabs', 'Italians', 'skips', 'lifeguards', 'bitches', 'Islam' and 'Christians'.

## Community perceptions

From 24 December 2005 to 26 March 2006, the Community Relations Commission of NSW activated its Community Liaison Officer (CLO) program 'to avert and manage potential conflicts and prevent misunderstandings between different groups gathering in public spaces in the Sutherland Shire area.'<sup>133</sup>

The Community Liaison Officers (both Arabic and English speaking) spoke to 5,341 people in Sutherland Shire between December 2005 and March 2006 and provided 'a significant means of gauging community attitudes among local residents and visitors to the Sutherland Shire on issues arising from the unrest in Cronulla.'<sup>134</sup>

The findings of the Community Relations Commission are consistent with our survey of businesses in Cronulla and Brighton-le-Sands to the extent that many people spoke of feeling safer as a result of increased police presence:

*[The] Commission's on-going liaison with Arabic-speaking communities in the Canterbury-Bankstown area has revealed that many people, young people in particular, feel they have been unfairly targeted by police following the Cronulla incidents.*<sup>135</sup>

The Commission notes that while it is impossible to quantify such community sentiment, 'it is important to take community attitudes into account when examining the potential impact of the legislation on police and community relations...'<sup>136</sup>

Perceptions — whether well-founded or baseless — that police are targeting certain individuals within an authorised area, could easily inflame an already volatile situation. The NSW Commission for Children and Young People submitted 'it would be counterproductive if invocation of these powers caused deterioration of Police-community relations to the point where public disorder become more likely.'<sup>137</sup> There are operational advantages to police maintaining good relations with all parts of the community.

At the end of Chapter 6, we set out our conclusion in support of the random vehicle search powers, but recommend a threshold test be introduced for personal searches. We also make recommendations about record keeping for searches.

## Requiring the disclosure of identity

A police officer can require certain people in an authorised target area or road to disclose their name, address and other particulars. Unlike the Part 6A stop-search powers where mere presence in a target area is enough to establish the grounds for a search, the requirement to provide details of identity only applies if an officer 'reasonably suspects that the person has been involved or is likely to be involved in a public disorder'.<sup>138</sup>

The section also prescribes two offences — one for failure or refusal to comply with a request for disclosure of identity without reasonable excuse, and the other for giving an incorrect address or a name that is false in a material particular without reasonable excuse.<sup>139</sup> Each of these carries a penalty of up to \$5,500 or 12 months imprisonment or both.

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An officer can also request people who are required to disclose their identity to provide proof of their identity.<sup>140</sup> There is no penalty if a person does not respond to this request — reflecting the fact that there is no general requirement for people to carry identification in NSW.

The Part 6A power is in addition to various other powers for police to require members of the public to disclose their identity in certain circumstances. One of the most common situations involves officers exercising functions under road safety legislation, which has broad powers enabling police to require drivers, passengers and owners of vehicles to provide details of their identity.<sup>141</sup> These provisions were widely used in conjunction with the Part 6A powers during the police operations on 17–19 December 2005, as indicated by frequent use of random breath testing for alcohol at many of the roadblocks established to protect areas from public disorder. There are also powers to require identification details elsewhere in LEPRA such as a provision enabling police to require a person to disclose his or her particulars if police reasonably suspect the person may be able to assist in the investigation of an indictable offence.<sup>142</sup>

## Police use of the identity powers

There is no way to accurately estimate how often police used this power during the public disorder operations to require people in target areas or on target roads to provide their names, addresses and other particulars. Any attempt to quantify the uses of the section 87L power would need to take account of a number of practical impediments.

Firstly, people frequently provide their details when requested without police having to rely on statutory powers to require this information. Our analysis of police records and other sources such as police and media video footage of roadblocks and cordons found that police requests for information were generally met with very high levels of compliance and cooperation, even among those most affected by the powers such as people who had cars, mobile phones and other items seized. When officers were professional in their approach, people generally complied.

Secondly, police can require the information under other statutory provisions. Our analysis of the police records found that when officers did indicate that they had required a member of the public to provide details, it was often not clear whether they were relying on the section 87L identity provisions, other parts of LEPRA or some other provision. Of the 625 people recorded as having been stopped by police in operations using the Part 6A provisions on 15–16 December and 17–19 December 2005, most (477 or 76%) were in vehicles. In the case of drivers, many could have been required to produce their driver's licence under road transport legislation. In these instances, the section 87L requirement that police consider whether they 'reasonably suspect' that the person 'has been involved or is likely to be involved in a public disorder' would not have applied.

Thirdly, it is likely that there were at least some instances when police requested identification because they had good cause to reasonably suspect the person's involvement or likely involvement in public disorder, but many of the records did not clearly reflect this. Our review found some police records where apparent requests for identity were clearly supported by reasons, but in many cases there were no reasons noted or the reasons had to be inferred.

Finally, it is important to note that there was no requirement for officers to make a record of their requests for identification, other than in their official notebooks. Only some interactions with the public will result in an officer creating an entry or 'event' on COPS. A COPS event should record an incident that is 'a criminal or non-criminal activity that occurred at the one place at the one time and which is of interest to police.'<sup>143</sup> Police can also create intelligence reports on COPS. Our review of records arising from the police use of Part 6A powers found that COPS events were often only created when the contact between police and members of the public became significant in some way, such as when an item was seized or a person charged with an offence.

In summary, it is highly likely that the number of people identified in COPS represents only a fraction of the total number of people who provided their details to police, whether as a result of police uses of the section 87L powers, under some other statutory power, or voluntarily.

Our review of COPS records relating to the police uses of Part 6A powers in operations on 15–16 December and 17–19 December 2005 found that:

- No one was charged for failing or refusing to comply with a request to disclose their identity, or for giving an incorrect address or name that was false in a material particular.
- Of the 625 people subject to the Part 6A powers in or near target areas while authorisations were in place, 552 (88%) had their identity recorded. These consisted of 263 drivers, 205 passengers, and 84 pedestrians.
- The COPS records include some details of 73 individuals who were stopped, searched or subject to some other Part 6A power, but details of their identity were not noted. Officers may have noted the information in their official notebooks, but not on COPS.

From the COPS records and our discussions with police, it appears that people may have been asked for identification as a matter of course when stopped at roadblocks and within target areas. While in some cases only the driver was

asked for identification, in others the passengers were also asked for identification. It also appears that when police stopped pedestrians who were in a target area, they may have routinely asked for names and other particulars.

## Recording issues

Once a person's details are provided to police, whether voluntarily or as required under a statutory provision, there are important issues to consider with respect to what information should be recorded on COPS and how it might subsequently be used.

In our interviews with police commanders involved in early uses of the Part 6A provisions, some queried the adequacy of the advice provided in relation to what records should be kept and in what form. While they recognised the need to adequately document police uses of the emergency powers so decision-making could be accountable, there was a concern that such large-scale operations could create an influx of records being created on COPS that would be of little value.

One commander argued that if the only reason for stopping and searching people or vehicles is that they are in or near a target area or road, then detailed records of the encounter — including personal details of a pedestrian, driver or passengers — are generally only warranted if:

- the search leads to items being surrendered or seized
- the vehicle and occupants are refused entry or given a direction
- the encounter gives rise to legal action, or
- there is some other factor warranting the creation of a detailed record.

That is, if nothing is found and the only reason for exercising the stop-search powers was that the person or vehicle was in an authorised area at the relevant time, the intelligence value of recording their personal details is likely to be very limited. Moreover, two local area commanders felt there was a risk that such 'low value' records could potentially prejudice a person's future interactions with police if frontline officers are unable to easily distinguish records of stops and searches under Part 6A from records relating to general stop-search powers, such as searches where an officer must 'reasonably suspect' the person searched has stolen goods, a dangerous article, prohibited drugs and so on. At least in principle, the latter records have greater potential to help police identify patterns of suspicious activity.

One senior officer suggested recording all the vehicle stops and searches at roadblocks on a running sheet, similar to the summary information noted during random breath testing operations. A running sheet could be used to note the car registration, the time and location of the stop, and other basic details. COPS events would only be created if there was good reason. This would create a much more reliable and consistent record of the vehicles stopped during an operation, reduce the time frontline officers spend creating unnecessary COPS records, and protect the integrity of the COPS database from an influx of records of little value to police. It might also protect ordinary individuals who were stopped and searched under Part 6A from being confused with suspects or offenders in their future interactions with police.

## 'Reasonable suspicion'

When the legislation was introduced, there was considerable debate about the requirement that police must 'reasonably suspect' an individual 'has been involved or is likely to be involved in a public disorder' before they can be required to provide their name, address and other details. One MP advocating removing the requirement stated:

*If the situation is so dire that an area, through the authority of the Commissioner of Police or Deputy Commissioner, is declared to be a special zone, as far as I am concerned, anybody in that area should be required to reveal his or her identity.<sup>144</sup>*

Our Issues Paper invited submissions on whether the requirement should be amended or removed.

A submission by one senior officer noted the usefulness of the current identification powers in helping to prevent large-scale public disorder. He gave an example of police noting the particulars of individuals who had travelled to a locked down area on the weekend of 18-19 December 2005 to see what might happen, partly as a way of deterring them from becoming participants in any riot or affray. He supported removing the 'reasonable suspicion' requirement so all members of the public know they have an obligation to cooperate when entering a 'high risk' area.<sup>145</sup>

However, most police submissions advocated retaining the 'reasonable suspicion' requirement. The Minister for Police thought the current provision was adequate, the NSW Police Force requested no change to this 'core power', and the Police Association of NSW stated that 'the present requirement of "reasonable suspicion" is appropriate'. The police corporate spokesperson for public order issues stated:

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*Provision of identity details confirms or otherwise your bona fides to be within an authorised area. Reasonable suspicion within an authorised area is appropriate and effective in accordance with the intent of the legislation.*<sup>146</sup>

Others supporting the retention of the requirement included the Australian Privacy Foundation:

*The power to require disclosure of identity is a major intrusion into privacy and freedom and must be strictly rationed and controlled. The 'reasonable suspicion' criterion is therefore an essential safeguard.*<sup>147</sup>

## Penalising non-compliance

As noted earlier, individuals can be fined up to \$5,500 or imprisoned for up to 12 months for failing or refusing to comply with a request to disclose their identity 'without reasonable excuse' or for giving police false or incorrect particulars 'without reasonable excuse'.<sup>148</sup>

In the Parliamentary debate, one MP questioned the value of section 87L(3)(a), asking what reasonable excuse there could be for someone 'giving an identity that is false in a material particular'. He added: 'What possible excuse could a person have for giving a false name? I urge the Government to consider that matter...'<sup>149</sup>

In our Issues Paper, we invited feedback about this issue.

The NSW Police Force submission stated:

*NSW Police does not believe it necessary for the Act to include an exception for 'reasonable excuse'. It is difficult to see what 'reasonable' excuse there could be for providing police with a false name and address.*<sup>150</sup>

However, most other submissions argued that the 'reasonable excuse' exception was necessary and appropriate if individuals were to be penalised for failing to comply. One explained the need to retain the condition in the following way:

*We strongly support the retention of the 'reasonable excuse' defence. Strange as it may seem, a person may have a reasonable excuse for providing a false name, eg (s)he may have an intellectual disability, or an insufficient grasp of the English language to understand the question. Reasonable excuses for giving a false or incomplete address are even easier to envisage, eg a person who is homeless and moves frequently between boarding houses, refuges and other temporary accommodation may not be able to recall their exact address.*<sup>151</sup>

As noted earlier, police can request proof of identity, but there is no penalty for people who cannot provide proof.<sup>152</sup> Our Issues Paper also asked whether failure to comply with a police request for proof of identity should be an offence.

The NSW Police Force argued that if individuals are carrying identification documents, it should be an offence if they do not produce them, but noted that there would be situations where they might not be carrying such documents and that could provide a 'reasonable excuse' for failing to comply.

A number of submissions argued that penalising any failure to provide proof of identity was unreasonable and impractical except in specific situations such as driving a motor vehicle where drivers are required to carry identification. The NSW Commission for Children and Young People stated:

*Many children and young people could not comply with a request for proof of identity simply because they do not possess any.*<sup>153</sup>

The Australian Privacy Foundation said many other people do not carry identification documents in various circumstances, and that requiring them to do so would significantly change the character of Australian society.

Another concern raised by many submissions was the severity of the penalties. Most, including the Shopfront Youth Legal Centre, argued that fines of up to \$5,500 and/or up to 12 months imprisonment were 'far too high':

*Similar offences in other legislative provisions (eg LEPR sections 12 and 13) attract a maximum penalty of only 2 penalty units [\$220].*<sup>154</sup>

Similarly, Redfern Legal Centre stated:

*We do not object in principle to the imposition of penalties for refusing to comply with a request, however we do believe that the penalties are unduly harsh and do not reflect the seriousness (or rather relatively trivial nature) of the offence. We find it particularly disproportionate and absurd that a jail term of 12 months may be imposed for such a 'crime'.*<sup>155</sup>

At the end of Chapter 6 we set out our conclusion that, at this stage, there is no case for change to the identity powers and our recommendation about the record keeping in relation to police requests for a person's identity.

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## Seizing and detaining the ‘tools’ of rioters

The seizure and detention provisions set out in section 87M were a critical element of the emergency powers granted to police. In the nights following the initial disorder at Cronulla, police struggled to counter sporadic attacks on people and property in Cronulla and other beachside suburbs. Under the cover of darkness, assailants travelling in cars used mobile phones to coordinate sudden attacks on unsuspecting targets in residential streets and quickly disperse before police had time to react.

Subsequent police planning focused on practical ways to prevent further attacks and stop the spread of civil unrest. While police were confident they could deal effectively with confrontations involving crowds massing in busy, well-lit commercial and beachfront areas, there were concerns about how best to deal with sudden attacks by highly mobile groups in cars converging on quieter residential streets. Measures were also needed to prevent ‘lookouts’ with mobile phones from alerting the assailants to police movements.

A meeting of senior police commanders agreed there was an urgent need for additional emergency powers to seize mobile telephones and impound vehicles.<sup>156</sup> A key objective of seizing phones was to undermine the ability of potential assailants to plan and coordinate their attacks, and to interrupt the flow of information between assailants and the lookouts helping them to avoid detection. Special powers to confiscate vehicles could help disrupt and disable anyone travelling in convoy with an intent to cause disorder. The commanders also identified a need for additional powers to seize offensive implements and articles.

The emergency section 87M seizure powers passed by Parliament were a direct response to the needs identified by senior police. In introducing the provisions, the Minister for Police described how the emergency seizure provisions might be used in conjunction with the new roadblock powers to remove the ‘tools’ of potential rioters:

*Riot roadblocks will be used to prevent ring-ins and would-be accomplices from entering or leaving a lockdown area. Not only will police stop people in their tracks; they will take away any tools that people may use to feed this unrest. Police will search people, seize their weapons, impound their vehicles and remove their means of communication. That is, at a riot roadblock, police will be able to conduct a search and not only seize offensive implements but confiscate the car, mobile phones and communication devices.<sup>157</sup>*

There are two parts to the section 87M seizure provisions. The first involves search and seizure powers primarily directed at seizing vehicles and mobile telephones where that seizure will assist in preventing or controlling a public disorder. The second involves a power to seize items that an officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence.<sup>158</sup> Police have powers to seize and detain prohibited drugs or offensive weapons under other legislation. Practices relating to seizures will be considered in more detail later in this chapter.

## Records of seizures

Our analysis of police records relating to people stopped as a result of authorisations in target areas and roads in Sydney, Wollongong, the Central Coast and Newcastle in December 2005 found that the seizure powers were widely used:

- 625 people were stopped in target areas and 283 (45.3%) had items seized
- 287 items were seized, including 16 vehicles and 56 mobile phones
- 19 people who had items seized were charged with offences
- Most seizures resulted in no further action being taken, and
- 86% of seizures followed vehicle searches; the rest related to searches of pedestrians, cyclists, drinkers in public parks, and people using public transport.

It is important to note that our analysis is limited to records on COPS. It does not include unrecorded uses or uses recorded in individual officers’ official notebooks.

Commanders responsible for managing these early operations advised that, at least initially, there was no clear advice on what interventions should be centrally recorded on the police computer system. They said there were many uses of the emergency powers that were not recorded centrally because no further action was required and the vehicles and people stopped presented no foreseeable risk. As such, there was no intelligence or other reason to record the interaction. On the other hand, a review of the police data indicates that officers were more diligent in creating electronic records where particular risks were identified, items seized or charges laid, or where there was a more intrusive interaction such as a personal search.

There were only two recorded seizures from the policing operation at authorised roadblocks in the Sutherland Shire on 15–16 December 2005. Both refer to small amounts of cannabis seized following vehicle stops on River Road, Sutherland.

There were significantly more recorded uses of the Part 6A powers in authorised areas from 17–19 December 2005, resulting in numerous recorded uses of the section 87M seizure and detention powers. Table 3 lists the types of items seized.

**Table 3: Most common items seized in target areas and roads, 17–19 December 2005**

Type of item	Number seized	% of total	Type of item	Number seized	% of total
Mobile phone	56	19.5	Timber pieces, sticks, handles	7	2.4
Knife*	45	15.7	Spear, arrows	7	2.4
Drugs**	22	7.7	Masks, gloves & other clothing	6	2.1
Alcohol	16	5.6	Sword	5	1.7
Vehicle	16	5.6	Pool cue & other sporting	5	1.7
Baseball bat	14	4.9	Australian Flag	4	1.4
Golf Clubs	13	4.5	Petrol	4	1.4
Metal bar, pipe	13	4.5	Spray paint — cans	4	1.4
Hammer, crow bar & other tools	9	3.1	Portable radios & scanners	4	1.4
Club lock, other car equipment	8	2.8	Other	23	8.0

n=287. \* 'Knife' category includes 3 scissors. \*\* 20 of the 22 drug seizures were cannabis.

Source: Ombudsman analysis of 2056 NSW Police Force COPS records noting seizure of 287 items as a result of operations in target areas in Sydney, Wollongong, the Central Coast and Newcastle on 17–19 December 2005.

As the data shows, mobile phones and knives were by far the most common types of items seized. The knives seized included various retractable cutting tools, fishing knives, pocket knives (Swiss army knives and pen knives) and 'Leatherman' utility tools with blades attached. Vehicles, drugs, alcohol, weapons (swords, arrows, spears), gardening and sporting equipment (baseball bats, hockey sticks, golf clubs and pool cues), tools such as hammers, chisels and crow bars, car equipment (notably club locks and wheel braces), and items considered inflammatory such as Australian flags and offensive T-shirts were also seized.

The category 'other' generally refers to one-off items or items that were difficult to classify such as a paver brick, a rolling pin, a piece of chrome tubing from a vacuum cleaner, a cigarette lighter in the shape of a firearm, fuel cans and documents. Police records show that many of these were confiscated as a precautionary measure or immediately destroyed with the owner's consent.

Police took a range of actions to either secure or dispose of the items seized. Generally, police records show that seizures of more valuable items were carefully documented, including police exhibit book or miscellaneous property record entries, and owners were given advice on where and when their property could be retrieved. This was certainly the case with vehicles and mobile phones, and items such as tools that owners claimed were needed to earn their livelihood. Less valuable items, such as sticks, broken furniture and other items seized because of their potential to be used as weapons, were generally destroyed or disposed of, usually with the owner's permission. Open containers of alcohol were generally tipped out on the spot.

## Seizing vehicles, mobile phones and other communication devices

Section 87M(1)(a) gives police conducting searches in target areas or roads the power to 'seize and detain, for a period of not more than 7 days, a vehicle, mobile phone or other communication device if the seizure and detention... will assist in preventing or controlling a public disorder'.

Items seized may be held for a further 14 days if police can satisfy the Local Court that 'continued detention will assist in preventing or controlling a public disorder'.<sup>159</sup> The Local Court may approve further extensions, provided that each extension does not exceed 14 days. Information provided by police and the Local Court indicates that no extensions were sought.

The section seems to permit police to seize certain items within a target area or on a target road without a need to establish that the item was used or was intended to be used in an offence. The legislation does not provide any

mechanisms enabling owners to have a police decision to seize an item reviewed, only that the initial period of detention should not exceed seven days.

On the other hand, the words 'will assist in preventing or controlling a public disorder'<sup>160</sup> appear to require some certainty on the part of a police officer as to the effect of the seizure and detention of the vehicle, mobile phone or communication device. That is, the provision seems to require a higher level of certainty than similar police powers requiring officers to 'reasonably believe' or 'reasonably suspect' that the exercise of a particular power is warranted. As such, it could present police with considerable practical difficulties in determining in practice whether a seizure and detention under section 87M(1)(a) is lawful or reasonable. These difficulties would be highlighted in the event of any legal challenge to the legality of any seizure pursuant to section 87M(1)(a), although the practical likelihood of a legal challenge is considerably reduced by the absence of mechanisms enabling owners to have a police decision to seize property reviewed.

Part 6A provides for the creation of regulations to govern the detention and return of vehicles, mobile phones or other communication devices. The current regulation only deals with vehicles, notably provisions relating to removing and detaining seized vehicles, and owners' liability to pay towing and storage fees.<sup>161</sup> The NSW Police Force has advised that all items seized were recorded either as 'exhibits' or as 'miscellaneous property'. In most instances, people were told how to collect their items. Some items were destroyed without objection from their owners.

The legislation permits police to seize a 'communication device' but provides no further guidance as to what this term might include. Nor does the regulation provide advice in this regard. The NSW Police Force standard operating procedures developed to guide officers in their use of the powers define 'other communication device' to be 'any electronic device that has the capability of receiving and/or transmitting information that includes but is not limited to voice, data, images and video'.<sup>162</sup> Examples cited in the police operating procedures include scanners, hand held portable radios, CB radios, public address systems and radio jamming devices.

The police procedures highlight one important exception. From the outset officers were instructed not to seize laptop computers<sup>163</sup> even though the legislation would appear to permit the seizure of at least some portable computers. This policy was noted in police procedures and consistently reinforced through education materials and in the pre-operational briefings and instructions provided to officers involved in the early uses of the emergency powers. Our review of police data relating to seizures under section 87M found no records of any laptop computers, handheld computer-phones or other such communication devices being seized.

This advice has since been incorporated into other briefing and education materials prepared for police, including the *Constables (Investigators) Pocket Guide*<sup>164</sup> and advice published in the *Policing Issues and Practice Journal*.<sup>165</sup>

A 'Six Minute Intensive Training' exercise developed by the NSW Police Force at short notice to provide scenario-based training for officers involved in operations using the emergency powers suggested a hypothetical example of when the seizure powers might be used. After describing a situation involving a stop and search of a vehicle with five male occupants in a target area, the exercise states:

*Whilst searching the vehicle you observe one of the male persons make a call on his mobile phone. You overhear him state 'Hurry up and get here. We will get those bastards.'*

*What can you do?*

*Under section 87M police may seize the vehicle, mobile phone or other communication device if the seizure will substantially assist in preventing or controlling a public disorder. Police may detain the phone and vehicle for up to 7 days.*<sup>166</sup>

The police standard operating procedures relating to seizures of mobile phones provide little additional advice on whether and why a mobile phone should be seized, but do detail what should happen to the phone once it is seized. This includes directions to record the owner's name and details, the grounds for seizing the phone, details of the phone and its condition, checking whether it has been stolen, switching it off and issuing a receipt to the owner, creating appropriate property records when it is taken to the nearest police station, explaining to the owner where it will be stored and how it may be retrieved, and creating a corresponding COPS record. The procedures explain how the phone should be disposed of if the owner fails to reclaim it, but concludes: 'It is the responsibility of the seizing police to ensure the property is returned to the owner as soon as practicable'.<sup>167</sup>

## Seizing vehicles

Our review of police records associated with vehicle and mobile phone seizures under section 87M found that threatening or offensive text messages were often cited as a factor in determining whether to seize vehicles. Mobile phones were seized at the same time as nine of the 16 vehicle seizures, indicating that text messages may have been a factor in relation to many of these seizures.



The narrative relating to one vehicle search in a target area noted that 'no offensive implements [were] found', but police found two text messages inciting violence after inspecting the driver's mobile phone:

*First message read. "TODAY IN THE JUNGLE THE LION SLEEPS WAKE UP WAKE UP OH LIONS OF LEBANON RETALIATE TAKE ACTION FOR WE ARE THE KING OF THE JUNGLE SHOW THEM WE HAVE AWAKEN THIS SUNDAY WE WILL ALL MEET AT BRIGHTON AND TOGETHER EXTERMINATE THE ENEMY AT CRONULLA SEND THIS TO EVERY LION OF LEBANON. Second message Reads "COME SUPPORT AUSSIE AND LIFE GAURD [sic] BASHING DAY AT CROUNALLA [sic] BEACH ON SUNDAY AND LET'S SHOW THEM THAT IT'S OUR FUCKING BEACH SEND THIS TO ALL YOUR MATES."*<sup>168</sup>

The police narrative states that the driver refused to tell police who sent the messages and 'as a result of the above messages' a sergeant at the scene 'gave a direction for the [driver's] mobile phone and vehicle to be confiscated for seven days'. The driver was given a confiscation form noting details of the car and informed that the car and phone could be collected after seven days.<sup>169</sup>

Another COPS entry indicates that the police decision to seize a vehicle and mobile phones in a target area was clearly linked with text messages and the person's actions and demeanour:

*[A police foot patrol] saw that the vehicle contained four males and heard a number of offensive words being yelled from occupants of the vehicle. At the time the accused, [name], was occupying the rear passenger seat of the vehicle... Shortly after the vehicle stopped in traffic... The accused got out of the vehicle and was walking back up the hill shouting the words, "Fuck you, ya greasy fucken leb cunts. Come on fuck ya, I'll fucken kill ya. Fucken lebs, I'm a fucken Aussie". At the time the accused was wearing only a pair of board shorts (bare chested), and was holding a bottle of beer in his right hand. As he yelled this abuse he had his left hand clenched in a fist and was gesturing with this right hand for someone to come toward him.*<sup>170</sup>

The narrative explains that he stopped yelling abuse when police threatened him with capsaicin spray and arrested him. The man, the vehicle and the vehicle's other occupants were then searched and:

*... a number of mobile telephones were seized under Sect 87M, LEPR Act 2002. One of these mobile telephones was owned by the accused. Upon inspection of this phone police located a text message stored in the 'outbox' of the phone. This text message read, "No fukin around boys lets Fuck these greasy stinky gang rapin fuckin lebs right out of our country its australia for Fuck sake!! Lets keep it that way! [location] sunday 12pm".*<sup>171</sup>

The police narrative explains that the man claimed to have saved the text message to the 'outbox' of his mobile telephone because he didn't know who sent it to him, but was 'adamant' that he did not send or forward the text message. He also admitted to being at the location mentioned in the text close to the time of the proposed rally despite being stopped twice by police at roadblocks. The man was charged with affray.

Of the remaining vehicle seizures, the discovery of other items in the vehicle seemed to be a factor in many of these decisions. One record of a vehicle seizure involving a young man of Middle Eastern background notes that he was stopped while driving his sports car in a target area on the afternoon of Sunday 18 December 2005. He and his passenger were asked to provide details and the car was searched. The narrative notes:

*Whilst searching the vehicle, a 'box cutter' style retractable knife was located in the glove-box on the passenger side. The Accused was immediately cautioned and placed under arrest. When asked to explain why he had in his person an offensive implement, the Accused stated: "Its mine, I use it to fix the loose wires in my car stereo."*<sup>172</sup>

Apart from the box-cutter found in the car, there are no other factors mentioned in the narrative to explain the police grounds for arresting the driver for possessing an offensive implement and seizing his car 'utilising new public order legislation'. Numerous other drivers and passengers were found with knives and similar implements in their vehicles in target areas, yet they were not arrested. Nor were their cars seized. Some were fined,<sup>173</sup> while others had the implements seized and were given warnings.<sup>174</sup> It is not clear in this instance what made police determine that seizure of the young man's car would 'assist in preventing or controlling a public disorder'. He had to pay a towing fee of \$326.70 and a \$112 impound fee for the return of his car, and later had to pay \$165 in fines and court costs after pleading guilty to possessing a knife in public. In evidence presented to court, the young man said he and his friend had gone to Brighton-le-Sands to celebrate his birthday with two female friends who lived nearby and who were travelling in the car behind him. In addition to having to pay a total of \$603.70 in fines, costs and fees, the court heard that he had lost income as a contract paver because of difficulty in getting to various work sites without a car.

A young woman had the car she was driving seized after a police search at a roadblock found a broom handle and gardening hoe in the boot. The police narrative notes:

*Police were stopping all vehicles and searching both persons and vehicles... At 2.00pm on the 18th day of December 2005, the POI... entered the 'designated target area'... The POI complied with all police directions and exited her vehicle. The POI supplied Police with her driver's license. Police searched the [vehicle] and inside the boot, Police have located a wooden broom handle (1.5m) and a small gardening hoe with steel blade (.5m in length). Police have deemed these two items as prohibited / offensive weapons, with the potential to be used in a public order incident. The POI was informed that police would be confiscating these items for a period of seven days. Police have then questioned the POI as to her knowledge and reasons for possessing the items. The POI informed police that the vehicle is owned by her grandfather and that she only had custody of the vehicle since the morning. The POI further stated that she was unaware that the two items were inside the boot and that if she had knowledge of them she would have removed them. Due to the version given by the POI and in consultation with a senior Commissioned Officer at the scene, it was decided that the vehicle would be confiscated under section 87M... for a period of 48 hours.<sup>175</sup>*

Subsequent police inquiries confirmed that the woman's terminally ill grandfather owned the car and that her mother had allowed her to drive it that day. The mother explained that the broom handle had been used to prop the boot lid open, but did not know the garden hoe was also in the boot. The narrative adds: 'Considering the version supplied by the POI was fully supported by her mother, [name] and the demeanour of the POI upon locating the prohibited items Police have decided not to take action against the POI'. The car was released a few days later after towing and impound costs were paid.

The police decision to seize her grandfather's car in this instance seems harsh compared to actions taken following items found after searches of other vehicles in target areas. These include a piece of chrome vacuum tubing used to prop open a vehicle's rear hatch (even though police noted that there was no fault with the hatch),<sup>176</sup> the heavy metal handle of a shopping trolley,<sup>177</sup> and an iron bar that the owner offered no reasonable excuse for carrying in his car.<sup>178</sup> In these and many other instances the items were seized and the owners warned or given a direction to move on, but no further action was taken. It is not clear from the police record what it was about the broom handle and gardening hoe found in the young woman's car that made police decide that the car should be seized.

The biggest concentration of vehicle seizures was at Wollongong, where four of the 16 vehicles were seized. This included one man whose van had been searched at Woonona where he had gone to surf. Steak knives, a carving knife and two table legs were found and seized. As he was driving home to Horsley, to the south of Wollongong, police telephoned him, asking him to go to Wollongong Police Station, where he was required to surrender his van.<sup>179</sup> Police also seized vehicles at Brighton-le-Sands, Roselands, Auburn, Bankstown, Wiley Park and The Entrance.

## Mobile phones

The recorded reasons relating to police decisions to seize mobile phones seemed to be much more clearly related to the perceived threat of public disorder. Our analysis of police records found that almost all phones seized contained text messages inciting violence and urging recipients to gather at a particular location at a specified time. On at least one occasion the owner of a phone was seen making a call near a police checkpoint and was overheard saying: 'Don't come down [location] Road, the Cops are here checkin' cars stay away.'<sup>180</sup> His phone was seized after police found it contained messages inciting violence.

There was only one instance of a 'communication device' other than a mobile phone being seized. This arose from a vehicle search in which police located 'a CB radio system set to channel 20, portable radios and a handheld Police radio frequency scanner'.<sup>181</sup> The owner was not charged in relation to these items. However, there were charges arising from the discovery of other items found following the execution of a search warrant on his home.

## The power to seize and detain other things

Section 87M(1)(b) gives police conducting searches in target areas or roads the power to 'seize and detain all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence'

For seizures of items other than vehicles, mobile phones and other communication devices, police have to rely on either section 87M(1)(b) or other specific powers provided outside of Part 6A.

The advice and instruction initially provided to frontline officers on their seizure powers focused on the special powers to seize vehicles and mobile phones. There was no specific guidance provided on the ambit of section 87M(1)(b). Subsequent education materials also note that the power refers to things found in an authorised target area.<sup>182</sup> There appears to be no procedural advice or examples regarding what items or circumstances might provide 'evidence of the commission of a serious indictable offence'.

Our Issues Paper highlighted the following information drawn from our analysis of police records. In many instances it was apparent that the items seized met the criteria in section 87M(1) or were covered by other legislation.<sup>183</sup> However, from the information provided by police there were some items seized without a clear legislative basis. It would appear some police took an expansive view of section 87M and seized any item that could have potentially been used as a weapon or could inflame a large-scale public disorder.

### **Seized pursuant to section 87M(1)(b) of Part 6A or under the provisions of other legislation**

- prohibited plant or prohibited drug (for example cannabis<sup>184</sup> and ecstasy<sup>185</sup>).
- offensive implement (dangerous article/dangerous implement), for example knives,<sup>186</sup> arrows,<sup>187</sup> iron bar,<sup>188</sup> knuckle-duster,<sup>189</sup> spears,<sup>190</sup> spear gun,<sup>191</sup> swords.<sup>192</sup>

### **Other items seized where legislative basis is less clear**

- Items with the potential to be used to inflame a public disorder or violence such as Australian flags<sup>193</sup> and T-shirts deemed to be inflammatory or offensive including one featuring the Australian flag<sup>194</sup> and another with the 'image of a male person exposing his middle finger in an offensive manner' and featuring the words 'Welcome to Cronulla 2230'.<sup>195</sup>
- Items deemed by police as either offensive implements or implements that could be used in a public disorder due to the nature of the 'current climate'. For example a golf club<sup>196</sup> despite evidence provided that the owner had just played golf; a baseball bat<sup>197</sup> that a driver claimed was his son's and he had forgotten was in the vehicle; a club-lock<sup>198</sup> where the owner did not have a key.
- Items seized due to 'current climate' even though police considered explanation provided plausible, for example a builder's pinch bar<sup>199</sup> held by a registered builder who could provide proof of his trade; and an axe handle<sup>200</sup> despite police verifying that the person owned a wood chopping company. The 'new legislation' and concerns about the 'climate' were among the most commonly cited grounds for seizing items found.

The records of police interactions with the public indicate high levels of compliance with police decisions to stop and search, with many expressing their support for police actions to prevent further violence. The records indicate many readily surrendered items when concerns were raised.

*[A driver at a roadblock] declared that he had a Long wooden Kendo sword in the trunk. He stated that he did not intend to keep the wooden sword and stated he forgot to take it out. [He] was co operative and has then told police he did not wish to keep the item and agreed due to the current climate of trouble in the city he should not have it in his car. The POI has then given the item to police and signed a destruction order to state he did not wish for the item to be returned. The POI has committed no offence... The item is to be destroyed.<sup>201</sup>*

In some cases it seemed police were simply making a record of an item voluntarily surrendered.

*The POI has approached police and stated that he had a fishing knife in the boot of the vehicle and that he wished to surrender it to police. The knife was a black handled butchers knife. The POI has then signed a police notebook giving police to dispose of the object [sic]. There is no offence but item taken due to current civil unrest.<sup>202</sup>*

In some cases, the police narrative notes that people who had items seized complimented the police on their actions:

*A saw type implement was located in the boot of the vehicle and was taken by other police at the scene due to the current climate. The POI stated that he would collect the saw within seven days. [He] was fully compliant with police and was grateful (sic) that there was a police presents under the current climate.<sup>203</sup>*

*The [owner of an axe] thanked police for being in the area and was fully understanding of the current climate.<sup>204</sup>*

Police video recordings of searches at roadblocks in target areas also indicate high levels of cooperation and compliance by members of the public stopped by police, including recordings of people who had their vehicles seized.

## **Other issues relating to seizures**

During the parliamentary debate, concern was raised that the seven-day maximum time period for the initial seizure of a motor vehicle may be insufficient, and that a longer period would prove a greater deterrent.<sup>205</sup>

In practice, a number of vehicle owners approached police for the return of their vehicles much sooner. There were instances in which individuals and families lost income and incurred inconvenience and hardship because a vehicle they relied on was not available for that period.

Our analysis of records provided by police found that officers generally gave clear advice to individuals regarding the return of their items. However, occasionally owners were provided with inaccurate advice on how to go about retrieving their property. For example, one young driver was told he would 'have to apply to the court and obtain a court order for his vehicle to be returned to him'. A passenger in the same vehicle had his mobile phone taken. He was told 'that he may be able to apply to have his phone returned to him via a court order or at the police discretion at a later date'.<sup>206</sup> The legislation does not specify what powers courts may have to require the return of property before the specified period expires and the police procedures relating to returning property are also unclear. In this instance, the vehicle was actually returned to the young man after he and his father made direct representations to local police a few days later. The police record notes:

*Owner of vehicle and father... interviewed on 21 December 2005. [He]... uses vehicle frequently and had discussed weekend events with his father. Supt [name] also discussed weekend events with father which were relayed in a more factual sense to him. As a result of this interview it was decided by Supt [name] that the vehicle would be released. It is my view that no person in the vehicle is a 'white extremist' or linked to same. More over local self styled hoodlums who represent little future risk.*<sup>207</sup>

The record provided by police does not mention when the mobile phones seized from each of the five young men in the vehicle were returned. However, our own audits of police property records at three Sydney locations found that most vehicles and mobile phones were returned within seven days after being seized.

Another young man who had his mobile phone seized after inflammatory text messages were found in the phone's inbox later approached police to retrieve the phone. The police record notes:

*The POI has contacted police numerous times requesting that his phone be returned and he has been informed that he may pick up the phone seven days after it was confiscated which is Christmas Day.*<sup>208</sup>

Numerous police records relating to seizures nominate seven days as the period the property would be held, including many items purportedly seized under section 87M(1)(b) — even though that provision relates to items linked to the commission of serious indictable offences and does not provide for any seized items to be returned. As noted above, police adopted an expansive view of items that could be seized under section 87M(1)(b) so even if the provision did provide for the return of items other than vehicles, mobile phones and other communication devices after seven days, it is not clear whether many of the items seized or voluntarily surrendered would have been subject to the power.

Our Issues Paper invited submissions on the adequacy of the police powers under section 87M. The police submissions generally noted the importance of the seizure powers but said little on how the provisions might be refined or improved. In response to questions on the powers to seize vehicles, mobile phones and other items, the need for these powers, the appropriateness of the initial seven-day detention period and other issues, the NSW Police Force submission simply states:

*NSW Police believes this core power of the Act is necessary to help deal with large scale public disorder.*

On whether there was a need for any additional seizure powers, the police submission states:

*Police should have powers, beyond those in section 87M, to seize items that may become weapons or the tools of rioters in a public disorder. Such a power would considerably improve the ability of police to prevent disorder before it occurs.*<sup>209</sup>

The submission does not explain what this might involve.

The Minister for Police argued that the current provisions were sufficient. A submission by the police corporate spokesperson for public order issues argued that no additional powers were needed as 'there are other powers that can be used to supplement those afforded under section 87M'.<sup>210</sup> There was broad support for better definitions and clearer advice to be provided to police, but no details suggesting proposed amendments.

A privacy matter regarding mobile phones arose in the aftermath of the use of the powers in December 2005, following police searching mobile phones for text messages. Ms Pauline Wright from the NSW Council for Civil Liberties is reported to have said: 'This searching text messages is like looking into your private mail. There are similar powers for computer hard drives and so on, but in our view searching text messages is an extraordinary intrusion. If you regard these text messages as letters, then you are having people search your private mail.'<sup>211</sup>

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The NSW Police Force submission addressed this issue, arguing that the practice of scanning text messages on mobile phones is analogous to checking other written documents:

*NSW Police believes that its officers should be allowed to search through stored messages on a mobile phone. There is no reason why mobile phones should be put into some separate category of article that cannot be searched. Given that the memory of a mobile phone is really only a receptacle of stored information, there is really no difference in searching a mobile phone [as] opposed to a written diary or a filing cabinet of documents.<sup>212</sup>*

Perhaps one important difference between a mobile phone and a filing cabinet is that the latter would normally only be accessible to police through the execution of a search warrant on private premises. Yet the point remains that mobile phones can contain valuable information.

Another senior police source stated more succinctly the case in favour of permitting police searches of stored messages on mobile phones by arguing that such searches should continue to be permitted, provided the searches are for 'the lawful intent of detecting or preventing further offences'.<sup>213</sup> Such a condition would keep the police focus of a search on the original intent of including special search and seizure provisions for mobile phones; that is, recognising the role of mobile phones as a potential tool for assembling and organising people likely to be involved in large scale public disorder. There may be scope to include this condition in the legislation — or at least in the procedures instructing police on the responsible use of these emergency search powers.

At the end of Chapter 6 we make a number of recommendations to improve the consistency and fairness of decisions to seize vehicles and mobile phones, and to provide a mechanism for the early return of items seized in certain situations. We also recommend an extension of the seizure powers to items that may be used in or may inflame riot situations, and recommend changes to improve record keeping for seizures.

## Using the emergency powers to disperse groups

Among the amendments that came into force on 15 December 2006, 12 months after Part 6A was first introduced, is section 87MA. This section provides that a police officer may give a direction to 'disperse immediately' to a group or people within a group, if these people are within an area that is subject to a Part 6A authorisation.<sup>214</sup>

When issuing any direction to disperse, police must comply with section 201 LEPRA safeguards.<sup>215</sup> In the context of s87MA this requires police to advise the group or some of its members that the reason for the direction is 'for the purpose of preventing or controlling a public disorder'<sup>216</sup> and that failure to comply is an offence. Police are also required to provide their name and place of duty. The maximum penalty for failing to disperse without reasonable excuse is \$5,500.

This dispersal power was not available to police during the Cronulla riots or its aftermath. Section 87MA remains unused and untested.

The ability of police to issue a 'move on' direction existed prior to section 87MA. Section 197 of LEPRA provides that police may give a direction to a person in a public place if the officer believes on reasonable grounds that the person's presence or behaviour obstructs people or traffic, constitutes harassment or intimidation, or is likely to create fear. Failure to comply with a section 197 direction attracts a maximum penalty of \$220. There are some restrictions on the use of this power. Section 200 explicitly forbids the use of the power in relation to industrial disputes, apparently genuine protests or demonstrations, processions and organised assemblies. Section 199 provides that a person is only guilty of an offence if he or she persists in the proscribed conduct after the direction is given.

Police may also effectively disperse a group by arresting people if they are suspected of committing offences. As highlighted by the Criminal Law Review Division of the Attorney-General's Department, 'there are scores of potential offences that a person participating in civil (unrest) might be committing'.<sup>217</sup> Such offences include assault, police, riot, affray and violent disorder. Following arrest, 'a further raft of powers become available to the police including extended personal search powers, the ability to fingerprint a person and the opportunity to apply bail conditions upon release.'<sup>218</sup>

Of the 351 event entries we identified where the Part 6A powers were used, 24 events mention move on directions being given to people. We are unaware of any people being charged with failing to move on during the 17–19 December 2005.

In contrast to s197, section 87MA does not require police to form any sort of belief or suspicion that the group or its members are involved or likely be involved in public disorder. The group and/or its members need only be within the authorised area.

In its analysis of the likely impact of section 87MA, the Legislation Review Committee noted the high penalties for failing to comply with a direction to disperse under s87MA as well as the potential for this power to 'unduly trespass upon the right to peaceful assembly'. The committee warned:

*The very breadth of [Part 6A's] scope may well result in situations where people not involved in riots or any kind of protest, affray or assault, but who are merely bystanders or residents of the targeted area, will be subject to these powers, eg, a direction to disperse under proposed s 87MA.<sup>219</sup>*

The Act allows for the defence of reasonable excuse. However, Shopfront Youth Legal Service argued that this does not provide sufficient protection in circumstances where there are so few requirements to guide police use of the power:

*There is no requirement that police suspect (or believe) on reasonable grounds that any member of the group has been, or is likely to be, involved in a public disorder, or that the dispersal of the group is reasonably likely to assist in controlling the public disorder. Nor is there any requirement that the direction to disperse be reasonable in the circumstances.*

*Although there is a 'reasonable excuse' defence available, the onus of proof is on the defendant (LEPRA, section 236) and this does not afford sufficient protection to persons charged with an offence of failing to disperse.<sup>220</sup>*

Shopfront conceded there was a role for these kinds of emergency dispersal powers in certain circumstances, but 'strongly opposed' the section in its current form.

Redfern Legal Centre raised a concern that this power is 'likely to have disproportionate impact on young people and Indigenous people due to their more visible use of public space'. The risk of this kind of impact is higher during major operations such as those that occurred on 17–19 December 2005 when wide areas of Sydney and surrounding regions were 'locked down'. Redfern's submission was that the laws were discriminatory not by design but due to their potential impact.<sup>221</sup>

The NSW Police Force's only comment was that, 'while the new power in 87MA has yet to be used operationally, it should be a valuable tool for police'.<sup>222</sup> However, in his submission the Commander of the NSW Police Force's Public Order and Riot Squad explained the likely operational value of the provision:

*To disperse groups in an authorised area significantly disrupts their plans and intentions to continue or commence acts commensurate with public disorder. It places them on notice that they are under police scrutiny and coupled with the financial penalty involved provides an increased level of deterrent to those within the group.<sup>223</sup>*

Until the provision is actually used, it is difficult to determine how well it will meet this objective or whether the anticipated concerns might be realised.

At the conclusion of Chapter 6 we make a number of observations concerning the introduction of a possible threshold test for the use of the dispersal power.

## Exercising powers without an authorisation

Section 87N provides for the exercise of Part 6A powers, including search, seizure and the requirement to disclose identity, by any police officer without authorisation, in certain circumstances. For the purposes of the following discussion, we have set out fully the terms of this section.

*87N Powers exercisable without authorisation under this Division*

- (1) *This section applies where a police officer stops a vehicle on a road in accordance with a power conferred by or under this or any other Act, being a road that is not (or not in an area) the target of an authorisation under this Division*
- (2) *The police officer may exercise the powers conferred under this Division (except section 87MA) in relation to the vehicle (and any person or thing in or on the vehicle) without such an authorisation if the officer:*
  - (a) *has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and*
  - (b) *suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder, and*
  - (c) *is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder, and*
  - (d) *is satisfied that the urgency of the circumstances require the powers to be exercised without an authorisation under this Division.*

It appears that section 87N may have been intended to provide police officers with immediate access to the special Part 6A powers to respond to a looming or already occurring large-scale public disorder. In his second reading speech, the Premier stated:

*... [S]ection 87N... allows any police officer to stop a vehicle on a road without an authorisation being in force providing the officer has reasonable grounds to believe a large-scale public disorder is occurring or threatening to occur in the near future and that the use of the powers is reasonably necessary for preventing or controlling the disorder. Proposed section 87N is there as a back-up power for urgent circumstances. It is a prudent measure allowing front-line police to deal with a brewing riot while formal authorisation is sought.*<sup>224</sup>

Section 87N has only been invoked on one occasion, for a brief period during the evening of Sunday 19 March 2006, some three months after the disturbances related to the Cronulla riot. Police had seen a very large group of cars leave a car park at Brighton-le-Sands, many with three to four males of Middle Eastern appearance, apparently heading towards Cronulla. Concerned that the males were intending to participate in public disorder, an inspector invoked section 87N and established a roadblock on Taren Point Road to check southbound traffic. After half an hour, the roadblock was removed as it was apparent the cars had dispersed (see Chapter 2, Case Study D).

## Concerns about section 87N

A number of concerns have been raised about the construction and operation of section 87N.

One issue that has been raised is that section 87N cannot automatically be invoked as suggested by the Premier because section 87N only applies where a police officer stops a vehicle on a road in accordance with a power conferred by LEPRA or some other legislation.<sup>225</sup>

In its submission, the NSW Police Force stated:

*This section requires amendment if it is to be brought into line with the description of the power provided by the Premier in the Parliamentary debate. Section 87N only applies when an officer has stopped a vehicle using some other power in LEPRA or another Act. In other words, the power to stop the vehicle must come from somewhere else, but once stopped pursuant to the power, the section allows Part 6A powers to be applied. Section 87N does not, of itself, provide a power to stop a vehicle. If it is to be effective, it should.*<sup>226</sup>

This interpretation is shared by counsel from whom we sought legal advice on this issue. While noting that a second reading speech may be used to determine the proper scope of legislation, counsel was of the view that in this case the Premier's comments 'must cede to the express terms of the section'.

On this view, the officer who established the roadblock on Taren Point Road on the evening of 19 March 2006 was not entitled to rely on section 87N as it does not appear he had already properly exercised a power to stop a vehicle.

Other concerns that have been raised in relation to section 87N are:

### **The test for invoking section 87N is complex**

In its submission, the NSW Police Force stated,

*The test for the use of section 87N is complex to the point of being virtually incapable of practical application. The one section requires a police officer to reasonably believe one set of circumstances, and then have a reasonable suspicion about another, while being satisfied of two other issues...*<sup>227</sup>

The NSW Police Force position substantially restates the position of a Working Group convened by the Police Ministry to review Part 6A. However, the working group has already been advised that Parliament intended that the use of the emergency powers under section 87N be subject to a real and substantive test, and that if the provision was to be simplified, it must be done in a way that did not remove the obvious safeguards that Parliament intended.

### **There are few conditions governing use of the section 87N powers**

- *The powers can be exercised by any officer without authorisation by a senior officer*

This can be contrasted with the general roadblock powers contained in Part 4 Division 5 of LEPRA which allow roadblocks to be set up by any officer without authorisation where operational circumstances require, but the authority of a senior police officer is required as soon as practicable for the continued use of the power.<sup>228</sup>

It should be noted, however, that while there is no legal requirement for a senior officer to provide authorisation for continued use of section 87N, NSW Police Force instructions state that generally only the forward commander

(usually an inspector) would make the decision to use section 87N. The instructions also state that it would only be in exceptional circumstances that special powers would be utilised without an authorisation being in place.<sup>229</sup>

- *There is no maximum time frame specified for use of section 87N*

In the general LEPRA roadblock powers, a roadblock can only be in place for a maximum of six hours.<sup>230</sup> A further authorisation can be granted if still required.<sup>231</sup> While the Premier made it clear during the second reading speech that section 87N was intended to enable an interim response while an authorisation was sought for declaration of a target road or area,<sup>232</sup> the legislation does not specify any maximum period for use of section 87N.

- *There is no requirement to document decision-making*

The legislation does not require police to document use of section 87N. This can be contrasted with the other Part 6A powers where an authorisation or the establishment of an emergency alcohol-free zone has to be put in writing, as is the case with the general roadblock powers in LEPRA.<sup>233</sup>

At the following section, we recommend a review of section 87N to make the provision simpler, and to extend the power to specifically permit the stopping of vehicles. We also recommend additional safeguards on the use of the power.

## Conclusions and recommendations regarding the core powers

The following is a summary of our observations relating to the core powers in Division 3 of Part 6A, and recommendations to address the issues raised.

### Cordons and Roadblocks — section 87I

Participants in the public disorder on the nights following the Cronulla riots used vehicles to converge on unsuspecting targets and often travelled in convoys. The mobility of these groups was a defining characteristic of their behaviour.

The power to establish a cordon or roadblock as outlined in section 87I provided an essential part of the police armoury in countering and preventing these attacks and was widely used. The flexibility provided by the legislation regarding the form of the cordons and roadblocks, and the ability for police to set them up anywhere inside a target area or target road, proved valuable.

The legislation states that police must not refuse permission for anyone to leave an area in certain circumstances, however police may stop anyone entering. Police use of cordons and roadblocks, and who was stopped at them, is not well documented. It is unclear how many people or vehicles were refused entry into certain areas and on what grounds.

There may be value in changes to guide decisions regarding when certain classes of people, such as residents or workers, should be allowed to enter a target area if there is no immediate threat to their safety or the safety of others. When risks to personal safety or other factors prompt officers to refuse certain individuals permission to enter, there may be value in requiring police to make a record of the decision, including their reasons, especially with respect to people who reside, run a business and or work in the target area and who are more likely to be adversely affected.

One option might be to use a similar test to the current provision for people wishing to leave an area. Section 87I(2) currently states:

*A police officer must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person's own safety.*

A similar provision could be included for people, or classes of people, wishing to enter an area. Alternatively, this could also be achieved through a change in police procedures. The police discretion to refuse entry to people would remain. However, the exercise of this discretion should be guided by the same safety concerns that guide police when deciding whether people should be allowed to leave. The application of the same standards to people wishing to enter and exit also simplifies the provision.

### Recommendation 5

**Parliament consider amending section 87I of LEPRA so that police officers may not refuse permission for persons, in particular residents or those who work in a target area, to enter the target area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person's own safety.**



## Recommendation 6

The NSW Police Force amend Part 6A procedures to:

- (a) provide guidelines about the circumstances in which police officers might refuse permission for persons, in particular residents or those who work in a target area, to enter a target area, and
- (b) require police officers to make a record (such as in a running sheet or a brief notebook entry or other record) of any decision to refuse a person entry to a target area.

## Stopping and searching vehicles and people — 87J and 87K

The ability to conduct searches of people and vehicles was a central tool for police and was widely used on the few occasions that the use of the Part 6A powers was authorised.

The search powers do not require an officer to reasonably suspect a person of involvement or potential involvement in any wrongdoing. Mere presence in a target area or road is enough to establish a lawful basis to search. This is in contrast to standard police stop/search powers.

The potential for these powers to be exercised arbitrarily in what by definition is a volatile situation, has been raised as a concern in many of the submissions to this office. The concern is greater with respect to personal searches than vehicle searches.

The Legislation Review Committee's analysis of these search powers is consistent with these concerns. The committee, analysing the legislation after it was in force, has referred to Parliament for consideration whether the absence of any reasonable suspicion requirement in the search powers constitutes an undue trespass on a person's right to privacy.<sup>234</sup>

During the relevant times in Operation Seta, approximately 1.3 million residents in the Sydney, Newcastle, Wollongong and the Central Coast areas were potentially subject to random police searches.

Reasonable suspicion of some link to wrongdoing has traditionally been the method used to guide police discretion in this area and is one police are familiar with.

There are threshold requirements governing police use of other powers in Part 6A such as the power to obtain disclosure of identity in section 87L. In order to exercise that power an officer must first *'reasonably suspect that the person has been involved or is likely to be involved in a public disorder.'*<sup>235</sup>

Introducing a 'reasonable suspicion' requirement for personal searches would:

- encourage better targeting of police powers
- reduce the likelihood that people such as residents and workers who have no involvement or intended involvement in any kind of wrongdoing will be searched
- introduce a threshold test that police are already familiar with, and
- help address concerns about the potential for police to use the search powers arbitrarily.

This change would only apply to searches of persons. All vehicle searches at roadblocks, on target roads or inside target areas should remain random.

Our analysis of police data and our interviews with commanders also noted some concerns around police record keeping in this area. Issues and recommendations regarding record keeping will be discussed below in greater detail.

## Recommendation 7

Parliament consider amending section 87K of LEPRA to require an appropriate 'reasonable suspicion' test for any searches of persons under the Part 6A powers.

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## Requiring the disclosure of identity — section 87L

Submissions received in relation to this power have raised concern about the severity of penalties that apply if people fail or refuse to comply with a police request to disclose their identity.<sup>236</sup> However, in the absence of any person receiving such a penalty, it is difficult to comment on police use of the penalty provisions or the likely effects.

There is the provision for a defence of ‘reasonable excuse’ that may potentially protect some of the more vulnerable in our society such as those with an intellectual disability, residents of boarding houses or homeless people, from the relatively harsh penalties contained in the Act. As no penalties have been imposed, the effectiveness of this safeguard is yet to be tested.

Most submissions, including those by police, acknowledged there is no requirement in Australian society to carry identification, except in certain circumstances such as when driving. During the police operations to prevent disorder it seems that many people willingly cooperated with police when asked for their personal details.

However, our analysis of police data and interviews with commanders has raised an administrative issue regarding the recording of people’s identification details. Our recommendations about the issue of record keeping will be dealt with on pages 59–60.

## The power to seize and detain things — section 87M

Accompanying the search powers in Part 6A is a power that allows police to seize and detain certain items. Police already have significant powers relating to the seizing of weapons, prohibited drugs and items that may provide evidence related to the commission of an offence.

Section 87M(1)(a) allows police to seize vehicles and phones for a 7 day period provided the seizure and detention ‘will assist in preventing or controlling a public disorder’. The power to seize and detain these things has a preventative aspect to it.

The evidence indicates that when clear advice was provided to frontline officers, such as the direction that laptop computers should not be included in the definition of ‘other communication device’ and thus should not be seized, there was widespread police compliance with that advice. Similarly, almost all of the records relating to mobile phone seizures set out the text messages or other information that officers believed provided them with the grounds for confiscating the phone. The detailed procedural advice provided to police on how to manage seized phones, including specific directions that officers record the grounds for seizing the phone and create appropriate COPS and property records, may have been a factor in the more consistent application of these provisions.

However, police records indicate that the provision may have been applied inconsistently in relation to some vehicle seizures. Although some police records demonstrate that the police decision to seize a vehicle was driven by a concern to prevent a public disorder, in other cases the link between the decision to seize and the likely threat of public disorder is much less clear. Similar factual circumstances have resulted in different outcomes.

Our analysis of the available information relating to the limited police use of section 87M powers to seize vehicles indicates changes might be needed to support a fairer application of these provisions in future operations including:

- providing frontline officers with clearer guidance on the kinds of factors that might support a determination that a vehicle seizure is warranted, including case studies and suggestions of where further inquiries may be needed
- requiring officers to record the grounds for decisions to seize, and
- devising practical procedures that enable owners of seized items to request a review of the continued detention of seized vehicles, mobile phones and other items.

In summary, we recommend consideration be given to the following three issues and any change that may be warranted to the power as a consequence:

### ***Detailed guidance and the recording of reasons for seizing items***

Our analysis of police records relating to vehicles and other items seized by police during the police operations to prevent public disorder found significant variations in the police use of the seizure powers. There appears to be a need to provide frontline officers with clearer guidance on the kinds of factors that might support the decision to seize a vehicle or other items.

### ***Consider extending the seize and detain power in 87M(1)(a)***

Some items seem to have been seized by police where there is no clear legislative basis. These include items where there appeared to be good reason for the seizure, such as golf clubs, tools and other items that could be used as weapons, or T-shirts and flags that — although lawful to possess — could be considered inflammatory in the circumstances.

Many of these items were seized with the consent of the owner. Some owners were given the option to reclaim the items after a specified period.

It may be helpful to consider extending the power in section 87M(1)(a) so that police may confiscate and hold for a seven-day period items that are likely to be inflammatory or may be used to ill-effect in a time of public disorder. Police already have significant powers to seize weapons, drugs and items that may provide evidence relating to the commission of an offence. However, extending the power in section 87M(1)(a) to recognise the need for officers to 'seize and detain for 7 days, items that an officer reasonably believes is likely to assist in preventing or controlling a public disorder', should provide police with a proper legislative basis to confiscate obviously inflammatory items such as T-shirts or banners with racist slogans, or items such as tools or sporting equipment that could be used as weapons in certain circumstances.

The underlying causes and triggers for large-scale public disorder are likely to differ from one incident to another. What may be inflammatory in a race-based conflict may not inflame tensions in other conflicts and therefore consideration should be given to enable a broad based seizure and detention power.

This extension of the legislation should be accompanied by guidelines or procedures regarding the use and recording of the seizure power so as to enable its consistent and fair application by officers on the ground.

### ***A procedure for the early return of vehicles and mobiles phones in certain circumstances***

Seizing people's vehicles and mobile phones has the potential to have a significant impact on the individual including loss of earnings. The Act allows for the seizure of these items for seven days and police may apply to the Local Court for unlimited further 14 day extensions provided the Local Court is satisfied that the continued detention of the vehicle or phone will assist in 'preventing or controlling a public disorder'. There is no provision, either in the Act or regulations, for a person to apply to police to have their vehicle, phone or other essential items returned before the seven-day period ends. If police are satisfied that there are no longer grounds for believing a large-scale public disorder is either still occurring or imminent, there should be a simple procedure that allows people to request the return of their vehicle, phone or other items.

Relevant considerations may include whether owners are experiencing unjustifiable hardship as a result of the continued detention of their vehicle, tools of trade and other such items. Procedures encouraging police to review seizure decisions and authorise the immediate return of seized items should also include the discretion to waive towing and impound costs in appropriate circumstances, especially where the senior officer is of the view the original seizure decision was not well formed.

## **Recommendation 8**

**Parliament consider amending section 87M of LEPPRA to allow a police officer to seize and detain any item where the officer reasonably believes this is likely to assist in preventing or controlling a public disorder.**

## **Recommendation 9**

**The NSW Police Force amend Part 6A procedures to:**

- (a) provide to officers relevant factors to consider in deciding whether to seize and detain a vehicle**
- (b) require officers to record the reasons for the seizure and detention of any thing, including in COPS**
- (c) provide for an avenue of review of any decision by a police officer to seize and detain things, and**
- (d) facilitate the prompt return of things seized and detained where a large-scale public disorder is no longer occurring or threatened.**

## **The power to disperse groups — section 87MA**

This power has been in force since December 2006 and is yet to be used. Many submissions have expressed concern at its breadth, in particular the potential for it to be used with respect to people exercising their right to peaceful protest within a target area, or to residents or bystanders who have no involvement or intended involvement in any threatened or actual public disorder.

A number of submissions received concur with the Legislation Review Committee's analysis. Its report concluded:

*The committee considers that such special powers must have sufficient checks to ensure that they are only exercised when required to ensure public safety.*<sup>237</sup>

Although the power is yet to be used and the objections to it are largely theoretical, the introduction of a 'reasonable suspicion' threshold test may address the concerns.

There are a threshold tests for other key Part 6A powers that may be appropriate to adapt to this provision. For instance, police can seize and detain vehicles, mobile phones and other communication devices if that 'will assist in preventing or controlling a public disorder'. Similarly, people can be required to disclose identification details if 'the police officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder'.<sup>238</sup>

Currently police giving a direction to disperse must 'inform the person or persons to whom the direction is given that the direction is given for the purpose of preventing or controlling a public disorder'.<sup>239</sup> Introducing a threshold test to link uses of the group dispersal powers with the prevention or control of public disorder would be consistent with this requirement.

On the other hand, until the provision is used it is difficult to determine how well it will satisfy police operational objectives or whether the anticipated concerns will be realised. This situation highlights the need for ongoing monitoring of any future police use of the power.

## Exercising powers without an authorisation — section 87N

The test for invoking section 87N is complex. Police have expressed concern that the power 'is complex to the point of being virtually incapable of practical application.'

If this section is intended to enable police to use the Part 6A powers in urgent circumstances to deal with a 'brewing riot while formal authorisation is sought'<sup>240</sup> then there may be benefit in redrafting the provision so that the legislation is capable of fulfilling the desired aim.

We recommend that any redrafting:

- review the current requirements for exercise of the section, with a view to simplifying the tests for using the power
- consider the addition of a specific power to stop a vehicle
- provide that any use of the power requires approval of a senior officer as soon as practicable
- set a maximum time for the use of the power without an authorisation, and
- require that any use be documented, including reasons that directly address the requirements of section 87N.

## Recommendation 10

**Parliament consider amending section 87N of LEPRA to:**

- (a) simplify the test for its invocation,**
- (b) include a specific power to stop vehicles,**
- (c) set a maximum time frame for using the power before an authorisation must be sought**
- (d) require documentation of the reasons for invoking section 87N, and**
- (e) require approval of a senior officer as soon as practicable.**

## Record keeping

During the course of this review several senior police officers raised concerns about police record keeping regarding the use of these core powers. They advised us that frontline officers were not always clear as to when and where an item or action should or should not be recorded. This means that, in the same circumstance, some officers may decide to create a record on COPS while others might not.

Proper record keeping is an essential part of accountability and provides information needed for future operations and ongoing improvements. Our review identified deficiencies in police record keeping including the creation of detailed records for little or no apparent reason in some instances, and the failure to record important information about the use of the core powers and the authorisation on other occasions.

In order to reduce the number of detailed entries on COPS where there appears to be no operational value in recording those details, guidance should be provided to officers regarding searches or vehicle stop and searches during which nothing of concern is found. Guidelines should also consider whether, when and how a person's identity should be recorded.

Interactions inappropriately created on COPS as an event entry or an information report have the potential to:

- undermine the quality of the intelligence gathered during a disorder
- waste police time in creating unnecessary records, and
- prejudice a person's future interaction with police by inaccurately linking their identity to some wrongdoing.

Chapter 11 of our report on the *Review of the Police Powers (Drug Detection Dogs) Act 2001*<sup>241</sup> provides a detailed discussion of these issues. In our view, there would be value in the NSW Police Force creating simple and clear standard operating procedures to govern record keeping during a disorder, providing guidance to police in relation to when a matter should be recorded as an event and when an individual or vehicle should be identified in an event entry. Examples of occasions where accurate records of police actions and the reasons for taking them should be provided include:

- the seizing and detaining of vehicles, phones and other items
- initiating legal action for offences such as failing to disperse and providing false or misleading identity particulars without reasonable excuse, and
- the exercise of special powers without authorisation.

The advice to frontline officers should also include examples of interactions that would not normally warrant the creation of a COPS event entry or an information report, such as 'nil-find' searches or compliance with identification checks. If there is a need to record this information, such records should usually be in summary form. One senior officer suggested adapting the running sheets and other procedures police use to record summary details of random breath-testing operations.

The NSW Police Force's comments on this issue cautioned against a prescriptive approach and emphasised the need for balance in any advice provided to frontline officers regarding their recording requirements:

*An onerous requirement for police to create records (whether it be notebook, COPS or otherwise) of all uses of the powers and all persons/vehicles involved in those interactions would cause unnecessary delay to members of the public (eg. significant traffic jams on main roads) and potentially fuel community tension. There needs to be a careful balance between reasonable record keeping and the spirit of the legislation — being the preservation of life and property through the timely and effective resolution of public order incidents.*<sup>242</sup>

The Police Force response also noted the NSW State Plan advice regarding 'cutting red tape'.

We endorse the Police Force's support for a balanced approach and to avoid creating onerous, and potentially counterproductive, recording requirements in any procedural advice it prepares for its frontline officers. We believe the focus of police record keeping should be on interactions where particular risks are identified, items are seized or charges are laid, or where there is some other intrusive use of the emergency powers that would warrant an entry on COPS.

Consideration of streamlined record keeping, such as simple running sheets for roadblocks and cordons, should be considered. These processes should assist police in implementing Part 6A powers consistently, and minimise unnecessary red tape while enhancing the accountability of police officers.

## Recommendation 11

**The NSW Police Force amend Part 6A procedures to provide guidelines to officers about balanced record keeping requirements, including:**

- those circumstances where COPS records will be required, including: seizure and detention of vehicles, mobile phones and other items; exercise of powers without authorisation; and initiating action for Part 6A offences, and**
- those circumstances where less formal records (eg. running sheet, police notebook entry) may be sufficient including: for roadblocks and cordons, where persons are refused entry or exit; for nil-find searches; and for compliance with identity checks.**

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## Endnotes

- <sup>100</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87I(3).
- <sup>101</sup> *Law Enforcement (Powers and Responsibilities) Act* s 37(2)(a). The Act also requires that an exercise of the powers for this purpose must also provide evidence of the indictable offence.
- <sup>102</sup> *Law Enforcement (Powers and Responsibilities) Act* s 37(2)(b).
- <sup>103</sup> See *Law Enforcement (Powers and Responsibilities) Act* s 185 and 186.
- <sup>104</sup> 'Sydney tourism braces for popularity drop', 19 December 2005 [www.abc.net.au](http://www.abc.net.au). Accessed 4 September 2006.
- <sup>105</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87I(2).
- <sup>106</sup> Minutes of commander briefing that occurred on Friday 16 December 2005.
- <sup>107</sup> The NSW Police Force advised on 16 August 2007: 'In order to maintain 24/7 command and control coverage at each of these zones, a number of superintendents and inspectors were taken 'off line' from their usual local area command duties to occupy positions within the four Major Incident Response Teams (MIRT) that had been established (one MIRT per zone and one at the [Police Operations Centre]). Further... police officers were seconded to Operation Seta. The secondment of the superintendents, inspectors, sergeants and constables to Operation Seta created a need to implement a temporary plan to ensure that calls for service were met in those local area commands that had contributed to the staffing of Operation Seta. In some cases, resources from two or three local area commands were clustered under the leadership of a superintendent, supported by six inspectors for a temporary period of time, to ensure that calls for service for usual policing activities were responded to in a timely manner. This structure was referred to as Temporary Area Commands.'
- <sup>108</sup> Operation Seta, Highway Patrol Component, plans for 17 and 18 December 2005.
- <sup>109</sup> Operation Seta, Highway Patrol Component, plans for 17 and 18 December 2005. The other key role was to assist in the transportation of Operations Support Group (OSG) personnel to identified hot spots at the direction of the OSG commander.
- <sup>110</sup> Minutes of commander briefing that occurred on Friday 16 December 2005.
- <sup>111</sup> Minutes of commander briefing that occurred on Friday 16 December 2005.
- <sup>112</sup> Minutes of commander briefing that occurred on Friday 16 December 2005.
- <sup>113</sup> Operation Seta, Highway Patrol Component, 17 and 18 December 2005.
- <sup>114</sup> *Police v Esmailpour & Osmanagic*, Central Local Court, 31 May 2006
- <sup>115</sup> According to information supplied by NSW Police Force, 19 September 2006.
- <sup>116</sup> NSW Ombudsman survey of businesses in Cronulla, December 2006.
- <sup>117</sup> See safeguards in the *Law Enforcement (Powers and Responsibilities) Act* Part 4, Division 4 and s 201.
- <sup>118</sup> *Law Enforcement (Powers and Responsibilities) Act* s 32(1).
- <sup>119</sup> See *Law Enforcement (Powers and Responsibilities) Act* s 32(2)–(11).
- <sup>120</sup> The Hon Peter Breen MLC, NSWPD, Legislative Council, 15 December 2005, p 20607.
- <sup>121</sup> The Hon John Della Bosca MLC, NSWPD, Legislative Council, 15 December 2005, p 60124.
- <sup>122</sup> Summary of Conclusions, Numbers 53 and 54, *Legislative Review Digest*, No. 1 (2006).
- <sup>123</sup> Submission No. 9b, 26 January 2007.
- <sup>124</sup> NSW Police Force submission, 7 February 2007.
- <sup>125</sup> NSW Police Force submission, 7 February 2007.
- <sup>126</sup> NSW Police Force, COPS ref E25422409.
- <sup>127</sup> NSW Police Force, COPS ref E25334630.
- <sup>128</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87J(2) and 87K(3).
- <sup>129</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>130</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 6.
- <sup>131</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 35.
- <sup>132</sup> NSW Police Force, COPS ref E25493815.
- <sup>133</sup> Community Relations Commission submission, 21 February 2007. The NSW Police Force advised on 16 August 2007 that Assistant Commissioner Mark Goodwin first contacted the commission on Friday, 9 December 2005, two days before the riot, regarding the Commission's involvement in reducing community tension.
- <sup>134</sup> Community Relations Commission submission, 21 February 2007.
- <sup>135</sup> Community Relations Commission submission, 21 February 2007.
- <sup>136</sup> Community Relations Commission submission, 21 February 2007.
- <sup>137</sup> NSW Commission for Children and Young People submission, 2 February 2007.
- <sup>138</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L.
- <sup>139</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(2) and (3).
- <sup>140</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(4).
- <sup>141</sup> For instance, sections 171, 172 and 173 of the *Road Transport (General) Act 2005* require drivers, passengers and owners to provide details to police in certain circumstances.
- <sup>142</sup> *Law Enforcement (Powers and Responsibilities) Act* s 11.
- <sup>143</sup> NSW Police Force COPS User Guide, p16.
- <sup>144</sup> Mr Andrew Tink MP, NSWPD, Legislative Assembly, 15 December 2005, p20626
- <sup>145</sup> Northern Region Commander, Assistant Commissioner Peter Parsons, submission, 27 February 2007.
- <sup>146</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>147</sup> Australian Privacy Foundation submission, February 2007.
- <sup>148</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(2) and (3)
- <sup>149</sup> Mr Andrew Tink MP, NSWPD, Legislative Assembly, 15 December 2005, p. 20626-7.
- <sup>150</sup> NSW Police Force submission, 7 February 2007.
- <sup>151</sup> Shopfront Youth Legal Centre submission, 19 February 2007.
- <sup>152</sup> Shopfront Youth Legal Centre submission, 19 February 2007.
- <sup>153</sup> NSW Commission for Children and Young People submission, 2 February 2007.

- <sup>154</sup> Shopfront Youth Legal Centre submission, 19 February 2007.
- <sup>155</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>156</sup> Notes of senior commanders meeting chaired by Deputy Commissioner Scipione at the Police Operations Centre on the morning of 13 December 2005.
- <sup>157</sup> The Hon Carl Scully MP, NSWPD, Legislative Assembly, 15 December 2005, p. 20625.
- <sup>158</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87M(1)(a) and (b).
- <sup>159</sup> Under *Law Enforcement (Powers and Responsibilities) Act* s 87M(2) the Local Court must be satisfied that the continued detention of the item will assist in preventing or controlling a public disorder. LEPRA also allows an officer to seize or detain an item found during person or vehicle searches under s 21 and s36 if the article is dangerous or the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence.
- <sup>160</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87M(1)(a).
- <sup>161</sup> Part 3A, *Law Enforcement (Powers and Responsibilities) Regulation 2005*.
- <sup>162</sup> NSW Police Standard Operating Procedures — *Seizure and Detention of Mobile Phones and Motor Vehicles*, prepared for Operation Seta, 17 and 18 December 2005. Provided to NSW Ombudsman on 14 June 2006.
- <sup>163</sup> Power point presentation used in officer briefings for Operation Seta.
- <sup>164</sup> See p28 of the *Pocket Guide*, published by the NSW Police College, January 2006.
- <sup>165</sup> See *Policing Issues and Practice Journal*, April 2006, p7.
- <sup>166</sup> PDP 002 — *Vehicle/Persons in an Authorised Area — Part 6A LEPRA*, Education Services, NSW Police Force.
- <sup>167</sup> NSW Police Standard Operating Procedures — *Seizure and Detention of Mobile Phones and Motor Vehicles*, prepared for Operation Seta, 17 and 18 December 2005. Provided to NSW Ombudsman on 14 June 2006.
- <sup>168</sup> NSW Police Force, COPS ref E25756566.
- <sup>169</sup> NSW Police Force, COPS ref E25756566.
- <sup>170</sup> NSW Police Force, COPS ref E27338687.
- <sup>171</sup> NSW Police Force, COPS ref E27338687.
- <sup>172</sup> NSW Police Force, COPS ref E48721002.
- <sup>173</sup> Fines were for custody of a knife in public without a reasonable excuse. See for instance NSW Police Force, COPS ref E27635480, E25772879, E25927558.
- <sup>174</sup> See for instance NSW Police Force, COPS ref E27762383, E27466685, E25889431.
- <sup>175</sup> NSW Police Force, COPS ref E26088329.
- <sup>176</sup> NSW Police Force, COPS ref E83955938.
- <sup>177</sup> NSW Police Force, COPS ref E25585336.
- <sup>178</sup> NSW Police Force, COPS ref E25582456.
- <sup>179</sup> NSW Police Force, COPS ref E83953198.
- <sup>180</sup> NSW Police Force, COPS ref E25786179.
- <sup>181</sup> NSW Police Force, COPS ref E25609814.
- <sup>182</sup> See aide memoire produced by NSW Police Force summarising Part 6A powers, and *Policing Issues and Practice Journal*, Vol. 14, No. 2.
- <sup>183</sup> See for example *Law Enforcement (Powers and Responsibilities) Act* s 21 and 26 and *Summary Offences Act* s 11.
- <sup>184</sup> NSW Police Force, COPS ref E50125301, E25632864, E25384537.
- <sup>185</sup> NSW Police Force, COPS ref E26430953.
- <sup>186</sup> NSW Police Force, COPS ref E5013140, E27762383.
- <sup>187</sup> NSW Police Force, COPS ref E25871826.
- <sup>188</sup> NSW Police Force, COPS ref E25585336.
- <sup>189</sup> NSW Police Force, COPS ref E25581256.
- <sup>190</sup> NSW Police Force, COPS ref E25871826.
- <sup>191</sup> NSW Police Force, COPS ref E26440253.
- <sup>192</sup> NSW Police Force, COPS ref E25635361, E25579572, E26044040.
- <sup>193</sup> NSW Police Force, COPS ref E25947305, E25424070.
- <sup>194</sup> NSW Police Force, COPS ref E25954619.
- <sup>195</sup> NSW Police Force, COPS ref E27006755.
- <sup>196</sup> NSW Police Force, COPS ref E25573023.
- <sup>197</sup> NSW Police Force, COPS ref E25973604.
- <sup>198</sup> NSW Police Force, COPS ref E26050440.
- <sup>199</sup> NSW Police Force, COPS ref E25607814.
- <sup>200</sup> NSW Police Force, COPS ref E25950305.
- <sup>201</sup> NSW Police Force, COPS ref E25391944.
- <sup>202</sup> NSW Police Force, COPS ref E27466685.
- <sup>203</sup> NSW Police Force, COPS ref E28077386.
- <sup>204</sup> NSW Police Force, COPS ref E27419985.
- <sup>205</sup> The Hon Duncan Gay MLC, NSWPD, Legislative Council, 15 December 2005, p 20585.
- <sup>206</sup> NSW Police Force, COPS ref E25958949.
- <sup>207</sup> NSW Police Force, COPS ref E25958949.
- <sup>208</sup> NSW Police Force, COPS ref E26438039.
- <sup>209</sup> NSW Police Force submission, 7 February 2007.
- <sup>210</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>211</sup> 'Anxiety mounts over scope of laws', Sydney Morning Herald, 20 December 2005 [www.smh.com.au/news/national/anxiety-mounts-over-scope-of-laws](http://www.smh.com.au/news/national/anxiety-mounts-over-scope-of-laws). Accessed 20 December 2005.
- <sup>212</sup> NSW Police Force submission, 7 February 2007.
- <sup>213</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3, January 2007.

- <sup>214</sup> The *Crimes Legislation Amendment (Gangs) Act* was passed by Parliament on 19 September 2006 and came into effect on 15 December 2006. The Act amended Part 6A of *Law Enforcement (Powers and Responsibilities) Act* by including a power to disperse groups if they are within an authorised area.
- <sup>215</sup> *Law Enforcement (Powers and Responsibilities) Act* s 201 requires officers exercising the powers to provide evidence that they are police officers (unless already in uniform), their name and place of duty, the reason for exercising the power and a warning that failure to comply may be an offence.
- <sup>216</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87MA(2).
- <sup>217</sup> Attorney-General's Department submission, 10 March 2007.
- <sup>218</sup> Attorney-General's Department submission, 10 March 2007.
- <sup>219</sup> *Legislative Review Digest*, No. 10 (2006) p 57.
- <sup>220</sup> Shopfront Youth Legal Centre submission, 19 February 2007.
- <sup>221</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>222</sup> NSW Police Force submission, 7 February 2007.
- <sup>223</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>224</sup> The Mr Hon Morris lemma MP, NSWPD, Legislative Assembly 15 December 2005, p 20620.
- <sup>225</sup> See *Law Enforcement (Powers and Responsibilities) Act* s 87N(1).
- <sup>226</sup> NSW Police Force submission, 7 February 2007.
- <sup>227</sup> NSW Police Force submission, 7 February 2007.
- <sup>228</sup> *Law Enforcement (Powers and Responsibilities) Act* s 37(3).
- <sup>229</sup> *Policing Issues and Practice Journal*, April 2006.
- <sup>230</sup> *Law Enforcement (Powers and Responsibilities) Act* s 40(2).
- <sup>231</sup> *Law Enforcement (Powers and Responsibilities) Act* s 40(3).
- <sup>232</sup> The Hon Mr Morris lemma MP, NSWPD, Legislative Assembly, 15 December 2005, p 20621.
- <sup>233</sup> *Law Enforcement (Powers and Responsibilities) Act* s 41 also sets out the information that must be contained in an authorisation including the time and date they were used, the basis for the roadblocks (including the roadblock power police are relying on), the area covered by the authorisation, the vehicle or class or vehicles covered by the authorisation and the period of the authorisation (if less than six hours).
- <sup>234</sup> *Legislation Review Digest*, No. 1 (2006), p 54.
- <sup>235</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(1).
- <sup>236</sup> eg. see Redfern Legal Centre submission, 12 April 2007, and Shop Youth Legal Centre submission, 19 February 2007.
- <sup>237</sup> *Legislation Review Digest*, No. 10 (2006), p 14.
- <sup>238</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(1).
- <sup>239</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87MA(2).
- <sup>240</sup> The Hon Mr Morris lemma MP, NSWPD, Legislative Assembly 15 December 2005, p20621.
- <sup>241</sup> *Review of the Police Powers (Drug Detection Dogs) Act 2001*, NSW Ombudsman, June 2006.
- <sup>242</sup> NSW Police Force response to consultation draft report, 16 August 2007.





# Chapter 7. Other practice issues

This chapter considers other practical factors affecting the police use of the Part 6A powers, notably issues relating to:

- notifying the public when using the powers
- economic impact of the public disorder powers, and
- training and maintaining operational readiness.

## Notifying the public when using the powers

There is no formal legal requirement for police to notify the public when declaring an emergency alcohol-free zone or authorising the use of the public disorder powers in a target area or road.

There are clear operational advantages for police in keeping the public informed. As police found during the major operation to prevent public disorder on 17–19 December 2005, extensive publicity before a lockdown can help persuade large numbers of people to stay away while authorisations are in place. This eases the pressure on frontline officers staffing cordons and roadblocks and reduces the size of crowds within a lockdown area, making it easier for police to maintain order and protect public safety. Knowing that special powers apply might also have encouraged at least some would-be trouble-makers to stay home.

There are also important fairness considerations for members of the public, given that they will probably not know about the effect of an authorisation, of that the failure to comply with police requirements may result in very significant penalties.

## Operation to prevent disorder 17–19 December 2005

The Police Media Unit disseminated a media release on 16 December 2005 stating that police would use electronic signs to publicise the locations of police operations from 17–19 December 2005 and to 'advise motorists to avoid travel to these areas'. The media release asked that members of the public avoid visiting Cronulla, Sydney's eastern beaches, Central Coast beaches, Wollongong and Newcastle where possible, adding:

*People who do not live in these areas may be subject to security checks and face the likelihood of being turned away.*<sup>243</sup>

The high-profile police operation greatly reduced the crowds in the lockdown areas. Beaches in the lockdown areas were 'almost deserted' and trade in adjacent businesses fell sharply as the crowds of beach-goers stayed away.<sup>244</sup> One source estimated the crowd at Bondi on 18 December to be 3,000 people, well down on the 25,000 who normally attend on a sunny Sunday afternoon. North Cronulla beach had an estimated 100 people, far fewer than the usual weekend crowd of 5,000.<sup>245</sup>

The ability to inform the public was a factor in determining the geographic boundaries of some authorisations. One commander involved in discussions on how to define authorised target areas in Sydney's eastern suburbs advised us that 'we needed to identify an area in a way that could be communicated to the community'.<sup>246</sup> He said police opted to use local government boundaries rather than police local area command boundaries to define some target areas because the council areas such as Randwick and Waverley were better known and it would be easier to explain where the emergency powers applied.

In our surveys of drivers and owners whose vehicles were seized by police in lockdown areas, only one of the nine respondents claimed to have known that the area they were in was a target area. That respondent claimed that the expected police presence was actually an attraction, reasoning:

*We wanted to go for a swim and I thought it would be safe because there were so many police around — we had my friend's 13-year-old sister with us.*<sup>247</sup>

Two other respondents who claimed to be unaware they were in a target area said they would not have adjusted their route even if they had known:

*I didn't know but I wouldn't have changed my route because that's the way I had to go — I saw the cops about 300 metres away and could have turned off [before the roadblock], but I didn't because I hadn't done anything wrong.*

*No. I was on my way home from eating dinner at a restaurant nearby. My home is around the corner.*<sup>248</sup>

However, most respondents said they would have changed their decision to travel to the area if they had known it was within a lockdown zone.

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One claimed he went for a swim at Woonona, thinking it was outside the target area. He said he avoided Wollongong beach 'because of the problems — that's why I went to Woonona.' He said it was only after his vehicle was searched and later seized that he realised he was within an authorised target area.<sup>249</sup>

Another driver whose car was seized at a Sydney beachside suburb said 'a notice or something not to enter... would have been better'.

Our survey of 48 owners and managers of businesses in Cronulla and Brighton-le-Sands found that although 85% of respondents were aware that new police powers were introduced by Parliament immediately following the riots and retaliatory attacks in December 2005, less than 15% had an accurate understanding of what these powers generally entailed. The random search, seizure (vehicles) and lockdown powers were the best-known powers. Far fewer respondents knew that the Act also included special liquor provisions. Generally only those directly involved in running bottle shops, restaurants and other licensed venues knew about the liquor powers.

## Dubbo

The powers were used in Dubbo at very short notice on New Year's Day 2006. While the target area authorisation covered most of Dubbo, police only exercised the Part 6A powers in and around the Gordon Estate in West Dubbo. Roadblocks were set up at the entrances to the estate with a view to restricting non-residents from entering. Police said a number of vehicles were refused entry and many others turned around before reaching the roadblocks.

The prominence of well-lit, well-staffed roadblocks at every entrance to the estate meant that nearby residents were generally very aware that there was a significant police operation under way. Residents who approached the cordon were told that an authorisation was in place and special powers applied. Our interviews and consultations with residents found that there was a good understanding that police could prevent anyone from entering the area, a key Part 6A power used in the Dubbo operation. We were told that most also understood they could leave but at least some of those who were staying with family and friends on the estate decided against going out in case they were not allowed back in. Other Part 6A powers were not well understood, but these were not widely used during the lockdown. One vehicle and some alcohol were seized, but no-one was charged for specific Part 6A offences such as failing to disclose identity when requested.

## Police strategies to inform the public

Our Issues Paper asked what information should be provided to the public when an authorisation is in place, and how this could be achieved if an authorisation is invoked at short notice.

The submissions we received from all sources supported the principle that it is important for the public to be informed whenever police authorise a target area or road, or establish an emergency alcohol-free zone. Many felt that it was important for people to know that when an area is in lockdown, police powers are substantially increased.

Given the unique policing and reduced civil rights regime in operation inside an authorised zone, it would seem fair for members of the public likely to be affected by it to be properly informed of its operation. Submissions from the NSW Police Force and the Minister for Police both expressed the view that the level of communication should be dependent on the specific circumstances and considered on a case-by-case basis. The NSW Police Force suggested such a decision should be the responsibility of the operational commander.

Notification to the public is equally important when an emergency alcohol-free zone is established. The Northern Region Commander, Assistant Commissioner Peter Parsons, advised that 'during the Terrigal Operation an emergency alcohol-free zone was initiated and broadcast to the community via local media and word of mouth'.<sup>250</sup> The Police Association of NSW suggested television and radio are appropriate avenues for informing the public.

One senior commander pointed out that there might be some practical restraints to providing the community with prior warning simply due to speed in which some emergency alcohol free zones must be established. He suggested the public could be informed special provisions were in place through officers telling them directly or via a public address system, or by 'erecting large emergency signs at prominent points within and at the perimeter of the EAFZ'.<sup>251</sup>

The NSW Police Force's Media Unit is responsible for developing media plans to assist senior police during major operations.<sup>252</sup> The unit can play a dual role by both briefing senior public officials such as Members of Parliament, and providing the media and public with detailed and accurate information about areas subject to authorisations, emergency alcohol-free zones, roadblocks and cordons, and the nature of the police powers and offences applicable.

One key police review identified some concerns regarding the police corporate management of the media during the Cronulla riots and subsequent reprisal attacks, noting that:

- there was no media plan in place between Sunday 11 December and 13 December 2005

- concerns were later raised about the media 'being taken into police command centres and causing disruption to the command process', and
- there were questions about the adequacy of media guidelines for dealing specifically with public order management.<sup>253</sup>

Although these criticisms relate to public disorder incidents immediately before the introduction of the Part 6A powers, the review highlights the value of accurate and effective communication and calls for changes to improve the flow of timely information to the public during public order emergencies. One recommendation was for the NSW Police Force's public affairs director to review the organisation's media management policy and that 'relevant standard operating procedures for the Police Media Unit be developed for response to public order management operations'. Another was to consider using the NSW Government's State Coordination Centre when briefing non-police officials during large-scale public disorder incidents. The centre is used in 'current counter-terrorism arrangements' and its use would have the advantage of avoiding disruption to operational policing activity in command centres.<sup>254</sup>

The Government and police have acted on both recommendations.

The new police public affairs director reviewed and rewrote the police media policy, which was adopted in April 2007. The policy's advice on when to note ethnic descriptors in statements to the media now includes a warning against associating any particular group or community with criminal and anti-social behaviour, sets out clear guidance and examples on describing people to the media and notes the importance of correcting or clarifying misleading information. Significantly, the policy now recognises public disturbances as an issue that requires a planned approach to ensure the release of accurate, timely information, and the need for 'chain of command' police responsibility in releasing that information. The policy clarifies the media unit's role in helping police respond to critical incidents and public disturbances.<sup>255</sup>

The call to use the State Coordination Centre for briefing non-police officials during large-scale public disorder incidents was supported and referred to the Premier's Department for implementation, as the department manages that centre.

## Local communication strategies

Our analysis of police records, reviews and other commentary found examples of informal communication strategies initiated at the local level as a way of informing the public and improving police effectiveness.

During the operation to prevent public disorder on 17–19 December 2005, licensing officers in Wollongong approached licensed premises directly, providing licensees and managers with details of the police operation and the likely impact on their businesses. Direct contact details for key police personnel were provided to licensees, who in turn offered their full cooperation.

In many cases, the police use of these kinds of effective communication strategies can reduce the need for police to resort to formal powers such as those available under Part 6A. As noted earlier in this report, the police commander at Miranda was able to persuade the managers of takeaway liquor outlets in Cronulla to close early 11 December 2005 when concerns arose about the effect of alcohol on the crowd. Similarly, the commander was widely praised by respondents to our survey of Cronulla businesses for keeping local traders and residents informed of the measures police put in place to calm tensions and restore order in the weeks following the Cronulla riots. The following comment is typical of the feedback received:

*[Superintendent] Redfern visited the business. He did a magnificent job of keeping us all informed – he let us know about the police presence and resources.*<sup>256</sup>

This approach is consistent with local police responses to dealing with threats to public disorder generally. Another example of local police drawing on established community relationships to achieve positive outcomes through direct negotiation and communication occurred in Campsie in the days following the Cronulla riot and retaliatory attacks when tensions were high. On 12 December 2006, police received reports that a crowd of about 4,000 people had gathered at Lakemba Mosque to protect it from a threatened attack. Text messages had fuelled rumours that the mosque was at risk. The Campsie commander and his ethnic community liaison officer went to the mosque, using their strong ties with the community to appeal for calm and defuse a highly volatile situation. There was wide praise for the commander's consultative approach and the 'increased level of officer safety'<sup>257</sup> attributed to his intervention.

The benefits of this approach were also noted in another internal police review of the handling of the Cronulla Riots and related incidents:

*Intelligence gained by community consultation was accurate and of great assistance to forming strategies, especially in the Campsie area. This was facilitated by the Middle Eastern Ethnic Community Liaison Officer attached to the Campsie Local Area Command.*<sup>258</sup>

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## Accuracy of information

The tension and volatility in days immediately preceding the Cronulla riot starkly illustrate the need for accuracy when disseminating information to the public and the media.

On the morning of 5 December 2005 the Police Media Unit distributed a brief media release regarding an incident between off-duty lifeguards and a small number of males from Middle Eastern backgrounds at Cronulla on the previous day. The release was entitled 'Surf Lifesavers bashed — North Cronulla Beach'. The first lines stated:

*Police are investigating an attack on two surf lifesavers at North Cronulla Beach in Sydney's South.*

*About 3pm yesterday (Sunday 4 December), four males of Middle Eastern appearance have confronted the male lifeguards and a verbal altercation has occurred. One of the lifesavers has then been punched in the face. A large number of Middle Eastern males have then converged on the area, surrounding the guards.*

*The pair was set upon and sustained several blows to their heads...*

The portrayal of the incident as an unprovoked and cowardly attack is not consistent with the COPS entry relating to the incident, which indicated that it began with verbal abuse from each side.<sup>259</sup> One police review summarised the incident as follows:

*... three members of the surf club passed the group of Middle Eastern men, the members of each group staring at each other. A verbal exchange took place in which a member from each group accused the other of staring at him. At this time one of the Middle Eastern men said to (one of the lifesavers), in response to the staring accusation, 'I'm allowed to, now fuck off and leave our beach.' The lifesaver said during this verbal exchange, 'I come down here out of my own time and save you dumb [xxxx] from drowning, now piss off you scum.'<sup>260</sup>*

The verbal altercation continued and the young Middle Eastern Australians formed a semi-circle around the surf club members. One of the Middle Eastern men tried to calm the situation, but another threw a punch which missed. 'Some pushing then occurred between both groups which escalated to a fight.'<sup>261</sup>

The group of eight Middle Eastern Australian youths had been present at the beach for much of the day. One of the lifesavers advised police he had been on duty from 1pm to 3pm and there had been no problems with their behaviour during that time. Prior to the altercation between the groups, police had not been called to the area regarding any nuisance or threatening behaviour.

Although elements of the Police Media Unit's report are correct, it can, in our view, result in the very clear impression that the surf lifesavers were the innocent victims of an unprovoked attack. This is somewhat at odds with the COPS entry, which clearly suggests fault on both sides. In addition, the statement that a 'large number of Middle Eastern males converged on the area', possibly implies that the number of Middle Eastern Australian youth present was more than the eight who were there from the beginning; this is not supported by any of the information available. As the primary police account available to media reporting on the incident, it set the scene for inflammatory media debate in the days leading to the riot at Cronulla on 11 December 2005. That debate is widely regarded as a catalyst for the violence.<sup>262</sup> A more balanced or complete account of the 4 December assaults may have defused some of the more inflammatory media coverage that ensued.

The incident highlights the need to provide as full and accurate an account as possible to the media and public on issues such as these. This was especially important at Cronulla, where there were already pre-existing tensions from earlier confrontations between Middle Eastern Australians and other beach-goers from the local area.<sup>263</sup>

## Warning the public about Part 6A penalties

One factor that sets the emergency Part 6A powers apart is the substantial penalties for Part 6A offences. All are somewhat higher than the penalties for similar offences arising under other parts of LEPR or other legislation. As noted earlier in this report the penalties include:

- Fines of up to \$5,500 or up to 12 months imprisonment for any failure or refusal to comply with a request to disclose identity without reasonable excuse, or for giving an incorrect address or a name that is false in a material particular without reasonable excuse.<sup>264</sup> By comparison, the fine for similar offences elsewhere in LEPR is \$220.<sup>265</sup>
- Fines of up to \$5,500 for refusing or failing to comply with a police direction to disperse given without reasonable excuse, whereas the maximum penalty for similar offences elsewhere in LEPR is \$220.<sup>266</sup>
- A fine of \$2,200 under the emergency alcohol-free zone powers in section 87C for anyone who has been warned but who commences, fails to stop or resumes drinking liquor in the zone.<sup>267</sup> The penalty for similar conduct in an alcohol-free zone established under the Local Government Act is \$22.<sup>268</sup>

Although police established and enforced emergency alcohol-free zones in Bondi, Coogee, Maroubra, Newcastle and Terrigal, information provided by the NSW Police Force and courts indicates that no fines were issued in relation to these or any other offences under Part 6A.

Notwithstanding this, a number of submissions we received in response to our Issues Paper raised concerns about the size of these fines and their potential impact on financially vulnerable groups. In the context of a discussion about the Part 6A powers of police to request identity, Redfern Legal Centre argued:

*... the penalties are unduly harsh and do not reflect the seriousness (or rather relatively trivial nature) of the offence... We are particularly concerned that young people may not fully appreciate the serious consequences of refusing to disclose their identity (which they may do out of immaturity, lack of understanding, or defiance) and be liable for a serious fine which they may have no capacity to pay, or even a prison sentence.<sup>269</sup>*

Shopfront Youth Legal Centre said:

*We are of the view that the maximum penalty (\$5,500 and/or 12 months' imprisonment) is far too high. Similar offences in other legislative provisions (eg LEPPRA s12 and s13) attract a maximum penalty of only two penalty units (ie \$220).<sup>270</sup>*

Shopfront Youth Legal Centre made the same point regarding the \$5,500 maximum fine for failing or refusing to comply with a police direction to disperse under section 87MA, especially when compared with the \$220 potential fine for disobeying a police direction under section 199.

In a discussion expressing a general concern about the increase in penalties and sentences for public order offences, the NSW Council of Social Services stated:

*We believe it is counterproductive to constantly increase penalties in order to appear to be doing something about crime. In this case the resulting maximum penalties are clearly disproportionate to the level of criminality and, if invoked, risk undermining respect for our system of law and justice.<sup>271</sup>*

Nonetheless, the police corporate spokesperson for public order issues argued that the substantial penalties for offences such as refusing or failing to comply with a police direction under section 87MA, could act as an extra deterrent to potential offenders.

If this were the case, there would be value in making members of the public aware that substantial penalties apply in lockdown areas for failing or refusing to comply with certain police requests. Police media releases ahead of the major operation to prevent disorder on 17–19 December 2005 featured important information about the location of police operations and an appeal for members of the public to stay away from potential hot spots, but said nothing about the higher penalties for offences in relation to the increased police powers.

As the Part 6A provisions have not been widely used and the penalty provisions have not been used at all, it is difficult to determine the potential deterrence value of these fines or what impact they might have on individuals. Any future uses of the powers must include careful monitoring of these new penalty provisions. Also, if the higher fines and threats of imprisonment are to be retained, future operations should consider publicising the information on the penalty provisions. This would maximise whatever deterrent value there may be in imposing higher penalties, while putting members of the public on notice that such penalties apply.

## Conclusion and recommendations

The revised NSW Police Force Media Policy now recognises the need for clear media and communication strategies as part of the police response to public disturbances. However, the rarity of public order emergencies and the unique demands that they place on police, often at very short notice, mean there may be a need to supplement the general principles outlined in the media policy with more detailed guidance on providing advice to the public when public order emergencies occur and Part 6A powers are used.

Police should ensure that local emergency management planning processes include specific public information strategies as part of their broader preparations and training for responding to large-scale public disorder. This could take the form of good practice guidelines or principles for police to consider when a Part 6A authorisation is put in place, so that commanders and other senior officers do not have to begin from scratch when developing and implementing communication plans. We note in this respect that approaches may differ significantly in metropolitan as against regional or rural communities. They may also have distinct elements if concerns relate to identified communities, and involve the use of police liaison officers and others with strong networks or authority in those communities. Factors to consider in developing more specific guidance might include:

- Advice on notifying the public of the extent of an authorisation, the powers likely to be used and the penalties that will apply.

- Suggesting effective communication strategies and aligning those strategies with broader police measures to respond to public disorder.
- Providing specific examples of practices which have been employed and work effectively previously.
- Advising where resources such as local council or Road Traffic Authority mobile signage can be located.

## Recommendation 12

**The NSW Police Force develop good practice guidelines to assist officers in informing the public during local emergency management responses.**

## Economic impact of the public disorder powers

The summer months — especially the weekends immediately before Christmas — are normally the busiest for businesses adjacent to Sydney’s most popular beaches. In addition to retailers and other outlets meeting the needs of crowds of beach-goers, there is a thriving hospitality trade in most beachside suburbs that attracts numerous pre-Christmas functions and other events.

The public disorder and subsequent lockdowns in December 2005 turned crowds away from Cronulla, Brighton-le-Sands, Maroubra, Bondi and other beaches in the lockdown areas just as businesses in those areas should have been at their busiest. One media account of the police operation to prevent disorder at Bondi observed:

*Cash registers should be ringing like jingle bells at Bondi in December. But... very few [visitors] had bothered finding their way through the roadblocks to Australia’s most famous beach. Instead, on the Sunday before Christmas, every second parking spot on Campbell Parade was empty, there was [ample] room... on a beach where elbow room is normally at a premium, and you could take your pick of tables at the cafes.<sup>272</sup>*

Other lockdown areas experienced similar downturns. Beaches in the city’s south were described as ‘virtually deserted as people heeded advice from police to stay away’.<sup>273</sup> Hospitality venues at Cronulla and Brighton-le-Sands reported numerous cancellations, and other traders said lay-by purchases were cancelled and sales were well down compared to previous years.<sup>274</sup> As one Cronulla restaurateur later commented, ‘leading up to Christmas, which should have been our biggest period of the year, we virtually had no customers’.<sup>275</sup>

Our survey of managers and owners of 48 businesses in Cronulla and Brighton-le-Sands<sup>276</sup> canvassed a number of issues, including financial impacts of the riots and subsequent lockdowns. Both centres were particularly affected by the earlier rioting and reprisal attacks. In relation to financial impact, the survey showed that:

- There was a sharp slump in business at both Cronulla and Brighton-le-Sands in the period following the riots.
- The downturn in both centres lasted well beyond the initial period of public disorder and subsequent police lockdowns.
- Business in Brighton-le-Sands generally recovered sooner than in Cronulla.
- The impact on individual traders varied widely, depending on the type of business. Hospitality businesses and others that relied heavily on visitors to the area for custom were most affected. Others with a mixed customer base of locals and visitors were less acutely affected and for a shorter period. A handful of businesses whose customer base consisted mostly of local residents were largely unaffected, and one even reported an increase in business in the weeks following the riots and lockdowns which he attributed to a ‘show of support’ from locals.

All respondents commented on a dramatic fall in visitors to both areas following the riots and reprisal attacks. Some in both Cronulla and Brighton-le-Sands used terms such as ‘ghost town’ to describe their local shopping centre during the lockdown period. Another said: ‘In terms of trade, we referred to the street as “the ghetto”. It was ridiculous.’<sup>277</sup>

## Factors contributing to the downturn in trade

The dramatic falls in patronage in lockdown areas were most pronounced on the weekend of 18 and 19 December when numerous police roadblocks and cordons were in place and the police presence was most visible. This was also the time of greatest uncertainty about whether there might be a resurgence in violence.

Yet the difficulty experienced by potential patrons in accessing lockdown areas — or an assumption that visitors could not enter after police warned that ‘people who do not live in these areas may be subject to security checks and face the likelihood of being turned away’<sup>278</sup> — was just one of a number of factors affecting the size of crowds and impact on commerce. Others included:

- Concerns for personal safety after the violence of the previous week and police warnings of 'credible threats' of further large-scale public disorder.
- An appeal by the NSW Premier and police asking visitors to assist police by staying away from specified beaches and for any residents living within lockdown areas 'not to go to those beachside locations'.<sup>279</sup>
- A reluctance to support businesses in an area that customers perceived as 'racist' or a perception that they or their companions might feel unwelcome.
- Changes in patronage as customers forced to find other places to go to on one occasion may continue to patronise those businesses.<sup>280</sup>

We discuss these matters below in some detail. What is clear is that no one factor provides a full explanation of the downturn in trade in areas affected by public disorders and police lockdowns.

### Concerns for personal safety

Evidence that businesses in some areas were experiencing an acute downturn in sales began to emerge before the widespread use of the Part 6A powers. On 16 December, the day before police 'locked down' target areas across Sydney and other locations, the Mayor of Sutherland Shire called for 'law-abiding people... to make their way to Cronulla and help support those innocent business operators' as many had suffered a reduction in trade after adverse publicity about the violent assaults and criminal damage in that area.<sup>281</sup>

While conceding that the roadblocks and other policing measures may have had some impact, one senior officer closely involved with the police operation to restore order at Cronulla argued that ongoing concern about violence was a greater factor in driving the crowds away:

*The economic impact of the events on and post 11 December 2005 are well documented in relation to the Cronulla beach area business district. This was more as a result of the overall perceived situation rather than any exercise of an authorisation.*<sup>282</sup>

Concerns about personal safety and the racist nature of the violence appeared to be factors. One Cronulla shop assistant said immediately before the lockdowns that she would be staying away despite her employer's decision to keep the business open:

*I wouldn't be coming down here, like my boyfriend's Italian and he looks very like, very like... almost Lebanese, so I don't think that we'd be coming down here to the beach for a long time.*<sup>283</sup>

A related factor was the widespread criminal damage that occurred in the nights following the Cronulla riots and a fear that there was more to come. One Cronulla business owner later said there were at least some 'locals who were frightened to come out because they might get their car smashed'.<sup>284</sup>

Some respondents said concerns about safety persisted long after the violence subsided. One Cronulla business owner said:

*On the day [the riot] happened I was not frightened, but I was frightened afterwards. There were lots of rumours of drive-by shootings et cetera. Once a car back-fired and I hit the ground. Even walking home I was nervous. There was no-one around — the place was deserted...*<sup>285</sup>

In relation to the weeks following the riots, one Brighton-le-Sands respondent said:

*We had a considerable decrease in business... [with] many cancellations. My business is geared to women and families who were calling to say they were too scared to come. We had about a 50% decrease for that period. We were affected for about four to five months afterwards.*<sup>286</sup>

### Appeals for the public to stay away and difficulty in accessing lockdown areas

There was prominent media coverage given to the appeal from the Premier and senior police asking people to stay away from beaches in the 'eastern suburbs, Cronulla, the Central Coast, Newcastle and Wollongong' and for any residents living within lockdown areas 'not to go to those beachside locations'.<sup>287</sup>

A Cronulla restaurateur claimed that the lockdown announcement had an immediate impact:

*By the Friday after the riot we were fully booked and within 20 minutes of [the Commissioner] announcing the lockdown we went from 80 people booked to eight. The rest of the week's bookings were cancelled. Eight locals came and said 'nobody's going to scare us off'.*<sup>288</sup>

He said he had 'more staff than customers' and both staff and diners found it was 'hard to get through' the police roadblocks. Another business owner said: 'Because people thought they couldn't come into Cronulla, business fell off'.<sup>289</sup>



One Cronulla business proprietor who resides outside the lockdown area said he was stopped by police at one roadblock and had trouble convincing them that he had a legitimate reason for entering the area.<sup>290</sup> The manager of an accommodation business said some guests who were outside Cronulla when the roadblocks were created had to park their cars and walk about two kilometres to where they were staying, while some others cancelled their bookings.<sup>291</sup>

### Customers deterred by perceptions of racism

Several Cronulla respondents to our business survey said images from the riots exacerbated perceptions among some people that Cronulla was a mainly 'Anglo' area where people from other cultural backgrounds were made to feel unwelcome. A few reported feedback indicating that some customers feared the prospect of direct hostility to them or their companions, while others were generally put off by the area's 'racist' reputation. As one respondent said:

*People think Cronulla is a racist town so they stay away.*<sup>292</sup>

A Cronulla Chamber of Commerce business confidence survey of 31 local traders in early 2007 found that although factors such as inadequate parking and the cost of commercial leases were cited as pressing issues affecting the health of the local economy, a number also mentioned the perception that Cronulla is a racist suburb:

*Maybe it is still the image of Cronulla. Who knows, I think the racial image still exists.*<sup>293</sup>

Despite a \$250,000 government-funded advertising campaign and other programs in 2006 to entice visitors back to Cronulla, two businesses suggested the need for a 'public relations [campaign] to get Cronulla on the map for the right reasons' as the 'reputation [of the area] has been damaged'.<sup>294</sup>

Many respondents to our survey of Cronulla businesses criticised the role of the media in perpetuating negative images of Cronulla:

*[The] media keeps replaying the same footage of [an assault at] the train station... Every time the media plays footage, business decreases. The media continually reminds people.*<sup>295</sup>

*The press has run roughshod [over everybody] for 12 months and nobody is doing anything about it... Nobody wants to deal with the role of the press. The press has deliberately created divisions by perpetrating the myth... Anyone can be a spokesperson for the community.*<sup>296</sup>

### Changes in patronage

Most respondents to our survey of businesses at Cronulla and Brighton-le-Sands observed that hospitality businesses were among the hardest hit by the falls in patronage.

One restaurateur explained that many in the hospitality business draw much of their custom from visitors to the area, especially during the summer months. He said that once business was lost it can take time to rebuild, as at least some of the groups and individuals forced to find venues elsewhere for their annual Christmas lunches and other such functions would continue to patronise those venues into the future.

The owner of a hospitality business in Brighton-le-Sands felt that the erosion in confidence and consumer goodwill would be enduring:

*People's mentality is [that] once something happens, that's it. Customers don't feel they can come back.*<sup>297</sup>

### Quantifying the losses

Interestingly, most of the respondents to our survey of businesses in Cronulla and Brighton-le-Sands were able to quantify the financial losses they experienced following the riots and lockdown. Two Cronulla respondents advised:

*In the weeks before Christmas we sell a lot of gift vouchers. We would normally expect sales of \$3,000, \$4,000, \$3,000 for the three weeks before Christmas. Actual takings for those three weeks were \$0, \$0, \$10. Realistically, it's cost between \$80-100,000... [over] 10 months.*<sup>298</sup>

*\$3,000 to \$4,000 in pre-Christmas lay-bys were lost during the lockdown itself and \$10,000 [in expected sales] went in [a few] months.*<sup>299</sup>

Many others estimated their losses in terms of the volume of business compared to similar periods in previous years. One Cronulla respondent estimated that turnover in December 2005 was as much as 80% lower than in previous Decembers, and his January turnover was 70% lower.<sup>300</sup> In Brighton-le-Sands, one hospitality business reported:

*There were a high number of cancellations during the peak Christmas season. I had an 80% downturn in business for three to four weeks.*<sup>301</sup>

The survey indicated that the financial hardship experienced by businesses in Cronulla was more acute and lasted longer than for those in Brighton-le-Sands. One year after the riots, some Cronulla respondents said that although business was recovering, turnover continued to be less than in previous years. One estimated trade to be 30% down on pre-riot turnover, and the other estimated it was still 30–40% lower.<sup>302</sup>

While many in Brighton-le-Sands reported a slow period for some weeks following the riots in December 2005, most stated that business gradually improved and had returned to normal. One estimated that turnover fell by as much as 60 to 70% for the two weeks after the riot, but had since recovered fully.<sup>303</sup> Other Brighton-le-Sands feedback included:

*Whether it was because of the lockdown or the riot — people were hesitant to come down to the area... The lockdown made it harder for people to get into the area. [But] having loads of police around was very assuring to people, especially to staff. There was definitely a downturn in business, however we were back to normal trading by about February [or] March 2006.<sup>304</sup>*

*Visitor numbers are back to normal now. It depends on the weather really. If it's hot, I am busy.<sup>305</sup>*

Respondents in both Brighton-le-Sands and Cronulla advised that their local communities showed great support by dining out and shopping locally after publicity about the economic impact of the unrest. One business reported that takings slightly increased as a result of an increase in local custom:

*All my customers came and supported me. I'm doing better now than this time last year — how weird is that! [I have a] mostly local business base — the locals really came out to support us.<sup>306</sup>*

## Impact on local economies

It is clear that businesses near the heart of the public disorder and lockdowns in December 2005 suffered an acute economic blow — and at least some are still recovering, particularly in Cronulla. Yet it is not clear whether available evidence supports the assertion made by one Cronulla respondent that police 'over-reacted' and that locking down the suburb sent a message that authorities had 'lost control' — thereby exacerbating the fear and amplifying the damage.<sup>307</sup>

Firstly, a number of factors appeared to contribute to the enduring economic impact on businesses in the areas most affected by the riots and retaliatory attacks, making it hard to distinguish the influence of one factor over the others.

Secondly, although the police measures to prevent further violence in those areas might have heightened some concerns about the risk of further violence, the evidence suggests that those concerns were already well-entrenched before the lockdowns were put in place. Moreover, a number of sources praised the high-visibility police presence during the lockdown period and in the weeks and months that followed, with many commending police for their professionalism and saying their show of force helped reassure those with concerns about safety. The proprietor of a business in Cronulla was one of many who commended the local commander, Superintendent Rob Redfern, for visiting businesses and talking to owners throughout the emergency:

*He was really good actually. He implored us to open. We were tossing up whether to open. He said to open. He said Cronulla would be the safest place in town — and he was right.<sup>308</sup>*

Finally, any assessment of whether police use of the Part 6A powers might have compounded the financial impact on business should take account of the even greater potential costs incurred if the public disorder had persisted or escalated — thereby resulting in further violence, property damage, injuries or possibly even the loss of life. In his submission on this issue, the Northern Region commander, Assistant Commissioner Peter Parsons, stated:

*During Operation Seta several licensed premises either closed or restricted their operations. Whilst they would have experienced a financial impact during the period (of the authorisation), it cannot be compared with the likely financial impact had they not taken this action and public order unrest occurred, resulting in either injury or property damage.<sup>309</sup>*

The damage incurred by businesses affected by the rioting and subsequent lockdowns in December 2005 highlights the ongoing need for care when invoking the emergency provisions. While restoring peace and ensuring public safety must remain the highest priority for police at all times, it is useful for senior police who invoke the powers to be mindful of the potential for their decision-making to affect the livelihoods of others. At present the authorisations process restricts police use of the Part 6A powers to large-scale public disorder emergencies. A rigorous and accountable authorisations process should be maintained in any future scheme to provide police with special powers to prevent or control public disorder.

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## Financial impact arising from the seizure of vehicles and mobile phones

As noted in the discussion on the Part 6A seizure powers earlier in this report, police in or near target roads or target areas can seize and detain vehicles and mobile phones for up to seven days without having to establish that an offence has been committed. Police may apply to a court to have this extended for further periods of up to 14 days. The Act provides no mechanism for a member of the public to have this time reduced. However, some owners approached local commanders directly to have items returned sooner and, on a few occasions, this occurred.

The *Law Enforcement (Powers and Responsibilities) Regulation 2005* provides that if a vehicle is seized under the Part 6A powers, towing and storage fees must be paid before the vehicle is returned.<sup>310</sup> The prescribed towing fee is the actual cost of the tow<sup>311</sup> or the maximum charge as determined by section 54 of the *Tow Truck Industry Act 1998* — whichever is the lesser amount. The prescribed storage fee for vehicles is \$16 a day.<sup>312</sup> This amounts to \$112 for seven days. There is no fee applicable for police storage of seized mobile phones.

We audited the property records of three local area commands involved in Operation Seta for the period during which the Part 6A powers were used. The property audit of seized items indicated that in most cases, \$112 was charged for vehicle storage — even where cars were returned five or six days after seizure. While most people were not charged for the towing of their vehicle, one person had to pay \$326.70 and another \$112.

We surveyed nine of the 16 owners or drivers who had their vehicles seized by police during the period 17–19 December 2005. All advised they were required to pay a fee to have their car released. Estimates of the towing and impound costs incurred ranged from approximately \$100 to \$400. These figures are consistent with the police property records.

A number of people interviewed mentioned a negative impact on their employment following the police seizure and detention of their vehicle. One person advised he was unable to continue his lawn-mowing business for the three days that his car was impounded. Another young person said that he was required to borrow a car from a friend so that he could continue his employment delivering pizza. A third person who is a tradesperson, reported spending extra time travelling on public transport to job sites, and having to operate with fewer tools for the seven days his car was impounded. Some drivers did not own the cars that were seized and detained. The impact of the seizure then fell on the owners.

The seizure and detention of a person's vehicle can have a significant impact on a person's capacity to fulfil their family and employment obligations. In one case, the seized vehicle belonged to the driver's seriously ill grandfather. Family members had been relying on the car to visit him in hospital.

The vehicles seizures are intended to 'assist in preventing or controlling a public disorder' or some other serious offence.<sup>313</sup> Of the nine people interviewed by this office, only one was criminally charged as a result of items found in the vehicle and another received a caution.

There is clear operational value in providing police with a flexible power to seize vehicles in target areas or target roads. The highly mobile nature of the reprisal attacks nights following 11 December 2005 bears this out. However, while the period that a vehicle is held can be extended, there is no provision for reducing the period. As noted earlier in the comments related to Recommendation 9, it may be appropriate to consider a mechanism that allows people relying on their vehicle, mobile phone or other items for employment or similar reasons to apply for the early return of their property if the threat of public disorder has diminished or passed, or if other circumstances justify that the item be returned.

## Training and maintaining operational readiness

The Part 6A emergency powers are exceptional provisions, designed to deal with rare and exceptional circumstances. A key challenge for the NSW Police Force with respect to the proper and effective use of the powers is to maintain operational readiness — that is, to ensure appropriate systems and training are in place so that the powers can be used anywhere at short notice should the need arise.

Police preparedness for any future use of the powers is likely to be affected by their infrequent use, unique qualities, and the probability that large numbers of police from many commands will be involved. The challenges apply to officers at all levels, from the senior commanders who may be called on to decide whether or not the powers should be used and how police resources will be deployed, through to the general duties and specialist officers required to exercise these powers at cordons and road blocks, in patrols and other similar situations.

The practical police experience in using the powers to date is very limited. As outlined at the start of this report, the emergency powers were first used to prevent further violence following the Cronulla riots and retaliatory attacks in December 2005, and then to prevent a recurrence of violence in West Dubbo on 1 January 2006 following an earlier incident on the Gordon Estate. Although commanders have contemplated using Part 6A provisions in other situations, there has been no other authorised use of the powers.

The speed with which police were required to prepare for the first use of the Part 6A powers was unprecedented. The legislation was passed on Thursday 15 December 2005, and first used just hours later to establish several roadblocks in the Sutherland area. By the morning of Saturday 17 December 2005, there were nine authorisations in place allowing use of the new powers in wide areas of Sydney, the Central Coast, Newcastle and Wollongong. The operation that followed used 1,500 additional officers on the first day, and 2,000 extra officers on the next — more than 10% of the total number of police in NSW. They were brought in from many commands, including country areas. This was a logistically demanding set of circumstances.

Implementing a major public order operation using new powers appears to have been influenced by two key factors:

1. Providing comprehensive instruction on the new powers and the associated operational orders at very short notice.
2. Decision-making and command systems influenced by an examination of previous public order incidents, notably the major reviews of the police handling of the Redfern and Macquarie Fields riots.

## Start-up training and briefing materials

There were a number of measures used to brief officers and commanders on their powers and responsibilities before using the new Part 6A provisions in a major operation for the first time, including:

- An email sent to all officers on 15 December 2005 outlining the Part 6A amendments.
- A police executive and police legal services briefing to all relevant local area commanders on 16 December 2005.
- Operational orders and procedures prepared and disseminated before the first major use of the powers.
- Pre-operational briefings for all officers being deployed. The sessions included presentations, scenario-based training and 'question and answer' sessions with police Legal Services staff.
- The first few Six-Minute Intensive Training scenarios were prepared and included in the pre-operational briefings. These are short, sharp training sessions designed to improve officers' understanding of practical situations where the powers might be used.
- A pocket-sized card summarising the legislative provisions, created to assist in the first use of the powers on 15 December 2005. This aide memoire was designed as an easy reference for frontline officers.
- Information on the NSW Police Force Intranet containing an introduction to the powers and links to further information prepared by police legal services on the powers and operational legal issues relevant to crowd control.

This was a substantial array of information. Most was prepared, approved and published within a day or two of the Act being passed.

## The next steps

Immediately after the first major use of the powers on 17–19 December, the materials were reviewed and refined. On 22 December 2005, the Director of police Legal Services circulated another email to all officers clarifying the powers exercisable without an authorisation under section 87N and explaining the legal tests governing the use of that provision. In the weeks that followed, additional Six-Minute Intensive Training scenarios were prepared on other key aspects of the powers and the advice published on the intranet and in police circulars was reviewed and enhanced.

Since then, the NSW Police Force has sought to consolidate and improve officer awareness by:

- Including advice on 'Police Powers — Restoration of Public Order' in *The Constables (Investigator's) Pocket Guide*, the principal text for NSW police officers.
- Publishing articles in the *Policing Issues and Practice Journal*, which is distributed to all NSW police. There have been five articles relating to Part 6A since the beginning of 2006, including a comprehensive and accurate summary of the powers.
- Publishing articles in the *Police Weekly*, the official police publication circulated to all stations in NSW.
- Publishing additional legal services articles on the NSW Police Intranet.

In our view, both the initial police training response and its ongoing refinement show an impressive level of commitment by the NSW Police Force to ensuring officers act lawfully and with full knowledge of their legal powers and responsibilities.

On the other hand, it is important to note that the speed with which police were required to develop these resources created the potential for some inaccuracies or misleading advice. The period of time between Parliament introducing new powers and the first use of those powers varies enormously, but usually allows police sufficient time to prepare carefully considered legal advice and to base any training or summary materials on that advice. However, most of the training and summary materials used to implement Part 6A had to be prepared at incredibly short notice, and without

the benefit of the kind of carefully framed advice that was eventually published in the *Policing Issues and Practice Journal* some weeks and months after the Act commenced.

For instance, on the issue of requesting identification details under section 87L, the *Constables (Investigator's) Pocket Guide* (January 2006 edition) correctly sets out the terms of that section, including the condition that such requests can be only made if the person is in a target area 'and the officer reasonably suspects that the person has been involved/likely to be involved in a public disorder'. Yet the practice advice that immediately follows notes that the 'only prerequisite [for requiring identification] is that the person is within a public place within the authorised target area'.<sup>314</sup> While a person's presence in a target area is a prerequisite, it is not the only one. Advice subsequently published in the *Policing Issues and Practice Journal*<sup>315</sup> removes the misleading practice note, and adds a case study scenario that correctly applies the section 87L 'reasonable suspicion' requirement.

Thus it may be timely for the NSW Police Force to consider reviewing all of its Part 6A materials, especially the summary advice and training materials provided to frontline officers, to ensure the materials accurately reflect the law and good police practice.

The NSW Police Force advised on 16 August 2007 that it was reviewing the *Constables (Investigator's) Pocket Guide* to ensure it reflects changes as a result of amendments to *Law Enforcement (Powers and Responsibilities) Act 2002*, and that any identified discrepancies are rectified. This includes changes specifically relating to the application of legislative safeguards, the amended search powers and the amendments relating to alcohol-free zones.

## Recommendation 13

**The NSW Police Force review Part 6A procedures, training materials and other guides provided to officers that deal with the emergency powers:**

- (a) to ensure these materials reflect the law (including the December 2006 amendments) and good practice, and**
- (b) having regard to the amendments recommended in this report to improve police practice.**

## Tactical and command training

Enhanced tactical training through mandatory sessions run by the Police College's Operational Safety Training Unit is helping to instruct officers on the practical application of the Part 6A powers. The college's courses have been extended to include public order drills, and the proper use of riot equipment. Specialist support from Public Order and Riot Squad personnel gives course participants an operational perspective.

In addition to improved specialist training such as the Operations Support Group Commanders Course and the Operations Support Group Tactical Advisers Course, at least two other key training courses have been enhanced to include detailed instruction on the Part 6A emergency powers:

- *Incident & Emergency Management Course*  
This training is designed to give operational police an understanding of their legislative and procedural obligations when faced with various incidents and emergencies. The course material includes Part 6A and other legislative provisions, analysing crowd behaviour, and procedures for public order management.
- *Major Incident (Public Order) Commander Course*  
This provides commanders with training on when and how the Part 6A powers and other options can be used. This knowledge is then reinforced in practical exercises through simulations using 'Minerva', a system designed to simulate critical incidents such as riots, that tests the decision-making of commanders. It simulates large-scale, often critical policing incidents, allowing command teams to practice their command skills.

The NSW Police Force has advised that these two courses are currently being merged. By late 2007 they will become units within a single Incident Command Course. The training includes instruction on legislation and tactical decision-making for all major incidents including public order, incident and emergency management and counter-terrorism incidents.

## Debriefs and operational reviews

Another factor influencing how police implemented the major public order operation at short notice was the improved systems of command and decision-making in place or being developed when the Part 6A powers were introduced.

### Flaws in the initial response

It is important to distinguish the initial police response to the Cronulla riots on 11 December 2005 and during the disorder in the nights that followed, from the better-resourced and more effective police operation mobilised after the Part 6A powers commenced on 15 December. Despite some police preparations for the 11 December rally, it is clear that police were not adequately prepared when the spontaneous mob violence began to erupt at Cronulla:

*... the mobility and unpredictability of the crowd [at Cronulla] was dynamic in that attacks on Middle Eastern people and others were not planned, but responsive in different locations to the appearance of a target... Police on the street had to respond on many occasions without command direction to intervene and prevent assaults. Visual records of those incidents depict the individual initiative and courage of police officers. The lack of serious or fatal injuries to victims can be attributed to the actions of individual police who appeared to have no regard for their own safety when endeavouring to protect people coming under attack.<sup>316</sup>*

Like most people, police were also caught unawares by the ferocity and rapid spread of the reprisal attacks that followed:

*The attacks were well planned and coordinated... Because of the level of co-ordination, mobility and the random nature of [the] attacks, responding police had to use initiative and courage to protect victims and stop the attacks. The level of violence displayed in this public disorder was unprecedented in Australia.<sup>317</sup>*

Thus the practical difficulties for officers caught up in the initial mob violence at Cronulla and in the night-time attacks that followed, were compounded by difficulties in then accessing specialist staff, equipment and other resources. As the police regrouped and shut down disorder in one area, the attackers would move to another. In many cases, individual officers were left dangerously exposed as they were forced to cope as best they could as the violence spread:

*One of the features of the Cronulla riots and the reprisal attacks was the mobility of the rioters and their capacity to swiftly change the location of their attacks. This created a situation where police in areas who were not part of the original response plan becoming involved unexpectedly, e.g. Maroubra and Brighton-le-Sands. Protective equipment was not available to these first response officers. When requests were made for protective equipment, there was an expected lengthy delay in its delivery because of the situation that existed in other areas. There is evidence of injuries to police who responded to potentially volatile situations without protective equipment.<sup>318</sup>*

A detailed police review criticised many aspects of the initial police response, the adequacy of command arrangements in place to manage the response as events unfolded, and delays in accessing specialist staff, equipment and other resources.<sup>319</sup>

### Improvements to Operation Seta

Once these issues were recognised, appropriate command systems were put in place and adequate resources were deployed, the police response appeared to be markedly more effective. A critical step was the creation of new command structures, including three Major Incident Response Team (MIRT) zones under the command of a central Police Operations Centre, to coordinate and manage major policing operations across broad areas identified as being at highest risk of further unrest. By the time the new legislation was introduced on 15 December 2005, Operation Seta was on a much firmer footing thanks to changes in command arrangements, a dramatic increase in police numbers and improved access to specialist staff and resources. This put police in a much stronger position to make effective use of the powers.

Feedback from officers involved in this stage of the operation to restore order provides a stark contrast to the difficulties experienced a week earlier:

*Overall Operation Seta is considered by the vast majority of police debriefed to be an outstanding success. No officer was hurt during the various incidents, no more reprisal attacks took place after the implementation of the three MIRT Zones immediately after the 12th December 2005, a huge deployment of police was facilitated in a very short time frame, the legislation of new police powers was lobbied and granted, and public confidence and perception of safety was restored...<sup>320</sup>*

The use of MIRTs to command and coordinate police responses to large-scale public disorder incidents was a key recommendation from earlier reviews of the police handling of previous public order incidents, notably the Macquarie Fields riots. The successful application of these and other recommendations from those reviews — albeit after an initial delay — shows the potential of these kinds of reviews to contribute to a more effective police response to situations such as the Cronulla riots and their aftermath.

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## Redfern

The first of a number of recent police reviews of how police could respond more effectively to public disorder followed riots in the inner Sydney suburb of Redfern after the death of a young Aboriginal man on 15 February 2004. The violence erupted amid existing tensions between the local community and police, and rumours of possible police involvement in the young man's death.

The disorder involved a crowd of up to 150 individuals who participated in street battles with police outside Redfern railway station. The incident lasted for several hours and eventually involved the deployment of 250 police, ambulance and fire brigade personnel.

Strike Force Coburn, initiated by the Police Commissioner on 17 February 2004, reviewed the police handling of the civil unrest and identified numerous shortcomings in the police response, including deficiencies in command decision-making at the scene, poorly maintained and stored riot equipment, and a lack of training in the proper use of that equipment.

Strike Force Coburn found that 'prolonged and organised riots place demands beyond the capabilities of local area commands' and recommended a number of changes, including the development of systems for better managing the police response to major incidents.<sup>321</sup>

A subsequent WorkCover prosecution of the NSW Police Force for breaches of the *Occupational Health and Safety Act 2000* supported Strike Force Coburn's analysis. About 40 officers were injured during the riots. The Industrial Relations Commission found that the NSW Police Force had failed to ensure the safety and welfare of its employees and imposed a \$100,000 fine, noting that the NSW Police Force:

*... placed [its] employees in a situation where they were at serious risk to their personal safety because many of them were neither adequately equipped nor trained to deal with the situation. However, in fixing the penalty I must also have regard to the subjective factors in mitigation, which in this case are significant, especially the comprehensive steps taken by [the police force] following the riot to improve its handling of public disorder incidents.<sup>322</sup>*

## Macquarie Fields

The next major police review followed riots at Macquarie Fields a year later. In mid-January 2005, Strike Force Delage was formed to investigate a series of offences including motor vehicle theft and aggravated burglary in the Macquarie Fields area. Police had information that suspects were preparing to commit further violent offences and were told to look out for people 'driving a stolen vehicle around Eucalyptus Drive, Macquarie Fields'.<sup>323</sup> On 25 February 2005, two strike force officers saw three males driving a stolen car on Eucalyptus Drive and advised police radio of their pursuit at 11am. One minute later police reported that the stolen vehicle had crashed into a tree. Two passengers in the car were killed and the driver ran from the scene. All three were local residents.

The incident placed multiple demands on police such as the preservation of the accident scene, the investigation of the accident, the formation of a Critical Incident Investigation Team to gather information on behalf of the Coroner, and the containment and management of a grieving crowd. Some residents blamed police for the deaths and the riots that followed which lasted for four nights.

The police review identified numerous shortcomings and proposed 15 recommendations for change. The recommendations proposed sought to 'build on intelligence gained and lessons learnt from both Redfern and Macquarie Fields'.<sup>324</sup> The review concluded:

*Additional specialised training, new and improved equipment, the introduction of a Major Incident Response Team and the establishment of a new NSW Police Public Order Management Committee will help to ensure that the impact on local communities and police is minimised during any future episodes of major civil unrest.<sup>325</sup>*

## The Cronulla riots and revenge attacks

There are also important lessons to be learned from reviewing various aspects of the police response to the Cronulla riots, the revenge attacks and the major operation to restore public order in the following weeks. The Cronulla riots and subsequent retaliatory attacks in December 2005 prompted the NSW Police Force to undertake three major reviews of its response:

- Operational debriefs: A series of operational debriefs was facilitated by senior police in relation to the Cronulla riots and subsequent operations covering the period from 11 December 2005 to 28 January 2006.

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The debriefs were designed to allow a broad cross-section of police officers of different ranks to offer comments, observations, assessments and recommendations.

- Strike Force Enoggera review: Senior police undertook a review of managerial policies, practices and procedures relating to Strike Force Enoggera, the team established on 13 December 2005 to investigate and arrest people involved in the criminal incidents in the period 11–13 December 2005.
- Strike Force Neil review: Strike Force Neil was set up to review the initial police response to the Cronulla riots and subsequent disorder from 11–13 December 2005. The terms of reference for this extensive review focused on the police operational response, including the tactics and strategies used, the command and control arrangements employed, any implications for training and education of police officers, and the availability and effectiveness of appropriate equipment. The strike force also closely examined the reports into the Redfern and Macquarie Fields public disorder incidents.

Details from this three-tiered review process have been published on the NSW Police Force Intranet and are being used to improve training and incident management systems. The numerous recommendations for further improvements in each of these reports highlight the lessons that can be learnt through conducting detailed reviews of major incidents such as these.

### **Training and systems to support operational readiness**

The challenge for the NSW Police Force is to ensure that training and systems are in place to put the lessons learned from these reviews into practice on the very rare occasions that large-scale violence flares and police are required to act.

A Government report to Parliament in December 2006 indicates that the NSW Police Force is now better placed to respond to sudden surges in public disorder than it was when the Cronulla unrest occurred. In responding to issues raised by the Legislative Council Standing Committee on Social Issues in its inquiry into the police handling of the Macquarie Fields riots, the Government response lists measures implemented to improve the police handling of public disorder, noting:

*NSW Police conducted a full internal inquiry ... and have implemented a number of initiatives in response to the recommendations from [the standing committee] inquiry, including the following:*

- *Establishment of a Major Incident Response Team, bringing together the specialist skills and experience within NSW Police, to be deployed to all significant unplanned public order incidents;*
- *Establishment of a Public Order Management Committee to support the operations of the Major Incident Response Team;*
- *Establishment of a full-time Public Order and Riot Squad;*
- *Ensuring regular review of crime trends by the Macquarie Fields Local Area Command to identify hotspot crimes and recidivist offenders/victims;*
- *Ensuring that all Local Area Commanders undertake the Major Incident (Public Order) Management course; and*
- *Ensuring that all general duty police and new recruits receive specialised Public Order Management Equipment Training.*

These measures highlight the kinds of ongoing training, systems and procedures needed to ensure that commanders and frontline officers are alert to the risk of public disorder and ready to respond quickly should the need arise. The Government advised the standing committee that police intend to review the initiatives on a regular basis to ensure they continue to deliver improved outcomes.



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## Endnotes

- <sup>243</sup> Police Media Unit press release dated 16 December 2005
- <sup>244</sup> 'Businesses miss their fortune as crowds dry up', *Sydney Morning Herald*, 19 December 2005.
- <sup>245</sup> 'City faces Christmas lockdown', *Sydney Morning Herald*, 19 December 2005.
- <sup>246</sup> Commander interview, 5 February 2007.
- <sup>247</sup> Ombudsman survey of drivers and owners whose cars were seized in lockdown areas.
- <sup>248</sup> Ombudsman survey of drivers and owners whose cars were seized in lockdown areas.
- <sup>249</sup> Although police operations were focused on areas adjacent to Wollongong's city beaches, the target area authorisation covered the whole Wollongong LGA, including Woonona. His vehicle was not seized immediately. As he was driving home the officers who searched his van telephoned and asked him to attend the nearest police station, where it was seized. It was returned a few days later after the owner made representations to local police that he needed the van for his employment.
- <sup>250</sup> Northern Region commander, Assistant Commissioner Peter Parsons, submission, 27 February 2007.
- <sup>251</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>252</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 89.
- <sup>253</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 89.
- <sup>254</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 90.
- <sup>255</sup> NSW Police Force Media Policy, revised 2 April 2007.
- <sup>256</sup> Respondent JDS5. See also BDS14 and BDS15.
- <sup>257</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 54.
- <sup>258</sup> *Debriefs: Operation Seta — Cronulla Riots and Related Incidents*, 11 December 2005 to 28 January 2006, p 7.
- <sup>259</sup> NSW Police Force, COPS ref E25317035.
- <sup>260</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 26.
- <sup>261</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 26.
- <sup>262</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 26. See also 'Debriefs Operation Seta, Cronulla Riots and Related Incidents, 11 Dec 2005 to 28 January 2006' at page 1 where the authors of the report view the incidents at Cronulla as being a 'direct result' of the assault involving the lifesavers a week earlier.
- <sup>263</sup> There were a number of violent incidents on the weekend 1–3 October 2005 where large groups of young Caucasian men were 'squaring off' with large numbers of youths from Middle Eastern backgrounds — see Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 25.
- <sup>264</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87L(2) and (3).
- <sup>265</sup> *Law Enforcement (Powers and Responsibilities) Act* Part 3, Division 1 provides that failure to comply with a police request for identity without lawful excuse may result in a maximum fine of only \$220.
- <sup>266</sup> Under *Law Enforcement (Powers and Responsibilities) Act* s 199(1), failure to obey a police direction to move-on in accordance with Part 14 may incur a fine of up to \$220.
- <sup>267</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87C(4).
- <sup>268</sup> Defined under section 642 of the *Local Government Act 1993* as 0.2 of a penalty unit.
- <sup>269</sup> Redfern Legal Centre submission, 12 April 2007.
- <sup>270</sup> Shopfront Youth Legal Centre submission, 19 February 2007.
- <sup>271</sup> NSW Council of Social Services submission, 22 February 2007.
- <sup>272</sup> 'Businesses miss their fortune as crowds dry up', *Sydney Morning Herald*, 19 December 2005.
- <sup>273</sup> ABC radio (NSW) news transcript, 17 December 2005.
- <sup>274</sup> Ombudsman surveys of businesses at Cronulla and Brighton-le-Sands, December 2006 and January 2007.
- <sup>275</sup> *PM*, ABC radio, 8 December 2006.
- <sup>276</sup> Cronulla businesses were surveyed in December 2006 and Brighton-le-Sands businesses in January 2007. Respondents included owners and managers of cafes, restaurants, hotels, liquor outlets, fast-food outlets, music and gift shops, fruit and vegetable shops, a youth hostel, dive shops and clothing outlets.
- <sup>277</sup> Respondent GMS2.
- <sup>278</sup> Police Media Unit, media release dated 16 December 2005.
- <sup>279</sup> 'Stay off the beaches', *Sydney Morning Herald*, 17–18 December 2005, p1.
- <sup>280</sup> Ombudsman surveys of businesses at Cronulla and Brighton-le-Sands, December 2006 and January 2007.
- <sup>281</sup> 'Stay off the beaches', *Sydney Morning Herald*, 17–18 December 2005, p1.
- <sup>282</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.
- <sup>283</sup> *The World Today*, ABC radio, 16 December 2005.
- <sup>284</sup> *PM*, ABC radio, 8 December 2006.
- <sup>285</sup> Respondent BDS15.
- <sup>286</sup> Respondent GMS4.
- <sup>287</sup> 'Stay off the beaches', *Sydney Morning Herald*, 17–18 December 2005, p1.
- <sup>288</sup> Respondent JDS6.
- <sup>289</sup> Respondent BDS11.
- <sup>290</sup> Respondent BDS13.
- <sup>291</sup> Respondent BDS12.
- <sup>292</sup> Respondent JDS2.
- <sup>293</sup> *Business Confidence Survey*, Cronulla Chamber of Commerce, 2007.
- <sup>294</sup> *Business Confidence Survey*, Cronulla Chamber of Commerce, 2007.
- <sup>295</sup> Respondent KMS22.
- <sup>296</sup> Respondent JDS6.
- <sup>297</sup> Respondent GMS9.
- <sup>298</sup> Respondent BDS11.

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- <sup>299</sup> Respondent BDS13.
- <sup>300</sup> Respondent JDS6.
- <sup>301</sup> Respondent GMS9.
- <sup>302</sup> Respondent JDS1 and JDS2.
- <sup>303</sup> Respondent GMS7.
- <sup>304</sup> Respondent KMS44.
- <sup>305</sup> Respondent KMS38.
- <sup>306</sup> Respondent BDS14.
- <sup>307</sup> Respondent JDS6.
- <sup>308</sup> Respondent BDS14.
- <sup>309</sup> Northern Region commander, Assistant Commissioner Peter Parsons, submission, 27 February 2007.
- <sup>310</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 36C(1).
- <sup>311</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 36C(2)(a).
- <sup>312</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 36D.
- <sup>313</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87M(1)(a) and (b).
- <sup>314</sup> *The Constables (Investigator's) Pocket Guide*, January 2006 edition, p27.
- <sup>315</sup> *Policing Issues and Practice Journal*, April 2006, Vol 14, No. 2.
- <sup>316</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 49.
- <sup>317</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 9.
- <sup>318</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 102.
- <sup>319</sup> Hazzard N, *Strike Force Neil Cronulla riots — Review of the police response* Vol. 1, p 66.
- <sup>320</sup> *Debriefs: Operational Seta – Cronulla Riots and Related Incidents, 11 December 2005 to 28 January 2006*, NSW Police Force, May 2006, p11.
- <sup>321</sup> *Public Order Management Review Redfern Final Report*, Part A, p 9.
- <sup>322</sup> *Inspector Jennifer Short v The Crown in the Right of the State of NSW* [2007] NSWIRC138 at 52.
- <sup>323</sup> *Final report Into Macquarie Fields Public Order Management Incidents*, Deputy Commissioner (Operations), NSW Police Force, 2005, p 22.
- <sup>324</sup> *Final report Into Macquarie Fields Public Order Management Incidents*, Deputy Commissioner (Operations), NSW Police Force, 2005, p 5.
- <sup>325</sup> *Final report Into Macquarie Fields Public Order Management Incidents*, Deputy Commissioner (Operations), NSW Police Force, 2005, p 5.



# Chapter 8. Conclusion

## ‘Whether the powers need to be continued in the same or another form, or at all’

When Parliament introduced the emergency powers, it included a provision requiring the Ombudsman to ‘keep under scrutiny the exercise of powers conferred on police officers’ under Part 6A,<sup>326</sup> and a ‘sunset provision’ that repeals Part 6A in December 2007.<sup>327</sup>

The Premier explained the rationale for these provisions when introducing the legislation:

*Another important element of the bill is the oversight powers. Proposed section 87O provides for monitoring and reporting on the powers by the Ombudsman. The Ombudsman is to keep the use of the powers under scrutiny for two years and to report after 18 months to the Attorney General and the Minister for Police. The Attorney will then table the report in the Parliament. Proposed section 87P places a two-year sunset clause on these powers, with the Government then able to review, in light of the Ombudsman’s report, whether the powers need to be continued in the same or another form, or at all.*<sup>328</sup>

There was bi-partisan support for the review provisions and sunset clause:

*The Opposition supports the important changes in the bill that deal with the provision of alcohol; locking down zones and closing roads; confiscating cars; presumption against bail; increased penalties for the offences of riot, affray and assault; and providing the Ombudsman with an oversight role.*<sup>329</sup>

Cross-bench support included the following:

*The Greens welcome the inclusion of a two-year sunset clause and the Ombudsman’s oversight of the new powers. They are critical because of our lack of time to properly scrutinise the bill.*<sup>330</sup>

Factors underlying the decision to subject the police use of the powers to independent review and make any extension contingent on Parliament having to pass new laws, appear to have included:

- the extraordinary nature of the powers
- the necessity to draft and introduce the legislation without delay, and
- the inability to subject the draft Part 6A powers to a period of public scrutiny and feedback prior to commencement.

Yet even if there had have been more time for drafting and public scrutiny, it is likely that there would still have been considerable uncertainty about the likely impact of the legislation. The powers were extraordinary and the nature and threat of public disorder was unprecedented. There was no way to know how useful the powers would be or the extent of any problems until the powers were used. It was expected that our review would be informed by police practice:

*The community expects the Government to respond [quickly], and we have responded. Given the extraordinary powers that we are giving the police, I think it is appropriate to have oversight by the Ombudsman and a sunset period. These laws must be reviewed when they are put in operation.*<sup>331</sup>

An obvious difficulty in providing Parliament with feedback about the practical application of the Part 6A powers is that there were so few police operations that necessitated the use of the provisions. While this underlines the fact that public disorder on this scale is fortunately quite rare and that police are able to address most situations without having to resort to extraordinary powers, any conclusions about the potential operational value of the provisions and the extent of possible shortcomings must be qualified by the fact that we are yet to see how the provisions will work in a range of situations.

A possible exception to this observation is the process for authorising the use of the powers. The requirements and police procedures relating to authorisations effectively restrict police use of the emergency powers to crises involving large-scale public disorder, or the threat of such a disorder, and generally only when more conventional policing measures will not work. As our report notes, police considered authorising use of the Part 6A powers on several occasions during the review period, but opted to use less intrusive measures instead. In this way, the authorisations process proved to be effective in encouraging the responsible use of the powers.

## Observations about police use of the powers to date

Our specific observations about the police use of each of the Part 6A emergency powers are detailed throughout this report, and include recommendations for possible improvements. A summary of those recommendations is set out at the end of this chapter.

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In considering the broader question of whether the emergency police powers should be continued in the same or another form, or not at all, Parliament might have regard to the following additional observations.

Police appear to have been responsible and appropriately measured in their use of the Part 6A emergency powers to date. The available evidence indicates that authorisations to use the powers were only granted in circumstances where senior police were genuinely of the view that other, less intrusive policing measures would be insufficient to restore order or prevent further attacks. Significantly, there were a number of public order incidents, or threats to public order, where senior commanders considered whether to authorise the use of the Part 6A powers, but opted not to as other effective and appropriate options were available to police.

On the rare occasions that use of the Part 6A powers was authorised, such authorisations generally appear to have been well founded, and in accordance with the legislative requirements and the intention of Parliament. Although the reasons were not always clearly documented, and the level of supporting documentation appeared to be variable, our interviews and discussions with senior police indicate that on each occasion careful consideration was given to the legislative requirements, and how the use of particular powers might be needed to help control a public disorder or prevent further violence. Feedback from senior police commanders indicates that all applications for Part 6A authorisations were the subject of critical examination and robust discussion of the competing options.

Although the legal framework provided by Part 6A is important, the powers would be of little use without police having the logistical capacity to implement an effective response to public disorder. It is therefore important to consider the broader operational context of their use. The effectiveness of any major public order operations will be influenced by factors such as:

- how quickly officers can be assembled, briefed and deployed
- the availability of specialist staff, equipment and resources
- frontline officers' familiarity with using specialist equipment
- commanders' and frontline officers' familiarity with tactical procedures
- the organisation and analysis of reliable intelligence as dynamic situations unfold
- the quality of intelligence and other information available to police, and
- effective communication and leadership.

The NSW Police Force's efforts to address these kinds of issues has a strong bearing on their ability to maximise police effectiveness in responding to public disorder, or the threat of disorder.

Public goodwill was a significant factor in the apparent success of operations involving the use of Part 6A powers. The available records, police videos from operations, submissions and other sources indicate that there were generally high levels of public compliance and cooperation with the police operations in which the Part 6A powers were used. Even a majority of those members of the public who were most affected by the police operations, such as people who lived, worked or ran businesses in lock-down areas, and people who had their vehicles and mobile phones seized or were required to surrender their tools of trade or other equipment, generally demonstrated a high degree of cooperation and compliance with police requests and directions. The extent of this compliance seems to indicate that police benefited from a strong public perception that the threat of further large-scale public disorder was serious, legitimising the police use of the emergency powers on those occasions.

Finally, it is important to acknowledge police efforts in mobilising a major operation to facilitate the first use of the powers. Two factors characterised the initial police preparations. Firstly, there was an urgent need to create new command structures to coordinate and manage major policing operations in the broad areas identified as being at risk of further unrest, and to task and train all staff involved in these operations. This required the creation and dissemination of new procedures, training materials and guidelines to clarify officers' respective roles and the ambit of their new powers.

Secondly, there were the enormous logistical challenges associated with amassing the staff, vehicles and other resources needed for these operations. There were 1,500 extra officers deployed for these operations on 17 December 2005, and 2000 the following day. Leave was cancelled and officers brought in from other commands, including country areas. The success of the NSW Police Force in developing and implementing these operations in such a tight timeframe, and with relatively few problems, was an impressive achievement.

## Future uses of the provisions

Although the police use of the Part 6A powers has been limited, the mostly positive outcomes associated with those early public order operations indicates that Parliament should consider extending the provisions in some form.

The former Minister for Police argued in his submission that the current Part 6A should remain in place and — for the most part — not be amended, as ‘the policing portfolio is of the strong view that the continuation of these powers is absolutely necessary to enable police to effectively deal with public disorder situations’.<sup>332</sup>

The NSW Police Force ‘would like to see the Act continue to be available to police, albeit with [some] amendments’,<sup>333</sup> and the police spokesperson for public order issues submitted that ‘these powers are an essential part of policing the difficult environment of public order and should be retained’.<sup>334</sup> The Police Association of NSW noted the difficulty of commenting on legislation that had only been used twice, but concluded that the powers were ‘extremely important and much needed’.

In his response of 16 August 2007 to our consultation draft, the Police Commissioner states: ‘The Act provides important powers to assist police in controlling incidents of large scale public disorder and I strongly support the powers being adopted on a permanent basis’.<sup>335</sup>

Yet most submissions qualified any support for extending the Part 6A powers by arguing that any future police use of the powers should be accountable and subject to independent review. The Australian Privacy Foundation’s conclusion was typical of the views expressed:

*There should be a requirement for detailed annual reporting, oversight by an external agency, and a periodic review of the need for Part 6A.*<sup>336</sup>

Similarly, Privacy NSW favoured:

*... ongoing external oversight and monitoring by the Ombudsman and a requirement for annual reporting, should Parliament decide it necessary to extend the powers contained in Part 6A.*<sup>337</sup>

Although submissions favouring the inclusion of review provisions focused on the need for police accountability, the proposed mechanisms for independent review varied:

*I... support the continuance of [the Part] 6A powers, and favour an ongoing Ombudsman surveillance as an important mechanism to guard against any excesses.*<sup>338</sup>

*Yes, the powers in Part 6A should be extended... Because of the civil liberties issues there probably should be ongoing oversight and monitoring, probably by the Ombudsman... Annual reporting of use of the powers to Parliament would [also] seem to be appropriate and all or most of this should be available to the public... There should be future appraisals of the necessity of these powers... every five years or more unless the annual reporting highlights something requiring more urgent attention.*<sup>339</sup>

The Aboriginal Justice Advisory Council said the powers could help police to reduce the impact and severity of public disorder, but wanted far greater accountability. It favoured ongoing monitoring by a ‘steering committee’ made up of ‘agencies such as the NSW Ombudsman, NSW Council for Civil Liberties, AJAC and the NSW Law Society’.<sup>340</sup>

Some submissions argued against extending the provisions beyond December 2007. Yet all also argued that if Parliament does decide to extend the powers, ongoing scrutiny is essential:

*The powers should not be extended... police already have sufficient powers to deal with public disorder situations... In the alternative, we submit that the powers should be amended as we have described in our responses... We firmly stress the need for checks and balances to prevent and assess any abuse of the powers. The Ombudsman should monitor the use of these powers on an ongoing basis. We also submit [that] a reporting requirement to the Police Minister and the Attorney General would be useful to ensure ongoing transparency and accountability.*<sup>341</sup>

*My obvious preference is that this legislation should not be extended beyond its expiry in December 2007. If it is extended, then there should be a further sunset clause with external oversight by the Office of the Ombudsman or some other independent agency which can produce impartial reports without fear or favour. Obviously, there should be regular appraisals of the necessity of these powers.*<sup>342</sup>

*The powers... should not be extended... [Police] have plenty of discretion under the general law to maintain and keep order. Certainly, there should be an ongoing oversight and monitoring by the Ombudsman of the use powers under Part 6A (which really should be repealed)...*<sup>343</sup>

The various mechanisms proposed for strengthening the reporting on, and external scrutiny of, Part 6A are similar to existing provisions in legislation such as the *Terrorism (Police Powers) Act 2002*, which includes requirements for:

- the Police Commissioner to report on each time there is an authorisation to use special powers under Part 2 of the Act (s14B)
- detailed annual reporting on various police powers and functions, which the Attorney General must table in Parliament (s26ZN)

- Ombudsman scrutiny for the first five years after commencement and for the Attorney General to table the Ombudsman's report in Parliament (s26ZO), and
- Ministerial reviews every two years to determine whether the policy objectives of the Act remain valid (s36).

In considering the adequacy of safeguards in Part 6A, it is also important to note the mechanisms for judicial review in the current legislation. At present these principally relate to Supreme Court decisions on whether 'target area' or 'target road' authorisations should be extended beyond 48 hours (s87G) and a role for the Local Court in determining whether items seized under s87M for up to seven days should be extended for periods of up to 14 days (s87M). Neither has been used, so their effectiveness as safeguards remains untested.

The reasons for Parliament incorporating review provisions and a sunset clause in the original Part 6A legislation included concerns about the extraordinary nature of the powers proposed, the need for Parliament to legislate without knowing what impact those powers would have, and an expectation that monitoring the practical application of the powers would provide an insight into the operational value of, and any concerns about, police use of the powers in a range of situations. In many important respects, these concerns persist.

Also, key amendments commenced in December 2006, including new police powers to require the *immediate* removal of liquor from emergency alcohol free zones and the introduction of powerful new provisions to disperse groups within lockdown areas, are yet to be used.

Until the community can be confident about how the Part 6A provisions will work in practice, and in a range of emergency situations, some form of independent scrutiny of future police uses of the powers would seem to be an essential safeguard.

## Recommendation 14

**Should Parliament determine to continue Part 6A of LEPR in its present or some amended form, consideration be given to appropriate ongoing accountability including:**

- detailed police reviews each time the Part 6A powers are used, to assess the effectiveness of the police response and look for opportunities for improvement**
- a requirement for detailed annual reporting by the Commissioner of Police about the use of Part 6A powers, including outcomes of reviews undertaken following particular uses, or (if the powers are unused) details of training and other preparations to ensure operational readiness to use the powers at short notice**
- some form of external and independent review, and**
- periodic Ministerial reviews to determine whether the policy objectives of Part 6A of LEPR remain valid.**

## Endnotes

<sup>326</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87O(1),(4) and (5).

<sup>327</sup> *Law Enforcement (Powers and Responsibilities) Act* s 87P.

<sup>328</sup> The Mr Hon Morris Iemma MP, NSWPD, Legislative Assembly, Second Reading speech, 15 December 2005, p20621.

<sup>329</sup> The Hon Duncan Gay MLC, Deputy Leader of the Opposition, Legislative Council, 15 December 2005, p20584.

<sup>330</sup> Ms Lee Rhiannon MLC, Legislative Council, 15 December 2005, p20588.

<sup>331</sup> The Hon Carl Scully MP, NSWPD, Legislative Assembly, 15 December 2005, p. 20626.

<sup>332</sup> Minister for Police, Mr John Watkins, submission, 2 February 2007.

<sup>333</sup> NSW Police Force submission, 7 February 2007.

<sup>334</sup> Public Order and Riot Squad Commander, Chief Superintendent Steve Cullen, submission 3 January 2007.

<sup>335</sup> NSW Police Force response to consultation draft report, 16 August 2007.

<sup>336</sup> Australian Privacy Foundation submission, February 2007.

<sup>337</sup> Privacy NSW submission, 2 February 2007.

<sup>338</sup> Submission No. 8, 29 January 2007.

<sup>339</sup> Submission No. 7, 25 January 2007.

<sup>340</sup> Aboriginal Justice Advisory Council submission, January 2007.

<sup>341</sup> Redfern Legal Centre submission, 12 April 2007.

<sup>342</sup> Submission No. 9b, January 2007.

<sup>343</sup> Submission No. 11, 28 January 2007.

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# References

Where appropriate, we considered the findings and recommendations of related reviews, including:

- Police Ministry Working Group *Issues Paper* (May 2006), unpublished: A report from a working group consisting of police, Police Ministry, Police Association, Attorney General's Department, and Cabinet Office representatives to review early uses of the legislation and recommend changes.
- *Debriefs: Operation Seta — Cronulla Riots and Related Incidents*, NSW Police Force (5 May 2006), restricted publication: In early 2006, Detective Superintendent Adam Purcell conducted a series of operational debriefs with officers directly involved in responding to the Cronulla riots and subsequent operations. The debriefs focused on issues associated with command and control, operations and tactics, investigations, intelligence and planning/resources/logistics.
- *Cronulla Riots: Review of the Police Response*, Strike Force Neil, NSW Police Force (September 2006), published at <http://www.abc.net.au/mediawatch/transcripts/s1776943.htm>: A four-volume report by former Assistant Commissioner for Counter Terrorism and Public Order Management, Mr Norm Hazzard. The review focused on the police operational response, command and control issues, education and training, and equipment. The final report detailed factors leading up to the initial riot and the incidents and subsequent police response that followed. It also noted key findings from earlier reports relating to the police handling of the Redfern and Macquarie Fields riots, and the impact of changes made in light of those public order incidents.
- *Strike Force Enoggera — A review of managerial policies, practices and procedures*, NSW Police Force (24 October 2006), Cabinet in Confidence, published at <http://www.smh.com.au/pdf/cronullareport.pdf>: This report reviewed managerial policies, procedures and practices relating to the establishment and operation of Strike Force Enoggera, the taskforce established to investigate offences associated with the initial riots and reprisal attacks.
- Redfern and Macquarie Fields: The detailed police reviews following riots in Redfern (Strike Force Coburn: Final report — Redfern Local Area Command Civil Unrest 15–16 February 2004 (2004)) and Macquarie Fields (Final report Into Macquarie Fields Public Order Management Incidents) (2005)). Both reports have been published by the NSW Parliament's Legislative Council Standing Committee on Social Issues at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).





# Appendix A: Copy of Part 6A

Copy of *Law Enforcement (Powers and Responsibilities) Act 2002* Part 6A, as at August 2007.

## Part 6A Emergency powers — public disorder

### Division 1 Preliminary

#### 87A Definitions

1. In this Part:

**licensed premises** means premises licensed or required to be licensed under the *Liquor Act 1982* for the sale or supply of liquor, and includes the premises of a registered club under the *Registered Clubs Act 1976*.

**liquor** has the same meaning as in the *Liquor Act 1982*.

**mobile phone** includes any device that may be used, in whole or in part, for the purpose of sending or receiving voice or other data over a mobile telephone network, whether or not it may be used for any other purpose.

**public disorder** means a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations.

**public place** includes a school.

**road** includes a road related area, and a part of a road or road related area.

2. For the purposes of this Part, controlling a public disorder includes containing or reducing the disorder or bringing the disorder to an end.
3. For the purposes of this Part:
  - (a) a person in an area that is the target of an authorisation under Division 3 includes a person who is about to enter the area or who has recently left the area, and
  - (b) a vehicle that is in an area the target of an authorisation under Division 3 includes a vehicle that is about to enter the area or that has recently left the area.

### Division 2 Liquor restrictions

#### 87B Emergency prohibition on sale or supply of liquor

1. A police officer of or above the rank of Superintendent may authorise the closure of any licensed premises, or the prohibition of the sale or supply of liquor on any licensed premises, if the police officer:
  - (a) has reasonable grounds for believing that there is a large-scale public disorder occurring in the vicinity of the licensed premises or there is a threat of such a disorder occurring in the near future, and
  - (b) is satisfied that the closure or prohibition will reasonably assist in preventing or controlling the public disorder.
2. The period that an authorisation relating to any licensed premises has effect must not exceed the period that the police officer giving the authorisation considers reasonably necessary for the purpose for which it is given, but must not in any case exceed 48 hours. The period that the authorisation has effect may be extended by the giving of a further authorisation, but only if the total period of the authorisation in relation to those premises does not exceed 48 hours.

Note. The closure of licensed premises may be extended by the Licensing Court or by an order of an authorised officer under section 104A or 104C of the *Liquor Act 1982*.
3. Any police officer may, in accordance with an authorisation under subsection 1., direct any person who is apparently in charge of, or who is selling or supplying liquor on, licensed premises to close the premises or to cease selling or supplying liquor on those premises, as the case requires.
4. An authorisation under subsection 1. may be given orally or in writing and, if given orally, it must be confirmed by instrument in writing as soon as it is reasonably practicable to do so.
5. An authorisation under subsection 1. may be revoked at any time by a police officer of or above the rank of Superintendent if the police officer is satisfied that the authorisation is no longer necessary.

The police officer is to give notice to a person apparently in charge of the licensed premises of the revocation of the authorisation.

6. A person to whom a direction is given under this section must comply with the direction.  
Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

### 87C Emergency alcohol-free zones

1. A police officer of or above the rank of Superintendent may, by instrument in writing, establish in an area within a public place an emergency alcohol-free zone if the police officer:
  - (a) has reasonable grounds for believing that there is a large-scale public disorder occurring in the vicinity of the area or there is a threat of such a disorder occurring in the near future, and
  - (b) is satisfied that the establishment of the zone will assist in preventing or controlling the public disorder.
2. The period for which an emergency alcohol-free zone may be established in any area must not exceed the period that the police officer establishing the zone considers reasonably necessary for the purpose for which it is established, but must not in any case exceed 48 hours. The period for which the zone is established may be extended by a further instrument, but only if the total period that the zone is established in the area does not exceed 48 hours.
3. A police officer who finds a person or group of persons drinking or in possession of liquor in an emergency alcohol-free zone may warn the person or group of persons that it is an offence to drink liquor in the zone and that any liquor in the possession of the person or persons may be confiscated unless it is immediately removed from the zone.
4. A person who has received a warning under subsection 3. in relation to an emergency alcohol-free zone, but who:
  - (a) commences to drink liquor in the zone, or
  - (b) fails to stop drinking liquor in the zone, or
  - (c) resumes drinking liquor in the zone,is guilty of an offence.  
Maximum penalty: 20 penalty units.
5. An emergency alcohol-free zone may be established under this section in respect of an area that is an alcohol-free zone established under the *Local Government Act 1993*. In that case, a person cannot be convicted of an offence under this section and that Act in respect of the same act or omission.
6. Any liquor in the immediate possession of a person in an emergency alcohol-free zone who is committing, or has just committed, an offence under this section, and any container in which the liquor is packaged, may be seized by a police officer.
7. Any liquor in the immediate possession of a person in an emergency alcohol-free zone who has received a warning under subsection 3., and any container in which the liquor is packaged, may also be seized by a police officer if:
  - (a) the person does not immediately remove the liquor from the zone, and
  - (b) the police officer is satisfied that the seizure of the liquor will assist in preventing or controlling the public disorder.
8. Any liquor (and any container) seized under this section is, by virtue of the seizure, forfeited to the State and may be disposed of in accordance with directions given by the Commissioner of Police.
9. The establishment of an emergency alcohol-free zone under this section may be revoked at any time by a police officer of or above the rank of Superintendent if the police officer is satisfied that it is no longer necessary.

## Division 3 Special powers to prevent or control public disorders

### 87D Authorisation of special powers to prevent or control public disorder in public place

An authorisation for the exercise in a public place of the special powers conferred by this Division may be given in accordance with this Division if the police officer giving the authorisation:

- (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and
- (b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder.

### 87E Target of authorisation

1. An authorisation may authorise the exercise of the special powers conferred by this Division in a public place:

- (a) for the purpose of preventing or controlling a public disorder in a particular area described in the authorisation, or
  - (b) for the purpose of preventing persons travelling by a road specified in the authorisation to an area to create or participate in a public disorder (whether or not the area is also subject to an authorisation under paragraph (a)).
2. The area or road is referred to in this Division as the **target** of the authorisation.

#### **87F Giving of authorisation**

1. An authorisation may be given by the Commissioner of Police or by a Deputy or Assistant Commissioner of Police. The power conferred by this section cannot be delegated.
2. An authorisation may be given orally or by instrument in writing.
3. If the authorisation is given orally, it must be confirmed by instrument in writing as soon as it is reasonably practicable to do so.
4. An authorisation must:
  - (a) state that it is given under this Division, and
  - (b) describe the general nature of the public disorder or threatened public disorder to which it applies (including the day or days it occurs or is likely to occur), and
  - (c) describe the area or specify the road targeted by the authorisation, and
  - (d) specify the time it ceases to have effect.

#### **87G Duration and revocation of authorisation**

1. An authorisation has effect, unless sooner revoked, during the period beginning at the time it is given and ending at the time specified in the authorisation.
2. The period that an authorisation relating to any area or road has effect must not exceed the period that the police officer giving the authorisation considers reasonably necessary for the purpose for which it is given, but must not in any case exceed 48 hours.
3. The period that the authorisation has effect may be extended by the giving of a further authorisation, but only if:
  - (a) the total period of the authorisation in relation to the area or road does not exceed 48 hours, or
  - (b) the Supreme Court, on the application of the police officer proposing to give the further authorisation, determines that the police officer is entitled to give the further authorisation.
4. The Commissioner of Police or a Deputy or Assistant Commissioner of Police may revoke an authorisation at any time, and must revoke it if directed to do so by order of the Supreme Court.
5. The cessation of an authorisation (by revocation or otherwise) does not affect anything lawfully done in reliance on the authorisation before it ceased to have effect.

#### **87H Exercise of special powers conferred by authorisation by police officers**

1. The special powers conferred by this Division may be exercised by any police officer in a public place for the purposes for which an authorisation is given under this Division.
2. A police officer may exercise those powers whether or not the officer has been provided with or notified of the terms of the authorisation.

#### **87I Power to place or establish cordon or roadblock**

1. A police officer may, for the purposes of stopping and searching persons or vehicles under this Division or preventing persons entering or leaving an area without the permission of a police officer:
  - (a) place a cordon around a target area or any part of it, or
  - (b) establish a roadblock on a target road (including any road in a target area).
2. A police officer must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person's own safety.
3. A cordon or roadblock may consist of any appropriate form of physical barrier or obstruction preventing or limiting the passage of vehicles or persons.

#### **87J Power to stop and search vehicles**

1. A police officer may, without a warrant, stop and search a vehicle, and anything in or on the vehicle, if:
  - (a) the vehicle is in an area that is the target of an authorisation, or

- (b) the vehicle is on a road that is the target of an authorisation.
- 2. A police officer may detain a vehicle for so long as is reasonably necessary to conduct a search under this section.

### **87K Power to search persons**

1. A police officer may, without a warrant, stop and search a person, and anything in the possession of or under the control of the person, if:
  - (a) the person is in an area that is the target of an authorisation, or
  - (b) the person is in or on a vehicle on a road that is the target of an authorisation.
2. Division 4 of Part 4 (except to the extent that it authorises strip searches) applies to the search of a person conducted under this section.
3. A police officer may detain a person for so long as is reasonably necessary to conduct a search under this section.

### **87L Power to obtain disclosure of identity**

1. A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if:
  - (a) the person is in an area that is the target of an authorisation (whether or not in or on a vehicle), or
  - (b) the person is in or on a vehicle on a road that is the target of an authorisation,and the police officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder.
2. A person who is so requested to disclose his or her identity must not, without reasonable excuse, fail or refuse to comply with the request.  
Maximum penalty: 50 penalty units or 12 months imprisonment, or both.
3. A person must not, without reasonable excuse, in response to any such request:
  - (a) give a name that is false in a material particular, or
  - (b) give an address other than the person's full and correct address.Maximum penalty: 50 penalty units or 12 months imprisonment, or both.
4. A police officer may request a person who is requested under this section to disclose his or her identity to provide proof of his or her identity.

### **87M Power to seize and detain things**

1. A police officer may, in connection with a search under this Division:
  - (a) seize and detain, for a period of not more than 7 days, a vehicle, mobile phone or other communication device if the seizure and detention of the vehicle, phone or device will assist in preventing or controlling a public disorder, or
  - (b) seize and detain all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence (whether or not related to a public disorder).
2. The Local Court may, on the application of a police officer, authorise the continued detention of a vehicle, mobile phone or other communication device under subsection 1. (a) for an additional period not exceeding 14 days if satisfied that its continued detention will assist in preventing or controlling a public disorder. More than one extension of the detention may be authorised under this subsection, so long as each extension does not exceed 14 days.
3. A power conferred by this section to seize and detain a thing includes:
  - (a) a power to remove a thing from the place where it is found, and
  - (b) a power to guard the thing in or on the place where it is found.
4. The regulations may make provision for or with respect to the seizure, detention and return of vehicles, mobile phones or other communication devices referred to in subsection 1. (a).

### **87MA Power to disperse groups**

1. If a group of persons are assembled within an area that is the target of an authorisation, a police officer may give a direction to those persons, or to any of them, to disperse immediately.
2. For the purpose of complying with section 201 1. (c), the police officer giving the direction must inform the person or persons to whom the direction is given that the direction is given for the purpose of preventing or controlling a public disorder.
3. (Repealed)

4. A person must not, without reasonable excuse, refuse or fail to comply with a direction given in accordance with this section.  
Maximum penalty: 50 penalty units.
5. A direction under this section is to be given orally and, if given to a group of persons, is to be given in such a manner as is likely to be audible to all persons in that group, or to as many of them as practicable.
6. If a direction under this section is given to a group of persons, it is not necessary for the police officer to repeat the direction, or to repeat the information and warning required to be given under section 201, to each person in the group.
7. However, just because the police officer is not required to repeat any such direction, information or warning does not in itself give rise to any presumption that each person in the group has received the direction, information or warning.

#### **87N Powers exercisable without authorisation under this Division**

1. This section applies where a police officer stops a vehicle on a road in accordance with a power conferred by or under this or any other Act, being a road that is not (or not in an area) the target of an authorisation under this Division.
2. The police officer may exercise the powers conferred under this Division (except section 87MA) in relation to the vehicle (and any person or thing in or on the vehicle) without such an authorisation if the officer:
  - (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and
  - (b) suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder, and
  - (c) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder, and
  - (d) is satisfied that the urgency of the circumstances require the powers to be exercised without an authorisation under this Division.

### **Division 4 Miscellaneous**

#### **87O Monitoring by Ombudsman**

1. The Ombudsman is to keep under scrutiny the exercise of powers conferred on police officers under this Part.
2. For that purpose, the Ombudsman may require the Commissioner of Police or any public authority to provide information about the exercise of those powers.
3. The Commissioner of Police is to ensure that the Ombudsman:
  - (a) is notified as soon as practicable of the giving of any authorisation under Division 2 or 3, and given a copy of any such authorisation, and
  - (b) if an authorisation is revoked — is notified as soon as practicable of the revocation.
4. The Ombudsman must, as soon as practicable after 18 months after the commencement of this Part, prepare a report on the exercise of those powers and furnish a copy of the report to the Attorney General and the Minister for Police.
5. The report is to be tabled by the Attorney General in each House of Parliament as soon as practicable after it is received by the Attorney General.
6. If a House of Parliament is not sitting when the Attorney General seeks to table a report, copies of the report are to be presented to the Clerk of the House concerned by the Attorney General.
7. The report:
  - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
  - (b) may be printed by authority of the Clerk of the House, and
  - (c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and
  - (d) is to be recorded:
    - (i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and
    - (ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly, on the first sitting day of the House after receipt of the report by the Clerk.

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**87P Sunset provision**

This Part is repealed on the second anniversary of the commencement of this Part.

# Appendix B: Legal advice on Part 6A

As part of our review, we sought legal advice from senior counsel in early 2007 about the meaning and application of certain provisions in Part 6A of the *Law Enforcement (Powers and Responsibilities) Act 2002*, notably issues relating to:

- the extent to which police could apply the Part 6A powers on private property
- whether a ‘target area’ authorisation can be declared in an area where public disorder is not occurring or imminent, and
- the use of section 87N to exercise of powers without an authorisation.

In a memorandum dated 3 May 2007, Tim Game SC and Tony Payne provided a joint opinion in the following terms:

## Introduction

1. We have been asked to advise about the proper construction of certain provisions of Pt 6A of the Law Enforcement (Powers and Responsibility) Act 2002 (NSW) (“Law Enforcement Act”)...

## Law Enforcement Act

2. We have been asked to provide advice about the following questions:  
*Question One — Whether and to what extent police are entitled to exercise their Pt 6A powers on private property.*  
*Question Two — Whether police can exercise their Pt 6A powers in the types of circumstances highlighted in the NSW Police and Police Association submissions, namely:*
  - (i) *A situation where Division 3 powers have been authorised, and people have gathered or “spilled over” into private areas adjoining public places. NSW Police is concerned that a person on a footpath is subject to the exercise of Pt 6A powers, but a person a metre away on a front lawn is not.*
  - (ii) *A situation where an emergency alcohol free zone has been established under s 87C, and people are in their yards holding bottles of alcohol. The Police Association is concerned that police currently have no power to confiscate alcohol from people who are party to the violence where they are in their own front yards.*

## Summary

3. Private property may fall within the definition of “public place” under the Law Enforcement Act depending upon the use to which the property is, or has been, put at the time of an authorisation. To that extent, the powers conferred by Pt 6A may be exercised on private property. In addition, Div 3 powers may be exercised outside a “public place” that is the subject of an authorisation in certain limited circumstances.
4. The particular factual examples mentioned above are considered in the body of the advice.

## Reasoning

5. Part 6A of the Law Enforcement Act confers a wide variety of powers upon police officers. The powers may conveniently be divided into Division 2 and Division 3 powers. Division 2 relevantly provides for the establishment of “emergency alcohol-free zones” in “an area within a public place” (s 87C). Division 3 provides for the exercise of “special powers” “in a public place” (see s 87D).
6. The questions raised above encompass two interrelated issues. First, to what extent, if any, may the powers provided for in Pt 6A be exercised in places other than those properly characterised as ‘public places’. Secondly, what is the proper construction of the expression ‘public place’ in Pt 6A of the Act.
7. In our view, the powers provided for in Div 2 of Pt 6A may not be exercised unless the object of the power is within an area of a “public place” that has been declared to be an emergency alcohol zone. The powers provided for in Div 3 of Pt 6A may not be exercised unless the object of the power: (a) is within an area of a “public place” that is the subject of an authorisation under s 87D; or (b) is about to enter, or has recently left, that area.
8. So far as Div 2 powers are concerned, s 87C(1) of the Act provides:

### Emergency alcohol-free zones

1. A police officer of or above the rank of Superintendent may, by instrument in writing, establish **in an area within a public place** an emergency alcohol-free zone if the police officer:
  - (a) has reasonable grounds for believing that there is a large-scale public disorder occurring in the vicinity of the area or there is a threat of such a disorder occurring in the near future, and



(b) is satisfied that the establishment of the zone will assist in preventing or controlling the public disorder.  
(emphasis added)

9. The powers provided for in the remaining sub-sections of s 87 are dependent upon the establishment of an emergency alcohol-free zone pursuant to sub-section (1). In addition, each power is dependent upon the object of the power (relevantly, a person or group of persons drinking liquor) being “in an emergency alcohol-free zone” at the time the power is exercised. This is clear not only from the words of the provision but also from the fact that s 87C(3), for example, contemplates that the possession and drinking of alcohol outside the zone is not the subject of police powers conferred by s 87. That construction accords with the underlying purpose of the provision. If the powers conferred by s 87C were not limited to the geographic area set out in the instrument establishing the emergency alcohol-free zone, there would be no need to establish the zone in the first instance.
10. It follows that a police officer would not be permitted to exercise powers *under s 87C* (cf broader police powers which may be available) with respect to individuals holding or consuming alcohol immediately outside an emergency alcohol-free zone. The next question, which is dealt with below, therefore becomes to what extent an emergency alcohol-free zone can encompass private property. If such property can properly fall within the definition of “public place”, the police would be able to exercise their Division 2 powers in respect of individuals on that property.
11. With one important exception, a similar construction likely applies to Division 3 powers. The operative provision is s 87H(1). That provision provides:

**Exercise of special powers conferred by authorisation by police officers**

1. The special powers conferred by this Division may be exercised by any police officer in a public place for the purposes for which an authorisation is given under this Division. (emphasis added)
12. Section 87H(1) is the mechanism by which the Division 3 powers are conferred upon police officers. It is clear from the provision that the powers conferred may only be exercised “in a public place”. In addition, s 87H must be read with s 87D, which limits the scope of an authorisation to the exercise of powers “in a public place”:

**Authorisation of special powers to prevent or control public disorder in public place**

An authorisation for the exercise in a public place of the special powers conferred by this Division may be given in accordance with this Division if the police officer giving the authorisation:

- (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and
  - (b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder. (emphasis added)
13. There is no indication in s 87D that an authorisation can be extended to places other than “public places” as defined in s 3.
  14. This construction is supported by the terms of each provision conferring a power in Div 3. For example, s 87K(1) provides:

A police officer may, without a warrant, stop and search a person, and anything in the possession of or under the control of the person, **if**:

- (a) the person **is in an area** that is the target of an authorisation, or
- (b) the person **is in or on a vehicle on a road** that is the target of an authorisation. (emphasis added)

(The combined operation of s 87E(1) and 87D means that an area or road that is the target of an authorisation must be a “public place”.)

15. The use of the word “if” in s 87K indicates that the power is conditional upon either of the requirements set out in (a) or (b) being satisfied. There is no suggestion that the power could be exercised outside those areas. A similar analysis operates with respect to ss 87J, 87K, 87L, 87M and 87MA. Although the powers under s 87N are not dependent upon the existence of an applicable authorisation, those powers only apply with respect to vehicles stopped “on a road” (which is incorporated within the definition of “public place” in s 3).
16. However, there is an important qualification to the above analysis, in so far as it concerns Div 3 powers. The qualification derives from s 87A(3), which provides:

For the purposes of this Part:

- (a) a person in an area that is the target of an authorisation under Division 3 includes a person who is about to enter the area or who has recently left the area, and
- (b) a vehicle that is in an area the target of an authorisation under Division 3 includes a vehicle that is about to enter the area or that has recently left the area.

17. Section 87A(3) has the effect of deeming individuals who are physically present outside an authorised area to be within the area for the purpose of the exercise of Division 3 powers.

18. This provision in our view would appear to permit the exercise of Division 3 powers in relation to individuals who, for example, leave an authorised area and stand on private property immediately adjacent to that area. The existence of the provision suggests that Parliament was concerned to ensure that police officers were given an appropriate 'leeway' in exercising their powers in the immediate vicinity of an authorised area.
19. In our view, provided that the temporal limitation contained in the section is satisfied, the section would likely permit the exercise of Div 3 powers in respect of individuals or groups who have 'spilled over' the boundary of a 'public place' authorised under s 87D.
20. Before leaving this topic, we acknowledge a degree of uncertainty attaching to the operation of s 87A(3). Rather than providing for a geographic criterion (eg 100 metres outside an authorised area), the provision adopts a temporal restriction ("about to enter" or "recently left"). Both expressions provide little guidance as to their outer limits. Nor do they provide a yardstick by which a calculation of time can be made.
21. Having determined the extent to which Pt 6A powers can be exercised outside an authorised area, it is necessary to consider the scope of the expression "public place".
22. "Public place" is defined in s 3 of the Act to include:
  - (a) a place (whether or not covered by water), or part of premises, that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, and
  - (b) a road or road related area, but does not include a school.
23. The definition of "public place" in s 3 mirrors that contained in the *Summary Offences Act 1988* (NSW) and has a long history in earlier criminal legislation. Numerous decisions in this country and the United Kingdom have considered the extent to which a place or road may be characterised as a "public place" or a place "used by the public". The precise scope of the definition in s 3 can involve difficult questions in respect of which reasonable minds may well differ. An indication of the potential complexity of the issue is illustrated by the fact that a decision of the Court of Criminal Appeal on the analogous question of whether a hotel car park was a "public street" extended to over 50 pages of the New South Wales Law Reports (*R v Abrahams* [1984] 1 NSWLR 491). The following discussion focuses principally upon interpreting s 3 in the context of the factual scenarios raised in the above questions.
24. Private residential property will not generally be "open to the public". However, the definition in s 3 extends to places that are "used by the public... whether or not the place... is ordinarily so open or used". This limb of the definition is important because it encompasses private property which, although not open to the public and not intended by its owner to be used by the public, has in fact been used on a particular occasion. In other words, the definition does not require regular or consistent 'use' by the public over a period of time before a place can be said to fall within the definition.
25. It is less clear whether the definition of "public place" would permit a police officer to make a s 87D authorisation (or s 87C declaration) on the basis that private property was *currently* being used by members of the public for the *first time*. On one view, the expression "used by the public", while not requiring regularity of use, does suggest use by the public prior to the date on which a police officer purports to make an authorisation in respect of it (see eg *Schubert v Lee* (1946) 71 CLR 589 at 592). On the other hand, the expression "whether or not the place *is ordinarily* open or so used" (emphasis added), appears to contemplate first-time public use at the time of authorisation. This latter construction is supported by the fact that both ss 87C and 87D permit an authorisation to be made when a large-scale public disorder is already occurring. In our view, a police officer who is informed that a particular piece of private property is being used by members of the public for the first time would be permitted to make a s 87D authorisation (or a s 87C declaration).
26. This construction is also consistent with relevant caselaw. In *McIvor v Garlick* [1972] VR 129 at 133,134 Newton J set out three different circumstances in which a place will be characterised as a "public place" under the general law:
  1. In my opinion, a place will ordinarily be a "public place"... 1. If at the relevant time members of the public are lawfully entitled, invited or permitted to be there in their capacity as members of the public, whether or not subject to payment for admission or to other conditions, and irrespective of the number of persons in fact present at the relevant time... 2. If the place is one to which significant numbers of the public in their capacity as such are in the habit of going, whether or not by legal right or authority, either at all hours or during hours which include the relevant time, and even if at the relevant time none or only a few persons are present... 3. **If at the relevant time a large number of persons are in fact there, whether or not by legal right or authority.** (emphasis added)
27. A similar conclusion was reached by Grove J in *R v Wellard* (1884) 14 QBD 63 at 66, where his Lordship noted, in a passage that has regularly been applied since, that "[a] public place is one where the public go, no matter whether they have a right to go or not. The right is not the question."

28. Finally, in *Camp v The Queen* [1975] 1 NSWLR 452, the Court of Criminal Appeal considered a definition of “public place” identical to that contained in s 3 of the Law Enforcement Act. After setting out the definition, the Court said:

This is a wide definition indeed. It is sufficient if the place, or a part of premises, is open to or used by the public. It matters not whether they pay money to use it or whether it is ordinarily so open or used, and it is sufficient if the public to whom it is open consists only of a limited class of persons. So it would appear that any place, or part of any premises, which the public use, or which is open to the public, whether they are private premises or a place surrounded by private lands, **whether the people who use the place or premises do so not as of right but even as trespassers, is within the definition.**

The definition does not distinguish between private property and public property. It has long been held that a public place is one where the public go, no matter whether they have a right to go or not. The right is not the question: *R v Wellard* [(1884) 14 QBD 63], where the place was one to which people were in the habit of going without having any strict legal right so to do. That case was followed in *Ex parte Brian* [(1902) 2 SR (NSW) 125], where the applicant was convicted under a municipal by-law for using any street or public place for the purpose of betting; **the place in question, although private land, being in fact frequented by the public, who were present in large numbers when the betting took place.** (emphasis added)

29. In our view, where a crowd occupies not only public property (such as a road) but also the front gardens of adjacent houses, the latter area falls within the definition of “public place” from the moment of first-use. An officer empowered to make a s 87C or s 87D authorisation would, when faced with such situation, therefore be entitled to make an authorisation that covered the expanded area. The decisions set out above are helpful because they demonstrate that the concept of a “public place” is not fixed but may change from day to day as the circumstances of the use of particular places changes.
30. However, it is important to emphasise that members of the “public” must be using the private property in order for it to amount to a “public place”. While this requirement will likely be satisfied if a crowd of people moves onto private property en masse, it may not be satisfied merely when the owner of the property, or a member of the owner’s immediate family, stands in the front yard drinking alcohol (cf *Morrison Holdings v IRC* [1966] 1 All ER 789 at 798 with *Commissioner of Income Tax v Bjordal* [1955] AC 309).
31. In expressing these views, we recognise that the distinction we have made may not always be easy for a police officer to identify in making operational decisions. The consequence of a police officer entering upon private property without lawful justification is that such entry may amount to a trespass: see generally *Plenty v Dillon* (1991) 171 CLR 635. In some cases, the consequences of the exercise of police powers on private property without lawful justification can be significantly adverse, both for the officers concerned and the State: see, for example, *State of NSW v Ibbett* (2006) 231 ALR 485.
32. The questions we have been asked are limited to the powers provided for in Pt 6A. However, it is important to recognise that other powers provided for in the Law Enforcement Act will be available to a police officer who is faced with individuals standing on private property in the context of a large-scale public disorder. For example, s 9 of the Act empowers an officer to enter premises if the officer believes on reasonable grounds that a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of peace. In addition, s 10 permits a police officer to enter and stay on premises for a reasonable time in order to arrest a person with or without warrant (see also s 99).

*Question Three — Whether the legislation permits an authorisation to be made for an area outside the area in which a public disorder is occurring or imminent?*

## Summary

33. With the exception of an authorisation directed to blocking use of a road so as to prevent a public disorder occurring at another location, it is unlikely that an authorisation may be made for an area other than that in which the public disorder is occurring or imminent. However, the terms of the legislation are not entirely consistent and a contrary view is open.

## Reasoning

34. The starting-point is s 87D, the terms of which are set out above. There is no express requirement in the provision that the public place in respect of which Div 3 powers may be exercised must be the place where a large-scale public disorder is occurring or threatened to occur. However, the title of the provision (“Authorisation of special powers to prevent or control public disorder in public place”) probably suggests that the provision was intended to confine the authorisation to the location of the public disorder.

35. The position is complicated by s 87E, which provides:

**Target of authorisation**

1. An authorisation may authorise the exercise of the special powers conferred by this Division **in a public place**:
    - (a) for the purpose of preventing or controlling a public disorder **in a particular area described in the authorisation**, or
    - (b) for the purpose of preventing persons travelling by a road specified in the authorisation **to an area to create or participate in a public disorder** (whether or not the area is also subject to an authorisation under paragraph (a)).
  2. The area or road is referred to in this Division as the **target** of the authorisation.
36. Section 87E(1)(b) necessarily contemplates a situation in which an authorisation may permit the exercise of Div 3 powers in a “public place” (relevantly a road) that is outside the area in which the large-scale public disorder is occurring or threatened to occur. By virtue of sub-section (2), the ‘road’ is the “target” of the authorisation and the powers conferred in ss 87I, 87J, 87K, 87L, 87M and 87MA may therefore be exercised in relation to it.
37. In contrast, s 87E(1)(a) appears to be more limited in scope. While on one view the section contemplates a distinction between the “public place” in respect of which Div 3 powers may be authorised and the “public disorder **in a particular area** described in the authorisation” (emphasis added), it is unlikely that that construction would be preferred. This is principally due to the effect of s 87E(2). By virtue of that sub-section the area in which the public disorder is occurring or is likely to occur is deemed to be the “target of the authorisation”. Importantly, the powers conferred on police officers in ss 87I, 87J, 87K, 87L, 87M and 87MA are limited to the target of the authorisation. The combined operation of s 87E(2) and the terms of each Division 3 power therefore indicates a construction of s 87E(1)(a) that limits the authorisation to the particular area of the public disorder. This construction is supported by the bracketed phrase “whether or not the area is also subject to an authorisation under paragraph (a)” in s 87E(1)(b). “Area” in that phrase refers to the area in which the disorder is occurring or likely to occur.
38. The differing constructions of s 87E(1)(a) and (b) are consistent with the applicable second reading speech, in which the Premier said:
- Proposed section 87E provides that the target area for a lockdown can be **either** the place where the riot is actually occurring or a road that may be used by people travelling to participate in the riot **or both**. (emphasis added)

*Question Four — Are a police officer’s powers under s 87N(2) dependent on the officer first having exercised an existing power to stop a vehicle?*

**Summary**

39. A police officer can only act pursuant to s 87N(2) where he or she has exercised an existing power to stop a vehicle.

**Reasoning**

40. Section 87N provides:

**Powers exercisable without authorisation under this Division**

1. This section applies where a police officer stops a vehicle on a road in accordance with a power conferred by or under this or any other Act, being a road that is not (or not in an area) the target of an authorisation under this Division.
  2. The police officer may exercise the powers conferred under this Division (except section 87MA) in relation to the vehicle (and any person or thing in or on the vehicle) without such an authorisation if the officer:
    - (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and
    - (b) suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder, and
    - (c) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder, and
    - (d) is satisfied that the urgency of the circumstances require the powers to be exercised without an authorisation under this Division.
41. By virtue of sub-section (1), the balance of the provisions of s 87N are only enlivened where: (a) a police officer stops a vehicle in accordance with a power conferred by or under the Law Enforcement Act or any other Act; and (b) the vehicle stopped is on a road that is not (or not in an area) the target of an authorisation

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under Div 3. In the absence of either threshold requirement being satisfied, no power under s 87N is conferred upon a police officer.

42. We note the comments of the Premier in his second reading speech about the operation of s87N (Hansard, Legislative Assembly, 15 December 2005 at 10621). The Premier appears to assume that s 87N *allows* a police officer to stop a vehicle without an authorisation being in force, subject to the terms of s 87N(2). Those comments do not reflect the terms of the section. Section 87N(1) is not a free-standing provision. Rather, its application is dependent upon the exercise of a pre-existing power conferred by statute. While a second reading speech may be utilised in determining the proper scope of legislation (*Interpretation Act 1987* (NSW), s 34(2)(f)), in our view the Premier's comments must cede to the express terms of the section.

*Question Five — Is the scope of the operation of s 87N limited on the basis that the terms of s 87N(1) do or may presuppose that an authorisation to use the Pt 6A powers has already been granted in relation to an area and/or road elsewhere?*

### **Summary**

43. The operation of s 87N is not dependent upon the existence of an authorisation in relation to an area and/or road other than that in which the police officer purports to exercise his or her powers under s 87N(2).

### **Reasoning**

44. This question concerns the second threshold requirement of s 87N(1) identified above. That requirement ensures that s 87N(2) only operates with respect to roads that are not the target of an authorisation under Div 3.
45. In our view, that threshold requirement does not presuppose that a Division 3 authorisation has already been granted in relation to an area/or road elsewhere. The purpose of s 87N appears to be to ensure that police officers are able to exercise Division 3 powers on an interim basis where they are satisfied that a large-scale public disorder is occurring or is likely to occur and no authorisation has been made (Hansard, Legislative Assembly, 15 December 2005: “[Section 87N] is a prudent measure allowing front-line police to deal with a brewing riot while formal authorisation is sought”). We do not believe it is likely that a Court will imply a requirement into s 87N that an authorisation has been made in relation to a different road or area.

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# Appendix C: Authorising public assemblies

Our review included an examination of concerns about whether, and in what circumstances, police could potentially authorise the use of Part 6A powers in relation to peaceful public assemblies — see discussion in the latter sections of Chapter 3.

In considering issues associated with the policing of public assemblies, particularly large-scale demonstrations, rallies and disputes, it is important to understand the legislation and procedures associated with the management of such events. This includes a process whereby organisers can apply for police authorisation to hold a public assembly. The authorisation process provides important benefits for organisers, participants and police.

## Authorised public assemblies

Public assemblies are covered by Part 4 of the *Summary Offences Act*. A person can provide the Commissioner of Police with notice of the intention to hold the assembly. This notice details certain information such as the date, time and place of the proposed assembly, its purpose and the number of people who are expected to participate. The assembly will be authorised if the Commissioner notifies the organiser that he does not oppose the assembly being held. In certain circumstances the Commissioner can apply to a court for an order prohibiting the public assembly or the organiser can apply to the court for an order authorising the public assembly.

There is no requirement that a person organising a public assembly submit a notice of intention to hold the assembly. However, if an assembly is authorised in accordance with Part 4, people who participate in the assembly cannot be prosecuted for participating in an unlawful assembly, or obstructing a person, vehicle or vessel in a public place, provided the public assembly is held substantially in accordance with the notice provided to the Commissioner. In this way, Part 4 provides people participating in assemblies with the opportunity for immunity against prosecution for behaviour which otherwise may constitute an offence.

The NSW Police Force has advised that local area commands independently manage smaller assemblies within their own resources. When a planned public assembly is too large to be managed by local policing resources, the local area command will provide a copy of the notice of intention to hold a public assembly to the relevant region command's planning unit. We asked the NSW Police Force to advise how many of these notices of intention were received by the region covering inner Sydney (Central Metropolitan Region), where most large-scale demonstrations take place. The NSW Police Force has advised that in the first year that the Part 6A legislation was in place (15 December 2005 to 15 December 2006), the Central Metropolitan Region's planning unit handled 54 notices of intention to hold a public assembly. All of these were authorised.

## Unlawful assemblies

Section 545C(1) of the *Crimes Act* provides that knowingly joining or continuing to participate in an unlawful assembly is an offence. There is a separate offence for being an armed member of an unlawful assembly — section 545C(2). An unlawful assembly is 'any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what the person is not legally bound to do or to abstain from doing what the person is legally entitled to do'.

NSW Bureau of Crime Statistics and Research analysis<sup>344</sup> showed there were no local or higher court convictions relating to unlawful assemblies in the first year the Part 6A powers were in place — that is, 15 December 2005 to 14 December 2006. Similarly, there were no convictions for the year preceding the introduction of the Part 6A powers — 15 December 2004 to 14 December 2005. However, in that period there were three charges laid for the offence of carrying an offensive weapon in an unlawful assembly — two were withdrawn and one was stood out of the list.

## Assemblies which have not been authorised but are not unlawful

As indicated above, an assembly does not become unlawful just because a person does not notify the Commissioner of its proposed occurrence. However, the participants do not have the benefit of immunity against prosecution for certain offences. An assembly will only be an unlawful assembly if it contains the elements of an unlawful assembly set out in section 545C.

There may be many assemblies that are not authorised assemblies, but are not unlawful assemblies either.

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## Endnotes

<sup>344</sup> Data provided by NSW Bureau of Crime Statistics and Research 15 March 2007 and 21 August 2007, ref vk075162.

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## Appendix D: List of submissions

Australian Hotels Association (NSW)

Australian Privacy Foundation

R. J. Bartley AM

Ben Blackburn

Canterbury City Council

Community Relations Commission

Legal Aid Commission NSW

Anthony Martin

Reba Meagher MP, Minister for Community Services, Aboriginal Affairs, Youth, and Minister assisting the Premier on citizenship

NSW Aboriginal Justice Advisory Council

NSW Attorney General's Department, Criminal Law Review Division

NSW Police Force, Chief Superintendent Cullen, Commander Public Order & Riot Squad

NSW Police Force, Commissioner's Office

NSW Police Force, Assistant Commissioner Parsons APM, Region Commander, Northern Region

NSW Commission for Children & Young People

NSW Department of Community Services

Office of the NSW Privacy Commissioner

Robert Pauling

Police Association of NSW

Randwick City Council

Redfern Legal Centre

Brian Rowe

Shopfront Youth Legal Centre

John Watkins MP, Deputy Premier, Minister for Police, Minister for Transport.



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# Acknowledgements

This report was researched and written by Brendan Delahunty, Kate McDonald, Nicole Blundell, Sharon Johnson and Liani Stockdale with assistance from the following Ombudsman staff: Simon Cohen, Julianna Demetrius, Kimber Swan, Gabrielle McNamara, Katrina Sanders, Laurel Russ, Rebecca Curran, David Ryan, Claudio Palma and Michelle Stewart.

We would like to thank the NSW Police Force for providing information and assistance for this review, in particular Nathan Vincent from the Commissioner's Inspectorate, and the many commanders who provided direct input through interviews, submissions and other assistance.

Thank you also to the individuals and organisations who contributed to the review by providing information, responding to surveys, participating in interviews and making written submissions.

NSW Ombudsman

Level 24 580 George St Sydney NSW 2000

Phone: 02 9286 1000

Fax: 02 9283 2911

Toll free (outside Sydney): 1800 451 524

Tel. typewriter: 02 9264 8050

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)