

**Review of Restricted Premises Act
police powers and offence provisions:
Issues Paper**

Review under Section 20A of the
Restricted Premises Act 1943

August 2015

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Glossary

2013 amendments	The amendments made to the <i>Restricted Premises Act 1943</i> by the <i>Firearms and Criminal Groups Legislation Amendment Act 2013</i>
additional section 13 search powers	The powers that police can exercise under a warrant issued pursuant to section 13(3) of the <i>Restricted Premises Act 1943</i> to search for weapons and explosives
additional section 10 search powers	The powers that police can exercise under section 10 of the <i>Restricted Premises Act 1943</i> at any time without a warrant to search for weapons and explosives
amendment act	<i>Firearms and Criminal Groups Legislation Amendment Act 2013</i>
bikie gang	bikie gang or OMCG (outlaw motorcycle gang)
LAC	Local Area Command (NSW Police Force)
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
NSWPD	New South Wales Parliamentary Debates
proscribed activities	The activities listed in section 3(1) of the <i>Restricted Premises Act 1943</i> : <ul style="list-style-type: none"> • drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character • unlawful sale or supply of alcohol or drugs • reputed criminals or associates of reputed criminals attend the premises • certain people, including 'a reputed criminal or an associate of reputed criminals', control or manage the premises.
review period	24 months between 1 November 2013 and 31 October 2015
Search Warrant SOPs	NSW Police Force, <i>Standard Operating Procedures for the execution of Search Warrants</i> , October 2014
standard LEPRA search warrant	Search warrant issued by an eligible issuing officer under section 48 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , on application by a police officer under section 47 of that Act
weapons and explosives warrants	The seven warrants that were issued under section 13(3) of the <i>Restricted Premises Act 1943</i> in the nine months after 1 November 2013, which authorised police to search for all items listed in section 13(3)(b), including any weapon or explosive

Chapter 1. Introduction

The *Restricted Premises Act 1943*, previously called the *Disorderly Houses Act 1943*, provides for a scheme to prevent unlawful and undesirable activities from taking place on premises. Originally the Act was used to target so-called 'sly grog shops' and nightclubs during the Second World War. Police could apply for a declaration over premises if they suspected that certain proscribed activities were occurring there, in particular the unlawful sale or supply of alcohol or drugs. In addition, police could obtain a warrant to search any such place, to find and confiscate alcohol and drugs. If the Supreme Court or District Court made a declaration, police were empowered to search the declared premises at any time without a search warrant, and owners and occupiers of the premises could commit certain offences.

On 15 October 2013, the NSW Parliament passed the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act), to give the police additional powers to combat gun-related crime.¹

One of the things the amendment Act did was to expand the list of items that police can search for under the *Restricted Premises Act*. Previously, the Act empowered police to search only for alcohol and drugs (and related items). After the amendments, police also have the power to search for weapons and explosives.

The amendment Act also introduced new offences. A new category of declaration – known as a 'reputed criminal declaration' – can be made if the predominant reason for the declaration is that reputed criminals attend, control or manage the premises.² The owner or occupier of those premises will commit an offence if a reputed criminal attends, controls or manages the premises while such a declaration is in force.³ These new offences are punishable by up to three years' imprisonment and/or a \$16,500 fine.

1.1 Background to the changes to the *Restricted Premises Act*

Between 2011 and 2013, there was extensive media coverage of drive-by shootings and other gun-related crime in Sydney.⁴ In July 2013, *The Daily Telegraph* reported that there had been 249 shootings⁵ and 21 gun-related killings⁶ since March 2011. These incidents occurred mainly in the western and south-western suburbs of Sydney,⁷ and were attributed to outlaw motorcycle gangs,⁸ other organised crime groups such as the Brothers 4 Life,⁹ and young men 'arming themselves with illegal guns to fight petty disputes'.¹⁰ This increased media coverage created a perception that there had been an increase in firearms crime in NSW, in particular drive-by shootings.

In October 2012, the Bureau of Crime Statistics and Research found that the frequency of most criminal offences involving firearms had decreased or stayed stable since 1995. However, it was reported that the number of incidents of drive-by shootings had more than doubled, from 41 in 1995 to 100 in 2011.¹¹ Further analysis in April 2013 found that:

*the trends in discharge firearm into premises, shoot with intent and unlawfully discharge firearm, individually and in total, have not shown statistically significant increases in the 2 years, 5 years, 10 years or 15 years up to December 2012. Generally speaking the pattern has been one of surges in the frequency of such incidence followed by periods of relative quiescence ...*¹²

1. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
2. *Restricted Premises Act 1943*, s. 3(3).
3. *Restricted Premises Act 1943*, ss. 8(2A), 9(3).
4. See, for example, Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014.
5. Ben McClellan, 'Dodging the bullets in war zone suburbs of Sydney', *The Daily Telegraph* (online), 26 July 2013, viewed 24 February 2014.
6. Andrew Clennell, Mark Morri, Yoni Bashan and Ben McClellan, 'Latest gun murders strike at the heart of safety in Sydney', *The Daily Telegraph* (online), 31 July 2013, viewed 4 March 2014.
7. Nathan Klein and Leigh van den Broeke, 'Gun violence plagues Sydney's streets', *The Daily Telegraph* (online), 20 April 2012, viewed 24 February 2014; 'NSW govt shoots down Labor's gun bill', *The Australian* (online), 12 September 2013, viewed 24 February 2014.
8. Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014.
9. Damien Murphy and Nick Ralston, 'Drive-by justice', *The Sydney Morning Herald* (online), 9 November 2013, viewed 24 February 2014.
10. Rachel Olding and Nick Ralston, "'Idiot factor" drives gun crime', *The Sydney Morning Herald* (online), 23 January 2013, viewed 24 February 2014.
11. Emma Birdsey, NSW Bureau of Crime Statistics and Research, Criminal offences involving firearms in New South Wales, 1995-2011, Crime and Justice Statistics Bureau Brief, Issue paper no. 82, October 2012, p. 8.
12. Jacqueline Fitzgerald, NSW Bureau of Crime Statistics and Research, *Non-fatal shootings in New South Wales*, Crime and Justice Statistics Bureau Brief, Issue paper no. 85, April 2013, p. 7.

In March 2013, the then Prime Minister, Julia Gillard, announced a National Anti-Gang Taskforce to fight gang-related crime across Australia, supported by the introduction of national anti-gang laws, national unexplained wealth laws and reforms to tackle the illegal firearms market.¹³ In April 2013, the Commonwealth also announced that it would seek to strengthen Australia's anti-gun laws through the Council of Australian Governments, including through possible implementation of 'additional firearm search powers to target repeat offenders', and the Council agreed to continue to cooperate to ensure that Australian law enforcement agencies have the powers needed to effectively respond to gang violence, organised crime and firearms-related crime.¹⁴

After a spate of shootings and four deaths in July 2013, then NSW Opposition Leader John Robertson criticised the NSW Government for failing to take action against criminal gangs and gun-related crime in Sydney.¹⁵ On 29 August 2013, Mr Robertson introduced into Parliament a private member's Bill, the Firearms Amendment (Prohibition Orders) Bill 2013. This Bill proposed a number of amendments to the *Firearms Act 1996*, including a new power for police to search any person subject to a firearms prohibition order, and their homes and vehicles, without a warrant, in addition to consequential amendments to the *Criminal Procedure Act 1986*.¹⁶

The private member's Bill was superseded on 17 September 2013 when then Premier Barry O'Farrell introduced the Firearms and Criminal Groups Legislation Amendment Bill 2013 into Parliament. The Bill contained proposed amendments to the firearms prohibition order scheme under the *Firearms Act* that were similar to those in the private member's bill introduced by the Opposition. However, the proposed amendments to the *Restricted Premises Act* were a new initiative, a product of consultation between the NSW Ministry for Police and Emergency Services and the NSW Police Force about options for tackling criminal organisations, in particular bikie gangs.¹⁷ In canvassing a range of options to tackle this modern policing problem, policy analysts looked to historical legislation. They discovered that the *Restricted Premises Act* could be adapted for use against places where bikies congregate. This is because the conduct giving rise to the relevant search powers and offences, such as the unlawful supply of alcohol, was viewed as conduct that often takes place at bikie clubhouses.

1.2 Parliamentary debate and concerns about the changes

The Firearms and Criminal Groups Legislation Amendment Bill 2013 proposed a number of measures aimed at combating gun-related crime, and included changes to the *Firearms Act*, the *Crime Commission Act 2012* and the *Restricted Premises Act*. When introducing the Bill, the then Premier stated:

*This bill will equip the NSW Police Force with powerful new weapons to help tackle criminals with guns. This legislation has been put together with the advice of the NSW Police Force to ensure that police have the power, the resources and the powerful new weapons to help tackle criminals with guns, in particular to target gun crime across Sydney.*¹⁸

The proposed changes to the *Restricted Premises Act* were largely unopposed in their passage through Parliament. However, Alex Greenwich MP criticised the expansion of the police power to search declared premises without a warrant to allow searches for weapons and explosives, stating that these powers 'should be scaled back, not expanded' and 'are open to police corruption and lack accountability'.¹⁹

The Legislation Review Committee, which has responsibility for considering Bills introduced into Parliament and reporting to Parliament on their impact upon specific rights and liberties, referred to Parliament its concern that the new offence provisions may unduly impact on the right to freedom of association.²⁰ However, this issue was not discussed during the parliamentary debates on the Bill.

13. The Hon. Julia Gillard (Prime Minister), *National Plan to Tackle Gangs, Organised Crime and the Illegal Firearms Market*, media release, Sydney, 6 March 2013.

14. Council of Australian Governments, *Council of Australian Governments Meeting – Communiqué*, Canberra, 19 April 2013.

15. Andrew Clennell, Mark Morri, Yoni Bashan and Ben McClellan, 'Latest gun murders strike at the heart of safety in Sydney', *The Daily Telegraph* (online), 31 July 2013, viewed 4 March 2014.

16. Firearms Amendment (Prohibition Orders) Bill 2013, Schedule 1, cl. 3.

17. Consultation with Ministry for Police and Emergency Services, 14 October 2014.

18. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

19. Alex Greenwich MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23680.

20. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 2013, pp. 15-16.

1.2.1 Parliament's intention when amending the Restricted Premises Act

The then Premier, in the second reading speech, stated that the amendments to the Restricted Premises Act would 'make it easier for police to get premises declared on the grounds that they are routinely used by serious criminals, such as gang clubhouses'.²¹ He noted that the amendments were also intended:

- to allow police to search premises specifically for firearms and other weapons, and
- to increase penalties for the offences which may be committed by owners and occupiers of declared premises.²²

However, he reassured Parliament that:

*Nothing in this legislation should concern innocent citizens of this State. This legislation will concern those who are involved in criminal activities involving guns. This legislation will ensure that those people have no place to hide.*²³

On 4 March 2014, the then Minister for Police and Emergency Services said that the changes to the Restricted Premises Act formed part of a number of measures aimed at assisting the NSW Police Force 'in their investigations and operations that target organised criminals'.²⁴

1.3 Our role and the purpose of this paper

The Ombudsman is required to keep under scrutiny the exercise of the police powers introduced by the amendments to the Restricted Premises Act and monitor the operation of the new offence provisions for two years.²⁵ As the amendments came into effect on 1 November 2013, we are conducting this review from 1 November 2013 to 31 October 2015.

We will report to the Minister for Police, the Attorney General and the Commissioner of Police as soon as practicable after this two year period, and the final report will be tabled in Parliament.²⁶

Our review is examining whether police have used the additional powers and new offence provisions appropriately and effectively, and whether any changes are necessary to the law or police policy and practice in this area. This issues paper sets out the key issues we have identified, for public consideration. The purpose of the paper is to invite members of the public and interested parties to provide submissions and comments on the issues we discuss, and any other issues they consider relevant, to inform our review.

We particularly welcome information about the personal experiences of people who have been directly affected by the exercise of the new police powers.

1.4 Invitation for submissions or information

Submissions or correspondence in relation to this issues paper are due by 2 October 2015 and can be sent by email or post to the addresses below. Responses are also welcome by fax. There is a document containing all the questions for consideration and an optional submissions template (in MS Word) available on the Ombudsman website: www.ombo.nsw.gov.au.

You are welcome to comment on any matter relating to the new police powers and offence provisions, not just those we have discussed in the issues paper. As we may publish the submissions we receive on our website or in the final report, please advise us if you do not want your submission to be made public.

If you would prefer to provide your comments by telephone or in a meeting with Ombudsman staff, please contact us.

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21. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

22. Ibid.

23. Ibid.

24. The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 March 2014, p. 26926.

25. *Restricted Premises Act 1943*, s. 20A(1).

26. *Restricted Premises Act 1943*, ss. 20A(4), (6).

Chapter 2. Legislative framework

This chapter provides a historical overview of the *Restricted Premises Act 1943*, outlines the legislative framework, and details the additional police powers and new offence provisions that the Ombudsman is responsible for reviewing.

2.1 Historical overview

The Restricted Premises Act was formerly known as the *Disorderly Houses Act 1943*. The Disorderly Houses Act was introduced during the Second World War to disrupt the activities of 'sly grog shops' and nightclubs.²⁷ National security was a central reason for the Act's creation. There was concern that members of the armed forces attending these premises would reveal defence secrets to foreign fighters.²⁸ The Act was used frequently following commencement, with 71 declarations made in the first 10 years of operation.

The Disorderly Houses Act established a scheme for the closure of declared disorderly houses.²⁹ The grounds on which a declaration could be sought, which continue to apply today, included that alcohol or drugs were unlawfully sold or supplied on the premises or that reputed criminals attended, controlled or managed the premises.³⁰ The original Act created a number of offences and powers to facilitate the closure of premises on which these proscribed activities took place. Firstly, it was an offence under section 7 for any person to attend a disorderly house, unless he or she was there for a lawful purpose. Secondly, the owner or occupier of declared premises was guilty of an offence under section 8 or 9 if any of the activities that could give rise to a declaration continued to take place. Thirdly, section 10 conferred powers upon police to forcibly enter and search disorderly houses and confiscate certain items.

The offences under sections 8 and 9 of the Disorderly Houses Act continue to operate today in a revised form. However, the offence under section 7 was repealed in 2002.³¹ At the same time, the Disorderly Houses Act was renamed the Restricted Premises Act by the *Disorderly Houses (Commercial Supply of Prohibited Drugs) Act 2002*, which also made a number of amendments aimed at enabling 'the effective policing of illegal suppliers of cannabis and other drugs'.³² These amendments included the introduction of new orders for the temporary closure of premises used for the commercial supply of prohibited drugs.³³

Since 2001, only four declarations have been made. Two of these declarations have been rescinded. In February 2009, the first declaration was made in relation to a bikie clubhouse, the Sydney headquarters of the Hells Angels in Guildford.³⁴ Although this declaration was never rescinded, it has effectively become inoperative because the clubhouse was closed down after it was made.³⁵ The second active declaration was made in June 2009 over the Astoria Hotel in Kings Cross, but has also become inoperative because the hotel was sold in the second half of 2014.³⁶

2.2 The Restricted Premises Act prior to the 2013 amendments

The existing scheme of the Restricted Premises Act was undisturbed by the changes made by the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act). The amendment Act instead added certain features to this scheme. This section outlines the following key aspects of the existing scheme:

- a process for police to obtain a declaration over premises under section 3
- offences that can be committed by owners and occupiers of declared premises under sections 8 and 9

27. The Hon. Robert Downing MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 20 May 1943, p. 3491.

28. The Hon. Robert Downing MLC, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3492.

29. The Hon. William McKell MP, NSWPD, (Hansard), Legislative Assembly, 19 May 1943, p. 3418.

30. *Disorderly Houses Act 1943*, s. 3(1).

31. Section 7 of the Disorderly Houses Act was repealed by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002*.

32. The Hon. John Della Bosca MP, NSWPD, (Hansard), Legislative Assembly, 20 November 2002, pp. 7100-7101.

33. *Restricted Premises Act 1943*, s. 15C.

34. *The Sydney Morning Herald*, 'Legal first: no warrant needed to raid Sydney Hells Angels', *The Sydney Morning Herald* (online), 28 January 2009, viewed 12 September 2014; *Restricted Premises Act 1943*, Notice of Declaration, 53 Broughton Street Old Guildford, *NSW Government Gazette*, No. 44, 27 February 2009, p. 1276.

35. Consultation with Strike Force Raptor, 30 September 2014.

36. Eryk Bagshaw, 'The death of Kings Cross as we know it', *The Sydney Morning Herald* (online), 22 September 2014, viewed 30 September 2014; *Restricted Premises Act 1943*, Notice of Declaration, 9 Darlinghurst Road Kings Cross, *NSW Government Gazette*, No. 87, 12 June 2009, p. 3057.

- search warrants that police can obtain under section 13
- the right of owners of items seized under a section 13 warrant to apply for the return of those items, and
- police powers to search premises subject to a declaration at any time without a warrant under section 10.

2.2.1 Declarations under section 3 and related offences under sections 8 and 9

A senior police officer can apply to the Supreme Court or the District Court to have premises declared under section 3 of the Restricted Premises Act. An application must be determined by a judge. In order for a declaration to be made, the officer must show 'reasonable grounds for suspecting' that one or more of the following activities listed in section 3(1) (the proscribed activities) take place on premises:

- drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character
- unlawful sale or supply of alcohol or drugs
- 'reputed criminals' or 'associates of reputed criminals' attend the premises
- certain people control or manage the premises, including (a) 'a reputed criminal or an associate of reputed criminals', and (b) a person who has managed premises subject to a declaration under the Act, premises attended by people of 'notoriously bad character', or premises on which alcohol or drugs have been unlawfully sold or supplied.³⁷

The purpose of making such a declaration is to put responsibility on the owners and occupiers of declared premises to stop the proscribed activities from continuing. Their incentive is that if the activities continue to take place on the premises while the declaration is in force, they may commit an offence.³⁸ The maximum penalty for this offence is a \$5,500 fine and/or six months' imprisonment.³⁹

An owner or occupier of premises over which police are seeking a declaration may have an opportunity to be involved in the proceedings and, if a declaration is made, will receive a notice of the declaration.⁴⁰ However, it is possible for a declaration to be made in the absence of the owner or occupier.⁴¹

2.2.2 Section 13 warrants

Section 13 gives police an option to apply for a warrant to search any premises, if they have reasonable grounds for believing that the proscribed activities are taking place there.⁴² Police are empowered to seize alcohol, drugs and related items when executing a section 13 warrant.⁴³ Information and items gathered as a result of these searches may be used by police in preparing an application for a declaration under the Act.

2.2.3 Section 10 search without warrant power

Once a declaration has been made, section 10 authorises police to search the premises at any time without a warrant, and as often as they wish, for alcohol, drugs and related items. The Restricted Premises Act contains no limitations on the use of these powers, unlike other regimes. For example, police can only use their search without warrant power under section 74A of the *Firearms Act 1996* 'as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence'.⁴⁴

2.3 Amendments made to the Restricted Premises Act by the amendment Act

The amendment Act added the following features to the existing scheme:

- a new category of declaration, called a reputed criminal declaration
- new offences that may be committed under sections 8(2A) and 9(3) by owners and occupiers of premises subject to a reputed criminal declaration

37. *Restricted Premises Act 1943*, s. 3(1).

38. *Restricted Premises Act 1943*, ss. 8(1), 9(1).

39. *Restricted Premises Act 1943*, ss. 8(1), 9(1).

40. *Restricted Premises Act 1943*, s. 6(1).

41. Under Schedule 10 of the Uniform Civil Procedure Rules 2005, 'the Supreme Court or the District Court may make a declaration under section 3 (1) of the Act even if the summons has not been served on the owner or occupier of the premises'.

42. *Restricted Premises Act 1943*, s. 13(2).

43. *Restricted Premises Act 1943*, s. 13(3)(b).

44. *Firearms Act 1996*, s. 74A(1).

- definitions of the terms 'reputed criminal' and 'associate of a reputed criminal', and
- new search and seizure powers under sections 10 and 13.

2.3.1 New category of 'reputed criminal declaration' and new offences under sections 8(2A) and 9(3)

The amendment Act provided for a new category of declaration called a 'reputed criminal declaration'. A reputed criminal declaration is made if the relevant court, when making the declaration, states that the reason (or predominant reason) for a declaration is that reputed criminals attend, control or manage the premises.⁴⁵

New offences, which may be committed by owners and occupiers of premises subject to a reputed criminal declaration, were introduced. Once a reputed criminal declaration is made, it is an offence under sections 8(2A) (committed by an owner) and 9(3) (committed by an occupier) if a reputed criminal subsequently attends, controls or manages the premises. Significantly, it is not the reputed criminal who commits the offence, but the owner or occupier of the premises. These offences are punishable by a substantially higher fine than the existing offences under sections 8 and 9. The maximum penalty is a \$16,500 fine and/or three years' imprisonment. These offences are indictable offences, but are to be dealt with summarily before the Local Court unless the prosecutor elects otherwise.⁴⁶

2.3.2 Definitions of 'reputed criminal' and 'associate of reputed criminal'

To provide 'certainty and guidance for police officers in preparing applications for a declaration',⁴⁷ the amendment Act inserted definitions of the terms 'reputed criminal' and 'associate of a reputed criminal'. These definitions are also relevant when police are applying for a section 13 warrant.

A 'reputed criminal' is defined as including a person who:

- has been convicted of an indictable offence (including the consorting offence under section 93X of the *Crimes Act 1900*), or
- is engaged in an organised criminal activity within the meaning of section 46AA of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
- is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.⁴⁸

An 'associate of a reputed criminal' is defined as including a person who has received an official consorting warning under section 93X of the *Crimes Act*.⁴⁹

The new definition of 'reputed criminal' must be applied by police when investigating and prosecuting the new offences in sections 8(2A) and 9(3), relating to reputed criminals attending, controlling or managing the premises.

2.3.3 Expanded search and seizure powers

The amendment Act expanded the existing search powers under the *Restricted Premises Act* to allow police to search for and seize 'any weapon or explosive' in addition to the items they could already seize.⁵⁰ Police may therefore be able to rely on the expanded search powers to search for weapons and explosives and/or the items previously listed – alcohol and drugs, and items related to the consumption, storage and supply of alcohol and drugs – once they have entered the premises. This applies when police are executing a section 13 warrant and when they are exercising their powers to search declared premises without a warrant under section 10.

45. *Restricted Premises Act 1943*, s. 3(3).

46. *Restricted Premises Act 1943*, s. 18A(2). If dealt with in the Local Court, the maximum penalty is two years' imprisonment and/or a \$5,500 fine: see *Criminal Procedure Act 1986*, s. 268.

47. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

48. *Restricted Premises Act 1943*, s. 2.

49. *Restricted Premises Act 1943*, s. 2.

50. See *Restricted Premises Act 1943*, ss. 10(f), 13(3)(b).

2.3.3.1 What items can police search for under section 10 and section 13?

When exercising their expanded search powers under section 10 and section 13, police may search only for the following items:

- alcohol and any drinking glasses, vessels, containers or devices used or capable of being used to store, supply or consume alcohol⁵¹
- drugs and any vessels, containers or devices used or capable of being used to store, supply, use or take drugs⁵²
- weapons⁵³
- explosives.⁵⁴

A section 13 warrant may authorise police to search for any or all of these items. When police are exercising the section 10 search powers, they can search for all of these items.

A 'weapon' is defined as 'a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*' or 'a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*'.⁵⁵ Prohibited weapons include certain knives, military-style weapons such as bombs and grenades, certain imitation weapons and concealed blades, miscellaneous weapons such as tasers and knuckle-dusters, and miscellaneous items such as handcuffs, silencers, brass catchers and detachable firearm magazines, as listed in Schedule 1 to the *Weapons Prohibition Act 1998*.

'Explosive' has the same meaning as in the *Explosives Act 2003*,⁵⁶ which is an article or substance prescribed by the Explosives Regulation 2013.⁵⁷ There are three categories of explosives prescribed by the Explosives Regulation:

- dangerous goods of Class 1 within the meaning of the *Australian Dangerous Goods Code*⁵⁸ or the *Australian Explosives Code*⁵⁹
- goods too dangerous to be transported (within the meaning of the *Australian Dangerous Goods Code* or the *Australian Explosives Code*) that can produce an explosive or pyrotechnic effect, and
- articles or substances that, when manufactured, mixed or assembled, can produce an explosive or pyrotechnic effect.⁶⁰

These explosives include certain chemicals, detonators, bombs, fireworks and various categories of ammunition.

2.3.3.2 NSW Police Force procedures, policies and guidelines for the exercise of the additional search powers

The *Standard Operating Procedures for the execution of Search Warrants* (Search Warrant SOPs), in force since 1 November 2014, apply to the execution of search warrants in addition to other situations where police lawfully enter premises without the consent of the occupier.⁶¹ Police exercising search powers under both section 10 and section 13 are required to follow them. The NSW Police Force has also developed a Search Warrant Toolkit to provide police with a 'one stop shop' for information, guidance, forms and tools to be used when executing search warrants and conducting other uninvited entry operations.⁶² These policies and resources provide a comprehensive set of guidelines to ensure that police conduct searches in a way that minimises any risks involved and provides accountability.

The Search Warrant SOPs set out processes including:

- the mandatory steps that must be undertaken during the pre execution, execution and post execution phases of searches, incorporating detailed risk assessment procedures
- the mandatory roles that must be undertaken during these three phases
- the role of the newly created Search Warrant Review Committee,⁶³ and
- instructions for the video recording of searches.⁶⁴

51. *Restricted Premises Act 1943*, ss. 10(e), 13(3).

52. *Restricted Premises Act 1943*, ss. 10(e), 13(3).

53. *Restricted Premises Act 1943*, s. 13(3).

54. *Restricted Premises Act 1943*, s. 13(3).

55. *Restricted Premises Act 1943*, s. 2.

56. *Restricted Premises Act 1943*, s. 2.

57. *Explosives Act 2003*, s. 3(1).

58. National Transport Commission, *Australian Code for the Transport of Dangerous Goods by Road & Rail*, 7.3 ed, August 2014.

59. Workplace Relations Ministers' Council, *Australian Code for the Transport of Explosives by Road and Rail*, 3rd ed, 2009.

60. Explosives Regulation 2013, s. 4.

61. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants*, October 2014 (Search Warrant SOPs).

62. NSW Police Force, *Search Warrant Toolkit*, 1 July 2014.

63. This Committee is responsible for reviewing the execution of search warrants and uninvited entry operations which meet certain criteria and reviewing the contents of the Search Warrant Toolkit: see Search Warrant SOPs, p. 30.

64. Search Warrant SOPs, October 2014, pp. 16, 25-26, 40-41.

The search warrant participants must include an Independent Observer; that is, an officer not connected with the investigation, responsible for acting as an impartial observer and ensuring the propriety and integrity of the search.⁶⁵ Another mandatory role is that of the Safety Check Officer, who monitors and guides safe work practices for the search warrant team.⁶⁶ Police are required under the Search Warrant SOPs to provide an occupier's notice to the person occupying the premises,⁶⁷ to describe the search warrant and to outline the rights and obligations of police and the occupants.⁶⁸

2.4 Powers and provisions under review by the Ombudsman

The Ombudsman is required to review two aspects of the amendments made by the amendment Act. Firstly, we are to keep under scrutiny the additional powers inserted in sections 10 and 13 for police to search for and seize weapons and explosives.⁶⁹ Secondly, we are responsible for monitoring the operation of the new offence provisions in sections 8(2A) and 9(3).⁷⁰

65. Search Warrant SOPs, p. 28.

66. Search Warrant SOPs, pp. 27-28.

67. Search Warrant SOPs, p. 19.

68. Search Warrant SOPs, p. 14.

69. *Restricted Premises Act 1943*, s. 20A(1).

70. *Restricted Premises Act 1943*, s. 20A(3).

Chapter 3. The additional section 13 search powers

This chapter discusses issues relating to police use of the additional powers to search for and seize weapons and explosives when executing a warrant under section 13 of the *Restricted Premises Act 1943*. We call these powers 'the additional section 13 search powers' throughout the issues paper. During the first 18 months of the review period from 1 November 2013 to 30 April 2015, the additional section 13 search powers were used on seven occasions. All premises searched were suspected to be operating as clubhouses for bikie gangs, which the NSW Police Force refers to as OMCGs (outlaw motorcycle gangs).

The discussion in this chapter of necessity also covers aspects of the section 13 search powers more broadly. This is because on the seven occasions in which police exercised the additional section 13 search powers, they were exercising the existing section 13 search powers simultaneously. In addition, the way in which police have exercised the existing section 13 search powers provides a useful point of comparison.

3.1 Applying for and executing section 13 warrants

A police officer may apply for a section 13 warrant if he or she reasonably believes that 'any of the conditions referred to in section 3(1) obtain, and are commonly reported to obtain, in respect of any premises'.⁷¹ The conditions or activities listed in section 3(1) (the proscribed activities) are:

- drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character
- unlawful sale or supply of alcohol or drugs
- reputed criminals or associates of reputed criminals attend the premises
- certain people, including 'a reputed criminal or an associate of reputed criminals', control or manage the premises.⁷²

An application for a section 13 warrant may be made to a Magistrate, a registrar of the Local Court or another 'authorised officer',⁷³ who may only issue the warrant 'if satisfied that there are reasonable grounds to do so'.⁷⁴ An owner or occupier of premises in relation to which a section 13 warrant is sought has no entitlement to be involved in the proceedings and would not know about the issue of the warrant until police turn up to search the premises. An owner or occupier of searched premises may make an application to a Magistrate for the return of goods seized by police.⁷⁵

As outlined in chapter 2, police could already search for drugs, alcohol and related items when executing section 13 warrants. The amendment Act expanded these powers to allow them to search for weapons and explosives at the same time.

Part 5, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) applies to the issue of section 13 warrants.⁷⁶ Those provisions impose a number of requirements to safeguard the rights of occupiers of premises searched under a warrant and ensure that searches are carried out in a fair and reasonable manner. For example, the police officer seeking the warrant must furnish a report in writing to the officer who issued the warrant, providing advice about whether or not the warrant was executed, the result of the execution of the warrant and a brief description of anything seized.⁷⁷ The provisions also provide for powers and arrangements to facilitate the execution of warrants.⁷⁸ See section 4.3 of this issues paper for more specific details about those provisions.

We note that the proscribed activities on which a section 13 warrant may be based do not include any conduct relating to weapons or explosives. Yet a section 13 warrant may be issued to search for, and seize, these items. This is because, somewhat anomalously, while the 2013 amendments added weapons and explosives to the list of items that could be searched for under section 13, no amendment was made to the list of proscribed activities. This means that police can be granted a section 13 warrant to search for weapons and explosives even if they have no reason to believe that weapons and explosives are on the premises, or that there is any other nexus between the premises and such items.

71. *Restricted Premises Act 1943*, s. 13(2). However, under section 2 of the *Restricted Premises Act*, licensed premises and registered clubs are excluded from the definition of premises, which means that the search powers cannot be exercised on these types of premises.

72. *Restricted Premises Act 1943*, s. 3(1)(d).

73. An 'authorised officer' includes a Magistrate, Children's Magistrate and registrar of the Local Court, or an authorised employee of the Department of Justice: see *Restricted Premises Act 1943*, s. 13(1) ; *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 3(1).

74. *Restricted Premises Act 1943*, s. 13(3).

75. *Restricted Premises Act 1943*, s. 13A.

76. *Restricted Premises Act 1943*, s. 13(4).

77. LEPRA, s. 74.

78. LEPRA, ss. 59-76.

This approach is very different to the circumstances in which police can obtain a standard LEPPRA search warrant, which empowers a police officer to search for a thing connected to a particular offence, and then only if the officer reasonably believes that the thing is in or on the premises, or will be within the next 72 hours.⁷⁹ It is also somewhat at odds with the common law position that a 'general warrant', allowing police to search for things that evidence the 'commission of offences generally',⁸⁰ or identifying 'a multitude of different and unrelated offences',⁸¹ is not permitted.⁸²

3.2 The purpose of section 13 warrants

Section 13 was originally intended to allow police to investigate whether the proscribed activities were occurring on suspected premises and to seize evidence to support an application for a declaration. During the parliamentary debates for the original Act,⁸³ the then leader of the Opposition remarked that:

*where there is a suspicion that a house is being conducted in a disorderly manner a search warrant should be taken out, a search made, and if sufficient evidence be found that it is a disorderly house, the inspector of police should then make his affidavit, and have the house declared.*⁸⁴

The term 'suspected premises' in the title of section 13 provides another indication that these powers were intended to assist police in determining whether suspected premises were suitable candidates for a declaration.⁸⁵

However, the amendment to section 13 allowing police to search for weapons and explosives is not related to the need for evidence in support of a declaration. This is because the proscribed activities do not include the presence of weapons or explosives on the premises or activity relating to a weapons or explosives offence.

3.3 The use of the additional section 13 search powers from 1 November 2013 to 30 June 2015

Police have exercised the additional section 13 search powers on seven occasions during the 20 months from 1 November 2013 to 30 June 2015. They executed seven section 13 warrants authorising them to search for all of the items that a section 13 warrant can be issued for, including weapons and explosives. In this issues paper we refer to these seven warrants as the 'weapons and explosives warrants'.

All of the weapons and explosives warrants were executed on premises suspected of being used as bikie clubhouses. The searches were conducted at the following locations and suspected clubhouses on the following dates:

- Girraween (Nomads), 6 December 2013
- Boolaroo (Life & Death), 13 February 2014
- Newcastle (Rebels), 20 February 2014
- Woy Woy (Rebels), 11 April 2014
- Leppington (Rebels), 15 April 2014
- Warwick Farm (Rebels), 9 May 2014
- Burwood (Rebels), 9 May 2014.

Each of the seven premises had been set up like a bar, with tables and chairs, lounges, a bar service area and bar stools. Six of them had a stage set up for performances, and two of them had stripper poles. Five of them had the bikie gang's posters and slogans on the walls. In one of the premises there was also a separate area upstairs with bedding, indicating that someone may have been living there.

79. LEPPRA, s. 47(1).

80. *Esso Australia v Curran* (1989) 39 A Crim R 157 at 163.

81. *Esso Australia v Curran* (1989) 39 A Crim R 157 at 164.

82. We note, however, that one possible interpretation of the requirement in section 13(3) for the issuing officer to be 'satisfied that there are reasonable grounds for doing so' before issuing a section 13 warrant is that police would be expected to provide additional justification for seizing any or all of the listed items, over and above information about the proscribed activities taking place on the premises.

83. *Disorderly Houses Act 1943*.

84. The Hon. Alexander Mair MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 19 May 1943, p. 3430, regarding the *Disorderly Houses Bill 1943*.

85. The original heading was 'Special warrant to enter and search suspected premises', *Disorderly Houses Act 1943*, s. 13 (as first enacted).

Six of the properties were commercial or industrial premises. The seventh comprised a two bedroom residential unit which had been converted. The premises had a bar, a pool table, separate men's and women's bathrooms, a commercial music system and a modified wall which may have been for noise insulation. There were no beds, clothing or other items on the premises that would suggest it was being used as a residence.

All of the weapons and explosives warrants were issued by Local Court registrars.

The use of the section 13 search powers since the 2013 amendments entered into force has primarily been led by Strike Force Raptor, in collaboration with Local Area Commands (LACs), as part of a range of strategies to combat bikie gangs.⁸⁶ Strike Force Raptor was launched on 27 March 2009, following a fatal brawl between members of the Hells Angels and Comancheros bikie gangs at Sydney Airport on 22 March 2009.⁸⁷ A unit within the Gangs Squad, Strike Force Raptor conducts proactive operations to disrupt the serious criminal activities of OMCGs and prevent violence between them. The Gangs Squad drives the NSW Police Force response to gang-related crime. It is one of 12 squads that make up the State Crime Command and falls within the Organised Crime Directorate.

Strike Force Raptor applied for five of the weapons and explosives warrants, while officers from the Gangs Squad and a LAC applied for the remaining two. Six of the warrants were executed by officers from Strike Force Raptor, together with officers from the LAC in which the premises were located and specialist units such as the Public Order and Riot Squad, the Rescue and Bomb Disposal Unit and the Dog Unit. One search was coordinated and executed by officers from a LAC, with the assistance of Strike Force Raptor and the Rescue and Bomb Disposal Unit, as well as local council rangers who were told provided expert assistance based on their knowledge of the searched property.

The police used force to enter at least three of the seven premises, where there was either no one present at the time of entry or someone present who did not respond to police. One of the weapons and explosives warrants was executed shortly after the execution of a crime scene warrant on the same premises in connection with a murder.

3.3.1 What did police find and remove?

The weapons and explosives warrants authorised police to search for and seize:

- alcohol
- drugs
- any drinking glass, vessel, container or device that can be used in connection with the storage, supply or consumption of any alcohol or drug
- weapons, and
- explosives.

The most common item found in the premises searched was alcohol. Police found substantial quantities in all seven searches.

Small quantities of prohibited drugs (amphetamines and cannabis) were located in three of the searches.

Only one of the searches found firearms and ammunition. During that search, police found and seized an air rifle, a pistol, a sawn-off shotgun, 52 rounds of ammunition, a ledger relating to the manufacture of explosives, a rifle scope, and a speed loader for .38 firearm cartridges.

Another search found explosives. In that search police found and seized a quantity of Powergel (C4).

In four of the searches, police located and seized a number of knives and swords and, in one case, a set of knuckle-dusters.

Police also seized most of the rest of the contents of each premises, including:

- cash and bar tickets
- stages and stripper poles they had dismantled
- furniture, electrical appliances, entertainment units, and sound and lighting systems
- a laptop, USBs, ledgers, letters and other documents
- bedding
- tattoo equipment, and
- bikie gang clothing and memorabilia.

86. Consultation with Strike Force Raptor, 30 September 2014.

87. Nick Ralston, Stephanie Gardiner and Kellee Nolan, 'NSW Police double gang squad members', *The Sydney Morning Herald* (online), 23 March 2009, viewed 20 January 2015.

3.3.2 Charges resulting from the seven weapons and explosives warrants

Charges were laid following five of the searches. Those charges and the related court outcomes were as follows:

- **Girraween:** The occupier was charged with carrying out a development without development consent.⁸⁸ He was convicted and fined \$5,000.
- **Woy Woy:** The occupier was charged with carrying out a development without development consent.⁸⁹ This charge has been withdrawn.
- **Warwick Farm:** The occupier was charged with selling alcohol without a licence, using premises to sell alcohol without a licence, and failing to comply with a requirement under Part 4 of the *Gaming and Liquor Administration Act 2007*.⁹⁰ He was convicted and received fines totalling \$15,000.
- **Boolaroo:** The occupier was charged with unauthorised possession of a firearm, unregistered possession of a prohibited firearm, and not keeping a firearm safely.⁹¹ He was convicted and received fines totalling \$550.
- **Leppington:**
 - Two men were each charged with one count of possessing a prohibited drug.⁹² They were each convicted, and fined \$1,000 and \$500 respectively.
 - Another man was charged with resisting an officer in the execution of his or her duty, and two counts of assaulting an officer in the execution of his or her duty.⁹³ He was convicted and received a suspended sentence of 12 months' imprisonment.
 - Another man was charged with multiple counts relating to possessing and supplying prohibited drugs, having stolen goods in custody, and dealing with the proceeds of crime. He was convicted of supplying prohibited drugs on an ongoing basis, possessing a prohibited drug and having stolen goods in custody, receiving a sentence of 16 months' imprisonment with a four month non-parole period. He was found not guilty of knowingly dealing with the proceeds of crime, and the remaining charges were withdrawn.

As this information shows, although a lot of alcohol was seized, only one occupier was charged with selling alcohol without a licence. In two cases the occupiers were charged with offences under the laws governing how premises in particular areas can be fitted out and used (the charges were for carrying out a development without development consent contrary to section 76A(1)(a) of the *Environmental Planning and Assessment Act 1979*).

3.3.3 Use of section 13 to dismantle bikie clubhouses

The potential to use the Restricted Premises Act to target bikie clubhouses was first identified by Strike Force Raptor officers shortly after the unit's launch, when it was realised that many such clubhouses fell squarely within the proscribed activities triggering the section 13 search powers and the declaration process, due to suspected unlawful supply of alcohol at these premises.⁹⁴

Strike Force Raptor and various LACs have used the section 13 search powers to achieve a number of objectives. Police media have reported that Strike Force Raptor has on numerous occasions used these powers to 'dismantle' bikie clubhouses,⁹⁵ with more than 30 now closed down.⁹⁶ In practice, as described earlier in this chapter, police have relied on a broad interpretation of the meaning of 'device ... which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor' to strip premises of most items, including furniture.

Officers told us that the section 13 search powers, including the weapons and explosive warrants, also provided them with an opportunity to investigate offences that were suspected of being committed on premises suspected of being used as a bikie clubhouse. In particular, they investigated possible breach of liquor laws and use of premises contrary to applicable development applications and zoning requirements under environmental planning laws. In three cases, the officers executing the weapons and explosives warrants told the occupants that they could be committing a criminal offence if they continued to use the premises in the same fashion.

88. *Environmental Planning and Assessment Act 1979*, s. 76A(1)(a).

89. *Environmental Planning and Assessment Act 1979*, s. 76A(1)(a).

90. *Liquor Act 2007*, ss. 7(1), 8(1)(a); *Gaming and Liquor Administration Act 2007*, s. 34(1).

91. *Firearms Act 1996*, ss. 7A(1), 36(1), 39(1)(a).

92. *Drug Misuse and Trafficking Act 1985*, s. 10(1).

93. *Crimes Act 1900*, s. 58.

94. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014.

95. NSW Police Force, 'Raptor takes down one percenters', *Police Monthly*, May 2014, pp. 7-9.

96. NSW Police Force, 'Caught for consorting', *Police Monthly*, March 2015, p. 5; Ashley Mullaney, 'Bikie Crime Crackdown: Clubbed-House', *The Daily Telegraph*, 8 June 2015, p. 9. The Investigations Coordinator of Strike Force Raptor has confirmed that this action was taken using section 13 of the Restricted Premises Act: Consultation with Strike Force Raptor, 2 April 2015.

Officers observed that gang members and associates rarely returned after a search had been conducted.⁹⁷ In effect, those people stopped using the premises. As a result, police have only applied for a declaration over one of the searched premises during the first 18 months of the review period, the national clubhouse of the Rebels bikie gang at Leppington. This clubhouse is owned by Alex Vella, the national president of the Rebels,⁹⁸ which is considered one of Australia's most serious criminal threats.⁹⁹ The application is yet to be determined.

Although numerous clubhouses exist throughout NSW, not all of them have been searched using the section 13 powers. Officers from Strike Force Raptor advised that they use a strategic and intelligence-led approach in selecting clubhouses to target using the section 13 search powers.¹⁰⁰ The unit uses an approach it calls 'consequence-based policing', meaning that it develops strategies to respond to any detected increase in violence or overt criminal activity by a particular OMCG, rather than targeting OMCGs generally.¹⁰¹

The recent use of the section 13 search powers by police appears to be different from how Parliament envisaged the powers would be used. The original Act¹⁰² was designed to curb the operation of 'disorderly houses' by prosecuting offences committed *after* a declaration was made by the court over the premises.¹⁰³ These offences included an offence by an owner of failing to take reasonable steps to evict an occupier, and an offence by an occupier of failing to take reasonable steps to prevent the proscribed activities from continuing on the premises.¹⁰⁴ It was originally an offence for a person to be found in or leaving declared premises without a lawful purpose.¹⁰⁵ The purpose of giving police the section 13 search and seizure powers was to give them the ability to gather evidence to support an application to the court for a declaration.¹⁰⁶

In making the 2013 amendments to the Restricted Premises Act, the then Premier anticipated that police may seek declarations to take action against bikie clubhouses. In Parliament, he stated that '[t]hese amendments will make it easier to get premises declared on the grounds that they are routinely used by serious criminals, such as gang clubhouses'.¹⁰⁷ The intention to make it easier to get premises declared seems based on an assumption that it would be necessary to have premises declared before action could be taken to shut down the use of those premises as a clubhouse. The way police have used section 13 has demonstrated that this step has not, in practice, been necessary. Section 13 searches have been used to dismantle clubhouses and have resulted in the clubhouse closing in most cases, without the need for a declaration by the court or the prosecution of owners or occupiers of the premises for the relevant offences.

During our consultations with Strike Force Raptor, officers told us that the additional powers to search for and seize weapons and explosives did not greatly change the way in which police were already using the section 13 search powers. In fact, they explained that police have still been largely relying on the existing powers to search for alcohol, drugs and related items to achieve their objectives. Although more than 30 suspected clubhouses have been dismantled, only seven were searched using a weapons and explosives warrant, as already outlined. Some officers expressed the view that the 2013 amendments had not actually expanded the powers of police to search for weapons and explosives in a practical sense.¹⁰⁸ They suggested that if police discovered any illicit firearms during a section 13 search for drugs and alcohol, they already had other powers to seize them.¹⁰⁹

97. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014; Consultation with Lake Macquarie LAC and Brisbane Water LAC, 26 November 2014; Consultation with Burwood LAC, 4 December 2014.

98. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014.

99. Australian Crime Commission, *Attero National Task Force*, viewed 21 January 2015, <https://www.crimecommission.gov.au/organised-crime/joint-task-forces-and-initiatives/attero-national-task-force>.

100. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014.

101. NSW Police Force, *SCC Gangs Squad dismantles Rebels Newcastle clubhouse*, media release, 20 February 2014; NSW Police Force, *Major interstate police crackdown on bikies – Tweed-Byron LAC*, media release, 21 March 2014; NSW Police Force, *Rebels Liverpool clubhouse dismantled, bikies arrested and cannabis house shut down – SCC Gangs Squad*, media release, 9 May 2014; NSW Police Force, *Police dismantle OMCG clubhouse in Tweed Heads following search warrant – Strike Force Raptor*, media release, 23 November 2014; NSW Police Force, 'Caught for consorting', *Police Monthly*, March 2015, p. 5.

102. *Disorderly Houses Act 1943*.

103. In the second reading speech for the Disorderly Houses Bill 1943, the then Premier stated that '[t]he bill provides for the closing of what are designated disorderly houses': The Hon. William McKell MP, NSWPD, (Hansard), Legislative Assembly, 19 May 1943, p. 3418.

104. *Restricted Premises Act 1943*, ss. 8(1), 9(1).

105. *Disorderly Houses Act 1943*, s. 7. This provision was repealed by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002*.

106. The Hon. Alexander Mair MP, NSWPD, (Hansard), Legislative Assembly, 19 May 1943, p. 3430, regarding the Disorderly Houses Bill 1943.

107. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

108. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014; Consultation with Lake Macquarie LAC and Brisbane Water LAC, 26 November 2014; Consultation with Burwood LAC, 4 December 2014.

109. For example, police can seize a 'dangerous article' on premises if they reasonably suspect the article was used to commit certain offences (LEPRA s. 22), they can seize any ammunition which is not being kept safely in accordance with Part 4 of the Firearms Act, and they can apply for a search warrant if they have reasonable ground to believe that weapons connected to an offence are located on premises (see LEPRA, s. 47).

Questions for consideration

1. **What are your views on the way police have used the section 13 search powers during the review period?**
2. **What are your views on whether the expansion of section 13 to allow police to search for weapons and explosives is necessary, given the existing powers available to police to search for and seize these items and the way that police have used the section 13 search powers in practice?**

3.4 Issues relating to the items seized during exercise of the additional section 13 search powers

Section 13 warrants authorise the seizure of items as described and defined in the Restricted Premises Act. There are currently no policies in place to guide police in interpreting the relevant provisions.

As discussed above, when conducting searches of suspected bikie clubhouses under section 13 warrants, including the weapons and explosives warrants, police have stripped the premises of almost all their contents. This is not how police conduct other types of search. The *NSW Police Force Handbook* explains that:

The actual seizure of an item is often unnecessary. On most occasions, photographs of an exhibit will suffice as evidence [of an offence]. You only need to keep the actual item where there is something special about it that would not be obvious from the photograph. Examples of exhibits that should be kept include items that:

- are to be analysed or tested in some way and/or
- have a unique characteristic, label or marking.¹¹⁰

Some LAC officers we consulted explained that they would typically only seize illicit items or other things connected with an offence. We asked those officers whether, for example, they would seize a bed located in industrial premises as evidence of a breach of a development application under the Environmental Planning and Assessment Act. They explained that they could do so, but could alternatively just take a photograph.

We discuss some issues relating to the interpretation of the provisions governing the items police can seize when executing a section 13 warrant in more detail below. Since police can seize exactly the same items when exercising powers under section 10 and section 13, the issues raised in this section are also relevant to the use of the section 10 search powers.

3.4.1 Interpretation of section 13(3)(b) – device related to alcohol

A search warrant can be issued under section 13 to authorise police to search the premises for any drinking glasses, vessels, containers or 'devices' described in section 10(e), in addition to alcohol, drugs, weapons and explosives.¹¹¹ The devices described in section 10(e) include any device 'capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the ... [use] or taking of any drug'. The legislative intent appears to be that to effectively prevent the continued use of the premises to unlawfully supply alcohol and/or drugs, police must be empowered to seize not only the substances but also paraphernalia associated with them.

Some of the items seized during execution of the weapons and explosives warrants were items that were unambiguously capable of being used in connection with storing, serving or consuming alcohol, such as fridges, eskies and glassware.

The NSW Police Force advised that the seizure of other items, such as 'furniture, stages, entertainment systems, pool tables, stripper poles, bars and bar utilities, cash boxes, cash and paperwork', was on the basis that they were 'devices' as described in section 10(e). In its view, these items fell within the definition because they 'all contribute to enhance the ambience of the premises to support the sale and consumption of alcohol in the same way that legitimate commercial licensed premises undertake fitouts'.¹¹²

110. NSW Police Force, *NSW Police Force Handbook*, 20 January 2015, p. 359.

111. *Restricted Premises Act 1943*, section 13(3)(b).

112. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, to Michael Gleeson, Deputy Ombudsman (Police), dated 18 February 2015.

This view was also expressed to us during our consultations with LAC officers. Because the residential unit searched in the LAC had been completely converted and appeared to be functioning solely like other commercial premises where the sale and consumption of alcohol is the primary activity, they formed the view that all of the items on the premises were there to be used in connection with the supply or consumption of alcohol. They also said that, in other circumstances, they would probably not seize all items from searched premises.

In our view, there is ambiguity in the Restricted Premises Act's description of a 'device ... which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor'. It could be argued, for example, that items such as furniture, pool tables and stages are not 'devices' in the ordinary sense of the word, and are not inherently connected with the supply or consumption of alcohol. On the other hand, it could be argued that by being placed and used in close proximity to a bar, these objects are then 'capable of being used ... in connection with' the supply or consumption of liquor.

In light of this ambiguity, the question arises as to whether clarification or guidance should be provided in the Restricted Premises Act or internal police guidelines, to ensure that police practice is consistent with the intention of the Act.

Question for consideration

3. What are your views on the need for clarification around the meaning of the items described in section 10(e)? If clarification is required, what should that be?

3.4.2 Interpretation of 'weapon' and 'explosive'

The terms 'weapon' and 'explosive' have very technical meanings under the law. The Restricted Premises Act defines a 'weapon' as:

- (a) a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*, or
- (b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*.¹¹³

An 'explosive' is defined as having 'the same meaning as in the *Explosives Act 2003*'.¹¹⁴

By reference to these other Acts, these definitions of 'weapon' and 'explosive' allow police to confiscate a broad range of items, such as:

- firearms (including pistols, blank fire firearms and air guns), imitation firearms, and firearms which are incomplete, defective or obstructed¹¹⁵
- a range of 'prohibited weapons', including certain knives, military-style weapons such as bombs and grenades, certain imitation weapons and concealed blades, miscellaneous weapons such as tasers and knuckle-dusters, and miscellaneous items such as handcuffs, silencers, brass-catchers and detachable firearm magazines,¹¹⁶ and
- an extensive list of explosives, including certain chemicals, detonators, bombs, fireworks and various categories of ammunition.¹¹⁷

However, the definitions do not cover every type of firearm part nor every type of knife. The definitions capture only one type of firearm part (detachable firearm magazines), and two types of firearm attachments (silencers and brass-catchers), which are listed as 'prohibited weapons' in the *Weapons Prohibition Act 1998*.¹¹⁸

113. *Restricted Premises Act 1943*, s. 2.

114. *Restricted Premises Act 1943*, s. 2.

115. *Firearms Act 1996*, ss. 4(1)-(2), 4D.

116. *Weapons Prohibition Act 1998*, s. 4(1), Schedule 1.

117. The *Explosives Act 2003* and Explosives Regulation 2013 define 'explosive' by reference to certain Codes published by the Australian Government: *Explosives Act 2003*, s. 3(1); Explosives Regulation 2013, cls. 3(1), 4; National Transport Commission, *Australian Code for the Transport of Dangerous Goods by Road & Rail*, 7.3 ed, August 2014; Safe Work Australia, *Australian Code for the Transport of Explosives by Road and Rail*, 3rd ed, 1 January 2009.

118. *Weapons Prohibition Act 1998*, s. 4(1) and Schedule 1, cl. 4(3)-(5).

We note that the amendment Act also made changes to the *Firearms Act 1996*, empowering police to search for items described as ‘firearms, firearm parts and ammunition’,¹¹⁹ a description that is different from ‘weapons and explosives’.

During the execution of one of the weapons and explosives warrants, police seized two firearm parts – a rifle scope and a speed reloader – that do not appear to fall within the definition of ‘weapon’ or ‘explosive’. We wrote to the NSW Police Force to ask about the legal basis for seizing these items. In its response, it wrote:

The Ombudsman’s office has noted that the definitions of ‘weapon’ and ‘explosive’ in ... the Restricted Premises Act are complex, and incorporate terms defined in a number of other Acts and statutory instruments.

Difficulties for operational police are often experienced in interpreting definitions. While there is judicial precedent that suggests that firearm parts may be regarded as a firearm as defined within the Firearms Act 1996, any amendments to clarify or make definitions more inclusive would be beneficial to operational police

The rifle scope and speed reloader were seized at the Boolaroo clubhouse to assist in the investigation of the firearm possession offences.¹²⁰

Question for consideration

4. Should the definition of ‘weapon’ in the Restricted Premises Act be amended to explicitly include firearm parts?

3.4.3 Common law powers to seize items connected to a serious offence

In the course of conducting a section 13 search, police might incidentally discover items of interest that they are not permitted to seize using the section 13 search powers. During our consultations, some police officers expressed the view that it would be useful if the Restricted Premises Act included an express power for police to seize additional items believed to be connected to an offence while exercising the section 13 search powers, similar to the ancillary seizure power attaching to a standard LEPRA search warrant. Section 49 of LEPRA allows a police officer executing such a warrant ‘to seize and detain any other thing that the person finds in the course of executing the warrant and that the person has reasonable grounds to believe is connected with any offence’.¹²¹

We note that police were not restricted by the absence of such an ancillary power in stripping each of the seven premises searched under the weapons and explosives warrants.

In addition, police have a variety of other powers and processes already available to them to seize items found incidentally in this way. Most commonly, police can declare the premises a crime scene and apply for a crime scene search warrant under LEPRA to authorise the seizure of items connected to a serious indictable offence,¹²² or can apply for a standard LEPRA search warrant to seize items connected to a particular ‘searchable offence’.¹²³

Further, NSW Police Force policy¹²⁴ advises that the common law permits the seizure of items where a police officer is already lawfully on premises and reasonably believes that: a serious crime has been committed; the item is the fruit of the crime, the instrument by which it was committed or material evidence; and the person possessing the item is the offender, or is implicated in or an accessory to the crime.¹²⁵

119. *Firearms Act 1996*, s. 74A, as introduced by the *Firearms and Criminal Groups Legislation Amendment Act 2013*.

120. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, to Michael Gleeson, Deputy Ombudsman (Police), dated 18 February 2015.

121. Section 47A of LEPRA provides the general authority conferred by a search warrant issued under section 48 of LEPRA to enter the premises and search them for ‘things connected with a particular searchable offence in relation to the warrant’, and section 49 of LEPRA sets out the specific seizure powers.

122. LEPRA, ss. 94(1) and 95(1)(m).

123. LEPRA, ss. 47 and 49. Section 46A(1) of LEPRA defines the term ‘searchable offence’ as an indictable offence, a firearms or prohibited weapons offence, a narcotics offence, a child abuse material offence, or an offence involving a thing being stolen or otherwise unlawfully obtained.

124. For example, NSW Police Force, *Police Powers Handbook*, March 2013, pp. 48-49.

125. *Ghani v Jones* [1970] 1 QB 693 at 708–709, as cited in *Director of Public Prosecutions v Tamcelik* [2012] NSWSC 1008 at [67]–[68].

Question for consideration

- 5. Should the Restricted Premises Act be amended to give police a separate ancillary power to seize particular items, similar to section 49 of LEPRA?**
-

3.5 Right to apply for return of seized items

An item seized under section 13 will be automatically forfeited to the Crown unless the owner applies to a Magistrate to have it returned within 21 days under section 13A(2).¹²⁶ In considering any such application, the Magistrate must order that the item be forfeited to the Crown if he or she finds that any of the proscribed activities were taking place on the premises when the item was seized.¹²⁷ This means that items could be forfeited even if they had no connection to the proscribed activities on which the section 13 warrant was based. This regime is different from the standard rules for return or forfeiture of seized items. The usual basis for determining whether a seized item should be returned to its owner (except for items that are prohibited) is whether or not police need to retain it for evidentiary purposes, pending determination of relevant criminal proceedings.¹²⁸

Under other search regimes it is the responsibility of police to return seized items to the owner if they are no longer required for a police investigation.¹²⁹ If property is seized under a section 13 warrant, the onus is on the owner to seek its return. The owner may not be aware that this is the case, and if they fail to make an application for its return within 21 days, their property will be forfeited. Currently there are no police policies advising police to inform the owner of seized items that they need to commence action should they want their property returned.

No applications were made for the return of any of the items seized under the seven weapons and explosives warrants. All of the items were forfeited to the Crown.

Questions for consideration

- 6. Should the legislation be amended to allow a Magistrate to consider the nature of each item and its connection with the proscribed activities that occurred on the premises, when determining applications for the return of items seized under a section 13 warrant?**
- 7. Should police be required to inform the owner of property seized during a section 13 search that they are required to apply to a Magistrate within 21 days if they want their property returned? If so, what procedures should police be required to follow?**
-

3.6 Lack of power to conduct person and vehicle searches when exercising the additional section 13 search powers

The Restricted Premises Act does not provide police who are executing a section 13 warrant with powers to search people or vehicles on the premises. By way of contrast, when executing a standard LEPRA search warrant, a police officer has an ancillary power to search a person found on the premises if he or she 'reasonably suspects' that the person has 'a thing mentioned in the warrant'.¹³⁰ A number of police officers we consulted suggested that there should be ancillary powers to search people and vehicles on the premises when executing a section 13 warrant.¹³¹ Such powers could make it difficult for people on the premises to circumvent the section 13 search process by hiding illicit items in their clothing or vehicles. This issue is also relevant to the exercise of the additional section 10 search powers.

126. *Restricted Premises Act 1943*, ss. 13A(2), (4).

127. *Restricted Premises Act 1943*, s. 13A(2).

128. LEPRA, ss. 212 and 218.

129. See, for example, LEPRA, ss. 218(1), 216.

130. LEPRA, s. 50.

131. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014; Consultation with Burwood LAC, 4 December 2014.

Question for consideration

- 8. Should police have ancillary powers to search people and vehicles on the premises when executing a section 13 warrant and, if so, what should be the threshold for conducting such searches?**
-

3.7 Lack of power to demand information about identity

One clear purpose of the Restricted Premises Act is to prevent reputed criminals from attending, controlling and managing premises. However, the Act does not allow police, when exercising the section 13 search powers, to demand information about the identity of people attending the premises. During our consultations with Strike Force Raptor, police suggested that they should be able to demand the names and addresses of people on the premises when exercising the section 13 search powers.¹³² This information could be used by police when applying for a declaration under section 3 on the grounds that reputed criminals attend, control or manage the premises.

Police have numerous powers to require (as compared to request) a person to disclose his or her identity, but these powers can only be exercised for very specific purposes.¹³³ For example, the power to demand information about a person's identity on the basis that the person is suspected on reasonable grounds to have breached the gaming and liquor laws¹³⁴ may be available when police conduct a section 13 search, if they suspect that alcohol is being unlawfully supplied on the premises.

In practice police regularly request people to provide their name and address, and people usually comply. When police executed the weapons and explosives warrants, it appeared that everyone on the premises provided police with details of their identity.

This issue is also relevant to the search powers under section 10 of the Restricted Premises Act. When exercising the section 10 search powers, being able to establish the identity of people occupying the searched premises may assist police when investigating the new offences in sections 8(2A) and 9(3), relating to reputed criminals attending, controlling or managing the premises.

Question for consideration

- 9. Should police be given an additional distinct power to require a person who is present at premises being searched under the Restricted Premises Act to provide information about their identity?**
-

132. Consultations with Strike Force Raptor, 30 September 2014 and 16 October 2014.

133. For example, LEPRA, s. 13A (suspected AVO defendants); LEPRA, s. 14 (drivers and passengers of vehicles in connection with an indictable offence); LEPRA, s. 87L (in an area subject to an authorisation of special powers to control public disorder under Part 6A of LEPRA); *Summary Offences Act 1988*, s. 11 (person under 18 suspected of carrying or consuming alcohol in a public place); *Fines Act 1996*, s. 104 (in order to serve a fine default warrant).

134. *Gaming and Liquor Administration Act 2007*, s. 31.

Chapter 4. The additional section 10 search powers

This chapter discusses issues relating to the additional powers to search for and seize weapons and explosives when conducting a search without a warrant under section 10 of the *Restricted Premises Act 1943*. These powers are enlivened by the making of a declaration. We call these powers ‘the additional section 10 search powers’ throughout this issues paper. Although the NSW Police Force has applied for one declaration since the amendment Act entered into force in 2013, that application has not yet been finalised, and the two remaining active declarations are no longer operative. Accordingly, the additional section 10 search powers have not yet been used. In this chapter we discuss issues that may arise from the use of these powers. The discussion of necessity also covers some aspects of the section 10 search powers more broadly, because the additional section 10 search powers and the existing section 10 search powers will always be exercised simultaneously.

4.1 Section 10 searches without warrant

A declaration can be made by the Supreme Court or the District Court once a senior police officer has shown reasonable grounds for suspecting that the activities listed in section 3(1) (the proscribed activities) take place on the premises.¹³⁵ The police can then search the declared premises without a warrant at any time under section 10 for alcohol, drugs, items connected to the storage, consumption or supply of alcohol or drugs, weapons and explosives.¹³⁶

Significantly, the 2013 amendments allow police to search for weapons and explosives without a warrant following the making of a ‘reputed criminal declaration’ as well as a standard declaration. This type of declaration may be made if a senior police officer shows reasonable grounds for suspecting that reputed criminals have attended, controlled or managed the premises. There is no requirement for any evidence that the premises or the reputed criminals using the premises have a connection to weapons or explosives.

The police may enter the declared premises and any land or building which is suspected of being used to access, exit or escape from the declared premises,¹³⁷ and may pass through any other land or building for the purposes of entry.¹³⁸ In exercising these powers, police are authorised to break open doors, windows and partitions, and to do ‘such other acts as may be necessary’.¹³⁹

4.2 Grounds for exercising the additional section 10 search powers

Significantly, apart from the declaration, there are no provisions constraining the circumstances in which the section 10 search powers can be exercised, or setting any threshold that must be met – such as reasonable belief or suspicion that certain facts exist – before a search may be conducted and items may be seized.

Once a declaration is made, section 10 searches may be conducted at any time, without any further authorisation or oversight by a Magistrate or other external officer. In the parliamentary debates dealing with the 2013 amendments, Alex Greenwich MP raised concerns about such proposed search without warrant powers:

*... I do not support search powers without a warrant ... This bill opens the way for police corruption and abuse of power. A warrant allows oversight of the what, where and when of police searches when they are often dealing with criminals, and removing accountability is dangerous and completely unnecessary. Warrants are easy and quick to access if there is a reasonable reason to search a property.*¹⁴⁰

The section 10 search powers are more expansive than search without warrant powers in other contexts, such as powers to detect breaches of liquor laws¹⁴¹ and prevent suspected imminent terrorist acts.¹⁴²

135. *Restricted Premises Act 1943*, s. 3(1).

136. *Restricted Premises Act 1943*, s. 10.

137. *Restricted Premises Act 1943*, s. 10(a)-(b).

138. *Restricted Premises Act 1943*, s. 10(c).

139. *Restricted Premises Act 1943*, s. 10(d).

140. Alex Greenwich MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 18 September 2013, p. 23680.

141. *Gaming and Liquor Administration Act 2007*, s. 24(1).

142. *Terrorism (Police Powers) Act 2002*, s. 20(1).

Firstly, the things police can seize when exercising the section 10 search powers (including weapons and explosives) need not have a connection to the proscribed activities giving rise to the declaration. Indeed, police may search for and seize weapons and explosives on premises that have been declared on the basis that reputed criminals have attended those premises, without any evidence that these people are in possession of weapons or explosives or have a history of related offences. In contrast, police enforcing liquor laws can only seize an item that they have 'reasonable grounds for believing is connected with an offence under the gaming and liquor legislation'.¹⁴³ Similarly, under anti-terrorism laws, police can only seize items where they believe on reasonable grounds that they may be used to commit a terrorist act, or may provide evidence of the commission of a serious indictable offence.¹⁴⁴

The second way in which the section 10 search powers are more expansive than comparable powers is that police are not required to form a view or suspicion, or to be fulfilling a particular purpose, in order to conduct each individual search on the declared premises. By comparison, police can only use their search without warrant powers under section 74A of the *Firearms Act 1996* 'as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence'.¹⁴⁵ Similarly, police can only search premises suspected of breaching liquor laws for specific purposes connected to the effective administration of the legislation.¹⁴⁶ Even searches without warrant under the anti-terrorism laws can only be conducted if an authorisation of special powers to prevent or investigate terrorist acts has already been given¹⁴⁷ and the officer forms certain reasonable beliefs.¹⁴⁸

Legal requirements such as a warrant, a reasonable belief or reasonable suspicion that certain conditions are met, or that a search must be conducted for a particular purpose, can protect individuals from unreasonable searches and arbitrary invasions of their privacy. Since the section 10 search powers have not been used since the 2013 amendments entered into force, there is no evidence to suggest that police would employ these powers unreasonably. However, the absence of any threshold or limitations in the Restricted Premises Act raises a question about the need for further guidance on the use of the powers. In relation to the additional section 10 search powers, a key consideration is whether the police need those powers, without any of the legal constraints found in comparable laws, in order to effectively combat criminal activity involving firearms, weapons and explosives.¹⁴⁹

Question for consideration

10. What are your views about the need, if any, for the Restricted Premises Act to be amended, or police to develop guidelines, to include a threshold for the use of the additional section 10 search powers?

4.3 Lack of legislative safeguards that apply to other search powers

The Restricted Premises Act contains no provisions that specify how section 10 searches are to be carried out. The only legal requirement applying to their conduct is the requirement in section 202 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) for the officer conducting the search to identify himself or herself as a police officer (if not in uniform), provide his or her name and place of duty, and explain the reason for the exercise of the power.¹⁵⁰ Part 5, Division 4 of LEPRA, which contains a number of provisions to ensure that search warrants and crime scene warrants are executed in a reasonable,

143. *Gaming and Liquor Administration Act 2007*, s. 26(2)(f).

144. *Terrorism (Police Powers) Act 2002*, s. 20(1).

145. *Firearms Act 1996*, s. 74A(1).

146. *Gaming and Liquor Administration Act 2007*, s. 18(1).

147. *Terrorism (Police Powers) Act 2002*, s. 15.

148. *Terrorism (Police Powers) Act 2002*, s. 19(1).

149. This was the purpose of the amendment Act, as stated by the former Premier in his second reading speech: the Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

150. *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 202. This information must be provided to 'the person subject to the exercise of the power' 'as soon as it is reasonably practicable to do so': LEPRA, ss. 202(1), 202(2)(a).

safe and effective manner,¹⁵¹ applies to the execution of section 13 warrants but not to the exercise of the section 10 search powers. This raises the question whether similar provisions should also regulate the exercise of the section 10 search powers. Parliament did not articulate the reasons why section 10 searches should not be subject to restrictions and arrangements similar to those that apply to other search powers.

4.3.1 Fair and reasonable conduct of searches

The requirements in Part 5, Division 4 of LEPRa aim to safeguard the rights of occupiers of premises and ensure that searches are carried out in a fair and reasonable manner. They include the following:

- A police officer must announce that he or she is authorised by warrant to enter and give any person in the premises an opportunity to allow entry.¹⁵²
- The warrant must be shown to an occupier of the premises if requested.¹⁵³
- An 'occupier's notice' must be served on the occupier on entry, as soon as practicable after entry, or within 48 hours of executing the warrant.¹⁵⁴
- The warrant must be executed by day, between 6am and 9pm, unless the issuing officer authorises its execution by night.¹⁵⁵
- The warrant generally expires within 72 hours.¹⁵⁶
- A report must be provided to the issuing officer following execution of the warrant.¹⁵⁷

Currently there is no requirement for police to announce that they are authorised to enter and give the person in the premises an opportunity to allow entry when conducting a section 10 search. However, it would be expected that police would do this as a matter of good practice, particularly so as to avoid any misunderstanding about their authority.

Once a declaration has been made, owners and occupiers of the declared premises will be provided with a notice of declaration,¹⁵⁸ and will therefore know that their premises could be searched at any time without a warrant. However, police may conduct a search in the absence of the owner and occupier, and there is no requirement to provide written notification after the search has been conducted.

When police execute a standard LEPRa search warrant or a section 13 warrant under the Restricted Premises Act, they serve an 'occupier's notice' at the same time, which advises the occupant of: the details of the premises; the powers that can be exercised; the applicant officer's name, rank and unit; the issuing officer's name; and information about challenging the conduct of the search.¹⁵⁹ The *Standard Operating Procedures for the execution of Search Warrants* (Search Warrant SOPs) include provision of an occupier's notice as a role to be performed by the Case Officer. However, the Search Warrant SOPs are a policy directive only and do not impose a legal requirement. In fact, the NSW Police Force has advised us that occupiers of premises subject to a section 10 search will not be provided with an occupier's notice and will instead be verbally notified of an intention to carry out a section 10 search.¹⁶⁰

Officers conducting a section 10 search are required to identify themselves as police, give their name and place of duty, and provide the person subject to the exercise of the power with the reason for its exercise 'as soon as it is reasonably practicable to do so'.¹⁶¹ This means that if there are no people occupying premises when police conduct a section 10 search, the occupier

151. Part 5, Division 4 of LEPRa applies to the warrants and police powers listed in section 59 of LEPRa.

152. LEPRa, s. 68(1).

153. LEPRa, s. 69.

154. LEPRa, s. 67(4).

155. LEPRa, s. 72(1)-(3). The issuing officer cannot authorise the execution of a warrant by night unless satisfied that there are reasonable grounds for doing so, including because execution by day is unlikely to be successful, there is likely to be less risk to the safety of any person, or an occupier is likely to be on the premises only at night to allow entry without the use of force.

156. LEPRa, s. 73.

157. LEPRa, s. 74.

158. *Restricted Premises Act 1943*, s. 6.

159. LEPRa, s. 67(1)-(3); *Restricted Premises Act 1943*, s. 13(4); Law Enforcement (Powers and Responsibilities) Regulation 2005, cl. 7 and Schedule 1, Forms 17 and 18.

160. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, to Michael Gleeson, Deputy Ombudsman (Police), dated 18 February 2015.

161. LEPRa, ss. 202(1)(c), (2).

might not be provided with an explanation for the search until after the search has been conducted. By way of contrast, the only situation in which the service of an occupier's notice in relation to a LEPRA search warrant can be postponed is for the execution of covert search warrants.¹⁶²

There is nothing in the law that limits the timing of section 10 searches. Once a declaration has been made, police officers are empowered to enter and search the premises at any time of day. There is also no limit on the time taken to conduct a search.

4.3.2 Facilitative powers and arrangements

Part 5, Division 4 of LEPRA also provides for powers and arrangements to facilitate the conduct of searches, including the following:

- The warrant may be executed with the aid of any assistants considered necessary.¹⁶³
- Police may use force, disable alarms and pacify guard dogs, as and if reasonably necessary to enter the premises.¹⁶⁴
- An executing officer may, if necessary, break open receptacles.¹⁶⁵
- An executing officer may do anything reasonably necessary to prevent the loss of, or damage to, any thing connected with an offence reasonably believed to be on the premises.¹⁶⁶
- An executing officer may do anything reasonably necessary to render safe any dangerous article found in or on the premises.¹⁶⁷
- Police may use electronic and other equipment necessary to examine a thing found at the premises and may move a thing found at the premises to another place for a specified period of time for examination.¹⁶⁸

These provisions ensure that police have the means to carry out searches safely and effectively. Currently these options are not available to police exercising the section 10 search powers.

One practical example of where these facilitative powers could be helpful relates to the ability to search with the aid of an assistant. During the first 18 months of the review period, we know of at least two instances where police sought assistance from people who were not NSW Police Force officers to conduct section 13 searches. In one case, local council rangers who were familiar with the premises assisted police in executing one of the weapons and explosives warrants. In another case, Australian Federal Police officers assisted with the execution of a section 13 warrant to search for drugs and alcohol.¹⁶⁹

As section 10 search targets are the same as the targets of section 13 searches, it is theoretically possible that if any section 10 searches are conducted in the future, police may need to seek assistance from other people. Because the LEPRA provisions do not apply, police needing assistance would have to use the current administrative mechanism, which is to appoint the people required as 'special constables' under the *Police Act 1990*.¹⁷⁰ This is a more administratively burdensome process.

Questions for consideration

11. ***Should any additional legal requirements apply to the conduct of section 10 searches?***
 12. ***What are your views on whether any or all of Part 5, Division 4 of LEPRA should apply or be adapted to the conduct of section 10 searches?***
-

162. LEPRA, s. 67A.

163. LEPRA, s. 71.

164. LEPRA, ss. 70(1)-70(1A).

165. LEPRA, s. 70(2).

166. LEPRA, s. 70(3).

167. LEPRA, s. 70(4).

168. LEPRA, s. 75A.

169. NSW Police Force, *Major interstate police crackdown on bikies – Tweed Byron LAC*, media release, 21 March 2014.

170. Under section 82L of the *Police Act 1990*, the Commissioner of Police can confer any of the functions of a police officer of the rank of constable on a 'special constable'.

4.4 Forfeiture of seized items

Items seized under section 10 of the Restricted Premises Act are automatically forfeited to the Crown.¹⁷¹ The Act provides for a scheme aimed at bringing to an end any illegitimate business or unlawful activities taking place on particular premises. Automatic forfeiture of items seized strengthens the impact of declarations in achieving this objective. Unlike items seized under a section 13 warrant,¹⁷² there is no legislative or administrative process that an owner can follow to seek their return.

Police have taken a broad interpretation of section 13(3)(b) (which describes the items they can seize under a section 13 warrant) and are likely to take the same approach to seizing items under section 10(e). This practice raises the question whether owners and occupiers should have an avenue to appeal decisions by police to seize items under section 10.

Question for consideration

- 13. What are your views on whether the Act should be amended to include an avenue to apply for the return of an item seized under section 10, similar to the provisions in section 13A(2)?**
-

171. *Restricted Premises Act 1943*, s. 13A(1).

172. *Restricted Premises Act 1943*, s. 13(2)-(4).

Chapter 5. The new offence provisions

This chapter discusses issues relating to the new offence provisions in sections 8(2A) and 9(3) of the *Restricted Premises Act 1943*, which are enlivened by the making of a reputed criminal declaration. We consider the circumstances in which these offence provisions apply, practical implementation issues, and the incentives for owners and occupiers to stop the activities listed in section 3(1) (the proscribed activities) from taking place on the premises as intended.

As no declarations have been made under the *Restricted Premises Act* since the 2013 amendments came into effect, no one has been charged under the new offence provisions to date. However, one application for a reputed criminal declaration has been made during the first 18 months of the review period.¹⁷³ If that declaration is made, someone could be charged under the new offence provisions in the future.

5.1 New offences by owners and occupiers under sections 8(2A) and 9(3)

As discussed in chapter 2, a new category of declaration, called a reputed criminal declaration, can now be made over premises that are attended, controlled or managed by people who are 'reputed criminals' as defined in section 2.¹⁷⁴ In addition, two new offences have been introduced in sections 8(2A) and 9(3) in relation to premises subject to a reputed criminal declaration. These offences are identical, but the first relates to conduct of the owner of the declared premises, and the second to conduct of the occupier. An owner or occupier will commit an offence if, after he or she has been served with notice of the declaration, a reputed criminal attends, controls or manages the premises while the declaration is in force.¹⁷⁵

A person who commits an offence under section 8(2A) or section 9(3) is liable for up to three years' imprisonment and/or a \$16,500 fine. These offences are indictable offences, but are to be dealt with summarily before the Local Court unless the prosecutor elects otherwise.¹⁷⁶ If dealt with in the Local Court, the maximum penalty is two years' imprisonment and/or a \$5,500 fine.¹⁷⁷

It was already an offence under sections 8(1) and 9(1) for the owners and occupiers of declared premises to fail to prevent a reputed criminal from attending, controlling or managing the premises. According to the Bureau of Crime Statistics and Research, there have been no finalised charges for these offences since 1994.¹⁷⁸ The effect of the new offence provisions was to increase the length of the maximum prison sentence six-fold (from six months' to three years' imprisonment), and triple the maximum fine that could be imposed (from \$5,500 to \$16,500). The higher penalties that apply to the new offences may give owners and occupiers a stronger incentive to stop people they identify as reputed criminals from attending, controlling or managing declared premises.

An owner or occupier is not guilty of an offence if they prove that they took all reasonable steps to prevent a reputed criminal from attending, controlling or managing the premises.¹⁷⁹ An owner of premises occupied by another person is not guilty of the offence under section 8(2A) if they prove that they took all reasonable steps to evict the occupier.¹⁸⁰

5.2 Concerns raised by the Legislation Review Committee

By requiring the owner or occupier to exclude reputed criminals from the declared premises, the new offences operate in a way that can target conduct that is not otherwise criminal, such as merely attending premises. This is similar to other schemes aimed at stopping certain people from associating with one another.¹⁸¹

173. That application has been made in relation to the Rebels bikie clubhouse at Leppington, as discussed in chapter 3.

174. *Restricted Premises Act 1943*, s. 3(3).

175. *Restricted Premises Act 1943*, ss. 8(2A), 9(3). An owner or occupier cannot be convicted of an offence under either section 8(2A) or section 9(3) and also convicted under section 8(1) or section 9(1) in respect of essentially the same facts: *Restricted Premises Act 1943*, ss. 8(2C), 9(5).

176. *Restricted Premises Act 1943*, s. 18A(2).

177. *Criminal Procedure Act 1986*, s. 268.

178. NSW Bureau of Crime Statistics and Research, Number of finalised charges under sections 8(1), 9(1), 8(2A)(a), 8(2A)(b), 9(3)(a), 9(3)(b) and 11 of the *Restricted Premises Act 1943* by outcome (unpublished data). Data was unavailable for the period before 1994.

179. *Restricted Premises Act 1943*, ss. 8(2B), 9(4).

180. *Restricted Premises Act 1943*, s. 8(3).

181. Examples include the *Crimes (Criminal Organisations Control) Act 2012* and the consorting provisions in sections 93W-93Y of the *Crimes Act 1900*.

The Legislation Review Committee, which is responsible for scrutinising all Bills introduced into the NSW Parliament, raised the concern that the 2013 amendments could unduly impact on the right to freedom of association. In its review of the Firearms and Criminal Groups Legislation Amendment Bill 2013, the Committee remarked:

The Committee is concerned that the Bill may further criminalise association between convicted criminals. Further, there is no need to prove such individuals have committed any other offence whilst associating with each other at restricted premises (or that they have ever committed any offence other than associating with convicted criminals) for an owner/occupier of restricted premises to be subject to a significant penalty. The Bill may therefore impact unduly on the right to freedom of association.¹⁸²

The Committee referred this matter to Parliament for further consideration. However, the issue was not addressed in the parliamentary debates on the Bill.

5.3 Are the circumstances in which the new offences apply too broad?

The new offences apply to premises subject to a reputed criminal declaration. A reputed criminal declaration may be made for the reason (or predominant reason) that reputed criminals have attended or are likely to attend the relevant premises, or have the control or management of the premises.

The amendments that provided for reputed criminal declarations were intended to 'make it easier for police to get premises declared on the grounds that they are routinely used by serious criminals, such as gang clubhouses'.¹⁸³ In this section we discuss the implications of the broad definitions of 'reputed criminal' and 'premises' under the Restricted Premises Act, and their potential impact on the operation of the new offences.

5.3.1 The definition of 'reputed criminal'

The *Firearms and Criminal Groups Legislation Amendment Act 2013* introduced a new definition of 'reputed criminal' which 'includes (without limitation)' people who:

- have been convicted of an indictable offence, including the consorting offence under section 93X of the *Crimes Act 1900*
- are engaged in an organised criminal activity as defined in section 46AA of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), or
- are controlled members of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.¹⁸⁴

People within the first bullet point of the definition (those who have been convicted of an indictable offence) represent over 3.5% of the NSW adult population (see table 1). There are two types of criminal offences in NSW – summary and indictable. Indictable offences include those attracting a maximum term of imprisonment of more than two years.¹⁸⁵ They include virtually all types of criminal activity or offence category, ranging from the most serious criminal offences such as murder to less serious offences such as shoplifting and minor property offences.¹⁸⁶

As can be seen from table 1, more than 200,000 people in NSW have been convicted of an indictable offence within the last 10 years.¹⁸⁷ Almost 8% of young adult males under 30 were convicted of an indictable offence during this period, representing almost 25% of the total.

182. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 15-16.

183. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

184. *Restricted Premises Act 1943*, s. 2.

185. *Criminal Procedure Act 1986*, s. 6(1)(c).

186. *Criminal Procedure Act 1986*, ss. 3-6 set out the definition of an indictable offence.

187. The number of people who come under the definition of a reputed criminal on this basis will be even higher, as the data excludes people with convictions older than 10 years.

Table 1: Percentage of adult population in NSW convicted of indictable offences over a 10 year period (1 July 2004 to 30 June 2014)

Age at 30 June 2014	Women		Men		Total	
	No. of people	% of cohort	No. of people	% of cohort	No. of people	% of cohort
18-29	10,525	1.71%	48,457	7.63%	58,982	4.72%
30 and over	27,793	1.19%	118,406	5.34%	146,199	3.21%
Total	38,318	1.30%	166,863	5.85%	205,181	3.53%

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Re-offending Database June 2004 to June 2014, Adults convicted of an indictable offence, excluding those dealt with under s. 10 *Crimes (Sentencing Procedure) Act 1999*, appearances in Children's Court and people aged under 18 at finalisation (unpublished data); Australian Bureau of Statistics, *Population Projections, Australia, 2012 (base) to 2101*, 'Table B1. Population projections, By age and sex, New South Wales – Series B', time series spreadsheet, Cat. No. 3222.0, ABS Canberra, 2013.

The definition of 'reputed criminal' may apply to people whose convictions have become spent after a crime-free period of 10 years.¹⁸⁸ Spent convictions can no longer be taken into account in questions concerning a person's criminal history.¹⁸⁹ However, the consequences of a conviction become spent do not apply to evidence given before a court or decision-making by a court.¹⁹⁰ A person who has been convicted of an indictable offence may therefore fall within the definition for the rest of their life for the purposes of court proceedings under the Restricted Premises Act.¹⁹¹

The definition also extends to people who may have never been convicted of an offence. For example, people who are controlled members of a declared organisation need never have been convicted.¹⁹² In addition, because the definition of reputed criminal is not exhaustive, it could potentially apply to someone with a mere reputation for criminality.¹⁹³

The definition of 'reputed criminal' determines when a reputed criminal declaration can be made, and the range of people whom owners and occupiers of declared premises must attempt to exclude from the premises due to the new offence provisions. It also determines when the section 10 and section 13 search powers can be exercised.

It seems that the intention of making this definition broad is to give police the discretion to use the Restricted Premises Act as a tool against people and gangs they suspect of involvement in serious organised criminal activity. When introducing the Firearms and Criminal Groups Legislation Amendment Bill 2013, the then Premier indicated that the Act should be used in relation to premises used by 'serious criminals' and people involved in gun crime.¹⁹⁴ In keeping with this intention, the definition includes descriptions of people who are the subject of other schemes intended to target organised crime and the activities of criminal gangs, being the scheme under the Crimes (Criminal Organisations Control) Act, the provisions in section 46AA of LEPR, and the consorting offence.¹⁹⁵

During our consultations, police officers from Strike Force Raptor said that the broad scope of the definition provides an advantage because a number of their targets who are suspected to be high-ranking bikie gang members may not have recent convictions, even though police have intelligence indicating that they are presently engaged in criminal activity.¹⁹⁶ Limiting the definition could prevent police from targeting premises used by these people. They also told us that the new definition

188. Sections 7 and 8 of the *Criminal Records Act 1991* govern the circumstances in which certain convictions become spent. Some convictions can never become spent, including convictions where a prison sentence of more than six months was imposed and convictions for sexual offences: *Criminal Records Act 1991*, s. 7(1).

189. *Criminal Records Act 1991*, s. 12.

190. *Criminal Records Act 1991*, s. 16(1).

191. See *Tajjour v New South Wales* (2014) 88 ALJR 860 at 871 (French CJ): 'there is no upper limit on the age of a conviction which would constitute the person convicted a "convicted offender" for the purposes of s 93W'. In this decision, French J was interpreting the comparable term 'convicted offender' in relation to the consorting offence in section 93X of the *Crimes Act 1900*, which means a person convicted of an indictable offence.

192. See the criteria for making a criminal organisation declaration under section 7(1) of the *Crimes (Criminal Organisations) Control Act 2012* and for making a control order under section 19(1) of that Act.

193. It was held by the South Australian Supreme Court in the case *Dias v O'Sullivan* [1949] SASR 195, when considering the offence of consorting with a 'reputed thief', that a reputation known only to police was sufficient to bring a person within the term 'reputed thief'.

194. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.

195. *Crimes Act 1900*, s. 93X.

196. Consultation with Strike Force Raptor, 16 October 2014.

had assisted them to use the Act more effectively and efficiently, by clarifying who is intended to be covered.¹⁹⁷ Previously, uncertainty about what the term meant contributed in one case to police abandoning an application they were preparing for a declaration under the Act.

There are no statutory limitations or police policies that restrict the application of the new offence provisions to owners and occupiers of premises being used by people suspected of involvement in serious organised criminal activity or gun crime.

5.3.2 The types of places on which the offences may be committed

There are few limitations on the types of places that can be made subject to a declaration, and in which the new offences may therefore be committed. Section 2 defines 'premises' as including any building or part of a building, except licensed premises and registered clubs. During our consultations, police officers told us that they intend to use the additional section 10 and section 13 search powers and new offence provisions to target premises used by organised criminals and criminal gangs.¹⁹⁸

The exclusion for licensed premises and registered clubs was in the original *Disorderly Houses Act 1943*, and is consistent with Parliament's purpose when enacting the statute to target premises where alcohol was unlawfully sold and supplied, such as sly grog houses.¹⁹⁹ Licensed premises and registered clubs are places where alcohol can be lawfully sold and supplied, so the proscribed activities would be less likely to occur there. During our consultations, a number of police officers told us that this exclusion is appropriate given that their use of the Restricted Premises Act continues to be focused largely on the unlawful sale and supply of alcohol in suspected bikie clubhouses.²⁰⁰

While this is the way the provisions have been used in practice thus far, the definition does not exclude residential homes, or a range of places where businesses or community services operate (including schools, churches, boarding houses, health clinics and legal centres).

Because, as discussed above, the definition of reputed criminal covers more than 3.5% of the NSW adult population, a reputed criminal declaration could potentially be granted over any number of places that have been attended by more than one 'reputed criminal' (for example, to receive services), and an owner or occupier could be charged with an offence under section 8(2A) or section 9(3) if any of those, or other, 'reputed criminals' subsequently attended the premises.

5.3.3 Consequences of the breadth of the definitions of 'reputed criminal' and 'premises'

In combination, the broad definitions of 'reputed criminal' and 'premises' leave it open for the new offence provisions to apply in relation to a range of premises that are not used for criminal purposes.

No declarations have been made during the review period. We therefore have no evidence that police have used or would use the provisions other than to investigate suspected bikie clubhouses. However, as discussed in chapter 3 (see section 3.3.3), police have successfully used the existing and additional section 13 search powers in a way that has resulted in the closure of suspected bikie clubhouses, without needing to seek a declaration at all. On the current evidence, it appears that police may not need to make extensive use of the new 'reputed criminal declaration' provisions, and related offences under sections 8(2A) and 9(3), to close down bikie clubhouses.

197. Ibid.

198. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Lake Macquarie LAC and Brisbane Water LAC, 26 November 2014; Consultation with Burwood LAC, 4 December 2014.

199. The Hon. Robert Downing MLC, NSWPD, (Hansard), Legislative Council, 20 May 1943, pp. 3491.

200. Consultation with Burwood LAC, 4 December 2014.

Questions for consideration

14. *What are your views on whether reputed criminal declarations and the related offences under sections 8(2A) and 9(3) are necessary to achieve the objective of targeting premises used by people involved in serious organised criminal activity and/or gun crime?*
 15. *What checks and balances, if any, are required to ensure that the new offences do not apply in relation to premises that were not intended by Parliament to be targeted?*
 16. *What are your views on whether, for example, police use of the new offence provisions should be explicitly limited to premises used for organised criminal activity and/or gun crime by:*
 - (a) *inserting an objects clause into the Restricted Premises Act*
 - (b) *changing the definition of 'reputed criminal', and/or*
 - (c) *changing the definition of 'premises'?*
-

5.4 Notification of a declaration and its consequences

Section 6(1) of the Restricted Premises Act requires that notice of the declaration be served on the owner or occupier of the declared premises, either personally or by fixing a notice at or near the entrance to the premises. An owner or occupier is not liable under the new offence provisions until he or she has been served with a section 6 notice.²⁰¹ At the time of writing, no declarations have been made during the review period, and therefore no notices have been issued during that time.

The Act does not contain any provisions regarding the form and content of a section 6 notice. Ensuring that owners and occupiers are provided with information about the consequences of a declaration may facilitate the operation of the new offence provisions to prevent the proscribed activities from occurring on declared premises. Such information could include:

- the offences they may be liable for, if they do not take reasonable steps,
- the reasons for the decision to make the declaration,
- the section 10 search without warrant powers, and
- how to seek a rescission of the declaration.

Requirements as to the form and content of a section 6 notice could be prescribed in either the Restricted Premises Act itself or in regulations under the Act.²⁰²

Question for consideration

17. *Should the Restricted Premises Act, or regulations under the Act, prescribe the form and content of a section 6 notice and, if so, what information should be included in this notice?*
-

201. *Restricted Premises Act 1943*, ss. 8(1), (2A), 9(1), (3).

202. Section 19 of the *Restricted Premises Act 1943* provides a power to make regulations under the Act. There are currently no regulations under the Act.

5.5 Identifying and excluding reputed criminals

The intent of the new offence and defence provisions of the Restricted Premises Act²⁰³ appears to be to give owners and occupiers an incentive to take action, following the making of a declaration, to stop reputed criminals from attending, controlling or managing the declared premises. In this section we discuss some practical obstacles that owners and occupiers might face in attempting to achieve this.

5.5.1 Identifying who is a reputed criminal

If an owner or occupier is to prevent reputed criminals from attending, controlling or managing their premises, they need to know whether particular individuals fall within the definition of reputed criminal. The breadth of the definition, as discussed in section 5.3, makes this exercise challenging.

Following service of the notice of the declaration, an owner or occupier may be made aware that a person who is controlling or managing the premises is a reputed criminal. It may be harder for an owner or occupier to gain this knowledge about a person who is *attending* the premises. A declaration could theoretically be made over a wide range of premises, including those open to the public. It is difficult to see how any owner or occupier of such premises would be able to practically obtain the knowledge they require to determine whether any particular individual attending the premises would be considered to be a 'reputed criminal'. Thus far during the review period, police have only used the Restricted Premises Act to target suspected bikie clubhouses. It is possible that in this context, the owner or occupier would have the requisite knowledge to determine which individuals they need to exclude.

Currently there is no process in place to facilitate owners and occupiers accurately identifying 'reputed criminals' so that they can exclude those people from the premises. In these circumstances, it is unlikely that the offence provisions will work as intended and achieve this policy objective.

One way of assisting owners and occupiers to identify 'reputed criminals' would be for the police to provide them with a notice about particular individuals police consider to fall within this definition, and who are in some way connected with the declared premises. Alternatively, this information could be provided by police following the declaration process. For example, police could be required to specify the particular 'reputed criminals' who have attended, controlled or managed the declared premises as part of the notice of declaration. Advising owners and occupiers that they need to exclude particular named individuals would be a similar approach to that taken in recent amendments to the consorting provisions in the Crimes Act. A person cannot be guilty of consorting with particular convicted offenders unless they have been provided with an official warning about each of those convicted offenders.²⁰⁴

5.5.2 Excluding reputed criminals

Another practical obstacle that an owner or occupier may face is how to exclude a person whom they have identified as being a 'reputed criminal' from the declared premises.

The provisions may work effectively in relation to excluding people who are controlling or managing the premises. For example, any relevant contractual arrangements of people who lease or are employed on the premises could be terminated (as long as this was lawful).

Preventing certain people from attending premises poses different challenges, particularly in premises that are open to the public, such as places where businesses or community services operate. For example, even though the owner or occupier might put up a sign prohibiting reputed criminals from entering, or even ask individuals whom they know to be 'reputed criminals' to leave, they may have no lawful way of physically removing those people if they refuse to cooperate. It is possible that the only measure an owner or occupier could take in these circumstances would be to call the police.

203. *Restricted Premises Act 1943*, ss. 8(2A)-(2B), 8(3), 9(3)-(4).

204. *Crimes Act 1900*, s. 93X(1)(b).

Questions for consideration

- 18. What steps should be taken, if any, to reduce the practical obstacles faced by owners and occupiers in attempting to comply with the obligations effectively imposed by the new offence provisions?**
- 19. Should the Restricted Premises Act be amended so that:**
- (a) police are required to advise owners or occupiers about particular reputed criminals whom they are required to exclude from the premises, and**
 - (b) owners and occupiers will only commit an offence if they fail to exclude those named individuals?**

5.6 Knowledge about people attending, controlling or managing premises

It is a general principle of criminal responsibility that the defendant must have chosen to commit the acts amounting to the offence.²⁰⁵ This requirement for intent to commit the offence, or a mental element, is an essential safeguard of a defendant's right to be presumed innocent.²⁰⁶ If an offence does not require proof of a particular mental state,²⁰⁷ it is a strict liability or absolute liability offence.²⁰⁸ However, if a mental element is not expressly included in an offence, the offence may still incorporate such an element by implication.²⁰⁹ This depends upon factors such as the wording of the provision, the nature and seriousness of the offence, and the legislative scheme.

The new offence provisions do not expressly include any mental element that requires the owner or occupier of declared premises to know that particular reputed criminals are attending, managing or controlling the premises. It is not clear, however, whether the requirement to prove a mental element has actually been excluded. To clarify this issue, we sought advice from the Crown Solicitor's Office, which advised that on balance it preferred the view that the prosecution must prove that the owner or occupier had actual knowledge or was at least reckless as to whether:

- a person who attended, controlled or managed premises subject to a reputed criminal declaration was a 'reputed criminal', and
- that person attended, controlled or managed the premises.²¹⁰

However, the advice also stated that in the absence of any court decisions addressing this issue, the question of whether knowledge is an element of an offence against sections 8(2A) and 9(3) is 'difficult' and that 'there are significant indications pointing in opposite directions'.²¹¹

This raises the question whether the Restricted Premises Act should be amended to clarify whether or not the new offences incorporate a mental element. Expressly including a mental element could avoid a situation where owners and occupiers could be convicted without intending to commit these offences. We note that if the new offence provisions do displace the usual mental element of an offence, the defence of honest and reasonable mistake of fact would likely still be available to owners and occupiers.²¹²

205. *He Kaw Teh v R* (1985) 157 CLR 523 at 528 (Gibbs CJ).

206. Legislation Review Committee, NSW Parliament, *Strict and Absolute Liability*, Discussion Paper No. 2, 2006, p. 1; *He Kaw Teh v R* (1985) 157 CLR 523.

207. *He Kaw Teh v R* (1985) 157 CLR 523 at 528 (Gibbs CJ).

208. *He Kaw Teh v R* (1985) 157 CLR 523 at 533 and 536 (Gibbs CJ); *Leichhardt Municipal Council v Hunter* (2013) 83 NSWLR 637 at 640 (Latham, Fullerton, Adamson JJ).

209. The majority in *He Kaw Teh v R* (1985) 157 CLR 523, for example, held that a provision in the *Customs Act 1901* (Cth) which did not expressly include a mental element did not displace the presumption that a guilty mind is required before a person can be found guilty of a 'grave criminal offence'.

210. NSW Crown Solicitor, Advice, *Powers under Restricted Premises Act and Law Enforcement (Powers and Responsibilities) Act*, dated 1 June 2015, p. 21.

211. NSW Crown Solicitor, Advice, *Powers under Restricted Premises Act and Law Enforcement (Powers and Responsibilities) Act*, dated 1 June 2015, p. 21.

212. *CTM v R* (2007) 171 A Crim R 371 at 456; NSW Crown Solicitor, Advice, *Powers under Restricted Premises Act and Law Enforcement (Powers and Responsibilities) Act*, dated 1 June 2015, pp. 21-22.

Question for consideration

20. Should the new offence provisions be amended to make it clear that the prosecution must prove that owners and occupiers had knowledge, or were reckless, as to whether a particular person:

(a) was a reputed criminal, and

(b) was attending, controlling or managing the premises?

5.7 Rescission provisions

A declaration is in force until rescinded.²¹³ This means that unless an application is made for a declaration to be rescinded, it will remain in force indefinitely.²¹⁴

A senior police officer or the owner or occupier of the declared premises can apply to the court that made the declaration for its rescission.²¹⁵ A declaration may be rescinded if:

- the owner or occupier proves that he or she has not at any time allowed any of the proscribed activities to take place in relation to the premises,²¹⁶ or
- a senior police officer proves that there is no reasonable ground for suspecting that any of the proscribed activities 'obtain in relation to' the premises.²¹⁷

Of the four declarations made since 2001, two have been rescinded. One of these declarations lasted only three months, and the other five years.²¹⁸ The other two remain in force, even though they are no longer operationally necessary.

The rescission process provides police with a straightforward way to end a declaration where it is no longer needed to meet the goal of preventing the proscribed activities from occurring. This situation could arise where premises are taken on by a new owner or occupier who is not considered to be a risk, or police have formed the view that the proscribed activities have not taken place on the premises for some time. In these circumstances, police would not need to continue using the new offence provisions in relation to the premises. However, neither the Restricted Premises Act nor NSW Police Force policy establishes any process for the routine review of a declaration to ensure that the information on which the declaration was based is still current, and that the declaration is still operationally necessary.

There are also no clear legal or policy requirements to advise potential or new owners and occupiers about a declaration, either before or after they purchase or start occupying the premises. This means that prospective owners and occupiers of declared premises could enter into contractual arrangements regarding ownership or occupancy of such premises unaware of the existence and effect of the declaration. If the declaration is to work as intended, then it seems practical for police to notify any new owner or occupier of the declaration.

Putting in place a system for periodic review of each declaration would give police an opportunity to identify potential and new owners and occupiers, so that police can advise them of the declaration and their responsibilities to prevent the proscribed activities from taking place there. A system for periodic review would also support the use of the additional section 10 search powers, whose effectiveness depends on the currency of the information on which police base their decision to search the declared premises on a particular occasion. Information about new occupants moving in, or the sale of the premises to new owners, would be relevant to the decision to conduct a section 10 search.

213. *Restricted Premises Act 1943*, s. 3(2).

214. A declaration may, however, be overturned if an owner or occupier successfully appeals the decision to make the declaration in the first place.

215. *Restricted Premises Act 1943*, s. 4(1).

216. *Restricted Premises Act 1943*, s. 4(1)(a).

217. *Restricted Premises Act 1943*, s. 4(1)(b).

218. *Restricted Premises Act 1943*, Notice of Declaration, First floor, B464 Cleveland Street Surry Hills, *NSW Government Gazette*, No. 41, 19 March 2010, p. 1334; *Restricted Premises Act 1943*, Notice of Declaration, Shop 2, 9 Ward Avenue Potts Point, *NSW Government Gazette*, No. 51, 5 March 2004, p. 1097. Our search of the *NSW Government Gazette* database identified rescissions for both of these declarations: *Restricted Premises Act 1943*, Notice of Rescission, First floor, B464 Cleveland Street Surry Hills, *NSW Government Gazette*, No. 71, 4 June 2010, p. 2356; *Restricted Premises Act 1943*, Notice of Rescission, Shop 2, 9 Ward Avenue Potts Point, *NSW Government Gazette*, No. 112, 14 August 2009, p. 4082.

The rescission provisions are somewhat less straightforward for owners and occupiers who wish to have the declaration reversed. An owner or occupier must prove that he or she has not *at any time* allowed *any* of the proscribed activities to take place on the premises. The parliamentary debates in the lead up to the enactment of the original provisions²¹⁹ suggest that the rescission process was intended to provide a safeguard only for those who had *never* allowed the proscribed activities to take place,²²⁰ such as a person who bought or leased premises that were already subject to a declaration.

The practical impact of this approach is that even if an owner or occupier of premises took steps to stop reputed criminals from attending, controlling or managing the premises as soon as they received notice of the making of a reputed criminal declaration, it may be virtually impossible for them to satisfy a court that the declaration should be rescinded. As the High Court has remarked:

*the terms require the applicant ... to negative a very large proposition, namely that at any time he has allowed any of the conditions to obtain On its very clear literal terms that means that one by one the very numerous possible examples of misbehaviour or breach of decorum which that sub-section enumerates must be shown at no time to have been allowed by the applicant.*²²¹

The High Court considered that this interpretation of the provisions was the only one available:

*[I]n spite of the stringent and onerous nature of the condition a literal interpretation imposes, the words of s. 4(1) are clear and explicit and really allow no escape from a construction of the condition they prescribe which makes it necessary that the applicant must offer some proof that never at any time did he allow any of the things to obtain ... Of course in proving negatives of this kind slight evidence will often be enough to set up a prima facie inference and it will always be open to those attempting to support the original order to narrow the issues and dispense with unnecessary formal proofs.*²²²

If the intention of the new offence provisions is for owners and occupiers to stop the proscribed activities from occurring on the premises, having a mechanism by which they can demonstrate that they have successfully done this could function as a 'reward' for taking action (just as the offence provisions function as a disincentive for failing to take action). A court could be given the authority to rescind a declaration if the owner or occupier could prove that since the declaration had been served, they had taken action that successfully stopped the proscribed activities that gave rise to the declaration from occurring. Alternatively, the basis for a rescission could be that there are no reasonable grounds for suspecting that the relevant proscribed activities take place on the premises *any longer*, and that they have not taken place for a specified time period.

Questions for consideration

- 21. To ensure that use of the new offence provisions and additional section 10 search powers is targeted and effective, should there be a process requiring police to review each declaration, periodically or on receipt of new information, to ensure that the reasons for the declaration remain current?**
 - 22. What are your views on whether any processes should be in place to ensure that prospective and new owners and occupiers of declared premises are made aware of declarations?**
 - 23. Should the Restricted Premises Act be amended so that owners and occupiers of declared premises can apply for a rescission on a different basis and, if so, what should they be required to prove?**
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219. These provisions were in the *Disorderly Houses Act 1943*.

220. The Hon. Robert Downing MLC, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3493.

221. *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 393 (Dixon CJ and Webb J).

222. *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 393 (Dixon CJ and Webb J).

Appendices

Appendix 1

Restricted Premises Act

Part 2 Disorderly houses

3 Declaration by Supreme Court or District Court in relation to premises

- (1) On a senior police officer showing reasonable grounds for suspecting that all or any of the following conditions obtain with respect to any premises, that is to say:
 - (a) that drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises, or has taken place and is likely to take place again on the premises, or
 - (b) that liquor or a drug is unlawfully sold or supplied on or from the premises or has been so sold or supplied on or from the premises and is likely to be so sold again on or from the premises, or
 - (c) that reputed criminals or associates of reputed criminals are to be found on or resort to the premises or have resorted and are likely to resort again to the premises, or
 - (d) that any of the persons having control of or managing or taking part or assisting in the control or management of the premises:
 - (i) is a reputed criminal or an associate of reputed criminals, or
 - (ii) has been concerned in the control or management of other premises which have been the subject of a declaration under this Part, or
 - (iii) is or has been concerned in the control or management of premises which are or have been frequented by persons of notoriously bad character or of premises on or from which liquor or a drug is or has been unlawfully sold or supplied,
 - (e) (Repealed)

the Supreme Court or the District Court may declare such premises to be premises to which this Part applies.

- (2) Such declaration shall be in force until rescinded.
- (3) The appropriate Court may, in declaring premises to be premises to which this Part applies, state that the reason (or the predominant reason) for the declaration is that:
 - (a) reputed criminals have attended or are likely to attend the premises, or
 - (b) a reputed criminal has, or takes part or assists in, the control or management of the premises.

Any such declaration is a **reputed criminal declaration** for the purposes of this Act.

4 Rescission of declaration

- (1) Any such declaration may be rescinded by the appropriate Court subject to such terms as the Court thinks fit, on application being made to it:
 - (a) by the owner or occupier of the premises, the subject of the declaration, on proof that the owner or occupier has not at any time allowed any of the conditions referred to in subsection (1) of section 3 to obtain in relation to such premises, or
 - (b) by a senior police officer on proof that there is no reasonable ground for suspecting that any of the conditions referred to in subsection (1) of section 3 obtain in relation to such premises.
- (2) Where an application under this section is made by the owner or occupier of the premises notice in writing of intention to make the same shall be served on a senior police officer two days at least before the hearing of such application.

5 Publication of notice of declaration and rescission

- (1) Notice of any such declaration or any rescission of the same shall be published in the Gazette.
- (2) In any proceedings under this Act the production of a copy of the Gazette containing such notice shall be evidence that the declaration or rescission therein notified was duly made.

6 Notice given of declaration

- (1) A senior police officer is to cause notice of the making of a declaration under this Part to be served on the owner or occupier of the premises to which the declaration relates:
 - (a) personally, or
 - (b) if personal service cannot be effected promptly, by causing a copy of the notice to be fixed at or near to the entrance of the premises.
- (2) A person must not deface, destroy, cover or remove a copy of a notice fixed under this section at or near the entrance to premises unless the person is a police officer or the owner or occupier of the premises.

Maximum penalty (subsection (2)): 20 penalty units.

...

8 Offence by owner of premises

- (1) After the service of a notice under section 6 on the owner of premises of the making of a declaration, the owner is guilty of an offence if any of the conditions referred to in section 3 (1) apply to the premises while the declaration is in force.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

- (2) An owner of premises is not guilty of an offence under subsection (1) if the owner proves that he or she has taken all reasonable steps to prevent the conditions referred to in section 3 (1) applying to the premises.
- (2A) After the service of a notice under section 6 on the owner of premises of the making of a reputed criminal declaration, the owner is guilty of an offence if, while the declaration is in force, a reputed criminal:
 - (a) attends the premises, or
 - (b) has, or takes part or assists in, the control or management of the premises.

Maximum penalty: 150 penalty units or imprisonment for 3 years, or both.

- (2B) An owner of premises is not guilty of an offence under subsection (2A) if the owner proves that he or she has taken all reasonable steps to prevent a reputed criminal:
 - (a) attending the premises, or
 - (b) having, or taking part or assisting in, the control or management of the premises.

- (2C) A person is not liable to be convicted of an offence under both subsections (1) and (2A) in respect of essentially the same facts.

- (3) An owner of premises that are occupied by a person other than the owner is not guilty of an offence under this section if the owner proves that he or she has taken all reasonable steps to evict the occupier from the premises.

9 Offence by occupier of premises

- (1) After the service of a notice under section 6 on the occupier of premises of the making of a declaration, the occupier is guilty of an offence if any of the conditions referred to in section 3 (1) apply to the premises while the declaration is in force.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

- (2) An occupier of premises is not guilty of an offence under subsection (1) if the occupier proves that he or she has taken all reasonable steps to prevent the conditions referred to in section 3 (1) applying to the premises.
- (3) After the service of a notice under section 6 on the occupier of premises of the making of a reputed criminal declaration, the occupier is guilty of an offence if, while the declaration is in force, a reputed criminal:
 - (a) attends the premises, or

(b) has, or takes part or assists in, the control or management of the premises.

Maximum penalty: 150 penalty units or imprisonment for 3 years, or both.

- (4) An occupier of premises is not guilty of an offence under subsection (3) if the occupier proves that he or she has taken all reasonable steps to prevent a reputed criminal:
- (a) attending the premises, or
 - (b) having, or taking part or assisting in, the control or management of the premises.
- (5) A person is not liable to be convicted of an offence under both subsections (1) and (3) in respect of essentially the same facts.

10 Entry by police

While any such declaration is in force with respect to any premises any member of the Police Force may, without warrant:

- (a) enter the said premises,
- (b) enter any land or building which the member has reasonable grounds to suspect is used as a means of access to or of exit or escape from the same,
- (c) pass through, from, over and along any other land or building for the purpose of entering in pursuance of paragraph (a) or paragraph (b),
- (d) for any of the purposes aforesaid break open doors, windows, and partitions, and do such other acts as may be necessary,
- (e) search such premises for, and seize, any liquor and any drug in such premises and any drinking glass, vessel, container or device in such premises which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the user or taking of any drug,
- (f) search the premises for, and seize, any weapon or explosive.

...

13 Suspected premises—issue of search warrant

(1) In this section:

authorised officer has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

- (2) A member of the Police Force may apply to an authorised officer for a search warrant if the member of the Police Force has reasonable grounds for believing that any of the conditions referred to in section 3 (1) obtain, and are commonly reported to obtain, in respect of any premises.
- (3) An authorised officer to whom an application is made under subsection (2) may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force:
- (a) to enter the premises, and
 - (b) to search the premises for, and to seize, any liquor or drug or any drinking glass, vessel, container or device referred to in section 10 (e) or any weapon or explosive.
- (4) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.

13A Forfeiture or disposal of seized articles



- (1) Any article seized either before or after the commencement of the *Disorderly Houses (Amendment) Act 1943* in any disorderly house by a member of the Police Force in pursuance of powers conferred on the member by section 10 shall be forfeited to the Crown.
- (2) Any person claiming to be the owner of any article seized by a member of the Police Force so authorised by a search warrant under section 13 may:
- (a) if such seizure was made before the commencement of the *Disorderly Houses (Amendment) Act 1943*, within twenty-one days after such commencement, or
 - (b) if such seizure was made after such commencement, within twenty-one days of such seizure,
- make application to a Magistrate for the return to the person of such article.

Such Magistrate shall inquire into the matter and if it appears to the Magistrate that at the time of the seizure any of the conditions mentioned in section 3 obtained on the premises where the seizure was made, the Magistrate shall order the forfeiture of such article, to the Crown.

If it appears to such Magistrate that at the time of the seizure any of the conditions mentioned in section 3 did not obtain on such premises, the Magistrate may order that the article so seized be handed over to the owner or occupier of such premises or to such other person as may appear to the Magistrate to be the rightful owner.

- (3) Any person who makes application to a Magistrate under subsection (2) shall, at least seven days prior to the hearing of such application, serve on a Superintendent or Inspector of Police a notice in writing of such application.
- (4) Where, in respect of any article seized by a member of the Police Force so authorised by a search warrant under section 13, no application is made under subsection (2) within the time prescribed by that subsection such article shall be forfeited to the Crown.
- (5) In this section:

article means any liquor, drug, drinking glass, vessel, container or device or any weapon or explosive.



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