



NSW Ombudsman

Vehicles Powers

Report under s. 16 of the
Police Powers (Vehicles) Act

September 2003

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1. Introduction

On 27 November 1998 the NSW Parliament passed the *Police Powers (Vehicles) Act 1998* (the *1998 Act*), which commenced on 1 January 1999. The *1998 Act* conferred powers on police to:

- request information from drivers and/or owners of a vehicle about their identity and the identity of other occupants of the vehicle,
- stop and search vehicles,
- establish road blocks, and
- give reasonable directions to persons in or on the vehicle, road or area concerned.

The NSW Ombudsman reviewed this Act during the first twelve months of the Act's operation. A report of the Ombudsman's findings was tabled in the NSW Parliament on 19 December 2000.¹

In part to address findings and recommendations from the Ombudsman's review, in October 2001 the NSW Parliament passed the *Police Powers (Vehicles) Amendment Act 2001* (the *2001 Act*). This Act commenced on 1 January 2002.

The *2001 Act* amended the *1998 Act* by conferring on police additional powers to:

- request passengers in vehicles to identify themselves and the driver and other passengers in the vehicle; and
- request persons who are required to identify themselves to provide proof of their identity.

The *2001 Act* required the NSW Ombudsman to keep under scrutiny the exercise of the additional powers conferred on police by the Act, for the period of 12 months from the date of assent to the Act. This report documents the Ombudsman's findings resulting from the scrutiny of the operation of the additional powers.

For convenience, the report uses the short title '*1998 Act*' to refer to the original *Police Powers (Vehicles) Act 1998*, and the '*2001 Act*' to cover the provisions of the *Police Powers (Vehicles) Amendment Act 2001*. Where the *Police Powers (Vehicles) Act 1998* as amended by the *2001 Act* is discussed in relation to its application and enforcement, the short title "*1998 Act as amended*" will be used.

¹ NSW Ombudsman, Vehicle Powers, Questions and Answers: Report under s.16 of the *Police Powers (Vehicles) Act*, August 2000.

2. Background

This chapter outlines background material useful to understand the introduction and implementation of the *1998 Act as amended*.

Structure of NSW Police

Local Area Commands (LACs) are the primary management units of NSW Police. There are a total of 80 LACs across NSW. Since 1 July 2002, each of these local commands is located within one of five regions:

- Southern Region
- Northern Region
- Greater Metropolitan Region
- Western Region
- Inner Metropolitan Region.

Some of the specialist Police commands and organisational units relevant to this review include:

Traffic Services is responsible for the administrative and policy aspects of traffic enforcement and manages the NSW Police strategy to reduce road trauma.

Court and Legal Services provides advocacy, legal advice and summary prosecutorial services for NSW Police.

Target Action Groups (TAGs) are specialised units formed to address specific crime issues relevant to a local area. TAGs often include officers from a number of neighbouring commands and focus on projects that extend beyond an individual LAC.

Role of the NSW Ombudsman

The NSW Ombudsman is responsible for handling complaints about public authorities in New South Wales. Each year, the Ombudsman receives a considerable number of enquiries and complaints about NSW Police.

As a result of the reforms to NSW Police following the Wood Royal Commission, as well as a subsequent series of legislative changes to the *Police Act 1990*, NSW Police deals with most complaints about police officers. The Ombudsman's main role is to independently oversee, review and audit the handling of complaints by NSW Police.

Over the past few years, the Ombudsman has also had an increasing role in scrutinising the operation of selected laws that confer new powers on NSW Police. In performing this role, the Ombudsman conducts independent research into the operation of these police powers to identify any difficulties, inequities or systematic injustices that may arise from their implementation. Where appropriate, the legislative reviews make recommendations to improve the practical implementation of the laws, clarify their meaning and ensure they are implemented in a fair, equitable and effective way.

Review of the *Police Powers (Vehicles) Amendment Act 2001*

In this instance the Ombudsman's responsibility is to review the operation of the additional powers conferred by the *2001 Act*.

For the purposes of this review, the additional powers subject to the Ombudsman's scrutiny are those contained in Sections 6(1)(b) and 9A of the Act. These are the powers to:

- request passengers in vehicles to identify themselves and the driver and other passengers in the vehicle; and
- request persons who are required to identify themselves to provide proof of their identity.

According to Section 16 of the Act, the Ombudsman was required to review the operation of the additional powers for the first 12 months from the date of **assent** to the *2001 Act*, which was on 25 October 2001. However, the powers under that Act did not commence until 1 January 2002, when the Act was **proclaimed**.²

This means that the Ombudsman was only able to review the operation of the additional powers' under the Act for 10 months, being the period from the *2001 Act's* commencement on 1 January 2002 to 25 October 2002 (12 months after the date of assent to the Act).

² Proclamation is one of the ways in which a law may commence. According to information provided by the NSW Parliament: "[w]hen an act or clauses of an act come into force by proclamation, this date is determined by the minister who, on behalf of the Governor, places an announcement in the Government Gazette shortly before the date of commencement." (<http://www.parliament.nsw.gov.au>)

3. Police powers over vehicles and the origins of the *Police Powers (Vehicles) Amendment Act 2001*

This chapter describes the legislative provisions that confer new passenger identification powers on police in NSW. A brief survey of current related and analogous powers in NSW is also provided.

The *Police Powers (Vehicles) Act 1998*

The *1998 Act* was introduced following a drive-by shooting attack on Lakemba police station on 1 November 1998. When it was introduced into the Parliament, the Government argued that it was needed to deal with gang related criminal activity.

Definitions

A number of definitions contained in the *1998 Act* and other related Acts are relevant to the review of the additional powers under the *2001 Act*. These include:

- “*Driver*” includes a person having control over the steering, movement or propulsion of a vehicle and includes a person riding a vehicle.
- “*Identity*” means the name or residential address of the person (or both)
- “*Owner*” of a vehicle means the responsible person for the vehicle within the meaning of the *Road Transport (General) Act 1999* and includes:
 - a) a person who is not such an owner but who usually has the care, control and custody of the vehicle, and
 - b) any other person prescribed by the regulations for the purposes of this definition.

There is no definition of ‘*passenger*’ for the purposes of the Act, either in the *1998 Act* or the amendments established by the *2001 Act*.

Provisions

The provisions of the *1998 Act* relate to situations where a police officer reasonably suspects that a vehicle was or may have been used in the commission of an indictable offence. The Act has two main parts:

- *Part 2*, which confers on police powers to require that drivers and owners of vehicles provide their identity and the identity of others in the vehicle; and
- *Part 3*, which confers on police powers to stop and search vehicles (or a class of vehicles), establish road blocks and give reasonable directions to persons in or on the vehicles, or on or in vicinity of the road, road related area or other public place concerned.

Under the *1998 Act* there was no power to request a passenger to provide identification details.

The *1998 Act* prescribed that prior to making a request for identification or searching a vehicle under the Vehicles Act, the police officer must:

- provide evidence that he or she is a police officer (if the police officer is not in uniform)
- give his or her name and place of duty,
- give the reason for the request for identification, and
- warn that a failure to comply with the request may be an offence.³

³ *Police Powers (Vehicles) Act 1998*, s.6(2).

Under the *1998 Act*, the driver or owner must comply with police requests for information or with police directions unless he or she has a reasonable excuse not to do so.⁴

Under Section 13, a person charged with an offence under the Act has the onus of proof in establishing reasonable excuse.

If the driver or owner who is requested to provide information details about other persons does not know the full and correct identity of those persons, they must disclose such information as is known to them.⁵

The *1998 Act* prescribed that police could use the powers to stop and search vehicles (or a class of vehicles) and to establish road blocks **only** with the prior authorisation of a senior police officer.⁶

The *1998 Act* prescribes a maximum penalty of 50 penalty units or 12 months imprisonment, or both, for failure to comply with a police request for identification under Part 2 and for failure to stop a vehicle and comply with police directions under Part 3.

Review of the 1998 Act by the Ombudsman

The Ombudsman was responsible for monitoring the operation of the *1998 Act* in its first year of operation. The Ombudsman's report on the operation of the Act entitled '*Vehicle Powers, Questions and Answers: Report under s. 16 of the Police Powers (Vehicles) Act*' was tabled in the NSW Parliament on 19 December 2000.⁷ The report made 22 recommendations with the aim of clarifying aspects of the Act and improving its implementation and enforcement by NSW Police.

The Ombudsman recommended that consideration be given to amending Section 6 (1) of the Act so that a police officer could exercise the identification powers if the officer suspected on reasonable grounds that the vehicle was, or may have been, used '*in connection with*' as well as '*in*' the commission of the indictable offence.⁸

The Ombudsman's report stated that this broader wording might overcome difficulties associated with a narrow interpretation of the provisions. Such an interpretation was identified during the review of the *1998 Act* – a local magistrate had ruled that the identification powers could only be used in circumstances where the vehicle itself had been used in the offence, such as in a "ram raid".

Statements made during the Parliamentary debate confirmed that the intention of the *1998 Act* was that the police powers under Section 6 were to be applied in a broader sense:

*The clear intention of the legislation is to enable police to use their powers when a vehicle has been used to escape from the scene of a crime, and most magistrates have applied the Act in this way.*⁹

While analysing the driver and owner identification powers conferred by the *1998 Act*, the Ombudsman's review observed:

*there is no power in the legislation to request a passenger to provide identification details.*¹⁰

At the same time as the Ombudsman's report was tabled, the Minister for Police tabled the review of the policy objectives of the *1998 Act*¹¹, which considered the Ombudsman's recommendations, and supported the majority.

4 Ibid, s.7 and s.8.

5 Ibid, s.7 and s.8.

6 Ibid, ss.10(1),(2).

7 NSW Ombudsman, *Vehicle Powers, Questions and Answers: Report under s. 16 of the Police Powers (Vehicles) Act*, August 2000.

8 NSW Ombudsman, *Vehicle Powers, Questions and Answers, Report under s.16 of the Police Powers (Vehicles) Act*, August 2000, p.42.

9 The Hon. J. Hatzistergos MLC, LC Hansard, 16 October 2001, p. 17257

10 NSW Ombudsman, *Vehicle Powers, Questions and Answers, Report under s. 16 of the Police Powers (Vehicles) Act*, August 2000

11 Report of the Director-General of the Ministry for Police, *Review of the Police Powers (Vehicles) Act 1998*, December 2000.

The Minister's review identified as a legislative anomaly the absence of police powers to request passengers for identification details, while they can request this information from drivers and owners. According to the review, passengers may be more likely to be involved in the primary offence, while the driver may only provide the means of escape from the scene for an offender.¹²

The Minister's review also emphasised that the absence of police powers to directly request passengers for their identification details might create some difficulties for the efficient implementation of the Act:

Requiring a driver to identify the passenger whilst the passenger is present, increases the likelihood of passenger misidentification. Drivers may not know the identity of their passengers or may provide false information, knowing it would be more difficult to prove an offence for falsely identifying a passenger than for falsely identifying themselves.¹³

Objectives of the *Police Powers (Vehicles) Amendment Act 2001*

The *Police Powers (Vehicles) Amendment Bill 2001* was introduced in the Legislative Assembly on 18 September 2001, and was debated on 21 September 2001. The Legislative Council considered and passed the Bill on 16 October 2001. No amendments to the Bill were proposed or passed. The *Police Powers (Vehicles) Amendment Act 2001* was assented to on 28 October 2001; however, it did not commence until 1 January 2002.

The *2001 Act* was introduced in similar circumstances to those surrounding the introduction of the *1998 Act*. Its introduction followed media coverage of violent crime involving groups of offenders, and a strong public response to a number of gang-rapes of teenage girls in Sydney.

Before the *2001 Act* was introduced, the NSW Premier announced a package of legislation that aimed to address 'gang-related' crime. Additional powers for police to request passengers for identification details and to request proof of identity, under an amended *1998 Act* were foreshadowed as part of this package. The announcement also foreshadowed a range of legislative strategies relating to the investigation of offences committed by gangs and the sentencing of offenders. These included increased sentences for offences such as sexual assault in company, kidnapping, malicious wounding or infliction of grievous bodily harm, and some firearms offences.

During the Second Reading debate on the *Police Powers (Vehicles) Amendment Bill 2001*, the Government clarified that the aim of the legislation was "to enable police to use their powers when a vehicle has been used to escape from the scene of a crime".¹⁴

Members of Parliament also argued that there was a need for additional police powers to request passengers for identification details, similar to the existing police powers to request drivers and owners for identification details. According to Parliamentary debates, the powers then available to police were inadequate to assist officers in the investigation of crimes where a number of offenders were involved:

*It is likely that the driver of a vehicle may not assist in identifying a passenger who is a fellow gang member. In a deliberate attempt to obstruct justice, the driver may claim to be ignorant as to the passenger's identity or simply refuse to properly answer the request. This may prevent police from following up an important lead in their investigations. Giving police the power to question passengers directly will help to overcome this problem.*¹⁵

In addition to providing a means to deal with gang-related crime, Parliament also intended to address potential legislative 'gaps' in the *1998 Act* highlighted by the Ombudsman's and the Ministerial reviews of that Act.

¹² Review of the *Police Powers (Vehicles) Act 1998*, Report of the Director-General, Ministry for Police, December 2000, p.9

¹³ Review of the *Police Powers (Vehicles) Act 1998*, Report of the Director-General, Ministry for Police, December 2000, p.9

¹⁴ Mr B. Gaudry MP, LA Hansard, 18 September 2001, p.16718

¹⁵ Mr B. Gaudry MP, LA Hansard, 18 September 2001, p. 16719

In debate on the *2001 Act*, Mr Gaudry MP cited the Ombudsman's observations, telling the Legislative Assembly:

*Whilst the Act enables police to ask owners and drivers of vehicles to disclose the identity of the driver and passengers of a vehicle, the Ombudsman notes there is no power in the Act to request a passenger to produce identification details. Whilst the Act enables police to request that the driver of a relevant vehicle identify him or herself, there is no power to request the passengers to identify themselves, even where they are present when the driver is being questioned.*¹⁶

During the Parliamentary debate on the Police Powers (Vehicles) Amendment Bill 2001, frequent reference was made to the respective roles of drivers and passengers in scenarios involving crime gangs. Members described situations in which the driver of the vehicle was a 'get-away driver' and the passenger was the principal offender. One Government Member stated:

*in drive-by shootings, such as the one on Lakemba police station, it is rare for the shooter to be the driver.*¹⁷

According to comments made during the Second Reading Speeches in the Legislative Assembly and Legislative Council, the purpose of the amendments was to:

- 'assist police in the investigation and prosecution of gang and other offences.'
- 'respond to gang-related criminal activity, where a number of gang members leave the scene of a crime in a vehicle.'
- 'break the 'strict code of silence' that most gang members adhere to.'
- '[enable] police to use their powers when a vehicle has been used *in connection*¹⁸ with the commission of an indictable offence.'
- '[assist] in verifying information provided by other vehicle occupants and discourage the making of false or misleading statements as to identity.'¹⁹

Summary of amendments made to the 1998 Act by the 2001 Act

Circumstances where the powers can be used

Following the Ombudsman's recommendation to amend Section 6(1) to prevent a narrow interpretation of the section, the *1998 Act* was amended by extending the circumstances where the police powers conferred by the section could be used:

A police officer who reasonably suspects that a vehicle was or may have been used in or *in connection with* the commission of an indictable offence may make any of the following requests: ...
[emphasis added]

¹⁶ Mr B. Gaudry MP, LA Hansard, 18 September 2001, p.16718

¹⁷ Mr B. Gaudry MP, LA Hansard, 18 September 2001, p.16718

¹⁸ The Act was amended to reflect this objective, with the amendment to Section 6 (1), which adds 'in connection with' to the 'has been used in the commission of the indictable offence'.

¹⁹ Second Reading Debate speeches by Mr B. Gaudry MP, LA Hansard, 18 September 2001, pp.16718-9 and the Hon. J. Hatzistergos MLC, LC Hansard, 16 October 2001, pp.17257-9

Power to request identification details from passengers

The *2001 Act* amended the *1998 Act* by including a new subsection allowing police to request identification details from passengers in vehicles used in, or in connection with, the commission of an indictable offence.

Section 6 of the *1998 Act as amended* provides:

- (1) A police officer who reasonably suspects that a vehicle was or may have been used in or in connection with the commission of an indictable offence may make any one or more of the following requests:
- a) a request that the driver of the vehicle disclose his or her identity and the identity of any passenger in or on the vehicle at or about the time the vehicle was or may have been so used,
 - b) a request that any passenger in or on the vehicle disclose his or her identity and the identity of the driver of, or any other passenger in or on, the vehicle at or about the time the vehicle was or may have been so used,
 - c) a request that any owner of the vehicle (who was not the driver or a passenger) disclose the identity of the driver of, and any passenger in or on, the vehicle at or about the time the vehicle was or may have been so used.

While the amended Section 6 now more clearly establishes the circumstances in which the identification powers may be used, a number of issues relating to its exercise by police still exist. For instance:

- There is no time frame as to when an officer may make a request of a driver, owner or passenger under the Act. As the onus of establishing a reasonable excuse lies on the person being prosecuted for failing to give the required information, this highlights the need for police to apply common sense in making the request and considering the reasonableness of any excuse offered by the person in failing to provide the required information.
- The Act requires a request of a driver or passenger to relate to the use of the vehicle in connection with the indictable offence. It appears that police are precluded from making a request of the driver and passengers to identify those in the vehicle at the time the vehicle is stopped. While the intent of the legislation is to assist in the investigation of the indictable offence allegedly involving the use of the vehicle, the investigation may be assisted in having the driver and passengers identify or confirm the identity of other passengers in the vehicle at the time it is stopped. Consideration may need to be given to clarifying whether the Act should be amended to allow a request to be made in these circumstances.
- The Act refers to “an indictable offence”, which for interpretation purposes is taken to also mean indictable offences. As police may require information if they reasonably suspect that the vehicle was “or may have been” involved in the commission of an indictable offence, it is unclear whether this needs to be a specific offence or whether a request can be made if police have general intelligence on a number of offences committed in the locality where the car has been spotted and/or stopped.
- Although section 6(1)(a) confers powers on police to request drivers to provide the identity of passengers in or on the vehicle, unless they are the owner of the vehicle there is no power to require them to provide the identification details of other persons who may have driven the vehicle at the time the alleged offence was committed.

RECOMMENDATIONS

1. That consideration be given to the need to amend the *1998 Act as amended* to allow police to request the driver of and passengers in a vehicle to identify the persons in the vehicle at the time the vehicle is stopped and the request is made.
2. That consideration be given to the need to amend the *1998 Act as amended* to ensure that a driver, who is not the owner of the car, may be requested to provide details of other persons who may have driven the vehicle at the time the alleged offence was committed.

Request for proof of identity

While the *1998 Act* enabled police officers to *request* identification details from drivers and owners of vehicles, it did not provide police with the power to request *proof of identity*. The *2001 Act* amended the *1998 Act* to provide police with this power, with Section 9A providing:

A police officer may request a person who is required under this Part to disclose his or her identity to provide proof of his or her identity.

There are *no* penalty provisions for failure to provide proof of identity under the Act.

Relevant sections of the *Police Powers (Vehicles) Act 1998*

The following sections of the *1998 Act* were not amended by the *2001 Act*, but they remain relevant to the exercise and application of the additional powers under the *2001 Act*.

Section 6 (2) of the Act sets out a number of requirements that police officers **must** satisfy prior to exercising their powers under the Act:

A police officer may make a request under subsection (1) only if, before making the request, the police officer:

- (a) provides evidence to the person that he or she is a police officer (unless the police officer is in uniform), and
- (b) provides his or her name and place of duty, and
- (c) informs the person of the reason for the request, and
- (d) warns the person that failure to comply with the request may be an offence.

In March 2000, the Deputy Commissioner recommended that officers use a particular 'form of demand' when exercising their powers in relation to drivers. This form of demand was revised in February 2003 to include the additional powers under the *2001 Act* and it states:

*My name is ... (rank, name, place of duty, produce identification unless in uniform). I reasonably suspect that motor vehicle (Registration) was or may have been used in or in connection with the commission of an indictable offence being (specify offence) at (time, date, place). I warn you that failure to comply with the following request may be an offence.*²⁰

Sections 7(1), 7(A) and 8(1) provide that it is an offence not to comply with a demand from a police officer to identify drivers and passengers unless the person who is required to provide this information 'has a reasonable excuse for not doing so'.

20 NSW Police, Education Services, Education Package E03/1, Police Powers (Vehicles) Amendment Act 2001, February 2003, p.7.

If the driver, owner or passenger does not know the full and correct identity of others in the vehicle, he or she must disclose such information as is known to them.²¹

It is an offence under the legislation to give a false name, or an address other than the full and correct address, without a reasonable excuse. The maximum penalty for the offence is 50 penalty units (currently \$5,500) or 12 months imprisonment.²²

Under Section 13, a person who is subject to proceedings for an offence against the Act has the onus of proof that he or she had a reasonable excuse for failure to comply with a police request or direction.

Other 'person identification' powers in New South Wales

Police in NSW have powers to request or require identification details from persons in different circumstances and under different legislation.

Crimes Act 1900

Under Section 563 of the *Crimes Act 1900*, a police officer can ask for the name and address of a person, if the officer believes on reasonable grounds that the person may be able to assist in an investigation of an indictable offence, because the person was at or near the place of the alleged offence. Police may also request a proof of identity. Failing to provide information or providing false or misleading information under this section is an offence and attracts a penalty of 2 penalty units. There are no specific powers in the *Crimes Act* for asking a person to provide the identity of other persons.

Road Transport (General) Act 1999

Drivers, owners and passengers may be required by police to provide identification details for themselves and others under different sections of the *Road Transport (General) Act 1999*.

Under Section 21(1), if the driver of a motor vehicle is alleged to have committed an offence under the road transport legislation:

- a) the responsible person for the vehicle, or the person having custody of the vehicle, must give the name and address of the driver to an authorised officer, when required to do so.
- b) any other person must give to an authorised person if required, any information they have that may lead to the identification of the driver.

The maximum penalty for an offence under section 21(1) is 20 penalty units.

It is a defence to an offence under sub-section 1(a) if the defendant proves to the satisfaction of the court that they did not know and could not find out with reasonable diligence the driver's name and address.

Section 19 of the *Road Transport (General) Act 1999* confers powers on police officers to request identification information, including a driver's licence, from a driver of a vehicle. Section 20 of the same Act allows police officers to request identification details and a driver's licence from a passenger who is supervising a learner driver. Failure to comply with these requests is an offence and attracts a maximum of 20 penalty units.

Rail Safety Act 1993

Under Section 80 of the Act, police officers may request the name and address of anyone they suspect of having committed an offence whilst traveling on a train, or in relation to railways property in NSW. A person who does not comply with such a police request does not commit an offence if the police officer does not advise the person prior to the request that failure to comply with the request may constitute an offence.

Firearms Act 1996

Under Section 68 of the *Firearms Act 1996*, a police officer may request a person to whom a licence or a permit is issued to produce his or her firearms licence and to provide his or her name and address. The maximum penalty for failure to comply with the demand is 50 penalty units.

²¹ *Police Powers (Vehicles) Act 1998*, sections: 7 (2) (b), 7A (2) (b) and 8 (1) (b).

²² *Police Powers (Vehicles) Act 1998*, section 9.

4. Overview of the use of the new powers

This chapter provides an overview of the incidents in which the passenger identification powers were used during the review period to provide an assessment of the main issues arising from the implementation of the *1998 Act as amended* by police. The following chapter details the incidents in which the passenger identification powers were used, and the issues arising from the use of those powers.

These chapters are based on the assessment and evaluation of police records, court transcripts, interviews with police officers, surveys and other related material. A detailed methodology is set out in Appendix A.

This chapter provides data on the use of the powers (including when and where the powers were used, the nature of the offences, charge information) as well as demographic details of the passengers who were asked for details by police and their alleged role in the offence.

Recorded use of the passenger identification powers

We analysed all records in the Computerised Operational Policing System (COPS), which is the primary operational case and record management system used by NSW Police, where police used their driver, owner and passenger identification powers under section 6(1).

The powers conferred by the various sub-sections in Section 6 in the *1998 Act as amended* are similar, and there was relatively low overall recorded use of the passenger identification powers. We undertook analysis of all identification events to ensure that we were aware of those incidents that were mistakenly recorded in an inappropriate category in COPS.

For the purpose of the review, NSW Police provided the Ombudsman with COPS events recording the use of the *1998 Act as amended* for the period of 1 January 2002 to 25 October 2002.

Table 1 shows the events provided by NSW Police for the purpose of this review, including a breakdown of events according to the type of police powers used.

Table 1: COPS data on the use of the *1998 Act as amended*.

Total COPS events provided by NSW Police	77
Use of identification powers under s.6 (1)	58
Use of passenger identification (s.6(1)(b))	7
Use of driver/owner identification powers	51
Incorrect recordings	19

Source: 2001 – 2002 COPS events provided by NSW Police

As shown in Table 1, our analysis of the 77 events provided by NSW Police identified 58 events in which the *1998 Act as amended* appeared to have been used. Most of these were records of incidents in which police made identification requests of drivers and owners of vehicles according to Part 2 of the Act. These powers were the subject of our earlier review. It is worth noting that there were 51 uses of these powers in the current review period compared to 36 instances of the use of the driver/owner identification owners in 1999 (the year of the earlier review).

We identified only seven event records in which police used their new powers to request passengers for identification details under section 6(1)(b) of the Act. Two of these COPS events related to the same incident. Therefore, this report refers to **six** incidents where police used the passenger identification powers under Section 6(1)(b).

We identified 19 COPS events that incorrectly recorded the use of *1998 Act as amended*. The majority of these events documented searches of vehicles because police had reasonable suspicion that they were carrying drugs and/or stolen goods and therefore involved the use of powers conferred on police by the *Drug Misuse and Trafficking Act 1987* and s. 357E of the *Crimes Act 1900* respectively. We also identified a small number of COPS events where police had requested the driver and/or owner to provide their identification details under the *Road Transport (General) Act 1999*. We eliminated these 19 events from our analysis.

This review will primarily focus on the six incidents where the new passenger identification powers were used. However, as a point of comparison, given the small number of recorded uses of these powers, the review will also consider the other 51 events where the driver/owner identification powers under s.6(1) of the *1998 Act as amended* were used.

When and where the powers were used

Table 2. Recorded uses of identification powers by region

Use of passenger identification powers (s.6(1)(b))					
Western	Southern	Inner Metro	Northern	Greater Metro	Total
3*	2	1	1	0	7
Use of driver/owner identification powers (s.6(1)(a))					
Western	Southern	Inner Metro	Northern	Greater Metro	Total
3	6	17	7	18	51

* Two of the three COPS events refer to the same incident. Therefore, there were two incidents where police used their passenger identification powers in the Western region.

Source: COPS data provided by NSW Police, March – October 2002

Passenger identification powers

Table 2 shows that we identified seven COPS events, involving six incidents, where police have used their passenger identification powers. However, police at Western Region recorded the same incident in two separate COPS events. Accordingly there were only six incidents where the powers under review were used.

The six incidents where the passenger identification powers were used occurred in the following regions: Western (two incidents in two different LACs), Southern (two incidents in different LACs), Inner Metropolitan (one incident) and Northern (one incident). Some investigations of offences where the passenger identification powers were used involved officers attached to two or more police stations.

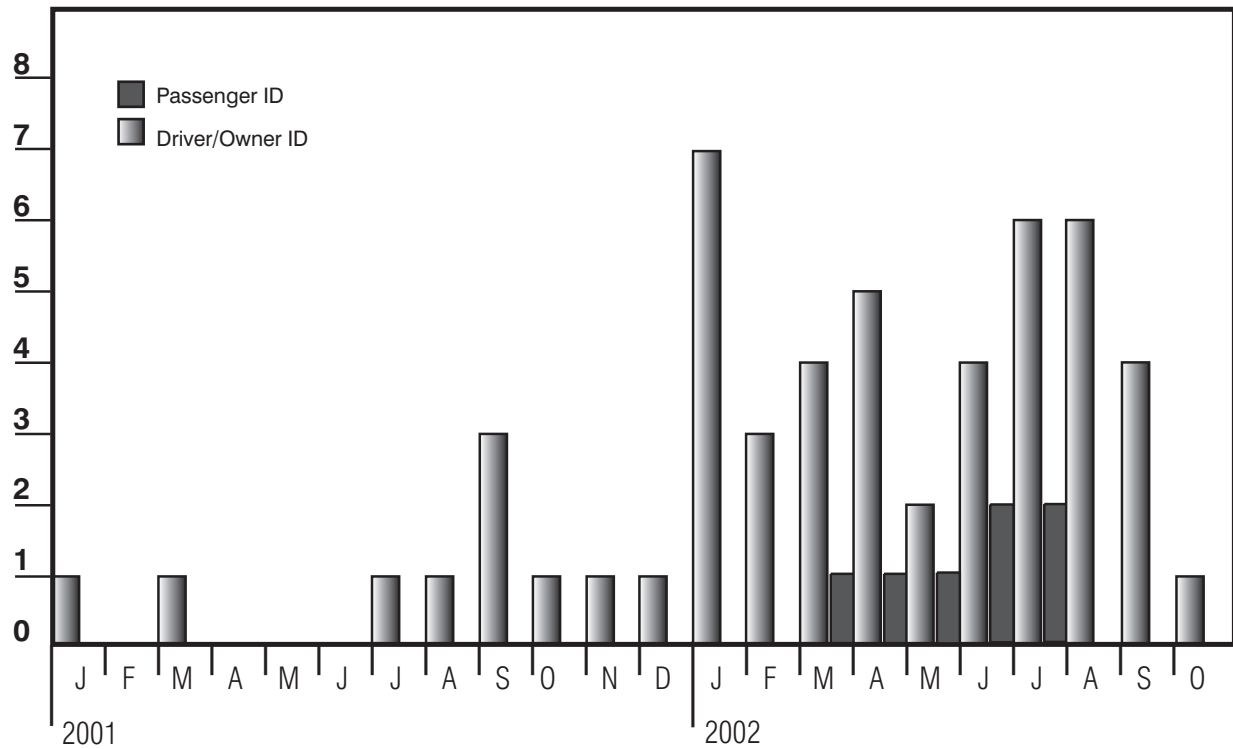
The passenger identification powers were used during the following months: March 2002, April 2002, May 2002, June 2002 (two events), July 2002 (two events).

Driver/owner identification powers

Table 2 shows that the majority of incidents where police used their driver/owner identification powers occurred in the Inner Metropolitan Region (17 incidents) and the Greater Metro Region (18 incidents). The powers were used in significantly smaller numbers in regional areas in NSW: Southern Region (6 incidents), Northern Region (7 incidents) and Western Region (3 incidents).

Graph 1 shows the use of driver and owner identification powers and the passenger identification powers for each month during the review period. According to the table, 41 incidents occurred from 1 January to 25 October 2001. NSW Police provided us with 10 COPS events that recorded incidents that occurred before the review period. According to NSW Police advice, these incidents were identified in the search of COPS data as relevant to the review, because even though the incident occurred before the review period, the investigation did not conclude until after the review period. For example, one incident occurred in January 2001; however, we found that police used their powers about six months after the event occurred and the investigation was finalised in January 2002. We decided to include these incidents in the review.

Graph 1: Recorded use of driver/owner identification powers per month



Source: 2001-2002 COPS events provided by NSW Police

Type of offences

The identification powers in the *1998 Act as amended* may only be used in relation to an indictable offence. Indictable offences include a range of offences, from less serious offences such as graffiti and shoplifting, to more serious offences such as homicide. The *Crimes Act 1990* and other statutes establish the range of indictable offences in NSW.

The following table presents an analysis of the type of offences relating to the use of identification powers under the Act.

Table 3. Use of identification powers according to type of offence

Type of offence	Driver/owner identification	Passenger identification	Total Offences
Assault	15	1	16
Car theft	1	0	1
Break Enter and Steal (BE&S)	4	1 ²³	5
Stealing (shoplifting and other)	15	1	16
Fraud (failing to pay for petrol)	2	0	2
Malicious property damage	4	2	6
Graffiti	1	0	1
Malicious Wounding	3	0	3
Firearms offences	2	0	2
Armed Robbery	3	0	3
No (indictable) offence occurred	1	0	3
TOTAL	51	7	58

Source: COPS data provided by NSW Police from March to October 2002

According to *Table 3*, police used their passenger identification powers in the six incidents in relation to the indictable offences of:

- malicious damage of property
- stealing
- break, enter and steal
- assault (occurring in a road rage incident).

In at least six incidents where police used their driver/owner identification powers, this was for the purpose of investigating multiple offences (eg. assault and malicious damage). All incidents where police used the passenger identification powers involved a single offence.

The most typical scenario in which police powers under the Act were used was when an offence had occurred and the offenders escaped the scene in a vehicle. Witnesses had noted the registration details of the vehicle and provided these to police. Police then used their powers under the Act to request the owner of the vehicle to disclose the driver and passenger identification details.

The majority of incidents where “assault” was recorded as the indictable offence occurred in a road rage situation, and the majority of these were classified as ‘assaults occasioning actual bodily harm’.

Charge Information

Passenger identification powers

Of the six incidents where police used the passenger identification powers, three of them involved situations where passengers failed to comply with a police request to provide identification details. In only one of these events did police charge the passenger for failure to comply with a police request. This was done by a way of Court Attendance Notice (CAN). This charge resulted in a conviction by a local court and the passenger was ordered to pay a penalty of \$500. In addition to this charge, the passenger was also charged (and convicted by the same court) with larceny, which was the indictable offence that police were investigating when they used their powers under the *1998 Act as amended*.

Driver identification powers

Examination of all 51 COPS events that recorded the use of the driver and owner identification powers under the *1998 Act as amended*, showed that the majority of incidents resulted in charges under the Act, and most commonly proceeded by way of summons to appear in court.

There were 31 events where the driver/owner identification powers were used that resulted in charges for failure to comply with a police request under the Act. Penalties arising from convictions included a 10 month good behaviour bond and fines ranging from \$300 to \$1000.

We identified one event where police cautioned the owner/driver under the *Young Offenders Act 1997* for her failure to provide the details of a passenger who had stolen a bottle (worth \$35) from a liquor store. The passenger had escaped from the scene by entering the passenger side of a waiting vehicle, registered to the young person.

Demographic Characteristics

Almost all COPS events examined for the purpose of this review recorded the age of persons who were asked by police to provide their identification details. The majority were males aged between 20 and 35 years.

Demographic details of passengers

Table 6 provides the demographic details of passengers who were requested by police to provide identification details under Section 6(1)(b) of the Act.

²³ Two of these offences are the subject of discussion later in this review as to whether they are specific indictable offences or a pattern of offences, see Scenarios One and Two at pages 22 and 23 respectively.

Table 6:
Demographic and other characteristics of passengers asked to provide details under Section 6(1)(b)

Police region	Age	Gender	Country of birth	Aboriginal	Nature of request	Complied with request	Charges under PPVA	Convictions
Western ²⁴	28	Female	Australia	No	Provide passenger details	No	Yes	Yes
Inner Metro ²⁵	18	Male	Australia	No	Provide passenger details	No	No	No
Western ²⁶	22	Male	Australia	No	Provide driver id.	No	No	No
	17	Female	Australia	No	Provide driver id.	No	No	No
Southern ²⁷	16	Male	Australia	No	Provide own id.	Yes	No	No
	17	Female	Australia	Yes	Provide own id.	Yes	No	No
	15	Male	Australia	Yes	Provide own id	Yes	No	No
	14	Female	Australia	Yes	Provide own id	Yes	No	No
Southern ²⁸	21	Male	Australia	No	Provide own id	Yes	No	No
	19	Male	Australia	No	Provide own id	Yes	No	No
	21	Female	Australia	No	Provide own id	Yes	No	No
Northern ²⁹	N/a	Male	N/a	N/a	Provide own id	Yes	No	No
	N/a	Male	N/a	N/a	Provide own id	Yes	No	No
	N/a	Female	N/a	N/a	Provide own id	Yes	No	No

According to *Table 4*, 14 passengers³⁰ were requested to provide identification details to police under Section 6 (1) (b). Of these:

- 2 passengers were requested to provide the identification details of the *driver* of the vehicle,
- 2 passengers were requested to provide the identification details of *other passengers* in the vehicle; and
- 10 passengers were asked to provide their own identification details.

Table 4 shows that passengers who were requested by police to provide their identification details were generally younger than the driver and owners who were subject to the similar police powers under Section 6 (1). Where age was recorded, the age of the passengers involved in these incidents ranged from 16 and 22 years of age. At least five passengers under the age of 18 were asked to provide their details to police.

Six female and eight male passengers were asked by police to provide identification details.

Three passengers who were asked to provide details to police identified as Aboriginal or Torres Strait Islander. All 11 passengers for whom police recorded the country of birth were born in Australia.

Role of passengers in the indictable offences

We examined all COPS events where the driver/owner and passenger identification powers were used to determine the role of passengers in the indictable offences investigated by police. The purpose of this analysis was to compare the level of passenger involvement in indictable offences against the level of use of the passenger identification powers by police during the investigation of those offences.

Table 5 Involvement of passengers in indictable offences

Total COPS events	58
Passengers present in vehicle at time of alleged offence	50
Passengers only allegedly committed indictable offence	4
Passengers suspected of being involved in the alleged offence	40
Passengers present in vehicle but not involved in alleged offence	9
No passengers present	9
Owner/driver requested to provide own identification details	57
Passenger requested to provide driver/owner identification	3
Passengers requested to provide identification details	7

Source: COPS events provided by NSW Police, March – October 2002

Table 5 presents an analysis of the role of passengers in the alleged indictable offences recorded in 58 COPS events. It shows that passengers were present in the vehicle at the time the alleged offence had been committed in 49 incidents, and that the passengers were suspected of being involved in the alleged offence in 40 incidents.

During the analysis, we found that in almost all incidents, police requested the driver/owner to provide identification details under the Act. In comparison, police asked passengers to identify the driver/owner of the vehicle in only three incidents.

Our analysis of police records showed that in the majority of circumstances where police suspected that the passengers may have been involved in the commission of the indictable offence, police were not able to obtain their identity, as the driver/owner failed to comply with police request for identification.

Circumstances in which the passenger identification powers were used

The passenger identification powers were mostly used after witnesses to an offence noted the registration number of a vehicle or identified the passengers in the vehicle. This occurred in four incidents of the six incidents where the powers were used. In the remaining two incidents, the use of the powers was based upon the officer's own observations and/or intelligence reports about the vehicle and/or its occupants. After the relevant vehicle had been stopped, police requested the driver and the passengers to provide information about their identity.

Passenger identification powers and criminal gangs

As discussed earlier, the primary objective of the additional police powers conferred by Section 6(1)(b) was to assist police in addressing gang-related criminal activity.

Despite the stated purpose of the legislation, our analysis of the 58 COPS events where the identification powers were used shows that in only three events police recorded that the incident was possibly gang related.

24 Record 83.

25 Record 80.

26 Record 79, 2 events.

27 Record 81.

28 Record 68.

29 Record 82. Police did not record any personal details of the three passengers in the vehicle. Police only recorded in the narrative of the incident that they spoke to the driver and three passengers. Police later informed us that the passengers were two men and one woman.

30 In the course of this report, we refer to six incidents where the passenger identification powers were used. To avoid confusion, it should be noted that these six incidents involved the 14 individuals who are described.

We examined all 58 events where the identification powers under Section 6(1) were used to determine whether the powers had been used in relation to 'gang related' offences.

The majority of incidents examined during the review involved one, two or three offenders. There were 11 incidents where more than four persons were present inside the vehicle at the time the indictable offence had occurred or at the time police used their powers under Section 6(1). However it is unclear whether all of these participated in the commission of the offence.

Only one COPS event where police have used the **driver/owner** identification powers, was recorded as 'gang related'. This involved a serious shooting incident in a location in South Western Sydney where a number of publicised gang related incidents had occurred previously. Records of calls to emergency services show residents reporting up to forty shots being fired, with the suspects fleeing the scene in a number of vehicles. We did not identify any incidents where the **passenger** identification powers were used in circumstances said to be 'gang related'.

5. The powers in action and issues arising

During the course of the review a number of significant issues were identified through examination of COPS events, discussions with police officers and examination of court transcripts and submissions as well as other analysis.

To illustrate and explain the operation of these powers, the six incidents in which the new powers were used are described in detail throughout this section as Scenarios One through Six.

The issues arising from these scenarios illustrate the experiences of police in the implementation of the legislation, as well as legal, procedural and other issues arising from the 'additional powers'. These issues relate to such matters as the circumstances in which the powers may be used, the rights of persons under the Act, police practices relating to cautions and warnings, and penalties for failing to provide details as requested.

Indictable offence - actual offence or a general suspicion

Section 6 (1) of the 1998 Act as amended states that a police officer may use the identification powers if the officer reasonably suspects that a vehicle "*was, or may have been used in or in connection with the commission of an indictable offence*".

It is unclear whether the police officer's suspicion must be related to the commission of a particular (or specified) indictable offence or offences, or whether it is sufficient that police have a general suspicion that the vehicle and its occupants might have been involved in the commission of any indictable offence that may have occurred in a locality.

During the Parliamentary debate, a number of concerns were expressed relating to the possibility that police might misuse the additional powers by police officers. Some Members of Parliament stated that the new powers were very broad and could adversely affect a wide range of vulnerable community groups:

*the sort of people likely to be targeted by police ... I am referring to young people, people of non-English speaking backgrounds and indigenous youth. They are not likely to understand the intricacies of the law. These broad and unjustified powers will make it easier for police to pull over vehicles on flimsy grounds, and effectively harass their occupants.*³¹

In response to these concerns, the Government stated that the powers can only be used when there is a suspicion that the vehicle may have been used in connection with an indictable offence:

*We require an indictable offence if we are to be able to activate the provisions to which this bill relates.*³²

Our analysis of incidents for the purpose of the review shows that police have used their powers in both circumstances: that is, where the police suspicion related to the use of the vehicle "in or in connection" with a very specific offence or offences as well as where they simply have a general suspicion that the vehicle may have been involved in any number of indictable offences.

Generally, the basis on which police formed their suspicion that the vehicle was used in the indictable offence was different in the two types of settings. In the incidents described in four of our scenarios an indictable offence had occurred and police had information from witnesses about the involvement of the vehicle in the commission of the offence.

On the other hand, in the incidents described in the other two scenarios, police relied on their intelligence reports about the vehicles and their occupants as well as police intelligence on 'high risk areas' where indictable offences had occurred. In these scenarios, the subsequent police actions seemed to be based as much on a belief that the vehicle was in an area where indictable offences had occurred as belief that the driver and/or passengers might have been involved in the commission of those offences.

³¹ Ms Lee Rhiannon MLC, LC Hansard, 16 October 2001, p. 17262.

³² The Hon. J. Hatzistergos, LC Hansard, 16 October 2001, p.17267

The six incidents where the passenger identification powers were used, described in the scenarios, involved the following indictable offences:

- stealing,
- assault, generally in a road rage situation, and
- malicious damage.

Scenario One - 'Break and Enter' offences and car theft

In July 2002, members of the Target Action Group (TAG) were patrolling an area on the south coast of NSW where a number of break and enter and car theft offences had been committed. The TAG had information about a number of possible offenders and a particular vehicle that was often used during offences in the area.

The police located the targeted vehicle parked in the area. The vehicle was unoccupied, but appeared to have been driven during the night. According to police reports:

an extensive patrol of the area where the vehicle was first sighted was conducted and the occupants not sighted. As such, the [vehicle's particulars were] circulated via Police radio to stop and check bona fides etc.³³

According to police records, police suspected that the vehicle may have been used in connection with the commission of a number of indictable offences, including break and enters and car theft. Police explained to us how a 'reasonable suspicion' was formed in relation to the vehicle and its occupants:

The vehicles bona fides were checked revealing intelligence associated with the vehicle. The vehicle is also known via local intelligence reports. The [name of LAC] at that juncture was besieged with a spate of breaking offences and car theft. A known target identified under the Suspect Target Management Plan was known to be a regular occupant of the vehicle. Local Police were aware perpetrators committing the aforementioned indictable offences [break and enters and car theft] were also using a support vehicle.³⁴

One hour after the radio message concerning the vehicle's particulars was broadcast, the vehicle was stopped by the Highway Patrol. Additional police were then called to the scene.

According to police records, police used their powers under Section 6(1) of the 1998 Act as amended to request the driver and passengers to disclose their identities. Police also searched the vehicle.

According to the COPS report, the female owner/driver of the vehicle and one female passenger had prior charges for break and enter offences, while a male passenger had prior charges for car theft offences. There were three other passengers in the vehicle, one male and two females.

³³ Record 81.

³⁴ Record 81. Written statement provided by a police officer for the purposes of this review.

³⁵ Record 81, written statement from a police officer.

Scenario Two - Suspected indictable offence

Police told us that they informed the driver and passengers about the reasons for stopping the vehicle and warned them that failure to comply with the police request may be an offence.³⁵

The occupants complied with the police request for identification details. Police told us that they requested the driver and passengers to provide proof of identity, however only the driver provided her driver's licence and the passengers stated that they did not carry proof of identity. While police issued Traffic Infringement Notices to the driver for a number of offences, there appears to have been no progress made in the investigation of the break and enters.

This incident occurred late at night in July 2002, on the south coast of NSW. During a routine police patrol, police observed a vehicle making an abrupt turn into a scenic drive without indicating. Police told us that they believed the driver was attempting to avoid police.

The COPS report stated that the vehicle was stopped for the purpose of a random breath test.

Police told us that they believed that the car occupants 'looked suspicious' because they appeared nervous and apprehensive. The police cited additional factors in taking further interest in the occupants of the vehicle:

The time of night, the demeanour of the occupants and the high level of BE&S [Break, Enter and Steal] offences in the area suggested the vehicle may have been involved in similar offences.³⁶

Police also told us that after stopping the vehicle, they asked the male driver (27 years old) to identify himself and to provide his driver's licence. The driver was asked to perform a breath test. Police asked the passengers (two men aged 23 and 20, and one woman aged 22 years) for their identity and whether they had proof of identity. According to police, the car occupants were informed that their vehicle was stopped because police were 'checking out'.

Police made enquiries over the police radio and established that there was police intelligence regarding the driver and the vehicle for 'Break Enter and Steal' offences. Police also observed that the car, which was a station wagon, had a large amount of electrical equipment in the back.

Police told us that they asked the driver "Do you mind if we have a look inside your car?", and the driver acquiesced. Police identified a large load of electrical equipment in the back and asked the driver about the equipment. Police told us that at that time they suspected that the equipment may have been stolen. The occupants told police they were going to a party and they were taking the equipment there. After searching the vehicle, police established that the electrical equipment was not stolen and allowed the vehicle to leave the scene. However, police told us that they followed the vehicle to the party, to ensure that "everything was OK".³⁷

Police told us that they did not put a form of demand on the driver and passengers to provide information and to search the vehicle, because they complied with police requests. However, police told us that the manner in which the vehicle had been driven aroused their suspicions before it was stopped and that following the 'check up' of police records and the search of the vehicle, police believed that the vehicle may have been used in the commission of an indictable offence - stealing. Police also told us that at the time they were conducting the search of the vehicle, they were using their powers under the *1998 Act as amended*.

Police did not detect any offences during the incident and there were no charges resulting from it.

³⁶ Record 68, COPS Event

³⁷ Interview with a police officer, 15 October 2002

In these two events where police requested passengers to provide identification details, police were not investigating a specific indictable offence.

In Scenario One, police suspected that the vehicle and its occupants were involved in the commission of a number of indictable offences that had occurred in the area over a period of time. The focus of police operations leading to this incident seems to have been the identification of any potential offenders involved in any or all of the indictable offences.

Scenario Two relates to an event where police were not acting on the basis of particular knowledge that an indictable offence had occurred. Police only suspected that an indictable offence may have occurred once they confirmed that there was police intelligence on the driver in relation to stealing offences and they detected a large amount of electrical equipment inside the vehicle.

The facts suggest that the reasonable suspicion that the vehicle may have been used in connection with an indictable offence was formed after police stopped the car and asked for identification details of the driver and passengers. Police did not have any information to indicate that electrical equipment had been stolen in the area. Rather, it appears that police were using their powers to establish whether an offence had been committed, rather than progressing an investigation into a specific offence.

It is unclear whether this is permitted by the legislation, and indeed whether it was the intent of Parliament in enacting these provisions to allow them to be used in such circumstances. In the first instance, we would recommend that NSW Police obtain legal advice on whether these powers can be used to establish whether an offence has been committed or whether they can only be used to assist the investigation of an indictable offence.

Obtaining this advice is a critical element in ensuring that the legislation is properly enforced, and that the courts do not rule inadmissible the investigative results coming from requests made using the powers.

Should this advice indicate that a narrower interpretation be given effect, NSW Police should issue guidelines and modify existing education material and training to explain the exact circumstances in which the powers can be applied. This will ensure that police officers are aware of the circumstances where it may be unlawful or inappropriate to exercise the powers.

RECOMMENDATIONS

3. That NSW Police obtain legal advice on the circumstances in which the 'request for identification details' powers under the *Police Powers (Vehicles) Act 1998* as amended may be used, particularly on the issue of whether the powers can be used to determine whether an indictable offence has been committed as opposed to assisting the investigation of an indictable offence that is already known to have occurred.
4. That should the advice indicate that the narrower interpretation be given effect, NSW Police issue guidelines and modify existing education material and training to explain the exact circumstances in which the powers can be applied.

Procedural requirements

During their interaction with drivers, owners and passengers for the purpose of the Act, police are required to perform a number of actions to ensure that persons are informed about their rights and responsibilities. Most requirements are specified by the legislation that confers the police powers exercised during the interaction. However, additional requirements are prescribed by other NSW Police policies and procedures.

The procedural requirements relevant to this review are:

- 'Form of demand' - formal request by police to provide passenger identification details.
- Warning
- Cautioning

Formal request to provide identification details to police - 'form of demand'

During interviews with some police officers we identified some confusion about how to demand identification details in the manner required by the Act. One police officer who had used the passenger identification powers stated that he did not use a 'form of demand' prior to requesting the passengers to identify themselves. However, in his description of the event, he stated that he informed the car occupants about the reasons for his request and warned them that failure to comply with the request may constitute an offence. The police officer commented that he did not know that there was a written form of demand to use when exercising the powers under the *1998 Act as amended*. The police officer suggested that police officers be assisted with fulfilling their responsibilities under the Act by being given written formal requests to follow:

*My recommendation would be that NSW Police prepares a form of demand for officers to use when making a request for identification under the Act. This would assist us in many circumstances.*³⁸

In February 2003 the 'form of demand' was revised to include the 'additional powers' under the *2001 Act*, and was included in the supporting Education Package for the *2001 Act*.

The Police Service Handbook and other NSW Police educational material such as the Six Minutes Training Program (SMIT) provide some instructions on this issue. The SMIT training package states that a police officer should warn the person twice that failure to comply with a request may be an offence, before action can be taken against the person for failure to comply with the request.³⁹

According to our examination of COPS events, the issuing of a form of demand according to the Act was not always recorded. We established that police recorded the issuing of form of demand in 40 instances (out of 58 incidents). In these events, police made records of the issuing of a 'form of demand' either by recording the exact words used by police, or by recording in the narrative field that 'a form of demand was used'.

Notwithstanding that police use the 'form of demand' in the majority of incidents where the powers under the Act have been used, there are still a significant number of instances where it cannot be established that the demand was made properly. Accordingly, it is important that NSW Police continues to ensure that police officers' are aware of the legislative requirements to provide information to passengers prior to the use of these powers.

Warnings

Section 6(2) of the *1998 Act as amended* requires that prior to police requesting a person to provide identification details under the Act, police must warn the person that failure to comply with the police request may be an offence under the Act. The warning is included in the 'form of demand' used by police. Police records relating to the six incidents under review where the passenger identification powers were used indicate that police warned the persons in two events.

Following our analysis of police records, it appears that there is a common police practice of informally asking people for identification details when conducting an investigation. If the person refuses to comply with the police request, police then make the form of demand under the Act, including a warning that failure to provide the information may be an offence.

³⁸ Record 81, Telephone interview with a police officer, 1 October 2002.

³⁹ Six Minutes Training Program,

Scenario Three: 'Bag snatch' from a house

This incident was reported to us by NSW Police as an instance of the exercise of police powers to request the driver of a vehicle to provide the identification of passengers under the *1998 Act as amended*. Closer scrutiny of the narrative of the incident indicated that police may have used the 'additional powers' conferred by the 2001 Act to request passengers for their identification details. However, analysis of those records in this instance suggests that police did not rely to a great extent on these powers as a tool to investigate the offence as some time had elapsed between the offence and when the vehicle was stopped.

In March 2002, members of a Target Action Group (TAG) on the central coast of NSW received a report over the police radio about a break, enter and steal offence that had occurred the previous day. The radio report included a description of two male suspects and the registration number of a vehicle used by them prior to and after the offence.

A house had been broken into and some property had been stolen. Neighbors had observed two men (one of "Aboriginal appearance" and one of "Caucasian appearance") leaving a vehicle and walking towards the house, while one man and one woman stayed inside the vehicle. The neighbors also saw the men running back to the vehicle, which was then driven away. When the neighbors alerted the residents of the house, who had been in the back garden, it was discovered that a lady's wallet containing \$200 in cash, a handbag and a mobile phone had been stolen. They alerted the police, and a COPS report was initiated shortly after the offence occurred.

Shortly after the broadcast was received, the TAG intercepted the suspect vehicle. Police spoke to the male driver/owner and three passengers - two men and one woman. Police also searched the vehicle and its occupants for stolen property and "a clothing description was recorded for each person". Police questioned the driver (who was also the owner) and the passengers about the offence. After the passengers denied any knowledge of the offence and the identity of passengers who may have been inside the vehicle at the time of the offence, they were allowed to leave the scene.

In this scenario, it was significant that police considered the time period between the commission of the indictable offence and the interception of the vehicle, which is in contrast to the situation in Scenario Two:

We stopped the vehicle one day after the offence occurred. It would have been difficult to prove that the passengers seen inside the vehicle were the same people who were in the car the day before.⁴⁰

Police requested the driver/owner of the vehicle to provide the details of the passengers in his vehicle at the time the offence had been committed. After the driver denied any knowledge of the identity of the passengers, he was arrested for failure to comply with a police request for identification details under the 1998 Act as amended.

The following is a segment from a recorded interview with the driver. It shows that after the driver denied knowledge of the identity of the passengers, police immediately cautioned him and advised him of his right to silence. While issuing the form of demand, police failed in their obligations under the Act to warn the driver that failure to comply with the police request may be an offence:

⁴⁰ Telephone interview with a police officer, 24 October 2002

Scenario Three: 'Bag snatch' from a house (Continued)

Police: "I now require you to tell me who was the [sic] driving the vehicle about 1.00pm yesterday the [date]?"

Suspect: "Yes, I was the driver."

Police: "Can you tell me who the passengers were in that vehicle yesterday about 1.00pm?"

Suspect: "I don't know".

Police: "I must inform you that you are not obliged to say or do anything. Do you understand that?"

Suspect: "yes"

Police: "I must also inform you that anything you may say will be recorded and may later be used in evidence. Do you understand that?"

Suspect: "yes".

Police: "Will you tell me who were the other persons in vehicle [registration number] about 1.00 p.m. yesterday, [date]?"

Suspect: "I don't know?"

Police: "Will you read this notebook to ensure I have recorded our conversation correctly?"

Suspect: "No."

Police: "Will you sign this notebook to ensure that it is a correct record?"

Suspect: "No."

Police: "Under the Police Powers Act [sic] you are going to be charged with not disclosing the identity of the passengers in your vehicle yesterday. Do you understand that?"

Suspect: "Yes".⁴¹

The charges were subsequently withdrawn, following a recommendation from the police prosecutor. The prosecutor advised that the matter should be withdrawn because police did not properly fulfill their responsibility to warn the person prior to charging him under Section 6(1) of the *1998 Act as amended*.

The prosecutor advised us that he subsequently discussed with the involved police officers their obligation to advise suspects of their rights and obligations according to the Act. The prosecutor further advised that the police officer "accepted the advice and at this time [the prosecutor] does not envisage any further problems of this nature".⁴²

⁴¹ Police officer statement, p.2-3, Record 82.

⁴² Record 82: Advice from the police prosecutor, 28 October 2002.

From the facts of this scenario, it is interesting to note that:

- Police considered the period of time that passed from the time of the offence to the time when police intercepted the vehicle in their decision not to place a form of demand on the passengers to provide the details of others who may have been in the vehicle at the time of the offence. In this instance, the driver/owner of the suspect vehicle was considered the primary source of information in the investigation of the offence.
- If police fail to satisfy the requirements set out by section 6(2) of the *1998 Act as amended* prior to exercising their powers under section 6(1), it is most likely that charges laid for an offence against the Act will not succeed. In this instance, the police officers failed to warn the driver that failure to provide the identification details of passengers may be an offence under the Act.
- Police also issued a caution on the right to silence, which is inconsistent with their powers to demand information under the *1998 Act as amended*. Even if the officers had properly complied with the requirements set out in the Act, any charges would have been at risk of unsuccessful prosecution due to the caution issued in the course of the interview. The issue of cautioning is discussed in further detail in this section.

In advising police that they had not fulfilled their requirements under the Act to warn the driver, the prosecutor stated:

I submitted the Mandatory Dismissal Form and nominated Investigation as the primary reason. The deficiency in this area was as follows:-

Under this section, [Section 6 (1) (a)] police have certain responsibilities that they have to adhere to prior to the offence being made out. These four things are contained in sub-section 2, points (a) and (d) which state as follows:-

(2) A police officer may make a request under subsection (1) only if, before making the request, the police officer:

- a) provides evidence to the person that he is a police officer (unless in uniform); and*
- b) provides his/her name and place of duty; and*
- c) informs the person of the reason for the request; and*
- d) warns that person that failure to comply with the request may be an offence.*

From reading of the brief and evidence gleaned at the time of the hearing, it was obvious that the police did not comply with sub-section (d), in that they did not warn the person. There were arguments that there were inferences there however this could not be proven at court beyond the required standard. Thus the matter was dismissed.⁴³

We discussed the incident with the involved police officer, who stated that police had warned the person that he may be committing an offence if he did not provide the details of passengers to police. According to the officer, police warned the person at the time his vehicle was intercepted that failure to comply with a police request may be an offence, however they did not make a record of this in their police notebooks.

The Ombudsman's review of the *1998 Act* found that police officers often did not warn drivers and owners of vehicles about the consequences of their failure to comply with a police request. As a result of these findings the Ombudsman recommended that NSW Police advise officers of the correct procedures for giving a warning under the *1998 Act*⁴⁴. This recommendation was supported by the Ministerial Review of that Act, which stated that the issue would be addressed in officer's education and training.

⁴³ Record 82.

⁴⁴ NSW Ombudsman, Vehicle Powers, Questions and Answers, August 2000, Recommendation 8, p.58.

We canvassed the matter of issuing warnings with police officers during the telephone surveys conducted during the review. Most police officers were aware that when using their powers under the Act, they were required to appropriately warn a person that failure to comply may be an offence. The issue of warning has been included in the suggested form of demand, which was revised to include the 'additional powers' conferred by the 2001 Act.

Providing a warning that advises the driver or passenger of their lawful obligations, and the consequences of failing to comply with a lawful request, offers a fundamental protection to the public. We are also mindful that the same form of warning will be required by the *Law Enforcement (Powers and Responsibilities) Act 2002* to exercise such powers as the search and arrest of persons, the search of vehicles, vessels and aircraft, the entry to and search of private property, and the seizure of property. In view of this, NSW Police should give consideration to preparing a single form of demand for these warnings that is simple, comprehensive and ensures that police officers carry out their statutory obligations.

RECOMMENDATION

5. That NSW Police consider the development of a form of demand that incorporates their obligations under the *1998 Act as amended* and the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide a warning of the consequences of failing to comply with a police request.

Cautioning

Prior to obtaining information from a person who is under arrest or who is suspected of having committed an offence, police have an obligation to 'caution' the person, that is, to inform the person about his or her right to silence. The standard form of caution used by police officers is:

You do not have to say or do anything but anything you say or do may be used in evidence.

The principle of cautioning of persons derives from the privilege against self-incrimination, which is a fundamental aspect of the Australian legal system.

Under Section 138 of the *Evidence Act 1995* evidence obtained improperly may not be admissible in court. Evidence may be 'improperly obtained' when the police officer does not caution the person who is under arrest about his or her right to silence before police question the person.

The NSW Police Custody, Rights, Investigation, Management, Evidence Code of Practice (CRIME), is a succinct summary of police powers and obligations in the investigation of offences.

The advice contained in CRIME in relation to cautioning is:

Caution someone once you:

- *Arrest them, or*
- *Believe there is sufficient evidence to establish they have committed the offence which is the subject of the questioning, or*
- *Would not allow them to leave if they wanted to, or*
- *Have given them reasonable grounds to believe they would not be allowed to leave if they wanted.*

If you fail to caution at the appropriate time, or if the suspect does not fully understand it, any subsequent conversation or admission might be ruled to be improperly obtained and inadmissible.⁴⁵

⁴⁵ Custody Rights Investigation Management Evidence Code of Practice, CRIME, NSW Police Service, 1997, p.25

However, CRIME advises that police are not required to caution persons if an Act requires the person to provide information to police officers:

*You **do not** have to caution where the law requires people to answer questions put by, or to do things required by, the investigating official, eg. Traffic & Customs Acts.⁴⁶ [Emphasis added]*

Information provided to police prosecutors on cautioning explains this point further and states that in some circumstances, an Act can remove the right to silence:

*An Act of Parliament may impose an obligation on a person to give certain information. The right to silence is only lost to the extent that the person is obliged to give that information. A person must **NOT** be cautioned if an Act of Parliament imposes an obligation upon them to give the information.⁴⁷*

Some police records relating to the use of passenger identification powers, examined during this review, show that police issued cautions prior to making a request under the Act.

Scenario Four: Stealing from a video rental store

One evening in April 2002, police were called to a video rental store located in a shopping center in a small town west of Sydney. They were responding to reports that a man, who was accompanied by two women, had stolen a number of DVDs and run out of the store, activating the store's security alarms.

A staff member told police that she chased the man to the outside of the store and saw him going to the car park. One customer reported to police that she saw the man entering the driver's side of a vehicle and leaving the scene. She said that two women, who did not enter the vehicle, urged the man to leave the area. The customer provided the vehicle's registration number to police.

About thirty minutes after the incident, police intercepted the suspect vehicle and spoke to the female driver (29 years old) and the female passenger (22 years old). Police established that the vehicle was registered in the name of the driver's father, but that she usually drove the vehicle. According to police reports, police said to the women:

we have information that your vehicle may have been used in a stealing from [name of video store] a little while ago. Can you tell me who was the male person who was seen driving your car away from the store?⁴⁸

The women denied any knowledge of the incident or the man who was involved in it. They were arrested for "[their] involvement in the stealing and for also failing to provide [police] with the identity of [their] male accomplice."⁴⁹ After their arrest, the women stated that they did not visit the video store and that no other person had driven the car apart from the female driver.

After this statement, police took the women back to the video store to view the security video. It showed the women entering the store in the company of the male offender and talking to him for about 15 minutes before he ran out of the store, activating alarms. Police records show that both women denied that they knew the man and stated "they had only seen him once or twice around town".⁵⁰

46 Custody Rights Investigation Management Evidence Code of Practice, NSW Police Service, 1997, p.25

47 NSW Police Prosecutor Training Unit, Dickson, I. "Cautioning of Persons", 20 August 1997. (unpublished)

48 Record 83. Police record of an interview with the suspect.

49 Record 83. Police record of an interview with the suspect.

50 COPS Report, Record 83.

Scenario Four: Stealing from a video rental store (Continued)

The women were taken to the police station where they were interviewed about their alleged involvement in the stealing at the video store and their knowledge of the male offender. According to police records, police cautioned the women before interviewing them about the offences.

According to transcripts of the interview, police did not warn the women that failure to comply with the police request might be an offence under the 1998 Act as amended.

Each woman was charged with two offences in relation to the stealing (larceny and involvement in the larceny in the second degree) and one offence for failure to comply with a police request for identification details under 1998 Act as amended.

It is interesting to note that the female driver at the time of arrest was charged under section 7(1) of the *1998 Act as amended* which relates to the failure of a driver to provide his or her own identity to police. (The Court Attendance Notice records the 'law source' for the charges as "30618 - Driver fail to disclose identity to police after request.") There are no powers under section 6 of the Act to request a driver for the identity of another driver of the vehicle. In fact, the driver can only be asked to identify other possible drivers of the vehicle by a request made under section 8 if they meet the definition of the "owner" of the vehicle.

Given that the female driver of the vehicle was in fact the usual custodian of the vehicle, thereby meeting the definition of 'owner' for the purposes of the Act, she should instead have been charged under section 8(1), requiring the owner to provide the identification details of a driver or passengers in a vehicle to police. These issues were not raised during court proceedings, but they do indicate grounds upon which a defence to charges under the Act might have succeeded.

In addition to witness evidence that the two women were seen urging the man to drive the vehicle away from the scene, the court also heard evidence from another witness that the two women were seen together with the man immediately before the incident and it appeared that they were familiar with him.

The Local Court Magistrate found the women guilty of the charges of 'accessory to larceny' and 'failure to provide identification details to police':

The defendants have given evidence that they did not know the male. They did not act in concert. They exited the shop and got straight into the motor vehicle and left. That does not accord with the evidence of [the customer witness] who gave evidence that she saw them waving to the motor vehicle as it drove off being driven by the male or by a male and by them saying certain words. On the evidence before me I can only come to the conclusion that the male was known to the defendants.... the evidence essentially says it all. Whether it was stupid action or whether it was premeditated who knows but it's costly...⁵¹

The penalties ordered for each defendant were \$500 for each of the two offences (larceny and failure to provide identification details under the 1998 Act as amended, in addition to \$120 for compensation under the *Fines Act*).

⁵¹ Police v. C & W, local court, 10 September 2002, (unreported).

Among the issues raised by this scenario:

- Police used their identification powers under section 6(1) when a considerable period of time had elapsed after the vehicle left the scene of the offence. The identification powers were used to investigate a connection between persons and the vehicle 'at or around the time' the indictable offence had been committed. Even though police had no evidence that the female driver and passenger were inside the vehicle when it left the scene of the offence, the women were not able to satisfy police and the court that they did not know the male offender who was seen escaping in the vehicle.
- Police charged the usual driver of the vehicle under section 6 of the 1998 Act as amended for failing to provide the details of the person who was driving the vehicle at, or around the time the offence was committed. The Act does not permit this. If the driver is the also the owner (which is taken to include the "usual custodian") of the vehicle, then it is possible to exercise powers and lay charges pursuant to section 8 of the Act.
- The officers issued a caution to the persons, using the standard wording used generally in interviewing suspects, which contains advice on their right to silence ('you do not have to say or do anything if you do not want to') prior to placing on them a form of demand to disclose identification details, which gives effect to a statutory requirement to provide information requested by police, which cannot be refused without reasonable excuse. The Ombudsman's review of the 1998 Act highlighted some court examples where the Magistrate had accepted that a person has a reasonable excuse not to comply with a police request to provide identification details because police have previously cautioned them.

In the incident described in this scenario, after the driver and passenger denied any knowledge of the identity of male driver of the vehicle, police arrested them and cautioned them about their right to silence. Shortly afterwards, police again requested the driver and passengers to disclose the identity of the driver. During the electronically recorded interview at the police station, the driver and passenger were again cautioned prior to being requested to provide identification details. The cautioning issue was not raised during the court proceedings resulting from this incident.

Similarly, the driver in Scenario Three was twice requested to provide information to police under the *1998 Act as amended*. He was cautioned each time before he was requested to provide the identification details of passengers in his vehicle.

The Ombudsman's review of the *1998 Act* established that police often issued a caution prior to demanding that a person provide identification details under that Act. The Ombudsman's report cited a District Court appeal where a conviction for failure to comply with a police request under the Act was quashed because police had cautioned the driver prior to requesting her to provide identification details. The District Court found that the driver had a 'reasonable excuse' not to comply with the police request because she was informed that she was able to exercise her right to silence.⁵²

The Ombudsman noted then that cautioning prior to requiring a response to demand under the Act would provide a reasonable excuse for not complying with the demand. Accordingly, the Ombudsman recommended that NSW Police provide guidance to officers about how to give cautions in the context of demands made under the passenger and driver identification provisions in the 1998 Act.⁵³

In his review of the Act, the Minister supported this recommendation and stated that such guidance "will provide clarity for police and help them carry out their duties."⁵⁴

Our examination of education and training material for the purposes of the review has not provided any indication that this recommendation has been implemented. During the surveys conducted for the purposes of the Act, we asked police officers whether there has been any specific guidance provided by NSW Police in relation to issuing of cautions in the context of requesting car occupants for identification details. All police officers that replied to this question were not aware of any specific guidance in relation to issuing of cautions. The survey showed that in the absence of specific guidelines for cautioning in the context of the police powers in the Act, police mainly followed the standard police practice of cautioning as prescribed in the Police Handbook and CRIME.

⁵² NSW Ombudsman, Vehicle Powers, Questions and Answers, August 2000 p. 45

⁵³ NSW Ombudsman, Vehicle Powers, Questions and Answers, August 2000 p. 47.

⁵⁴ Review of the *Police Powers (Vehicles) Act 1998*, Report of the Director General, Ministry for Police, December 2000, p.20

RECOMMENDATION

6. That NSW Police reinforce the appropriate form of cautioning with officers in the context of their powers and responsibilities under the *Police Powers (Vehicles) Act 1998*.

Other rights of persons under of the Act

Reasonable excuse for not complying with the request

The Act provides that it is not an offence not to comply with a request from a police officer to provide identification details, if the driver, owner or passenger 'has a reasonable excuse for not doing so'.

The Ombudsman's review of the *1998 Act* considered in detail the question of what might constitute a 'reasonable excuse' under the legislation. In the review, we argued that it is desirable that persons who are requested to provide identification details under this Act are informed of their right not to comply with the request where they have a reasonable excuse to do so. The Ombudsman then recommended that the suggested form of demand be amended to ensure that officers inform person that they need not comply with a demand if they have a reasonable excuse not to do so.

This recommendation was not supported by the Ministerial review on the basis that there is no requirement in the Act for the officer to inform the person that they do not have to comply if they have a reasonable excuse.

The Ministerial review further stated that police officers ask for the reasons of failure to comply with the police request, and consider whether these reasons constitute a reasonable excuse prior to determining whether charges should be laid.

Our examinations of police records indicate that this does occur on occasions. We identified a relatively small number of incidents where police have recorded their decision not to charge a person for failure to comply with a police request under the Act, because police considered that drivers, owners or passengers had provided genuine reasons for not complying with police requests for identification details.

Scenario Five: Malicious damage to school property

In April 2002, police were called to the scene of a single vehicle accident in a small town in northern NSW. While investigating the accident, police received information that shortly before the accident, the vehicle had also been used to perform 'reverse donuts' on local school basketball courts causing some damage to the surface of the courts.

Police at the scene interviewed the owner of the vehicle (22 years of age) who stated that he was a passenger in the vehicle at the time of the collision. The owner told police that a man called "Anthony"* (from another town had driven the car, crashed it and immediately run off. During the interview, police realised that the owner was 'moderately affected' by alcohol, and suspended the interview to a later time. After numerous attempts by police to obtain a statement from the vehicle owner, he was finally interviewed about the incident three months later. He again said that he only knew the driver as 'Anthony' and that he possibly resided in a nearby town, but he could not provide any further identification details.

Police later interviewed three persons identified as having been passengers in the vehicle, in relation to both incidents - passenger A was the twin brother of the owner, his girlfriend (passenger B) and another male (passenger C). Passenger C stated that he did not have a good memory of the accident 'as a result of a mental illness'.⁵⁵ The police officer investigating the incident told us that he was reluctant to formally make a request under the Act to passenger C due to his mental illness.

* Not real name as recorded in police records.

Passengers A and B initially declined to make statements to police, because they wanted to seek legal advice. It appears that police allowed a period of up to two months for the passengers to seek this advice, consider their obligations under the Act and provide a statement to police. Following this, police again made use of the provisions of the *1998 Act as amended* as well as the *Road Transport (General) Act 1999* to formally require these two passengers to identify the driver of the vehicle at the time of both the crash and the 'reverse donut' incidents. Both passengers provided limited information about the identity of the driver to police, stating that the driver was a man called "Anthony" who resided in a nearby town and that they had never seen him prior to the night of the incidents.

Police received information from other witnesses that it was in fact the vehicle owner who was driving the vehicle at the time of the offences. Police suspected that the information provided by passengers A and B in relation to the identity of the alleged driver 'Anthony' was erroneous and was provided with the purpose of shielding the real identity of the driver.

We contacted police while their investigation was under way, and they advised us that they were considering charging the owner and passengers because they had 'failed in their obligations' under the *1998 Act as amended*. Police advised us that they were in the process of seeking legal advice from the police prosecutor, but were fairly confident that charges would be laid.⁵⁶

Following further inquiries with the police officer in charge of the investigations, we were advised that police were now reluctant to proceed further against the passengers because of the absence of a victim statement from the school principal. Police had received oral advice from the police prosecutor that even though there appeared to be sufficient evidence to proceed with malicious damage charges, this was not desirable because of lack of community interest in prosecution. The police officer asked: "if the victim is not interested in charging the offenders, is it in the interest of the community to prosecute for this offence?"⁵⁷

Police also told us that while considering whether to charge the passengers, they took into account the age of passenger B and the extent of her involvement in the offence: "She was a young person and a girlfriend of the other passenger. She was probably influenced by the other males in the vehicle, who were adults."

Police advised us that they later charged the owner of the vehicle for failure to provide the details of the driver of the vehicle at the time of the collision. This is an offence under the *Road Transport (General) Act 1999*. No charges were laid under the *1998 Act as amended*.

It is interesting to note that although police decided not to charge the passengers for failure to provide identification details, there is still the possibility that charges may be laid for interfering with the police investigation. This is because of the passengers' repeated failure to comply with a police request. The police officer stated:

Depending how the court case goes, and if it is proven that the owner was driving the vehicle at the time, we may decide to charge the passengers of the vehicle for perverting the course of justice as witnesses, because they continuously lied to us about who the driver was.⁵⁸

Police stated that the lack of cooperation with police in this case was probably due to the small size of the community:

I can understand why this happens, it's a small community, everyone knows everyone else, and people do not want to provide statements in court against each other, no matter what.

⁵⁵ Record 79, recorded interview between police and a witness.

⁵⁶ Telephone interview with a police officer, 2 July 2002

⁵⁷ Telephone interview with a police officer, 2 July 2002

⁵⁸ Telephone interview with police officer, 30 January 2002.

* Police use the term 'form of demand' to refer to the practice when police formally request persons to provide information according to specific legislation. In this case 'form of demand' refers to a formal request to provide identification details according to the *Police Powers (Vehicles) Act 1998*.

Legal advice

The Ombudsman's review of the *1998 Act* examined the issue of whether it is reasonable to allow a driver or owner to seek legal advice prior to responding to a police officer's demand under s.6 of the Act. The Ombudsman identified a number of events where drivers and owners had declined to provide information to a police officer upon request explaining that they wanted to obtain legal advice.

Examination of police records for the purposes of this review identified one incident where two passengers declined to provide the identity of the driver of the vehicle following a police request. In Scenario Five, police allowed the passengers to seek legal advice in respect of their obligations under the Act. According to the records, police suggested to one passenger, who was a juvenile, that she obtain legal advice after she initially failed to comply with a police request. The passenger received legal advice over the telephone while in the police station. Ultimately, the passenger did not comply with the police request.

The issue of whether it is reasonable for police to allow the passengers to seek legal advice has not arisen as a significant issue in our discussions with police or any court proceedings during this review. However, the officer involved in the incident described in Scenario Five commented that police were possibly 'over fair' to the passengers, as they were given several opportunities to seek legal advice, but still declined to comply with police requests. The officer believed that the investigation became protracted because the passengers were allowed to seek and consider legal advice on a number of occasions. During a telephone discussion the officer told us:

*We could have just allowed them to speak to a solicitor over the phone and then placed a 'form of demand' on them*⁵⁹

This review has established that there is still no clear guidance to police about what should occur in situations where a person requests to seek legal advice prior to responding to a request by a police officer.

Following the review of the *1998 Act*, the Ombudsman recommended that NSW Police develop guidelines in relation to police officers allowing persons to seek legal advice after being required to comply with a demand.

The Ministerial review advised that NSW Police took the position that specific guidelines may "restrict, rather than direct, the exercise of an officer's discretion", and offered support for addressing this issue through officer education and training.⁶⁰

Our examination of educational and training materials prepared by NSW Police in relation to the *1998 Act* and the *2001 Act* has not identified any information for police officers in relation to allowing persons to seek legal advice prior to responding to a police request under the Act.

RECOMMENDATION

7. That NSW Police provide clear guidance for police officers through education and training in relation to allowing suspects to seek legal advice prior to using the 'request for identification details' powers under the *Police Powers (Vehicles) Act 1998*.

Penalties for failure to provide identification details

The offence of failing to disclose identity as requested by a police officer without a reasonable excuse, or for providing false or misleading information, attracts a maximum penalty of 50 penalty units (currently \$5,500) or 12 months imprisonment or both. There are no offence/penalty provisions for failing to produce proof of identity.

As we have discussed earlier in this report, similar offences exist in other Acts in NSW. However, there is a wide disparity between the maximum applicable penalty provisions for these similar offences. For example, the *Crimes Act* establishes a penalty of 2 penalty units (currently \$220) for failure to provide name and address or for providing misleading information to police officer, and the *Road Transport and Traffic Act* establishes a penalty of 20 penalty units (currently \$2,200) for a similar offence.

During the Parliamentary debate on the Police Powers (Vehicles) Amendment Bill 2001, the Government explained that it thought the penalties imposed by other Acts that could be used in relation to passengers to be too low or inadequate for the type of offenders expected to be dealt with by this Act:

It is possible that police could ask passengers to provide their identity under section 563 of the Crimes Act 1900. However, that section does not enable police to ask passengers to identify other passengers or the driver of a vehicle. It also only provides for a penalty of only \$220 for failure to refuse to comply with the request. Section 563 is designed primarily to identify potential witnesses, not potential offenders. A \$220 penalty is not going to be sufficient to get potential indictable offenders to disclose their identities. The bill provides that passengers who refuse to give relevant identity information can be charged with an offence carrying a penalty of 12 months imprisonment and/or \$5,500.³¹

In a submission to the Ombudsman's review of the 1998 Act, the Attorney General's Department stated that the penalties for failure to provide identification details contained in the Act are severe in comparison to penalties for similar offences in other legislation. The Department's submission expressed concern that this disparity may bring about a significant increase in penalties for similar offences in other Acts so that they are equivalent to the penalties provided for in this Act.

The Ministerial Review considered the issue of discrepancy between penalty provisions for similar offences under the different Acts and suggested "that the Government may wish to consider identifying all legislation which enables such requests for information, and establishing a working group of affected agencies to consider improving consistency between them".⁶²

The *Law Enforcement (Powers and Responsibilities) Act 2002* consolidates some police powers to request for information details, presently contained in different Acts.

According to statements made by Government members in Parliament, the higher penalty provisions are intended to ensure that people subject to the Act comply with police requests:

This [the penalty] will reduce the likelihood of people providing false identity information under the Act, and assist police in prosecuting offences relating to the provision of false information, which also carries a penalty of 12 months imprisonment and/or \$5,500.⁶³

Examination of penalties for offences for failure to comply with police request shows that the majority of cases attracted a penalty of \$500, while the highest penalty was \$1000. With the exception of one event where the offence was 'failure of a passenger to provide identification details' under the 1998 Act as amended, all of the other events were in relation to request for identification details of owner or driver. The penalty for the failure of the passenger to provide identification details of the driver of the vehicle was \$500.

During interviews conducted as part of this review, some police officers commented on the impact of penalties on potential compliance with police requests to disclose identification details. Police expressed a range of views on this issue:

- *Penalties don't have much of an impact. Higher penalties may be effective only if the person is aware of it - unless you tell them that failure to comply may be an offence and tell them what the exact weight of the penalty may be, I don't see how that can have an effect on their decision to comply.⁶⁴*
- *Significant penalties give the legislation the teeth it needs to work - otherwise it will be a 'toothless tiger'. It is good that the penalties are higher than the Crimes Act.⁶⁵*

There was only one incident that resulted in conviction of a passenger for failure to provide identification details to police under the Act. The penalty imposed for this offence was \$500, which is significantly lower than the maximum penalty for an offence under the Act, but still higher than some of the maximum penalties contained in analogous legislation.

⁵⁹ Telephone interview with a police officer, 30 January 2003.

⁶⁰ Report of the Director-General, Ministry for Police, Review of the *Police Powers (Vehicles) Act 1998*, December 2000, p.11.

⁶¹ The Hon. J. Hatzistergos MLC, LC Hansard, 16 October 2001, p. 17258.

⁶² Ministerial review p. 8

⁶³ Mr Gaudry MP, Second Reading Speech, LA Hansard, 18 September 2001, p. 16178

⁶⁴ Interview with a police officer, 15 October 2002.

⁶⁵ Interview with a police officer, 15 October 2002.

6. Proof of identity

The *2001 Act* required the Ombudsman to also review the powers conferred by Section 9A of the *1998 Act as amended*. This section confers a new power on police officers to request proof of identity from car occupants who have been requested to identify themselves under the Act. However the Act imposes no penalty for failure to comply.

This provision mirrors an amendment made to section 563 of the *Crimes Act* during the Committee Stage of the Legislative Council's consideration of the Crimes Legislation Amendment (Police and Public Safety) Bill 1998. Section 563 allows police to request the name and address from possible witnesses to an indictable offence. The amendment allowed police to ask for proof of identity. The argument for the amendment was that it established a clear authority for police to request proof of identity at the scene as an alternative to arresting the person in order to, among other things, verify their identity.

During the Parliamentary debate on the 2001 Act, questions were raised in relation to the practical enforcement of this section:

What form of identification would be sufficient to satisfy that test? We do not have ID cards in New South Wales. Does that section refer to a driving licence? There is a possibility that the passenger asked to provide proof may not have a licence-in fact, the driver of the vehicle may not have a driving licence.⁶⁶

The Government explained during the Second Reading speech that there is no penalty for failure to provide a proof of identity:

There can be no penalty for failing to produce documentary proof of identity as there is no legal requirement for people to carry identification documents. However, drivers may be asked to produce their licence if they are questioned whilst driving, rather than at some later time, as it is a legal requirement for people to carry licences whilst driving.⁶⁷

Examination of the COPS events where the passenger identification powers were used showed that a request for proof of identification was not recorded in the COPS event. However, all events (except one) recorded the name, address and date of birth of passengers in the COPS event. It is unclear whether police officer were able to verify this information with a proof of identity.

Police officers involved in all of the above scenarios told us that they had asked the passengers for their identity details, however, not all of them remembered whether the passengers provided proof of identity.

Because of the small number of recorded incidents where the passenger identification powers were used, we were not able to analyse a wide range of scenarios where police request proof of identity. For instance, it was difficult to determine what may happen in a situation where a passenger is requested to provide identification details, and he or she 'complies' with the request by providing a false name and address.

As passengers are not required to carry proof of identity, it may be difficult for police to verify the information provided. Interviews with police officers show that police in these circumstances endeavour to verify the person's details by using the police radio. However, this will only be of value in those circumstances where the person's details are already and accurately recorded in the police record system.

While these provisions were part of the review, their relatively low usage and lack of penalty has meant that they have not been a significant issue in the course of this review.

⁶⁶ The Hon. Rev. Fred Nile MLC, LC Hansard, 16 October, p. 17263

⁶⁷ The Hon. Hatzistergos MLC, LC Hansard, 16 October 2001, p. 17267

7. Recording the use of powers

Maintenance of accurate and timely records of police activity is fundamental to successful prosecutions and reliable intelligence information. The Ombudsman's scrutiny of the implementation of legislation relies very heavily on records made during the operation of the particular legislation under review.

What are the requirements to record?

According to the NSW Police Handbook, police are required to record all relevant information about a case and their exercise of powers in their notebooks and to transfer this information into a COPS event as soon as possible.

According to the Handbook, police are to record incidents in their police notebooks, including as much information as possible. The Handbook requires that specific information should be recorded 'as a minimum', including:

- the exercise of a power (eg: arrest, handcuffing, searching), including why you exercised it (eg: searched because you saw money and foil change hands - suspected drug deal),
- the person's demeanor, clothing worn and anything found as a result
- the time and date you take a statement (unless otherwise identifiable)
- warnings given, including the offence
- a matter which needs a COPS entry but cannot be immediately placed on the system - remember to include driver's licence numbers of all parties (if possible).⁶⁸

In relation to recording information in the COPS system, the NSW Police Handbook provides the following guidance:

*When you return to your station from an incident, enter all event and intelligence information (recorded in your notebook at the scene) into COPS as soon as possible. Remember, this information might be of value to other officers so is imperative it be available on COPS as soon as possible.*⁶⁹

The CRIME code of practice requires that police officers record in their notebooks confessions, admissions or statements made by a person during questioning.

According to this information, the correct form of recording the exercise of police powers under the *1998 Act as amended* is in a COPS event and in police notebooks.

Apart from the requirement to record information about incidents, NSW Police also requires that relevant data be recorded for intelligence purposes. The NSW Police policy on recording for intelligence purposes states that information can be collected in a form of COPS Information Report (IR), whenever there is a genuine business need, or it is to be "sought and used in support of the Service performing its protective or regulatory roles or providing a service to the community".⁷⁰ These reports typically record information about suspected criminal activities of individuals or groups and may be related to specific police operations or investigation of offences in general.

Intelligence Reports are not alternatives for COPS events. An important distinction between the two is that Information Reports are created for the purpose of providing an accessible database of information to assist in the investigation of suspected offences and their use is more internal within NSW Police, while the COPS events include broader information recording the use of police powers in investigations of offences and may have a wider and formal use, for example in legal proceedings.

⁶⁸ Police Service Handbook, Chapter N, Notebooks, pp.

⁶⁹ NSW Police Handbook, p. c-64.

⁷⁰ Policy for the Creation, Classification, Evaluation, Storage, Review and Destruction of COPS IRs, August 2001, NSW Police Service, Information and Intelligence Centre, p. 16.

Some police officers, interviewed during our surveys, told us that they record the use of their powers under the Act in Information Reports rather than in COPS events, if the use of these powers does not result in charges against the passengers. For example, this may occur in situations where the passengers comply with the request and provide the details, or if police did not identify a particular offence as a result of the use of those powers. The officers said that they believed they were recording valuable intelligence information relating to the persons or the vehicle.

This form of recording is not in accordance with NSW Police policy on recording, as described above, which requires that the exercise of specific police powers should always be recorded in a COPS event, and an Information Report should not be recorded as an alternative to a COPS record.

Incorrect and inadequate recording

With the introduction of the *1998 Act*, a specific field was created in the COPS system to record the use of powers under the Act. This field has remained as the relevant field for recording the use of passenger identification powers conferred by the *2001 Act*:

Incident Type : POLICE POWERS (VEHICLES) ACT

Further Class. : Passenger identification (or driver/passenger identification)

Examination of police records and discussions with police officers during the review showed that there are distinct variations in the quality and volume of data recorded by police in relation to incidents.

We identified 19 events that incorrectly recorded the use of police powers. In addition, our analysis of the remaining 58 events provided by NSW Police for the purposes of the review showed that the information contained in at least 40 events was incomplete. Apart from incompletely recording the use of powers during the incidents, these events also lacked information about charges or some actions taken during police investigations.

Recording of passenger identification powers

Examination of the seven⁷¹ COPS events relating to the scenarios we have described, where police used their powers to request passengers for identification details, shows the following recording practices:

- Police appropriately recorded the use of powers in four COPS events. In these events, police recorded 'driver/passenger identification' under the 'Incident Type' field where the *1998 Act as amended* was recorded.
- We identified one event where police recorded 'actual demand name/address' in the 'Incident Type' and 'refuse to give name/address' in the 'Further Class.' field. The use of the *1998 Act as amended* was not recorded at all in this incident, even though the powers exercised by police were conferred on police by that Act.
- One event recorded 'driver identification' in the 'Further Class.' Field, even though the passenger identification powers were also used during the incident, and the passenger was charged for failure to provide the identification details of the driver to police.
- One event recorded 'vehicle searched, details obtained from occupants' as a police action performed during the incident, while it only recorded the vehicle search powers under the appropriate 'Further Class.' field.

We identified similar patterns of recording of the use of driver/owner identification powers. We identified at least 23 COPS events where the narrative of the incident suggested that the driver/owner identification powers may have been used by police, however, this was not recorded in the appropriate incident category. These events were nevertheless sent to us by NSW Police as uses of the *1998 Act as amended*. For example, the narrative of one incident showed that police suspected that a vehicle had been used in the commission of an indictable offence, and a form of demand was placed on the owner to identify the driver of the vehicle. However, the use of the Act was not recorded in the incident category of the report.

⁷¹ While there were six incidents where these powers were used, there were seven COPS events because of the double recording of one incident.

Examination of COPS events where the driver/owner identification powers had been used shows that in some instances, police do not always update the COPS event to record the actions performed during the investigation of an offence, and that errors occur in the recording of actions.

Scenario Four refers to an incident where police from two different LACs were involved in the investigations of the indictable offence. Police records showed that police officers from one LAC 'assisted' in the investigations conducted by the neighbouring LAC by formally requesting the owner of the vehicle suspected of being used in the indictable offence to provide identification details of the driver and passengers. However, our analysis of the COPS report in relation to this incident shows that the use of these powers by police from the "assisting LAC" was not recorded in the COPS report. The police officer responsible for the investigation told us that it was the responsibility of the police performing the action to record it in the use of powers in the COPS event.

Another example shows police have recorded in COPS that the investigations have been completed and no further action was required, when the report suggested that police investigations were ongoing. We were able to confirm with the Duty Officer that the recording of 'no further action' was an error.

Incorrect recordings

We identified 19 COPS events in which police recorded use of the person identification powers or vehicle search powers under the *1998 Act*, when it appeared that they were exercised pursuant to another Act – most often the *Drug Misuse and Trafficking Act* or the *Crimes Act*. Twelve of these events incorrectly recorded a search of vehicle as a use of the *1998 Act as amended*.

The following is an example of an incident that was incorrectly recorded as a use of powers under the *1998 Act as amended*. The error in recording was subsequently identified and corrected by the police officer involved.

The event related to an incident in which police were called to a beach area to deal with 'hoodlum' behaviour. Police spotted a vehicle in the area and stopped it. The driver was requested to undergo a breath test. The driver was found to have a suspended licence and further police intelligence checks indicated that the driver and the passenger supposedly had previous involvement with drugs. Police detected a strong smell of cannabis coming out of the vehicle and searched the vehicle. It appeared from the COPS report that the driver and passenger were requested to provide their identity, although a use of identification powers was not specified in the relevant field.

Following further inquiries from this Office in relation to this incident, police advised us that the event was incorrectly recorded as use of the *1998 Act as amended*. We were advised that this was probably because police at the time of recording were misled by the 'vehicle search' category in COPS.

The involved police officer advised us:

I have reviewed the event and it would appear that I have mistakenly used the police powers (vehicles) act incident. The vehicle was originally pulled over for the purpose of a random breath test and the vehicle was searched under the drug misuse and traffic act as there was a strong smell of cannabis in the vehicle. The driver and passenger willingly provided their particulars to police and the vehicle and occupants were searched with a negative result. Whilst putting the event on the system I have listed it under this incident believing it was purely a vehicle search, not realising it was an indication that I had implemented powers under the [2001 Act]. The event will be deleted and the appropriate one will be completed.⁷²

The incorrect recording of vehicle search powers was raised as a significant issue in the Ombudsman's review of the *1998 Act*. The Ombudsman's report showed that the high rate of recording errors was caused by the wording of the Incident field in COPS, where Vehicle Search Powers existed as a sub-category under 'Police Powers (Vehicles) Act'. The report found that a number of police officers acted on the belief that any vehicle search could be recorded under this incident type.

⁷² Correspondence from a police officer to this Office, 26 September 2002

The Ombudsman recommended “that the Police Service investigate the causes of the high level of recording errors for the use of the vehicle search powers, implement appropriate changes to the COPS system and/or guidelines and procedures, and monitor the effectiveness of these changes.”⁷³

This recommendation was supported by the Ministerial Review, which stated:

service education and training should address this issue, with the Service to give further consideration to whether additional changes need to be made to COPS and/or procedures and guidelines.

During the debate in Parliament relating to the Police Powers (Vehicles) Amendment Bill 2001, the Government stated that the COPS system was being altered to reduce the recording errors noted in the Ombudsman’s report.⁷⁴ In correspondence received on 24 July 2003 from the Deputy Commissioner, Support, NSW Police has advised that these amendments have recently been finalised. The delay in implementing the changes was due to other urgent high priority changes to COPS. When police now select the *1998 Act* as an incident category within COPS, a pop-up window alerts the officer to not select this category unless the powers they used derived from the *1998 Act* and not from other Acts such as the *Crimes Act* or the *Drugs Misuse and Trafficking Act*.

Why are there difficulties with recording?

Some possible reasons for incorrect or inadequate recording of the use of police powers are:

- Lack of police knowledge of recording requirements; and
- Lack of appropriate supervision and monitoring of recording practices.

Lack of police knowledge of recording requirements.

The level of use and recording of the passenger identification powers largely depends on police knowledge of their powers under the Act, the requirements to record the exercise of these powers and the appropriate field in which to record the exercise of these powers.

Interviews with police officers indicated that there are differences in police understanding and implementation of the requirements to record particular data in the COPS system. Almost all senior police officers (Duty Officers and Supervisors) interviewed as part of this review said that it is highly likely that police officers are not recording uses of powers at all or that they may be recording these incidents incorrectly. These officers suggested possible reasons for the failure to record or inadequate recording may be the complexity of the COPS system and limited knowledge about the importance of recording the identification powers. Some senior officers also told us that because there are no formal requirements for recording all police information in a COPS event, police are allowed certain discretion in deciding whether some information should be recorded in COPS:

Pressure is put on officers to record the uses of powers. However, if there is no form of demand, the identification powers are not formally recorded. These are recorded in the police notebook, but they are not specifically put in COPS that the powers were used. Transferring all of the information from the police notebook into COPS is best practice, but there are no specific policies that require that this happens.⁷⁵

While almost all police officers interviewed during the review agreed that police actions should be recorded in some form, there was an obvious lack of consistency in practice.

Some police officers stated that their practice was to create COPS events for incidents in which the identification powers were used, including those incidents that did not result in offences or charges. One officer stated:

⁷³ NSW Ombudsman, Vehicle Powers, Questions and Answers, August 2000, p. 73

⁷⁴ The Hon. J. Hatzistergos MLC, LC Hansard, 16 October 2001, p.17267

⁷⁵ Interview with a police officer, 15 October 2002.

I never had to use it [the passenger identification powers under the Act]. Recording should be in the notebook and in COPS at all times, even if there is no offence. Even if they comply with the legislation, it still has to be recorded. It provides more accountability, particularly in respect of oversight agencies, such as the Ombudsman.⁷⁶

Some officers stated that they were not aware of the requirements to record the request for identification details under the Act, but that they would record these as a matter of course in the COPS database:

Recording should be done in a COPS event - every time a power is used. I don't know whether there is any specific way of recording these.... but it is 'good practice' to record everything, as it is too hard to measure on how often powers are used if they are only recorded in individual police handbooks.⁷⁷

Some officers believed that police were not required to record the request for name and address information from passengers in the COPS database in instances where police simply spoke to the person to investigate an indictable offence.

I would record the use of powers in the police notebook, if there are no other offences. I will also record them in COPS if there is an offence associated with the use of powers. I am not sure if there is a separate category in COPS for recording these particular powers.⁷⁸

Recordings are made in the notebook and in COPS. If there are no offences or charges related to the use of powers, recording in COPS is as an 'occurrence only' not necessarily intelligence reports.⁷⁹

One education officer contacted during the review also confirmed this view:

Passenger identification powers should be recorded in COPS if charges are laid, but this is not necessary if there are no charges connected to the request.⁸⁰

Others believed that all information contained in a police notebook should be entered into COPS. We noted the following comments in relation to this issue:

Should be recorded in the notebook at the scene in all cases, the information should be put in COPS, even when people comply with the request. The requirements for recording should be similar to the move on powers and the knife searches powers — everything is entered into COPS.⁸¹

Some police officers stated that they would not record the use of passenger identification powers as a separate COPS event where these do not result in offences or charges. However, police believed that the information should be recorded somewhere on the COPS system:

The use of powers should be recorded as a COPS event, there should be a record that they've been spoken to, so that other police will have that when they encounter the same person again. There should be an intelligence report on COPS (even if they comply with the directions). I would not be making a special event on COPS.⁸²

Conversations are recorded in the police notebook and in COPS as an information report or intelligence report. If there are no charges or offences, recording in COPS is done as an 'anonymous' report.⁸³

We are concerned that the wide discrepancy in recording the exercise of powers generally, as well as police understanding of their requirements to record in this particular instance, may have contributed to police not recording the use of 'additional powers' under the Act.

It is therefore important that NSW Police develop strategies to ensure that police consistently record uses of formal powers, and in particular formal exercise of powers conferred under the Act, in the COPS system.

⁷⁶ Interview with police officer, 4 September 2002.

⁷⁷ Interviews with police officers, 5 September 2002.

⁷⁸ Interview with a police officer, 4 September 2002.

⁷⁹ Interview with a police officer, 10 October 2002.

⁸⁰ Interview with an education officer, 5 September 2002.

⁸¹ Interview with a police officer, 5 September 2002.

⁸² Interview with a police officer, 4 September 2002.

⁸³ Interview with a police officer, 10 October 2002.

Supervision and monitoring of recording practices

Information obtained through discussions with police officers suggests that the quality of recording can be also influenced by the level and quality of supervision of recording practices. COPS requires that an event created by a police officer (usually by the officer involved in the event) be verified by another police officer. One Duty Officer advised us that this verification requirement provides an opportunity to identify any deficiencies in the investigation or in the recording of the event. However, the Duty officer also commented that senior police officers might verify events without thoroughly checking the COPS report for errors.

We identified one event that recorded 'No Further Investigation' at a particular date, even though it was clear from the data recorded in the event that investigations had continued well after that date. We later confirmed with the Duty Officer that the 'No further investigation' notice was an error and that it is the responsibility of officers who verify the event (usually senior police or supervisors) to correct any mistakes in recording. We were advised that a message would be sent to all supervisors at that LAC to remind them of the importance of properly checking events before verifying them.

One senior police officer advised us that to overcome inadequate recording in COPS, NSW Police has adopted a 'system' whereby police officers are not able to complete their COPS events if these are not verified by their supervisor, which often occurs within four days of the creation of the COPS event. The officer advises us that incorrect and incomplete records can occur because of human error, as the supervisor may overlook an error in recording.⁸⁴

It is important that NSW Police develop strategies to ensure that supervisors are aware of their requirements to properly verify the recording practices of police officers. In correspondence from the Deputy Commissioner, Support, received on 24 July 2003, we have been advised of a number of online training modules to assist officers with recording and verification procedures. While these education and awareness initiatives are acknowledged, they need to be reinforced by ongoing improvements in day to day practice by officers and their supervisors.

RECOMMENDATION

8. That NSW Police continue to develop strategies to ensure effective supervision and verification of recording practices by police officers.

Reasons for low level of use of passenger identification powers

As discussed elsewhere in this report, there is a considerable difference between the level of use of the driver and owner identification powers under the Act, compared to the use of passenger identification powers under the Act. While the use of driver and owner identification powers have been recorded in 58 COPS events, the passenger identification powers have been recorded in only seven COPS events.

It is not possible to determine with certainty the exact cause for the relatively low number of incidents where the passenger identification powers were used. It is highly probable that a combination of the possible factors described in this section may have contributed to the low *recorded* use of these powers. It is also important to be mindful that infrequent use of the powers (as opposed to poor recording practices) should not necessarily be viewed as a criticism of police practice. If there are relatively few appropriate situations for the useful application of the powers, then low recorded use of the powers makes sense.

⁸⁴ Telephone interview with a police officer, 8 October 2002.

There are a number of possible explanations for the low recorded use of the powers under review, including:

- **Consent policing:** police may not record cases where passengers comply with an informal or non-statutory request for identification
- **Lack of police knowledge of the Act:** police may not use the powers because they are not aware of their availability under the *1998 Act as amended*.
- **The low level of recording is a true reflection of use of the powers:** there were not many situations where it was necessary or appropriate for police to exercise their passenger identification powers under the Act.

Consent policing

'Consent policing' occurs when police make a request of a person they are dealing with and the person complies. In general, this practice sees police interact with the public in an informal and non-confrontational manner to ensure cooperation from persons and a better relationship between police and the public. As such, 'consent policing' can be regarded as an effective and beneficial 'tool' in policing.

However, 'consent policing' may obscure what particular police power, if any, is being used and recorded, as it may be unclear whether police are using specific legislative powers, or the person acts 'voluntarily', for example by providing information to police.

Analysis of COPS events and discussions with police officers for the purpose of the review suggest that police officers may not always be clear in distinguishing between voluntary identification by persons and the formal request of identification details.

We examined incidents where police were entitled by the Act to formally request for identification details, however, they did not use a 'form of demand' and instead obtained the information from passengers 'by consent'. In these circumstances, police may not have considered that they formally used a power under any Act.

One police officer contacted during the survey confirmed that although information obtained by consent may be recorded in the COPS system, it may not be recorded as a formal use of police powers:

Records can be made in the police notebook and in COPS, even if no charges are made. If there is identification of passengers resulting from a question by police officer and no demand is put, I call it a voluntary identification, this is only recorded as passengers being identified.⁸⁵

The requirements to record identification of persons that occur by 'consent' are unclear. The following comment made by a police officer during a telephone interview reflects a recording practice that appears to be common across NSW Police:

if they [police] conduct a search by the invitation of a person, and there is nothing found and the police officer does not suspect that an offence may be committed, there is no particular requirement that the search is recorded in a COPS record and it is sufficient that a record is only made in the police officer's notebook.⁸⁶

These views were reinforced in interviews with other officers.

At present, the level of recording of these events seems to depend on the willingness of and time available to individual police officers, and specific policies or accountability strategies enforced by individual commands. For example, some Supervisors and Duty Officers told us that they reinforce with their officers the need to record all their actions in the COPS system, as this is the most effective way of 'tracking down' and reviewing information.

Not recording information obtained through 'consent policing' may have a significant impact on data collection for administration, accountability and intelligence purposes. The need to appropriately record the exercise of police powers was also stressed by NSW Privacy in its submission to this review:

⁸⁵ Interview with a police officer, 11 October 2002.

⁸⁶ Interview with a senior investigator, 8 October 2002.

It might reasonably be argued that it would be unduly onerous to record every instance in which police asked a person to identify themselves. In my view however, where Police specifically invoke a power to require a person to identify themselves, as distinct from simply asking them to do so, a record of that fact should be made.⁸⁷

Lack of knowledge and familiarity with the new powers

It is also possible that the limited use of the passenger identification powers is related to a lack of knowledge by police officers about the new powers. We identified one incident where police did not use the passenger identification powers during their investigation because the investigating officer was not aware of the existence of the powers.

Scenario Six: ‘Road rage’ resulting in assault and malicious damage

Police were called to a ‘road rage’ incident in an inner Sydney suburb in May 2002. Two men (19 and 20 years old) had been assaulted in the incident while their car had been damaged. The two men, another male passenger in the same vehicle, and a further witness provided the vehicle registration details and a brief description of the alleged offenders to police.

According to police records, the two men were travelling home in the vehicle when another vehicle with five occupants (four men and one woman) “cut in front of the victim’s car” and “[the victim] sounded the horn in response”.⁸⁸ Shortly afterwards the other vehicle stopped in the middle lane of the road, blocking the victims’ car. Four men jumped out of the vehicle and attacked the victims and their car, causing damage to the vehicle and injuring the driver and front passenger. The victims and witnesses stated to police that, during the incident, one young woman also came out of the offending vehicle and observed the incident.

Shortly after the incident, police formally requested the owner of the vehicle to identify the driver and passengers of the vehicle, according to the *1998 Act as amended*. The owner complied with the police request and told police his nephew was driving the vehicle at the time the offence had occurred and that one of the passengers was the nephew’s friend. Police accepted the owner’s statement that he was not aware of the identity of the other passengers in the vehicle.

Police questioned the nephew and his friend about the incident and the identity of the other male passengers in the vehicle. The men respectively admitted to being the driver and the passenger in the vehicle at the time the offence had occurred. The passenger admitted that he assaulted two persons in the other vehicle, while the driver only admitted to driving the vehicle at the time of the offences. Both men denied that there were two other males in the vehicle and stated that the other two passengers were their girlfriends. However, they were not able to supply police with the full names of these two women as they ‘only knew them by their first names’.

According to police records, the driver was informed that failure to provide the identity of the passengers was an offence under Section 6(1) of the *1998 Act as amended* and was charged for that offence. Both the driver and a passenger were charged for offences relating to the assault of the two victims and the malicious damage to the vehicle.

⁸⁷ Letter from Mr Chris Puplick, then Privacy Commissioner, NSW Privacy, to Mr Steve Kinmond, Assistant Ombudsman (Police), 17 June 2002.

⁸⁸ Record 80.

Police informed us that they believed that there was sufficient evidence to prove that the driver and passenger intentionally did not disclose the identity of the other two male passengers in the vehicle at the time of the offences. Police indicated that they would charge the driver and passenger for failure to provide the identification details of passengers under Section 6 of the *1998 Act as amended*.

However, subsequent analysis of police reports showed that only the driver was charged for failure to provide identification details of the passengers. We questioned police about their decision not to charge the passenger using the provisions of the *1998 Act as amended*. The police officer advised us that she thought that police could only charge the driver and owner under the Act, and she was not aware of the new police powers that relate to the request of passengers for identification details:

“at the time when I used these powers, I was in the job for three weeks and I did not know that you could charge passengers as well.”⁸⁹

While police advised us that all charges against the driver and passenger resulted in convictions court, the officer’s lack of knowledge and understanding of the additional powers’ under the Act lessened the effectiveness of the powers in possibly establishing whether there were, and the identity of the, other persons in the vehicle.

One Duty Officer contacted during our survey s tated that although police officers may be familiar with the powers conferred by the *1998 Act*, they may not be aware of the ‘additional’ powers conferred by the *2001 Act*:

Maybe not many police officers know about the powers because they associate the legislation with other powers - stop, search, road blocks etc.⁹⁰

Another officer’s statement confirmed the view that police officers may be confused with the similar police powers contained in different Acts, and this may influence the quality of recording:

It could be associated with the knowledge of the identification powers under the Act and the recording - it may be that police do not know about the powers, officers may only associate the Vehicles Act with stop, search and roadblock powers and not with request of information. Also when they use the powers, they may not be properly recorded in COPS.⁹¹

Some senior police officers expressed concern about the high volume of information about new police powers and procedures to ‘keep track’ of on ongoing basis. One police officer commented that this ‘information overload’ might result in police not being aware of new and minor powers and not using these powers:

Police may not know about the Act, so they may not be using the powers as readily as they would use the driver identification powers. There is too much to catch up to, in terms of legislation. There are circulars one per day with new information.⁹²

One police officer commented that because some police officers lack familiarity with the legislation, they may be more likely to ‘informally’ ask persons for their identity, rather than use the formal powers under the Act. The lack of understanding or knowledge of police powers may mean that police will prefer to make ‘informal’ requests of passengers because they are unsure of the legislative requirements in making more formal requests.

⁸⁹ Telephone interview with a police officer, 28 January 2003.

⁹⁰ Interview with a police officer, 6 September 2002.

⁹¹ Interview with a police officer, 6 September 2002.

⁹² Interview with a police officer, 4 September 2002

We believe that the officers' comments are relevant in suggesting that NSW Police develop strategies to ensure that police officers are appropriately informed about legislative changes to their powers. We recognise that changes to police powers occur frequently, and that regard must be had to the appropriate level of awareness and training that can be afforded when there are competing demands on police resources. However, the conferring of any new powers on police carries with it the assumption that these will be exercised where appropriate and this can only occur if police are made aware of the existence of such powers.

Low levels of recording – a true reflection of use of the powers

Another explanation for the infrequent use of the passenger identification powers is that the circumstances where police can use these powers may arise less often than the circumstances where police can request drivers or owners for identification details.

The description of the role of passengers in indictable offences presented in this report shows the majority of incidents involved a vehicle that had departed from the scene of the offence and police used the vehicle's registration number to identify the owner and driver of the vehicle. Police records show that whenever police had information that passengers had been inside the vehicle at the time of the offence, police requested the owner or driver to provide their identification details. However, in the majority of incidents, drivers and owners failed to comply with the police request, making it harder, if not impossible, to identify and make inquiries of the passengers. This explanation was confirmed by two senior police officers who commented:

These powers may not be used very often, they are the kind of powers that police need to rely on if there is no other way to get the information. People may comply or there is no need or opportunity to ask passengers. The kind of offences where the legislation would apply are where the vehicle has escaped from the scene and police are not able to stop it, so they are relying on the registration details of the vehicle and using the driver/owner identification powers.⁹³

Drivers are often 'caught' in more responsible situations while it may be difficult to prove that a passenger was linked to an offence or vehicle – it is easier for passengers to disassociate themselves from a situation.⁹⁴

Were the passenger identification powers useful to police?

Given the small number of incidents where police used the passenger identification powers under the *1998 Act as amended*, it is difficult to assess how useful these powers were to police during the review period. In comparison to the driver/owner identification powers, police have not made much use of the passenger identification powers. However, it is important to note that the utility of specific police powers cannot be solely assessed on the frequency of their use. In some circumstances, powers can be considered to be extremely useful if they are available to be applied in the appropriate circumstances and if in these circumstances, the powers assist police in investigating an indictable offence.

Many police officers interviewed during the review told us that the 'additional powers' were useful, because passengers could be 'compelled' to provide identification details. Some police officers stated that prior to the introduction of the 'additional' police powers, police were able to ask for information from passengers in vehicles involved in indictable offences.

However, in circumstances where passengers refused to provide information to police, there were no 'strong' powers available to police officers to ensure compliance with a request. According to police, the 'additional powers' addressed a gap in the legislation that police were aware of – while they could ask for information from passengers and obtain it by consent, they could not 'compel' a passenger to provide information if he or she refused to provide it.

⁹³ Interview with police officer, 11 October 2002.

⁹⁴ Interview with a police officer, 10 October 2002.

On the other hand, examination of the incidents where police have used the passenger identification powers to obtain information for the purposes of investigating an offence raises questions about the actual usefulness of these powers in investigating an offence.

We identified only two incidents where police needed to rely on the passengers to identify the driver. In both incidents, the passengers failed to provide information to police, even though they were aware they were committing an offence under the Act. In one of these incidents, the passenger was charged and convicted for this offence.

While it is not possible to clearly determine the reasons for failure to comply with police requests in these circumstances, it is evident that the suspects wanted to conceal information from police even when faced with the prospect of significant charges and penalties. This may well have been out of concern that they would be charged and prosecuted for more serious offences.

Our examination of the six incidents where police requested passengers for information, including those incidents where the passengers complied with the police request, showed that the use of these powers did not greatly assist police in investigating the indictable offence in question.

Forming part of a legislative package that targeted gang crime or 'crime in company', the purpose of the 2001 Act was to assist in the investigation and prosecution of offences that are 'typical' to crime gangs. There was also no evidence that the powers were particularly useful to police officers in addressing 'gang-related' crime.

However, these findings should not suggest that the powers would not be useful to police in the investigation of indictable offences.

One police officer who used the 'additional' powers told us that the powers were useful in the investigation of indictable offences. The police officer said:

*the powers will assist police in the identification of criminals etc associated with suspect vehicles used in or in connection with the commission of an indictable offence. It will build our arsenal of powers to help police reduce crime.*⁹⁵

⁹⁵ Record 81.

8. Education and Training

The appropriate use of any new police powers is dependent on effective education and training of police officers and their supervisors about the proper implementation of those powers. This review placed some emphasis on the level of education and training provided to police officers to inform them about the introduction of the new powers.

Police officers' awareness of the Act

We conducted a survey in March 2002, which occurred three months after the provisions in the Act had commenced. On this occasion, we found that police awareness of the new powers conferred by the Act was low. Only four out of twelve duty officers or managers at four LACs contacted during the survey were aware of the new powers under the Act.

To ascertain whether awareness increased after this period, we conducted an additional survey in September and October 2002. These surveys showed that police officers had become more aware of the new powers. This increased awareness coincided with the issuing of educational and training materials as well as information and training sessions.

Most Duty Officers and Supervisors contacted during the survey stated that they were informed about the additional powers through the Law Notes, circulated in June 2002 and published in the Police Service Journal. Some officers stated that had learnt about the powers during their preparation for an incremental assessment. The majority of police officers also stated that information sessions or packages organised by Education and Development Officers at individual LACs have been very useful in keeping officers up to date with new police powers generally.

We found that Education Development Officers (EDOs) in some LACs regularly assessed the educational needs of police officers and coordinated education and training in cooperation with senior police and supervisors.

We also examined the content of education and training packages provided to police officers. This was of particular interest to this Office because the Ombudsman's review of the *1998 Act* recommended a number of changes to the educational material developed in relation to the Act. During the debate on the Bill in October 2001, the Government representative stated the following:

In response to the Ombudsman's recommendations the Police Academy has developed modules on the highway patrol education program; the constables education program, relating to policing road safety; and the constables education program, relating to society, law and practice. In line with the review recommendations, real live case studies are now being used to reinforce the training given.

The police handbook, which is available to all police officers, and which is available on the intranet, contains sections of the Act. Further improvements in the Act to police training are under way, in particular, the development of videos showing how to correctly execute search powers under the Act. This form of training is powerful because it is visual. It is also flexible in that videos can be used at any time.⁹⁶

Despite these initiatives, surveys conducted with police officers indicate that police officers believe that more appropriate education and training is needed to address the needs of police officers. When asked whether the education and training provided in relation to the Act was sufficient, one officer responded:

No, it is not sufficient. Until recently I was in charge in a detective's office and I raised the issue about the lack of education and training about the new powers in relation to a number of shootings where some vehicles were involved. I talked to officers about the powers. They had not known about the powers and they were not using them.⁹⁷

⁹⁶ The Hon. J. Hatzistergos MLC, LC Hansard, 16 October, p.17267

⁹⁷ Interview with a police officer, 4 September 2002.

A number of senior police officers told us that in circumstances where there may be conditions suitable for the use of police powers or procedures that are not commonly used, junior police officers rely on senior police officers for advice:

*Mainly senior officers would be aware of the Act. Junior officers are less likely to be aware of all changes to legislation, and they do not need to be aware of everything, because they can always seek advice from senior officers if there is a need for use of these powers.*⁹⁸

One important issue identified by this review is the need for police officers to be regularly informed about changes to the content of police powers. One police officer stated that he was not aware of any training provided to police officers to educate them about the passenger identification powers of the *1998 Act as amended*. He said:

*I believe that mock scenarios could be published to further educate police in relation to the powers and delivered at training days, by the Police Education and Development Officer (EDO).*⁹⁹

A significant number of senior police officers have commented that police are inundated with information about new powers and procedures that it is very difficult to retain a high level of awareness about all legislative changes:

*There is also the possibility of overload of information – I work 12 hour shifts and then have 6 days off, so I had 89 memos to read and you cannot take everything in.*¹⁰⁰

One education officer interviewed during the review commented that the information was not always provided in a relevant and effective manner:

*Most police officers who work in the field do not get ample opportunities to read the Police Service Weekly or other information and so they may not find out about new powers or legislation.*¹⁰¹

We acknowledge that it is neither possible nor desirable to provide the same level of education and training in respect of each new legislative provision conferring new powers or obligations on police. On the other hand, there appears to be little point in providing police with additional powers if they remain unaware of such powers or how to properly exercise them.

Education and training strategies

Given the rapid and extensive change in police powers through legislative amendment over the last two years, it would seem prudent for NSW Police to develop some effective tools to better inform police of their changing powers and obligations.

NSW Police initially informed police officers about the additional powers conferred by the *2001 Act* with the Law Notes, (a leaflet containing a brief summary of the legislative changes), issued by the Court and Legal Services section of NSW Police on 27 June 2002. This occurred about six months after the commencement of operation of the new powers and eight months after the commencement of the Ombudsman's review of the Act. The Law Notes were also published in the July 2002 issue of the Policing Issues & Practice Journal.

The Police Handbook, which is the principal source of reference for officers about police powers, was updated to include the passenger identification powers as contained in the *2001 Act*.

We were advised that the amendments to the Act formed part of education material for a subject entitled 'Society, Law and Practice' at the Police Academy in Goulburn.¹⁰² This subject is part of the Constable Education Program, undertaken by students as part of session 2, just prior to attestation as Probationary Constables.

⁹⁸ Interview with a police officer, 4 September 2002.

⁹⁹ Record 81, Interview with a police officer, 1 October 2002

¹⁰⁰ Interview with a police officer, 10 October 2002.

¹⁰¹ Interview with an education officer, 5 September 2002.

¹⁰² Written advice from NSW Police, 10 July 2002.

By the end of the review period in October 2002 we were concerned that the education and training strategies provided to police officers in respect of the *1998 Act as amended* were insufficient to address the needs of police officers.

NSW Police acknowledged these deficiencies in the education of police officers shortly before the conclusion of the review period. The Commissioner of Police advised the NSW Ombudsman that staffing and resource limitations in NSW Police had resulted in “a number of deficiencies in the communication of additional powers police have by the virtue of the legislation”. The Commissioner further advised that a number of Local Area Commands have produced education material relating to the additional police powers, ‘however this has not had the impact of NSW Police’s usual integrated education and training approach’.¹⁰³

Following this advice, in January 2003, a detailed article was published in the Policing Issues and Practice Journal, which addressed the 2001 amendments and included updated forms of demand.

The Standard Operating Procedures (SOPs) for the *1998 Act as amended* were reviewed to include the passenger identification powers and were to be finalised in February 2003.

Also in February 2003 the NSW Police Education Package for *1998 Act as amended* was redeveloped to include the amendments to the Act. The package includes a PowerPoint presentation, pre- and post-session quizzes, and Computerised Assessment Systems (CAS) questions. We were advised that the package will be used by Education and Development Officers in the Six Minutes Training Programs (SMITs), for police officers. We were also advised that the CAS questions, developed for the package, were included in the Computerised Assessment Test (CAT) from January 2003.

Furthermore, the Constables Pocket Guide was updated in January 2003 to include the updated forms of demand and other information on the amendments.

While it is important to acknowledge these recent efforts in educating police about the existence of the new powers, there would be benefit in NSW Police monitoring the effectiveness of these education initiatives. In correspondence from the Deputy Commissioner, Support, received on 24 July 2003, we have received advice that Education Services have developed and recently implemented a quality assurance process for all new training programs. We have been advised that these quality assurance measures will be included in any updated training on the Act.

RECOMMENDATION

9. That NSW Police monitor the effectiveness of their education initiatives in improving the exercise of the powers under the Act.

¹⁰³ Letter from the Commissioner of Police to Mr Steve Kinmond, Assistant Ombudsman (Police), 18 November 2002.

8. Summary of recommendations

- 1 That consideration be given to the need to amend the *1998 Act as amended* to allow police to request the driver of and passengers in a vehicle to identify the persons in the vehicle at the time the vehicle is stopped and the request is made.
- 2 That consideration be given to the need to amend the *1998 Act as amended* to ensure that a driver, who is not the owner of the car, may be requested to provide details of other persons who may have driven the vehicle at the time the alleged offence was committed.
- 3 That NSW Police obtain legal advice on the circumstances in which the 'request for identification details' powers under the *Police Powers (Vehicles) Act 1998* as amended may be used, particularly on the issue of whether the powers can be used to determine whether an indictable offence has been committed as opposed to assisting the investigation of an indictable offence that is already known to have occurred.
- 4 That should the advice indicate that the narrower interpretation be given effect, NSW Police issue guidelines and modify existing education material and training to explain the exact circumstances in which the powers can be applied.
- 5 That NSW Police consider the development of a form of demand that incorporates their obligations under the *1998 Act as amended* and the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide a warning of the consequences of failing to comply with a police request.
- 6 That NSW Police reinforce the appropriate form of cautioning with officers in the context of their powers and responsibilities under the *Police Powers (Vehicles) Act 1998*.
- 7 That NSW Police provide clear guidance for police officers through education and training in relation to allowing suspects to seek legal advice prior to using the 'request for identification details' powers under the *Police Powers (Vehicles) Act 1998*.
- 8 That NSW Police continue to develop strategies to ensure effective supervision and verification of recording practices by police officers.
- 9 That NSW Police monitor the effectiveness of their education initiatives in improving the exercise of the powers under the Act.

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Appendix A - Methodology

For the purposes of this review, we relied on information from the COPS system, interviews with police officers, enquiries received by the Ombudsman in relation to the use of the *1998 Act as amended*, and examination of court decisions and transcripts. We also sought comments from organisations with specialised knowledge and interest in the police powers under review. As there were relatively few instances of the passenger identification powers being used in the period under review, we were able to individually assess and analyse every instance of the use of the powers.

Computerised Operational Policing System (COPS)

The NSW Police Computerised Operational Policing System (COPS) is the central system for recording the exercise of police powers. Access to the COPS system is available at all police stations.

The data recorded on COPS is the most comprehensive record available about the extent and nature of use of police powers. The COPS records examined during this review provided information about:

- The dates, times and locations where the powers were used;
- The police officers involved in the event and their local area command[s];
- Details about the offenders, including date of birth, address, physical description, racial appearance, Aboriginality and country of origin and the vehicles in which they were travelling;
- The type of offence;
- The type of charges or other action taken as a result of an offence.

The NSW Police Service Handbook¹⁰⁴ advises police officers to enter all event and intelligence information into COPS as soon as possible on their return to their station after an incident. The COPS database is designed to allow police to record event details in specific 'fields', such as date, location and offence. COPS also has what is called a 'narrative' field which allows officers to describe an event in their own words and to record important features of an incident which may not fit under other category headings.

Despite its advantages as a central record of large volumes of police data, COPS does have some limitations as a source of information about police activity. Those limitations stem from the technical design of the system, its vulnerability to human error, as well as the relevance and effectiveness of police recording procedures in relation to policing practice. The advantages and disadvantages of COPS as a research tool have previously been discussed at length in our report "Policing Public Safety".¹⁰⁵

Using COPS for this review

Following the creation of new police powers under *1998 Act*, new fields were created in the COPS system to capture the exercise of specific powers under that Act. This allowed police officers using the powers under that Act to select the category 'Police Powers (Vehicles) Act' and to then record the exercise of powers conferred by the Act in the corresponding sub-category. A training package was developed to inform police officers about the use and recording of powers under the *1998 Act*. This package instructed police to record the exercise of powers under Part 2 of the Act in the 'Incident Type: Demand Name and Address'.¹⁰⁶

NSW Police advised us that the 'additional powers' under the *2001 Act* formed part of the principal *1998 Act* and would be recorded under the existing field for recording the driver and owner identification powers under the principal *1998 Act*.

¹⁰⁴ NSW Police Service Handbook at C-61.

¹⁰⁵ NSW Ombudsman, Policing Public Safety: Report under s.6 of the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*, p.90.

¹⁰⁶ Six Minutes Intensive Training (SHOAL012) – Police Powers

For the purpose of the review, arrangements were made with NSW Police to advise the Ombudsman of all COPS events that documented the use of powers under Section 6 of the Act. Of necessity, this included records relating to the use of powers not within the scope of the current review, such as the powers to request identification details from drivers and owners of vehicles.

NSW Police advised us that from 1 January 2002 to 25 October 2002 (being the review period), there were 77 COPS events recording the exercise of Part 2 powers under the *1998 Act as amended*. NSW Police identified these events from COPS data recording the use of powers under the *1998 Act as amended* in the specific category or where charges had been laid for failure to comply with a police request according to the Act.

We examined all of these COPS events and established that the exercise of the passenger identification powers was recorded in seven of these events.

The COPS records provided information about the type of offences committed in incidents where the identification powers under the Act were used. Using COPS data, we also collected information about the charges and penalties incurred for failure to comply with requests for identification details.

We analysed the COPS data to determine the age, sex and Aboriginality, and wherever possible, the country of birth of persons who were requested by police to provide identification details according to the Act. We found that the majority, although not all, of the COPS events entries recorded demographic details.

Surveys of police officers

We conducted three surveys with senior police officers (Duty Officers, Crime Managers and Supervisors) in a sample of local area commands. These surveys occurred in March, September and October 2002. The purpose of the surveys was to obtain information about the knowledge and experiences of police officers in the use of the new powers conferred by the *2001 Act*. The surveys specifically focused on Duty Officers and Crime Managers because of their operational responsibilities and their role in the management and supervision of police officers.

The surveys included questions:

- to assist in determining the level of awareness of police officers about the additional police powers in the *2001 Act*;
- to better understand police experience in using the legislation;
- about police recording practices;
- about the types of education and training offered to and/or attended by police officers; and
- about operational strategies put in place by the NSW Police to assist in the implementation of the Act.

The surveys were conducted by telephone, and in the majority of cases, without prior notice to police officers about their participation in the survey. Because one of the survey objectives was to gauge police knowledge of the new police powers under the Act, it was not desirable that police officers 'prepare' in advance for the survey.

The selection of LACs for the survey was not pre-determined, other than attempting to select at least two LACs in each region. In order to achieve some diversity and representation in the sample of LACs, wherever possible, we selected LACs that did not share common boundaries and were in different geographical areas in the region.

During the first survey, which was conducted on 27 March 2002, we contacted a total of 10 police officers from the following LACs: St. George, City Central, Marrickville, Cabramatta, Parramatta, Penrith, Darling River, Wagga Wagga, Wollongong and Coffs Harbour. The purpose of this survey was primarily to assess the knowledge of police officers about the new powers and to gain an insight into any operational or educational initiatives put in place by NSW Police.

The second survey took place in September 2002 and included 15 police officers from the following LACs: City Central, Bankstown, Marrickville, Wollongong, St. George, Coffs Harbour, Albury, Blacktown, Goulburn. The purpose of the second survey was to 'follow up' on the same LACs included in the first survey, to assess the development of their officers' knowledge and experience with the implementation of the Act.

According to a protocol established between the NSW Ombudsman and NSW Police in the period following the first survey, we contacted the External Agencies Response Unit (EARU) of the NSW Police and advised them of our intention to conduct the second survey with a selected sample of LACs. We advised them of the purpose and objectives of the survey. This was intended as a courtesy call to keep the EARU advised of our contact with local police.

During the conduct of the survey, it became apparent that police officers had been advised about the survey and its purpose. In addition, they had received specific information about the additional police powers in the *2001 Act*. The Manager of the EARU subsequently advised us that a staff member from the Unit had contacted officers prior to our survey, discussing its purpose and providing background information. As a result, information gained during this survey in relation to knowledge by officers of the new powers under the Act was discarded.

The third survey was conducted in September/October 2002 as a result of the decision to exclude certain results from the second survey. We included 11 police officers from the following LACs: Kings Cross, Burwood, Mascot, Gladesville, Fairfield, Newcastle, Liverpool, Miranda, Monaro Highway Patrol, Tweed Heads and Tamworth.

Examination of court transcripts

The COPS data provided by NSW Police included information about relevant charges. We used this data to identify and request court transcripts from all incidents in which charges were laid under the *1998 Act as amended*.

We examined all court transcripts that were available during the period of the review. Some transcripts were not available because cases had not yet been heard.

Interviews with police officers

To gain a better understanding about how the legislation was implemented 'on the ground', we interviewed police officers involved in all incidents in which the use of the passenger identification powers was recorded. We also interviewed some police officers that were involved in incidents where the COPS narrative suggested that the powers may have been used although the COPS record did not clearly state this.

Submissions

We sought submissions from organisations and agencies with an interest in the legislation. Privacy NSW and the Police Association of NSW made submissions to the review.

Complaints to the Ombudsman and NSW Police

NSW Police and the Ombudsman receive complaints and inquiries from members of the public and police officers in relation to police conduct. These are addressed according to legislative requirements in the *Police Act 1990*.

Complaints and enquiries received by the Ombudsman in relation to police conduct can also assist the Office in its legislative review functions.

During the review, the Ombudsman did not receive any complaints in relation to police use of the passenger identification powers. One complaint was received where it appeared that police may have used the passenger identification powers under the Act. Further inquiries showed that the *1998 Act as amended* was not used during this incident. Despite this, this complaint continued to be relevant to this review, particularly in relation to the recording of use of powers in the COPS system and it is discussed in this report.

Appendix B

Telephone Survey relating to the *Police Powers (Vehicles) Amendment Act 2001*

Audience: Senior Officers

Introduction

I am _____ from _____ and I am conducting a telephone survey relating to police knowledge of the *Police Powers (Vehicles) Amendment Act 2001*. This survey is directed to police officers who fit the following criteria: Duty Officers, Crime Managers and Supervisors. The information obtained from this survey will not be used in relation to any individual police officer.

Question 1

What are the new powers conferred on police by the *Police Powers (Vehicles) Amendment Act 2001*?

Answer

Request that a passenger in or on the vehicle reasonably suspected of being used in or in connection with the commission of an indictable offence, to provide details about their identity and the identity of other passengers and the driver of the vehicle.

Question 2

What form of training have you received in relation to the new police powers contained in the *Police Powers (Vehicles) Amendment Act 2001*?

Question 3

Where do you record the use of these powers?

Agreement with NSW Police regarding the recording has not yet been reached.

Question 4

Before giving a direction under Section 6 of the *Police Powers (Vehicles) Amendment Act 2001* for passengers to provide identification details, what must you do?

Answer:

- Provide evidence that you are a police officer (if not in uniform),
- Provide officers' name and place of duty,
- Tell the person the reason for the request, and
- Warn the person that failing to comply with the request may be an offence.

Appendix C

Questions used during Survey Two conducted 4 – 6 September 2002 and Survey Three conducted 10 – 15 October 2002

Question 1

When did you become aware of the new police powers contained in the *Police Powers (Vehicles) Amendment Act 2001*?

Question 2

Can you briefly describe what are the new powers under the Act?

Question 3

What educational and training strategies have been put in place to inform police officers of the new powers contained in the Act, and when were these strategies put in place?

Question 4

What topics were covered as part of these education and training strategies? Was there any information provided about: forms of issuing cautions, warnings under the Act, allowing suspects to seek legal advice in relation to the form of demand, and admissibility of evidence?

Question 5

Do you believe that these educational and training strategies were successful in their aim to inform police? Do you believe that police officers are aware of their new powers?

Question 6

What are the requirements to record uses of police powers under the legislation? What are the requirements to record these intelligence reports? How do you create intelligence reports?

Question 7

What may be the possible reasons for the small recorded number of incidents where police have used their powers to request passengers for identification details under the *Police Powers (Vehicles) Amendment Act 2001*?

Question 8

Do you believe that the penalties for not complying with a police request under Section 6 of the *Police Powers (Vehicles) Amendment Act 2001* are an important deterrent to people from committing an offence under that Section?

