

**Review of police use of
Firearms Prohibition Order
search powers:
Issues Paper**

Section 74A of the
Firearms Act 1996

July 2015

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FPO Search Powers Review

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... that gives the police the right to stop, to search, to enter premises to ensure that they don't have a firearm, they haven't got ammunition or parts of a firearm. All of that without warrant. Now they're extraordinary powers.¹

NSW Police Commissioner Andrew Scipione

¹ Simon Bouda, Interview with Andrew Scipione (Police Commissioner), *Nine News – Saturday Extra*, 13 December 2014.

Chapter 1. Introduction

On 1 November 2013, police in New South Wales obtained new search powers to enforce a Firearms Prohibition Order (FPO). The new search powers² allow police to search (without a warrant) any person subject to an FPO and any premises or vehicle that the person occupies, controls or manages. The powers were introduced to help police find and seize firearms and related items (such as a firearm part or ammunition) that the person is prohibited from having. Police can conduct an FPO search at any time, as long as the search is ‘reasonably required’ to determine whether the person has committed an offence by using a firearm, or by acquiring or possessing a firearm, a firearm part or ammunition.³

The FPO regime is not new. Since 1973, the Commissioner of Police has had the power to make an FPO against any person who, in his or her opinion, is not fit, in the public interest, to possess firearms (the FPO subject).⁴ The effect of an FPO is to prohibit a person from possessing or using a firearm⁵ and to prohibit others from selling or giving a firearm to the FPO subject.⁶

Until the introduction of the new FPO search powers, police seeking to determine whether a person subject to an FPO was in possession of a firearm could search that person using ordinary police powers.⁷ This meant that if police wanted to search an FPO subject’s home they would need to obtain a search warrant. Or, if police wanted to search the person or their vehicle, police would need to have sufficient facts to form a ‘reasonable suspicion’ that the person had something unlawful in their possession, had committed a crime or was about to commit a crime.⁸ The introduction of the FPO search powers provided police with a direct power to conduct a search to enforce an FPO, with no requirement to obtain a warrant or to form a ‘reasonable suspicion’.

In the first 40 years of the FPO regime, 62 FPOs were issued. After the introduction of the FPO search powers, the number of FPOs issued increased. More than 400 new FPOs were issued in the first 12 months.⁹

1.1 Our role and the purpose of this paper

Parliament required that the Ombudsman keep under scrutiny the exercise of the new FPO search powers for the first two years of their operation (from 1 November 2013 to 31 October 2015).¹⁰ At the end of this period, we will report our findings and any recommendations to the Attorney General, the Minister for Police and the Commissioner of Police.¹¹ The Minister for Police is then required to table our report in Parliament as soon as practicable.¹²

This issues paper provides information on police use of the FPO search powers in the first ten months of operation. We provide this information in order to seek your views on key issues related to the use of the powers.

We particularly welcome information about the personal experiences of people directly affected by the exercise of an FPO search, including people who have been searched under the FPO search powers, people who live or work with a person subject to an FPO, and current and former police who have exercised the search power.

2 The powers are contained in section 74A of the *Firearms Act 1996*, as inserted by the *Firearms and Criminal Groups Legislation Amendment Act 2013*.

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

4 *Firearms and Dangerous Weapons Act 1973*, s. 69(1); *Firearms Act 1989*, s. 39(1); *Firearms Act 1996*, s. 73(1). The FPO regime did not apply to pistols or blank fire pistols/firearms until 1985 and 1989 respectively: see *Firearms and Dangerous Weapons (Amendment) Act 1985*, Schedule 6 cl. 25(a); *Firearms Act 1989*, s. 39(1).

5 *Firearms and Dangerous Weapons Act 1973*, s. 70(1)(a); *Firearms Act 1989*, s. 40(1); *Firearms Act 1996*, s. 74(1).

6 *Firearms and Dangerous Weapons Act 1973*, s. 70(1)(b); *Firearms Act 1989*, s. 40(3); *Firearms Act 1996*, s. 74(4).

7 Police would usually need to meet a threshold test to be granted a search warrant by a judicial officer, or to exercise their powers to search without warrant under sections 21, 23 and 36 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

8 LEPRA ss. 21 and 36.

9 ‘More than 390 of these new orders have been put in place, and a further 100 orders have been approved.’ The Hon. Stuart Ayres MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 6 November 2014, p. 2293.

10 *Firearms Act 1996*, s. 74B(1).

11 *Firearms Act 1996*, s. 74B(3).

12 *Firearms Act 1996*, s. 74B(5).

1.2 The Firearms and Criminal Groups Legislation Amendment Act 2013

On 1 November 2013, the FPO search powers came into effect, enacted through amendments to the *Firearms Act 1996* made by the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act).

In the three years prior to the amendments, a number of drive-by shootings and firearms-related crimes in Sydney received extensive media coverage.¹³ These incidents were reported as having occurred predominantly in the western and south-western suburbs of Sydney¹⁴ and were attributed to outlaw motorcycle gangs¹⁵ and other organised crime groups such as the Brothers 4 Life.¹⁶

This increased media coverage created a perception that there had been an increase in firearms-related crime in NSW, particularly drive-by shootings. At the time, the NSW Bureau of Crime Statistics and Research reported that drive-by shootings had more than doubled from 41 incidents in 1995 to 100 incidents in 2011.¹⁷

The amendment Act introduced a number of measures aimed at combating 'gun crime'¹⁸ and included changes to the *Firearms Act 1996*, the *Crime Commission Act 2012* and the *Restricted Premises Act 1943*. When introducing the amendment Bill, the then Premier the Hon. Barry O'Farrell MP said:

*This bill will equip the NSW Police Force with powerful new weapons to help tackle criminals with guns. This legislation has been put together with the advice of the NSW Police Force to ensure that police have the power, the resources and the powerful new weapons to help tackle criminals with guns, in particular to target gun crime across Sydney.*¹⁹

The then Premier also made clear that the FPO search powers were intended to be used against people involved in criminal activities involving guns:

*Nothing in this legislation should concern innocent citizens of this State. This legislation will concern those who are involved in criminal activities involving guns. This legislation will ensure that those people have no place to hide.*²⁰

The proposed changes to the Firearms Act were largely unopposed in their passage through Parliament. However, some concerns were raised. Greens member David Shoebridge MLC noted that '... it is not entirely inappropriate for the police to have the ability to conduct random searches of people who are the subject of a firearms prohibition order'²¹ but expressed concerns that the amendment provided police with a warrantless search power without any checks and balances.²² He said:

*... we are extremely concerned that these powers are being provided without any checks and balances. As it stands, a person who has been the subject of a series of random searches at their workplace, their home or while driving a car cannot request a review of the exercise of those powers.*²³

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- 13 See: Stephanie Gardiner, 'Another night, another Sydney shooting', *Sydney Morning Herald* (online), 15 February 2011, viewed 24 February 2014; Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014; Ben McClellan, 'Dodging the bullets in war zone suburbs of Sydney', *The Daily Telegraph* (online), 26 July 2013, viewed 24 February 2014.
- 14 Nathan Klein and Leigh van den Broeke, 'Gun violence plagues Sydney's streets', *The Daily Telegraph* (online), 20 April 2012, viewed 24 February 2014; AAP, 'NSW govt shoots down Labor's gun bill', *The Australian* (online), 12 September 2013, viewed 24 February 2014.
- 15 Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014.
- 16 Nick Ralston and Emma Partridge, 'Wanna-be gangsters busy flexing trigger fingers', *Sydney Morning Herald* (online), 27 July 2013, viewed 24 February 2014; Damien Murphy and Nick Ralston, 'Drive-by justice', *Sydney Morning Herald* (online), 9 November 2013, viewed 24 February 2014.
- 17 Emma Birdsey, *Criminal Offences involving firearms in New South Wales, 1995-2011*, Crime and Justice Statistics: Bureau Brief, Issue paper no. 82, NSW Bureau of Crime Statistics and Research, Sydney, October 2012, p. 8.
- 18 The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
- 19 Ibid.
- 20 Ibid.
- 21 David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.
- 22 Ibid.
- 23 Ibid.

The Greens proposed an amendment that would allow a person to lodge an application with a Local Court to declare a search to have been unlawful on the basis that it was unreasonable, unjust, oppressive or otherwise an abuse of power. Where such an application was successful, the evidence obtained from such a search would be inadmissible. In addition, the proposed amendment would have enabled the Local Court to issue an order to prevent police from conducting any further searches under section 74A for a period not exceeding three months.²⁴ The proposed amendment was not supported.

Alex Greenwich MP, an independent member, expressed concern regarding the manner in which the Bill was '... rushed through the House without members being given an opportunity to consult experts and their communities about it.'²⁵ While supporting the provisions in the Bill that placed stronger restrictions on people subject to an FPO, Mr Greenwich expressed the following concerns regarding the FPO search powers:

... I do not support search powers without a warrant. The bill allows police officers to enter the premises of someone subject to a firearms prohibition order and search for firearms and ammunition. An officer does not even have to have a reasonable suspicion that the person is not complying with the firearms prohibition order. This bill opens the way for police corruption and abuse of power. A warrant allows oversight of the what, where and when of police searches when they are often dealing with criminals, and removing accountability is dangerous and completely unnecessary. Warrants are easy and quick to access if there is a reasonable reason to search a property.

They act as an important check and balance on police powers. Their removal is another incremental step towards a loss of basic rights that prevent exploitation of the innocent... I continue to work with and support the police officers in my electorate, but I do not support removal of police oversight and accountability.²⁶

The Bill was referred to the Legislation Review Committee²⁷ to consider whether it unreasonably encroached²⁷ on specific rights and liberties. The Committee referred three issues back to Parliament for consideration, including one concern which related to the FPO search powers. The Committee said:

... [the FPO search powers] provides that police can detain and search a person subject to a firearms prohibition order and search his or her premises and/or vehicle to determine whether the person has contravened a firearms prohibition order. In the Committee's view, this may impact on a person's right to be free from unreasonable search.²⁸

Upon referring these matters back to Parliament, Stephen Bromhead MLC, Chair of the Legislation Review Committee, presented the above concerns to Parliament and concluded by saying:

... it can be noted that this legislation is extremely tough on targeted groups. It is another example of this Government looking after the interests of the wider public, rather than the rights of those individuals.²⁹

On 15 October 2013 the Bill was passed unamended. Two days later, Parliament noted the Committee's concerns.

1.3 Limitations of the NSW Police Force statistical data

Upon the introduction of the FPO search powers, the NSW Police Force updated its Computerised Operational Policing System (COPS) to facilitate the recording of FPO person searches and FPO vehicle searches. This made information relating to FPO person searches and FPO vehicle searches easily identifiable. At that time, similar changes were not made to facilitate the identification of FPO premises searches.

As a result, for the first ten months of the review, the NSW Police Force was only able to provide accurate records relating to person and vehicle searches conducted under the FPO search powers. The NSW Police Force also provided us with records of premises searches 'likely' to have been conducted under FPO search powers, noting that these records may not be complete and may also include some irrelevant records. As a result of the reliability issues associated with these records, we have not included quantitative data regarding premises searches in this issues paper. Instead, we have used the premises search data provided to us by the NSW Police Force, along with others we were able to find from person search and charge information, to identify 42 case studies which we reviewed to identify some key issues.

24 David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.

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

26 Ibid.

27 Section 8A of the *Legislation Review Act 1987* outlines the functions of the Legislation Review Committee with respect to Bills.

28 Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 16-17.

29 Stephen Bromhead MP, NSWPD, (Hansard), Legislative Assembly, 17 October 2013, p. 24295.

In September 2014, the NSW Police Force introduced a new incident field on COPS to facilitate the identification of FPO premises search information. As a result, we expect to be able to provide figures relating to premises searches conducted in the remainder of the review period in our final report.

1.4 Structure of this issues paper

Chapter 2 of this issues paper provides some background to the NSW firearms licence and permit system. It then explains how an FPO is created, when an FPO comes into effect and options available to request a review of the decision to issue an FPO.

Chapter 3 provides an overview of the use of the FPO search powers in the first ten months of operation. It contains key statistics regarding the number of searches, who and what was searched and what was found. As explained above, our ability to report on use is limited to FPO person and vehicle search data.

Chapters 4 and 5 present some key issues associated with the exercise of the FPO search powers, relating to why, when, what and how FPO searches are conducted. To do this we provide an overview of the relevant legislative and policy frameworks that relate to each issue as well as provide examples from our review of the exercise of the search powers in the first ten months.

1.5 Invitation for submissions or information

Submissions or correspondence in relation to this issues paper is requested by 31 August 2015. This correspondence can be sent by email or post to the addresses below. To assist with your submission, we have prepared a document containing all the questions for consideration and an optional submissions template (in MS Word). These materials are available on the Ombudsman website www.ombo.nsw.gov.au.

You are welcome to comment on any matter relating to the FPO search powers, not just those we have discussed in the issues paper. We may publish submissions we receive on our website. Please advise us if you want your submission to remain confidential.

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

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Chapter 2. Legislative and operational context

This chapter provides an overview of the legislative and operational context within which the FPO search powers operate. It provides an overview of the system for regulating lawful firearms and firearms use in New South Wales, ordinary police powers to search for firearms, firearm parts and ammunition, and the FPO search powers. It then explains the process for making an FPO, which, once made provides the lawful basis for an FPO search.

2.1 The system for regulating lawful firearms and firearms use in NSW

New South Wales has a system of licences and permits which allows people to lawfully possess and use firearms in NSW. This system is principally governed by the *Firearms Act 1996* and managed by the NSW Police Force. The licence and permit system is intended to restrict the lawful ownership of firearms to people who have a 'genuine reason' to possess a firearm.³⁰ The system restricts the type of firearms that a person is authorised to own, use or sell and prescribe the activities the person is allowed to undertake with those firearms. It also provides a scheme for the suspension or cancellation of a licence, and for the safe storage or destruction of firearms.

The licence and permit system regulates the legal firearms market, that is firearms that are owned and used by people who the Commissioner of Police has determined have a genuine reason to have a firearm. In seeking a firearms licence and/or permit, legal firearms owners undertake to comply with strict legislative conditions, including submitting to routine inspections.

The FPO regime applies strictly to people whom the Commissioner has expressly determined should not, in the public interest, have access to firearms. It precludes these people from ever being eligible to lawfully obtain a firearm, by not allowing them to obtain a licence or permit. It is these people who can be searched under the FPO search powers.

2.2 Other police powers to search for firearms, firearm parts and ammunition

The introduction of the FPO search powers added to the powers police already had to conduct a search for firearms, firearm parts and ammunition. The existing powers for police to search for these items are provided to police on a case-by-case basis through the warrant system, and through a range of common law and legislative search-without-warrant powers.

2.2.1 Searches under warrant

In order to search premises for firearms and related items, police typically require a warrant. To obtain a warrant, police are required to provide evidence or sufficient information that sets out the reasons why they believe 'things' connected with a particular offence are or will be in or on a certain premises.³¹ If satisfied that the officer has 'reasonable grounds' for a search warrant, the authorising officer can issue a search warrant that enables police to enter and search premises, and seize relevant property.

2.2.2 Searches without warrant

In addition to the FPO search powers, there are a range of circumstances in which police can search an FPO subject without a warrant for firearms, firearm parts and ammunition. Police can conduct a search without warrant if they 'reasonably suspect' that an FPO subject has a firearm or related item, and the FPO subject is under arrest,³² in a public place,³³ or in a vehicle in a public place.³⁴

³⁰ *Firearms Act 1996*, ss. 12 and 31.

³¹ *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 47.

³² In such circumstances, section 23 of LEPRA would enable the police to search the FPO subject on the basis that a firearm would present a danger to a person, could be used in an escape, was or could be used in the commission of a crime, or is evidence.

³³ In such circumstances, section 21 of LEPRA would enable the police to search the FPO subject on the basis that a firearm is a 'dangerous article' or a thing used in the commission of an offence.

³⁴ In such circumstances, section 35 of LEPRA would enable the police to search a vehicle on the basis that it was reasonably suspected to contain a dangerous article, an item that was unlawfully obtained, or is intended to be used to commit a serious offence.

A reasonable suspicion involves less than a reasonable belief but more than a possibility. This means that in order for a suspicion to be 'reasonable', police must have some factual basis for the suspicion. This can include information obtained by hearsay.³⁵

2.3 The FPO search powers

The *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act) made a number of amendments to the *Firearms Act 1996* (the Act), the *Crime Commission Act 2012* and the *Restricted Premises Act 1943*. These changes were intended to address community concerns about firearms crime. The amendments to the Act included:

- the new FPO search powers, intended to expand police powers to detect FPO subjects who have firearms and related items
- tightening the restrictions imposed by an FPO, and
- increasing the maximum penalty for an existing offence.³⁶

The most significant change was the introduction of search powers provisions, which provided police with powers to search an FPO subject and their premises and vehicles for firearms, firearm parts and ammunition. It is these search powers that are the subject of this issues paper.

Section 74A of the Act provides:

(1) The powers of a police officer under this section may be exercised as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence under section 74 (1), (2) or (3).

(2) A police officer may:

- (a) detain a person who is subject to a firearms prohibition order, or*
- (b) enter any premises occupied by or under the control or management of such a person, or*
- (c) stop and detain any vehicle, vessel or aircraft occupied by or under the control or management of such a person, and conduct a search of the person, or of the premises, vehicle, vessel or aircraft, for any firearms, firearm parts or ammunition.*

(3) In this section, premises includes any place, whether built on or not.

Police have a range of other powers, referred to in paragraph 2.2 above, that they can draw on to search for firearms and related items. However these powers can only be exercised if police form a reasonable suspicion, based on fact, that the person has committed an offence. The FPO search powers added to these powers by empowering police to search for firearms and related items 'as reasonably required'.

The offences that police can use the FPO search powers to detect are to 'acquire, possess or use a firearm',³⁷ to 'acquire or possess a firearm part',³⁸ and to 'acquire or possess ammunition'.³⁹ The latter two offences were introduced by the amendment Act.

2.4 The process for making and challenging an FPO

In order for a person to become subject to an FPO, police, or non-sworn staff working at the Firearms Registry, must first nominate the person for an FPO. The Firearms Registry then provides information as to the suitability of an FPO for that particular individual, before the Commissioner, or his or her delegate, makes a decision about whether or not to authorise an FPO.

Once authorised, the FPO must be served on the person. After the FPO is served, the restrictions placed on the person by the FPO apply and the person may be subject to searches under the FPO search powers.

³⁵ *R v Rondo* (2001) 126 A Crim R 562.

³⁶ The maximum penalty imposed on an FPO subject acquiring, possessing or using a firearm was increased from ten years to 14 years, where the firearm is a pistol or prohibited firearm, and remained at five years in any other case. See *Firearms Act 1996*, s. 74(1).

³⁷ *Firearms Act 1996*, s. 74(1).

³⁸ *Firearms Act 1996*, s. 74(2).

³⁹ *Firearms Act 1996*, s. 74(3).

2.4.1 Making an FPO

The Act gives the Commissioner the power to make an FPO against a person if:

... *in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession of a firearm.*⁴⁰

The Commissioner has formally delegated this authority to any police officer of or above the rank of Inspector.⁴¹ In practice, the majority of FPOs are authorised by two Superintendents and one Inspector tasked to the Firearms Registry, State Crime Command and Operation Talon respectively.⁴²

Police of any rank and from any Command can nominate a person for an FPO. This can include general duties police at Local Area Commands, and police working in specialist squads. An FPO can also be initiated by sworn or non-sworn staff tasked to the Firearms Registry.⁴³

2.4.2 When an FPO comes into effect

An FPO takes effect when police personally serve a copy of the FPO on the person named in the FPO.⁴⁴ As soon as this happens, any firearms licence or permit held by the person is automatically revoked,⁴⁵ and the person becomes ineligible to receive a firearms licence or permit now or in the future in NSW.⁴⁶

2.4.3 Challenging an FPO

A person who has been served with an FPO has 28 days in which to request that the NSW Police Force review the decision to make the FPO.⁴⁷ If the internal review by the NSW Police Force is unsuccessful,⁴⁸ some FPO subjects are eligible to apply to the NSW Civil Administrative Tribunal (NCAT) for a review of the decision.⁴⁹ This option is only available to a person over 18 years old who:⁵⁰

- has not been convicted in NSW or elsewhere of certain prescribed offences in the last ten years⁵¹
- has not been subject to an apprehended violence order (AVO) within the last ten years (except for an AVO which was revoked), and
- is not subject to a good behaviour bond (entered into in NSW or elsewhere) relating to certain prescribed offences.⁵²

If a person wishes to challenge an FPO after the 28-day review period has expired, they can apply to the Commissioner to revoke the FPO. The Commissioner can do this 'at any time for any or no stated reason.'⁵³

40 *Firearms Act 1996*, s. 73(1).

41 NSW Police Force, *New South Wales Police Force Instrument of Delegation of Authority Firearms Act 1996*, 5 November 2013.

42 NSW Police Force, *Firearms Registry Statement of Information*. Operation Talon is a centrally controlled operation tasked with tackling gun crime in Sydney.

43 Firearms Registry, NSW Police Force, *Fact Sheet: Firearms Prohibition Orders (FPOs)*, November 2013, p. 2.

44 *Firearms Act 1996*, s. 73(2).

45 *Firearms Act 1996*, ss. 24(1) and 30(3A).

46 *Firearms Act 1996*, ss. 11(5)(e) and 29(3)(e).

47 *Administrative Decisions Review Act 1997*, s. 53(2)(d).

48 See *Administrative Decisions Review Act 1997*, s. 55(3)-(6). An internal review is taken to be finalised when the applicant is notified of the outcome of the review, or if the applicant has not been notified within 21 days of lodging his or her application: *Administrative Decisions Review Act 1997*, s. 53(9).

49 *Firearms Act 1996*, s. 75(1)(f).

50 *Firearms Act 1996*, ss. 11(5), 29(3) and 75(1A).

51 See Firearms Regulation 2006, cl. 5(1). Broadly speaking, these are offences which involve: firearms or weapons; prohibited drugs etc; violence; sexual matters; fraud, dishonesty or stealing; robbery; terrorism; or organised criminal groups.

52 See Firearms Regulation 2006, cl. 5(2). Broadly speaking, these offences are of a similar nature to those prescribed in cl. 5(1).

53 *Firearms Act 1996*, s. 73(3). This function may be delegated to the rank of Inspector. See *Firearms Act 1996*, s. 81(2A).

Chapter 3. Overview and context of use

Under the FPO search powers, police can search any person subject to an FPO, as well as any premises (including a home or business) or vehicle that is occupied by or under the control or management of an FPO subject.

3.1 What was searched?

Due to the way the NSW Police Force recorded FPO premises searches in the first ten months that the FPO search powers were in operation, we are unable to report comprehensively on the number of premises searches conducted during that time.⁵⁴

A total of 642 FPO searches were conducted on people and vehicles during that time. Of these, 442 were searches of people, known as a 'person search', and 200 were searches of cars, known as a 'vehicle search'. These searches were conducted over 323 separate interactions with police, known as 'events'.

3.2 Who was searched?

224 people were the subject of a person or vehicle search.

The 224 people included 132 FPO subjects; 334 person searches and 190 vehicle searches were conducted on these 132 people.

92 people not subject to an FPO were searched using the FPO search powers. 107 person searches were conducted on these 92 people. Most of these person searches (97 of 107) occurred during an FPO vehicle search and the person was in the vehicle with an FPO subject. There were ten vehicle searches where there was no FPO subject present.

We do not know the number of premises searches conducted during the first ten months the powers were in operation. However, we have observed from police records the following scenarios where a person not subject to an FPO had their premises searched under the FPO search powers:

- An FPO subject shared a house with a flatmate and their young children. Police conducted a search of the premises, including a shared lounge room, the flatmate's room and the children's rooms.
- Two separate houses were located on a single block. An FPO subject lived in house A. The FPO subject's brother and sister-in-law lived in house B. Police conducted a search of both houses A and B.

The 224 people searched were between the ages of 15 and 55 at the time of their first FPO search. The median age was 27 years. Although children and young people were unlikely to be searched, there were circumstances where children were present at an FPO search, either when the family home was searched or when travelling in a vehicle that was searched.

The majority of people searched (92%, n = 206) were male. This is not surprising as the majority of FPO subjects are male.⁵⁵ Of these, 131 were subject to an FPO, 75 were not. Of the 18 women searched, only one was the subject of an FPO. The others were with an FPO subject at the time of the search.

3.3 Where were the searches conducted?

The vast majority of the 323 FPO search events took place in metropolitan Sydney. More than half (56%) of the FPO search events took place in South Western Sydney Metropolitan Area. The Central Metropolitan Region was a distant second with 29% of search events. Only 6% of FPO searches took place in a non-metropolitan area.

54 The NSW Police Force has since made updates to the COPS database to facilitate the identification of FPO premises searches. As a result, we expect to be able to report on premises searches conducted between 1 September 2014 and 31 October 2015 in our final report.

55 Where the search was a vehicle search, this means that the search was conducted on a vehicle owned or controlled by a male.

3.4 Who conducted the searches?

FPO searches can be conducted by police of any rank from any police unit. In the first ten months the FPO search powers were in operation, police from Local Area Commands (LAC) through to specialist squads exercised the powers. The 642 FPO searches were conducted over 323 separate interactions with police, known as 'events'.

More than half of the 323 FPO search events (56%, n = 182) were conducted by police in the South West Metropolitan Region. This was followed by police in the Central Metropolitan Region (29%, n = 93), North West Metropolitan Region (9%, n = 30), Northern Region (4%, n = 14) and Southern Region (1%, n = 4). There were no recorded person searches or vehicle searches in the Western Region during this period.

The majority of FPO search events (63%, n = 205) were conducted by general duties police tasked to LACs, including South West Metropolitan Operations (13%, n = 43), St George (6%, n = 19), Fairfield (6%, n = 18), Leichhardt (5%, n = 16), Rosehill (5%, n = 15), Kings Cross (4%, n = 12) and Liverpool (3%, n = 11).

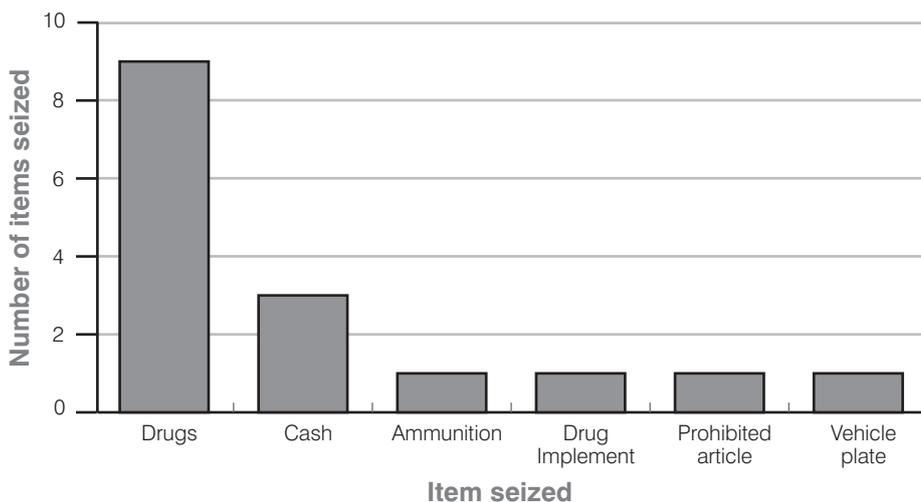
This was followed by police assigned to specialist units tasked with responding to the issue of public place shootings, namely Operation Talon (n = 44, 14%) and the Firearms and Organised Crime Squad (n = 1); and police units tasked with responding to Middle Eastern Organised Crime (n = 25, 8%) and Gangs (n = 16, 5%)⁵⁶. There were also three occasions on which police tasked to the Public Order and Riot Squad recorded an FPO search event, assisting local and specialist commands in the execution of a search.

3.5 What did police find?

None of the 642 FPO searches over 323 events resulted in police finding a firearm. However, in eight of these search events police did find something that police alleged was unlawful, was used to commit an unlawful act, or constituted the proceeds of crime. A total of 16 objects were seized (see Figure A):

- One search led to the discovery of ammunition for a 30/30 rifle.
- One weapon was found. The weapon was a prohibited article known as a nunchaku. No other weapons were found.
- Nine drug or restricted substance exhibits were seized, including cocaine, cannabis and steroids. Scales used for weighing drugs were also seized.
- Other items seized included a set of vehicle number plates and three lots of cash.

Figure A: Items seized after person and vehicle searches



⁵⁶ This figure does not include Sydney Crime Command Gangs Squad events associated with Operation Talon – these are included in the figures for Operation Talon.

3.6 What charges were laid?

As a result of the 642 FPO searches, a total of 48 charges were laid against 11 people (of whom ten were FPO subjects and one was not). Of these, 25 charges were proved, four were not proved, and 19 are yet to be finalised by a court.

Of the 25 charges that were proved:

- one charge was for possessing or using a prohibited weapon without a permit; the weapon was a nunchaku
- six charges related to the unlawful possession of an illicit drug; the drug types included cocaine and cannabis⁵⁷
- 16 charges related to driving and licence offences
- two charges related to use of offensive language in a public place.

One charge related to unlawful possession of ammunition – three 30/30 rifle rounds. This charge is yet to be heard by a court. This is the only firearms-related charge laid as a result of all 642 FPO searches.

3.7 Were the people searched those whom Parliament intended?

When proposing the amendment Bill, the then Premier, the Hon. Barry O'Farrell MP said:

*Nothing in this legislation should concern innocent citizens of this State.*⁵⁸

At the Bill's second reading speech, the then Minister for Police and Emergency Services, the Hon. Michael Gallacher MP said:

*We have drawn a line in the sand for those who should not, by virtue of their pre-existing criminal record or some other matter, have access to a firearm.*⁵⁹

In various debates regarding the Bill, members of Parliament articulated the types of people who it envisaged would be subject to an FPO search. They included people who:

- are involved in criminal activities involving guns⁶⁰
- have a history of domestic violence and mental health issues⁶¹
- use, sell or supply illegal drugs⁶²
- are members of organised criminal groups.⁶³

We reviewed the criminal history and law enforcement data holdings⁶⁴ related to all 224 people searched under the FPO search powers, as at the date of their most recent FPO search, against the above criteria.

We found that 97% (n = 128) of the 132 FPO subjects met one or more of the above criteria, and 3% (n = 4) did not. Of the 92 people not subject to an FPO, 78% (n = 72) met one or more of the criteria, and 22% (n = 20) did not.

3.7.1 People who have never been convicted of an offence

We found that 18% (n = 40) of the 224 people searched under the FPO search powers had never been convicted of an offence. This included five FPO subjects and 35 people not subject to an FPO.⁶⁵ Of these 35 people:

- 13 had never been charged with an offence and did not have any alleged criminal associations
- 13 had never been charged with an offence but had alleged criminal associations
- nine had been charged with but not convicted of an offence. Six of them had an alleged criminal association, and three did not.

57 Four of these charges were against the person not subject to an FPO.

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

59 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23904.

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

61 David Shoebridge MP, (NSWPD), (Hansard), Legislative Council, 15 October 2013, p. 23899.

62 Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23674.

63 David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.

64 Including alleged criminal associations.

65 This included 26 people not subject to an FPO who, as at 31 August 2014, had never been charged with any offence.

3.7.2 Criminal activities involving ‘guns’

From 1973 to 2013, the *Firearms Act 1996* and its predecessors provided a description of the type of circumstance in which an FPO might be made. The provision read:

Such an order may be made in respect of any person who had possession of or used a firearm immediately before its being seized under this or any other Act.⁶⁶

While this provision did not limit police use of FPOs to people who had possessed or used a firearm, it appeared to indicate Parliament’s intent that the powers would be used to prevent people who had their firearm seized (for improper or unlawful use or possession) from gaining access to firearms in the future.

Although the amendments to the Act removed this provision, upon proposing the amendment Bill, the then Premier, the Hon. Barry O’Farrell MP, indicated that the powers were intended to target people involved in criminal activities involving firearms:

This legislation will concern those who are involved in criminal activities involving guns. This legislation will ensure that these people have no place to hide.⁶⁷

We reviewed the criminal histories of all 224 people searched under the FPO search powers, as at the date of their most recent search, to see how many had been convicted of a firearms-related offence. In this issues paper a ‘firearms-related offence’ includes offences where the person used a firearm to aid the commission of a violent crime, such as murder, assault, sexual assault or robbery. It also includes offences that relate to the import, export, sale or possession of a prohibited firearm, and offences that involve the unlawful sale, possession or use of a regulated firearm.

The majority of people searched had not been convicted of a firearms-related offence.⁶⁸ This included 78% of FPO subjects (n = 103) and 91% of people not subject to an FPO (n = 84). We reviewed the firearms-related convictions of the 37 people who had been convicted of a firearms-related offence, in order to identify their most serious firearms-related offence. We found that:

- three of the FPO subjects had been convicted of a violent or threatening offence involving the use of a firearm⁶⁹
- six FPO subjects and two people not subject to an FPO had been convicted of selling, possessing and/or using prohibited firearms⁷⁰
- the majority of those with a firearms-related conviction had been convicted of unlawfully obtaining or possessing a regulated firearm, misuse of a regulated firearm and dealing or trafficking in regulated firearms.⁷¹

Prohibited firearms are the most strictly regulated types of firearms in Australia and can include machine guns, self-loading rifles, self-loading shotguns, pump-action shotguns and firearm parts such as silencers.

Regulated firearms are the most common type of firearms in Australia and are generally single-shot firearms, including air rifles (sometimes referred to as pellet guns or BB guns), rim-fire rifles, shotguns (other than pump-action and self-loading) and shotgun/rim-fire combinations.

66 *Firearms Act 1996*, s. 73(2) repealed on 1 November 2013 by the *Firearms and Criminal Groups Legislation Amendment Act 2013*.

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

68 To conduct this review we have used the Australian and New Zealand Standard Offence Classification (ANZSOC) to assist with the analysis of crime statistics. There is no ANZSOC code that specifically identifies firearms-related crime. Although many of the firearms-related offences fall under Division 11, which relates to prohibited weapons and explosives, there are a range of offences for which a firearm may be used, such as homicide, that do not appear in this category. In order to ensure that we identified all relevant firearms-related offences, we identified all charges where the NSW Law Part Title included the terms ammunition, discharge, firearm/s, pistol/s or shoot. We then grouped the identified charges by their relevant ANZSOC division and subdivisions.

69 These convictions related to shoot with intent to murder and shoot with intent to inflict grievous bodily harm offences. To identify violent or threatening offences involving the use of a firearm, we first identified all violent and threatening offence types using the following ANZSOC codes: 0111 – Murder; 0121 – Attempted murder; 0131 – Manslaughter; 0211 – Serious assault resulting in injury; 0212 – Serious assault not resulting in injury; 0213 – Common assault; 0299 – Stalking; 0299 – Other acts intended to cause injury; 0311 – Aggravated sexual assault; 0511 – Abduction and kidnapping; 0521 – Deprivation of liberty/false imprisonment; 0531 – Harassment and private nuisance; 0532 – Threatening behaviour; 0611 – Aggravated robbery. We then narrowed this down to firearms-related offences by searching NSW Law Part Titles for the terms: ammunition, discharge, firearm/s, pistol/s or shoot.

70 See Schedule 1 of the *Firearms Act 1996* for a list of the characteristics of a prohibited firearm. To identify offences related to prohibited firearms we first identified all charges where the NSW Law Part Title included the terms ammunition, discharge, firearm/s, pistol/s or shoot. We then identified those falling into the following ANZSOC codes: 1111 – import or export prohibited firearms; 1112 – sell/possess and/or use *prohibited* firearms; and 1119 – prohibited firearms offence.

71 This included 20 FPO subjects and two people not subject to an FPO. To identify offences related to *regulated* firearms, we first identified all charges where the NSW Law Part Title included the terms ammunition, discharge, firearm/s, pistol/s or shoot. We then identified those falling into the following ANZSOC codes: 1121 – Unlawfully obtain or possess regulated firearms; 1122 – Misuse of regulated firearms; 1123 – Deal or traffic regulated firearms; and 1129 – Regulated firearms offences.

3.7.3 History of domestic violence or mental health issues

When considering the amendment Bill, David Shoebridge MLC said:

Briefings provided by the Government indicated that a number of people have been the subject of a firearms prohibition order because they have been involved in domestic violence or have significant mental health issues, which means that they would be a substantial threat to people known to them or to the community at large if they were allowed to get their hands on a firearm.⁷²

We reviewed the criminal histories of all people searched under the FPO search powers in order to identify domestic-violence-related offences.⁷³ We found that 10% (n = 13) of FPO subjects and 7% (n = 6) of people not subject to an FPO had been convicted of a domestic violence offence.

There is no link between public health records and law enforcement data. As a result we were only able to identify people who have been mental health consumers where the person or someone they know has told police about their mental health history and police have made a record of that information; police have referred that person to mental health services and that referral was recorded on COPS; and/or there was reference to mental health in the person's court record (for example, a court had made an order discharging the person under section 32 of the *Mental Health (Forensic Provisions) Act 1990*).

From this information we found that 19% (n = 25) of FPO subjects searched under the FPO search powers and 15% of people not subject to an FPO (n = 14) had been consumers of mental health services.

3.7.4 Use, sell or supply illicit drugs

At the second reading speech of the amendment Bill, the then Parliamentary Secretary, Troy Grant MP, said:

The Government's bill delivers practical reforms – not just prohibition orders but across a range of Acts – to help the NSW Police Force and the Crime Commission combat gun crime and the criminals who use, sell and supply illegal drugs. This bill is well thought out, practical and goes to the heart of the matter to help combat the issues relating to gun crime that are facing our community.⁷⁴

We reviewed the criminal histories of all 224 people searched under the FPO search powers, as at the date of their most recent FPO search, to see how many had been convicted of any form of illicit drug⁷⁵ or restricted substance offence. We found that 50% (n = 66) of FPO subjects and 24% (n = 22) of people not subject to an FPO had been convicted of a drug-related offence.

We found that for 20% of FPO subjects (n = 26) and 2% of people not subject to an FPO (n = 2), their most serious drug-related conviction was for dealing, trafficking, manufacturing or cultivating illicit drugs. However, for the majority of people searched under the FPO search powers who had a conviction for an illicit drug offence, their most serious illicit drug offence was for possession or use of an illicit drug.⁷⁶

3.7.5 Members of organised criminal groups

A relationship between people who have criminal associations and firearms was also highlighted during the parliamentary debate on the amendment Bill by David Shoebridge MLC, who said:

The police also want to be able to issue orders against people who they have good reason to believe are members of organised criminal groups and thereby have access to firearms. It is important in those circumstances that the police have the capacity to check whether the order is being observed.⁷⁷

⁷² David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.

⁷³ To do this we looked for NSW Law Part Titles that included the domestic violence identifier (DV) and any breach of a Domestic Apprehended Violence Order (DAVO).

⁷⁴ Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23674.

⁷⁵ In order to identify all illicit drug and restricted substance offences we first identified all offences under ANZSOC Division 10 (Illicit drugs) and category 1626 – restricted substances. We then searched the NSW Law Part Titles for the words: drug, plant, steroid, anabolic and androgenic. This was to ensure that we identified all relevant illicit drugs and restricted substances.

⁷⁶ This was 31% of FPO subjects (n = 40) and 22% of people not subject to an FPO (n = 20). These included drug-related offences related to the dangerous or negligent operation of a vehicle (drug related), regulatory driving offences, and public health and safety offences.

⁷⁷ David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.

We reviewed the criminal histories of the people searched under the FPO search powers in order to identify how many, at the time of search, had been convicted of a criminal organisation, criminal association or consorting offence. We also reviewed law enforcement information holdings to identify people who police had alleged, at some time in their history, had an association with an organised crime group or gang.

We found that one person, an FPO subject, had been found guilty of a criminal association offence. This person was convicted of the offence of participating in a criminal group and assisting in criminal activity. However, almost all of the FPO subjects (90%, n = 119) and nearly 60% of people not subject to an FPO (58%, n = 53), at some point had an alleged link to an organised crime group or gang recorded in their law enforcement history. Most of these alleged associations related to a relationship with an Outlaw Motor Cycle Gang and/or a Middle Eastern crime group.

3.8 Vulnerable people

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) identifies characteristics of people who are deemed vulnerable for the purpose of investigation and questioning. This includes children, people who have impaired intellectual or physical functioning, Aboriginal or Torres Strait Islander people and people from a non-English-speaking background. It also provides a range of safeguards designed to preserve the dignity and privacy of people during a search. Some of these safeguards vary depending on the characteristics of the search subject. For example, when searching a female, police are required not to search the breast area unless reasonably necessary.⁷⁸

Requirements under LEPRA do not apply to the conduct of an FPO search. However we have used these safeguards as a framework to explore the vulnerabilities of people searched under the FPO search powers.

In order to estimate the number of people searched under the FPO search powers that were vulnerable, based on the above criteria, we reviewed their Police Oversight Data Store (PODS) profiles to identify those who:

- were a child or young person at the time of the search
- had ever been a mental health consumer
- were from a non-English-speaking background
- identified as female
- identified as an Aboriginal or Torres Strait Islander person
- had a cognitive or physical impairment.

3.8.1 Children and young people

Two people were under 18 years of age at the time of the FPO search. Both were male.

In the first case, police stopped a vehicle for a random breath test. The driver was an FPO subject and was travelling with a 15-year-old and one other person. The narrative indicates that police misunderstood the FPO search powers and relied upon those powers to conduct a search of all occupants in the vehicle. The narrative does not refer to any other circumstances that would provide grounds for a person search of the passengers under LEPRA.

In the second case, a 17-year-old was searched after police followed a fast-travelling vehicle in Kings Cross. The vehicle had five occupants, including an FPO subject and a 17-year-old male. The narrative reports that police searched all occupants of the vehicle because '[p]olice were aware that such an order gave them the power to search the vehicle and any occupants in relation to firearms'. In this case, the narrative also indicated that police suspected that the occupants of the vehicle were members of a gang because they were wearing particular clothing.

Aside from being the subject of an FPO search, children may also be involved in an FPO search as observers, particularly when the search is of the family home or family car. The presence of children at a search is not necessarily recorded by police conducting a search. As a result, we are not able to report on the number of children and young people present at searches unless those children were the subject of a person search.

⁷⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 32(6).

3.8.2 Mental health consumers

We estimate that 17% of people searched (including FPO subjects and people not subject to an FPO) had at some point in their history been a consumer of mental health services.

3.8.3 Non-English speaking background

We estimate that at least 15% (n = 33) of people searched under the FPO search powers came from a non-English-speaking background. Of these, 27 people were FPO subjects and six were not.

In order to identify these people, we conducted a manual review of PODS profiles in order to identify circumstances where the person searched under the FPO search power had at some point requested or used a translator, or where records indicated that their immediate family did not speak English.

3.8.4 Gender

The majority of FPO searches in the first ten months were conducted on men (92%, n = 206).⁷⁹ Of these, 131 were FPO subjects and 75 were not.

Women were much less likely to be the subject of a person or vehicle search. Of the 18 women searched, only one was an FPO subject, the others were with an FPO subject at the time of the search or were at premises or in a vehicle owned, controlled or managed by an FPO subject.

3.8.5 Aboriginal and Torres Strait Islander status

Of the 224 people searched under the FPO search powers, just over 10% (n = 24) had at some point identified themselves as an Aboriginal or Torres Strait Islander person. 17 of these people were FPO subjects and seven were not.

Almost 11% (n = 69) of the 642 FPO searches were conducted on a people who identified themselves as Aboriginal or Torres Strait Islander person. In 62 of these searches, the person was an FPO subject, and seven were not.

3.8.6 Cognitive or physical impairment

Of the 224 people searched under the FPO search powers, we found five people (2%) who at some point had been identified as having a cognitive impairment, and three people (1%) who had been at some point identified as having a physical impairment. We also found one person identified as having both a cognitive and a physical impairment.

⁷⁹ In terms of vehicle search this means that the search was conducted a vehicle connected to a male.

Chapter 4. Why and when should police conduct an FPO search?

An FPO search must only be conducted as is 'reasonably required' for the purpose of checking whether an FPO subject has committed an offence by breaching certain prohibitions imposed by the FPO. The *Firearms Act 1996* does not define the term 'reasonably required' and it is not a term that is commonly used in the context of a search. We understand from parliamentary debate that this threshold is intended to be lower than the usual search threshold of 'reasonable suspicion'. However, it is not clear how Parliament intended this to work in practice.

In this chapter we provide some examples of the range of circumstances in which police have determined that an FPO search is 'reasonably required'. To assist us in evaluating these practices we sought advice from the Crown Solicitor's Office regarding the meaning of 'reasonably required'.

We then provide a discussion of issues relating to the timing of an FPO search, including searches conducted within the 28-day internal review period, the time of day/night a search may be conducted and when the FPO search powers expire.

4.1 When a search is 'reasonably required'

When considering the amendment Act, David Shoebridge MLC expressed concern that the FPO search powers may be exercised in an oppressive fashion:

... nothing in the legislation stops police using that [FPO search] power in an oppressive fashion. Nothing stops them from searching a person's home in the morning, their vehicle and work premises in the afternoon, then their homes again that night – and doing that around the clock, day in and day out, as a show of strength against someone they think might be involved in gun crime; that is, using this power to provide a direct, 24-hour-a-day impingement of someone's civil liberties.⁸⁰

Similarly, the Legislation Review Committee expressed concern that the FPO search powers may impact on a person's right to be free from unreasonable search.⁸¹

Police currently have no policy or guidelines to help them decide whether or not an FPO search is 'reasonably required'. However, there are a range of factors that police could consider when determining whether an FPO search is 'reasonably required', including:

- investigative factors, such as new or recent intelligence regarding the FPO subject's access to firearms or involvement in a firearms-related crime incident
- individual factors, including that the FPO subject behaved in a suspicious manner, fled at the sight of police, or said something to arouse police suspicion
- situational or environmental factors, such as the time of day and location associated with firearms crime, or recent or ongoing conflict between crime groups
- deterrence factors, including whether or not the FPO subject has been searched recently, under the FPO search powers or another power, and the number and frequency of such searches
- prevention factors, including that the FPO subject is suspected of engaging in activities associated with illicit firearms carriage,⁸² such as illicit drug dealing and associating with organised criminal groups,⁸³ and

80 David Shoebridge MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 15 October 2013, p. 23903.

81 Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 16-17.

82 Activities such as drug dealing and robbery have been associated with a 'criminal firearms culture', in which firearms are carried to commit criminal offences, for self-protection and as a symbol of power and criminal affluence. Firearms carriage in these groups may also be conflated with respect, status and violent potential. See Gavin Hales, Chris Lewis and Daniel Silverstone, *Gun crime: the market in and use of illegal firearms*, 2006, Home Office Research Study 298, 2006, viewed 9 January 2015.

83 Australian Institute of Criminology, *Characteristics and dynamics of firearm trafficking*, Research and Public Policy Series, Research Paper number 116, 2012, viewed 9 January 2015.

- recidivist risk factors, including that the FPO subject has recently been convicted of an offence, is associating with pro-criminal associates,⁸⁴ or is engaging in behaviour that demonstrates an antisocial or pro-criminal attitude.⁸⁵

In order to establish whether the 'reasonably required' test is sufficient to preclude the kind of arbitrary searches about which some members of parliament and the Legislation Review Committee expressed concern about, we:

- analysed the frequency of FPO searches conducted on each person, excluding premises searches (due to the previously mentioned data limitations),⁸⁶
- reviewed advice provided to police in the *Police Monthly* regarding the exercise of the FPO search powers, and
- consulted with police regarding their interpretation of 'reasonably required'.

From our review of the frequency of searches, we found that the median number of searches for FPO subjects was two (this was normally a search of their person and a search of their vehicle at the same time) and the median number of searches for people not subject to an FPO was one (this was typically a search of their person).

We found one FPO subject who was searched under the FPO search powers on 21 separate occasions during the first ten months the powers were in operation. The circumstances that gave rise to these searches are described in Case Study A.

CASE STUDY A

In February 2014 police issued an FPO against 'Alan' a 33-year-old man who identified as a Torres Strait Islander. At the time the FPO was served on Alan he had a lengthy criminal history, having been previously charged with 28 offences, 18 of which had been proven. These offences included serious assault resulting in injury, aggravated robbery, common assault, fraud and deception offences, theft from retail premises, receiving or handling proceeds of crime, breach of bail and possession of illicit drugs.

Alan had a history with firearms. When he was 16, he was found guilty of using an imitation firearm to commit an armed robbery. He had not been charged with any other firearms offence at any time and police had recorded no information which indicated that Alan had a firearm or intended to acquire one. As a result of his conviction for this offence involving the imitation firearm, Alan is a 'disqualified person' under the Firearms Act and would not be eligible for a firearms licence were he to apply for one.

Alan had a history of possession and use of illicit drugs and restricted substances. Police held no information which might indicate that Alan was dealing, trafficking or supplying illicit drugs or restricted substances. Similarly, police held no information alleging that Alan had criminal associations, other than associating with other drug users.

Alan has never been subject to an AVO. From the age of 17, Alan has had regular contact with police. In the majority of cases, the police narrative indicates that the interactions occurred as a result of his behaviour in public places. His most recent offences occurred in 2014, including serious assault and the unlawful possession of a legal drug that requires a prescription.

Alan's FPO stated that the order had been issued as a result of his criminal offences, in particular convictions in 2012 for assault occasioning actual bodily harm and larceny.

In the seven months following the service of the FPO, Alan was searched under the FPO search powers on 21 separate occasions. The majority of these searches occurred at a busy suburban railway station. Begging, loitering and/or suspected drug use were recorded by police as instigating factors for the majority of these FPO searches.

For example, one morning police were aware that Alan was outside a railway station for 45 minutes. Police conducted an FPO search after they became aware that he was asking commuters for cigarettes. On another occasion, Alan approached undercover police at a railway station and asked for money. Police then conducted an FPO search and issued him with a direction to move away from the area for two hours. Five hours later, the same police observed Alan at the same place, begging for cigarettes. Police searched Alan again using the FPO search powers and issued another direction to move away from the area.

84 Association with pro-criminal associates has been found to significantly predict how likely a person is to develop pro-criminal attitudes. See Jeremy F. Mills, Daryl G. Kroner and Toni Hemmati, *The Measures of Criminal Attitudes and Associates (MCAA): the prediction of general and violent recidivism*, *Criminal Justice and Behaviour*, 31(6), 2004, pp. 717-33, viewed 27 March 2015.

85 See Rainer Bainse, Judith Koppehele-Gossel, Lisa M. Kistemaker, Verena A. Werner and Alexander F. Schmidt, *Pro-criminal attitudes, intervention and recidivism*, *Aggression and Violent Behaviour*, 18(6), pp 673-85, viewed 27 March 2015.

86 See 1.3 – Limitations of the NSW Police Force statistical data.

A few weeks later, police observed Alan walking along the road with a person who appeared to be heavily drug affected. Alan was searched using the FPO search powers and his companion (who was not subject to an FPO) was searched by police using their ordinary search-without-warrant powers provided under *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA)⁸⁷ in relation to the suspected possession of drugs.

On another three occasions, police records of the searches indicate that each search was conducted for no other reason than that Alan was an FPO subject. One police narrative stated:

About 11.55am Police were patrolling the upper concourse of [station name] Railway Station when they observed the POI [person of interest] entering through the ticket barriers. Police recognised the POI from previous dealings and had knowledge that he was currently the subject of a firearms prohibition order which permits the POI to be searched for firearms at any time... Due to the above reasons the POI was subjected to an ordinary search for firearms with nil suspicious items located.

In the same seven-month period, Alan was also searched around 19 times under police search-without-warrant powers provided under LEPRA.

The FPO and LEPRA searches were conducted by a number of different police tasked to different police units.

None of the 21 FPO search events resulted in a find of a firearm, a firearm part or ammunition, or of any other illicit or suspicious items.

We discussed this case study with police, who told us that in deciding to search a person an officer has encountered on the street, the information available to police is likely to be limited to the context in which police saw the person and the fact that the person is subject to an FPO. It is unlikely that police would know the number of FPO searches that had been conducted on the person recently. Police also explained that the fact that the person is subject to an FPO may heighten police concern that the person is carrying a firearm.

From our review of instructions provided to police regarding circumstances in which it may be appropriate to conduct an FPO search, we found that some police have determined that an FPO search is 'reasonably required' each time a vehicle connected to an FPO subject is identified by the Automatic Number Plate Recognition (ANPR) device. Six months after the introduction of the FPO search powers, the then Commander of Operation Talon (a centrally-controlled operation tasked with tackling gun-crime in Sydney) used a *Police Monthly* article to encourage general duties officers to disrupt the activities of local Talon 'targets' through the use of the FPO search powers:

If you pull over a driver who's been issued with a Firearms Prohibition Order, then search their car ... No matter whether they live or work in your LAC [Local Area Command], or if they're just visiting, conduct as many inspections as you can.⁸⁸

In the same article, the Acting Crime Manager at Burwood LAC stated:

The beauty of these orders is that once you serve them, you can put a warning on COPS identifying them and their vehicle. Then wait for ANPR... to pick them up for another search.⁸⁹

The ANPR device uses cameras mounted on a police vehicle to optically recognise up to six licence plates per second and check them against the stolen vehicle database and the NSW Roads and Maritime Service registration database. Introduced to the NSW Police Force in 2005, the ANPR system is used to detect unregistered or stolen vehicles and unlicensed drivers, as well as to provide police with other information such as outstanding warrants and warnings.

We found four search events where police recorded that the search of a vehicle (and its occupants) was initiated through the use of an ANPR device. In addition, a person who was recently served with an FPO expressed concern regarding the potential impact of routine ANPR-initiated searches on his employment. He had been convicted of a firearms offence almost ten years prior to the service of the FPO. He told us that after serving a period of imprisonment, he had established a career in a legitimate industry which requires extensive car travel in the company of colleagues and clients. He said:

I often have colleagues and clients in my car. Police will stop me with the ANPR, put me in handcuffs and search the vehicle. Of course they won't find anything, but how am I going to explain that. It's an industry based on trust and respect.

⁸⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). s. 21.

⁸⁸ NSW Police Force, 'Operation Talon – Everyone's business, every day', *Police Monthly*, April 2014, p. 7.

⁸⁹ NSW Police Force, 'Operation Talon – Everyone's business, every day', *Police Monthly*, April 2014, p. 8.

We raised this issue with the current Commander of Operation Talon who told us that only vehicles connected to FPO subjects' who are subject to a current operation or investigation are marked with a warning on COPS that will be identified by the ANPR device. He said:

Where appropriate the ANPR system is used to create warnings with regards to people involved in a current conflict, who should be searched under the FPO search powers - the purpose being to remove their access to firearms.

We understand that NSW Police Force is currently working to improve the currency of information provided by the ANPR device, by enabling police to enter an 'expiry date' for warning information. NSW Police Force anticipates that this project will be completed by early 2016.

From our consultations with police, it appears that there is a diversity of opinion as to what 'reasonably required' means. Some police told us that they think the FPO search powers enable police to search a person solely on the basis that the person is an FPO subject – that 'reasonably required' relates simply to the manner in which police conduct the search. Others told us that they thought 'reasonably required' is a test to be applied before conducting a search – that requires something more than the person being subject to an FPO, but something less than a reasonable suspicion.

We sought legal advice from the Crown Solicitor's Office as to the meaning of 'reasonably required' and how such a test or qualification should be applied by police in practice.

The Crown Solicitor's Office advised that the term 'reasonably required' is akin to 'reasonably necessary', interpreting the words as imposing an objective test which requires a searching police officer to consider that an FPO search is more than 'appropriate in the circumstances', but less than 'absolutely necessary'. The Crown Solicitor's Office advised:

... my view is that the word "required" at s. 74A(1) is to be given its ordinary meaning, which is synonymous with, or at least akin to, "necessary". That is, I do not think the word "required" in this context can be read as meaning "appropriate in the circumstances".

While not free from doubt, my view is that being a provision that allows police to search persons and premises in New South Wales, a court would not give too broad or an expansive construction to s. 74A. A court would, in my view, prefer a construction that imposed a limitation on police. In this context, I think the word "reasonably" is not to be construed in the more colloquial sense of "to a moderate degree" but is to be construed as imposing a "reasonability" element of the test such that action must not only be "required" but must be "reasonably required" in an objective sense. Additionally, in this context, my view is that "required" means something less than absolute necessity but something more than appropriate in the circumstances. That is, it signifies something less than "essential".⁹⁰

In providing this advice, the Crown Solicitor's Office acknowledged that it is unclear what is meant by 'reasonably required' and that this lack of clarity presents an area of potential confusion for police.

It may assist operational police if the NSW Police Force develops guidelines in relation to when an FPO search may be reasonably required. We have provided the NSW Police Force with the Crown Solicitor's Office advice to assist them to develop such guidelines.

Question for consideration:

- 1. In developing guidelines, what criteria or principles should police consider when determining whether a search is 'reasonably required'?**
-

⁹⁰ NSW Crown Solicitor, Advice, *Powers under Firearms Act and Law Enforcement (Powers and Responsibilities) Act*, dated 19 May 2015, paras 5.9–5.10.

4.2 Searches conducted within the 28-day internal review period

The police interpretation of 'reasonably required' is also demonstrated through the practice of serving an FPO and searching the person straight away.

The instruction to serve an FPO is given by the Firearms Registry. As soon as an FPO is authorised, the Firearms Registry scans the FPO into COPS and creates an event, instructing a police unit to serve the FPO. This information and the FPO is available to all police who may check the person's COPS profile and have the opportunity to serve the FPO on the person. In practice, an FPO is usually served by the police unit that initially recommended that person for an FPO.

In the first ten months the FPO search powers were in operation, 11% of searched FPO subjects (n = 14) were searched upon service of an FPO. Due to the lack of reliable data on premises searches, we are unable to report on the number of 'serve and search' operations conducted on premises. However, from the information available to us, we understand that police often conduct an immediate search of premises after serving an FPO.

The primary argument for this 'serve and search' practice is that it is operationally effective as it provides police with an element of surprise. Searching immediately upon service of an FPO may be 'reasonably required' because it enables police to seize any firearms, firearm parts or ammunition in the person's possession before the person has an opportunity to hide, sell or dispose of them.

However, this practice also appears to undermine the right of a person who has been served with an FPO to seek a review of that decision. As the decision to issue an FPO is an administratively reviewable decision under the *Administrative Decisions Review Act 1997*, any person served with an FPO has 28 days in which to request that the NSW Police Force review the decision.⁹¹ Searching under the authority of an order that may be overturned on review could be considered to be inconsistent with the way other legal orders are acted upon.

The 'serve and search' practice led to police failing in their prosecution of a defendant in the case of *R v Tabikh*.⁹² The defence questioned the fairness of this practice and asked the Magistrate to consider not admitting the evidence as a result of it being unfairly obtained. The Magistrate found that although the police search was lawful, it was 'certainly unfair' and refused to allow the evidence from the search.⁹³ As a result, both charges were dismissed.⁹⁴ We understand that NSW Police Force considered this finding an error of law, but decided not to appeal the decision.

In circumstances where police reasonably suspect that a person about to be served with an FPO has a firearm or related item, police can exercise other powers to search that person, including applying for a search warrant to search the premises or,⁹⁵ searching the person and vehicle in a public place on the basis of that reasonable suspicion.⁹⁶

We raised this issue with police, who told us that the ability to search upon service is particularly useful when an FPO is issued in response to circumstances where police have reason to suspect an incident involving firearms may be imminent, but the information is insufficient to use support the use of other search powers. For example, where police have information that a conflict between two organised criminal groups has escalated, and retaliatory action is anticipated, but do not have sufficient detail to form a reasonable belief or suspicion about a particular person, place and time.

91 *Firearms Act 1996*, s. 75(1)(f).

92 *R v Tabikh* (unreported, Liverpool Local Court, Magistrate Clisdell, 23 June 2014).

93 In making this decision, the Magistrate relied upon section 138 of the *Evidence Act 1995* and *Ridgeway v The Queen* [1995] 184 CLR 19. In *Ridgeway*, Mason CJ, Deane and Dawson JJ referred to a trial judge's discretion to exclude evidence obtained unlawfully by law enforcement authorities, and observed that the discretion also extends to evidence obtained unfairly or improperly (at 36-37).

94 *R v Tabikh* (unreported, Liverpool Local Court, Magistrate Clisdell, 23 June 2014).

95 LEPR, s. 47.

96 LEPR, s. 21.

Questions for consideration:

2. *How do you think the apparent conflict between the police practice of conducting an immediate search upon service of an FPO and the person's right to seek a review of the decision to issue the order should be resolved?*
 3. *Should police introduce guidelines to wait until the period of 28 days has expired before conducting an FPO search (and use other search powers in the meantime if they have reasonable grounds to do so)?*
-

4.3 Time of day at which the search is conducted

The law does not prescribe any limits regarding the time of day at which the FPO search powers can be used. This means that an FPO search can be conducted at any time of day. If the FPO subject or their vehicle is in a public place at night, conducting a search at night does not raise concerns. However, a search of premises occupied by an FPO subject or premises under the FPO's subject control or management, particularly their home, is a different matter.

On the one hand, an 'anytime, anywhere' approach to FPO searches may be operationally effective, assisting police to:

- detect firearms and related items, by providing police with the element of surprise and the ability to respond to an immediate threat or anticipated incident involving firearms.
- deter an FPO subject from possessing firearms by creating a perception that they are, or could be, searched at any time.

On the other hand, searches of premises at night are typically only permitted in exceptional circumstances. For example, a warrant to search premises is typically executed in daylight hours. If police would like to execute a search warrant at night, they must get permission from the person who authorised the warrant.⁹⁷ Generally, permission will only be granted if:

- the execution of the warrant by day is unlikely to be successful
- there is likely to be less risk to the safety of any person if it is executed by night, or
- the person who occupies the property is only on the premises at night and is needed to be present to allow entry.⁹⁸

We raised this issue with police who told us that the ability to search by night was particularly useful in response to information regarding an escalating conflict between organised crime groups, because the majority of public place shootings occur between the hours of 10pm and 2am.

We are not currently able to report on the time of day or night when FPO searches are being conducted. However, we did receive a complaint about police conducting a search of a family home late at night.

As the NSW Police Force are now able to identify data relating to FPO premises searches, we expect to be able to report on this issue in our final report.

Questions for consideration:

4. *Is it appropriate that police are able to conduct a search of premises under the FPO search powers at any time, day or night?*
 5. *Should police be required to seek permission from a police officer of a particular rank in order to conduct an FPO search of premises at night?*
-

⁹⁷ Other than a covert search warrant.

⁹⁸ LEPR, s. 72.

4.4 Expiry of search powers

Once an FPO is made, it never expires. This means that an FPO subject, and his or her home and vehicles can be searched whenever police form the view that a search is 'reasonably required' for the rest of the FPO subject's life.

By way of contrast, a normal search warrant issued under LEPRA (to search premises) expires within 72 hours of being authorised. If for some reason police require an extension of the warrant, they can apply to the authorising officer for an additional 72 hours.⁹⁹ The maximum time allowed under LEPRA for the expiry of a search power is ten days.

A firearms licence is in force for no longer than five years; and in some cases, for no longer than 12 months.¹⁰⁰ This means that the Commissioner must freshly consider whether or not a person is a 'fit and proper person and can be trusted to have possession of firearms without danger to public safety or to the peace'¹⁰¹ at least once every five years, and only if the person applies for a new licence.

This recognises that people's circumstances change. It may have been appropriate to grant someone a licence five years ago, but during that time their conduct may show that they can no longer be trusted to possess a firearm safely. Similarly, a person may be considered to be unfit to possess a firearm (when deciding to make an FPO against them), but in the subsequent five years their conduct may demonstrate that they no longer pose the same level of risk. While, because of their past conduct, it may still be appropriate to permanently prevent the person from being granted a firearms licence, it may no longer be appropriate for the FPO search powers to be exercised against them.

The effective use of the FPO search powers depends on the currency of the information on which police base their decision to search a particular person on a particular occasion. If police routinely search any person who is subject to an FPO (for example, when the FPO subject's vehicle is recognised through the ANPR system) these searches may not be very effective if the reasons for the FPO are no longer current (such as because the FPO was made some time ago). Although the Firearms Act gives the Commissioner a power to revoke an FPO,¹⁰² neither the Act nor NSW Police Force policy establishes any process for the routine review of an FPO to ensure that the information on which the decision to make the FPO was based is still current.

Question for consideration:

- 6. To ensure that the use of the FPO search powers is targeted and effective, should an FPO expire after a certain period of time and/or should there be a process for the mandatory review of an FPO, to ensure that the reasons for issuing the FPO remain current?***
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99 LEPRA, s. 73.

100 *Firearms Act 1996*, s. 21.

101 *Firearms Act 1996*, s. 11(3)(a).

102 *Firearms Act 1996*, s. 73(3).

Chapter 5. What and how should police search?

The FPO search powers enable police to search people, vehicles and premises. These powers are to be 'exercised as reasonably required'. This limitation relates both to the grounds upon which police can exercise the search powers, and to the manner in which police can conduct a search.

In this chapter we discuss issues related to the nature and conduct of FPO searches. Our observations are informed by data provided by the NSW Police Force regarding FPO searches of people and vehicles in the first ten months that the powers were in operation, as well as a sample of 42 premises search events that we identified by reviewing narratives of person search events, charge information, complaints made to our office and legal advice we received from the Crown Solicitor's Office.

5.1 Person searches

Police conducted 442 person searches under the FPO search powers, searching 224 people (some were searched more than once).

The *Firearms Act 1996* (the Act) does not specify how police should conduct a person search or what actions police are permitted to take during the search. It also does not contain any safeguards to preserve the privacy or dignity of a search subject. In addition, the NSW Police Force currently has no particular policies or guidelines in place to instruct its officers how to conduct a person search under the FPO search powers.

5.1.1 How the FPO person searches were conducted

Almost 75% (n = 330) of person searches conducted were 'ordinary' searches. An ordinary search involves the search of a person or articles in his or her possession. This may include requiring the person to remove only his or her jacket or similar article of clothing and any gloves, shoes, socks and hat they are wearing for examination.¹⁰³

The other 25% of the person searches were (n = 112) were 'frisk' searches. A frisk search is conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing, and examining anything worn or carried by the person that is conveniently and voluntarily removed by the person.¹⁰⁴

Another form of person search is a 'strip search'. This may involve the removal and examination of all of the person's clothes and the visual examination of the person's body (but not his or her body cavities).¹⁰⁵ Police could conduct a strip search under the FPO search powers if the police officer conducting the search thought it was reasonably required under the circumstances, for example to find secreted ammunition or a firearms part. There were no strip searches recorded in the first ten months the powers were in operation. However, given the size and portability of ammunition and some firearms parts, it is conceivable that a strip search could be conducted under this authority at some point in the future. No legislative or policy safeguards would necessarily apply to such a search.

On 4 September 2014, the NSW Police Force updated the COPS database to tailor it specifically for FPO searches. As the three *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) search types – described above as ordinary, frisk and strip searches - do not apply to an FPO person search, the categories were removed. This means that records relating to FPO searches of people, vehicles and premises are easily identifiable, but the type of person search is no longer recorded. As a result we will not be able to report comprehensively on the type or nature of person searches in our final report.¹⁰⁶

¹⁰³ *Law Enforcement (Powers and Responsibilities) Act* (LEPRA), ss. 3(1) and 30(1).

¹⁰⁴ LEPRA, ss. 3(1) and 30(1).

¹⁰⁵ LEPRA, ss. 3(1) and 31. LEPRA places restrictions on the use of strip searches, which are only permitted where the searching officer reasonably suspects 'that it is necessary ... for the purposes of the search, and that the seriousness and urgency of the circumstances require the strip search to be carried out': s. 31. LEPRA also contains a number of safeguards relating to strip searches: see ss. 33–34.

¹⁰⁶ One of the searches conducted in the first ten months of the review was recorded in this manner. No narrative was written for this event. As a result we are not able to report on the type of search conducted.

Although the NSW Police Force has not developed specific guidelines or policies for the conduct of an FPO person search, some police have conducted the search in a manner that complies with the safeguards established under LEPRA that are intended to preserve the privacy and dignity of people searched (this is discussed in more detail below)¹⁰⁷ Of the 442 person searches, we had access to narratives for 81% (n = 357); police recorded that they had met the LEPRA search safeguards in just over a quarter of these searches (27%, n = 96).

5.1.2 Legislative safeguards that ordinarily apply to a person search

Search powers provided to police are typically complemented by a range of legislative, policy and procedural safeguards designed to preserve the integrity of the search process and protect the privacy and dignity of people involved in a search. Safeguards apply to all three types of LEPRA person searches. For example, a searching officer must (as far as is reasonably practicable):

- inform the person being searched whether he or she will be required to remove clothing, and why that is necessary¹⁰⁸
- ask for the person's cooperation¹⁰⁹
- conduct the search in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable¹¹⁰
- conduct the least invasive kind of search practicable in the circumstances¹¹¹
- not search the person's genital area or breasts, unless the searching officer reasonably suspects that it is necessary for the purposes of the search,¹¹² and
- allow the person to dress as soon as the search is finished and, if clothing is seized, ensure that the person is left with or given reasonably appropriate clothing.¹¹³

Importantly, a person search should be conducted by a police officer¹¹⁴ who is of the same sex as the person being searched,¹¹⁵ and the search must not be carried out while the person is being questioned.¹¹⁶

The police powers to search people in relation to terrorism offences provides for the same three categories of person search as those provided in LEPRA, and include the same safeguards.¹¹⁷

Other legislation that gives an authority person search powers typically specifies what a person search may involve and contains provisions aimed at preserving privacy and dignity during person searches.¹¹⁸ For example, the *Summary Offences Act 1988* empowers a correctional officer to conduct a search in a correctional facility. Such a search must be conducted with due regard to dignity and self-respect, and by a person of the same sex.¹¹⁹

Question for consideration:

7. ***Should person searches conducted under the FPO search powers be subject to legislative, policy or procedural safeguards? What should those safeguards be?***
-

107 LEPRA, Division 4, Part 4.

108 LEPRA, s. 32(2).

109 LEPRA, s. 32(3).

110 LEPRA, s. 32(4).

111 LEPRA, s. 32(5).

112 LEPRA, s. 32(6).

113 LEPRA, s. 32(9)–(10).

114 Or other person who is acceptable to the person being searched.

115 LEPRA, s. 32(7).

116 LEPRA, s. 32(8).

117 *Terrorism (Police Powers) Act 2002*, Schedule 1, cl. 5.

118 *Summary Offences Act 1988*, s. 27G(3)-(5); *Court Security Act 2005*, s. 10(2).

119 *Summary Offences Act 1988*, s. 27G(3)-(4). For other examples, see: *Children (Protection and Parental Responsibility) Act 1997*, s. 29; *Court Security Act 2005*, ss. 4 and 10(1)(b); *Major Events Act 2009*, s. 45(1)(a)-(c); and *Mental Health Act 2007*, s. 81(4) and (6).

5.1.3 Person searches of people not subject to an FPO

Of the 442 person searches conducted under the FPO search powers, a quarter (n = 107) were conducted on people who were not subject to an FPO. The FPO search powers do not give police the power to conduct these searches.

However, if in the process of conducting an FPO search police have grounds to search a person who is not subject to an FPO for firearms and related items, they can draw upon their ordinary police powers, described in Chapter 2, to do so.¹²⁰

To establish whether there was an alternative power police could have exercised in order to conduct these searches, we reviewed the event narratives. We found the following:

- There were 32 searches where the narrative made reference to factors that may have been used to support the lawful conduct of a search (in a public place) under LEPR.
- There were 34 searches where the narrative indicated that police misunderstood the FPO search powers. Typically, this occurred in the context of a vehicle stop, and the narrative explicitly stated that the other occupants of the vehicle (in addition to the FPO subject) were searched because of the FPO.
- There were 41 searches where there was no narrative recorded by police, or the narrative did not shed light on the power police were exercising.

We raised with the NSW Police Force the issue of the 34 searches where the narrative explicitly indicated that police misunderstood the FPO search powers. The NSW Police Force acknowledged that the FPO vehicle search power did not provide police with the power to search all occupants of the vehicle, and noted that these errors would ordinarily have been identified by a police supervisor when approving the COPS record of the events. We will continue to monitor the number and nature of these events.

5.1.3.1 Exercising 'reasonable suspicion' powers to search people not subject to an FPO

In a public place, police conducting an FPO search are able to stop, search and detain any person, without a warrant, under a range of circumstances, including if police reasonably suspect that the person has in their possession a 'dangerous article' (such as a firearm or related item).¹²¹ This means that police conducting an FPO search in a public place such as a motorway or shopping mall may be able to search people in the company of the FPO subject.

When on premises, police executing a LEPR search warrant are provided with an ancillary power to search any person in or on the premises for anything mentioned in the warrant, provided that police have a reasonable suspicion that the person has that item in their possession.¹²²

However, police conducting an FPO search on premises have no such powers to search a person not subject to an FPO, even if they have reasonable suspicion that the person is hiding a firearm or related item. The inability of police to search other people present at premises occupied by, or under the control or management of an FPO subject may provide FPO subjects with an easy way to circumvent the search process. For example, an FPO subject can pass a firearm or related item to another person at the premises to conceal in their clothing. If police are unable to search that person, they will not find that firearm.

Providing police with an ancillary power to search people not subject to an FPO, based on *reasonable suspicion* that the person has a firearm or related item, may make it more difficult for FPO subjects to circumvent the FPO search powers. However, as these people are not subject to an FPO themselves, such a power may interfere with a person's right to be free from unreasonable search.¹²³

During the first ten months in which the FPO search powers were in operation, police conducted a person search of 92 not subject to an FPO. Police did not find any concealed firearms or related items on any of them.

¹²⁰ See 2.2 – Other police powers to search for firearms, firearm parts and ammunition.

¹²¹ LEPR, 21(2)(c) empowers police to search for a 'dangerous article', which is defined to include a 'firearm, a spare barrel for any such firearm, or any ammunition for such firearm', 'an article or device, not being a firearm, capable of discharging by any means', and a prohibited weapon, as defined by Schedule 1 of the *Weapons Prohibition Act 1998*. This reference to prohibited weapons would also permit police to search for other firearms parts, such as a silencer, detachable magazine or attachment used to catch and eject cartridge cases.

¹²² LEPR, s. 50.

¹²³ See concerns expressed by the Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 16-17.

Question for consideration:

8. **Should the Act be amended to include a provision providing police with an ancillary power to search people not subject to an FPO in order to find firearms, firearm parts or ammunition?**
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5.2 Premises searches

As discussed at the start of Chapter 3, due to the way the NSW Police Force kept records of FPO premises searches, we are not able to report in this issues paper on the number of FPO premises searches conducted in the first ten months the powers were in operation.

However, we are able to provide information regarding a sample of 42 premises search events conducted under the FPO search powers that we identified by reviewing narratives of person search events, charge information and complaints made to our office. These interactions provide us with some insight into the issues related to the exercise of the FPO premises search power.

To facilitate the identification of FPO premises searches, the NSW Police Force introduced a new event category in COPS on 4 September 2014. If the new event category is used correctly by police, it will enable us to report with greater accuracy on premises searches conducted in the final 12 months of the review period.

The Act defines premises, for the purpose of an FPO search, as including ‘any place, whether built on or not’.¹²⁴ This can include a residential home, business or workplace. The FPO search powers extend to any premises ‘occupied by or under the control or management’ of the FPO subject.

The FPO premises search power is significant because it empowers police to search a person’s premises without a warrant and without reasonable suspicion.¹²⁵ Police have very few powers to search a person’s home without a warrant. Legislation that provides police with these powers are typically reserved to enable the policing of domestic violence¹²⁶ and terrorism.¹²⁷ Generally speaking, if police would like to conduct a search of private premises, they require a search warrant.¹²⁸ In order to obtain a search warrant, police usually need to apply to a Magistrate or another authorised officer and outline why they have a ‘reasonable suspicion’ that something unlawful is or will be located on the premises or that the premises are being, or will be used to commit a crime.¹²⁹ This is particularly the case for a search of residential premises such as a family home.¹³⁰

The usual legislative safeguards designed to preserve the integrity of a premises search do not apply to an FPO premises search.¹³¹ However, since 4 September 2014, the NSW Police Force has determined as a matter of policy that all FPO premises searches should comply with search warrant Standard Operating Procedures (SOPs). As a result of this decision, police are expected to explain to a resident that:

- the search is being conducted under the terms of the FPO and in accordance with section 74A of the Act

124 *Firearms Act 1996*, s. 74A(3).

125 *Firearms Act 1996*, s. 74A(2)(b).

126 Part 6 of LEPRA provides police with the power to enter residential premises provided that a police officer believes on reasonable grounds that a domestic violence offence is being, may have been recently, or is likely to be committed in any dwelling and only if invited to do so by any person who apparently resides there. Even if refused entry by another occupier, police may enter if invited to do so by the apparent victim of the offence. Police may enter and remain for the purpose of investigating whether a domestic violence offence has been committed. While present, police must enquire whether firearms are present in the dwelling, and if informed that there are firearms, take any reasonably practicable action to search for, seize and detain them. This power is limited in that it requires the express consent of one of the residents and it does not provide police with a general power to search the premises or people present.

127 Sections 17-19 of the *Terrorism (Police Powers) Act 2002* provide police with special powers to search persons, vehicles and any premises (including residential premises) which are targets of an authorisation. In order for an area to be the target of an authorisation, the authorising police officer, of the rank of Deputy Commissioner or above, must be satisfied there are reasonable grounds to believe that a terrorist act has been committed, or there is a threat of a terrorist act occurring in the near future. This does not empower police to conduct a covert search of the premises. In order to conduct a covert search on such grounds, police must apply to a court for a covert search warrant.

128 See *George v Rockett* (1990) 170 CLR 104.

129 For example, see: *Criminal Assets Recovery Act 1990*, s. 38(1); LEPRA, s. 47(1)-(3A); *Summary Offences Act 1988*, s. 21(1).

130 For example, see: *Local Land Services Act 2013*, s. 171; *Motor Dealers and Repairers Act 2013*, s. 153(2)(b); *Poisons and Therapeutic Goods Act 1966*, s. 43(4). These Acts, which otherwise allow police officers to enter and search premises without a warrant, expressly require police to obtain a search warrant before entering premises used for residential purposes.

131 LEPRA, Part 4, Division 4.

- the premises are being searched for firearms, firearm parts and ammunition
- the search will be video and audio recorded, and anything the person says or does may be used in evidence
- failure to comply with the searching officers' requests may be a criminal offence, and
- the person must not hinder or obstruct police during the execution of the search.¹³²

However, it is not necessary for all residents of the premises to be provided with this information.

Question for consideration:

9. ***Should premises searches conducted under the FPO search powers be subject to legislative, policy or procedural safeguards? What should those safeguards be?***

5.2.1 Premises that are 'occupied by' or 'under the control or management of'

As the FPO search powers allow police to search any premises 'occupied by' or 'under the control or management of' an FPO subject, a factor that police need to consider is whether or not the place they wish to search can be described in this way. If these search powers cannot be used, then police may have the option of applying for a search warrant.

In the course of this review we became aware of two issues related to the way in which police have interpreted premises to be 'occupied by' or 'under the control or management of' an FPO subject. The first relates to a matter where police searched two separate houses at the same address, one of which the FPO subject resided at, the other where he did not. The second arose from a complaint we received regarding the search of a vehicle not belonging to an FPO subject, which was parked on premises at which the FPO subject resided.

5.2.1.1 Determining the boundaries of premises

For the majority of FPO searches it is likely to be a straightforward matter for police to determine whether or not the place they wish to search is 'occupied by' or 'under the control or management of' an FPO subject. However, there may be some situations where the FPO subject's connection to a place is less clear, for example, when an FPO subject is only temporarily at an address, is an infrequent visitor to premises or utilises shared spaces, such as foyers, driveways or garden areas within a unit complex. Case Study B provides an example of an instance when this was an issue.

CASE STUDY B

'Emilio' and 'Zane' are brothers who live at the same address in separate houses. Emilio lives in the house at the front of the address while Zane lives with his young family in the house at the rear. Emilio is an FPO subject.

At nine o'clock one morning 24 police officers, a firearms dog and an independent observer attended the address to conduct an FPO search.

Zane was in the backyard with his wife and four-year-old child. Emilio, who had recently married, was overseas on his honeymoon.

With the assistance of Zane and Emilio's sister, whom Zane called to bring the keys, police accessed Emilio's house and conducted an FPO premises search. Police did not find any illicit items.

The police also relied upon the FPO powers to search Zane's house and his wife's car. Police records state that this was '*due to the occupant... [Emilio] being the subject of a Firearms Prohibition Order*'. Police found a small amount of steroid in the house. Zane said the steroids were his but he did not have a prescription for them. He was subsequently charged with being in possession of a prohibited drug. He pleaded guilty and was ordered to pay a small fine.

The searches of both houses and the car took approximately two and a half hours.

¹³² NSW Police Force, Central Metropolitan Region, *Guidelines concerning Firearms Prohibition Orders SOPS v2*, p. 12.

It was not clear to us whether Zane and his wife's house and vehicle could be described as being occupied by or under the control or management of Emilio. We sought legal advice as to how police should determine whether the property they wish to search is 'occupied by' or 'under the control or management of' an FPO subject.

The Crown Solicitor's Office advised us that an appropriate test to apply when determining whether or not a place is 'occupied by' or 'under the control or management of' an FPO subject is whether or not the person has sufficient control over the place, either directly or through others, to exclude strangers without resorting to physical force:

... the level of "control" required must be real and weighty such that, for example, the person had sufficient control to exclude strangers from "the premises, vehicle, vessel or aircraft". Further, "unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not generally construe a statute as having that operation"...

... The control may, however, be shared with others, such as, for example, joint occupiers. In my view, the word "management" suggests that it is sufficient if a person's power to exclude strangers is capable of being exercised through others ..., including in accordance with their directions.¹³³

Whether or not the control is exercised directly by the FPO subject or through others, the advice found that it must be real and weighty – it is not enough that the FPO subject owns or leases the premises, or is present at a place:

Therefore, it is not sufficient, under s. 74A, in my view, that a person merely own or lease the "premises, vehicle, vessel or aircraft". There may be cases where a person owns premises, but does not satisfy the requirements of s. 74A (occupies, controls, manages) such as, for example, where the "premises, vehicle, vessel or aircraft" are leased to an arm's length third party. In that context, the words "occupied", "management" and "control" suggest a tangible and immediate control over the premises, vehicle, vessel or aircraft...

... to constitute "occupation" it would be necessary to establish that the person has sufficient control ... to exclude strangers ... It will also be necessary for that control to be physically manifest ... more than fleeting or effervescent...

...The word "control" probably extends beyond the notion of "occupation" in that it does not require physical manifestation of itself; it will be probably sufficient if the person has a real and direct power to exclude strangers from the "premises, vehicle, vessel or aircraft". Accordingly, I doubt that it would be sufficient that a person subject to an FPO order is merely in a vehicle or at a premises.¹³⁴

This concept of control as the ability to exclude a stranger, without the use of force, could be adopted by the NSW Police Force as a criterion to be applied by police when considering whether or not a place is occupied or control or management of an FPO subject.

5.2.1.2 Vehicles and vessels on premises

The Act defines premises as including 'any place, whether built or not'. This definition does not make clear whether vehicles and vessels located on or in the premises form part of the premises, for example, a car, caravan or mobile home.

In the course of this review we received a complaint which raised the issue of police searching under the FPO premises search power a vehicle that did not belong to an FPO subject but which was parked on or in premises. The complainant was of the view that the search of a vehicle on premises was a separate search to the search of the premises. The complainant's understanding of the search powers was that police can only search vehicles in or on premises if the vehicle is 'occupied by, or under the control or management of' an FPO subject. This interpretation would mean that there may be some vehicles parked in or on premises that cannot be searched under the FPO search powers, for example a vehicle belonging to a visitor not known to the FPO subject.

We discussed this issue with police who were of the view that a vehicle parked on premises forms part of the premises. Police told us that if they were not able to search all vehicles parked in or on premises, FPO subjects could circumvent the FPO search process by hiding firearms and related items in a visitor's car.

We were unsure as to which interpretation was correct. To clarify this issue, we sought legal advice from the Crown Solicitor's Office, which expressed the view that an FPO search of premises does not include vehicles located on or in premises:

¹³³ NSW Crown Solicitor, Advice, *Powers under Firearms Act and Law Enforcement (Powers and Responsibilities) Act*, dated 19 May 2015, paras 5.44 and 5.46.

¹³⁴ NSW Crown Solicitor, Advice, *Powers under Firearms Act and Law Enforcement (Powers and Responsibilities) Act*, dated 19 May 2015, paras 5.45-5.46.

Having regard to the words of the provision in context, it seems to me that, by providing for a specific search power in relation to vehicles, vessels and aircraft in the form of s. 74A(2)(c), it can be taken that the Parliament intended that the operation of s. 74A(2)(b) should not be so wide as to include vehicles, vessels and aircraft found on searched premises.¹³⁵

As a result of this advice, it would appear that police can only conduct an FPO search of a vehicle by exercising the FPO vehicle search power. This requires that police establish that each vehicle is 'occupied by' or 'under the control or management of' an FPO subject before conducting a search.

This interpretation of the provision may reduce the risk of people not subject to an FPO being subject to an unreasonable search.¹³⁶ However, it may also make the premises search power less effective.

One way to resolve this issue may be to provide police with an ancillary power to search a vehicle or vessel not 'occupied by' or 'under the control or management of' an FPO subject on the basis of a reasonable suspicion that it contains a firearm. However, this may not enable police to search in circumstances where they have a general concern that a vehicle is being used to store a firearm but insufficient facts to meet the 'reasonable suspicion' threshold. Another option could be to change the definition of premises to one similar to that in the Victorian *Firearms Act 1996*, which includes any vehicle or vessel on or in the premises.¹³⁷

Questions for consideration:

10. ***Should the NSW Police Force develop guidelines to assist police to determine whether or not the premises they wish to search under the FPO search powers are occupied by or under the control or management of an FPO subject? If so, what is relevant for police to consider in making this decision?***
 11. ***Should police have the power to search all vehicles or vessels in or on premises subject to an FPO search?***
-

5.2.2 Notifying an FPO subject that a search has occurred

There is no requirement for an FPO subject to be present at premises when police are conducting an FPO search. This means that an FPO search can occur without the FPO subject being there. When a search is conducted without an FPO subject being present, an issue may arise where an FPO subject is not notified that a search has taken place.

The only legislative safeguard that applies to the conduct of an FPO search is a requirement that police conducting the search must provide the person 'subject to the exercise of the power' with evidence that they are police,¹³⁸ their name and place of duty and the reason for the exercise of the power.¹³⁹ This information must be provided as soon as reasonably practicable.¹⁴⁰

Where the FPO subject is not present, it is not clear whether police could satisfy this obligation by informing the landlord or another resident of the premises. If the obligation can be satisfied by providing the information to a person who is not the FPO subject, it is possible that the FPO subject may not know that a search of their premises has taken place.

As mentioned earlier, since 4 September 2014, the NSW Police Force has determined as a matter of policy that all FPO premises searches should comply with search warrant SOPs. This includes a requirement for police to provide a 'notice to occupier'. This requires that police serve a written document that describes the search powers and outlines the rights and

¹³⁵ NSW Crown Solicitor, Advice, *Powers under Firearms Act and Law Enforcement (Powers and Responsibilities) Act*, dated 19 May 2015, para 5.21.

¹³⁶ See concerns expressed by the Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 16-17.

¹³⁷ *Firearms Act 1996* (Vic), s. 146(1).

¹³⁸ Unless they are in uniform.

¹³⁹ LEPR, ss. 201(1)(c) and 202(1).

¹⁴⁰ LEPR, s. 202(2)(a).

obligations of police and people present at the search. This information is required to be provided to an 'occupier', which may be the FPO subject. However, in some circumstances this could be another person who 'occupies' the premises. There is no requirement for police to notify the FPO subject directly that a search has been conducted.

Questions for consideration:

- 12. Should there be a legislative requirement that police provide a notice to occupier when conducting an FPO premises search?**
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5.2.3 Informing residents about the FPO and police search powers

When conducting a search under a search warrant, police are required to provide a written notice to the occupier describing the search warrant and outlining the rights and obligations of the police and the occupants. The Act does not require any such notice, written or unwritten, when executing an FPO premises search.

From the materials provided to us by the NSW Police Force, it appears that FPO subjects are ordinarily made aware of the FPO search powers at the time of service of the FPO. When serving an FPO, police are required to '[s]erve the notice on the person, explain the notice and advise them to read the notice'.¹⁴¹ In most cases, this oral explanation was supported by the written FPO itself which typically included a direct quote from the relevant section of the Act that gives police the power to search.¹⁴²

However, there is nothing in this system that requires police to notify other residents about police powers to search. An issue may arise where an FPO subject shares residential premises with other occupants, such as family members or flatmates, who may be unaware of the existence of the FPO or of the powers that it provides to police. We received a complaint from a person who shares a home with an FPO subject that raised this issue.

It is understandable that people not subject to an FPO may feel upset about police having the power to search their premises, at any time, without a warrant. However from our discussion with FPO subjects and their family members it appears that responses to the interaction with police varied greatly depending on the communication skills, manner and civility of the police conducting the search.

South Australian police have similar FPO search powers. Under the South Australian system, the FPO subject is required to inform any adult who lives at the same address as them of the fact that they are subject to an FPO.¹⁴³ This condition goes some way to ensuring that people who reside with an FPO subject are aware that the FPO exists. However, even with this provision, there is nothing requiring the FPO subject to explain to other adults who live with them that one of the consequences of the FPO is that police can search their residence at any time without a warrant.

These interactions present an opportunity for police to build ties and work closely with members of the community. A negative interaction may erode trust, make cooperation harder¹⁴⁴ and undermine the legitimacy of the police force.¹⁴⁵ Given that the premises search power can affect people who are not subject to an FPO, it is important that police communicate with residents about the nature and extent of the FPO search powers prior to conducting each search. However, there could also be a responsibility for FPO subjects to explain to other residents that they are subject to an FPO and that police can search the premises at any time.

¹⁴¹ NSW Police Force Firearms Registry Statement of Information, received 8 May 2014.

¹⁴² Of those 228 FPOs, 79% quoted section 74A in full. The remaining 21%, which did not refer to section 74A, were all issued within the first three weeks of the new FPO regime.

¹⁴³ *Firearms Act 1977 (SA)*, s. 10C(9).

¹⁴⁴ Martin Drum and Daniel Baldino, *Community-based policing as an alternative to 'stop and search'?: The example of Northbridge, Western Australia* [online] Public Policy, 7(2), 2012, pp. 183-98, viewed 22 January 2015.

¹⁴⁵ Ben Bowling and Coretta Phillips, *Disproportionate and discriminatory: reviewing the evidence on police stop and search*, *The Modern Law Review*, 70(6), 2007, pp. 936, 939.

Questions for consideration:

13. *Should the FPO subject be required to inform other adult residents of the fact that the person is subject to an FPO?*
 14. *Should the FPO subject be required to inform other adult residents that police can conduct a search of the premises for firearms, firearm parts or ammunition, at any time?*
 15. *Should police be required to explain the nature and extent of the FPO search powers to all adult residents before conducting each FPO search? If so, should this be in the form of a written notice?*
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