



# **Review of police use of the firearms prohibition order search powers**

Section 74A of the *Firearms Act 1996*

**August 2016**



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## **Acknowledgements**

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We would also like to acknowledge the assistance we received from the NSW Police Force in conducting this review. In particular, we thank Detective Superintendent Stephen Blackmore, the Forward Commander of Operation Talon, for his time and input into this review.

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*Police [have] 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.<sup>1</sup>*

NSW Commissioner of Police Andrew Scipione

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

## Foreword

Since 1973, the Commissioner of Police has had the power to prohibit any person from possessing a firearm if, in the Commissioner's opinion, the person is not a fit person in the public interest to have possession of a firearm. The mechanism is called a firearms prohibition order (FPO). An FPO, once made, can have a wide-ranging effect: it is an offence for an FPO subject to possess a firearm or ammunition, to reside in premises where a firearm or ammunition is kept, or for another person to sell or give a firearm or ammunition to someone they know is an FPO subject.

Police were given strengthened powers in 2013 to conduct searches in aid of FPO orders. The new search powers were introduced as part of a series of legal reforms intended to enhance the ability of police to prevent and control crime, and gun crime in particular. The Commissioner of Police described the new powers as 'extraordinary'. They enable police, without a warrant, to search an FPO subject's body and any vehicle or premises that the person occupies, controls or manages. A search may be conducted 'as reasonably required' to determine if the FPO subject has committed an offence by having a firearm, firearm parts or ammunition.

The breadth of the new search powers raised concerns that police may use them arbitrarily or unreasonably. The NSW Parliament required the NSW Ombudsman to keep under scrutiny the exercise of the new FPO search powers for the first two years of their operation. At the end of that review, the Ombudsman is required to prepare a report on the way police have exercised their FPO search powers, and make recommendations for any changes that he considers necessary.

This is my report following that review. It contains recommendations for the consideration of the Minister for Justice and Police, about possible changes to legislation and internal procedures and practices that guide the way police use the FPO search powers. I am required to provide my report to the Minister for Justice and Police, the Attorney General and the Police Commissioner. The Minister is required to table the report in Parliament.

My office found that police used the FPO search powers extensively during the review period. Over the two years, there were approximately 1,500 interactions where police used the search powers. During those interactions, police conducted over 2,500 separate searches, sometimes of the person's body as well as their property. The police were sometimes able to use the FPO search powers in circumstances where general search warrant powers were unlikely to apply.

Police found firearms, ammunition and firearm parts in 2% of these interactions. In the two years, they seized 35 firearms, 26 lots of ammunition and 9 firearm parts.

We examined the profiles of the people whom police searched using the FPO search powers. In total, 400 FPO subjects were searched. The searches conducted on these people appeared to be generally consistent with Parliament's intention.

However, we also found that police conducted searches on over 200 people who were not subject to an FPO at the time of the search (a total of 269 person searches). Police conducted those searches on what appears to be an erroneous application of the new FPO search powers and, as such, the searches may have been unlawful.

We also found a lack of clarity in police understanding of when they may conduct an FPO search on an FPO subject. In 14% of search events, police conducted a search on the basis of their apparent understanding that a search can be conducted for the reason alone that the person is an FPO subject. We do not consider this is correct. A search can be conducted only when 'reasonably required' to determine if an FPO offence has been committed. It is not a roving search power to be used randomly on FPO subjects, but a power to be used in a targeted way to examine if firearms control legislation is being properly observed.

This report recommends changes to ensure that the intended meaning of the legislation is properly observed. One option is for Parliament to consider amending the legislation to resolve the apparent ambiguity that has led to the incorrect use of the search powers. Another option is for the NSW Police Force to develop guidelines regarding the meaning of 'reasonably required', and to ensure that, through education, training and monitoring, the intended meaning of the legislation is understood and followed by police.

Other measures are also proposed to ensure that police use FPO search powers fairly and reasonably. We recommend that FPOs expire after five years. This recommendation, if implemented, will allow police to continue to target current firearms risks, while reducing the potential for people to be subject to arbitrary or unreasonable searches for an indefinite period. If the circumstances warranted, the Commissioner could make a further FPO against that same person at the expiry of five years.

FPO searches have enabled police to confiscate illicit firearms during the review period: this is a positive outcome. However, it is not possible to determine the deterrent, prevention or disruption effects of the FPO search powers by assessing data for only the first two years of use. A study covering a longer period of operation would be required to provide deeper insight. It is still too early to measure whether the FPO search powers will have a significant impact in the policing of firearms-related crime. We recommend an evaluation be conducted after the powers have been in place for at least five years. This would also address understandable concerns that have been raised publicly about the potential misuse of these extraordinary powers. It is important that the public can be fully informed about the effectiveness (or otherwise) of the powers.

The fair and reasonable use of these new FPO search powers depends largely on the discretion of individual police officers. Adopting our recommendations will assist police to manage the risk of unreasonable use by placing clear limitations around the duration and scope of FPOs. This will encourage and facilitate the appropriate use of the powers and, in turn, maintain public confidence in police.



Professor John McMillan AO  
**Acting Ombudsman**





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## Glossary

<b>ANZSOC</b>	Australia and New Zealand Standard Offence Classification system
<b>BOCSAR</b>	NSW Bureau of Crime Statistics and Research
<b>COPS</b>	Computerised Operational Policing System (NSW Police Force)
<b>FPO</b>	firearms prohibition order
<b>LAC</b>	Local Area Command (NSW Police Force)
<b>LEPRA</b>	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
<b>MEOCS</b>	The Middle Eastern Organised Crime Squad of the NSW Police Force
<b>MLC</b>	Member of the Legislative Council
<b>NOI</b>	National Offence Index, a statistical tool developed by the Australian Bureau of Statistics which provides an ordinal ranking of the offence categories according to perceived seriousness.
<b>NSWPD</b>	New South Wales Parliamentary Debates (Hansard)
<b>OMCG</b>	Outlaw Motorcycle Gang. This term has been adopted by the Australian Crime Commission and the NSW Police Force and is acknowledged by the Supreme Court of NSW in cases such as <i>Moefli v State Parole Authority</i> [2009] NSWCC 1146.
<b>POI</b>	person of interest
<b>SOPs</b>	standard operating procedures

## Terms used in this report

### **Aboriginal**

The term 'Aboriginal' refers to Aboriginal and/or Torres Strait Islander people.

### **amendment Act**

The *Firearms and Criminal Groups Legislation Amendment Act 2013*.

### **amendment Bill**

The Firearms and Criminal Groups Legislation Amendment Bill 2013.

### **audit of COPS Event records**

Our in-depth examination and analysis of information from COPS and event narratives related to each of the 1,343 FPO search events that took place in the first 22 months of the review period, including information related to the items seized and charges laid.

### **children**

This term generally refers to people aged 10 to 15 years.

### **children and young people**

This term refers to people aged 10 to 17 years.

### **COPS Event records**

Electronic records made by police on COPS of individual incidents.

### **COPS Event narrative**

The free-text portion of a COPS Event record created by police officers. In this review, the narrative documents the use of the FPO search powers in the individual incident.

### **firearms prohibition order**

Firearms prohibition order made by the NSW Commissioner of Police under section 73 of the *Firearms Act 1996*.

### **FPO search powers**

Powers under section 74A of the *Firearms Act 1996*.

### **FPO subject**

A person who has been issued and served with a firearms prohibition order.

### **review period**

1 November 2013 to 31 October 2015. This term refers to the two-year period during which the NSW Ombudsman was required to keep under scrutiny the police exercise of the search powers in section 74A of the *Firearms Act 1996*.

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## Executive Summary

Police powers to search, without a warrant, any person subject to a firearms prohibition order (FPO) came into effect on 1 November 2013. These FPO search powers are contained in section 74A of the *Firearms Act 1996*. They were introduced via amendments made by the *Firearms and Criminal Groups Legislation Amendment Act 2013*, which also provided for the Ombudsman to scrutinise police use of the new FPO search powers over their first two years of operation.

During the review period, from 1 November 2013 to 31 October 2015, we carefully monitored police use of the FPO search powers. We obtained and examined information from the NSW police in order to assess:

- the circumstances in which the powers were being used
- the people who were searched
- the manner in which the NSW Police Force had implemented the powers
- whether the powers had been exercised lawfully and reasonably, and in a manner consistent with Parliament's intent
- whether their implementation had resulted in any unreasonable or unjust outcomes.

We also published an issues paper and called for public submissions. We took into account all that information in our review. This is the report of our findings and recommendations.

Under section 74A(2) of the *Firearms Act*, 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.

These new search powers enable police to search for any firearms an FPO subject might be carrying, as well as look in places under the person's control or management where a firearm or related item could be hidden.

The search powers are subject to one condition, expressed in section 74A(1) of the *Firearms Act*:

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).

The relevant offences are that the FPO subject must not acquire or possess a firearm, firearm part or ammunition, and must not use a firearm.

### Use of the powers during the review period (chapter 3)

As at 31 October 2015, there were 1,317 people served with an FPO in NSW. A third of those people (445) were searched by police under the new FPO search powers during the review period.

To gain a comprehensive understanding of how police used the powers, we undertook an in-depth audit of a large sample of the police records of FPO searches conducted during the review period. That sample consisted of every search that police conducted during the first 22 months of the 24-month review period. To avoid confusion and provide clarity around the findings we present in this report, our summary data about the use of the powers is provided for the same 22 month period.<sup>2</sup>

We found that, during those 22 months, police conducted 2,571 searches using the FPO search powers. Those searches were conducted over 1,343 separate interactions with police, called 'search events'. FPO searches outside Sydney were rare. Almost all of the search events were conducted in metropolitan areas. More than half were conducted in South-Western Sydney.

More than half of the FPO searches were 'person searches'. This is because police commonly searched a person at the same time as they searched a vehicle or premises that the person was occupying, or had under their control or management.

Over a third of the searches were of vehicles and only 7% of searches were of premises. The proportion of premises searches in the sample is significantly less, because, due to limitations with police data, we were only able to examine information about premises searches over a 12-month period. Furthermore, in that 12-month period, the number of premises searches was fewer than the number of vehicle or person searches.

A total of 634 people were subject to an FPO search during the 22 months. However, only 407 of those people were subject to an FPO; 227 were not.

We found that police conducted 269 person searches on people who were not the subject of an FPO at the time of the search. Those searches mostly occurred while the person was in the company of an FPO subject, commonly during a vehicle stop. However, the new FPO search powers only authorise police to search the FPO subject and any premises or vehicle, vessel or aircraft in that person's possession or under their control or management. Accordingly, we recommend further education for police about the scope of the FPO search power. We discuss this in section 7.1 of chapter 7.

Police found firearms and related items in 29 search events (2% of the 1,343). In total, police seized 25 firearms, 19 lots of ammunition and 9 firearms parts during the 22 months.

Police also found a range of other unlawful items, or items suspected to have been used to commit an offence, or that comprised the proceeds of crime. Overall, police seized a total of 416 items (including firearms) in 10% of all the FPO search events. The most common item was small quantities of illicit drugs. Police also seized 51 weapons that were not firearms.

A total of 15 search events (1%) resulted in a charge for committing a firearms-related offence (other than an FPO offence). Of those 15 search events, 7 also involved a charge for committing an FPO offence. In total, 11 people subject to an FPO were charged with an FPO or other firearms-related offence following an FPO search event.

Eight search events resulted in a charge for a firearms-related offence (other than an FPO offence) being proven. Three resulted in a charge for an FPO-related offence being proven.

2. Please see Appendix B for an overview of police use of these powers for the entire two-year review period. The information about the last two months of the review period provided in this Appendix is limited to automatically generated information only.



## People who were searched (chapters 4 and 5)

The Commissioner may make an FPO against any person who, in the Commissioner's opinion, is not fit, in the public interest, to possess firearms. At the time the new FPO search powers were proposed, Parliament indicated the kinds of people it expected the powers would be used to search. Some examples were:

- people engaged in criminal activities involving guns
- those who should not have access to guns because of their criminal record or other reasons known to police
- people involved in drug use or supply
- people who police have good reason to believe are members of organised criminal groups.

We conducted an in-depth examination of the criminal history and law enforcement data holdings for all 634 people who the police reported to have searched using FPO search powers, as at the date of their first FPO search. The purpose of our examination was to assess whether the people whom police searched in the first 22 months in exercise of the FPO search powers met the criteria described above.

We found that the FPO subjects who police searched generally met the criteria, with 40% of them having been convicted of an offence relating to firearms. For the majority of FPO subjects searched, the most serious firearms-related offence concerned prohibited firearms parts. However, for eight FPO subjects, the most serious firearms-related offence concerned a violent or threatening offence involving the use of a firearm.

The other people who had no FPO, but who police nevertheless searched in the mistaken belief that the FPO search powers applied, had a different profile. Over 95% had never been convicted of a firearms-related offence and 41% had never been convicted of any offence. However, the information police held about those people indicated that almost 80% were alleged to have been associated with an organised crime group.

We did not find that a disproportionate number of the people searched had characteristics of vulnerability, such as youth. See chapter 5.

## Reasons for search (chapter 6) and circumstances of searches (chapter 7)

The powers to search may be exercised 'as reasonably required'. The precise operation of these words of limitation has yet to be considered by a court. However, based on advice from the Crown Solicitor's Office, we consider that the phrase is both a threshold test that informs the decision to search, as well as a limitation on the manner of a search. Accordingly, we have assessed whether the police had reasonably decided to conduct an FPO search, and whether the circumstances of the search were reasonable.

In 86% of search events during the 22 months, we assessed that the records demonstrated that the decision to search was or could reasonably have been required, based on one or more of the following factors:

- search upon service (the information supporting the issuing of the FPO also supported the search)
- investigative purposes
- intelligence about current risks or concerns
- circumstances during a by-chance encounter with a person that raised police's suspicion
- warnings about the person encountered.

However, in the other 14% of search events police may have proceeded on the basis that the FPO search powers authorised a search of a person solely because the person was an FPO subject.<sup>3</sup> This interpretation is not consistent with the Crown Solicitor's Office's advice, and such searches may be beyond the FPO search powers. We have recommended that either section 74A be amended or NSW Police Force policy be revised to make it clear that the fact that a person is subject to an FPO is not, of itself, a sufficient ground to decide to search the person under the FPO search powers.

We also examined whether this erroneous interpretation of the FPO search powers led to a high occurrence of repeat or frequent searches that were not justified on other grounds. We found that over 60% of people were searched only once during the 22-month period and another 13% were searched twice. We also found that 27 people were subject to 10 or more search events, and 6 were searched 20 or more times. This data suggests that the incidence of repeat searches is relatively low. In looking closely at the circumstances of the repeat search events, we found only one case where we were concerned that some of the searches may have been unreasonable.

We examined whether the FPO search powers were used to conduct searches at unreasonable times. While we found some searches were conducted at night time, we were generally satisfied that there were sound reasons to justify searches at those times. This is discussed in section 7.2 of this report.

We also reviewed how police interpreted the scope of the powers as they relate to the range of premises that can be searched. We found some cases where police searched premises that were the homes of relatives and friends of FPO subjects, but also cases where police used their discretion and did not proceed with a planned FPO search when they received information that satisfied them the FPO subject no longer occupied, controlled or managed the premises. This is discussed in section 7.3 of this report.

## Implementation issues (chapter 7)

Our review found a number of implementation issues that should be addressed to ensure the powers are used fairly and reasonably in the future.

As discussed above, it appears that a significant number of the person searches of people not subject to an FPO may have been conducted based on a mistaken belief that the FPO search powers authorised these kinds of searches. We have recommended further education for police to ensure the lawful use of the FPO search powers.

However, we have also formed the view that consideration should be given to providing police with a separate and additional power to search a person on private premises (who is not the subject of an FPO) should police reasonably suspect the person to be in possession of a firearm, firearm part or ammunition. This reflects a similar ancillary search power that police currently have when executing an ordinary search warrant. It will ensure that police have sufficient powers to find any firearms and related items that the FPO subject is hiding. See section 7.1.2.

Along the same lines, we have also recommended that police be given unambiguous power to search a vehicle parked on premises even if it is not under the control or management of an FPO subject, as part of the FPO power to search premises. See section 7.4 of this report.

A majority of the public submissions to this review raised serious concerns about the timeframe over which the FPO search powers can be exercised. As an FPO never expires, the FPO search powers can potentially be exercised over a person's lifetime unless the Commissioner revokes the FPO. The effectiveness of searches depends on the currency of the information about the risks posed by a

3. As discussed in section 6.8.2 of chapter 6, in some of these cases police could have accessed information about warnings about the person, but the police record of the search event indicated that the police's understanding of the search power was that they could search for the sole reason that the person was the subject of an FPO.

person to be searched. We have recommended that an FPO expires five years after it is served. At the time of expiry, the Commissioner can issue a fresh FPO should the circumstances warrant it. This should reduce the risk of the powers having an unreasonable impact on individuals. See section 7.5.

The FPO search powers allow police to conduct person searches, which can include a strip search. In the case of non-FPO person searches, the law makes it clear that police are required to follow processes to maintain people's privacy and dignity. We have recommended that the law be amended to make it clear that police must follow those same processes when using the FPO search powers. See section 7.6.

Police may conduct a search of premises using the FPO search powers in the absence of the FPO subject. In these circumstances, police may encounter occupiers who may not know about the FPO or the associated powers that police can exercise. Currently there is no legislative requirement that police provide any information to those people that explains the police's powers and the rights and obligations of the occupiers and police. This is already a standard requirement when police execute a search warrant.

When this situation arose during the review period, police informed the occupiers about the FPO search powers verbally just before they conducted the search. In our view, given the unusually broad scope of the FPO search powers and the lack of a warrant indicating judicial authorisation for the search, it is in the interests of both police and occupiers if police provide written information about the powers to any person in the premises to be searched. This will go some way to ensuring the communication is clear and occupiers understand that police are behaving lawfully. See section 7.7.

Our review also identified that there is currently a legislative impediment to police making video recordings of premises searches using the FPO search powers. A contemporaneous video recording is a standard accountability measure in the conduct of most other premises searches, and we have recommended that the necessary changes be made to the law to permit this. See section 7.8.

We also observed that the FPO search powers are not accompanied by a corresponding seizure power. This is a standard ancillary power to many other search powers. During the review period we did not find any cases where a person challenged police's power to seize items following an FPO search. However, we consider the current seizure powers unnecessarily complicated. We recommend that police be provided with clear legislative authority to seize any firearms, firearm parts or ammunition that are found using the FPO search powers. See section 7.9.

## Concluding observations (chapter 8)

The FPO search powers were introduced to give police additional tools to respond to, and prevent, gun crime. The power to search, as reasonably required, and without requiring a warrant, was intended to help police respond more nimbly. Police embraced the new FPO search powers, using them to conduct over 2,500 searches during the first 22 months of use.

Although we are concerned to note the significant number of people whom police may have searched unlawfully, we are satisfied that situation arose from a misunderstanding about the scope of the FPO search powers. Setting aside that group, it appears that police have largely targeted the cohort of people Parliament intended when conducting searches under the FPO search powers.

We noted in our review instances where police used the FPO search powers in circumstances where the evidence was not sufficient to support the alternative of a warrant, but police nevertheless had reason to form a view that a search was reasonably required. In one case, the FPO powers were used to conduct a search in a situation where rival gangs appeared to be arming themselves for conflict.

Overall, we consider it is too early to tell if the FPO search powers have operated as an effective tool in policing firearms-related crime. We can report that police discovered a firearm or related item in 2% of all search events. Nothing was seized in 90% of search events and the remaining 8% uncovered mostly small amounts of drugs and drug paraphernalia.

We identified increased use of the FPO search powers throughout the first two years of use. This is a trend that seems likely to continue, particularly in light of the fact that only a third of all FPO subjects in NSW have been searched so far, with almost 600 people yet to experience their first search.

We recommend that the efficacy of the FPO search powers be monitored and evaluated in the future. Any such evaluation should include examining the extent to which people have been deterred from engaging in illicit firearms activity, firearms-related crime has been prevented, and the trade in illicit firearms has been disrupted.

As the potential for the powers to be used arbitrarily remains, any future evaluation should include an examination of whether the powers are being used appropriately and reasonably.

## Summary of Recommendations

### Recommendations ..... 56

1. The Minister for Police and Justice should propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require that police who serve a firearms prohibition order and then immediately conduct a search using the powers under section 74A of that Act, give the person an opportunity to immediately surrender any firearms or ammunition lawfully in their possession.
2. The Minister for Police and Justice should propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to make it clear that it is lawful to conduct a search under section 74A of that Act immediately following the service of the relevant firearms prohibition order.

### Recommendation ..... 72

3. The Minister for Police and Justice should propose, for the consideration of the Parliament, an amendment to section 74A of the *Firearms Act 1996* to make it clear that a police officer can only exercise the search powers under that section **if** a search is reasonably required for the purposes of detecting an offence under section 74(1), (3) or (3).

### Recommendations ..... 77

4. The NSW Police Force educate officers, through training materials or other communications, that the search powers in section 74A of the *Firearms Act 1996* do not authorise the person search of any person who is not the subject of a firearms prohibition order.
5. The NSW Police Force remind officers, through training materials or other communications, of the need to make accurate records of the power being exercised when conducting a search of a person who is subject to a firearms prohibition order or a person who is in his or her company.

### Recommendation ..... 78

6. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to section 74A of the *Firearms Act 1996* to include a provision that empowers police executing a search under section 74A(2)(b) of the Act to search any person found in or on the premises whom police reasonably suspect has a firearm, firearm part or ammunition in their possession.

### Recommendation ..... 85

7. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the definition of 'premises' in section 74A of the *Firearms Act 1996* to enable police conducting a search of premises under that power to search vehicles parked on those premises as reasonably required.

**Recommendation ..... 89**

8. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to provide that a firearms prohibition order issued under section 73(1) expires five years from the date it is served.

**Recommendation ..... 91**

9. The Attorney General propose, for the consideration of Parliament, a legislative amendment to make clear that the legislative safeguards under Part 4, Division 4, of the *Law Enforcement (Powers and Responsibilities) Act 2002*, that relate to personal searches, be applied to person searches conducted under section 74A(2) of the *Firearms Act 1996*.

**Recommendation ..... 92**

10. The NSW Police Force remind officers through training and practice notes to ensure the COPS record of a search event of a person search conducted under section 74A(2) of the *Firearms Act 1996* includes full details of the nature and type of any person search, in accordance with the person search categories in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

**Recommendation ..... 93**

11. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require police to notify a person subject to a firearms prohibition order, who is not present during a search of premises under section 74 of that Act, that a search has occurred, as soon as practicable after it has taken place.

**Recommendation ..... 95**

12. The NSW Police Force include in the Appendices to the Search Warrant Standard Operating Procedures a fact sheet, with information about the search powers under section 74 of the *Firearms Act 1996*, to be provided to occupiers of a premises searched under that power, at the time of the search or as soon as practicable after the search has taken place.

**Recommendation ..... 98**

13. The Attorney General propose, for the consideration of Parliament, an amendment to the *Surveillance Devices Act 2007* to permit the video recording of any lawful search conducted under section 74A of the *Firearms Act 1996*.

**Recommendation ..... 99**

14. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to empower police executing a search under section 74A of the Act to seize any firearm, firearm part or ammunition found as a result of a search under that section.

**Recommendation ..... 106**

15. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require a further independent and objective evaluation of the effectiveness of the FPO search powers after they have been in operation for at least five years.



# Chapter 1. Introduction

On 1 November 2013, police in New South Wales (NSW) obtained new search without warrant powers to enforce a firearms prohibition order (FPO). The new search powers, under section 74A of the *Firearms Act 1996*,<sup>4</sup> allow police to search any person who has an FPO against them and any premises or vehicle that the person occupies, controls or manages, without first obtaining a warrant. These 'FPO search 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 acquiring or possessing a firearm, firearm part or ammunition.<sup>5</sup>

The FPO regime itself 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.<sup>6</sup> An FPO prohibits the person (referred to in this report as an FPO subject) from possessing or using a firearm,<sup>7</sup> and prohibits other people from selling or giving a firearm to that person.<sup>8</sup>

Until the introduction of the FPO search powers, police wishing to determine whether an FPO subject was in possession of a firearm could only conduct a search of that person using ordinary police powers or a search warrant.<sup>9</sup> This meant that if police wanted to search the person or their vehicle, police needed sufficient facts to form a reasonable suspicion that the person had something unlawful, or had committed or was about to commit a crime.<sup>10</sup> If police wished to search an FPO subject's home, they needed to obtain a search warrant. This requires an application to a judicial officer, who may issue a warrant if satisfied that the police have a reasonable suspicion that firearms and related items were or would be on the premises within a certain time period. The introduction of the FPO search powers provided police with a power to search for firearms, firearm parts and ammunition with no need to obtain a warrant or to form a reasonable suspicion.

## 1.1 Our role and the purpose of this report

Parliament required the Ombudsman to 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).<sup>11</sup> As part of this scrutiny role, we examined whether police had used the powers in a manner and for the purpose intended by Parliament, whether the powers were implemented effectively (including whether guidance and training for police has been adequate), whether the powers have been exercised lawfully and reasonably, and whether the lawful exercise of the powers has or may result in unreasonable or unjust consequences that were unforeseen by the Parliament. Where appropriate, we make recommendations to amend the legislation or to improve police practices to ensure the powers operate reasonably and effectively.

4. As inserted by the *Firearms and Criminal Groups Legislation Amendment Act 2013*.

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

6. *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).

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

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

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

10. LEPRA, s 21.

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

This report presents the findings of this period of scrutiny. It provides information about police use of the FPO search powers during the period, and makes recommendations to improve the way that the FPO search powers operate in practice.

## 1.2 Background to the introduction of the new FPO search powers

The FPO search powers came into effect on 1 November 2013, through amendments to the Firearms Act 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 other incidents of firearms-related crime in Sydney received extensive media coverage.<sup>12</sup> These incidents were reported as having occurred predominantly in the western and south-western suburbs of Sydney<sup>13</sup> and were attributed to Outlaw Motorcycle Gangs<sup>14</sup> and other organised crime groups such as the 'Brothers 4 Life'.<sup>15</sup>

This increased media coverage created a perception that there had been an increase in firearms crime in NSW, in particular, 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.<sup>16</sup>

Later analysis by the NSW Bureau of Crime Statistics and Research reported there had not been a statistically significant increase in the number of shootings in this period, stating in April 2013:

... the trends in discharge firearm into premises, shoot with intent and unlawful discharge firearm, individually and in total, have not shown statistically significant increases in the 2 years, 5 years, 10 years or 15 years up to December 2012. Generally speaking the pattern has been one of surges in the frequency of such incidence followed by periods of relative quiescence.<sup>17</sup>

The NSW Police Force launched Operations Spartan<sup>18</sup> and Apollo, in January 2012 and February 2013 respectively, to combat gun crime in Sydney.<sup>19</sup> During the course of the two operations, police seized over 140 firearms, made over 1,000 arrests and laid over 2,000 charges.<sup>20</sup> The two operations were amalgamated into Operation Talon in August 2013,<sup>21</sup> which is ongoing.

Police powers to combat firearms-related crime were also a topic of discussion at the national level. On 29 June 2012, the Standing Council on Police and Emergency Management (SCPEM),<sup>22</sup> a council

12. For example see Stephanie Gardiner, 'Another night, another Sydney shooting', *The 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.
13. For example see Nathan Klein and Leigh Van Den Broeke, 'Gun violence plagues Sydney's streets', *The Daily Telegraph*, (online) 20 April 2012, viewed 24 February 2014; 'NSW govt shoots down Labor's gun bill', *The Australian*, (online) 12 September 2013, viewed 24 February 2014.
14. 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.
15. Damien Murphy and Nick Ralston, 'Drive-by justice', *Sydney Morning Herald*, (online) 9 November 2013, viewed 24 February 2014.
16. 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.
17. Jacqueline Fitzgerald, *Non-fatal shootings in New South Wales*, Crime and Justice Statistics: Bureau Brief, Issues paper no. 85, NSW Bureau of Crime Statistics and Research, Sydney, April 2013, p. 6.
18. Lisa Davies, Nick Ralston and Louise Hall, 'Public urged to reveal illegal guns anonymously', *The Sydney Morning Herald*, (online) 13 January 2012, viewed 4 March 2014.
19. Yoni Bashan, 'Sydney is a city under fire', *The Australian*, (online) 7 February 2013, viewed 4 March 2014.
20. NSW Police Force, *Operation Talon*, 30 September 2013, viewed 4 March 2014, [http://www.police.nsw.gov.au/community\\_issues/operation\\_talon](http://www.police.nsw.gov.au/community_issues/operation_talon).
21. NSW Police Force, *Operation Talon*, 30 September 2013, viewed 4 March 2014, [http://www.police.nsw.gov.au/community\\_issues/operation\\_talon](http://www.police.nsw.gov.au/community_issues/operation_talon).
22. The Standing Council on Police and Emergency Management brought together police and emergency management ministerial councils and was tasked with, amongst other things, promoting a coordinated national response to law enforcement and emergency management issues. It operated from October 2011 until December 2013. This work is now undertaken by the Law, Crime and Community Safety Council (LCCSC).



of the Council of Australian Governments (COAG),<sup>23</sup> established 'a working party to analyse further gaps and opportunities to strengthen legislation governing firearms possession and use'.<sup>24</sup>

In March 2013, the then Prime Minister, the Hon. Julia Gillard MP, announced a National Anti-Gang Taskforce to 'fight gang-related crime across Australia'.<sup>25</sup> This was supported by a plan to introduce 'national anti-gang laws, national unexplained wealth laws and reforms to tackle the illegal firearms market'.<sup>26</sup> The Commonwealth also announced it would seek to strengthen Australia's anti-gun laws through the COAG, including a number of measures, one of which was the introduction of FPOs across all States and Territories. A media release explained the Commonwealth would seek to:

Give police additional search powers to target offenders who are banned from carrying or owning firearms. States and Territories should introduce laws to give police the legal authority to search a person who is subject to a Firearm Prohibition Order (FPO), as well as any vehicle or premises they are in, for the presence of a firearm without the need to demonstrate reasonable suspicion. South Australia<sup>27</sup> is currently the only jurisdiction that gives the police these powers.<sup>28</sup>

On 19 April 2013, the COAG acknowledged that organised crime and firearms-related issues were of considerable concern to all governments and the community, and agreed that each State and Territory would consider 'the implementation of additional firearm search powers to target repeat offenders'.<sup>29</sup>

At the state level, NSW police tasked to Strike Force Raptor, working with South Australian police on the Attero National Task Force,<sup>30</sup> became aware of FPO related search powers in operation in South Australia. By 14 May 2013, the NSW Police Force had initiated formal processes to seek amendment to the NSW Firearms Act to include similar FPO search provisions to those contained in the South Australian *Firearms Act 1977*.

On 4 and 5 July 2013 the SCPEM met and agreed that each State and Territory would consider implementing 'additional firearm search powers in their jurisdiction to target known firearm offenders to prevent them from reoffending'.<sup>31</sup>

Later that month, the then NSW Opposition Leader Mr John Robertson MP criticised the NSW Government for failing to take action against criminal gangs and gun crime in Sydney.<sup>32</sup> On 29 August 2013, he introduced to Parliament the Firearms Amendment (Prohibition Orders) Bill 2013. The Bill proposed, amongst other things, to allow police to search a person subject to a firearms prohibition order, and their homes and vehicles, without a warrant.<sup>33</sup>

That Bill was superseded on 17 September 2013 when the then Premier of NSW, the Hon. Barry O'Farrell MP, introduced the Firearms and Criminal Groups Legislation Bill 2013 into Parliament.

23. The Council of Australian Governments is the peak intergovernmental forum in Australia. The members of COAG are the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association.

24. Standing Council on Police and Emergency Management, *Standing Council on Police and Emergency Management Communiqué*, 29 June 2012, p. 2.

25. Julia Gillard, (Prime Minister), *National Anti-Gang Taskforce: Federal and State Agencies to Work Together To Tackle Gang Crime*, media release, 3 March 2013.

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

27. Police in South Australia have had FPO search powers since 27 November 2008. The purpose of this search is to ensure compliance with an FPO. This was the first time police were granted a search without warrant power for the purpose of ensuring compliance with an FPO provision in Australia. *Firearms Act 1977 (SA)*, s 32.

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

29. Council of Australian Governments, *Council of Australian Governments Meeting - Communiqué*, 19 April 2013.

30. The Attero National Task Force was established by the Serious and Organised Crime Coordination Committee and subsequently endorsed as an Australian Crime Commission Board-approved task force on 14 June 2012. Its purpose is to disrupt, disable and dismantle criminal activities of the Rebels outlaw motorcycle gang. The ACC's work under Attero was linked to the ACC's participation the National Anti-Gang Squad.

31. Standing Council on Police and Emergency Management, *Communiqué – 4-5 July 2013*, 4 March 2013. Note, all states and territories, except the Australian Capital Territory, supported this resolution.

32. Andrew Clennell et al., 'Latest gun murders strike at the heart of safety in Sydney', *The Daily Telegraph*, (online) 31 July 2013, viewed 12 May 2015.

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

### 1.3 Parliament's intent and concerns

The Firearms and Criminal Groups Legislation Amendment Bill 2013 proposed a number of measures aimed at combating 'gun crime'<sup>34</sup> and included changes to the Firearms Act, the *Crime Commission Act 2012* and the *Restricted Premises Act 1943*. When introducing the Bill, the then Premier of NSW, the Hon. Barry O'Farrell MP, stated:

This bill will equip the NSW Police Force with powerful new weapons to help tackle criminals with guns. This legislation has been put together with the advice of the NSW Police Force to ensure that police have the power, the resources and the powerful new weapons to help tackle criminals with guns, in particular to target gun crime across Sydney.<sup>35</sup>

The then Premier also made clear that the 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.<sup>36</sup>

The proposed changes to the Firearms Act were largely unopposed in their passage through Parliament. However, some concerns were raised. A member of the Legislative Council from the Greens party said that although it was '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':

... we are extremely concerned that these powers are being provided without 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.<sup>37</sup>

He 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 make a declaration that would prevent police from conducting any further searches under section 74A for a period not exceeding three months.<sup>38</sup> The proposed amendment was not supported.

Concerns were also expressed about the potential for the powers to be exercised oppressively:

The Greens believe that if that power is to be available to the police then it should be subject to some oversight to ensure that it is not exercised in a manner that is unreasonable, unjust, oppressive or otherwise abusive. The flaw in the Government's legislation is not so much that it allows the undertaking of random checks of a limited class of people who are the subject of a weapons prohibition order; it is that nothing in the legislation stops police using that 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.<sup>39</sup>

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

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

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

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

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

39. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

An Independent member of Parliament 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'.<sup>40</sup> While supporting the provisions in the Bill that placed stronger restrictions on people subject to a firearms prohibition order, he expressed the following concerns regarding the search power:

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.<sup>41</sup>

The Bill was referred to the Legislation Review Committee<sup>42</sup> to consider whether it unreasonably encroached 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.<sup>43</sup>

Upon referring these matters back to Parliament, the Chair of the Committee presented their concerns to Parliament and concluded by saying:

[I]t 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.<sup>44</sup>

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

## 1.4 Methods

In the course of this review we:

- inspected and reviewed NSW Police Force policies, procedures and training materials related to the exercise of the FPO search powers in the review period
- conducted a literature review of national firearms agreements, and the national and state legislative and operational context within which the FPO search powers are exercised
- undertook an in-depth audit of a large sample of information from the NSW Police Force's Computerised Operational Policing System (COPS) and event narratives, being records related to each of the 1,343 FPO search events that took place in the first 22 months of the review period, including information related to the items seized and charges laid

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

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

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

43. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, p. ix.

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

- monitored 122 charges laid<sup>45</sup> against 23 people as a result of an FPO search event, and reviewed the reasons 10 charges laid against 7 of these people were not proven in court<sup>46</sup>
- inspected 393 of the 406 firearm prohibition orders that provided grounds for the lawful execution of an FPO search conducted in the review period<sup>47</sup>
- reviewed the Police Oversight Data Store (PODS) records relating to the 634 people searched under the new FPO search powers<sup>48</sup>
- analysed the demographic and criminal history information (from COPS) about the 634 people searched under the new FPO search powers
- analysed nine complaints made to our office regarding the conduct of FPO searches<sup>49</sup>
- conducted 15 semi-structured interviews, with police from 9 different police units, and with 6 non-police stakeholders, including 2 people subject to an FPO, and their families
- published an issues paper regarding the exercise of the powers in the first 10 months the powers were in operation, in order to inform stakeholders and seek their views on key issues related to the FPO search powers<sup>50</sup>
- considered 15 submissions made to the review, from a range of stakeholders including the NSW Police Force, peak bodies, non-government organisations, and members of the community.<sup>51</sup>

## 1.5 Data cleaning

This review drew upon statistical data provided by the NSW Police Force, extracted from the COPS database. In addition to statistical data about FPO searches, we also obtained records prepared by police that provided a free-text 'narrative' or description of the interaction.

This information was captured in a form designed to assist the NSW Police Force in the administration of its functions, not for research. As a result, this information contained:

- Duplicate records, for example, a single car, and the five people in the car who were searched, appeared as five vehicle searches and five person searches.
- Different information over time about a single person, for example, a person may have been searched twice, and in one entry the person has an address, but in another entry it is noted that the person is homeless.
- Errors and keying mistakes, for example, the officer entering the search information had selected the incorrect option from a drop-down menu.

45. We used the term charge to refer to a 'sequence' on a court attendance notice.

46. We also analysed an additional nine charges against five people that were not proven in Court. We did not consider these charges to have occurred as a result of an FPO search event. Typically in these matters, the FPO search occurred after police had apprehended the person, some hours or days after the alleged offence had been committed.

47. We reviewed all the FPO documents for all but 13 of the searched FPO subjects. We were unable to review these 13 as they were not provided to us by the Firearms Registry.

48. To conduct this audit we reviewed the complete Police Oversight Data Store (PODS) profile of all persons searched. The PODS database contains sensitive data about each person derived from a range of police systems including COPS, CIS (Customer Identification System) and c@ts.i (Customer Assistance Tracking System).

49. C/2014/845, C/2014/1620, C/2014/3710, C/2014/3764, C/2014/4116, C/2014/5684, C/2014/6548, C/2015/2680 and C/2015/6347.

50. NSW Ombudsman, *Review of police use of firearms prohibition order search powers: Issues Paper: Section 74A of the Firearms Act 1996*, July 2015.

51. See Appendix D for a full list of parties who made a submission to our review.

In order to use this information for research purposes, we undertook a process of data cleaning in order to enhance data integrity, accuracy and reliability with respect to the FPO search powers. This involved taking the following steps:

- We checked the data extracted from the COPS data against the written narrative in order to identify searches that had been misclassified as FPO searches and removed these searches from our data set.
- We reviewed the demographic information regarding the people searched to identify inconsistencies, for example, different dates of birth or racial appearance. Where this was the case, we applied the information recorded as at the person's most recent search.
- We identified duplicate person and vehicle searches that occurred on the same day at the same time, and removed the duplicate record, so that a single search was only counted once.<sup>52</sup>
- Where more than one person was present during an FPO search of a vehicle or premises, we attributed that search to one of those people, applying a consistent attribution rule.<sup>53</sup>

## 1.6 Limitations of NSW Police Force statistical data

Upon the introduction of the FPO search powers, the NSW Police Force updated its 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.

Similar changes were not made to facilitate the identification of FPO premises searches until September 2014. As a result, the NSW Police Force was not able to provide accurate records relating to premises searches conducted under the FPO search powers in the first 10 months of the review. The NSW Police Force did provide us with records of premises searches 'likely' to have been conducted under an FPO search power, 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 conducted between 1 November 2013 and 31 August 2014. The data reported relates to all FPO premises searches conducted between 1 September 2014 and 31 August 2015.

## 1.7 Structure of this report

In chapter 2, we provide an overview of the legislative and operational context within which the FPO search powers operate. It provides background information regarding the system for regulating firearms and firearms use in NSW, and an overview of ordinary police powers to search for firearms, firearm parts and ammunition. It then explains the changes made by the amendment Act and the process by which an FPO is made.

52. Sometimes the duplicate record was entered under old and new incident categories. Other times, the duplicate record was the result of a genuine data-entry error.

53. Vehicle searches were attributed to an FPO subject. If there was more than one FPO subject present, we attributed the search to the FPO subject that was driving, or if there was no FPO subject driving, then we attributed the search to the first allocated 'person of interest' (POI). If there was no FPO subject present, we attributed the search to the driver, or if the driver was unclear, the first allocated POI. Premises searches were attributed to an FPO subject if they were present. If there was more than one FPO subject present, we attributed the search to the FPO subject to the first allocated POI. If there was no POI allocated we attributed the search to a single FPO subject by applying the following hierarchy: 'person named', followed by 'owner/occupier' or 'person present'. If there was no FPO subject present, we attributed the search to the first allocated POI. Where POIs were not listed, we reviewed the narrative and attributed the search to the 'person named', followed by 'owner/occupier' or 'person present'.

In chapter 3, we provide an overview of police use of the FPO search powers in the first 22 months of operation, between 1 November 2013 and 31 August 2015. This includes a summary of who and what was searched, where and when the searches were conducted, what police found, and what charges were laid.

In debating the Bill which contained the FPO search powers, Parliament identified the types of people it envisaged would be searched. In chapter 4, we identify these criteria and present the characteristics of the people searched under the FPO search powers during the first 22 months of the review period.

Some people are considered vulnerable for the purpose of investigation and questioning, and police are required to adhere to certain safeguards in order to preserve their privacy and dignity during a search. In chapter 5, we report on the number of vulnerable people searched under the FPO search powers.

In chapter 6, we provide information regarding the different reasons why police determined that a search was 'reasonably required'. To do this, we explain the different ways in which 'reasonably required' may be interpreted, and what limits the term may place on police powers to search. We then present the results of our analysis of FPO search event narratives, in order to identify the key 'drivers' of FPO search events conducted in the review period, and the factors considered by police when making the decision to conduct a search.

In chapter 7, we provide information regarding the manner in which police conducted the searches, exploring issues related to the lawful and reasonable exercise of the powers.

In chapter 8, we discuss our key findings, and make recommendations regarding the ongoing evaluation and monitoring of police exercise of the FPO search powers into the future.



## 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 background regarding the system for regulating firearms and firearms use in NSW and an overview of other police powers to search for firearms, firearm parts and ammunition. It then explains changes made by the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act) and the process by which an FPO is made.

The FPO search powers are within Part 7 (Firearms prohibition orders) of the *Firearms Act 1996*. Part 7 (comprising sections 73, 74, 74A and 74B) is extracted in full in Appendix A.

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

In NSW, a person wanting to lawfully possess or use a firearm or related item requires permission from the Commissioner of Police (or his or her delegate). This permission is granted under the *Firearms Act* in the form of a permit or licence. It is only given to people who meet certain legislative requirements, and who have been found by the Commissioner to have a genuine reason for wanting to possess and/or use a firearm.

The licence and permit system enables the lawful and genuine use of firearms by people found by the Commissioner to be 'fit and proper' people, whilst also restricting the number and type of firearm/s that a person is authorised to own, use or sell, and prescribing the type of activities that the person is allowed to undertake with those firearms. It also provides a scheme for the suspension or cancellation of a licence, and the safe storage and destruction of firearms.

There are a range of 'genuine reasons' why a person may seek a firearms licence and/or permit. These are prescribed in the *Firearms Act*<sup>54</sup> and include having a firearm for:

- sport or target shooting,
- recreational hunting,
- pest control,
- farming activities (including the humane destruction of stock),
- employment as an armed security guard,
- an antique collection, historical re-enactment and film/television or theatre production.

A firearms licence allows a person to use, own or sell particular types of firearms, which are prescribed by the licence. In order to have and maintain a firearms licence, a person undertakes to comply with strict legislative conditions, for example, they must meet safe storage requirements and submit to routine inspections.

Another way a person can lawfully use a firearm is to obtain a permit. For example, a person under the age of 18 cannot obtain a firearms licence, but may be issued a 'minors permit' which enables them to use a firearm under personal supervision for the purpose of training and competition.<sup>55</sup>

54. *Firearms Act 1996*, s 12.

55. *Firearms Act 1996*, s 32.

In addition to having a licence or permit to use a firearm, permits are also required to:

- acquire firearms and firearm parts – for example, in order to legally buy a firearm, a person must have both a licence to use that firearm and a ‘permit to acquire’ it<sup>56</sup>
- engage in certain firearms-related activities – for example, approved clubs or shooting ranges can apply for an ‘open day’ permit to conduct an open day at an approved shooting range
- possess and use prohibited firearms and firearm parts – for example, a person must have a ‘silencer permit’ to possess and use a silencer (to obtain this permit the person must demonstrate why they require a noise-reducing device)
- manufacture, trade, instruct, train or compete with a prohibited firearm – for example, a person must have a ‘dealer permit’ to manufacture or trade in prohibited firearms, and have an ‘instructor permit’ to possess or use a prohibited firearm to instruct, train or compete in a sporting event.

Anyone may apply for a licence or permit, but a licence or permit must not be issued to certain categories of people.<sup>57</sup> In particular, a licence or a permit must not be issued to a person who is subject to a firearms prohibition order.<sup>58</sup> In addition, any firearms licence or permit that authorises a person to possess or use a firearm is automatically revoked if the person becomes subject to a firearms prohibition order,<sup>59</sup> and the person must immediately surrender the licence and any firearms in their possession to police.<sup>60</sup>

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

In this section we discuss the other powers that police have to search for firearms, firearm parts and ammunition, and the rules that police must follow in order to exercise those powers.

### 2.2.1. Searches under warrant

If police obtain information that a person may have firearms in their possession, they can apply for a search warrant. Typically police are required to provide evidence or sufficient information that sets out the reasons why an officer believes ‘things’ connected with a particular offence are or will be in or on a certain premises within the following 72 hours.<sup>61</sup>

If satisfied that the officer has ‘reasonable grounds’ for a search warrant, the authorising officer<sup>62</sup> can issue a search warrant that enables police to enter, search and seize relevant property. The authorising officer must record the reasons why the warrant was granted<sup>63</sup> and the offence to which the warrant is connected.<sup>64</sup>

56. In order to get a permit to acquire a firearm a person must provide their licence details, the category of firearm that they intend to buy and make a declaration that they have a ‘good reason’ for acquiring the firearm that is directly related to the reason for the issuance of the firearms licence or permit.

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

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

59. *Firearms Act 1996*, s 24(1).

60. *Firearms Act 1996*, s 25(1).

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

62. An ‘authorised officer’ includes a Magistrate and registrar of the Local Court, or an employee of the Attorney General’s Department. See LEPRA, s 3(1).

63. *Carrol v Mijovich* (1991) 58 A Crim R 243.

64. *Majzoub v Kepreokis* [2009] NSWSC 314.



Importantly, searches under a warrant must be conducted in accordance with a range of provisions within the *Law Enforcement (Powers and Responsibilities) Act 2002* (referred to in this report as LEPR) that limit the exercise of the search power. For an ordinary search warrant, these include the following limitations:

- Police must provide a person who is on the premises with an 'occupier's notice' upon entry to the premises or as soon as possible afterwards. The notice contains a summary of the nature of the warrant and police powers to search under the warrant.<sup>65</sup>
- The power to search is time limited – ordinarily lasting a maximum of 72 hours from the time it is granted, although police can request an extension.<sup>66</sup>
- Police can only seize things described in the warrant, or things that police have reasonable grounds to believe are connected with an offence (this may be a different offence to the one for which police sought the warrant).<sup>67</sup>
- Police must report back to the authorising officer within 10 days of the search, outlining the results of the execution, including a brief description of the items seized and whether or not the occupier's notice was served.<sup>68</sup>

None of these limits apply to searches conducted under the FPO search powers.

### 2.2.2. Searches without warrant

There are a range of circumstances in which police can search a person without a warrant for firearms, firearm parts and ammunition. Such a search can be conducted as a result of arrest, reasonable suspicion or consent.

If police 'reasonably suspect' that a person has a firearm or related item and the person is:

- under arrest, police can conduct a person search on the basis that the item 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.<sup>69</sup>
- in a public place, police can conduct a person search on the basis that the item is a 'dangerous article' or a thing used in the commission of an offence.<sup>70</sup>
- in a vehicle in a public place, police can search the vehicle on the basis that it contains a dangerous article, an item that was unlawfully obtained, or an item intended to be used to commit a serious offence.<sup>71</sup>

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, which can include information obtained by hearsay.<sup>72</sup>

Police do not require a reasonable suspicion if a person consents to the search. They can also conduct a search of the person's home or vehicle if the person, or someone entitled to grant entry to the premises or vehicle, consents to the search.

65. LEPR, s 67.

66. LEPR, s 73(3).

67. LEPR, s 49(1).

68. LEPR, s 74(2).

69. LEPR, s 23.

70. LEPR, s 21(1)(c).

71. LEPR, s 35 provides for the relevant offences, and they include offences against the *Firearms Act 1996*.

72. *R v Rondo* [2001] NSWCCA 540 at 53.

This power is provided at common law, so before conducting a search of premises under these circumstances, police are encouraged to seek express consent in writing in the form of a note in their police notebook, signed by the occupier or person granting entry.<sup>73</sup>

If police conduct a search of a person under these powers, they are required to comply with specific legal safeguards,<sup>74</sup> which require that:

- police give a reason for the exercise of the power,<sup>75</sup> and
- a vehicle is only detained for as long as reasonably necessary.<sup>76</sup>

Where the search is a search of a person, there are additional legal safeguards which preserve privacy and dignity during a search.<sup>77</sup> For example, police:

- must conduct the least invasive kind of search practicable in the circumstances,<sup>78</sup> and
- must not search the genital area of the person searched.<sup>79</sup>

## 2.3 Relevant changes to the Firearms Act

The amendment Act made a number of amendments to the Firearms Act, the *Crime Commission Act 2012* and the *Restricted Premises Act 1943*. These changes were intended to address community concerns about firearms crime. As discussed in more detail below, the amendments to the Firearms Act:

- 1) introduced new FPO search powers, intended to expand police powers to detect FPO subjects who have firearms and related items
- 2) introduced two new offences that people subject to an FPO could be charged with, with higher maximum penalties than those for the existing offences
- 3) tightened the restrictions imposed by an FPO (for example, a person subject to an FPO is now prohibited from attending certain premises), and
- 4) gave the Police Commissioner more discretion in relation to the making and revocation of an FPO.

### 2.3.1. FPO search powers

The most significant change made by the amendment Act was the introduction of the FPO search powers that are the subject of the Ombudsman's review. Police are now able to search a person against whom an FPO has been made for firearms, firearm parts and ammunition.

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73. Performance Improvement and Planning Command, NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, 'search with consent – no warrant', April 2015, p. 97.

74. LEPRA, Part 15 (ss 201-204B).

75. LEPRA, s 202(1)(c).

76. LEPRA, s 204.

77. LEPRA, s 32.

78. LEPRA, s 32(5).

79. LEPRA, s 32(6).

The FPO search powers are contained in section 74A of the Firearms Act, which provides:

**74A Powers of police to search for firearms in possession of person subject to firearms prohibition order**

- (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.<sup>80</sup>

The powers that police already have to search for firearms and related items can only be exercised if police form the requisite 'reasonable suspicion'. The FPO search powers allow police to search for firearms and related items using a different test: 'as reasonably required'.

The offences that police can use the FPO search powers to detect relate to 'acquire, possess or use a firearm',<sup>81</sup> 'acquire or possess a firearm part',<sup>82</sup> and 'acquire or possess ammunition' in contravention of an FPO.<sup>83</sup> The latter two offences were introduced by the amendment Act.

Police must use their existing search powers to investigate other offences that might be committed by FPO subjects under section 74.

Section 74A refers to firearms, firearm parts and ammunition. These are defined in the Act as follows:

firearm: 'a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm'.<sup>84</sup>

firearm part: 'a barrel, breech, pistol slide, frame, receiver, cylinder, trigger mechanism, operating mechanism or magazine designed as, or reasonably capable of forming, part of a firearm'.<sup>85</sup>

ammunition: '(a) any article consisting of a cartridge case fitted with a primer and a projectile, or (b) any article consisting of a cartridge case fitted with a primer and containing a propelling charge and a projectile, or (c) blank cartridges, airgun pellets, training cartridges or gas cartridges, or (d) any other article prescribed by the regulations for the purposes of this definition'.<sup>86</sup>

80. *Firearms Act 1996*, s 74A.

81. *Firearms Act 1996*, s 74(1).

82. *Firearms Act 1996*, s 74(2).

83. *Firearms Act 1996*, s 74(3).

84. *Firearms Act 1996*, s 4.

85. *Firearms Act 1996*, s 4.

86. *Firearms Act 1996*, s 4.

### 2.3.2. New FPO offences

The amendment Act introduced the following changes to the Firearms Act:

- An FPO subject is now prohibited from residing at premises where a firearm, firearm part or ammunition is kept or found.<sup>87</sup>
- It is now an offence for an FPO subject to acquire a firearm.<sup>88</sup>
- The existing offence to possess or use a firearm continues, but the maximum penalty is higher than it was previously.<sup>89</sup>
- It is now an offence for an FPO subject to acquire or possess a firearm part<sup>90</sup> or ammunition.<sup>91</sup>
- It is now an offence for a person to supply or give possession of a firearm, firearm part<sup>92</sup> or ammunition<sup>93</sup> to a person whom the supplier knows is subject to an FPO. Previously, the offence was limited to a person selling or giving possession of a firearm only.<sup>94</sup>

### 2.3.3. New restrictions on where FPO subjects can be

Since 2001, it has been an offence for a person subject to an FPO to be involved in a firearms dealer's business, and for a licensed firearms dealer to permit an FPO subject to act as an agent for, or participate in the management of, that business.<sup>95</sup>

The amendment Act introduced a prohibition on FPO subjects attending certain premises.<sup>96</sup> An FPO subject is now prohibited from attending the following places without a reasonable excuse:

- the premises specified in a firearms dealer's licence<sup>97</sup>
- a shooting range<sup>98</sup>
- the premises of a firearms club, or<sup>99</sup>
- any other premises of a kind prescribed by the regulations.<sup>100</sup>

### 2.3.4. Discretionary powers of the Commissioner of Police

The amendment Act introduced two new powers relating to the discretion of the Commissioner of Police to make an FPO: a revocation power and an exemption power.

The revocation power is in section 73(3):

(3) The Commissioner may revoke a firearms prohibition order at any time for any or no stated reason.

87. *Firearms Act 1996*, s 74(6).

88. *Firearms Act 1996*, s 74(1).

89. The *Firearms and Criminal Groups Legislation Amendment Act 2013* replaced the existing section 74(1), carrying a maximum penalty of imprisonment for 10 years if the firearm is a prohibited firearm or pistol, or imprisonment for 5 years in any other case, with the new section 74(1), carrying a maximum penalty of imprisonment for 14 years if the firearm is a prohibited firearm or pistol, or imprisonment for 5 years in any other case.

90. *Firearms Act 1996*, s 74(2).

91. *Firearms Act 1996*, s 74(3).

92. *Firearms Act 1996*, s 74(4).

93. *Firearms Act 1996*, s 74(5).

94. See historical version of the *Firearms Act 1996*, s 74(3), as at 31 October 2013.

95. See *Firearms Act 1996*, s 44A, inserted by the *Firearms Amendment (Trafficking) Act 2001*.

96. *Firearms Act 1996*, s 74(8).

97. *Firearms Act 1996*, s 74(8)(a).

98. *Firearms Act 1996*, s 74(8)(b).

99. *Firearms Act 1996*, s 74(8)(c).

100. *Firearms Act 1996*, s 74(8)(d).

The exemption power is in section 74(10):

(10) Exemptions

The Commissioner may by order exempt a person, either unconditionally or subject to conditions, from a specified provision of this section.

This provision gives the Commissioner scope to allow an FPO subject to attend the premises of a firearms club on a particular occasion, for example, if the Commissioner was satisfied that there was a legitimate reason for the FPO subject to be there.

In addition, the amendment Act removed subsection (2) from section 73. Before the amendment, subsections (1) and (2) of that section provided that:

73 Firearms prohibition orders

- (1) The Commissioner may make an order prohibiting a person from having possession of or using any firearm if, in the opinion of the Commissioner, the person is not fit, in the public interest, to be permitted to have possession of a firearm.
- (2) Without limiting the generality of subsection (1), 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.<sup>101</sup>

The removal of subsection (2) broadens the Commissioner's discretion to allow an FPO to be made against people who did not possess, or had never used, a firearm.

## 2.4 The process for making and challenging an FPO

In order for a person to have an FPO made against them, police from any police unit, 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 to the Commissioner, or his or her delegate, to make a decision. Once an FPO has been made, it must be served on the person to take effect.

### 2.4.1. Making and cancelling an FPO

The Firearms 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.<sup>102</sup>

The Commissioner has formally delegated the power to make an FPO to any police officer of or above the rank of Inspector.<sup>103</sup> In practice, during the review period the majority of FPOs were authorised by two Superintendents and one Inspector, tasked to the Firearms Registry, State Crime Command and Operation Talon respectively.<sup>104</sup>

101. See historical version of the *Firearms Act 1996*, s 73, as at 31 October 2013.

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

103. NSW Police Force, *Instrument of Delegation of Authority Firearms Act 1996*, 5 November 2013.

104. Correspondence from Gary Warboys, Acting Deputy Commissioner, received 8 May 2014.

Police of any rank and from any Command can nominate a person for an FPO. This includes 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.<sup>105</sup> The NSW Police Force told us:

Potential candidates are identified by police when they are determined as having the potential to compromise public safety if they were to come into possession of a firearm, firearm part or ammunition. Such candidates may come to police attention by being identified (through usual police practices) as being an OMCG or other criminal gang member or associate with established links to firearm related crimes, persons who have been convicted of armed robbery, murder or serious assault, persons involved in firearms trafficking or persons involved in serious criminal matters involving stalking, intimidation, sexual assault. Further consideration is also given as to whether there is recent credible intelligence that indicates the person's likelihood to have access to firearms.<sup>106</sup>

In practice, the Compliance and Intelligence Unit within the Firearms Registry is responsible for preparing a proposed FPO and making a recommendation to the authorised officer as to the appropriateness of the order. To inform this recommendation, Firearms Registry staff review all available information regarding the proposed FPO candidate. This involves reviewing all information held by the NSW Police Force and checking nation-wide criminal databases. In some circumstances, the Firearms Registry may also request additional information from other state and federal government agencies.<sup>107</sup>

#### 2.4.2. Information considered when making an FPO

The Firearms Registry considers whether an FPO will 'ensure public safety while being the most time efficient means of ensuring the customer is aware of their obligations under the Act due to criminal activity and continued attempts to obtain a firearms licence under the Firearms Act'.<sup>108</sup> It also considers whether the person:

- continues to apply for a firearms licence after a rejected application
- has a history of illegal firearm use or possession
- has used firearms in a criminal act or to threaten public safety or peace
- is involved in an organisation or gang that is known to have access to illegal firearms
- is subject to a lot of media attention
- has disassociated from a gang or association, has shown signs of rehabilitation, and their age and the time since last offence.<sup>109</sup>

The NSW Police Force told us that an FPO would generally be made in circumstances where the authorising officer has formed the view that a person's possession of a firearm, firearm part or ammunition would compromise public safety.<sup>110</sup> The NSW Police Force provided the following examples of the types of situations that may give rise to an FPO being issued against a person:

- OMCG member or associates where it has been established that there is a link with firearms in the commission of a crime or concerns are held they have access to illegal firearms

105. Firearms Registry, NSW Police Force, *Fact Sheet: Firearm Prohibition Orders (FPO's)*, November 2013.

106. Correspondence from Gary Warboys, Acting Deputy Commissioner, received 30 June 2014.

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

108. Firearms Registry, NSW Police Force, *SOPS 2008: Firearms prohibition order under section 73 Firearms Act - Decision made by Manager*, received 25 July 2014.

109. Firearms Registry, NSW Police Force, *SOPS 2008: Firearms prohibition order under section 73 Firearms Act - Decision made by Manager*, received 25 July 2014.

110. Firearms Registry, NSW Police Force, *Statement of Information*, received 8 May 2014, p. 6.

- People convicted of armed robbery
- People convicted of murder, conspiracy to murder, serious assault, and other serious violence-related matters
- People convicted of serious fraud-related matters involving the misuse of firearms resulting in serious breaches of the Firearms Act or regulations
- People involved in continued and repeated breaches of the Firearms Act or regulations
- People involved in firearms trafficking or other serious firearms offences, for example, possession of firearms in a public place
- People involved in serious criminal matters involving stalking, intimidation, sexual assault
- People with a psychiatric illness where possession of a firearm has occurred and fears are held that it may occur in the future.<sup>111</sup>

### 2.4.3. When does an FPO come into effect

An FPO takes effect when police personally serve a copy of the order on the person named in the FPO.<sup>112</sup> As soon as this happens any firearms licence or permit held by the person is automatically revoked,<sup>113</sup> and the person becomes ineligible to receive a firearms licence or permit in NSW.<sup>114</sup>

### 2.4.4. 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.<sup>115</sup>

If the internal review does not result in the decision to make an FPO being set aside,<sup>116</sup> some FPO subjects are eligible to apply to the NSW Civil Administrative Tribunal for a review of the decision.<sup>117</sup> This option is only available to a person over 18 years old who:<sup>118</sup>

- has not, in the last 10 years, been convicted in NSW or elsewhere of certain prescribed offences<sup>119</sup>
- has not been subject to an Apprehended Violence Order (AVO) within the last 10 years (except for AVOs which were revoked)
- is not subject to a good behaviour bond (entered into in NSW or elsewhere) relating to certain prescribed offences.<sup>120</sup>

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'.<sup>121</sup>

111. Firearms Registry, NSW Police Force, *Statement of Information*, received 8 May 2014, p. 6.

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

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

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

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

116. See *Administrative Decisions Review Act 1997*, ss 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).

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

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

119. 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.

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

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



## Chapter 3. Overview and context of use

As at 31 October 2015, two years after the introduction of the FPO search powers, there were 1,317 people served with an FPO in NSW.<sup>122</sup> A third of them (445) had been searched by police under the new FPO search powers sometime during those first two years.

To gain a comprehensive understanding of how the powers were used by police, we undertook an in-depth audit of a large sample of the police records of the FPO searches conducted during the 24-month review period, being every search conducted during the first 22 months of operation (1 November 2013 – 31 August 2015).

To avoid confusion and provide clarity around the findings we present in this report, this chapter and the rest of the report presents data about the use of the powers for the same period. Please see Appendix B for an overview of police use of these powers for the entire two-year review period (1 November 2013 – 31 October 2015). The information about the last two months of the review period provided in this Appendix is limited to automatically generated information only.

### 3.1 What was searched?

We were able to identify and scrutinise 2,571 FPO searches conducted in the first 22 months that the powers were in operation. These searches were conducted during 1,343 separate interactions with police, called ‘search events’.

The 2,571 FPO searches included searches of:

- people, known as a ‘person search’
- cars and boats, known as a ‘vehicle search’, and
- houses, restaurants, garages and backyards, known as a ‘premises search’.

There were 1,486 person searches, 912 vehicle searches and 173 premises searches.

These premises searches were conducted over a 12-month period, between 1 September 2014 and 31 August 2015. Unfortunately, due to the way the NSW Police Force recorded FPO premises searches in the first 10 months of the review period (1 November 2013 – 31 August 2014), we were unable to obtain accurate information about the premises searches that were conducted during that time.<sup>123</sup> As a result, our analysis of premises searches is limited to the 12 months from 1 September 2014 to 31 August 2015.

The person searches comprised 58% of all the FPO searches, the vehicle searches comprised 35% and the premises searches made up the final 7%.

### 3.2 Who was searched?

There were 634 people searched under the FPO search powers during the first 22 months the FPO search powers were in operation. Of these, 407 were subject to an FPO<sup>124</sup> and 227 people were not.<sup>125</sup>

122. Correspondence from Nick Kaldas APM, Deputy Commissioner, D/2015/619711, received 15 December 2015.

123. We drew this problem to the attention of the NSW Police Force and once updates to the COPS database were made to facilitate the identification of FPO premises searches, police were able to provide us with information about premises searches conducted between 1 September 2014 and 31 August 2015.

124. All but six of these FPO subjects were served with an FPO after the FPO search powers were introduced.

125. We classified a person as being the subject of an FPO if the person had ever had an FPO issued and served on them and had been searched during the review period using the FPO search powers.



These people were subject to a total of 2,571 searches. The number of searches is different to the number of people because some people were searched more than once, or had more than one vehicle or premises searched.

The FPO subjects were subject to 1,230 person searches, 891 vehicle searches and 169 premises searches.<sup>126</sup>

The people who had not been issued with an FPO were subject to 21 vehicle searches, 4 premises searches<sup>127</sup> and 256 person searches.<sup>128</sup>

Many of these person searches took place when the person was in the company of an FPO subject, with 199 conducted at the same time as a vehicle search, and 5 at the same time as a premises search.

However, in 32 of these person searches there was no FPO subject present at the time of the search. Most of these searches (n=28) occurred when the person was in a public place, often in a vehicle. We found that 13 of these searches occurred because police mistakenly thought the person was subject to an FPO.

### 3.2.1. Age

The people searched were between the ages of 15 and 87 at the time of their first FPO search. The median age was 29 years.

Seven young people were person searched, all aged between 15 and 17 years.<sup>129</sup> From our review of police narratives of search events we were also able to establish there were at least eight search events in which children were present at an FPO search. Three of these events happened while the child was travelling in a vehicle that was searched.

In addition to the young people searched, we identified a further two search events where two children and one young person were present but not searched.<sup>130</sup>

### 3.2.2. Gender

Over 90% of the people searched were male (n=588). The majority of the searched FPO subjects were male (n=403). There were 46 women searched, of whom four were FPO subjects.

## 3.3 Where were the searches conducted?

The vast majority of the 1,343 FPO search events took place in metropolitan Sydney, with half of them taking place in the South West Metropolitan Region.<sup>131</sup> Only 5% of FPO search events took place outside of a metropolitan area. Figure 1 shows the number of FPO search events that took place within the geographical boundaries of each policing region. The shaded areas show the three metropolitan policing regions.

126. 10 of the 407 FPO subjects were searched before and after they were served with an FPO. We have included the 13 person searches and one vehicle search conducted of these people before they were served with an FPO in the count of 1,230 person searches and 891 vehicle searches.

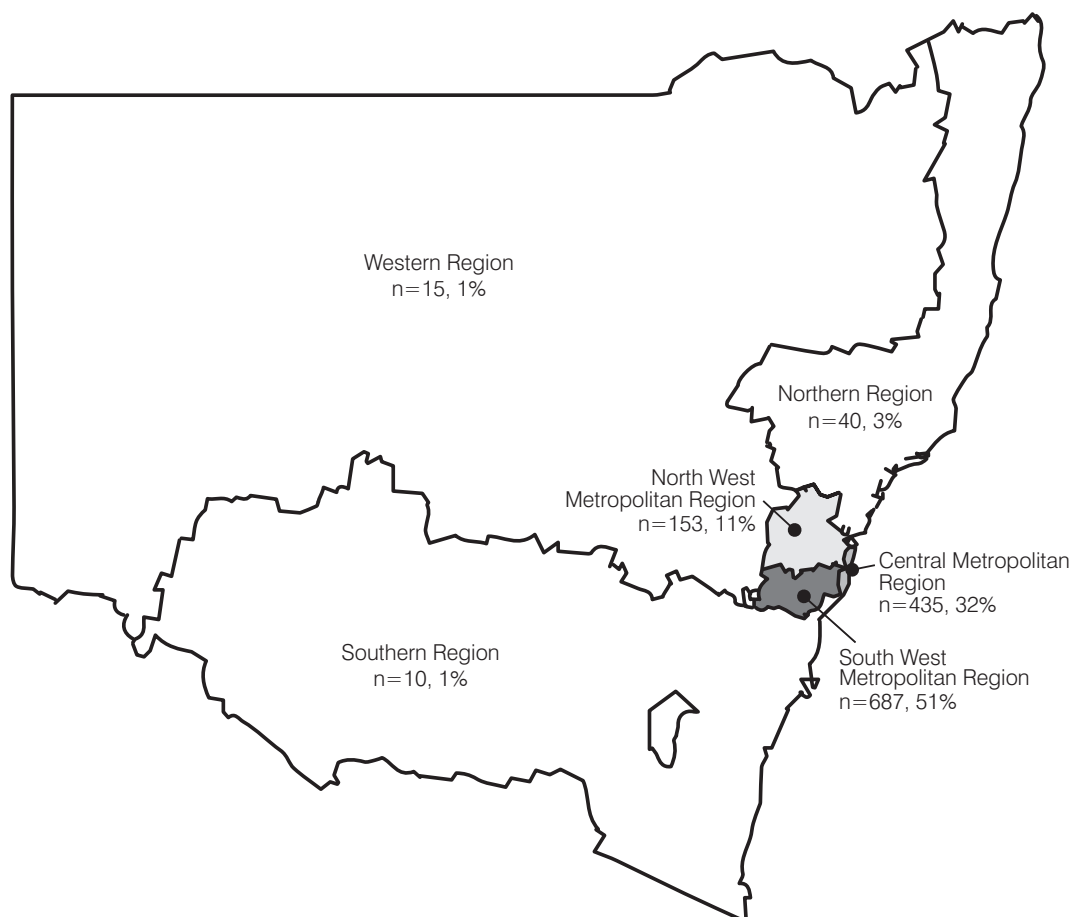
127. See section 1.5 in chapter 1 where we discuss the attribution rules we used in this review.

128. 10 of the 407 FPO subjects were the subject of 13 person searches before they had been served with an FPO. These person searches have been included in the count of 269 person searches of 233 people not subject to an FPO *at the time of search* discussed in the Foreword, Executive Summary and section 7.1.

129. The age reported here is the person's age as at date of the person's first FPO search.

130. One of the children was less than a year old, the others were 12 and 16 years old. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

131. The Local Area Commands of the NSW Police Force are organised into six policing regions, shown in figure 1.

**Figure 1. Location of search events, by NSW Police Force Region**

**Source:** NSW Police Force – Analysis of COPS event narratives (1 November 2013 to 31 August 2015).

### 3.4 When were the searches conducted?

Over half of the FPO search events took place in daylight hours (n=735), between 6.00am and 9.00pm. The rest were conducted by night (n=608).

### 3.5 Who conducted the searches?

There are a number of specialist commands and squads within the NSW Police Force that complement and support the work of Local Area Commands. Of particular relevance to this report are the specialist units tasked with responding to the issue of public place shootings.<sup>132</sup> Around a quarter of the search events were conducted by, or involved assistance, from these specialist units. As table 1 shows, the Middle Eastern Organised Crime Squad, Operation Talon and the Gangs Squad were frequent users of the FPO search powers. Other specialist units, such as the Public Order and Riot Squad, used them in a more limited way.<sup>133</sup>

132. Operation Talon, State Crime Command (Middle Eastern Organised Crime Squad, Gangs Squad, Firearms Squad), Public Order and Riot Squad, Counter Terrorism & Special Tactics.

133. The Public Order and Riot Squad conducted 14 FPO search events, Counter Terrorism & Special Tactics conducted three FPO search events and the Firearms Squad conducted five FPO search events.

Over 1,000 search events were conducted by general duties police and other specialist squads not tasked with responding to firearms-related crime. As table 1 shows, the South West Metropolitan Operations was the command with the highest use, followed by Leichhardt and St George. The Transport South/South West Command, responsible for policing trains and stations within that region, used the FPO search powers on 32 occasions. Most of these were person searches.

**Table 1. Police units that conducted the highest number of search events during the first 22 months**

Police unit, command or operation	No. of search events	% of search events (n=1,343)
State Crime Command - Middle Eastern Organised Crime Squad	151	5.9%
South West Metropolitan Operations	132	5.1%
Operation Talon	108	4.2%
Leichhardt	75	2.9%
St George	71	2.8%
Eastern Beaches	62	2.4%
Burwood	60	2.3%
Fairfield	49	1.9%
Rosehill	45	1.8%
State Crime Command - Gangs Squad	44	1.7%
Kings Cross	35	1.4%
Eastern Suburbs	32	1.2%
Transport South/South West	32	1.2%
Flemington	31	1.2%
Sydney City	28	1.1%
Holroyd	27	1.1%
Bankstown	26	1.0%
Campsie	24	0.9%
Parramatta	20	0.8%
Liverpool	18	0.7%

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015), n = 1,343.

### 3.6 Who else was present?

In addition to the 634 people searched under the FPO search powers (407 FPO subjects and 227 people not subject to an FPO), we identified a further 224 people who were searched during an FPO search event. These searches were either recorded under another search power, or were searches conducted under the FPO search powers but only recorded in the written narrative prepared by police.<sup>134</sup> Due to time restrictions we were unable to include these people in our in-depth audit, which presents a limitation on our findings and observations.

We found that 157 of the 1,343 FPO search events (12%) involved the search of a person who was not the FPO subject, under powers other than the FPO search powers. Typically these were searches without warrant conducted under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). For example, police conducting a search of an FPO subject and their vehicle also conducted searches under LEPRA of all other people in the vehicle.

There were also an unknown number of other people present at the FPO search events, but they were not searched (either under the FPO search powers or any other power). We are unable to report on the number of people affected in this way, and the impact that being present at a search had on them.

### 3.7 What did police find?

In the first 22 months of the review period, police found 25 firearms,<sup>135</sup> 19 lots of ammunition and 9 firearm parts. These were found during 29 FPO search events, which constitute 2% of the 1,343 search events. A firearm was found in 18 of these events.

In another 107 search events police did not find any firearms or related items, but did find, and seize, items that were alleged to be unlawful, used to commit an unlawful act, or constituted the proceeds of crime. These made up 8% of the 1,343 search events.

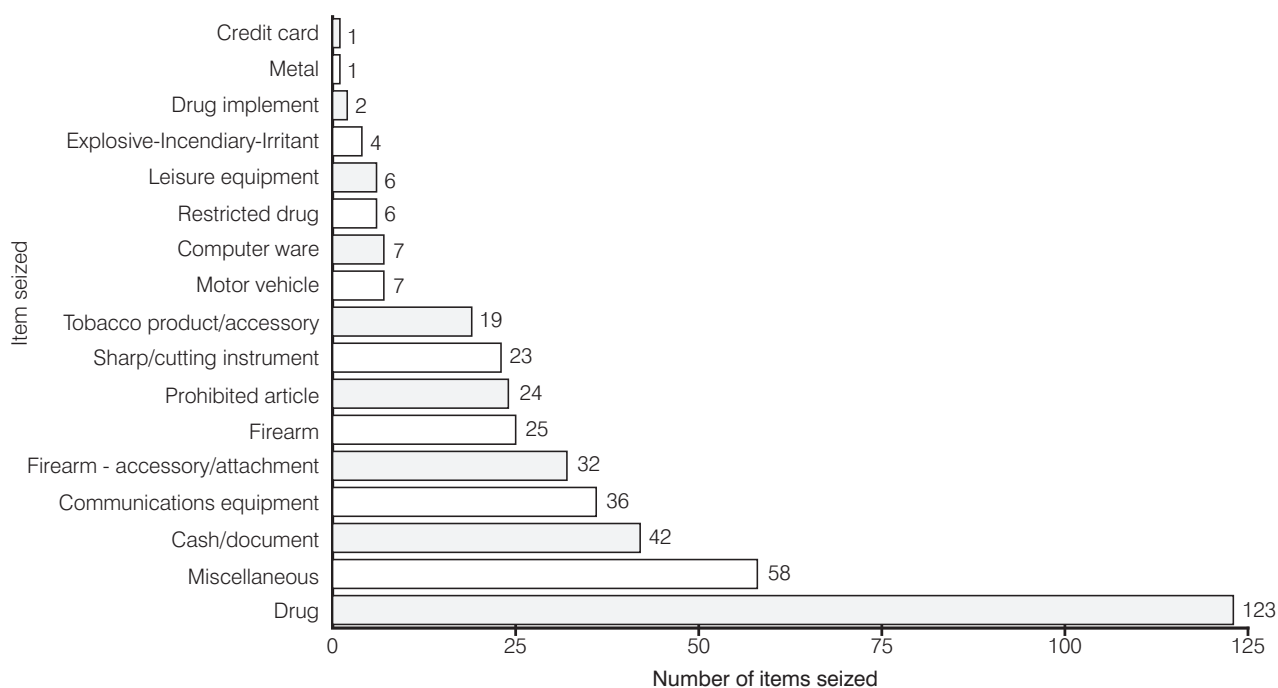
A total of 416 items were seized as a result of the 1,343 search events.<sup>136</sup> Figure 2 shows the different types of items that were seized. The most common item seized was illicit drugs, the majority of which involved small quantities. Police seized 51 weapons that were not firearms or related to firearms, including explosive devices, prohibited items such as knuckle dusters and tasers, and cutting instruments like knives and machetes.<sup>137</sup> Police also seized 36 mobile phones and 7 computers, and made 42 seizures of money and documents which police alleged were the proceeds of crime.

134. We identified the other people by reviewing the search event narratives for all 1,343 FPO search events, and manually recording the number of other people recorded by police as subject to a search, and where possible categorising the power exercised by police drawing upon information provided in the 'reason for search' field and the written narrative.

135. There were seven rifles, four pistols, four replica handguns, three air rifles, three revolvers, two imitation firearms (plastic guns), one Flintlock pistols and a shotgun.

136. Most of the 416 items seized were located as a result of an FPO search; however, some items were located as a result of other powers used in conjunction with the FPO search powers where it was more appropriate to use another kind of search power.

137. Other items seized included batons/truncheons, nunchakus, oleoresin capsicum spray (OC Spray) cans, samurai-type swords, a blow-dart gun, and a crossbow.

**Figure 2. Type of object seized as a result of FPO search during the first 22 months**

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015), Analysis of COPS event narratives (1 November 2013 to 31 August 2015), EFIMS (1 November 2013 to 31 March 2015).

### 3.8 Charges resulting from searches

A total of 86 people were charged as a result of an FPO search. Of these, 61 people were subject to an FPO, and 25 were not.

Of the 61 FPO subjects charged, 11 were charged with one or more FPO or other firearms-related offences.<sup>138</sup> All 11 people were charged with a firearms-related offence. For 6 of them, at least one of those charges was for an FPO offence, and 3 were proven guilty of that offence.

Of the 25 people charged, who were not FPO subjects, 4 were charged with firearms-related offences, and 3 were proven guilty.

Of the 1,343 search events, 84 (6%) resulted in at least one charge being laid. As figure 3 shows, the majority of these search events led to charges that were not related to offences against the FPO, nor were they related to firearms.<sup>139</sup>

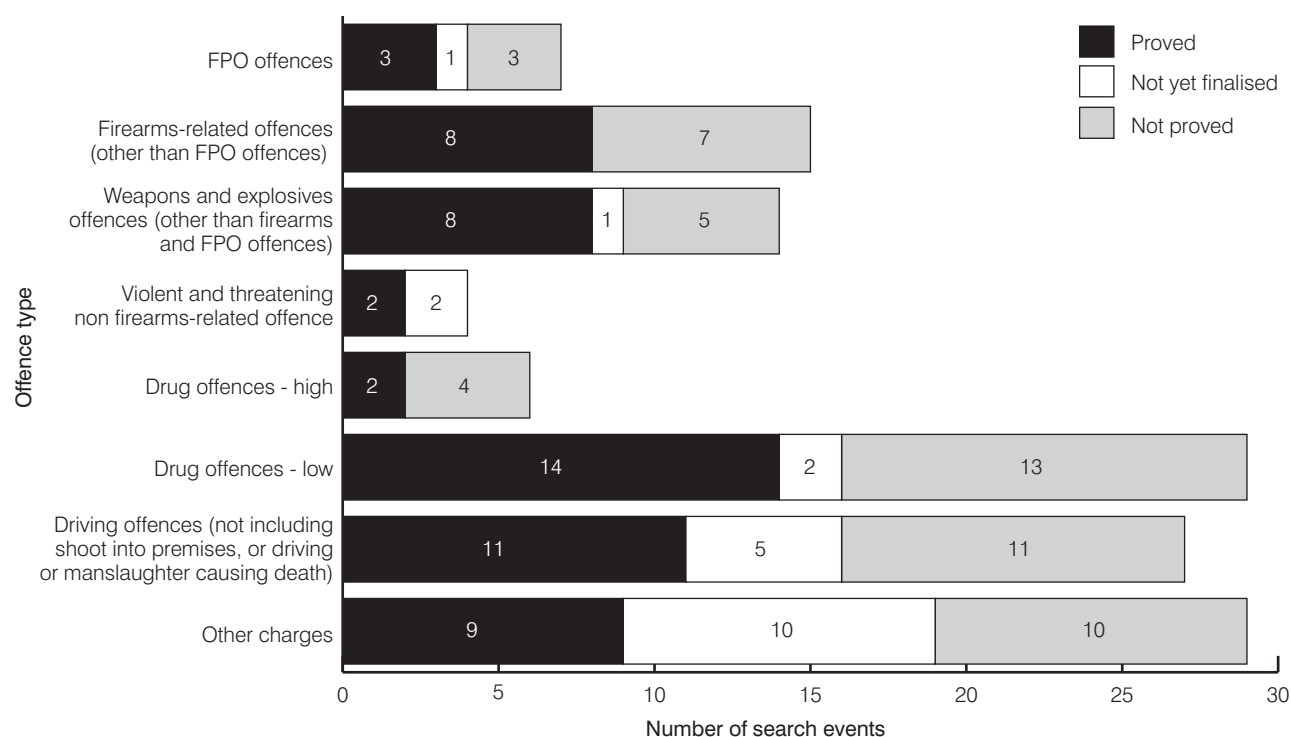
Most of the search events that resulted in a proven charge for illicit drugs related to quantities in a person's possession for personal use. Two search events resulted in proven charges for dealing a non-commercial quantity of an illicit drug, but no firearms were found in either search.

One search event involved a charge for supplying a commercial quantity of an illicit drug other than cannabis. However, only a small quantity of illicit drugs and no firearms were found during this search event. This matter is yet to be finalised by a court.

<sup>138</sup>. A breakdown of all offences included in each category can be found at Appendix C: List of offences included in charge categories.

<sup>139</sup>. Of the 84 search events that resulted in a charge, 39 resulted in at least one conviction; one resulted in the charge being proven but no conviction recorded. A further 17 search events resulted in no charges being proven. Charges relating to the remaining 27 search events are yet to be finalised by a court.

**Figure 3. Number of search events that resulted in charges laid by type of charge and charge outcome**



**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

**Note 1:** to maintain mutual exclusivity for each offence type, we classified search events as 'proven' if any of the finalised charges was proven, 'not proven' if none of the finalised charges have been proven (even if some charges are still progressing), and 'not yet finalised' if all charges are still progressing through court.

**Note 2:** Please see Appendix C: List of offences included in charge categories, for a breakdown of all offences included in each category.

As figure 3 shows, a total of 15 search events resulted in a charge for committing a firearms-related offence (other than an FPO offence). Of those events, 7 resulted in a charge for an FPO offence. These 7 events are shown in the top bar of figure 3.

Figure 3 also shows that 8 search events resulted in a charge for a firearms-related offence (other than an FPO offence) being proven. Of those search events, 3 also resulted in a charge for an FPO-related offence being proven. Table 2 lists the specific charges that resulted from those 8 search events.

As table 2 shows, each of the 8 search events resulted in charges for regulated firearms-related offences being proven.

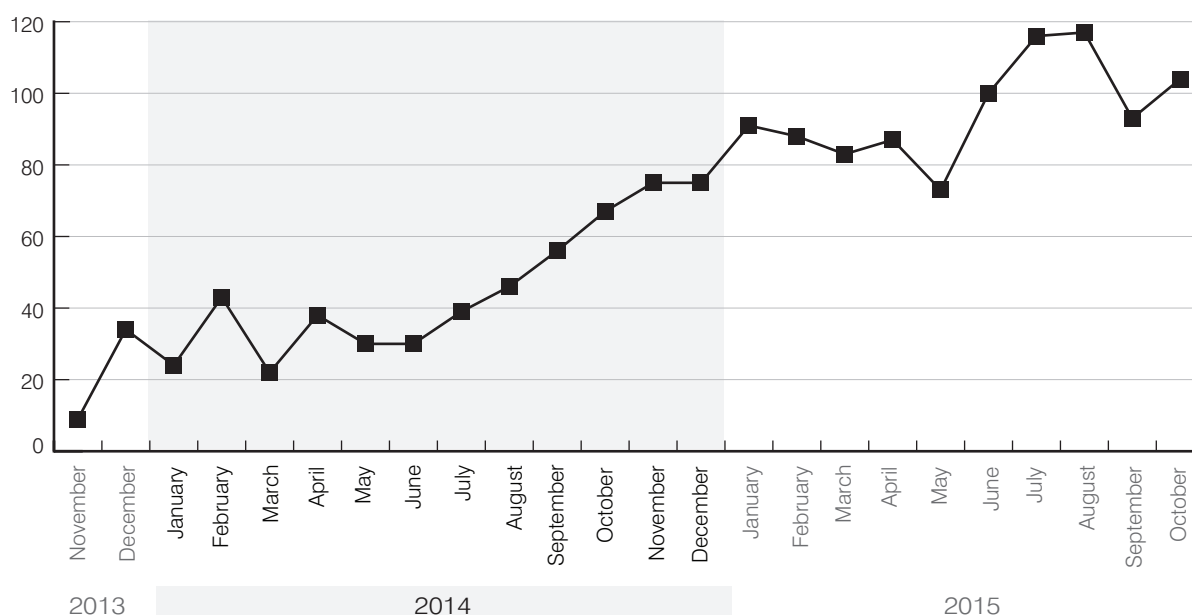
**Table 2. Firearms-related charges that were proven, resulting from an FPO search during the first 22 months**

Search Event	Possess firearm subject to FPO	Acquire firearm part subject to FPO	Acquire ammunition subject to FPO	Possess unauthorised firearm	Possess unregistered prohibited firearm	Possess unauthorised pistol	Possess unregistered pistol	Possess ammunition	Failure to keep firearm safe	Regulated firearms-related offences
1								X		X
2	X									X
3								X		X
4	X	X	X							X
5								X		X
6	X			X			X		X	X
7				X	X			X	X	X
8						X				X

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

### 3.9 Number of search events conducted per month

We found that the overall trend for the number of search events conducted grew as each month of the two-year review period passed. See figure 4. This could partly be explained by the growing number of people issued and served with an FPO during the same time, who were then subject to the search powers.

**Figure 4. Number of search events, by month (1 November 2013 – 31 October 2015)**

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 October 2015).

## Chapter 4. Characteristics of the people searched

During debates regarding the Bill, members of Parliament articulated the characteristics of people they envisaged would be prohibited from possessing firearms and subject to police searches to detect any breaches of an FPO. They included people who:

- should not have access to a firearm because of their pre-existing criminal record<sup>140</sup>
- are involved in criminal activities involving guns,<sup>141</sup> including the use, sale and supply of illegal guns<sup>142</sup>
- have a history of domestic violence and mental health issues<sup>143</sup>
- use, sell or supply illegal drugs<sup>144</sup>
- are members of organised criminal groups.<sup>145</sup>

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.<sup>146</sup>

To explore whether the search powers had been used to search the people Parliament envisaged, we reviewed the criminal history and law enforcement data holdings<sup>147</sup> related to all 634 people searched under the FPO search powers, as at the date of their first FPO search, against the above criteria.<sup>148</sup>

Overall, for the 407 FPO subjects who were searched, we found that 168 met three or more of the criteria, 138 met two of the criteria, 93 met one of the criteria and 8 met none of the criteria.

For those 227 people searched who were not the subject of an FPO at the time of the search, we found that 40 met none of the criteria, 118 met one of the criteria, 50 met two of the criteria and 19 met three or more of the criteria. In chapter 7.1 we discuss concerns we have about the legality of the searches of people who were not the subject of an FPO at the time they were searched.

140. The Hon. Michael Gallacher MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 15 October 2013, p. 23904.

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

142. Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23673; Gary Edwards MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, 23680.

143. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013.

144. Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23673.

145. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013.

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

147. This included alleged criminal associations. To do this we audited the PODS profiles of all persons recorded as searched under the FPO search powers.

148. Our criminal history analysis was limited to COPS records that contain criminal history information from 1998 onwards and to charges that were finalised as at 31 August 2015.



## 4.1 Pre-existing criminal record

To understand whether the FPO subjects searched had a pre-existing criminal record, we reviewed the principal (or most serious) offence of all FPO subjects as at the date the FPO subject was served, using the National Offence Index.<sup>149</sup> The most serious offence for each searched FPO subject is shown in figure 5, with each dot representing each person. We found that the majority of people had been convicted of serious criminal offences, including assault, abduction, aggravated robbery, stalking, murder, attempted murder, sexual assault, and weapons and explosives-related offences.

In our analysis, we also examined how many FPO subjects had ever been convicted of a firearms-related offence. In this report, we have defined a 'firearms-related offence' to include:

- offences where the person used a firearm to aid the commission of a violent crime, such as murder, assault, sexual assault or robbery
- 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.

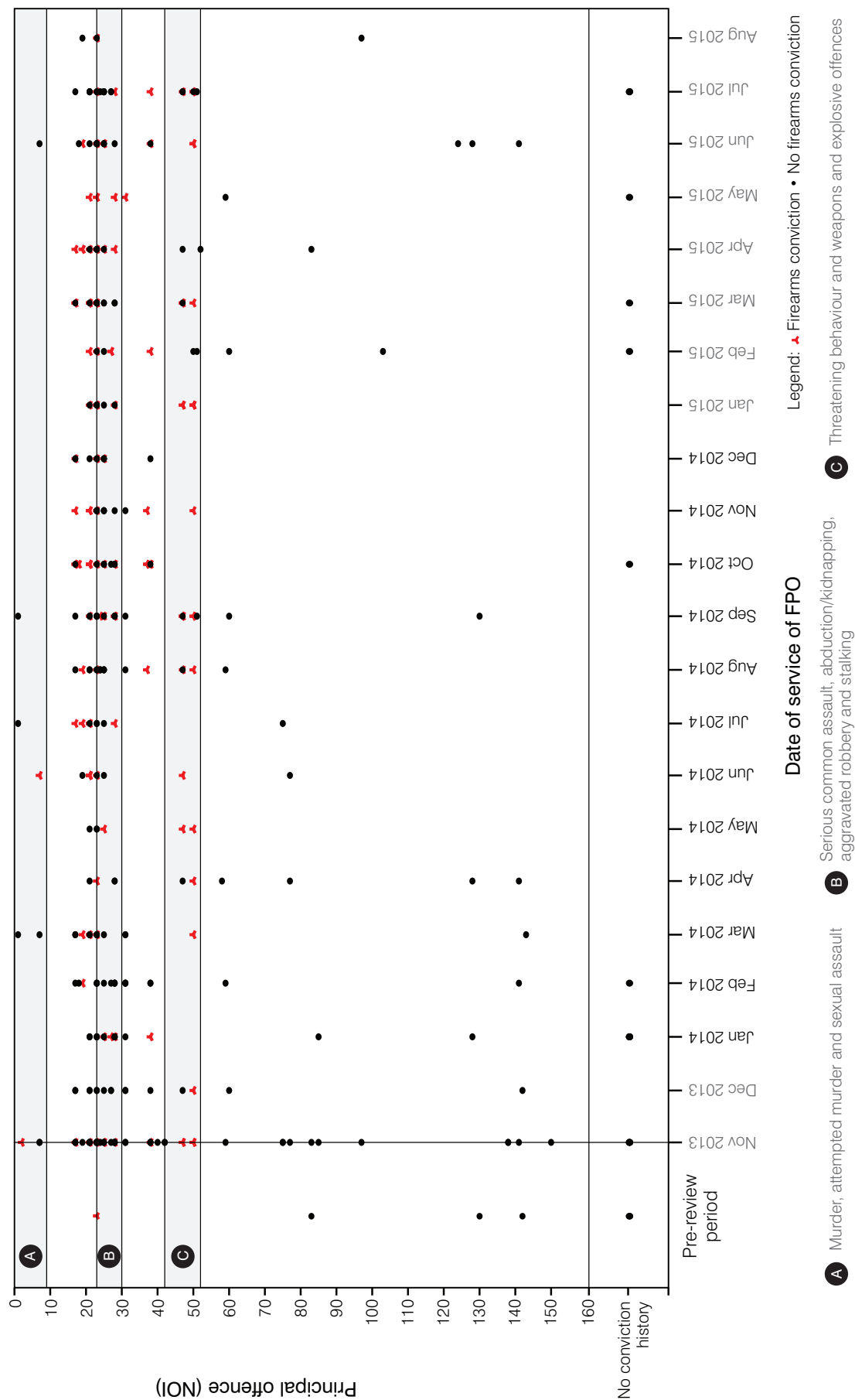
These FPO subjects are represented in figure 5 by a red dot.

Some of these FPO subjects had been convicted of a firearms-related offence, but this was not their most serious offence. The red dot representing each of these people is positioned at the National Offence Index category for the person's most serious offence, not at the category for the firearms-related offence for which they were convicted.

As the bottom of figure 5 shows, we also identified a small number of FPO subjects who had never been convicted of an offence. At the time of writing, one of these people had been charged with a serious firearms-related offence, which was yet to be heard by a court. For the others, police records contained information regarding allegations about their access to or use of illicit firearms.

149. The National Offence Index (NOI) is a statistical tool developed by the Australian Bureau of Statistics which provides an ordinal ranking of the offence categories according to perceived seriousness. For further information, see: Australian Bureau of Statistics, *National Offence Index - overview*, 23 July 2009, viewed 29 March 2016, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/1234.0.55.001~2009~Main+Features~Overview?OpenDocument>.

Figure 5. Principal offence of searched FPO subjects as at date of service of FPO



**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

## 4.2 People involved in criminal activities involving guns

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

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.<sup>150</sup>

The then Parliamentary Secretary, Troy Grant MP, also commented that the amendment Bill:

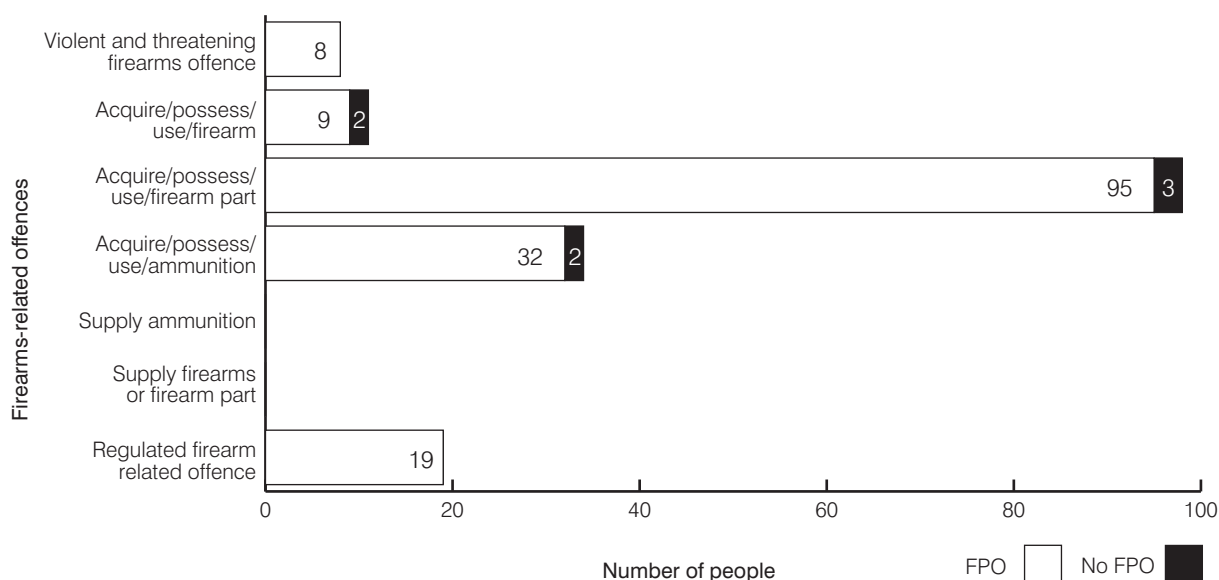
delivers broad-ranging reforms to help the NSW Police Force and the Crime Commission combat gun crime and those who use, sell and supply illegal guns<sup>151</sup>

To explore how many of the 634 people searched had been involved in criminal activities involving guns, we reviewed their criminal histories, as at the date of their first search, to see who had been convicted of a firearms-related offence.<sup>152</sup>

Three-quarters of the people searched had not been convicted of a firearms-related offence. This included 60% of FPO subjects (n=244) and 97% of people not subject to an FPO (n=220).

Of the 170 people who had been convicted of a firearms-related offence, 163 were FPO subjects and 7 were people not subject to an FPO. We reviewed these people's firearms-related convictions in order to identify their most serious firearms-related offence. As figure 6 shows, the most serious firearms-related offence for 98 of these people was for acquiring, possessing and/or using prohibited firearms parts. There were also 17 FPO subjects whose most serious firearms-related offence was either a violent or threatening offence involving the use of a firearm, or acquiring, possessing and/or using prohibited firearms.

**Figure 6. Most serious firearms-related conviction of search subjects**



**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

**Note:** Please see Appendix C: List of offences included in charge categories, for a breakdown of all offences included in each category.

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

151. Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23673.

152. A breakdown of all offences included in each category can be found at Appendix C: List of offences included in charge categories.

### 4.3 History of domestic violence or mental health issues

When considering the amendment Bill, a member of the Legislative Council 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.<sup>153</sup>

We reviewed the criminal histories of all people searched under the FPO search powers in order to identify domestic violence offences.<sup>154</sup> We found 12% of FPO subjects (n=49) and 4% of people not subject to an FPO (n=10) had been convicted of a domestic violence offence. In total, these people made up 9% (n=59) of the 634 people searched.

As there is no link between public health records and law enforcement data, we used a proxy indicator that a person may have (or had) a mental health issue. This involved reviewing the PODS profiles of people searched and identifying any records made by police that indicated that:

- the person had accessed a mental health service
- the person had been detained by police under section 22 of the *Mental Health Act 2007*
- a court had made an order such as discharging the person under section 32 of the *Mental Health (Forensic Provisions) Act 1990*, or
- the person's family or friends had informed authorities that person has sought or used a mental health service.

From this information we found that 21% of FPO subjects (n=86) and 12% of people not subject of an FPO (n=27) may, at some point, have accessed a mental health service (n=113). In total, these people made up 18% of the 634 people searched.

### 4.4 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.<sup>155</sup>

We reviewed the criminal histories of all 634 people searched under the FPO search powers, as at the date of their first FPO search, to see how many had been convicted of any drug offences.<sup>156</sup>

From this information we found that 56% of FPO subjects (n=228) and 25% of people not subject of an FPO (n=57) had been convicted of such an offence. In total, these people made up 45% of the 634 people searched (n=285).

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

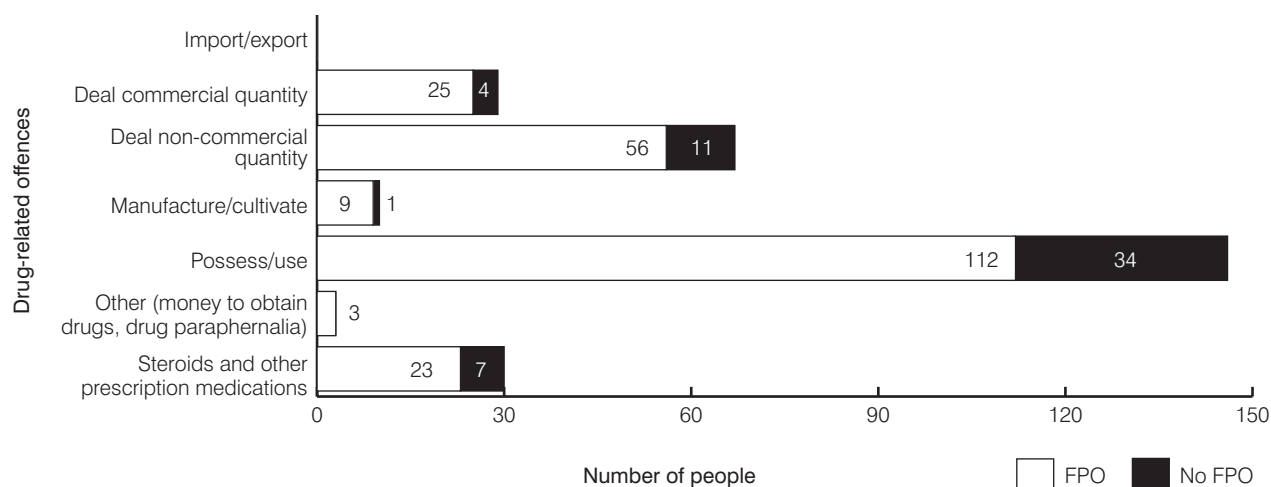
154. In order to identify domestic violence offences we identified persons that had been convicted of an offence where the NSW Law Part Titles included the domestic violence (DV) identifier, and any person convicted of an offence related to a breach of a Domestic Apprehended Violence Order (DAVO).

155. Troy Grant MP, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23673.

156. A breakdown of all offences included in each category can be found at Appendix C: List of offences included in charge categories.

As figure 7 shows, the most serious illicit drug related conviction for many of these 285 people was for possession or use of an illicit drug or a restricted substance. There were also 106 people charged with more serious illicit drug offences, including dealing (in commercial and non-commercial quantities), manufacturing and cultivating.

**Figure 7. Most serious illicit drug conviction of search subjects**



**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

**Note:** Please see Appendix C: List of offences included in charge categories, for a breakdown of all offences included in each category.

## 4.5 Members of organised criminal groups

A relationship between people who have criminal associations and firearms was also discussed during the parliamentary debate on the amendment Bill by members of the Legislative Council. One member stated:

The range of reforms contained in the bill will help the NSW Police Force and the Crime Commission to combat gun crime and the organised criminal groups that use, sell and supply illegal firearms.<sup>157</sup>

Another 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.<sup>158</sup>

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.<sup>159</sup> We also reviewed law enforcement information holdings to identify people whom police had alleged, at some time in their history, had an association with an organised crime group or gang.

We found six FPO subjects and one person not subject to an FPO who had been convicted of a criminal association offence.

157. Fred Nile MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23901.

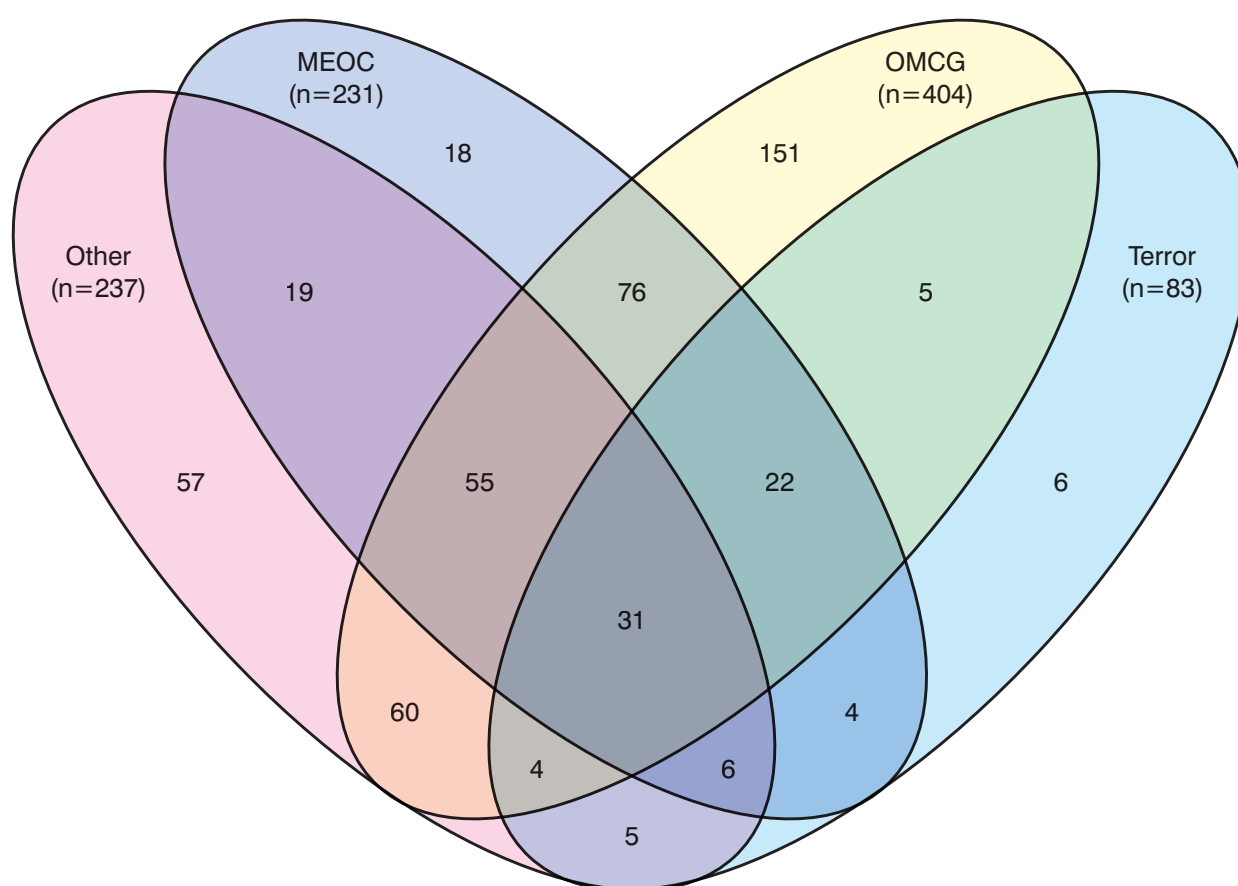
158. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23899.

159. Please see B.8 in Appendix C: List of offences included in charge categories, for a breakdown of all offences we included in these offence categories.

We found that 30% of FPO subjects (n=122) and 13% of people not subject to an FPO (n=29) had their friends and associates warned about associating with them, through the use of a consorting warning. In total, these people made up a quarter of the 634 people searched (n=151).

Our review of law enforcement information found that 85% of the FPO subjects (n=345) and 77% of people not subject to an FPO (n=174) had an alleged link to an organised crime group, gang or crime family recorded in their law enforcement history. In total, these people made up 82% of the 634 people searched (n=519). As figure 8 illustrates, most of these alleged associations related to a relationship with an Outlaw Motorcycle Gang and/or a Middle Eastern Organised Crime group. Some people had associations with multiple crime groups over time.

**Figure 8. Overlap of alleged criminal associations of 519 of the people searched under the FPO powers**



**Source:** Police Integrity Commission - PODS (1 November 2013 to 31 August 2015) Total number of people with alleged criminal associations = 519.

**Legend:**

**MEOC**

Middle Eastern Organised Crime (MEOC) includes groups such as: Brothers for Life, Muslim Brotherhood Movement, DLASTHR, Soldiers of Allah, True Kings, Assyrian Kings, Afghans for Life, and the Assyrian Brotherhood, Afghani Murderers.

**OMCG**

Outlaw Motorcycle Gangs (OMCG) include groups such as Rebels, Hells Angels, Nomads, Commanchero, Notorious, Bandidos, Lone Wolf, Finks, Mongols, Scorpions, Life and Death, Outlaws, Black Uhlans and the Fourth Reich.

**Terror**

People identified in this category have been linked to listed terrorist organisations, such as Islamic State, Al-Qa'ida, Abu Sayyaf Group and Jemaah Islamiyah; or police had recorded concerns regarding the person's 'radical' or 'extremist' ideology.

**Other**

People placed in this category had links to groups that conducted organised crime, but the group was not significantly represented in this data set to merit its own category. This includes, but is not limited to large crime families, and other groups including the Italian mafia, Russian/East European mafia, Colombian drug cartels, and Asian triads.<sup>160</sup>

## 4.6 People who have never been convicted of an offence

We found that 1% of the 407 FPO subjects (n=6), and 41% of the 227 people not subject to an FPO (n=92) searched under the FPO powers had never been convicted of an offence.

Overall, these 98 people made up 15% of the 634 people searched during the first 22 months of the review period.

Of these 98 people, over one-third (n=35) had been charged with an offence at some point, but not convicted. Two-thirds had never been charged with any offence (n=63).<sup>161</sup>

160. Andreas Schloenhardt, Submission to the Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, April 2008, p. 6, in Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p. 8.

161. This included two people who had their friends or associates warned about associating with them in the form of a consorting warning, none of whom had an FPO.

## Chapter 5. 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. LEPRA also provides a range of safeguards designed to preserve the dignity and privacy of people during a search. Some of these safeguards depend 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.<sup>162</sup>

These requirements of LEPRA do not apply to the conduct of an FPO search. However, we have used them as a framework to explore the vulnerabilities of people searched under the FPO search powers.

In order to estimate the number of the 634 people searched under the FPO search powers during the first 22 months of the review period who were vulnerable, we reviewed their 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.

### 5.1 Children and young people

Seven people were under 18 years of age at the time they were person searched, with none subject to an FPO.<sup>163</sup> These young people were typically searched while in the company of an FPO subject, and in a group of young adults aged between 18-27 years.

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.

### 5.2 People with mental health issues

We estimate that 18% (n=113) of people searched had at some point in their life accessed mental health services. This includes 86 FPO subjects (22 of whom had been had at some point been discharged under section 32 of the *Mental Health (Forensic Provisions) Act 1990*), and 27 people not subject to an FPO (three of whom had been discharged under the same provisions).

<sup>162</sup>. *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s 32(6).

<sup>163</sup>. Police records indicate that in one of these search events police thought that the young person was an FPO subject at the time of the search, however the person was not.



### 5.3 Non-English speaking background

In order to identify people from a non-English-speaking background, we conducted a review of their PODS profiles to identify circumstances where the person had at some point requested or used a translator, or where records indicated that their immediate family did not speak English.

We estimate that at least 17% (n=108) of people searched under the FPO search powers came from a non-English-speaking background. Of these, 68 people were FPO subjects and 40 were not.

### 5.4 Gender

The majority of people searched were men (93%, n=588). Of these, 403 were FPO subjects and 185 were not. Women were much less likely to be the subject of a person or vehicle search. Of the 46 women searched, four were subject to an FPO.

### 5.5 Aboriginal and Torres Strait Islander status

Of the 634 people searched under the FPO search powers, 12% (n=79) had at some point identified themselves as an Aboriginal or Torres Strait Islander person. Of these people, 64 were FPO subjects and 15 were not.

### 5.6 Cognitive or physical impairment

We found that 4% (n=25) of people searched had at some point been identified by police as having a cognitive or physical impairment.

## Chapter 6. How police interpreted ‘reasonably required’

To better understand the circumstances in which police decided to exercise the new FPO search powers during the review period, we examined closely the reasons police recorded for initiating each of the 1,343 search events that took place during the first 22 months of use. Our analysis involved categorising search events into three key ‘drivers’ – investigation, intelligence and interaction. We report the observations we made about the different types of factors that police might consider when making the decision to search, of a proactive and reactive nature.

We found that the wording of section 74A, including the meaning of the term ‘reasonably required’, is unclear and open to interpretation, about when police may exercise their search powers and have recommended that it be amended so that it is unambiguous. This recommendation is supported by our analysis of contemporaneous records which include the reasons police determined that a search was ‘reasonably required’.

This chapter also discusses the practice of searching at the time of service, and issues relating to that practice.

Finally, we explore whether police’s interpretation of ‘reasonably required’ has led to unreasonably frequent or repeat searches.

### 6.1 What ‘reasonably required’ means

The *Firearms Act 1996* provides that an FPO search:

... 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).<sup>164</sup>

It is not clear from the wording of this provision whether it imposes a threshold test that means police can only exercise the power if the search itself is ‘reasonably required’, or places a limitation on the manner in which police exercise the search powers (for example, that a person can only be strip searched if that is ‘reasonably required’), or both.

If the provision only relates to the manner of the search, this could mean that the mere fact that a person is subject to an FPO may be a sufficient reason for police to search that person at any time.

In debating the FPO search powers, some members of Parliament expressed concern that the FPO search powers may be exercised in an oppressive fashion, in particular, that there was a potential for frequent or repeat searches of FPO subjects to be conducted.<sup>165</sup>

We asked stakeholders to consider the circumstances in which an FPO search might be ‘reasonably required’. Some told us that a search could only be ‘reasonable’ if the person had done something to arouse police suspicion in some way.<sup>166</sup> Others argued that not only should police be required to have suspicion, but that this suspicion should relate directly to a concern that the person has a firearm or related item in their possession.<sup>167</sup>

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

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

166. Gun Policy Org, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 16 August 2015, p. 2.

167. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 4.

Police currently have no policy or guidelines to help them decide whether or not an FPO search is 'reasonably required'.

In a media statement released within two weeks of the FPO search powers being enacted, and following police serving 32 members and associates of an Outlaw Motorcycle Gang (OMCG) with FPOs, the Police Commissioner said:

People with a history of serious criminal activity or a violent past are well and truly in our sights.

We no longer need a warrant to stop and search people who have been issued with a Firearm Prohibition Order.

In the interest of public safety, we can stop and search them, their vehicles, their homes and their businesses whenever we feel it necessary.<sup>168</sup>

We asked a range of operational police what they thought 'reasonably required' meant in this context, and reviewed police records to see what reasons were provided by police as to why a search was reasonably required. We found that there was a diversity of opinion amongst police as to the limits imposed by this requirement.

Some police told us that the FPO search powers enable police to search a person solely on the basis that they are an FPO subject, arguing that 'reasonably required' related simply to the manner in which police conduct the search. This view was also reflected in the FPO search event narratives written by some police. For example:

This check also revealed that POI [person of interest] was previously served a firearms prohibition order. As a result of this order police have certain powers to search persons and vehicles without the need for reasonable cause.<sup>169</sup>

Other police told us that 'reasonably required' is a test that police should apply before conducting a search. This test requires police to develop something less than a reasonable suspicion, but something more than the knowledge that a person is subject to an FPO. Police records reflecting this understanding of the power typically referred to a level of 'suspicion'. For example:

Police explained to the POI [person of interest] that due to the current FPO served on the POI that Police may search on the suspicion he has a firearm in his possession.<sup>170</sup>

To clarify this ambiguity, 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 us that 'reasonably required' is an objective test that relates to both the reason for the search, and the manner in which it is conducted:

... 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

168. Andrew Scipione, (Commissioner of Police), *More than 30 Rebels targeted in police crackdown on firearms*, media release, 12 November 2013.

169. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

170. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

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”.<sup>171</sup>

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.

Having considered the Crown Solicitor’s Office’s advice, the NSW Police Force advised us:

The term reasonably required in s 74A(1) limits the power to search. It is apparent, however, that the nature of the limitation, to use the Crown Solicitor’s words, is not free from doubt.

Clarification on this point would assist police, though such clarification should not impose on police the need to apply complicated or esoteric legal tests. The search powers are to be called upon in the moment, not after legal debate.

It is the NSW Police Force view that reasonably required is not analogous to a requirement that there is a reasonable suspicion that the offence has been committed, or that there are reasonable grounds for such a suspicion. The relevant test can be stated as: is the action required to determine whether a particular offence has been committed? The ‘reasonableness’ attached to the limitation on the searching power relates to whether, on an objective view of the situation, an ordinary person in the same position as the searching police officer would also have formed the view a search was required to determine if the person subject of the FPO has committed one of the listed offences. The power is broader than the traditional reasonable suspicion test. It is a power similar to the power of police to enter licensed premises to determine if the licensing laws are being complied with (see s 24 *Gaming and Liquor Administration Act 2007*).

Among factors that will influence whether a search is reasonably required are the reliability and timeliness of information that may indicate a person is in possession of a firearm or firearm part, the risks to police and the wider community, and previous intelligence on the person and their propensity to possess firearms or firearms parts.<sup>172</sup>

We agree that ‘reasonably required’ is broader than ‘reasonable suspicion’. However, we do not agree that the *Gaming and Liquor Administration Act 2007* provides a relevant comparison, because the powers under that Act allow police to enter premises ‘at any time’, whereas the FPO search powers can only be used ‘as reasonably required’.

We also agree that clarity about the meaning of ‘reasonably required’ would assist police. To further explore our concerns about potential issues that may arise from the lack of clarity, we closely examined how, in practice, police interpreted ‘reasonably required’ and made decisions about the circumstances in which the search powers could be used. The following sections (6.2 – 6.9) discuss our findings, and in section 6.10 we make our recommendation.

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

172. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 1.

## 6.2 Things police might consider when deciding a search is ‘reasonably required’

We asked police about the circumstances that might lead them to conduct an FPO search. They told us that they often conduct a search upon service of an FPO.<sup>173</sup> After that takes place, FPO searches may be triggered by any of the following three ‘drivers’:<sup>174</sup>

- Investigation – police making inquiries about an incident reported to police, or conducting an active investigation of a reported or suspected crime (for example, police investigating a drive-by shooting).
- Intelligence – police considering information about the person, their vehicle or place (for example, police following up an anonymous report that an FPO subject has acquired a firearm).
- Interaction – an unplanned interaction with police that resulted in a search (for example, police talk to a person known to them loitering at a train station).

Once a ‘driver’ has caused police and the search subject to be in the same place, there are a range of factors that police may consider before determining an FPO search is ‘reasonably required’. They include ‘reactive’ factors, such as:

- 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, and
- situational or environmental factors, such as the time of day and location associated with firearms crime, or recent or ongoing conflict between crime groups.

They also include ‘pro-active’ factors, such as:

- 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, or the fact that the person is subject to an FPO
- prevention factors, including that the FPO subject is suspected of engaging in activities associated with illicit firearms carriage,<sup>175</sup> such as illicit drug dealing and associating with organised criminal groups,<sup>176</sup> and
- recidivist risk factors, including that the FPO subject has recently been convicted of an offence, is associating with pro-criminal associates,<sup>177</sup> or is engaging in behaviour that demonstrates an antisocial or pro-criminal attitude.<sup>178</sup>

173. There are issues associated with searches conducted within the first 28 days of service. These are discussed in section 6.5 of this chapter (Search upon service of an FPO).

174. Consultation with the Real Time Intelligence Centre, 4 November 2015.

175. 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*, Home Office Research Study, Report Number 298, London, 2006, p. 103.

176. Samantha Bricknell, *Characteristics and dynamics of firearm trafficking*, Research and Public Policy Series, Research Paper number 116, 2012.

177. 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.

178. Rainer Banse et al., *Pro-criminal attitudes, intervention and recidivism*, *Aggression and Violent Behaviour*, 18, (6), 2013, pp. 673-85, viewed 27 March 2015.

### 6.3 How we evaluated police's interpretation of 'reasonably required'

We closely examined the event narratives recorded by police for the 1,343 FPO search events during the first 22 months that the search powers were in operation in order to establish:

- the drivers for each search event, and
- the factors considered by police when making the decision to search.

It is often the case that an FPO search event may be triggered by more than one driver. For example, police might have had a by-chance interaction with a vehicle on the highway, but elect to stop and search the vehicle on the basis of intelligence. To examine search events that had more than one driver, we employed the following hierarchy to identify the 'primary' driver for the search:

- Service of an FPO – included search events where the person was served an FPO and searched on the same day.
- Investigation – included search events where investigation was a driver, except those where the driver was also the service of an FPO.
- Intelligence – included search events where intelligence was a driver, except those where investigation was also a driver, or the driver was service of an FPO.
- Interaction – included search events where interaction was the only driver.

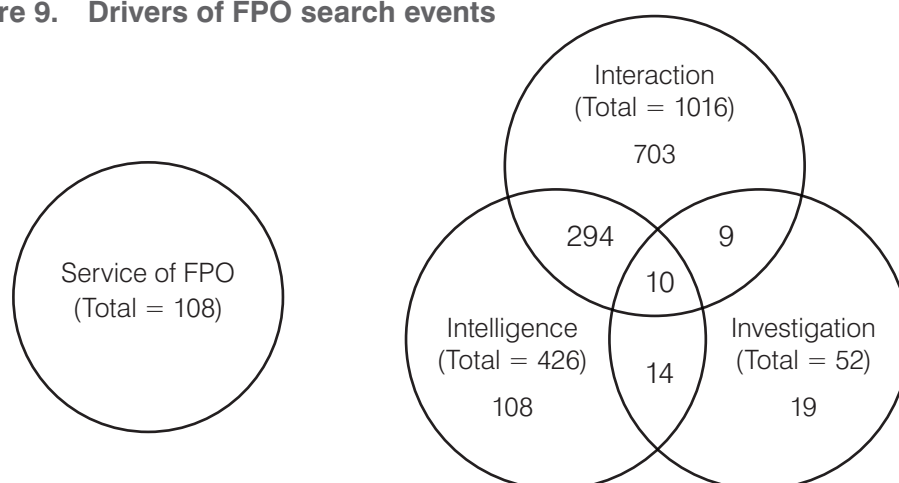
### 6.4 Overview of the drivers of the FPO search events

We were able to identify a driver for all but 78 of the FPO search events conducted in the first 22 months the powers were in operation. We were not able to establish the driver for these 78 search events because there was no written narrative for the search event, or the written narrative prepared by police shed no light on the reasons for the search.

As figure 9 shows, the most common driver for a search was a by-chance interaction with police, with interaction being one of the drivers in three-quarters of the 1,343 search events (n=1,016).

The most common scenario was where interaction was the only driver (n=703). The second most common scenario was where there were two drivers – intelligence and interaction (n=294 or 22%). Investigation was one of the least common reasons for search, making up less than 4% of the events (n=52). We also found 108 search events which occurred upon service of an FPO (comprising 8%).

**Figure 9. Drivers of FPO search events**



**Source:** NSW Police Force – Analysis of COPS event narratives (1 November 2013 to 31 August 2015). Total no. of FPO search events where we could identify a driver = 1,265 (1,343 – 78).



## 6.5 Search upon service of an FPO

A search upon service of an FPO is a search event conducted immediately after the FPO subject has been served a copy of the FPO. This search may take place at the same location as the person was served, or at a different location. For example, in case study A below a person was stopped on the highway and served with an FPO, and then police conducted FPO searches of his residential premises located several streets away and work premises located several suburbs away.<sup>179</sup>

We found 8% of search events we audited were conducted upon service of an FPO (n=108). These events involved 65 person searches, 52 vehicle searches and 63 searches of premises.

Search events conducted upon service of an FPO resulted in the seizure of more illegally possessed or unlawful firearms and related items than any other driver for search.

We found that 9 of the 108 search events resulted in firearms being seized. These search events accounted for 15 of the 25 firearms seized during the 22-month period (60%). Another four search events resulted in the seizure of a firearms-related item.

Police told us that the service of an FPO provides police with an element of surprise, enabling police to search for and find firearms and related items that are in the person's possession before the person has an opportunity to hide, sell or dispose of them. The NSW Police's Force's submission to our issues paper explained:

Firearm Prohibition Orders give police the power they need to effectively prevent serious violent crime when there is insufficient information to rely on other legislation. Given that the powers were introduced by the legislature **in addition** to existing powers that are able to be exercised by way of search warrant or by other means, the clear intention was to provide police with a tool to prevent imminent violent crime which was not otherwise available.<sup>180</sup>

In 74 of the 108 events, police records indicate that they determined a search was 'reasonably required' on the basis of intelligence (n=58) or in the course of an investigation (n=16).

Over one-third of the 173 premises searches conducted in the 12 months we were able to review were conducted upon service.<sup>181</sup> In these cases, the reason for search was not the FPO itself. Rather, the information used to support the approval of the FPO was also the information relevant to the decision to conduct the FPO search immediately upon service.

Operational police told us that it is not uncommon for them to make an urgent application for an FPO in order to respond to an immediate concern that a person has a firearm in their possession. In these circumstances, they consider that a search upon service is 'reasonably required' due to the currency of that information and the perceived risk to community safety. One police manager provided the following example:

Last Friday night we did an urgent application for an FPO and a serve and search. **We didn't have enough [evidence or information] for search warrant, but the FPO was necessary** – if [we] had to wait 28 day period, would not have been able to search for firearm, but we had credible information that he had access to a firearm. The search didn't find anything, but still.<sup>182</sup> [emphasis added]

See case study 1 for an example of a case where police formed the view that it was reasonably required to search the FPO subject immediately upon service.

179. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

180. NSW Police Force, Submission to *NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 3.

181. This was the second most common scenario for premises searches (n = 63), after intelligence (n = 93).

182. Consultation with the Director of the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015, para. 63.

### Case Study 1.

Police issued an FPO against 'Maurice' on the basis of information reports received by police in the previous 12 months that he was involved in the manufacture of firearms and the supply of illicit drugs. Maurice worked for a metal fabrication business.

Early one morning, police stopped Maurice travelling in his vehicle, served him with a Firearms prohibition order and explained its conditions. Police then searched Maurice as well as his vehicle, seizing his house keys, mobile phone and a metallic rod. As Maurice was not under arrest, police informed him that he was free to leave. He was also informed that police would be conducting a search of his home.

Upon entering Maurice's home, police saw what they suspected to be illicit drugs and drug paraphernalia on a coffee table. Police immediately suspended the search and obtained a search warrant. A search warrant was granted and police continued the search under the search warrant authority. Police found a number of items, including:

- an air rifle
- parts of a homemade sub-machine gun
- a 9mm pistol magazine
- a container of .177 calibre hunting pellets
- two books on manufacturing homemade sub-machine guns
- photographs of Maurice with firearms.

Once the search of Maurice's home was complete, police attended his workplace to conduct a search under the FPO search powers. Police searched the office of the business, a workspace used by Maurice and a room adjacent to the office. Police found:

- a .45 calibre pistol
- a Gamo brand rifle
- 12 rounds of mixed calibre ammunition
- a digital camera and laptop computer containing images of an assembled homemade firearm, that appeared to be made of the parts found in Maurice's home.

Police secured the premises and applied for a search warrant to seize the pistol, ammunition and other items. The next morning, police attended Maurice's work and placed him under arrest.

Police charged Maurice with manufacturing the homemade sub-machine gun and possessing the firearms and related items. At the time of writing, these charges were yet to be finalised by the court.

#### 6.5.1. Person's right to request a review of the decision to make an FPO

During our court observation work, we followed proceedings in the case of *R v Tabikh*.<sup>183</sup> This was an unsuccessful prosecution of an FPO subject for possession of ammunition discovered during an FPO search conducted immediately following service of the FPO. The case raised a practical issue concerning the admission of evidence seized in searches conducted on service.

Once a person is served with an FPO, they have 28 days to request that the NSW Police Force review the decision to make the FPO.<sup>184</sup> FPO searches can be lawfully conducted even if such a request is made, because the *Administrative Decisions Review Act 1997* specifically allows an administrative

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

184. *Firearms Act 1996*, ss 75(1)(f), 75(1A) and 75(1B) and *Administrative Decisions Review Act 1997*, ss 53 and 55.



decision to take effect regardless of whether there is an application for a review.<sup>185</sup> An FPO comes into effect when it is served on the person against whom it is made,<sup>186</sup> which means police can lawfully conduct a search immediately.

The issue is whether searches conducted during that 28-day period are appropriate. In *R v Tabikh*, police had served an FPO and then, shortly afterwards, searched the FPO subject's premises, where they found ammunition. The Magistrate refused to allow the ammunition to be admitted into evidence, expressing the view that the evidence was improperly obtained because it was unfair to conduct the FPO search within the 28-day review period.<sup>187</sup> As a result, both charges were dismissed.

While Local Court decisions do not set a binding precedent, there remains a risk for prosecutors that defendants may challenge the admission of evidence obtained from a search conducted upon service of an FPO.

In its response to our issues paper, the NSW Police Force expressed the following view:

Service of a FPO on a person and the immediate search of the person, their vehicle and their premises are lawful searches and there are circumstances that dictate that such a search is necessary to suppress conflict. In view of *R v Tabikh*, there is an argument for making this expressly clear in legislation.

In other circumstances, upon being served the FPO, it is usual practice that police give the person the opportunity to immediately surrender any firearms or ammunition he/she lawfully possesses. If surrendered, the person should not be charged with possessing the items because in the short time between the service of the order and surrender of the items the person did not have any opportunity to, and could not, comply with the law.

If the person denies they have any firearms or does not immediately surrender the lawful firearms which are in their possession and an immediate search of the person, their vehicle or premises reveals the possession of any firearm in contravention of the firearms prohibition order or any unauthorised firearms, they can and should be charged. The presentation of that evidence would not be unfair ...

The intent of the legislation would be thwarted if police were forced to wait for a period of 28 days before conducting a FPO search.<sup>188</sup>

Submissions to this review offered a range of opinions on whether FPO searches should be conducted within the 28-day review period. Some expressed the view that 'this practice yet again undermines the right of the person to seek a review ... There should at least be a 28-day period for the subject to seek out a review or have an opportunity to appeal the FPO decision before police act'.<sup>189</sup> Others argued that search upon service is appropriate, but only if certain guidelines are introduced to 'prevent oppressive use of the search power'.<sup>190</sup>

In our view, in providing that the FPO search powers come into effect upon service of the FPO, Parliament's clear intention was that police should be permitted to search straight away. The police practice of giving the person an opportunity to immediately surrender any firearms or ammunition

185. *Administrative Decisions Review Act 1997*, s 60. This means, for example, if a license to operate a business is revoked, a person may go out of business while waiting for their application for review of the revocation decision to be heard. Even if they win their case, a licence may no longer be of use to them. See Fiona McKenzie, *Administrative Power and the Law: a succinct guide to administrative law*, Australian Law in Practice, 2006, p. 86.

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

187. *R v Tabikh* (unreported, Liverpool Local Court, Magistrate Clisdell, 23 June 2014), pp. 6-7. In making this decision, the Magistrate relied upon *Ridgeway v The Queen* (1995) 184 CLR 19; [1995] HCA 66, para. 22 and, in the alternative, section 138 of the *Evidence Act 1995*. It appears that a court may consider the issue of fairness when exercising their discretion under section 138 of the Evidence Act: see *R v Helmhout* [2001] NSWCCA 372 at 11.

188. NSW Police Force, Submission to NSW Ombudsman regarding Police Use of FPO Search Powers, 14 September 2015, p. 2.

189. Family friend of an FPO subject, Submission to NSW Ombudsman regarding Police Use of FPO Search Powers, 9 September 2015, p. 3.

190. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, Submission to NSW Ombudsman regarding Police Use of FPO Search Powers, 31 August 2015, p. 5.

lawfully in their possession to avoid any subsequent charges, appears to appropriately ensure that the law does not operate unfairly. However, this is not a legal requirement. We therefore recommend that an appropriate change to the law be made to firstly, require police to give an FPO subject an opportunity to surrender firearms or ammunition lawfully in their possession, if they intend to search immediately upon service of the FPO, and secondly, to make it clear that it is lawful for police to conduct a search immediately upon service of the relevant FPO.

## Recommendations

1. The Minister for Police and Justice should propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require that police who serve a firearms prohibition order and then immediately conduct a search using the powers under section 74A of that Act, give the person an opportunity to immediately surrender any firearms or ammunition lawfully in their possession.
2. The Minister for Police and Justice should propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to make it clear that it is lawful to conduct a search under section 74A of that Act immediately following the service of the relevant firearms prohibition order.

## 6.6 Search in the course of an investigation

We considered that an FPO search event was driven by investigation if it occurred as a result of police making inquiries about an incident reported to police, or conducting an active investigation of a suspected crime.

We found that 4% of search events (n=52) arose from information that was obtained in the course of an investigation. These events involved 49 person searches, 19 vehicle searches and 14 searches of premises.

It is not surprising that investigation was the least common primary driver for an FPO search. In circumstances where police have investigative reasons to search, there are range of other search powers police may draw upon.<sup>191</sup> However, operational police told us that there are circumstances in which they may form the view that an FPO search is reasonably required in the course of an investigation and they do not have the level of specific information required to meet the reasonable belief or suspicion threshold for a search warrant (to search premises) or to conduct a person search without a warrant (if they are in a public place).<sup>192</sup>

Consistent with this advice, our audit of the FPO search event narratives where investigation was the primary driver found that most of these searches were conducted in circumstances where police had something less than a reasonable belief or suspicion that a particular person had a firearm or related item in their possession, at a particular place and time, but wanted to take preventative action to look for those items.

191. For example, if police reasonably believe that a person has a firearm or related item, they can apply for a search warrant to search premises: *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s 47. If the person is in a public place, police can search them without a warrant provided they have a reasonable suspicion that a person has a firearm or related item: LEPRA, s 21.

192. Consultation with the North West Metropolitan Region, North West Metro Region, 18 June 2015, para. 5; Consultation with the Forward Commander of Operation Talon, 3 June 2015, para. 6; Consultation with the Central Metropolitan Region, Central Metro Ops St George and Kings Cross, 9 June 2015, para. 14.

Following are some examples of scenarios that arose:

- Police investigating death threats made towards an FPO subject were concerned that the FPO subject may arm himself to commit a retaliatory act against the person/s that made the threat. Police attended the FPO subject's premises and conducted a search of his person, vehicle and premises.<sup>193</sup>
- Police investigating a serious assault used CCTV to identify two possible offenders. After recognising one of the people on the CCTV as an FPO subject, police conducted an FPO search of their residential premises to search for firearms in case the conflict that gave rise to the assault escalated further.<sup>194</sup>
- Police were investigating allegations that an FPO subject and his companion had committed an intimidation offence at a local hotel. The FPO subject was alleged to have threatened to shoot security staff, while his companion allegedly produced a firearm. A couple of hours after the alleged threats, police conducted a search of the FPO subject's premises.<sup>195</sup>
- Police investigating ongoing conflict between two groups became aware that threats had been made earlier that afternoon which indicated an escalation in the conflict was imminent. Police also identified a number of photos of the FPO subject holding a firearm, on the social media site Facebook. Police conducted an FPO search of the FPO subject's premises.<sup>196</sup>
- Police investigating the shooting of an FPO subject conducted a search of the subject's premises, because 'there is reasonable cause to believe that [the FPO subject] or parties close to him would be armed with firearms or other prohibited weapons for self defence or retaliatory purposes'.<sup>197</sup>

Police managers told us that although the FPO search powers gave them another tool, they considered that a search warrant provided the soundest ground for a search of premises. They told us that, in circumstances where there is sufficient information to obtain a warrant to search premises, they instructed their staff to do so.<sup>198</sup> One police manager said:

I think it is excellent for disrupting criminal behaviour and preventing criminal behaviour. Therefore it's important for police to maintain the integrity of FPOs and how they're used. In particular police need to manage risk and consider when is it appropriate to search – shouldn't be used as a proxy for warrant; therefore reasonably required is really important.<sup>199</sup>

Police told us that the FPO premises search power does not provide them with a 'short-cut' to circumvent the search warrant system.<sup>200</sup> This is because police are required to follow the search warrant and uninvited entry standard operating procedures.<sup>201</sup> One police manager said:

Police don't go overboard with premises. The SOPs require that a police officer consult with a senior officer. There needs to be enough to go and search not just ad hoc. If case officer has enough information they need to conduct a risk appreciation.<sup>202</sup>

193. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

194. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

195. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

196. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

197. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

198. Consultation with the North West Metropolitan Region, North West Metro Region, 18 June 2015, para. 3; Consultation with the Central Metropolitan Region, Central Metro Ops St George and Kings Cross, 9 June 2015, para. 20; Consultation with the Director of the Organised Crime Directorate, 11 April 2015.

199. Consultation with the North West Metropolitan Region, North West Metro Region, 18 June 2015, para. 3.

200. Consultation with the LAC- Northern Region, Tweed Byron LAC, 1 October 2015, para. 23.

201. NSW Police Force, *Overarching Policy and Procedures for Search Warrants and Other 'Uninvited Entry and Search' Operations*, September 2014, v. 1, pp. 2, 5. There is one exception, relating to the requirement to make a video-record of the search, an issue discussed in section 7.8 of chapter 7.

202. Consultation with the Central Metropolitan Region, Central Metro Ops St George and Kings Cross, 9 June 2015, para. 17.

As a result of this policy decision, police who wish to search premises under the FPO search powers are required to prepare a risk assessment and operational orders which must be checked by a supervisor, recommended by an officer at a rank of Inspector or above, and approved by an officer holding the rank of Superintendent or equivalent.<sup>203</sup> If the premises police intend to search is located in another LAC, police must also consult with that other LAC.<sup>204</sup> The requirement to follow these existing policies means there is a high level of supervision over the exercise of the FPO premises search powers.

## 6.7 Search on the basis of intelligence

We considered FPO search events to be driven by intelligence if they took place as a result of police recording that they had considered intelligence or information either about the people present, and/or about the premises, vehicle or place they were attending.

In the course of their duties, police receive a lot of information from a range of sources. The source may or may not be reliable. The information itself may or may not be true, relevant or complete. The intelligence process is the analytical process used to determine meaning and relevance of information within its context. It facilitates the identification and exclusion of poor information, and the development of inferences.

We found that in 30% of the FPO search events we examined (n=402)<sup>205</sup> the primary driver was intelligence. These events involved 402 person searches, 262 vehicle searches and 93 searches of premises.

In almost three-quarters of these 402 search events (n=294) interaction was also a driver. This was the second most common scenario that we identified (see figure 9 earlier in this chapter). We discuss these events in more detail below in section 6.7.1.

In the remaining quarter of the 402 search events, the events were driven solely on the basis of intelligence (n=108). The vast majority of these search events involved a search of premises, or a search of a person located on premises at the time of the search (95%, n=103).<sup>206</sup> Consistent with this finding, in consultations police told us that there are circumstances in which, on the basis of intelligence, they form the view that a search of premises is 'reasonably required' but the information is not sufficient to reach the threshold of 'reasonable suspicion' required to obtain a search warrant.<sup>207</sup>

Our audit of the FPO search event narratives found the following examples of scenarios where intelligence was the sole driver:

- Police received information that an FPO subject may be in possession of a pistol, likely to be located in the bedroom of a family home. Police attended the home and conducted an FPO search.<sup>208</sup>

203. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, (modified October 2015), pp. 5-7.

204. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, (modified October 2015), p. 7. If the other LAC seeks to prevent the execution of the search warrant, approval must be given by a Region Commander.

205. As figure 9 in section 6.4 shows, intelligence was one of the drivers in 426 search events, but in 24 of those events investigation was another driver. According to our method, those 24 events were categorised as having investigation as their primary driver. This leaves 402 events where intelligence was the primary driver.

206. Note we are unable to report on premises searches conducted in the first 10 months of the review. We estimate from our manual review of police narratives that most of these searches of people on premises also coincided with an FPO premises search.

207. Consultation with the Forward Commander of Operation Talon, 3 June 2015, para. 6; Consultation with the Central Metropolitan Region, Central Metro Ops St George and Kings Cross, 9 June 2015, para. 14; Consultation with the North West Metropolitan Region, North West Metro Region, 18 June 2015, para. 5.

208. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

- Police received information from more than one informant that a group of men were congregating around two motor vehicles in front of a house, and that one of the men was in possession of a firearm. The informants identified the vehicles through their licence plate number, colour and make. Police conducted a brief period of surveillance on the vehicles. A short time later both vehicles drove away from the house. Police stopped both vehicles and conducted searches of the vehicles exercising reasonable suspicion search powers under LEPR. No firearms were located. Police then conducted enquiries on the vehicles and their occupants. As a result of these enquiries, police established that one of the men was subject to an FPO and resided at the house where the vehicle had been parked. Police then conducted a search of the FPO subject's house.<sup>209</sup>
- Police received information that an FPO subject, who was on parole, and had previously been convicted of firearms manufacturing offences, 'may be contemplating making firearms again for profit'. The FPO subject was working at premises which contained tools that might assist in the manufacture of firearms, such as lathes and milling machines. Police conducted a search of the FPO subject's workplace and home.<sup>210</sup>
- Police received information 'suggesting a boat now present [at an FPO subject's property] contained two firearms – a handgun and a rifle.' Police conducted a search of the property, however there was no boat on the property. Police returned to the property two months later to conduct an FPO search. This time, the boat was on the property and police were able to search it.<sup>211</sup>
- Police received information that members of a particular OMCG had begun to arm themselves in preparation for a conflict with another organised criminal group. Police conducted a search of a home shared by two members of the OMCG who were FPO subjects.<sup>212</sup>
- Police attached to a pro-active crime team received reports that an FPO subject 'was in possession of a firearm and was seen to be waving this around in public'. Police records of the event state that '[a]lthough unable to be confirmed, several reports of a similar nature suggested the information to be credible.' Six days later, police stopped a vehicle where the FPO subject was a passenger. Police searched the FPO subject, but exercised their discretion not to search the vehicle he was travelling in. While conducting the search, police informed the FPO subject that they intended to conduct a search of his premises. The FPO subject requested to be present for that search. Some 15 minutes later, police attended the FPO subject's premises and spent 50 minutes conducting a search.<sup>213</sup>
- Police in a coastal town arrested an FPO subject for supplying and possessing drugs. At the time of his arrest, the FPO subject was residing in Sydney and on parole for convictions relating to supplying drugs and possessing a pistol. Some weeks later, as a consequence of the fresh drug supply and possession charges, the FPO subject's parole was revoked and he was taken into custody by police in Sydney. As the FPO subject had previously had a firearm when supplying drugs '[d]etectives had a reasonable belief that [FPO subject] may be in possession of a newly acquired firearm'. A day after the FPO subject was taken into custody for breaching parole, police conducted an FPO search of his premises.<sup>214</sup>

209. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

210. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

211. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

212. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

213. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

214. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.



### 6.7.1. Searches driven as a result of an interaction supported by intelligence

Over three-quarters of the 294 search events where both interaction and intelligence were a driver, involved the stop and search of a vehicle (n=230). The FPO search event narratives indicated that these vehicle stops occurred in two sorts of situations:

1. After police observed the person driving with expired registration, or driving in an erratic manner, or when police stopped the vehicle for the purpose of conducting a random breath test. Once the vehicle was stopped, police accessed information about the person, or vehicle, through the COPS warning system.
2. Where police identified the vehicle as a vehicle of interest connected to an FPO subject, either by sight because the person was known to police, or through the use of an Automatic Number Plate Recognition (ANPR) device,<sup>215</sup> which informed police that the person or vehicle had current warnings.

A COPS warning may relate to a person, organisation, location or vehicle, and is intended to quickly provide police with information that they should know in order to be able to preserve their own safety and that of others.<sup>216</sup> Police are encouraged to use warnings to record all relevant information relating to a person's violence toward police, and the person's access to firearms or other weapons. A warning can be general or specific. For example, a general warning might be that a person has a 'level of resistance' or 'may carry weapon', whereas a specific warning will provide more specific information, such as 'may carry firearm in [vehicle registration number]'. What a warning is about, how specific it is, and how it is articulated will affect the level of weight a searching officer pays to it.

There are also other variables that may influence the way police interpret the relevance of a warning when forming the decision to search, including:

- the national environment, including the National Terrorism Public Alert Level, and the Terrorism Threat Level for Australian Police Services
- the corporate or command environment, including policing operations aimed at achieving specific policing objectives or targeting particular types of crime and 'keep on the lookout for' (KLO4) instructions
- the immediate environment, including the location and time of day
- the specific interaction, including the manner in which the person responds when they notice the police and/or communicates with them.

In considering warnings in this context, police may also consider other information already known to them, including:

- information about the person, place or vehicle, and
- knowledge acquired through training and professional experience about potential indicators of criminal conduct.<sup>217</sup>

All of these considerations may influence the level of weight a searching officer gives to the intelligence available to them, and their view of the likelihood that the person they are interacting with is carrying a firearm or related item.

215. 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 current warnings.

216. Client Services & Practice Management, NSW Police Force, *Computerised Operational Policing System User Guide v. 2.1*, September 2010, p. 21.

217. See *Azar v DPP* [2014] NSWSC 132 at 38.

Our audit of FPO search event narratives found the following examples of scenarios where both interaction and intelligence were drivers of the search:

- '[P]olice were patrolling the vicinity of [suburb] due to a recent public place shooting incident. At this time police observed the [FPO subject] having a conversation with another male on the side of [the street]. Police observed the [FPO subject's vehicle] parked a short distance away. The [FPO subject] has an extensive criminal history and is currently on parole for a shooting incident. He is also subject to a firearms prohibition order. Police approached the [FPO subject]. He was informed police intended on utilising legislation under the firearms prohibition act to search both his person and his vehicle.'<sup>218</sup>
- Police observed a vehicle driving on a main road with flashing headlights and a sounding horn. Police stopped the vehicle for the purpose of conducting a breath test. Checks on the driver's licence showed that the driver had 'a firearms prohibition order in his name, as well as numerous intel [intelligence] for possessing a firearm and drug possession and supply'. Police then conducted a search of the driver and the vehicle under the FPO search powers. The passengers in the vehicle were also subject to warnings relating to prohibited drugs. Police searched the passengers, exercising reasonable suspicion powers provided under LEPRA.<sup>219</sup>
- Police observed a vehicle fail to stop at a red light. Police stopped the vehicle and conducted checks of the driver. As a result of these checks, police were informed that the driver was subject to an FPO, and had current warnings related to the possession of ammunition and drug supply. The police narrative recorded that the search was '[b]ased on the existence of the firearms prohibition order, the manner of driving of the [FPO subject], and previous history on both the [FPO subject] and the [vehicle]'.<sup>220</sup>
- 'Police were patrolling [location]. During this time, Police observed [a car] travelling North bound. As the vehicle passed the Police vehicle, the onboard ANPR displayed a warning from the previous day that it [the vehicle] may contain a POI [person of interest] who has 2 outstanding warrants. Police subsequently stopped the [vehicle], approaching the driver, stating name, rank and station in accordance with LEPRA. Police asked [the driver] to produce his driver's licence, to which he produced a current driver's licence. Given the intelligence relating to the possible outstanding offender, Police obtained details of the 2 passengers. Police conducted checks on all 3 [people] which revealed they were all well known to Police for a number of matters, with [one of the passengers] being on a current Firearms prohibition order. Given all the circumstances, Police believed the [people] may be in the possession of a weapon or dangerous article'.<sup>221</sup>
- Police in a vehicle conducting patrols at 2am on a Monday, saw a vehicle. 'Police conducted enquiries and were informed of warnings and intelligence for drugs and OMCG related matters. Police pulled the vehicle over and spoke to the driver. Police noticed that [a person] was seated in the front passenger seat and obtained his details. Checks were conducted of the two [people]. [The driver] was not known adversely by Police. [The passenger] was extremely well known for OMCG, drugs, firearm offences and was served with a Firearm Protection Order [sic]. Considering the adverse history of [the passenger] and the fact an FPO was served on him Police carried out a search of [the passenger, the driver and] the vehicle'.<sup>222</sup>

218. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

219. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

220. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

221. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report. Police searched the FPO subject using the FPO search power. Police used s 21 LEPRA powers to search the other two occupants of the vehicle who were not subject to an FPO.

222. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

Through our review we identified an issue related to the duration of warnings issued on COPS. In reviewing the information that police may consider when forming the view a search was reasonably required, we found a number of examples of warnings that had expiry dates in excess of five years, some that had expiry dates in excess of 90 years,<sup>223</sup> and others that had no expiry date at all.<sup>224</sup>

In the course of this review we were contacted by a person who was served with an FPO during the review period. He expressed concern regarding the potential impact on his employment of searches informed by 'warning' information facilitated through the use of the ANPR device. He told us that he had been convicted of a firearms-related offence almost 10 years prior to the service of the FPO. 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.<sup>225</sup>

In particular, the FPO subject told us he was concerned that this warning may relate strictly to his conviction for an offence that took place more than 10 years ago, and the fact that he was subject to an FPO which never expires.<sup>226</sup>

We asked the current Commander of Operation Talon about the way the warnings system worked. He told us that the NSW Police Force was currently working to improve the currency of warning information.<sup>227</sup> He also said 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.<sup>228</sup>

In order for a warning to assist police form the view that a search is 'reasonably required', the information upon which the decision is based should be current and relevant. We support the work of the NSW Police Force to address issues related to the currency of the warning information through the review of warning expiry dates.

## 6.8 Search after by-chance interaction

We considered searches driven as a result of a by-chance interaction to include circumstances in which police make the decision to search after encountering a person in the course of their duties. Such an interaction may arise when police are conducting routine patrols of public places, including roads. As shown in figure 9 earlier in this chapter, we found that three-quarters of the 1,343 search events came about as a result of a by-chance interaction with police (n=1,016). In some of these interactions, police made the decision to search:

- to support an investigation (19 search events, see figure 9 earlier in this chapter) or
- in response to intelligence (294 search events, see section 6.7.1 earlier in this chapter).

223. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

224. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

225. Telephone conversation with FPO subject no. 1, 10 December 2014.

226. Telephone conversation with FPO subject no. 1, 10 December 2014.

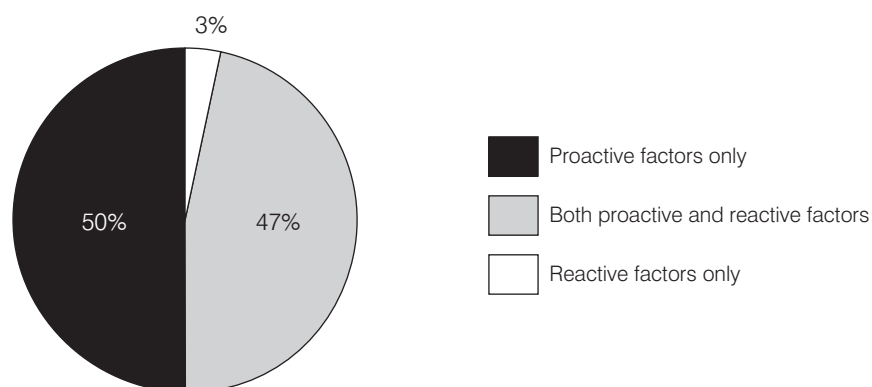
227. Consultation with the Director of the Organised Crime Directorate and the Real Time Intelligence Centre, 16 March 2016, para. 61.

228. Consultation with the Director of the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015, p. 5 at para. 25.



For the 703 search events where interaction was the sole driver, we looked at police records to identify the number of searches where police based their decision to search on reactive factors and the number where the decision was based on pro-active factors.<sup>229</sup> We found that police considered only pro-active factors in 326 search events, both pro-active and reactive factors in 307 events, and only reactive factors in 23 events. See figure 10. A more detailed explanation of these factors was provided in section 6.2 of this chapter.

**Figure 10. Factors considered during search events where interaction was the sole driver**



**Source:** NSW Police Force – Analysis of COPS event narratives (1 November 2013 to 31 August 2015), n=703.

#### 6.8.1. Interaction-driven searches where there were reactive factors

As figure 10 shows, in half of the search events where interaction was the sole driver, police considered reactive factors in deciding to search (n=330). They conducted searches in response to circumstances where the people involved behaved in a suspicious manner, fled at the sight of police, or said something to arouse police suspicion or concern. We found the following examples of searches of this kind:

- '[FPO subject] was seen yelling at passersby, 'you know what I done brah?' Police stopped him due to aggression and [FPO subject] stated quite loudly (Yelling) that he had been previously jailed for firearm, kidnapping and firing firearms at persons. The [FPO subject] yelled it loud enough for a number of persons to turn and hear what the [FPO subject] was saying. Due to the aggression of the [FPO subject], he was searched.'<sup>230</sup>
- 'The vehicle then appeared to turn left in a harsh manner, Police conducted a u-turn and caught up to the vehicle at the intersection of [street names and suburb]. Police spoke to the driver ... who was also the owner of the vehicle. He was subjected to a breath test which returned a negative result for alcohol. Whilst speaking to the driver, Police observed [passenger] and [FPO subject] who was well known to them in regards to firearms offences, drugs and assaults. Police were also aware that [FPO subject] has a current firearms prohibition order which was served upon him. Police informed all the occupants they would be searched as well as their vehicle.'<sup>231</sup>
- 'As the [FPO subject] approached the breath-testing site he turned right down [street name] suddenly and without indicating in a blatant attempt to avoid the breath-testing site. Police gave chase and stopped [FPO subject] a short distance down the road. As Officers approached the vehicle they observed [FPO subject] to be the driver and sole occupant of the vehicle. [FPO

229. We were unable to determine the factors for search in 47 of the 703 search events.

230. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

231. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

subject] was required to produce his licence ... Checks conducted revealed he was subject of a current firearms prohibition order which had been served on him. The [FPO subject] was questioned as to whether he had anything unlawfully in his possession. The [FPO subject] stated "look I'll tell you there is one thing, I have a baton in the back. I found it last week at a job and I've kept it." A search was performed of [FPO subject] and his vehicle...<sup>232</sup>

- 'Police attended the [street] in relation to a separate job and observed the [FPO subject] standing in the street staring at police next to the vehicle. The [FPO subject] continually walked backwards and forwards to the vehicle. Police conducted a check on the vehicle which had links to the [FPO subject]. Police approached the [FPO subject] and observed him as the Owner and a current [FPO subject]. Police conducted a search of the [FPO subject] and vehicle.'<sup>233</sup>
- '[FPO subject] tried to drive past [a stationary random breath testing station] ... [His] story ... changed several times about his licence being expired, suspended and the whereabouts of it ... Police became suspicious of the [FPO subject] and conducted a check. The check revealed that the [FPO subject] had a firearms prohibition order, due to this and the intel and the suspicious story telling of the [FPO subject], police conducted a search of the [FPO subject] and the [vehicle]'.<sup>234</sup>

### 6.8.2. FPO as a sufficient reason for search

To establish how many searches were conducted solely because the person was subject to an FPO, we first identified the number of the 703 search events (where interaction was the sole driver) in which police recorded only pro-active (and not reactive) factors as a reason for the search. We found that half of the search events met this criterion (n=326), and almost all of these search events involved at least one FPO subject (n=319).

In order to determine whether or not the FPO was the only thing considered by police when making the decision to search, we reviewed the 'warning' information about the FPO subjects involved in these search events, as at the date of each search. We did this to see if there were any relevant warnings that police may have considered when making the decision to search. We reviewed the 319 search events that involved at least one FPO subject.<sup>235</sup>

We are not able to determine whether police actually considered any such warning when making the decision to search. In addition, it was outside the scope of our research to look at the currency and accuracy of the warning information itself.

Our analysis looked for warnings related to the FPO subject:

- having access to firearms, or being 'armed' where the weapon type was not clear
- being involved in a conflict between organised criminal groups, or
- being involved in drug supply or trafficking networks.

We considered these warnings to be directly relevant to a searching police officer's assessment as to the risk that a person may be carrying a firearm or related item, because police told us that a person's involvement in conflict between organised criminal groups or drug trafficking is a potential indicator of firearms carriage.

232. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

233. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

234. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

235. There were 258 FPO subjects involved in these events. In some of the search events there was more than one FPO subject present.

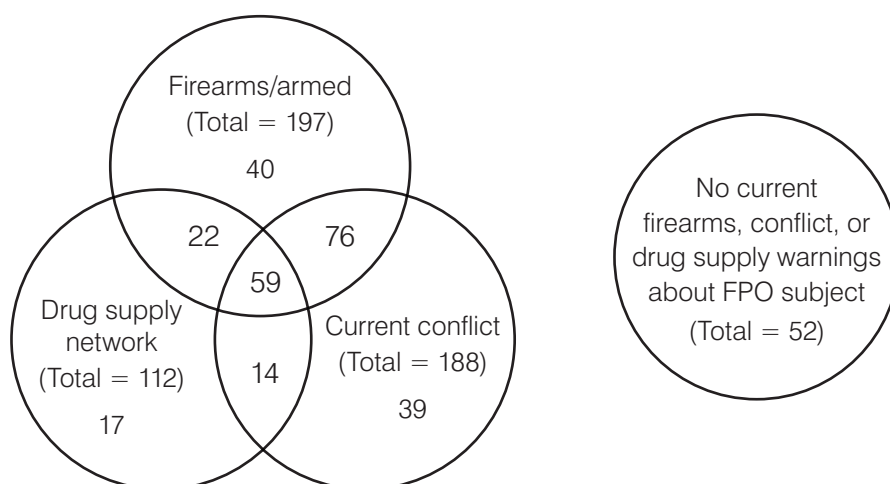
This view is supported by the Australian Institute of Criminology, which found that the illegal firearms market in Australia is:

... dominated by a collection of criminal gangs (OMCGs are frequently nominated) in which illicit firearm trafficking is run as a side business to the primary criminal venture (eg the drugs market) and small networks or individual operators, such as corrupt licensed dealers, who move illicit firearms around by word of mouth.<sup>236</sup>

In addition, the NSW Bureau of Crime Statistics found that, although firearms offences are not exclusively linked with the trade of illegal drugs, increases in firearms offences appear to be most pronounced in areas where drug trafficking is a problem.<sup>237</sup>

We found that police had relevant warning information available to them in a total of 267 search events. As figure 11 shows, in 197 search events, the search involved an FPO subject about whom there was a current firearms warning, or a warning that they may be armed (62%). There were also a number of search events where there were multiple warnings about the FPO subject's involvement in drugs, current conflict between organised criminal groups, or both.

**Figure 11. Current warning information for proactive, interaction-driven search events involving an FPO subject**



**Source:** Police Integrity Commission - PODS (1 November 2013 to 31 August 2015). Total number of interaction-driven search events where the factors considered were proactive = 319.

As figure 11 shows, we identified 52 search events, that were driven by interaction, where only proactive factors were recorded by police, and there was an FPO subject involved who had no current warnings for firearms, conflict or drug supply. As a result, it appears to us that these 52 search events were conducted simply because the person was subject to an FPO.

We also identified 182 search events in which the record made by police indicated that the FPO was the reason for the search. This included 42 of the 52 search events described above. The following excerpts of narratives made by police illustrate how this was expressed:

- 'This check also revealed that [FPO subject] was previously served a firearms prohibition order. As a result of this order police have certain powers to search persons and vehicles without the need for reasonable cause.'<sup>238</sup>

236. Samantha Bricknell, *Characteristics and dynamics of firearm trafficking*, Research and Public Policy Series, Research Paper number 116, 2012.

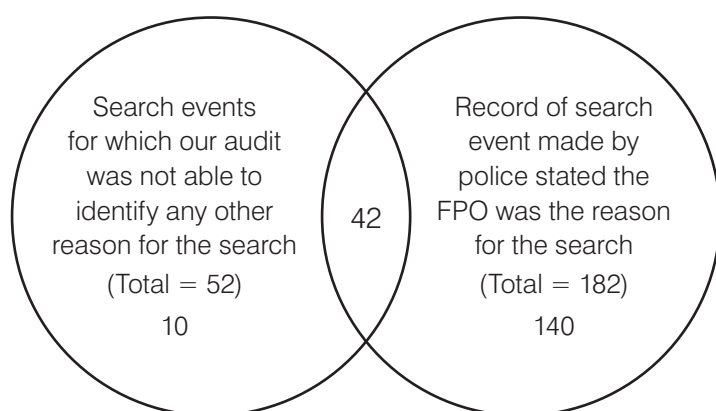
237. Jacqueline Fitzgerald, Suzanne Briscole and Don Weatherburn, *Firearms and violent crime in New South Wales*, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice, Number 57, NSW Bureau of Crime Statistics and Research, Sydney, May 2001, 2001.

238. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

- 'Police drove past the [FPO subject's] address and observed the [FPO subject] standing outside his home. Knowing that the [FPO subject] is subject to a firearms prohibition order Police stopped and subjected him to a search under the provisions of the firearms prohibition order.'<sup>239</sup>
- 'The [vehicle] was waved into the RBT bay. Police introduced themselves and submitted the driver [FPO subject] to a breath test with negative result. Police checks on [FPO subject] showed he was recently served a firearms prohibition order. As a result, Police searched the [FPO subject] and the [vehicle].'<sup>240</sup>
- 'Police stopped the vehicle for the purpose of a random breath test. Police conducted checks and found the passenger was the subject of a FPO. Due to this, Police searched the vehicle.'<sup>241</sup>
- '[Person is the] subject of a Firearms prohibition order. Due to this reason Police conducted a search of the [FPO subject].'<sup>242</sup>

We found that in 140 of these search events there was relevant warning information about an FPO subject available to police that they may have considered in deciding that an FPO search was, in fact, reasonably required. However, the records do not indicate whether that warning information was, in fact, taken into account. See figure 12.

**Figure 12. The 192 search events in which police appear to have considered FPO as sufficient reason for search to be 'reasonably required'**



**Source:** NSW Police Force – Analysis of COPS event narratives (1 November 2013 to 31 August 2015), Police Integrity Commission – PODS (1 November 2013 to 31 August 2015), n = 192.

As figure 12 shows, in a total of 192 search events, it appears that police understood 'reasonably required' to mean that the fact that a person was the subject of an FPO was a sufficient basis to search. These 192 events constitute 14% of the 1,343 search events conducted in the first 22 months of the review period.

Interpreting 'reasonably required' to mean that the fact that a person is subject to an FPO is a sufficient ground, in itself, to exercise the FPO search powers, is not consistent with the advice from the Crown Solicitor's Office. In our view, the FPO search powers should only be exercised if there is another reason, apart from the fact that the person is subject to an FPO.

We are of the view that the law should be clarified to make this clear, and discuss this further in section 6.10.

239. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

240. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

241. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

242. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

We consulted with police managers about the searches driven as a result of by-chance interaction. They told us that the information available to police in these circumstances 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. They explained that the fact that the person is subject to an FPO may heighten the searching officer's concern that the person is carrying a firearm.<sup>243</sup>

It is understandable that, when the FPO search powers were first introduced, a large proportion of the FPOs had been served recently, and therefore the information used to support the making of the FPO may have been current and may have been considered by police when forming the view that an FPO search was 'reasonably required'.

However, because an FPO warning exists for the life of the FPO, and the FPO does not expire, the information on which an FPO is made may not be current at the time of the search. As a result, an FPO warning should not be interpreted as a warning about the person's risk of possessing a firearm, but rather a notification of police powers to search that person.

We consider that a separate firearms warning is the appropriate way to communicate the current risk that an FPO subject possesses a firearm. Such a warning should be based on relevant and current information and be attributed with an expiry date appropriate for the information that supports it.

## 6.9 Did the police's interpretation of 'reasonably required' lead to unreasonably frequent or repeat searches of FPO subjects?

As discussed earlier in this chapter, a key concern about providing police with the power to search without a warrant was the potential that police could use the powers to conduct frequent or repeat searches that were not justified.<sup>244</sup>

Our audit of the FPO search event narratives and COPS data explored whether this concern had been realised during the first 22 months of use.

We identified FPO search events in which FPO subjects expressed frustration about what they perceived as repeat or frequent searches. The following excerpts of police narratives provide some examples:

- '... the [vehicle] was directly in front of the Police vehicle, Police have conducted checks on the [Mobile Data Terminal], which reveal that the driver of this vehicle is subject to a firearm prohibition order. Subsequently Police pulled the vehicle over, the driver immediately became defensive and said words similar to "yeah I know it's about the FPO, just search me and the cars let's do it quickly."'<sup>245</sup>
- 'Police questioned [FPO subject] about why he was driving the [vehicle] ... rather than his own to which he stated "Because you blokes are always stopping and searching me for no reason!"'<sup>246</sup>
- '[The FPO subject] stated "Let's get out and get searched boys, we know the drill, we are easy clients don't worry you won't get trouble from us." Police observed all four [people] exit the vehicle and empty out their pockets.'<sup>247</sup>

243. Consultation with the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015, para. 36.

244. For example, see David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

245. This person was involved in 18 events during the review period. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

246. This person was involved in nine search events during the review period. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

247. This person was involved in three search events during the review period. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

- Police told the FPO subject, 'that due to the current FPO served on the POI [person of interest] that Police may search on the suspicion he has a firearm in his possession. The POI [person of interest] wasn't happy about this and questioned Police powers stating he was challenging the FPO.'<sup>248</sup>

We reviewed the number of times a person was searched during the 22 months. We found that many people were searched only once (61%) or twice (13%). As table 3 shows, 27 people were subject to 10 or more search events, and six were searched 20 or more times.

**Table 3. Number of search events to which people were subject**

Number of search events	Frequency of unique people	Cumulative frequency of unique people
25+	1	1
20-24	5	6
15-19	3	9
10-14	18	27
5-9	75	102
<5	532	634
<b>Total</b>	<b>634</b>	

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

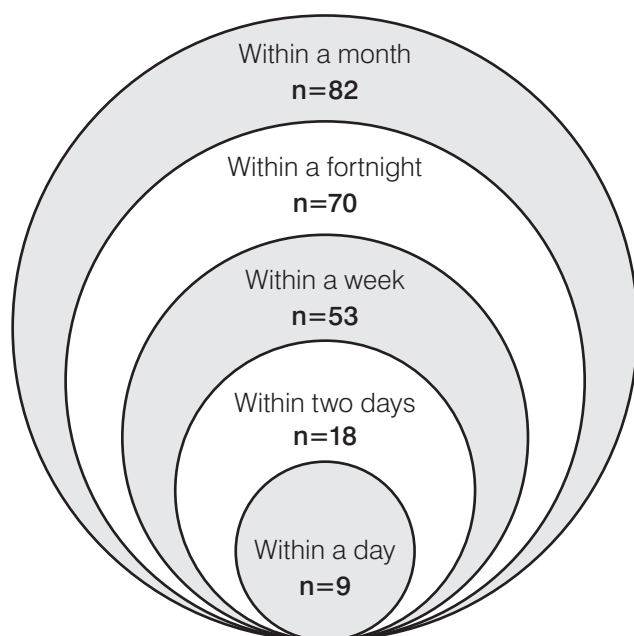
In our view, there is a higher risk of repeat and unreasonable searches in circumstances where the search event is driven solely as a result of interaction. This may be, in part, because once police find out a person is the subject of an FPO, they may be more likely to recognise the person if they encounter the person again. We therefore looked more closely at the frequency of FPO search events driven by interaction. We found nine people who had been searched more than once within the same day,<sup>249</sup> and another nine who were subject to more than one search event in two consecutive days (see figure 13).

We then reviewed the circumstances that gave rise to the search events of these 18 people, and all current 'warning' information related to the people, premises or vehicles at the time of search. For all but one of these people, we reached the view that police had considered some other relevant information to form the view that a search was 'reasonably required'. Case study 2 provides details about multiple searches of a man where we had concerns about the basis for some of the search events.

248. This person was involved in eight search events during the review period. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

249. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.



**Figure 13. Frequency of search (for search events driven by interaction)**

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

We found no evidence that frequent and repeat searching was a systemic problem, and no evidence to indicate that police had exercised the FPO search powers in a manner that was deliberately ‘unreasonable, unjust, oppressive or otherwise abusive’.<sup>250</sup>

Overall, the people subject to repeat or frequent searches on the basis of interaction were typically searched by different police, sometimes from different police units. The search events were conducted in different locations, although some were in the same suburb, on a different street. However, case study B does demonstrate that there may be an increased risk of repeat or frequent searching of FPO subjects when searches are driven as a result of a by-chance interaction between police and the FPO subject. This may in part be due to a person becoming more ‘visible’ to police, once police become aware that they are an FPO subject.

### **Case Study 2. Frequent and repeat searches**

‘Alan’ is a 35 year old man who identifies as a Torres Strait Islander. Alan was served with an FPO in February 2014 on the basis of his previous criminal offences, in particular convictions in 2012 for assault occasioning actual bodily harm and larceny.

Alan had a history with firearms. As a 16 year old he was found guilty of committing an armed robbery with an imitation firearm. Alan had no other firearms-related offence history and at the time of writing police had no record of any information which indicated that Alan had a firearm or intended to obtain one.

Alan had a history of possession and use of illicit drugs and restricted substances. Police had no information which might indicate that Alan was dealing, trafficking or supplying illicit drugs or restricted substances. Nor did they have information that he had criminal associations, other than associating with other drug users.

250. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

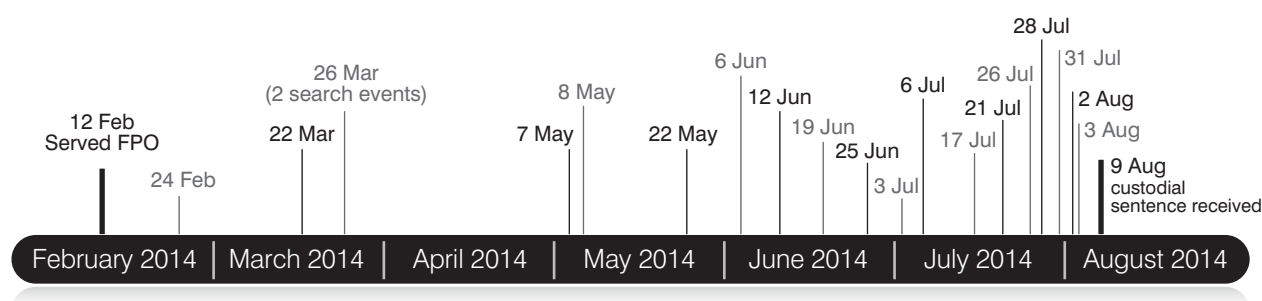
Over a seven month period, Alan was searched 20 times, each time as a result of a by-chance interaction with police.<sup>251</sup> Nearly half of these interactions occurred after police observed Alan 'loitering' or 'begging' at or near a busy railway station.<sup>252</sup>

We also observed that, as time went on, there was an increase in the frequency of searches where FPO was the 'sole reason' for search.<sup>253</sup> No firearms or other illicit items were found as a result of these FPO searches.

As can be seen from the figure below, police searched Alan twice<sup>254</sup> one day in March 2014, on consecutive days in May, and then almost once a week between May and the end of July, with three more searches in the first week of August.<sup>255</sup>

In August 2014, Alan received a custodial sentence. He was released from custody in mid-2015 and has not been searched under the FPO search powers since.

#### Timeline of FPO search events of 'Alan'



## 6.10 Summary of findings about police interpretation of 'reasonably required' in practice

At the beginning of this chapter we discussed the need for clarity in relation to the meaning of 'reasonably required'. The purpose of our audit of the police records of the 1,343 FPO search events was to understand how police interpreted 'reasonably required' in practice during the first 22 months the powers were in operation. We make the following four key findings.

First, it appears that police are sometimes exercising the FPO search powers in circumstances where police had information to form a view that a search was reasonably required, but not sufficient evidence to meet a reasonable belief or reasonable suspicion threshold to obtain a warrant or conduct a search without warrant under LEPRA. This arose in events where an FPO search was conducted upon service, and events where investigation or intelligence was the primary driver for search. The threshold of 'reasonably required' enabled police to respond in circumstances where they may not have otherwise been able to search.

Second, we found that the practice of searching the FPO subject upon service appeared to be the most fruitful for detecting firearms, compared to searches conducted after that time. Sixty percent of

251. We previously reported Alan had been searched 21 times during the seven-month period: NSW Ombudsman, *Review of police use of Firearms prohibition order search powers: Issues Paper: Section 74A of the Firearms Act 1996*, July 2015, pp. 17-18. Police appear to have created two records for one incident which was previously counted as two separate searches.

252. 9 of the 20 searches occurred after police observed Alan 'loitering' or 'begging'. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

253. Police refer to the FPO as being the reason for the search once during the first 10 searches and three times during the second 10 searches. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

254. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

255. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.



all the firearms found during the 22-month period were found during the 108 search events that took place at the time of service.

Third, we found that three-quarters of search events came about as a result of a by-chance interaction between police and the search subjects. Although the encounters were by chance, our analysis of the search event narratives found police may have considered other information to support the decision that a search was reasonably required, apart from the existence of an FPO. We found police may have considered:

- information obtained in the course of an investigation (19 search events, see figure 9<sup>256</sup>).
- intelligence about the person, vehicle or place (294 search events, see section 6.7.1).
- something they had observed and were reacting to (330 search events, see section 6.8.1), or
- warning information about an FPO subject (267 search events, see section 6.8.2).

A limitation of this finding is that it was not within the scope of our review to look at the currency, reliability or accuracy of any intelligence or warning information on which police relied when making the decision to search.

Fourth, after excluding all other possible reasons for search, we found 52 search events where it appears that police formed the view that a search was 'reasonably required' solely because the person was an FPO subject. All of these search events came about as a result of a by-chance interaction, and police were not responding to information or a concern caused by the particular circumstances. In our view, searches conducted on this ground are inconsistent with the legal advice from the Crown Solicitor's Office about the scope of the search powers.

This is a relatively low number, representing 4% of all search events, indicating that in the majority of search events, police appeared to have some other justification for conducting the search.

However, the narrative written by police explicitly stated that the FPO search powers were being exercised on the basis that the person was the subject of an FPO in 42 of those 52 search events, as well as in an additional 140 search events (where our analysis revealed other possible reasons for search).

Taking these figures together, it appears to us that police formed the view that the fact that a person was the subject of an FPO was a sufficient basis to search in 14% of the 1,343 search events (n=192). That inference can reasonably be drawn from the contemporaneous records prepared by police.

Although we found no evidence that frequent or repeat searching was a systemic issue, we did find 27 people were searched in 10 or more search events as a result of a by-chance interaction with police.

## 6.11 Recommendation to clarify the law

It seems that Parliament intended the scope of the FPO search powers to be limited. Both the Crown Solicitor's Office and the NSW Police Force agree that the law should be interpreted as meaning that a search can only be conducted where 'reasonably required'.

Further, given the concerns of some stakeholders about the breadth of the powers and the consequential risks of unreasonable use, there is a public interest in limiting their scope.

Our finding that, in practice during the first 22 months, in 14% of the search events police formed the view that the fact that a person was the subject of an FPO was a sufficient basis to search, supports our view that the current ambiguity in the law should be clarified.

256. There were 9 search events where investigation and interaction were drivers, and another 10 events where investigation, interaction and intelligence were all drivers.

Clarification will ensure that police clearly understand that the FPO search powers are only to be exercised if there are circumstances, in addition to the existence of the FPO, that support the view that a search is reasonably required. The alternative practice is associated with the risk of unreasonable and arbitrary use.

In recommending legislative change, we are not suggesting any change to the threshold test. We recognise Parliament's intention to provide police with a lower threshold, and found that has been a useful tool enabling police to search in some circumstances where they previously could not.

Instead, we recommend that the legislation be clarified to make it beyond doubt that, consistent with the view of the Crown Solicitor's Office and the NSW Police Force, the 'reasonably required' provision serves as a threshold test when making the decision to search, as well as limiting the manner of search that can be conducted.

A change to the legislation would not restrict police from deciding, on a case-by-case basis, the circumstances in which a search is 'reasonably required'. However, we anticipate that such a change will enhance community confidence in police and their capacity to exercise the FPO search powers appropriately.

## Recommendation

3. **The Minister for Police and Justice should propose, for the consideration of the Parliament, an amendment to section 74A of the *Firearms Act 1996* to make it clear that a police officer can only exercise the search powers under that section *if* a search is reasonably required for the purposes of detecting an offence under section 74(1), (3) or (3).**

## Chapter 7. Issues relating to the effective and reasonable exercise of the search powers

In this chapter we discuss how police interpreted the limits of the FPO search powers, and the manner in which police conducted the FPO searches.

The chapter first discusses the 269 person searches of those not subject to an FPO conducted during the first 22 months of the review period. This kind of search was not authorised by the FPO search power. It appears that police recorded that they were FPO searches due to a misunderstanding about the scope of that power. See section 7.1.

Some members of Parliament raised concerns about the limits of the FPO search powers at the time they were introduced into Parliament for debate (discussed in section 1.3 of this report). In addition, the NSW Bar Association wrote to the Government explaining its concerns in this way:

The extraordinary scope of these powers is plainly apparent, as is the potential for abuse. There is no requirement that the police have some basis to suspect that the person does possess a firearm, a firearm part or ammunition. The police may simply hope to find evidence of other criminality during a search for firearms or ammunition. The police could search the person's home in the middle of the night, and do so repeatedly night after night for an indefinite period. A search of a house for firearms and ammunition might take hours or even days, as all parts of the house are thoroughly searched. If the person owns or manages a business, the premises of the business may be subjected to lengthy and repeated searches with obvious deleterious consequence for the business. Searching for ammunition would permit invasive body searches which might be repeated at regular intervals.<sup>257</sup>

To determine the extent to which concerns about arbitrary and unreasonable use of the FPO search powers were borne out, we examined the following issues:

- how police made their decision to search (discussed in chapter 6)
- the extent to which people were searched repeatedly (discussed in section 6.9 of chapter 6)
- the time of day at which searches were conducted (discussed in section 7.2 of this chapter)
- police interpretation of whether premises were under the 'control or management' of an FPO subject (discussed in section 7.3 of this chapter).

Part of our role is also to examine any unforeseen impacts of the implementation of the law, particularly on people who are not the subject of an FPO. We identified an issue relating to vehicles, parked on premises, that belong to people other than the FPO subject. This is discussed in section 7.4 of this chapter.

Concerns about the scope and impact of the new powers are magnified by the fact that FPOs do not expire. This is discussed in section 7.5 of this chapter.

Our review also identified the following practical implementation issues that impacted on the police use of the powers, and issues where legislative clarity may be required:

- the application to FPO person searches of legal safeguards that police ordinarily follow to maintain people's privacy and dignity during a person search (discussed in section 7.6 of this chapter)

257. Correspondence from NSW Bar Association to the Hon. Michael Gallacher MLC, the then Minister for Police and Emergency Services, dated 30 September 2013.

- the practices that police follow when communicating with occupiers of premises being searched (discussed in section 7.7 of this chapter)
- the police practice of making a video record of searches of premises (discussed in section 7.8 of this chapter)
- the powers police have to seize firearms, parts and ammunition when conducting an FPO search (discussed in section 7.9 of this chapter).

## 7.1 Searches of people not subject to an FPO

In the first 22 months of use of the new FPO search powers, 269 person searches were conducted on 233 people who were not subject to an FPO at the time of the search.<sup>258</sup> These were conducted as part of 197 search events. In 56 of those events, more than one person who was not subject to an FPO was person searched.

The FPO search powers do not give police the power to conduct person searches on people who are not FPO subjects. However, there may be circumstances where, in the process of conducting an FPO search, police have grounds to search a person who is not subject to an FPO. Police have other powers that they may be able to use in such situations. The powers available to police vary depending on whether the search is conducted in a public place or on private premises.<sup>259</sup>

The 269 person searches constituted 18% of the 1,486 person searches recorded (in a field in the COPS database) as having been conducted under the FPO person search power during the 22-month period. Concerned by this relatively high number, we reviewed the FPO search event narratives in order to establish the location of these searches and to see if there was another power that police could have exercised to conduct these searches.<sup>260</sup> We discuss the person searches conducted in a public place separately from those conducted on private premises.

### 7.1.1 Searching people not subject to an FPO in a public place

Of the 269 person searches, 9 were conducted on private premises and 260 were conducted in a public place. In half of the 260 searches, police did not record a narrative, or the narrative did not shed any light on which power police were exercising, other than classifying the search as an FPO search. We reviewed the remaining narratives to establish the circumstances in which those searches were conducted.

Police have a power to stop, search and detain any person in a public place, without a warrant, where they have a 'reasonable suspicion' that the person has in their possession a firearm.<sup>261</sup>

This means that police conducting an FPO search in a public place can search a person in the company of the FPO subject where they form a reasonable suspicion that the person has a firearm in their possession.

258. As reported in section 3.2 of chapter 3, we found that people not subject to an FPO had been the subject of 256 person searches. In this chapter we also discuss an additional 13 person searches, conducted on 10 people who were not the subject of an FPO at the time of the search, but were served with an FPO at a later time. This brings the total number of person searches on people not subject to an FPO (at the time of the search) to 269. In chapter 3, these 10 people are included in the count of 407 FPO subjects, and the 13 person searches of them conducted before they had been served with an FPO were included in the count of 1,230 person searches of those FPO subjects.

259. See section 2.2 in chapter 2 (Other police powers to search for firearms, firearm parts and ammunition).

260. Where a location for the search was not provided and an FPO premises search was not conducted in the same event, we classified the search as having been conducted in a public place.

261. *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s 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 any such firearm', 'an article or device, not being such 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.

We found that in around 20% of the 260 person searches (n=49), police recorded information which indicated that they may have formed a reasonable suspicion that the person had something unlawful in their possession. Police might have been able to use their other search powers in these cases.

However, for 30% of the searches (n=79), the narratives written by police demonstrate that they misunderstood the limits of the FPO person search power. The following excerpts from police narratives illustrate this misunderstanding:

- 'Police conducted checks on [an FPO subject] which revealed that he has current a FPO that has been served on him. As result police informed him and [his passenger, who was not subject to an FPO] that the intention to search them and the [vehicle] was going to take place. A short time the [vehicle] and both [people] were searched with nil find. During the time with police [the FPO subject] was hostile towards police. It appears the [passenger not subject to an FPO] had no idea about the FPO. She was advised that this will take place again if she in the company of [the FPO subject]'.<sup>262</sup>
- A car was parked on the side of the road at 5.00am. As police approached the car drove away. Police wrote '... police have asked the occupants in the [vehicle] whether any had been served with a firearms prohibition order to which [FPO subject] has replied yes. As a result of that, police have conducted a search of all persons in the vehicle and the [vehicle]'.<sup>263</sup>

This kind of misunderstanding typically occurred in the context of a vehicle stop, in which police searched an FPO subject, the vehicle they were travelling in, and all the other people in the vehicle.

We discussed this practice in our issues paper. The NSW Police Force has acknowledged that the FPO search powers do not provide police with the power to search all occupants of a vehicle, and said that these errors would ordinarily have been identified by a police supervisor.<sup>264</sup>

We also identified 13 search events in which police mistakenly considered that the person was subject to an FPO at time of the search, but they were not.<sup>265</sup> One of these was because the person searched had the same name, though it was spelt differently, as a current FPO subject.<sup>266</sup> This was the only instance of mistaken identity our audit identified.

We plotted the number of person search events of people who were not subject to an FPO as the review period progressed. As figure 14 shows, the number of search events has slightly increased over time.

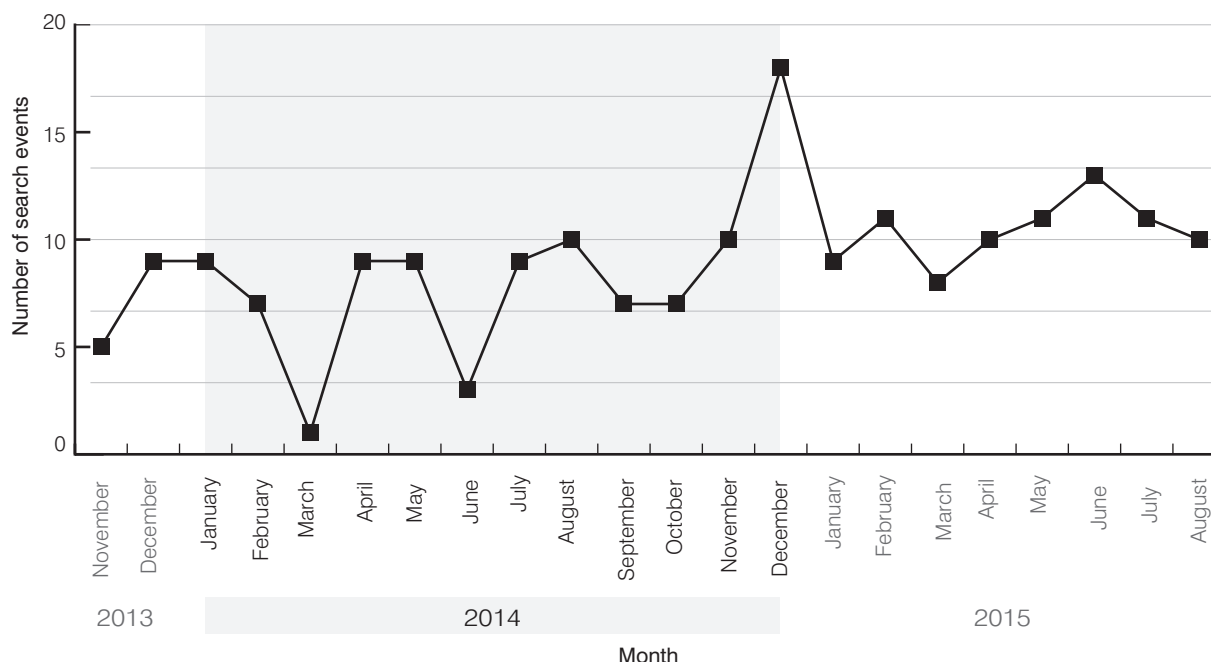
262. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

263. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

264. Consultation with the Director of the Organised Crime Directorate and the Real Time Intelligence Centre, 16 March 2016, para. 71.

265. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

266. These people had a date of birth seven years apart.

**Figure 14. Number of person search events of people who are not subject to an FPO**

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 August 2015).

#### 7.1.1.1. Concluding observations and recommendations

Search powers provide police with the lawful authority to touch a person, and encroach on their privacy, without the person's consent. Searching a person without lawful authority can constitute an assault. As such, it is critical that police have a clear understanding of the scope and limits of their powers to conduct a person search.

As a practical measure, it is important for police to make an accurate record of the power exercised. Good records can assist police to resist any challenge to the lawfulness of the search.

There appears to be a relatively high level of police misunderstanding about who can be person searched under the FPO search powers. As the number of person search events involving people not subject to an FPO has slightly increased over the review period, there is a real risk that this misunderstanding will continue.

We are of the view that there is a need for police to be reminded that:

- the FPO search powers do not authorise a person search of a person who is not the subject of an FPO, even if the person is in the company of an FPO subject or driving the FPO subject's car
- nevertheless, police have powers under LEPRA to conduct a person search in a public place if they form the requisite reasonable suspicion about a person who is not the subject of an FPO, and
- they should make an accurate record of any FPO or related search to indicate the power they have exercised in conducting the search.

## Recommendations

4. The NSW Police Force educate officers, through training materials or other communications, that the search powers in section 74A of the *Firearms Act 1996* do not authorise the person search of any person who is not the subject of a firearms prohibition order.
5. The NSW Police Force remind officers, through training materials or other communications, of the need to make accurate records of the power being exercised when conducting a search of a person who is subject to a firearms prohibition order or a person who is in his or her company.

### 7.1.2. Searching people not subject to an FPO on private premises

Of the 269 person searches of a person who was not subject to an FPO, 9 took place on private premises.

When police execute an ordinary search warrant they have an ancillary power to search any person on the premises for anything mentioned in the warrant, if they have a reasonable suspicion that the person has that item in their possession.<sup>267</sup>

There is no similar ancillary search power for police conducting an FPO premises search. The FPO search powers only enable police to search people subject to an FPO, and premises and vehicles controlled, occupied or managed by an FPO subject.

This may present a difficulty for police if a person, who is not the subject of an FPO, hides a firearm, firearm part or ammunition on their person in an effort to prevent police from finding the item at the premises.

We reviewed the written narrative prepared by police to establish the circumstances of the nine searches.

As discussed earlier in chapter 2, police have the power to search a person who is under arrest.<sup>268</sup> These powers are intended to ensure the safety of the person who is in custody as well as the safety of police. We found that one search of a person not subject to an FPO on private premises may have been lawful as the person was placed under arrest.<sup>269</sup> However, it was not clear from the narrative whether the person was arrested before or after the search.

We found one search where the record made by police indicates that police searched the person simply because they were present at the premises:

Whilst Police were at the location, the wife of the [FPO subject] ... returned to the unit, due to her being at the premises at the time of the FPO she was subsequently searched with nil find.<sup>270</sup>

There is some case law to suggest that, where police form the view that an action is reasonably necessary in order to protect a person from injury or death, and property from damage, police may be empowered to act.<sup>271</sup> This means that if police are concerned that a person who was not subject to an FPO had a firearm in their possession, police on premises could search that person, on the basis that a search was necessary because the presence of a firearm could be seen to present a real and immediate threat to safety. We found no evidence to indicate such a circumstance occurred in any of the searches of people not subject to an FPO.

267. LEPR, s 50.

268. LEPR, s 23.

269. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

270. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

271. *Police Act 1990*, s 6. *DPP v Araura* [2012] NSWSC 1120; *DPP v Gribble* [2004] NSWSC 926. This power has been used to restrain or move people but has not yet been tested with respect to conducting a person search. Police also have additional powers under the common law to take steps to prevent breaches of the peace: *Poidevin v Semaan* [2013] NSWCA 334.



The NSW Police Force are of the view that the absence of clear authority for police to search all people present at an FPO premises search may provide FPO subjects with an opportunity to circumvent the FPO search powers through the assistance of other people:

Certain (urgent) circumstances will dictate that police must undertake a search of a person not the subject of an FPO. To not do so would put police and the general community in danger, and effectively remove the original intent of the legislation, allowing FPO subjects to circumvent the s 74 search powers.<sup>272</sup>

To address this issue, the NSW Police Force suggested that the legislation:

could be amended by an express statement that a search under s 74A(2)(b) [FPO premises search] includes a search of any person ... on the premises but only if it is reasonably required to determine if the person subject of the FPO has committed a relevant offence.<sup>273</sup>

A number of submissions made to this review argued that the NSW Police Force should be provided with ancillary search powers in circumstances where police have formed a reasonable suspicion that a person has in his or her possession a firearm, firearm part or ammunition.<sup>274</sup>

Police require sufficient powers to support the execution of an FPO search in a manner that enables the identification of firearms, firearm parts and ammunition that may be on the premises. We consider that this balance is best achieved by giving police the same powers to search other people present at the premises as they would have when executing a search warrant.

## Recommendation

6. **The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to section 74A of the *Firearms Act 1996* to include a provision that empowers police executing a search under section 74A(2)(b) of the Act to search any person found in or on the premises whom police reasonably suspect has a firearm, firearm part or ammunition in their possession.**

## 7.2 The time of day at which the searches were conducted

An FPO search can be conducted at any time of day. 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, and
- deter an FPO subject from possessing firearms by creating a perception that they are, or could be, searched at any time.

In circumstances where the FPO subject, or their vehicle, is in a public place at night, the reasonableness of the time of day is not something that police generally need to consider.

However, a search of premises, particularly a person's home, does require police to consider the reasonableness of the time of day at which to conduct the search.

272. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 4.

273. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 4.

274. Enough is Enough, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, p. 7; Victims of Crime Assistance League (VOCAL), *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, p. 7; Gun Policy Org, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 16 August 2015.



Searches of premises at night usually require special justification. For example, if police would like to execute a search warrant to search premises at night, they must get permission from the person authorising the warrant.<sup>275</sup> Generally, this permission will only be provided 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 able to facilitate police entry without the use of force.<sup>276</sup>

We reviewed the time of day at which the FPO searches were conducted.<sup>277</sup> We found that 45% of all search events were conducted at night, between the hours of 9.00pm and 5.59am (n=608). However, we found that less than a quarter of the search events involving a premises search were conducted at night (21% of 172, n=36).

The NSW Police Force told us that there are circumstances in which an FPO search of premises at night may be 'reasonably required':

Data indicate the majority of conflict based shooting incidents occur during the hours of darkness. Often police receive intelligence that a conflict between parties is escalating and that violence (shootings) is planned. By its very nature this intelligence will often not meet the threshold for the application of a search warrant. However, the exercise of s 74A powers allows police to search premises at any time of the day or night to reasonably determine that there is no access to firearms in contravention of the Firearms Act that could be used to support the conflict.<sup>278</sup>

This view was echoed by operational 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.<sup>279</sup> We found that 8% (n=13) of search events involving a premises search were conducted between these hours.

Submissions to this review argued that the FPO search powers should be subject to the same limitations as a search conducted under warrant.<sup>280</sup> Others argued that police should at least be required to obtain permission from a senior officer before conducting an FPO premises search at night.<sup>281</sup>

In September 2014, the NSW Police Force made a policy decision to apply the Search Warrant Standard Operating Procedures (SOPs) to FPO premises searches. As a result of this decision, police planning an FPO premises search are required to obtain approval from at least three senior officers prior to conducting an FPO premises search. In providing this approval, one of the things that each senior officer must consider is the proposed time of execution. Police managers told us that in considering this issue their first and foremost concern is safety, both of the police conducting the search, and people present at the premises.<sup>282</sup>

275. Other than a covert search warrant – see LEPR, ss 72(1A) and 72(1).

276. LEPR, s 72.

277. This analysis was for all premises search events conducted between 1 September 2014 and 31 August 2015. Because we were not able to report on the premises searches conducted in the first 10 months of the review period, we limited our analysis to above period.

278. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 3.

279. Consultation with the Director of the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015, p. 11.

280. Gun Policy Org, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 16 August 2015, p. 2; Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 2.

281. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 6.

282. NSW Police Force, *Overarching Policy and Procedures for Search Warrants and Other 'Uninvited Entry and Search' Operations*, September 2014, v. 1; NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, modified October 2015, pp. 5-7.

We asked police if there were circumstances in which they might depart from the SOPs. Police told us that there could be circumstances in which they might form the view that an FPO premises search is reasonably required in order to respond to an immediate risk to public safety. In such circumstances, police are required to notify a senior officer that a premises search has taken place. The senior officer is then required to review the reason for the departure from SOPs.<sup>283</sup> We are satisfied that this level of oversight from senior police mitigates the risk of unreasonable searches at night.

### 7.3 How police determined that a thing was ‘occupied by’ or ‘under the control or management’ of an FPO subject

The FPO search powers allow police to search any premises ‘occupied by’ or ‘under the control or management of’ an FPO subject. However the Firearms Act does not define these terms.

We requested advice from the Crown Solicitor’s Office about 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:

I prefer the view that 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”...

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...

I think, 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 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. 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 the premises.<sup>284</sup>

We reviewed the FPO vehicle and premises search event narratives to see if there were circumstances in which an FPO subject’s level of control, occupation or management was in dispute.

We found that almost all of the FPO vehicle search events happened when an FPO subject was present in the vehicle (n=874 of 897). We have received no complaints challenging the level of occupation or control an FPO subject had over a vehicle that was searched.<sup>285</sup> This may be because where police had intelligence that a vehicle was linked to an FPO subject, police consistently reported checking the identification of the driver and its occupants before conducting a search.

Two thirds of the FPO premises search events were conducted in the presence of the FPO subject (n=117 of 172).

283. Consultation with Real Time Intelligence Centre, 19 February 2016.

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

285. From our analysis of COPS records, we identified whether or not an FPO subject was present during a search event if they were person searched, if they were in a vehicle during an FPO vehicle search, or if they are present during an FPO premises search.

Of the searches conducted in the absence of an FPO subject, one resulted in a dispute regarding the FPO subject's level of control, occupation or management of the premises. The registered owner of the premises (a commercial business), argued that, as the business was registered to another person, it should not be searched under the FPO search powers. However, as there was clear evidence the FPO subject attended the premises to give directions to employees, police formed the view that the FPO subject had a level of control over premises.<sup>286</sup>

Through our audit, we also identified some examples of circumstances where police exercised their discretion and decided not to conduct a planned FPO search when, upon arrival, they received new information which satisfied them that the FPO subject no longer controlled, occupied or managed the premises. For example:

- Police had information that an FPO subject was residing at a house, however upon arrival police were told by the occupant that the FPO subject no longer lived there. Police, 'after a short investigation revealed [the FPO subject] does not reside at the premises', decided not to search the premises.<sup>287</sup>
- Police attended a house to serve a man with an FPO. The man was not present at the house, but police were greeted by his relative who stated that the FPO subject 'no longer lived at the address and had not been seen or heard from for a period of two months'. Police were satisfied that the FPO subject did not live at the house and decided not to search the premises.<sup>288</sup>
- Police attended what they believed was the residence of the FPO subject for the purpose of conducting a search of the premises. On arrival, the mother of the FPO subject told police that the FPO subject 'was now living in Queensland'. Police decided not to search the premises because '[t]he POI was not seen at the premises'.<sup>289</sup>

However, our audit of FPO search event narratives identified a range of circumstances in which it was open to debate whether it was appropriate to search certain places or things, depending on how the terms 'control', 'occupy' and 'manage' are interpreted. For example:

- A man was served an FPO at his mother's residence.<sup>290</sup> Four months later, police attended the same address in order to conduct an FPO search of the premises. When police arrived, the FPO subject's mother and a number of siblings were at the house. After being invited into the premises, police enquired as to the whereabouts of the FPO subject. The FPO subject's brother told police that the FPO subject 'slept at his dad's residence' in another suburb. Police then conducted a search of the house, a vehicle which belonged to the FPO subject's brother, and also searched all the people present at the house at the time of the search. Police found nothing illicit and no items were seized.<sup>291</sup>
- Police searched the home of an FPO subject, who was known to be a member of an OMCG. At that time of the search, the FPO subject was in custody, and awaiting sentence for drug and bail offences. Police made the decision to search the home on the basis of information that one of the FPO subject's OMCG associates was 'possibly staying at the location'. The associate was present at the premises while police conducted the search. Police found nothing of interest.<sup>292</sup>

286. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

287. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

288. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

289. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

290. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

291. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

292. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

- Police attended the parent's house of an FPO subject to conduct a search based on information that the FPO subject 'sometimes stays at the residence'. On arrival, they were granted entry to the house by the father who allowed police to conduct a search. The search took approximately an hour. Police found nothing of interest.<sup>293</sup>
- Police searched two separate houses at the same address. The FPO subject resided in one of the houses. His brother lived in the other house. When police arrived to conduct the FPO search, the FPO subject was overseas on his honeymoon. His brother was in the backyard with his wife and child. Police conducted an FPO search of the FPO subject's house. Police then also searched the brother's house. The police record stated that the search was 'due to the occupant ... being the subject of a Firearms prohibition order'. Police found nothing in the FPO subject's house. They found a small amount of steroid in the brother's house. The brother was subsequently charged with being in possession of a prohibited drug. He pleaded guilty and was ordered to pay a small fine.

In its submission to our issues paper, the NSW Police Force provided us with its views on the meaning of control, occupy and manage:

It is the NSW Police Force view that the meaning of occupied when used in connection with a vehicle, vessel or aircraft means physically present in. This is the natural meaning of the term ... The Crown Solicitor has attributed a meaning that requires an element of control. This is not what is intended by the legislator when used in connection to a vehicle, vessel or aircraft because the element of control is specifically provided as a separate basis for connecting the person to the premises. If the Crown Solicitor is correct, *occupy* and *control* have the same meaning. That interpretation cannot be accepted as otherwise the word *occupy* when used in s 74A has no work to do. It has no meaning.

*Occupy* does have a different meaning when used in connection to premises. In domestic violence legislation the term *occupier* is used to describe a person who is a resident in a house. It does not include a visitor ... A person merely present on premises is rarely regarded as occupying the premises. Something more is required in this context of premises. In the NSW Police Force view it contemplates a use of the premises. That use can be long or short term but is more than mere visitation...

*Control* means the person is able to exercise physical influence over a vehicle or premises. Management can be achieved through other persons. *Management* means the person makes decisions in respect of the use of the vehicle, vessel, aircraft or premises.

Interpreted in this way, each word has its natural meaning ... This interpretation supports the legislative intention to permit a search to be conducted at a place that a person who is the subject of a FPO order would hide a firearm, part or ammunition.<sup>294</sup>

We asked operational police whether they thought the definition of 'control' proposed by the Crown Solicitor would work in an operational context. They told us that there are circumstances in which a person may have sufficient control over premises to directly exclude strangers without resorting to physical force but may not have any 'real' control over the premises. For example, a person nominated for membership of an OMCG (known as a 'nom'), may be responsible for controlling access to the OMCG's clubhouse, but is not yet a member and therefore not allowed to enter the clubhouse himself.<sup>295</sup>

Police told us that there are a range of techniques that they may employ in order to establish a person's connection to a place or thing, including obtaining information through telephone interception, listening and surveillance devices and covert human sources, as well as the development of intelligence products such as pattern-of-life analysis. Police may use one or more of these techniques to establish an FPO subject's connection to a place or thing.

293. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

294. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 5.

295. Consultation with the South West Metropolitan Regional Enforcement Squad, SWM Regional Enforcement Squad, 3 June 2015, p. 3, para. 17.

Police from State Crime Command told us they had observed that some FPO subjects, upon becoming aware of the FPO search powers, had made arrangements to store their firearms in places that they had less control over in an effort to evade detection. Police told us that in some circumstances this has resulted in 'tip-offs' or anonymous reports to police regarding the location of illicit firearms.<sup>296</sup> The power of police to search these places under the FPO search powers will depend on whether the FPO subject has sufficient 'control' over the premises.

Our audit of FPO search event narratives found the following examples of the different search powers used by police in order to conduct a search of premises, depending on the level of control police understood the FPO subject had over the premises:

- Police attended a house to serve a person with an FPO. The FPO subject was present at the house, but denied living at the premises, telling police 'I don't live here, I just come here for [sexual relations] every now and again'. Police initiated a search of the house, exercising the FPO premises search power. Upon finding drugs, police suspended the search, and obtained a search warrant. Police then continued to conduct the search under warrant and found more drugs, as well as numerous personal items belonging to the FPO subject. Police also found, in a vehicle parked in the front of the garage, a glock pistol, a magazine containing 17 rounds of ammunition as well as loose ammunition. Police charged the man with a number of offences.<sup>297</sup>
- While conducting an ongoing investigation of an organised criminal group, police obtained an FPO against one of group's core members. Two months later, police obtained a search warrant for the premises of a person described by police as a likely member of the criminal group.<sup>298</sup> The search under warrant resulted in police seizing a sawn-off semi-automatic shotgun. Subsequent forensic analysis found the FPO subject's DNA located on the trigger and handle of the shotgun.<sup>299</sup>

A submission to this review argued that:

... the Act should make clear that the mere fact that a person subject to an FPO is present at certain premises is not sufficient to constitute 'occupation'. A failure to do so would have the result of expanding the FPO premises search powers to an extent that could severely curtail the rights of persons who have little or no connection to a person subject to an FPO.<sup>300</sup>

The Crown Solicitor's Office and the NSW Police Force appear to agree that an FPO subject's mere presence would not be regarded as occupation.

Almost all of the submissions we received expressed concern regarding the ambiguity of these terms. For example, one submission expressed the view that:

The apparent ambiguity in the phrases 'occupied by' and 'under the control or management of' is concerning in light of the extraordinary powers to search premises and the lack of judicial consideration of the boundaries of these phrases.<sup>301</sup>

296. Consultation with the Real Time Intelligence Centre, 13 August 2015; Consultation with the Intelligence Directorate and the Firearms Squad, 23 June 2015.

297. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

298. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

299. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

300. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 10.

301. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 10.



Most submissions to this review suggested that the terms 'control', 'occupy' and 'manage' should be clearly defined. Some argued that the NSW Police Force should develop guidelines to assist police to determine whether the premises they wish to search is occupied, controlled or managed by the FPO subject.<sup>302</sup> Others argued for the development of guidelines by an agency other than the NSW Police Force.<sup>303</sup>

Given the diverse range of circumstances in which police may consider exercising the FPO search powers, we consider there would be little benefit in including a more specific definition of the terms in the legislation. Police will be guided in their use of the powers by any case law that might develop in relation to the meaning of these terms in the future.

Police need a degree of flexibility to determine what constitutes premises 'occupied by' or 'under the control or management' of an FPO subject to enable them to respond to changing circumstances. However, given the breadth of the FPO search powers, in particular the FPO premises search power, their exercise of this discretion must be appropriately supervised and scrutinised.

The NSW Police Force requires police who wish to conduct an FPO premises search to follow the search warrant and uninvited entry SOPs.<sup>304</sup> This decision has contributed to ensuring a high level of supervision over the exercise of the FPO premises searches.

Police who wish to conduct an FPO premises search are required to prepare operational orders and seek the approval of a supervisor, squad commander or crime manager, and a commissioned officer of the rank of Superintendent or above.<sup>305</sup> They are responsible for checking that the reasons for the search are sound and lawful, prior to authorising the search. In the case of an FPO premises search this includes ensuring that an FPO subject has a suitable level of control, occupation or management over premises for the exercise of the FPO search powers to be lawful. The intelligence products used to establish the FPO subject's connection or relationship to the premises are available to these supervisors.

## 7.4 Searches of vehicles parked on premises

During the first 22 months of the review period, 21% (n=36) of the FPO premises search events involved a search of a vehicle parked on premises at the time of the search.<sup>306</sup>

Police conducting a premises search under a search warrant are able to search not only a building, but also other structures on the grounds, because premises are defined as including 'any building, structure, vehicle, vessel or aircraft and any place, whether built on or not'.<sup>307</sup>

In contrast, the Firearms Act provides that 'premises includes any place, whether built on or not'.<sup>308</sup> This definition does not make clear whether vehicles and vessels located on or in the premises form part of the premises.

Where the FPO subject's level of control or management over the vehicle is not in question, police have a clear power to search it.<sup>309</sup> However, it is unclear whether police have the power to search a vehicle parked on the premises that is not clearly under the FPO subject's control or management. For example, it is not clear whether police could search a vehicle belonging to a person visiting the

302. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 9.

303. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 3.

304. NSW Police Force, *Overarching Policy and Procedures for Search Warrants and Other 'Uninvited Entry and Search' Operations*, 2014, v. 1.

305. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, p. 16.

306. A total of 41 vehicles were searched in these search events.

307. LEPRA, s 3(1).

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

309. *Firearms Act 1996*, s 74A(2)(c).

FPO subject's flatmate, who has no connection with the FPO subject, or a vehicle parked in the backyard that has no number plates.

In the course of this review we received a complaint drawing this ambiguity to our attention and we sought legal advice from the Crown Solicitor's Office.

The Crown Solicitor advised that there are two possible interpretations. One is that police can search a vehicle parked on premises because it falls within the definition of 'premises' occupied by or under the control of the FPO subject.

The other interpretation, which was preferred by the Crown Solicitor, is that the FPO premises search power does not authorise the search of vehicles located on or in premises. The Crown Solicitor advised us:

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.<sup>310</sup>

On this interpretation, police can only search a vehicle found on premises that they could establish was 'occupied by' or 'under the control or management of' an FPO subject.

We discussed this issue in our issues paper and in response, the NSW Police Force submitted as follows:

Vehicles should be considered to form part of premises for the purposes of the Act ... A vehicle parked in the driveway of a residence might be used by the FPO subject. Any restriction on premises searches is liable to result in FPO subjects circumventing the legislation through the ongoing use of vehicles owned by other persons.<sup>311</sup>

Other submissions to this review expressed concerns about police having the power to search all vehicles or vessels on premises under the FPO search powers. It was submitted that if the premises search powers were to be broadened in this way, guidelines would need to be developed and safeguards would have to be in place to ensure that the powers are not misused.<sup>312</sup> Others argued that expanding the FPO premises search powers 'could severely curtail the rights of persons who have little or no connection to a person subject to an FPO'.<sup>313</sup>

The powers were introduced to assist police to find firearms in the possession of FPO subjects. There may be circumstances where police form the view that it is reasonably required to search a vehicle parked on premises but the vehicle is not controlled or managed by an FPO subject. We are therefore of the view that police should have a clear power to do this.

We suggest that this issue should be resolved by amending the definition of premises in the Firearms Act.

## Recommendation

7. **The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the definition of 'premises' in section 74A of the *Firearms Act 1996* to enable police conducting a search of premises under that power to search those vehicles parked on premises as reasonably required.**

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

311. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 6, at item 11.

312. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 3.

313. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 10.

## 7.5 Expiry of search powers

An FPO never expires. This means that an FPO subject, and his or her home, workplace and vehicles, can be searched whenever a search is 'reasonably required' for the rest of their life.

In the course of this review we identified four people who were searched at least five years after service of the FPO.<sup>314</sup>

Although the Firearms Act gives the Commissioner a power to revoke an FPO,<sup>315</sup> neither the Act nor NSW Police Force policy establishes any process for the expiry or routine review of an FPO to ensure that the information on which the decision to issue the FPO was based is still current.

Police search powers usually have an expiration period. For example, police powers to search on the basis of a reasonable suspicion require that the search be conducted as quickly as reasonably practicable.<sup>316</sup> A warrant to search premises typically expires within 72 hours of being authorised.<sup>317</sup> If police want an extension of the warrant, they can apply to the authorising officer for an additional 72 hours.<sup>318</sup> The maximum time allowed for the expiry of a search warrant is six days.<sup>319</sup>

In response to our discussion of this issue in our issues paper, the NSW Police Force submitted as follows:

[T]he FPO regime, including the mechanism for making, reviewing and revoking orders, has been in place for a number of years, without incident. FPOs have previously been revoked following consideration of a request by a subject as a result of change in circumstances. A [FPO] subject continues to be able to apply for a revocation of their FPO and there is no reason to suggest future requests will be treated differently to those made in the past.

Furthermore, it does not follow that the length of a FPO makes the order any less cogent. Information may come to hand at any time during the existence of a FPO which could make the targeting of the subject of an FPO a necessity; impending armed conflict being one such reason. FPO searches should be undertaken when reasonably required.<sup>320</sup>

There was a diversity of opinion amongst operational police as to whether or not an FPO should expire. One view was that an FPO should stay in place for life:

[FPOs] should be like casino orders where they stay in place ...<sup>321</sup>

Other police expressed the view that some kind of process of review might be appropriate:

I suppose [FPO orders] should be subject to some revision. Like child protection orders – for a defined period.<sup>322</sup>

A time limit is not inappropriate.<sup>323</sup>

Staff at the NSW Police Force Firearms Registry expressed a view that a 10-year expiry period would be appropriate because the Firearms Act provides a general restriction on the issue of a firearms permit or licence for any person who has been convicted of a prescribed offence, or been subject to an apprehended violence order, for a period of 10 years.<sup>324</sup>

314. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

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

316. *LEPRA*, s 32(4)(b).

317. *LEPRA*, s 73(3). In some circumstances a warrant may exceed 72 hours: *LEPRA*, s 73(4).

318. *LEPRA*, s 73A.

319. *LEPRA*, s 73A(6)(a). A crime scene warrant may be extended to a maximum of 30 days: *LEPRA*, s 73A(7).

320. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 4.

321. Consultation with the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015.

322. Consultation with the Organised Crime Directorate and the Real Time Intelligence Centre, 23 June 2015, para 67.

323. Consultation with the South West Metropolitan Regional Enforcement Squad, 3 June 2015.

324. *Firearms Act 1996*, ss 11(5)(b), 11(5)(c), 29(3)(b) and 29(3)(c).



Some operational police told us that an expiry period of 10 years would be appropriate in part because a person's 'involvement in organised crime would in most cases exceed five years'.<sup>325</sup>

The majority of stakeholders who made submissions to this review expressed the view that an FPO should have some form of review or expiry period. Most argued that an FPO should expire and a mandatory finite period of time be instituted<sup>326</sup> and the time limit should be 'consistent with the level of risk to public safety' posed by the FPO subject.<sup>327</sup> Submissions proposed a range of time periods for expiry, including three,<sup>328</sup> four<sup>329</sup> or five<sup>330</sup> years from the date of service of the FPO. Others argued that an FPO should expire only if the reason for issuing it is no longer available.<sup>331</sup> Others proposed that an expiry system should include an option to extend if the reasons for issuing the FPO are still current.<sup>332</sup>

The following excerpts from submissions illustrate the diversity of opinions regarding the expiry or review of an FPO:

An FPO applies to the subject for life, along with the warrantless search powers. It isn't unreasonable to accept that people's circumstances change. FPOs do not recognise this, it makes the subject a criminal for life. A time limit must be enforced on FPOs, it is irresponsible and oppressive to expect anyone to live under an FPO for life, without any recourse, especially when they don't even have a criminal record.<sup>333</sup>

The effective loss of right to be free from unreasonable search that results from being subject to an FPO strongly suggests that an FPO should only remain in place whilst there is a sufficient basis.<sup>334</sup>

If the FPO subject has been imprisoned and they get a fixed term, they're supposed to be rehabilitated. Not supposed to be subject to intimidation from police, they can't just keep going after people. There should be mechanisms in place ... Maybe they should reconsider the FPO – maybe after three years...<sup>335</sup>

[I know] people who say they were members of OMCGs and are no longer. I'm thinking that three years is too short, especially if they spent some of that time in jail. But I don't disagree, there should be a sunset clause.<sup>336</sup>

[T]here should be a mandatory expiry date for all FPOs. There should be the ability to extend the FPO if the Commissioner was of the view that there remained a sufficient basis ...<sup>337</sup>

FPO's should have a finite 'life' and a clearly defined expiry date ... the expiry date and term of an FPO should be consistent with the level of risk to public safety posed by the individual FPO subject...<sup>338</sup>

A five year term of expiry for FPO's should be introduced. The current situation where a FPO does not expire is inconsistent with other principles of the justice system.<sup>339</sup>

325. Consultation with the Organised Crime Directorate and the Real Time Intelligence Centre, 16 March 2016, para. 102.

326. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 2; Family friend of an FPO subject, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 9 September 2015, p. 3; Enough is Enough, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, p. 6.

327. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 2.

328. Victims of Crime Assistance League (VOCAL), *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, pp. 5-6.

329. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 1.

330. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 2.

331. Shooters Union NSW, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 21 August 2015, p. 2.

332. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 7.

333. Family friend of an FPO subject, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 9 September 2015, p. 3.

334. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 7.

335. Victims of Crime Assistance League (VOCAL), *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, pp. 5-6.

336. Enough is Enough, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 25 August 2015, p. 6.

337. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 7.

338. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 2.

339. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 2.

The effective use of the FPO search powers depends on the currency of the information on which police base their decision to make an FPO, and the factors considered by police when determining that a search is 'reasonably required'.

We received submissions from FPO subjects about the impact of an FPO without an expiry date. We spoke with one FPO subject who received an FPO after a court had found that he had a firearm in his possession for the purposes of suicide. He told us his circumstances had since changed, and he was now receiving mental health treatment. He expressed concern that the imposition of the FPO would now prevent him from moving on from his past. He wrote:

This FPO hasn't been placed because anyone at all thinks I'm a risk of hurting people or because me having a firearm would lead to anyone in danger, this has been placed as a result of a mistake I made almost two years ago where I wanted to end my own life. Now because of this FPO, I will never be able to forget and move past this ...

This isn't a power which expires and it's going to hang over my life forever and over the lives of those around me ...

This FPO is a major concern for me, its ongoing negative effect is not going to wither as time goes on. It will cause me just as much angst and anxiety in 10 years as it will in 10 days ...

This is a form of punishment. I can understand its reason with repeat offenders... but with my case it's very hard to fathom it's the result of good will and protection of the community. There is no standard governing this process and at the moment its being used as an oppressive power to make me feel uncomfortable in the one place I should feel relaxed, at home.<sup>340</sup>

Another FPO subject expressed concern that once a person becomes subject to an FPO, there is no clear mechanism or means by which an FPO subject can demonstrate that they no longer pose a risk to the community:

... [T]hey require the applicant to prove that they are no threat to the community. I haven't yet found one person who can describe to me how this could be demonstrated, and I believe that if this is the case that their decisions are based on such things as this, than everyone in the community would most likely be placed on this order as it is impossible to give a guarantee of anyone's ability to offend.<sup>341</sup>

These submissions from FPO subjects illustrate the potential impact an FPO without an expiry date might have on people subject to an FPO.

The 'fit and proper' person test applied by the Commissioner when making the decision to make an FPO is the same test that the Commissioner applies when making the decision to issue a firearms licence. Currently, a firearms licence expires after a maximum of five years,<sup>342</sup> at which time the Commissioner must re-consider whether or not the person is a 'fit and proper' person to have possession of firearms 'without danger to public safety or to the peace'.<sup>343</sup>

As this test is the same test to make an FPO, we recommend that an FPO expire after a period of five years. At the time of expiry, the Commissioner may consider whether or not the person is a 'fit and proper' person and whether or not the public interest is served by continuing to prohibit them from holding a firearms licence and empowering police to search that person without a warrant. In our view this will increase public confidence that police will exercise the FPO search powers reasonably and fairly.

340. Email correspondence from FPO subject no. 2, 1 June 2015.

341. Email correspondence from FPO subject no. 1, 12 December 2014.

342. *Firearms Act 1996*, s 21(1). Currently the *Firearms Regulation 2006*, cl. 8, prescribes that an initial licence is in force for a period of two years only.

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

## Recommendation

8. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to provide that a firearms prohibition order issued under section 73(1) expires five years from the date it is served.

## 7.6 How police conducted the FPO person searches

Search powers provided to police are typically complemented by a range of legislative, policy and procedural safeguards.<sup>344</sup> The majority of searches that police undertake are conducted under powers that require police to adhere to safeguard provisions in LEPR.

LEPR prescribes three types of person searches. They are:

- A 'frisk search', which 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.<sup>345</sup>
- An 'ordinary search', which involves the search of the person or articles in their possession. This may include requiring the person to remove his or her jacket or similar article of clothing and any gloves, shoes, socks and hat they are wearing for examination.<sup>346</sup>
- A 'strip search', which 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).<sup>347</sup>

LEPR also prescribes the following rules to preserve a person's privacy and dignity during a search (in this report we refer to these provisions as 'privacy and dignity provisions'):

- police conducting the search must, as far as is reasonably practicable, be of the same sex as the person being searched<sup>348</sup>
- police must inform the person being searched whether he or she will be required to remove clothing, and why that is necessary<sup>349</sup>
- police must ask for the person's co-operation<sup>350</sup>
- police must conduct the search in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable<sup>351</sup>
- police must conduct the least invasive kind of search practicable in the circumstances<sup>352</sup>

344. The police powers to search people in relation to terrorism offences provide for the same three categories of person search as those provided in LEPR, and include the same safeguards: *Terrorism (Police Powers) Act 2002*, Schedule 1, cl. 5. Other legislation that gives person search powers typically specifies what a person search may involve and contains provisions aimed at preserving privacy and dignity during those searches. 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 (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); *Mental Health Act 2007*, s 81(4) and (6).

345. LEPR, ss 3(1) and 30(1).

346. LEPR, ss 3(1) and 30(1).

347. LEPR, ss 3(1) and 31. Strip searches 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': LEPR, s 31. The Act also contains a number of safeguards relating to strip searches: see ss 33-34.

348. LEPR, s 32(7).

349. LEPR, s 32(2).

350. LEPR, s 32(3).

351. LEPR, s 32(4).

352. LEPR, s 32(5).

- police must 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<sup>353</sup>
- police must 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<sup>354</sup>
- police must not conduct the search while the person is being questioned.<sup>355</sup>

LEPRA also prescribes additional safeguards that relate to the manner in which a strip search is conducted.<sup>356</sup> The search:

- must be conducted in a private area, and not conducted in the presence or view of a person who is of the opposite sex of the person being searched, or a person whose presence is not necessary for the purposes of the search<sup>357</sup>
- must not involve the search of a person's body cavities or an examination of the body by touch<sup>358</sup>
- must not involve the removal of more clothes<sup>359</sup> or more visual inspection<sup>360</sup> than is reasonably necessary
- can be conducted in the presence of a medical practitioner of the opposite sex,<sup>361</sup> or a parent, guardian or personal representative,<sup>362</sup> if the person has no objection to that person being present.

LEPRA contains specific provisions that preclude the strip search of children under the age of 10.<sup>363</sup> If the person is over 10 but under 18 years old, or if the person has impaired intellectual functioning, LEPRA also requires the presence of a person who is capable of representing the interests of the person being searched.<sup>364</sup>

### 7.6.1. Do the privacy and dignity provisions apply to FPO searches?

The privacy and dignity provisions are located in Part 4, Division 4 of LEPRA. We sought the views of the NSW Police Force as to whether these provisions applied when police were conducting person searches under the FPO search powers. The NSW Police Force advised that its interpretation of LEPRA is that the provisions contained in Part 4, Division 4 **do** apply to FPO person searches.<sup>365</sup> This is because LEPRA applies to the functions of police, unless expressly excluded.<sup>366</sup>

In our view there is some ambiguity around this interpretation of those provisions of LEPRA. Section 29 of that Act, which is contained in Part 4, Division 4, provides that:

This Division applies to any search of a person carried out, or authorised to be carried out, by a police officer ... under this Act ... except as otherwise provided by this Act or the regulations.<sup>367</sup>

353. LEPRA, s 32(6).

354. LEPRA, s 32(9)-(10).

355. LEPRA, s 32(8).

356. LEPRA, ss 33 and 34.

357. LEPRA, s 33(1)(a)-(c).

358. LEPRA, s 33(4).

359. LEPRA, s 33(5).

360. LEPRA, s 33(6).

361. LEPRA, s 33(7).

362. LEPRA, s 33(2).

363. LEPRA, s 34.

364. LEPRA, s 33(3).

365. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 4.

366. Section 5 of LEPRA deals with the relationship of LEPRA to other Acts. It refers to Schedule 1 of LEPRA, which contains a list of Acts which confer functions on police for which LEPRA does not limit the functions that police have under those Acts. The *Firearms Act 1996* is not listed in this Schedule.

367. LEPRA, s 29.

As the authority for FPO person searches comes from section 74A of the Firearms Act and not LEPR, it appears to us that, as a matter of statutory interpretation, there is some doubt as to whether or not the privacy and dignity provisions apply to searches conducted under the FPO person search power.

Submissions to this review that addressed issues associated with the conduct of a person search all expressed the view that FPO person searches should be subject to the same legislative safeguards as those conducted under LEPR.<sup>368</sup> We agree.

In our view it is important to make it clear, as a matter of law, that the privacy and dignity provisions apply to searches conducted under the FPO person search power. Resolving the ambiguity around the application of the privacy and dignity provisions to an FPO person search may address some practical implementation issues that we describe in the following section.

## Recommendation

9. **The Attorney General propose, for the consideration of Parliament, a legislative amendment to make clear that the legislative safeguards under Part 4, Division 4, of the *Law Enforcement (Powers and Responsibilities) Act 2002*, that relate to personal searches, be applied to person searches conducted under section 74A(2) of the *Firearms Act 1996*.**

### 7.6.2. Whether police applied the privacy and dignity provisions when conducting FPO person searches

During the first 22 months of the review period, police conducted a total of 1,486 person searches (in 1,183 search events) exercising the FPO person search powers. These searches were conducted on 559 people, 225 of whom were subject to a person search on more than one occasion.

Police managers told us that whether or not there was a legislative requirement, operational police would conduct searches in accordance with LEPR because of their training and experience.

We reviewed the FPO search event narratives in order to see if police had recorded that they adhered to the privacy and dignity provisions in LEPR. To do this we reviewed the 'search type' identifiers recorded by police in COPS and then checked these records against the FPO search event narratives.

We found that 84% of the person searches were ordinary or frisk searches (n=1,245).<sup>369</sup> There were only three strip searches recorded against the COPS 'strip' search type.<sup>370</sup> Police did not record a 'search type' for 16% of person searches conducted. We identified one more strip search, that was not recorded against the 'strip' search type category in COPS.<sup>371</sup> The other searches which were not allocated a 'search type' by police in COPS appeared, from our review of the FPO search event narrative, to be frisk or ordinary searches.

We also found police recorded that they had adhered to the privacy and dignity provisions in a quarter of the person searches conducted. For most FPO person searches police recorded a narrative (66%), but did not record whether or not they adhered to the privacy and dignity provisions. In the remaining 11% of searches, there was no narrative made by police that we could review.

368. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, pp. 2-3; The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 8.

369. This includes searches recorded by police under the search type categories 'general search', 'ordinary search' and 'frisk search'.

370. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

371. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

We are concerned that police did not record the type of person search conducted for 16% of person searches. These records are a key way in which police supervisors can supervise and manage search practices. We recommend that the NSW Police Force remind police of the need to make records of the nature and type of person searches they conduct under the FPO search powers.

## Recommendation

10. The NSW Police Force remind officers through training and practice notes to ensure the COPS record of a search event of a person search conducted under section 74A(2) of the *Firearms Act 1996* includes full details of the nature and type of any person search, in accordance with the person search categories in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

## 7.7 Communicating with people about a search of premises

FPO searches of premises have the potential to impact on other residents and occupiers of those premises. In some circumstances, both the FPO subject and other people may be present. In other circumstances, police may arrive to search but the FPO subject is not there. Police are authorised to proceed to search the premises in the FPO subject's absence.

There is no legal requirement under the *Firearms Act* for police to:

- notify an FPO subject that their premises have been searched in their absence, or
- provide specific information about the FPO search powers to other residents or occupiers who are present during an FPO premises search.

Police conducting an FPO premises search are required to comply with Part 15 of LEPRA, which requires police to provide the person 'subject to the exercise of the power' with:

- evidence that they are police,<sup>372</sup>
- their name and place of duty,<sup>373</sup> and
- the reason for the exercise of the power.<sup>374</sup>

This information must be provided to the person as soon as reasonably practicable.<sup>375</sup>

Police are required to follow the search warrant SOPs when conducting FPO premises searches. Those SOPs require police to provide a 'notice to occupier' when searching premises. This is a document describing the search powers and outlining the rights and obligations of police and people present at the search.

### 7.7.1. Notifying an FPO subject that a search has occurred in their absence

It is unclear whether compliance with the safeguards in Part 15 of LEPRA or with the search warrant SOPs would require police to inform an FPO subject that a search of their premises had been conducted in their absence. The FPO subject may not be considered to be the 'subject of the

372. Unless they are in uniform, see LEPRA, s 202(1)(a).

373. LEPRA, ss 201(1)(c) and 202(1)(b).

374. LEPRA, ss 201(1)(c) and 202(1)(c).

375. LEPRA, s 202(2)(a).



exercise of the power' that LEPRA is directed towards, nor the 'occupier' that the SOPs refer to. In these circumstances an issue arises about whether police should be required to do this.

We reviewed the FPO search event narratives in order to establish how many of the FPO premises searches were conducted in the absence of an FPO subject, and whether police had notified the FPO subject that a search had occurred. We found the following:

- The FPO subject was absent for 49 of the 172 FPO premises search events.
- In 41 search events there was no evidence that police had notified the FPO subject that a search had occurred.
- In the remaining eight, police told the FPO subject about the premises search verbally. In half those cases the FPO subject was notified before the search, with police serving the FPO when the person was not at home, and then telling the person they intended to search their home straight away.

This data shows that in 84% of the search events where the FPO subject was absent during a premises search, police either did not notify the FPO subject that the search had taken place, or did not record that this notification had been given.

In our issues paper we sought submissions on whether there should be a legislative requirement that police provide a notice to occupier when conducting a search. In its response, the NSW Police Force submitted that this was not necessary, and that the 'current police practice of explaining the search is considered sufficient'.<sup>376</sup>

A submission to this review expressed the view that 'there should be an obligation on police to provide notice to the FPO subject that a search has taken place as soon as is reasonably practical'.<sup>377</sup>

Police are generally required to inform a person whose premises they have searched that a search has taken place, even in relation to searches conducted covertly.<sup>378</sup> Police are ordinarily required to serve an occupier's notice relating to any covert search within six months of the search.<sup>379</sup> The service of this notice can be postponed beyond 18 months only if there are exceptional circumstances. Even then, it must be issued within a maximum of three years from the date of the search.<sup>380</sup>

We are of the view that the use of the FPO search powers to search a person's premises in their absence should be consistent with premises searches authorised under other laws. An FPO subject is entitled to know that such a search has taken place, and police should notify them as soon as practicable. Such a notification could be made verbally or in writing.

## Recommendation

- 11. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require police to notify a person subject to a firearms prohibition order, who is not present during a search of premises under section 74 of that Act, that a search has occurred, as soon as practicable after it has taken place.**

376. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 6, item 12.

377. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 2.

378. A covert search warrant is a search warrant issued under Division 2 of Part 5 of LEPRA that may be executed covertly.

379. LEPRA, s 67(8).

380. LEPRA, s 67A.



### 7.7.2. Informing other residents about the FPO premises search powers

It is unclear whether compliance with the safeguards in Part 15 of LEPRA or with the search warrant SOPs would necessitate police informing or explaining to other inhabitants of an FPO subject's residence, such as their family or flatmates, or other occupiers of their work premises, such as colleagues, the nature and extent of the FPO search powers.

When police execute a search warrant, they are required to provide a written notice to the occupier that explains the police powers with respect to the execution of the search warrant and the rights and obligations of the occupiers.<sup>381</sup> Providing occupiers with this information helps them understand what they are required to do, giving them an opportunity to comply with police requests and facilitate entry. This will, in turn, contribute to the safe conduct of the search.

Difficulties may arise for police if they arrive to search premises, and residents or occupiers (who are not the FPO subject) have not been previously made aware of the power police have to conduct such a search. The presence of police at their home to conduct a search may come as a shock, and could result in people obstructing police, or complaints about police conduct, because they do not understand or accept the extent of the police powers.

From our review of the FPO search event narratives, we found nine premises search events had been conducted in the presence of other people.<sup>382</sup> In five of these search events, the FPO subject was not present. Police verbally gave information about the FPO search powers to the other people just before they conducted two of these searches. It is unclear what information, if any, the police provided in the other three searches. It does not appear that police provided any information in writing.

In our issues paper we sought submissions on whether police should be required to explain the nature and extent of the FPO search powers to all residents before conducting an FPO search, and whether such a notice should be in written form. The NSW Police Force submitted:

It would be good practice to advise others affected by the power but a requirement to explain the powers to ALL adult residents, including presumably those not present at the time of the search, would be excessive. If it was deemed necessary for the [FPO] search powers to be extended to include other persons, then it would be appropriate at that point that those affected persons are advised.

In the NSW Police Force opinion, the production of the FPO could serve in place of the written notice.<sup>383</sup>

Operational police told us that they were not sure if it was appropriate for them to provide other residents with a copy of the FPO, because the FPO can contain personal information and also the reasons why the FPO was issued, possibly including information relating to the person's criminal history.

Submissions to this review expressed a range of opinions as to whether police should be required to inform other residents about the search powers. One submission argued that:

A notice to occupier would have no detrimental effect on the search itself and would be a step towards the premises search safeguards present in Division 5, Part 4 of LEPRA ... there should be a legislative requirement that police must provide a notice to occupier when conducting an FPO premises search.<sup>384</sup>

381. LEPRA, s 67 and the Law Enforcement (Powers and Responsibilities) Regulation 2005, cl. 7 and form 17.

382. These numbers should be interpreted in light of the limitations to our research. Firstly, we were not able to identify all of the people who were present during FPO searches. As discussed in section 3.6 of chapter 3, there were an unknown number of other people present during FPO search events. We were only able to count those people who were searched during a search event, as being present. Further, as discussed in section 1.6 of chapter 1, we only had data about FPO searches of premises for a 12-month period.

383. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 7, item 15.

384. The Law Society of New South Wales Young Lawyers - Criminal Law Committee, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 31 August 2015, p. 11.

Another submission stated that:

[G]iven that FPO premises searches may be conducted when the FPO subject is not present, I would recommend that the same explanation of the reason for the FPO premises search be given to all adult persons present. This would ensure that all persons present fully understand beforehand that they must not hinder or obstruct the conduct of the premises search.<sup>385</sup>

From our discussion with FPO subjects and their family members, it appears that responses to their interaction with police varied greatly depending on the communication skills, manner and civility of the police conducting the search. 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 co-operation harder<sup>386</sup> and undermine the legitimacy of the police force.<sup>387</sup> Given that the premises search power can affect people who are not subject to an FPO, it is vital that police appropriately communicate with residents about the nature and extent of the FPO search powers prior to conducting each search.

In our view, people occupying premises being searched under the FPO powers should receive comparable information to people occupying premises being searched under a search warrant. We recommend the development of a fact sheet explaining the nature and extent of the FPO search powers, and a change to police policy to require police to provide it to any occupiers of premises being searched under the FPO powers who are not the FPO subject. This would enhance police's ability to ensure the communication is clear and occupiers understand that police are behaving lawfully. Best practice would also require police to provide verbal information to those occupiers, and a video record should be made of this.

## Recommendation

12. **The NSW Police Force include in the Appendices to the Search Warrant Standard Operating Procedures a fact sheet, with information about the search powers under section 74 of the *Firearms Act 1996*, to be provided to occupiers of a premises searched under that power at the time of the search or as soon as practicable after the search has taken place.**

### 7.7.2.1. *Requiring FPO subject to inform other residents about police powers to search*

In South Australia, where police also have FPO search powers, an FPO subject is required to inform any adult who lives at the same address of the fact that they are subject to an FPO.<sup>388</sup> This condition goes some way to ensuring that people who reside with an FPO subject are aware that the FPO exists. The FPO subject is not required 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.

In our issues paper we sought submissions on whether the FPO subject should be required to inform other adult residents about the FPO. Submissions had differing perspectives on whether an FPO subject should be required to inform other adult residents of the fact that they are subject to an FPO.

385. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 3.

386. 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.

387. 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 and 939.

388. *Firearms Act 1977 (SA)*, s 10C(9). This section also requires the FPO subject to ask these people whether they propose to have firearms, firearm parts or ammunition on the premises.

One submission was of the view that:

[An] FPO subject should be required to inform other adults occupying the same premises that the premises are subject to search without a warrant.<sup>389</sup>

Another argued that FPO subjects should have discretion as to whether or not they disclose their FPO status to people who they reside with:

While I see the potential merit in this, being an FPO subject is a personal and private matter. It should not be a mandatory requirement to disclose this to other adult residents ... [T]his should not be a mandatory requirement and should be left up to the discretion of the FPO subject.<sup>390</sup>

In the course of this review we spoke with an FPO subject, recently served with an FPO, who explained the potential difficulties of telling a flatmate about the FPO:

[It's the] anxiety of someone coming to your home and searching a place at anytime, anywhere ... That's one thing that really stands out, its impact on me ... I have a housemate who is unaware. The way it was done, I understand that there is a need for that. [But] I could lose her as a flatmate, paying rent, because she doesn't want that happening to her, and that's fair enough.<sup>391</sup>

In its submission to our view, the NSW Police Force expressed the view that:

Such a requirement may prevent the subject of a FPO breaching the provisions of s 74(6) of the Act. It may also have a general deterrent effect on other residents, and ensure that the legislation is effective.<sup>392</sup>

Section 74(6) of the Firearms Act makes it an offence for an FPO subject to reside at premises where a firearm or related item is kept or found.<sup>393</sup> The only defence is for the FPO subject to demonstrate that they 'did not know, and could not reasonably be expected to have known'<sup>394</sup> that the firearm or related item was on the premises, or 'took reasonable steps to prevent the firearm, firearm part or ammunition from being on the premises'.<sup>395</sup> In considering whether an FPO subject 'took reasonable steps' to prevent the firearm or related item from being on the premises, a court might consider whether the person has disclosed to other residents that they are subject to an FPO.

While we understand the point being made by the NSW Police Force, in our view, mandatorily requiring FPO subjects to explain the potential impact of the FPO search powers on other people they live or work with, would not reduce the need for police to communicate with those people at the beginning of each search. In our view, requiring police to provide information to occupiers that is comparable to that provided when serving a search warrant, as recommended above, would be an appropriate way to ensure those people understand what they can expect from the search.

## 7.8 Police powers to make a video record of a premises search

Ordinarily it is an offence for any person to use a video camera<sup>396</sup> on premises, such as a family home, without the consent of the home owner.<sup>397</sup> However, there is an exception which allows police to lawfully video-record premises when executing a search warrant.<sup>398</sup>

389. David Leyonhjelm, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 September 2015, p. 2.

390. Shooters and Fishers Party, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 7 September 2015, p. 4.

391. Telephone conversation with FPO subject no. 2, 29 May 2015.

392. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 6, item 13.

393. *Firearms Act 1996*, s 74(6).

394. *Firearms Act 1996*, s 74(7)(a).

395. *Firearms Act 1996*, s 74(7)(b).

396. A video camera falls within the definition of an 'optical surveillance device' under the Act because it is a 'device capable of being used to record visually or observe an activity': *Surveillance Devices Act 2007*, s 4(1).

397. *Surveillance Devices Act 2007*, s 8(1).

398. *Surveillance Devices Act 2007*, s 8(2)(d). Only particular kinds of search warrant are covered by this exception: see *Surveillance Devices Act 2007*, s 8(3).

The NSW Police Force search warrant SOPs require police to make a continuous video record of all searches conducted under warrant, including all people present and any evidence found.<sup>399</sup> This requirement is intended to provide the 'most reliable account of police activities and serves as a valuable tool to address evidentiary and behavioural risks'.<sup>400</sup>

In the first year that the FPO premises search powers were in operation, the NSW Police Force had no specific SOPs regarding the exercise of FPO premises searches. We understand from our consultations with police that, in the absence of specific SOPs, many police simply followed the standard search warrant SOPs when conducting an FPO search.

In October 2014, the NSW Police Force issued an update to these SOPs and extended their application to all uninvited entry and search powers, including FPO premises searches. Amongst other things, the revised SOPs made clear that police were required to make a continuous video recording of FPO premises searches.

In the course of our review, we identified that this practice was unlawful because the exception to the offence provision does not cover premises searches conducted under the FPO search powers. This means that police do not have the power to make a video record of an FPO premises search, and police who make such a recording may be committing an offence.<sup>401</sup>

On 12 January 2015 we raised this issue with the NSW Police Force.<sup>402</sup>

In its response, the NSW Police Force acknowledged that police had no legal power to make a video record of FPO premises searches and attributed this to a legislative oversight.<sup>403</sup> It undertook to seek an amendment to the *Surveillance Devices Act 2007* to permit video recording of any lawful search conducted without a warrant. In its correspondence, the NSW Police Force stated that it was 'not in the public interest to disregard the importance of [the] accountability measure' provided by video recording, and asked us for suggestions on how to resolve this issue until such time as appropriate amendments were made to the *Surveillance Devices Act*.

In response, we explained that we did not consider it was the Ombudsman's responsibility to determine how the new police powers should be implemented, and suggested that police consider using other methods to enhance accountability, including the presence of independent observers, enhanced note-taking and the use of scene plans.<sup>404</sup>

In March 2015 the NSW Police Force issued a state-wide message to all staff instructing them not to make a video record of FPO searches.

Notwithstanding this legislative impediment, police made a video recording in 57 of the 172 premises search events that we were able to review.

The NSW Police Force told us that it 'has sought that an amendment be made to the *Surveillance Devices Act* to allow exemption for search under s 74A and that anything said or done on the resulting recording is admissible as evidence'.<sup>405</sup> However these amendments have not yet been made. In our view there is an urgent need for those amendments.

399. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, pp. 25-26.

400. NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants Version 1.4*, October 2014, p. 39.

401. *Surveillance Devices Act 2007*, s 8(1). This is the case even if the occupier consented to the search being video-recorded. This is because the terms of the offence provision contain no exception for circumstances where, after police have entered premises without consent, the occupier subsequently consents to the recording.

402. Correspondence from Fleur Beaupert, NSW Ombudsman, 12 January 2015.

403. Correspondence from Deputy Commissioner Field Operations, NSW Police Force, 18 February 2015.

404. Correspondence from Deputy Ombudsman (Police), NSW Ombudsman, 20 March 2015.

405. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 5, item 9.

## Recommendation

13. The Attorney General propose, for the consideration of Parliament, an amendment to the *Surveillance Devices Act 2007* to permit the video recording of any lawful search conducted under section 74A of the *Firearms Act 1996*.

## 7.9 Police powers to seize firearms, firearm parts and ammunition

Search powers provided to police are typically accompanied by a corresponding seizure power.<sup>406</sup> However, the FPO search powers were not accompanied by legislative powers enabling police to seize firearms, firearm parts and ammunition found as a result of an FPO search.

During the first 22 months of the review period, police seized 25 firearms, 9 firearm parts and 19 lots of ammunition. In order to seize these items police exercised seizure powers provided in a range of legislation.<sup>407</sup>

These legislative powers allow police to seize firearms and ammunition in a public place where they suspect the items are unlawfully in the person's custody.<sup>408</sup> They also allow police to seize some firearms parts – being a barrel<sup>409</sup> and a detachable firearm magazine.<sup>410</sup>

Police conducting a search of premises may seize firearms and ammunition if they have reasonable grounds to believe the items are improperly stored,<sup>411</sup> or reasonable grounds to suspect that the items are connected with an offence punishable by a period of imprisonment of five years or more.<sup>412</sup>

Not all firearms parts that may be found as a result of an FPO search are covered by these powers. For example, police do not appear to have legislative powers to seize breeches, pistol slides frames, receivers, cylinders, trigger mechanisms, operating mechanisms or magazines that form part of a firearm.<sup>413</sup> In order to seize these firearms parts, police must obtain a crime scene warrant<sup>414</sup> or a search warrant,<sup>415</sup> or rely upon the common law.<sup>416</sup>

406. For example: LEPRA, ss 21(2), 36(3), 42(2) and 49(1); *Restricted Premises Act 1943*, ss 10(e)–(f) and 13(3)(b); *Summary Offences Act 1988*, s 21(2)(c); *Terrorism (Police Powers) Act 2002*, s 20(1).

407. LEPRA, s 22 and 28; *Firearms Act 1996*, s 42; *Weapons Prohibition Act 1998*, s 39.

408. LEPRA, s 28. Under this section police have powers to seize an item where they have reasonable grounds to suspect that the item is a 'dangerous implement' that is unlawfully in a person's custody. The definition of 'dangerous implement' includes a 'dangerous article' which in turn includes firearms and ammunition: LEPRA, s 3.

409. LEPRA, s 28. The definition of a 'dangerous article' includes a spare barrel of a firearm: LEPRA, s 3.

410. LEPRA, s 28. The LEPRA definition of a 'dangerous article' includes a 'prohibited weapon'. The term 'prohibited weapon' is defined in the *Weapons Prohibition Act 1998* and includes a detachable firearm magazine: see Schedule 1, clause 4(4) of that Act. Police also have separate powers to seize a 'prohibited weapon' if they think it is connected with a prohibited weapons offence: *Weapons Prohibition Act*, s 39. This section also enables the police to seize items connected to firearms that are not defined as firearm parts, such as a firearms silencer and a brass catcher: Schedule 1, clause 4(3) and (5) of that Act.

411. *Firearms Act 1996*, s 42.

412. LEPRA, s 22. Under this section police have powers to seize a 'dangerous article' connected to a 'relevant offence'. The definition of 'dangerous article' includes firearms and ammunition: LEPRA, s 3. The definition of relevant offence includes indictable offences and offences against the *Firearms Act 1996*: LEPRA, s 20.

413. These items do not fall within the definitions of 'dangerous implement' or 'dangerous article' in section 3 LEPRA which empower police to seize items under sections 22 and 28 of that Act, but are listed as 'firearm parts' in section 4 of the *Firearms Act 1996*.

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

415. LEPRA, ss 47 and 49.

416. *Ghani v Jones* [1970] 1 QB 693 at 708–09, as cited in *DPP v Tamcelik* [2012] NSWSC 1008 at 67–68. This case is cited in NSW Police Force, 'Common Law – Powers of Search and Seizure', NSW Police Powers Handbook, viewed 1 March 2016. The NSW Police Force training module for police prosecutors, 'Search and Seizure', March 1999 (updated September 2014), cites this common law authority as another possible option for police. Also see *Poidevin v Semaan* [2013] NSWCA 334, section 6 of the *Police Act 1990*, which gives police a power to protect people from injury or death, *DPP v Gribble* [2004] NSWSC 926 and *DPP v Araura* [2012] NSWSC 1120.



In order to obtain a crime scene warrant to seize firearms and related items found as a result of an FPO search, police must suspect on reasonable grounds that a serious indictable offence has been committed (such as an offence against the conditions imposed by the FPO)<sup>417</sup> and that the establishment of a crime scene is necessary to preserve, search or gather evidence of that offence.<sup>418</sup>

Alternatively, police can apply for a search warrant in relation to particular premises to seize things connected with a 'searchable offence'.<sup>419</sup> Once a search warrant has been obtained, police can seize anything mentioned in the warrant,<sup>420</sup> and any other thing that police conducting the search believe is connected with any offence.<sup>421</sup> To obtain a search warrant police are required to provide the reasons why the person applying for the warrant believes that things connected with a 'searchable offence' are or will be in the premises within the following 72 hours.<sup>422</sup>

Under the common law, police have some authority to seize items as evidence of a crime without a search warrant or other power. To seize firearms and related items, police would need to reasonably believe that the item is in the possession of the FPO subject, an offence against the FPO has been committed, and the firearm or related item is material evidence of that offence.<sup>423</sup>

During the review period we did not find any matters where a person challenged the police power to seize firearms or related items following an FPO search. However, we found that the current powers to seize firearms and related items as a result of an FPO search are complicated, requiring police to consider a range of legislation and the common law in order to determine whether or not they are authorised to seize a particular item. In addition, it appears to us that there are some firearms parts that police may not have a clear legislative power to seize without obtaining a warrant.

In our view, it is in the public interest that police should have a clear legislative power to seize any firearms or related items found in an FPO search.

Most police powers to search, either with or without a warrant, are found in LEPRA and are accompanied by powers to seize items found in the course of the LEPRA search.

Since Parliament considered it appropriate to grant police the FPO search powers, allowing police to seize any firearms and related items found during an FPO search would facilitate the achievement of Parliament's objective, and bring those powers in line with other search powers.

## Recommendation 14

14. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to empower police executing a search under section 74A of the Act to seize any firearm, firearm part or ammunition found as a result of a search under that section.

417. Most of the FPO offences are serious indictable offences, as they are punishable by imprisonment for 5 years or more: LEPRA, s 3 and *Firearms Act 1996*, s 74(1)-(5). Section 74(6) of the *Firearms Act 1996* is not a serious indictable offence because it only carries a maximum penalty of 12 months imprisonment.

418. LEPRA, s 94.

419. LEPRA, s 47. All FPO offences are 'searchable offences': LEPRA, s 46A(1)(iii).

420. LEPRA, s 49(1)(a).

421. LEPRA, s 49(1)(b).

422. LEPRA, s 47.

423. *Ghani v Jones* [1970] 1 QB 693 at 708–709, as cited in *DPP v Tamcelik* [2012] NSWSC 1008 at [67]–[68]. This case is cited in NSW Police Force, 'Common Law – Powers of Search and Seizure', NSW Police Powers Handbook, viewed 1 March 2016.

## Chapter 8. Conclusion

The FPO search powers were introduced in response to a number of drive-by shooting and firearms-related crime incidents in Sydney.<sup>424</sup> These incidents, reported as having occurred predominantly in the western and south-western suburbs of Sydney,<sup>425</sup> created a perception that there had been an increase in firearms crime in NSW, in particular, drive-by shootings. The FPO search powers, one of several measures introduced by the Parliament of NSW at that time,<sup>426</sup> were designed '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'.<sup>427</sup>

At the time of their introduction, the then Premier said that the legislation was only intended to concern 'those who are involved in criminal activities involving guns', and was not intended to affect innocent citizens.<sup>428</sup>

The FPO search powers were framed so as to enable police to search a cohort of people who the Commissioner of Police had determined were not fit to possess firearms. The powers can be exercised if a police officer forms the view that a search is 'reasonably required' to determine if a firearms possession offence has been committed. A search of premises can be undertaken without a warrant. Ordinarily, premises (including people's residences) can only be searched after police obtain a warrant from a Magistrate or other authorised officer.

The threshold test that police are required to apply in deciding whether to search using the FPO search powers is that the search is 'reasonably required'. This is different from the threshold tests that police must meet when applying for a search warrant to search premises ('believes on reasonable grounds'<sup>429</sup>) or to search a person in a public place ('suspects on reasonable grounds'<sup>430</sup>).

While having a power to search as 'reasonably required' could assist police to take action in a broader range of circumstances, numerous stakeholders have expressed concern about providing police with such broad powers. Some members of Parliament raised those concerns during debates about the Bill; as did stakeholders who wrote directly to the Government about the proposed Bill.<sup>431</sup> Similar concerns were also raised by stakeholders who made submissions to our review.

In this chapter, we discuss our findings and observations from our examination of the way police have used the powers, and whether the risks and concerns associated with the FPO search powers have been realised. We also discuss whether the FPO search powers have operated as an effective tool in policing firearms-related crime.

424. For example see Stephanie Gardiner, 'Another night, another Sydney shooting', *The 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.

425. For example see Nathan Klein and Leigh Van Den Broeke, 'Gun violence plagues Sydney's streets', *The Daily Telegraph*, (online) 20 April 2012, viewed 24 February 2014; 'NSW govt shoots down Labor's gun bill', *The Australian*, (online) 12 September 2013, viewed 24 February 2014.

426. Other measures were part of a broader zero tolerance approach to gun crime. These include Strike Force Raptor, introduced in March 2009 and Operation Talon, a centrally controlled operation focused only on gun crime in Sydney, introduced in August 2013.

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

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

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

430. LEPRA, s 21(1).

431. NSW Bar Association, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 1 September 2015, p. 6.



## 8.1 Did police use the powers in a way Parliament intended?

The search powers enable police to search an FPO subject and any vehicle or premises they occupy, control or manage. The FPO search powers were intended to help police more readily detect firearms, firearm parts and ammunition, wherever such a person might keep them.

Police used the powers extensively during the first 22 months of the review period, conducting 2,571 searches. These searches were conducted over 1,343 separate interactions with police (called 'search events'). Almost all of these search events were conducted in metropolitan areas, with half in the south-western suburbs of Sydney, where police have been particularly active in their efforts to combat firearms-related crime.

The most common type of search was a person search, and many of these were conducted in conjunction with a search of a vehicle or premises.

### 8.1.1. Who was searched

Although Parliament gave the Commissioner a broad discretion to determine who should be made the subject of an FPO, it did indicate the kinds of people that it expected the law would be used to search. This included 'those who are involved in criminal activities involving guns',<sup>432</sup> 'those who should not, by virtue of their pre-existing criminal record or some other matter, have access to a firearm'<sup>433</sup> and people who police 'have good reason to believe are members of organised criminal groups and thereby have access to firearms ... to check whether the order is being observed'.<sup>434</sup>

Our findings about the exercise of powers suggest a mixed result in terms of the people searched by police using the FPO powers during the first 22 months of the review period. Of the 634 people searched, 407 (around two-thirds) were FPO subjects. The searches of these FPO subjects generally appeared to be consistent with the intent of Parliament. We found that 40% of the FPO subjects had a conviction relating to a firearms-related offence. Largely, their most serious firearms-related conviction was for acquiring, possessing and/or using prohibited parts of firearms but there were eight FPO subjects whose most serious firearms-related offence related to a violent or threatening offence involving the use of a firearm.

On reviewing the principal offence<sup>435</sup> of each of the FPO subjects as at the date of service of the FPO, we found that the majority had been convicted of serious criminal offences such as assault, aggravated robbery and murder.<sup>436</sup> In addition, the law enforcement information holdings in relation to around 85% of the FPO subjects contained police allegations that the person was, or had been, associated with an organised crime group.

However, at the same time we found a concerning number of situations where police appeared to mistakenly rely on the FPO powers to conduct person searches of people who were not the subject of an FPO. Most of these people were the family, friends and acquaintances of FPO subjects, who were with the FPO subject at the time of the interaction with police.

There were 269 person searches of this kind, conducted on 233 people, constituting 10% of all the FPO searches during the 22-month period. Approximately 95% of the 233 had never been convicted of a firearms-related offence, and 40% had never been convicted of any offence. However, police holdings indicate that almost 80% of them were the subject of police allegations that they were, or had been, associated with an organised crime group or gang.

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

433. The Hon. Michael Gallacher MP, NSWPD, (Hansard), Legislative Assembly, 15 October 2013, p. 23904.

434. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23889.

435. This analysis reveals the most serious offence for which each person had ever been convicted (if any).

436. See figure 5 in chapter 4.

The searches usually took place when the person was in a vehicle with an FPO subject, and police stopped or found the vehicle in a public place. Police have other search powers that they could use to conduct such person searches in public places. We found that in around 20% of these searches the record indicated police might have had a basis to use a different search power, but recorded the searches as an exercise of the FPO search power.

Thirty percent of these searches were clearly the result of police mistakenly believing that the FPO search powers authorised searches of a person who was not subject to an FPO but was in the company of an FPO subject.<sup>437</sup> We have recommended further education to ensure police do not use the FPO search powers to search a person who is not the subject of an FPO.

### 8.1.2. How the powers helped police to search for firearms

Our review found that the FPO search powers did give police an additional tool that enabled them to respond in circumstances where their existing powers to search people for firearms, firearm parts and ammunition could not be used.

These were circumstances where police did not have sufficient information to obtain a search warrant, or to conduct a search without warrant under LEPPRA, but nevertheless had sufficient information to form the view that a search was 'reasonably required'. For example, police exercised the FPO search powers to search premises belonging to two members of an OMCG, who (on the basis of intelligence) police were concerned had begun to arm themselves in preparation for a conflict with another organised criminal group.

## 8.2 Concerns about the search powers

The concerns about the search powers arise from what one stakeholder described as 'the extraordinary scope of these powers'.<sup>438</sup> Because the FPO search powers enable police to search without a warrant and without needing to form a 'reasonable suspicion',<sup>439</sup> concerns were expressed about the 'potential for abuse'<sup>440</sup> and the use of the power in an 'oppressive fashion'.<sup>441</sup> Particular concerns were that the power may be used to conduct searches with no justification,<sup>442</sup> repeat searches,<sup>443</sup> and searches in unreasonable circumstances (for example, at night<sup>444</sup>). One community centre wrote:

[W]e call on government and the NSW Police Force to maintain a delicate balance between ensuring our safety and security as a society and respect for our civil liberties ... that reflect our democratic values and human rights commitments. Keeping society safe must therefore not come at the expense of the human rights of individuals and groups.<sup>445</sup>

To determine the extent to which concerns were realised during the review period, we looked at how police interpreted the phrase 'reasonably required' when deciding to conduct an FPO search, how frequently the same people were searched, and to what extent, and for what reasons, premises were searched at night.

437. This issue is discussed in greater detail in section 7.1 of chapter 7, where we provide extracts of police records illustrating this.

438. Correspondence from NSW Bar Association to the Hon. Michael Gallacher MLC, the then Minister for Police and Emergency Services, dated 30 September 2013.

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

440. Correspondence from NSW Bar Association to the Hon. Michael Gallacher MLC, the then Minister for Police and Emergency Services, dated 30 September 2013.

441. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

442. Correspondence from NSW Bar Association to the Hon. Michael Gallacher MLC, the then Minister for Police and Emergency Services, dated 30 September 2013.

443. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

444. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 October 2013, p. 23903.

445. Cabramatta Community Centre, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 24 August 2015, p. 2.

Concerns about the potential for the FPO search powers to be used oppressively were magnified by the fact that FPOs have no expiry date. One submission observed:

An FPO applies to the subject for life, along with the warrantless search powers. It isn't unreasonable to accept that people's circumstances change. FPOs do not recognise this it makes the subject a criminal for life.<sup>446</sup>

We discuss our findings in greater detail below.

### 8.2.1. Whether the search powers have been used reasonably

An FPO search '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'.<sup>447</sup> The Crown Solicitor's Office advised us that, in its view, the provision relates to both the threshold decision to search and the manner in which a search was conducted.

In the majority of search events that took place during the first 22 months we found that police had some objective reason to search and thus exercised the powers in a way that is consistent with the advice from the Crown Solicitor's Office. In particular, we found that in 44% of the search events, police had an investigative reason to search or were searching in response to intelligence they had received. Where the search resulted solely from a by-chance interaction between police and an FPO subject,<sup>448</sup> the decision to search appeared to have been mostly made in reaction to circumstances that aroused police suspicion or concern, or where police might have taken into account warning information that the FPO subject might be armed, be part of a drug supply network, or be involved in a current conflict between organised criminal groups.

However, in around 15% of search events, it appears that police understood 'reasonably required' to mean that the fact that a person was the subject of an FPO was in itself a sufficient basis to search. Since this understanding is inconsistent with the advice from the Crown Solicitor's Office, there is a potential risk of unsuccessful prosecutions or civil action if police continue to apply the law in this way. Decisions to search on this basis could also be perceived to be unreasonable and somewhat arbitrary.

For these reasons, we have recommended that the NSW Police Force make it a clear policy that a search can only be conducted using the FPO search powers if the threshold test 'as reasonably required' has been met, and that the powers do not authorise the search of a person solely because the person is subject to an FPO. A clear policy statement is required to ensure that the risk of unlawful or unreasonable use is minimised in the future.

We have also made a recommendation that an FPO expires after five years to ensure that the ongoing use of the search powers by police is appropriate and based on current information about the subject of the FPO.

### 8.2.2. Whether there were unreasonably frequent searches

Police can lawfully use the FPO search powers as frequently as they believe it is 'reasonably required'. We were concerned because some police appeared to interpret 'reasonably required' to mean that the mere fact of an FPO was sufficient grounds for a search, this might have led to a high occurrence of repeat or frequent searches of certain FPO subjects that were not justified on other grounds.

We found that 61% people were searched only once and another 13% were searched twice. We also found that 27 people were subject to 10 or more search events, and six were searched 20 or more times.

446. Family friend of an FPO subject, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 9 September 2015, p. 3.

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

448. This comprised over half of the search events in the 22-month period.

From our in-depth examination of the reasons recorded for the searches, the evidence does not indicate that police have generally exercised the FPO search powers in a manner that was oppressive or abusive.

Nevertheless, we observed that there may be an increased risk of repeat or frequent searching of FPO subjects when searches are driven as a result of an interaction between police and the FPO subject. In our view, amending the law to make it clear that the FPO search powers cannot be exercised solely because a person is the subject of an FPO will help to reduce this risk.

### 8.2.3. Whether police unreasonably searched at night

In looking at the time of day when FPO searches were conducted, we focused on searches of premises, because police usually need a warrant to search premises, and night-time searches of premises usually require special justification.

We found that 79% of the searches of premises were conducted during daylight hours. Police told us that there are some circumstances where it is reasonably required to search particular premises at night. In their experience, the majority of public place shootings occur between 10pm and 2am, and the FPO search powers can be useful to respond in a timely way to information they receive about escalating conflict between organised crime groups.

Although there was evidence of premises being searched at night, the evidence did not show that these searches were unreasonable or unjustified.

The NSW Police Force's decision that Search Warrant Standard Operating Procedures generally apply to FPO premises searches ensures a high level of supervision over premises searches, which we believe will reduce the risk of unreasonable searches at night.

## 8.3 Whether the FPO search powers are an effective tool in policing illegal firearms

The NSW Police Force has advised us that:

Internal police analysis of shooting incidents in NSW from 1 January to 31 December 2015 demonstrates that:

- In 2015 there were 204 reported shootings across NSW, representing a 36% reduction from 2013 (315) and a 26% reduction from 2014 (275);
- NSW recorded the lowest number of shootings on record (by over 25%);
- In 2015 there were 42 reported discharges of a firearm into premises across NSW, the lowest on record (by 20%); and
- Reported shootings state-wide were predominantly personal violence related (65%, up from 56% in 2014), reflective of the decrease in those relating to organised crime and gangs.

Evidenced from the above empirical data, it is the NSW Police Force position that the search powers are an effective tool in combating firearms and gang related offences<sup>449</sup>

We note NSW Police's views about the efficacy of the FPO search powers. In our view, because the powers are relatively new, it is too early to reach firm findings on how effective the FPO search powers have been, or to identify any lasting impact their use has had on trends in the rates of firearms-related crime or incidents of public place shootings.

<sup>449</sup> Correspondence from Carlene York APM, Acting Deputy Commissioner, NSW Police Force, received 24 August 2016.

It does appear that the new powers have enabled police to respond in circumstances where they may not have otherwise been able to, being situations where they received information to support a view that a search was reasonably required but did not have sufficient evidence to obtain a search warrant. In one example, police received information that a particular organised criminal group had begun to arm themselves in preparation for a conflict with another group, but did not have information of sufficient specificity to support an application for a search warrant.

We can also report that approximately 10% of the FPO search events conducted in the first 22 months resulted in police finding something they believed was unlawful, used to commit an offence or the proceeds of crime.

These searches led to the seizure of 416 items,<sup>450</sup> including 25 firearms (which were found in 18 search events),<sup>451</sup> 19 lots of ammunition and 9 firearm parts. In all, firearms-related items were found in 29 search events (2%).

The most common item seized was small quantities of illicit drugs. Police also seized 51 weapons that were not firearms, including explosive devices, knuckle dusters, swords, nunchakus, tasers, capsicum spray cans, knives and a crossbow. In addition, police seized money they had reason to believe was the proceeds of crime.

Although the proportion of search events that resulted in police locating and confiscating illicit firearms and related items was low, detection of such items is only one of the purposes that the powers were intended to achieve. The powers were also intended to help police combat firearms-related crime, by giving them another tool to prevent crime, disrupt organised criminal groups that use, sell and supply illicit firearms, and deter people from engaging in illicit firearms activity. As the NSW Police Force wrote in its submission to our review:

[I]t is important to bear in mind that a failure to seize firearms can as easily point to the success of the FPO regime, including the new search powers, as it can to the powers' lack of effect.

Certainly, public place shootings are down and police believe the powers are making a useful contribution to tackling organised crime.<sup>452</sup>

As can be seen from figure 4 in chapter 3, the monthly use of the FPO search powers consistently increased during the first two years of use, and this trend seems likely to continue. In addition, only a third of all FPO subjects in NSW were searched during the review period, with almost 600 people yet to experience their first search. Our review only covered the first two years of operation.

We note that our data about the conduct of premises searches was limited to only 12 months of the review period. This seriously limited our ability to comprehensively explore issues arising in the context of premises searches. Given the serious nature of the objectives intended to be achieved by the use of the search powers, we are of the view that it would be in the public interest for their efficacy to be monitored and evaluated in the future. The purpose of such an evaluation would be to determine whether the powers have assisted police to achieve the intended objects.

We are of the view that the potential for the powers to be used arbitrarily and unreasonably remains if FPOs continue to have no expiry date and some police continue to interpret 'as reasonably required' to mean that a search can be conducted on the sole basis that the person is the subject of an FPO. For these reasons, we recommend that any future evaluation include determining if the powers are being used appropriately and reasonably by police.

450. Most of the 416 items seized were located as a result of an FPO search; however, some items were located as a result of other powers used in conjunction with the FPO search powers where it was more appropriate to use another kind of search power.

451. Including seven rifles, three air rifles, five pistols, four replica handguns, three revolvers, one Flintlock pistol, two imitation firearms (plastic guns) and a shotgun.

452. NSW Police Force, *Submission to NSW Ombudsman regarding Police Use of FPO Search Powers*, 14 September 2015, p. 1.

This further evaluation should be conducted after the powers have been in operation for a period of at least five years. This should allow sufficient time for a trend to be established with respect to the number of FPO subjects served each year, and the average number of searches per FPO subject. It will also allow sufficient time for charges laid as a result of FPO search events to be heard by the courts.

To enhance community confidence in the evaluation process, the evaluation should be conducted independently and objectively, and be based on evidence provided by the NSW Police Force and other interested parties, including relevant government departments, community stakeholders, peak bodies and people affected by the use of the powers.

## **Recommendation**

- 15. The Minister for Police and Justice propose, for the consideration of Parliament, an amendment to the *Firearms Act 1996* to require a further independent and objective evaluation of the effectiveness of the FPO search powers after they have been in operation for at least five years.**



# Appendix A:

## Part 7 of the *Firearms Act 1996*

### Part 7 Firearms prohibition orders

#### 73 Firearms prohibition orders

- (1) The Commissioner may make a firearms prohibition order 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.
- (2) A firearms prohibition order takes effect when a police officer serves a copy of the order personally on the person against whom it is made.
- (3) The Commissioner may revoke a firearms prohibition order at any time for any or no stated reason.

#### 74 Effect of firearms prohibition order

##### (1) Prohibition on persons acquiring, possessing or using firearms, firearm parts or ammunition

A person who is subject to a firearms prohibition order must not acquire, possess or use a firearm.

Maximum penalty: imprisonment for 14 years if the firearm is a pistol or prohibited firearm, or imprisonment for 5 years in any other case.

- (2) A person who is subject to a firearms prohibition order must not acquire or possess a firearm part.

Maximum penalty: imprisonment for 14 years if the firearm part relates solely to any kind of pistol or prohibited firearm, or imprisonment for 5 years in any other case.

- (3) A person who is subject to a firearms prohibition order must not acquire or possess ammunition.

Maximum penalty: imprisonment for 5 years.

##### (4) Prohibition on supplying firearms etc to persons subject to orders

A person must not supply or give possession of a firearm or firearm part to another person knowing that the other person is subject to a firearms prohibition order.

Maximum penalty: imprisonment for 14 years if the firearm is a pistol or prohibited firearm or if the firearm part relates solely to any kind of pistol or prohibited firearm, or imprisonment for 5 years in any other case.

- (5) A person must not supply or give possession of ammunition to another person knowing that the other person is subject to a firearms prohibition order.

Maximum penalty: imprisonment for 5 years.



**(6) Prohibition on persons residing at premises where there are firearms etc**

A person who is subject to a firearms prohibition order is guilty of an offence if a firearm, firearm part or ammunition is kept or found on premises at which the person is residing.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (7) It is a defence to a prosecution for an offence under subsection (6) if the defendant proves that the defendant:
- (a) did not know, and could not reasonably be expected to have known, that the firearm, firearm part or ammunition was on the premises, or
  - (b) took reasonable steps to prevent the firearm, firearm part or ammunition from being on the premises.

**(8) Prohibition on persons attending certain premises**

A person who is subject to a firearms prohibition order must not without reasonable excuse attend:

- (a) the premises specified in a firearms dealer's licence, or
- (b) a shooting range, or
- (c) the premises of a firearms club, or
- (d) any other premises of a kind prescribed by the regulations.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (9) Membership of a firearms club is not a reasonable excuse for the purposes of subsection (8).

**(10) Exemptions**

The Commissioner may by order exempt a person, either unconditionally or subject to conditions, from a specified provision of this section.

**(11) Proof of possession of firearm parts and ammunition**

For the purposes of any proceedings for an offence under this section, a reference in section 4A to a firearm is taken to include a reference to a firearm part or ammunition.

**74A Powers of police to search for firearms in possession of person subject to firearms prohibition order**

- (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.

#### **74B Monitoring of police search powers by Ombudsman**

(1) For the period of 2 years after the commencement of section 74A, the Ombudsman is to keep under scrutiny the exercise of powers conferred on police officers under that section.

(2) For that purpose, the Ombudsman may require the Commissioner to provide information about the exercise of those powers.

(3) The Ombudsman must, as soon as practicable after the end of that 2-year period, prepare a report on the exercise of the powers conferred on police officers under section 74A and furnish a copy of the report to the Minister, the Attorney General and the Commissioner.

(4) The Ombudsman may in the report identify, and include recommendations for consideration by the Minister about, amendments that might appropriately be made to this Act with respect to the exercise of functions conferred on police officers under section 74A.

(5) The Minister is to lay (or cause to be laid) a copy of the report furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.

(6) If a House of Parliament is not sitting when the Minister seeks to lay a report before it, the Minister may present copies of the report to the Clerk of the House concerned.

(7) The report that is presented to the Clerk of a House:

- (a) is, on presentation and for all purposes, taken to have been laid before the House, and
- (b) may be printed by authority of the Clerk of the House, and
- (c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and
- (d) is to be recorded:
  - (i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and
  - (ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the report by the Clerk.

## Appendix B:

### Overview of use (1 November 2013 – 31 October 2015)

As at 31 October 2015, there were 1,317 people served with an FPO in NSW,<sup>453</sup> 445 of whom (34%) had been searched by police under the new FPO search powers.

The FPO search powers provide police with specific powers to search these people, as well as any premises (including a home or business) or vehicle that they occupy, control or manage.

This Appendix provides an overview of police use of these powers during the 24-month review period (1 November 2013 – 31 October 2015). The information about the last two months is limited to automatically generated information only, and does not include other information which was derived from our audit of FPO search events, as this audit was strictly limited to search events conducted in the first 22 months the powers were in operation.

#### What was searched?

We were able to identify 2,946 FPO searches conducted in the review period. These searches were conducted over 1,540 separate interactions with police, called 'search events'.

The 2,946 FPO searches included searches of:

- people, known as a 'person search'
- cars and boats, known as a 'vehicle search', and
- houses, restaurants, garages and backyards, known as a 'premises search'.

There were 1,707 person searches, 1,044 vehicle searches and 195 premises searches. These 195 premises searches were conducted over a 14 month period, between 1 September 2014 and 31 October 2015. Unfortunately, due to the way the NSW Police Force recorded FPO premises searches in the first 10 months of the review period (1 November 2013 – 31 August 2014), we were unable to obtain accurate information about the premises searches that were conducted during that time.<sup>454</sup> As a result, our reporting of premises searches is limited to the 14 months from 1 September 2014 to 31 October 2015.

#### Who was searched?

There were 718 people searched under the FPO search powers during the review period. Of these, 445 were subject to an FPO<sup>455</sup> (FPO subjects), and 273 people were not.<sup>456</sup>

These people were subject to a total of 2,946 searches. The number of searches is different to the number of people because some people were searched more than once, or had more than one vehicle or premises searched.

The 445 FPO subjects were subject to 1,405 person searches, 1,009 vehicle searches and 188 premises searches.<sup>457</sup>

453. Correspondence from Nick Kaldas APM, Deputy Commissioner, D/2015/619711, received 15 December 2015.

454. We drew this problem to the attention of the NSW Police Force and once updates to the COPS database were made to facilitate the identification of FPO premises searches, police were able to provide us with information about premises searches conducted between 1 September 2014 and 31 October 2015.

455. All but six of these FPO subjects were served with an FPO after the FPO search powers were introduced.

456. We classified a person as being the subject of an FPO if the person had ever had an FPO issued and served on them and had been searched during the review period using the FPO search powers. We classified those people who had an FPO served on them during the review period but were not searched under the FPO search powers after that date as people not subject to an FPO.

457. 10 of the 445 FPO subjects were searched before and after they were served with an FPO. We have included the 13 person searches and one vehicle search conducted of these people before they were served with an FPO in the count of 1,405 person searches and 1,009 vehicle searches.

The 273 people who had not been issued with an FPO were subject to 35 vehicle searches and 7 premises searches.<sup>458</sup>

We also found that 264 of them were subject to 302 person searches.

## Age

The people searched were between the ages of 15 and 87 at the time of their first FPO search. The median age was 29 years. Nine young people were person searched, all aged between 15 and 17 years.<sup>459</sup>

## Gender

The majority of people searched were male (92%, n=660). This is not surprising as the majority of the searched FPO subjects were male (n=438). There were 58 women searched, of whom 7 were FPO subjects.

## Where were the searches conducted?

The vast majority of the 1,540 FPO search events took place in metropolitan Sydney. Just over half of the FPO search events took place in South Western Sydney Metropolitan Region, followed by the Central Metropolitan Region (32%), and the North West Metropolitan Region (12%). Only 5% of FPO searches took place outside of a metropolitan area.

## When were the searches conducted?

Over half of the FPO search events took place in daylight hours, between 6.00am and 9.00pm (n=852). The rest were conducted by night (n=688).

## Who conducted the searches?

There are a number of specialist commands and squads within the NSW Police Force that complement and support the work of Local Area Commands. Of particular relevance to this report are the specialist units tasked with responding to the issue of public place shootings.<sup>460</sup> Around a quarter of the search events were conducted by, or involved assistance from these specialist units. As table 4 shows, the Middle Eastern Organised Crime Squad, Operation Talon and the Gangs Squad were frequent users of the FPO search powers. Other specialist units, such as the Public Order and Riot Squad, used them in a more limited way.<sup>461</sup>

Over 1,100 search events were conducted by general duties police and other specialist squads not tasked with responding to firearms-related crime. As table 4 shows, the South West Metropolitan Operations was the command with the highest use, followed by St George and Leichhardt. The Transport South/South West Command, responsible for policing trains and stations within that region, used the FPO search powers on 33 occasions. Most of these were person searches.

458. See chapter 1.5 in which we discuss the attribution rules we used in this review.

459. The age reported here is as at the date of the person's first FPO search.

460. Operation Talon, State Crime Command (Middle Eastern Organised Crime Squad, Gangs Squad, Firearms Squad), Public Order and Riot Squad, Counter Terrorism & Special Tactics.

461. The Public Order and Riot Squad conducted 14 FPO search events, Counter Terrorism & Special Tactics conducted three FPO search events and the Firearms Squad conducted five FPO search events.

**Table 4. Police units that conducted the highest number of search events during the review period**

Police unit, command or operation	No. of search events	% of search events (n=1,540)
State Crime Command - Middle Eastern Organised Crime Squad	181	6.1%
South West Metropolitan Operations	141	4.8%
Operation Talon	118	4.0%
St George	86	2.9%
Leichhardt	84	2.9%
Eastern Beaches	68	2.3%
Burwood	65	2.2%
Fairfield	54	1.8%
Rosehill	53	1.8%
State Crime Command - Gangs Squad	49	1.7%
Kings Cross	41	1.4%
Flemington	38	1.3%
Eastern Suburbs	37	1.3%
Transport South/South West	33	1.1%
Holroyd	30	1.0%
Sydney City	29	1.0%
Campsie	28	1.0%
Bankstown	27	0.9%
Parramatta	23	0.8%
Newtown	20	0.7%

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 October 2015), n = 1,540.

### What did police find?

Our capacity to report accurately on the number and type of items seized as a result of an FPO search event was greatly enhanced by our audit of FPO search events conducted in the first 22 months of the review. We compared the seizure data reported to us by the NSW Police Force, against the event narrative prepared by police, and the Evidence and Forensic Information Management System (EFIMS) records (where the EFIMS record was available to us). As a result of this audit we verified, added and removed records to ensure the most accurate count of items seized during the 22-month audit period.

Our results are reported in section 3.7 of chapter 3.

The NSW Police Force provided us with information about the items seized as a result of FPO searches conducted in the last two months of the review period. Although we did not subject this data to the same rigorous checks as we did for the data for the first 22 months, it does enable us to report estimated aggregate figures.

According to police data, in those last two months, police conducted 375 FPO searches, during 197 search events.

In those last two months, police found 10 firearms and 7 lots of ammunition, but no firearm parts. These were found during 11 FPO search events. A firearm was found in 4 of these events.

In another 10 search events police did not find any firearms or related items, but did find, and seize, items alleged to be unlawful, used to commit an unlawful act, or constituted the proceeds of crime.

A total of 58 items were seized during the last two months.<sup>462</sup>

From this data, we can report that over the two-year review period police found and seized a total of 35 firearms, 26 lots of ammunition and 9 firearm parts. These were found during 36 search events, which constitute 2% of the 1,540 search events. A firearm was found in 22 of these events.

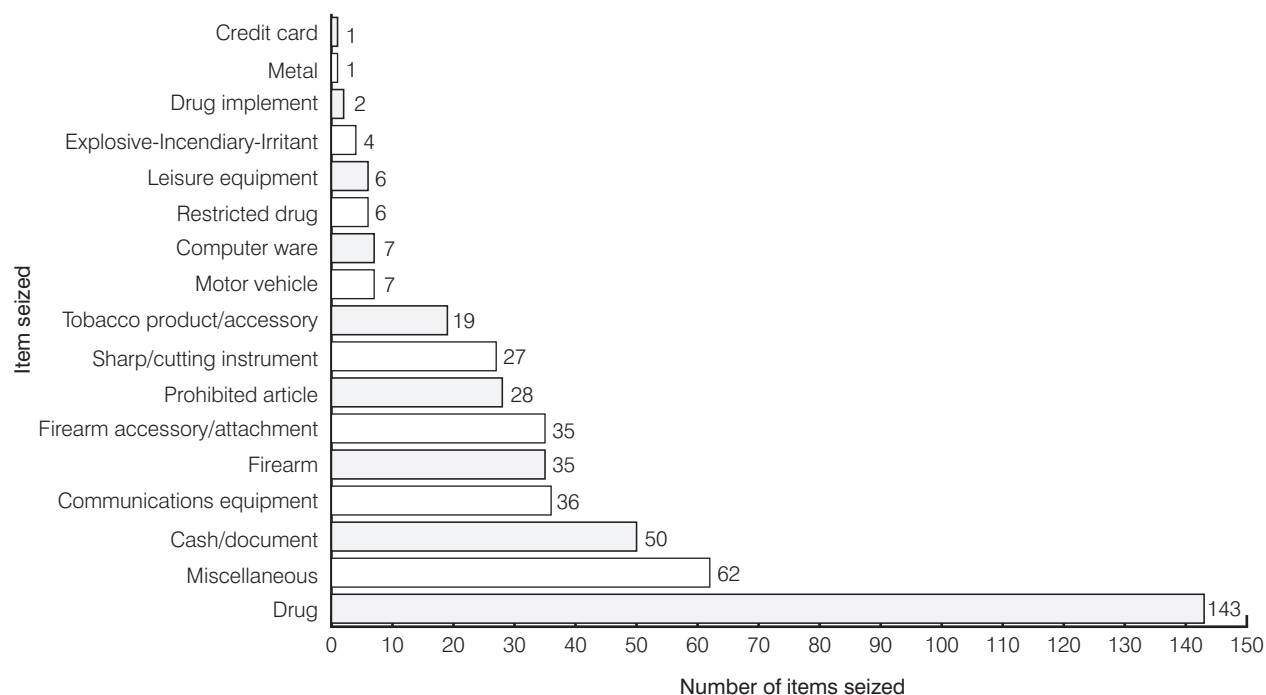
In another 117 search events, police did not find any firearms or related items, but did find, and seize, items that were alleged to be unlawful, used to commit an unlawful act, or constituted the proceeds of crime. These made up 8% of the 1,540 search events.

A total of 474 items were seized during the review period.<sup>463</sup> Figure 15 shows the different types of items that were seized. As was the case for the first 22 months of the review period, the most common item seized was illicit drugs, the majority of which involved small quantities. Police seized 59 weapons that were not firearms or related to firearms, including explosive devices, prohibited items such as knuckle dusters and tasers, and cutting instruments like knives and machetes.<sup>464</sup> Police also seized 36 mobile phones and 7 computers, and made 50 seizures of money and documents which police alleged were proceeds of crime.

462. Most of the items seized in the last two months were located as a result of an FPO search; however, some items were located as a result of other powers used in conjunction with the FPO search powers where it was more appropriate to use another kind of search power.

463. Most of the 474 items seized in the review period were located as a result of an FPO search; however, some items were located as a result of other powers used in conjunction with the FPO search powers where it was more appropriate to use another kind of search power.

464. Other items seized included batons/trunchens, nunchakus, oleoresin capicum spray (OC Spray) cans, samurai-type swords, a blow-dart gun, and a crossbow.

**Figure 15. Type of object seized as a result of FPO searches during the review period**

**Source:** NSW Police Force – COPS (Firearms merged dataset, 1 November 2013 to 31 October 2015), Analysis of COPS event narratives (1 November 2013 to 31 August 2015), EFIMS (1 November 2013 to 31 March 2015).

### How many searches resulted in a charge being laid?

During the last two months of the review period, an additional 16 people were charged as a result of an FPO search. This brings the total number of people charged as a result of an FPO search during the 24 month review period to 102. Of these, 70 were FPO subjects and 32 were not.

Of the 70 FPO subjects, 15 were charged with firearms-related offences.<sup>465</sup> For 7 of them, at least one of those charges was for an FPO offence.

Of the 32 people charged, who were not FPO subjects, 5 were charged with firearms-related offences.

Of the 1,540 search events, 101 (7%) resulted in at least one charge being laid.

In this Appendix we do not report any further data about the outcome of charges laid during the 24-month review period. This is due to a number of limitations to our data that prevented us from performing the relevant analysis.

<sup>465</sup> A breakdown of all offences included in each category can be found at Appendix C: List of offences included in charge categories.



## Appendix C:

# List of offences included in charge categories

### C.1 FPO offences

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified FPO offences by searching for the following law part codes:

Law Part Code	Law Part Title
18778	Possess firearm under proh order-not proh firearm/pistol-T2
18779	Use firearm against proh order-not proh firearm/pistol-T2
18780	Give firearm against proh order-not proh firearm/pistol-T2
18781	Sell firearm against proh order-not proh firearm/pistol-T2
27090	Possess firearm against proh order-prohibited firearm-T2
27091	Possess firearm against proh order-pistol-T2
27092	Use firearm against proh order-prohibited firearm-T2
27093	Use firearm against proh order-pistol-T2
27094	Give firearm against proh order-prohibited firearm-T2
27095	Give firearm against proh order-pistol-T2
27096	Sell firearm against proh order-prohibited firearm-T2
27097	Sell firearm against proh order-pistol-T2
81468	Acquire etc pistol-subject to firearms prohibition order-T2
81469	Acquire etc firearm - subject to prohibition order-T2
81470	Acquire etc prohibited firearm-subject prohibition order-T2
81471	Acquire etc pistol part - subject to prohibition order-T2
81472	Acquire etc firearm part - subject to prohibition order-T2
81473	Acquire etc prohibited firearm part - prohibition order-T2
81474	Acquire etc ammunition subject to prohibition order-T2
81475	Supply etc prohibited firearm subject prohibition order-T2
81476	Supply etc firearm to person subject to prohibition order-T2
81477	Supply etc pistol to other subject to prohibition order-T2
81478	Supply etc ammunition to other subject prohibition order-T2
81479	Firearm etc found at premises-subject to prohibition order
81480	Attend firearms dealer premises - firearms prohibition order
81481	Attend shooting range - firearms prohibition order
81482	Attend firearms club - firearms prohibition order
81483	Attend prescribed premises - firearms prohibition order

## C.2 Other firearms-related offences

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified firearms-related offences (other than FPO offences), by searching for the following law part codes:

Law Part Code	Law Part Title
5046	Give unsafe firearm without giving appropriate warning
5048	Handle/use firearm under the influence of alcohol/drug-T2
5049	Give firearm to other if knows/believes under influence-T2
5051	Give firearm to person when believes incapable of control-T2
5054	Possess firearm or barrel with altered/defaced id etc-T2
18350	Send firearm/firearm barrel by mail to NSW address
18351	Receive a firearm/firearm barrel by mail at NSW address
18703	Possess unregistered firearm-not proh firearm/pistol-T2
18743	Send firearm barrel to person, prescribed conditions not met
18744	Send firearm to another person-prescribed conditions not met
18750	Possess a barrel for a firearm unless authorised by licence
18751	Possess a barrel for a firearm unless authorised by permit
18755	Possess shortened firearm (not pistol) w/o authority-T2
18756	Give shortened firearm (not pistol) to other-T2
18763	Possess ammunition w/o holding licence/permit/authority
27054	Use unregistered firearm-not prohibited firearm/pistol-T2
27056	Possess unregistered firearm-prohibited firearm-T2
27058	Use unregistered firearm-prohibited firearm-T2
27060	Possess unregistered firearm-pistol-T2
27062	Use unregistered firearm-pistol-T2
48360	Possess firearm as firearms dealer w/o being licensed-T2
48374	Possess > 3 unregistered firearms w/o licence/permit-T2
48375	Possess >3 unregistered firearms, 1 is prohibited/pistol-SI
52438	Category H licence possess greater than 10 round magazine-T2
52439	Possess a barrel without authority of licence/permit-T2
53107	Possess unauthorised prohibited firearm-T2
53108	Possess unauthorised pistol-T2
53109	Use unauthorised prohibited firearm-T2
53110	Use unauthorised pistol-T2
53111	Possess unauthorised firearm-T2
53112	Use unauthorised firearm-T2

Law Part Code	Law Part Title
81412	Acquire prohibited firearm without dealer, witness-T2
81413	Acquire pistol without dealer, witness-T2
81414	Acquire firearm without dealer, witness-T2
81416	Unauthorised supply of firearm part-T2
81419	Unauthorised supply of prohibited firearm part-T2
81420	Unauthorised supply of pistol part-T2
81425	Acquire unregistered firearm-not pistol/proh firearm-T2
81426	Acquire unregistered firearm-pistol-T2
81427	Acquire unregistered firearm-prohibited firearm-T2
81428	Supply unregistered firearm-not prohibited firearm/pistol-T2
81429	Supply unregistered firearm-pistol-T2
81430	Supply unregistered firearm-prohibited firearm-T2
81434	Supply prohibited firearm to unauthorised person-SI
81435	Supply pistol to person unauthorised to possess it-SI
81438	Supply unsafe firearm without giving appropriate warning
81439	Supply shortened firearm (not pistol) to other-T2
81440	Supply firearm to other if knows/believes under influence-T2
81441	Supply firearm believes person incapable of control-T2
81443	Acquire firearm without licence or permit-pistol-T2
81444	Acquire firearm no licence/permit-not proh firearm/pistol-T2
81445	Acquire firearm no licence or permit-prohibited firearm-T2
81446	Acquire firearm no permit - not proh firearm/pistol-T2
81447	Acquire firearm no permit to acquire-prohibited firearm-T2
81448	Acquire firearm without permit to acquire-pistol-T2
81449	Acquire firearm part without authority to do so-T2
81450	Acquire prohibited firearm part no authority to do so-T2
81451	Acquire pistol part without authority to do so-T2
81452	Acquire ammunition for firearm without licence/permit
81456	Give prohibited firearm to unauthorised person-T2
81457	Give pistol to person not authorised by licence/permit-T2
81458	Give firearm to person not authorised by licence/permit-T2
81459	Give prohibited firearm part to unauthorised person-T2
81460	Give pistol part to person not authorised by licence etc-T2
81461	Give firearm part to person not authorised by permit etc-T2
81462	Acquire firearm supplier not authorised etc-T2

Law Part Code	Law Part Title
81463	Acquire prohibited firearm supplier not authorised etc-T2
81464	Acquire pistol supplier not authorised etc-T2
81466	Supply, give ammunition to person not authorised etc
81467	Supply, give ammunition not view licence, permit

We also included the following ANZSOC categories:

ANZSOC Category	ANZSOC Division
0111	Murder
0121	Attempted murder
0131	Manslaughter
0211	Serious assault resulting in injury
0212	Serious assault not resulting in injury
0213	Common assault
0291	Stalking
0299	Other acts intended to cause injury, nec
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
1111	Import or export prohibited weapons/explosives
1112	Sell, possess and/or use prohibited weapons/explosive
1119	Prohibited weapons/explosives offence, nec
1121	Unlawfully obtain or possess regulated weapons/explosives
1122	Misuse of regulated weapons/explosives
1123	Deal or traffic regulated weapons/explosives
1129	Regulated weapons/explosive offences, nec.

### C.2.1 Violent and threatening offence involving a firearm

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified violent and threatening offences involving a firearm using the following ANZSOC Divisions:

ANZSOC Category	ANZSOC Division
0111	Murder
0121	Attempted murder
0131	Manslaughter
0211	Serious assault resulting in injury
0212	Serious assault not resulting in injury
0213	Common assault
0291	Stalking
0299	Other acts intended to cause injury, nec
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

### C.2.2 Acquire, possess or use firearm

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘acquire, possess or use firearm’ offences by searching for the following law part codes:

Law Part Code	Law Part Title
18351	Receive a firearm/firearm barrel by mail at NSW address
18703	Possess unregistered firearm-not proh firearm/pistol-T2
18755	Possess shortened firearm (not pistol) w/o authority-T2
27054	Use unregistered firearm-not prohibited firearm/pistol-T2
27056	Possess unregistered firearm-prohibited firearm-T2
27058	Use unregistered firearm-prohibited firearm-T2
27060	Possess unregistered firearm-pistol-T2
27062	Use unregistered firearm-pistol-T2
48360	Possess firearm as firearms dealer w/o being licensed-T2
48374	Possess > 3 unregistered firearms w/o licence/permit-T2
48375	Possess >3 unregistered firearms, 1 is prohibited/pistol-SI

Law Part Code	Law Part Title
5048	Handle/use firearm under the influence of alcohol/drug-T2
5054	Possess firearm or barrel with altered/defaced id etc-T2
53107	Possess unauthorised prohibited firearm-T2
53108	Possess unauthorised pistol-T2
53109	Use unauthorised prohibited firearm-T2
53110	Use unauthorised pistol-T2
53111	Possess unauthorised firearm-T2
53112	Use unauthorised firearm-T2
81412	Acquire prohibited firearm without dealer, witness-T2
81413	Acquire pistol without dealer, witness-T2
81414	Acquire firearm without dealer, witness-T2
81425	Acquire unregistered firearm-not pistol/proh firearm-T2
81426	Acquire unregistered firearm-pistol-T2
81427	Acquire unregistered firearm-prohibited firearm-T2
81443	Acquire firearm without licence or permit-pistol-T2
81444	Acquire firearm no licence/permit-not proh firearm/pistol-T2
81445	Acquire firearm no licence or permit-prohibited firearm-T2
81446	Acquire firearm no permit - not proh firearm/pistol-T2
81447	Acquire firearm no permit to acquire-prohibited firearm-T2
81448	Acquire firearm without permit to acquire-pistol-T2
81456	Give prohibited firearm to unauthorised person-T2
81457	Give pistol to person not authorised by licence/permit-T2
81458	Give firearm to person not authorised by licence/permit-T2
81459	Give prohibited firearm part to unauthorised person-T2
81462	Acquire firearm supplier not authorised etc-T2
81463	Acquire prohibited firearm supplier not authorised etc-T2
81464	Acquire pistol supplier not authorised etc-T2

### C.2.3 Acquire, possess or use firearm part

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘acquire, possess or use firearm part’ offences by searching for the following law part codes:

Law Part Code	Law Part Title
18750	Possess a barrel for a firearm unless authorised by licence
18751	Possess a barrel for a firearm unless authorised by permit
5054	Possess firearm or barrel with altered/defaced id etc-T2
52438	Category H licence possess greater than 10 round magazine-T2
52439	Possess a barrel without authority of licence/permit-T2
81449	Acquire firearm part without authority to do so-T2
81450	Acquire prohibited firearm part no authority to do so-T2
81451	Acquire pistol part without authority to do so-T2

### C.2.4 Acquire, possess or use ammunition

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘acquire, possess or use ammunition’ offences by searching for the following law part codes:

Law Part Code	Law Part Title
18763	Possess ammunition w/o holding licence/permit/authority
81452	Acquire ammunition for firearm without licence/permit

### C.2.5 Supply firearm or firearm part

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘supply firearm or firearm part’ offences by searching for the following law part codes:

Law Part Code	Law Part Title
18350	Send firearm/firearm barrel by mail to NSW address
18743	Send firearm barrel to person, prescribed conditions not met
18744	Send firearm to another person-prescribed conditions not met
18756	Give shortened firearm (not pistol) to other-T2
5046	Give unsafe firearm without giving appropriate warning
5049	Give firearm to other if knows/believes under influence-T2
5051	Give firearm to person when believes incapable of control-T2
81416	Unauthorised supply of firearm part-T2
81419	Unauthorised supply of prohibited firearm part-T2
81420	Unauthorised supply of pistol part-T2



Law Part Code	Law Part Title
81428	Supply unregistered firearm-not prohibited firearm/pistol-T2
81429	Supply unregistered firearm-pistol-T2
81430	Supply unregistered firearm-prohibited firearm-T2
81434	Supply prohibited firearm to unauthorised person-SI
81435	Supply pistol to person unauthorised to possess it-SI
81438	Supply unsafe firearm without giving appropriate warning
81439	Supply shortened firearm (not pistol) to other-T2
81440	Supply firearm to other if knows/believes under influence-T2
81441	Supply firearm believes person incapable of control-T2
81456	Give prohibited firearm to unauthorised person-T2
81457	Give pistol to person not authorised by licence/permit-T2
81458	Give firearm to person not authorised by licence/permit-T2
81459	Give prohibited firearm part to unauthorised person-T2
81460	Give pistol part to person not authorised by licence etc-T2
81461	Give firearm part to person not authorised by permit etc-T2

### C.2.6 Supply ammunition

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘supply ammunition’ offences by searching for the following law part codes:

Law Part Code	Law Part Title
81466	Supply, give ammunition to person not authorised etc
81467	Supply, give ammunition not view licence, permit

### C.2.7 Prohibited firearm-related offence

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘prohibited firearm related’ offences using the following ANZSOC Divisions:

ANZSOC Category	ANZSOC Division
1111	Import or export prohibited weapons/explosives
1112	Sell, possess and/or use prohibited weapons/explosive
1119	Prohibited weapons/explosives offence, nec

### C.2.8 Regulated firearm related offence

To identify relevant firearms charges we first conducted a search of law part titles, for the following terms: “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”. We then identified ‘regulated firearm related’ offences using the following ANZSOC Divisions:

ANZSOC Category	ANZSOC Division
1121	Unlawfully obtain or possess regulated weapons/explosives
1122	Misuse of regulated weapons/explosives
1123	Deal or traffic regulated weapons/explosives
1129	Regulated weapons/explosive offences, nec.

### C.3 Weapons and explosive offences other than firearm offences

We identified weapons and explosive non-firearms-related charges by first identifying all offences within the below ANZSOC categories. We then excluded all offences that had a law part title which contained the terms “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”, as these offences are accounted for under the “Firearms related offences” category:

ANZSOC Category	ANZSOC Division
1111	Import or export prohibited weapons/explosives
1112	Sell, possess and/or use prohibited weapons/explosive
1119	Prohibited weapons/explosives offence, nec
1121	Unlawfully obtain or possess regulated weapons/explosives
1122	Misuse of regulated weapons/explosives
1123	Deal or traffic regulated weapons/explosive
1129	Regulated weapons/explosive offences, nec.
1332	Offensive behaviour & “knife” in law part title
1332	Offensive behaviour & “laser” in law part title

### C.4 Drug (high)

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified high drug offences using the following ANZSOC Divisions:

ANZSOC Category	ANZSOC Division
1011	Import illicit drugs
1012	Export illicit drugs
1021	Deal or traffic - commercial
1022	Deal or traffic in illicit drugs non-commercial
1031	Manufacture illicit drugs
1032	Cultivate illicit drugs

### C.4.1 Import/export

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified import/export offences using ANZSOC divisions 1011 - Import illicit drugs, and 1012 - Export illicit drugs.

### C.4.2 Deal commercial quantity

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified dealing commercial quantity offences using ANZSOC division 1021 - Deal or traffic – commercial.

### C.4.3 Deal non-commercial quantity

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified dealing non-commercial quantity offences using ANZSOC division 1022 - Deal or traffic in illicit drugs non-commercial.

### C.4.4 Manufacture/cultivate

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified manufacture/cultivate offences using ANZSOC divisions 1031 - Manufacture illicit drugs, and 1032 - Cultivate illicit drugs.

### C.5 Drug low

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified low drug offences by searching for the following ANZSOC Divisions:

ANZSOC Category	ANZSOC Division
1041	Possess illicit drugs
1042	Use illicit drugs
1099	Other illicit drug offences
1626	Licit drug offences

We also included the following law part codes:

Law Part Code	Law Part Title
28333	Bring prohibited plants or drugs into place of detention
2911	Drive under influence of drug (not alcohol)
30304	Drive under influence of drug-1st offence w/i 5 years
34945	Drive while under the influence of alcohol or other drugs
36615	Bring/introduce small quantity of drug into detention centre
60447	Drive vehicle with illicit drug present in blood etc-1st off
79172	Drive vehicle, illicit drug present in blood etc - 1st off
79173	Drive vehicle, illicit drug present in blood etc - 2nd+off
79185	Drive vehicle under influence of alcohol/other drug -1st off

### C.5.1 Possess/use

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified possess/use offences using ANZSOC divisions 1031 - Manufacture illicit drugs, and 1032 - Cultivate illicit drugs.

We also included the following law part codes:

Law Part Code	Law Part Title
2911	Drive under influence of drug (not alcohol)
30304	Drive under influence of drug-1st offence w/i 5 years
34945	Drive while under the influence of alcohol or other drugs
60447	Drive vehicle with illicit drug present in blood etc-1st off
79172	Drive vehicle, illicit drug present in blood etc - 1st off
79173	Drive vehicle, illicit drug present in blood etc - 2nd+off
79185	Drive vehicle under influence of alcohol/other drug -1st off

### C.5.2 Other (money to obtain drugs, drug paraphernalia)

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified other drug-related offences using ANZSOC division 1099 - Other illicit drug offences.

We also included the following law part codes: 28333 - Bring prohibited plants or drugs into place of detention, 36615 - Bring/introduce small quantity of drug into detention centre.

### C.5.3 Restricted substances (Steroids and other prescription medications)

To identify relevant drug charges we first conducted a search of law part titles, for the following terms: “drug”, “plant”, “androgenic”, “anabolic”, and “steroid”. We then identified restricted substances offences by searching for the ANZSOC division 1626 - Licit drug offences.

### C.6 Violent and threatening non firearms-related offences

We identified violent and threatening non-firearms-related offences by first identifying all offences within the below ANZSOC categories. We then excluded all offences that had a law part title which contained the terms “ammunition”, “discharge”, “firearm”, “pistol”, and “shoot”, as these offences are accounted for under the category ‘Firearms related offences’:

ANZSOC Category	ANZSOC Division
0111	Murder
0121	Attempted murder
0131	Manslaughter
0211	Serious assault resulting in injury
0212	Serious assault not resulting in injury
0213	Common assault
0291	Stalking
0299	Other acts intended to cause injury, nec
0311	Aggravated sexual assault
0511	Abduction and kidnapping
0521	Deprivation of liberty/false imprisonment
0531	Harrassment and private nuisance
0532	Threatening behaviour
0611	Aggravated robbery

### C.7 Driving offences (not including shoot into premises, or driving or manslaughter causing death)

We identified driving offences by identifying all offences within the following ANZSOC categories:

ANZSOC Category	ANZSOC Division
14	Traffic and Vehicle regulatory offences
0411	Drive under influence of alcohol (sans drugs)
0132	Driving causing death
0412	Dangerous or negligent operation of a vehicle

## C.8 Criminal association related offences

To identify relevant criminal association related offences we first conducted a search of law part titles, for the following terms: “consort”, “criminal group”, and “declared organisation”, “criminal association”. The following offences are accounted for under this category:

Law Part Code	Law Part Title
60717	Participate in criminal group assist criminal activity-T2
60718	Assault person intend criminal activity of criminal group-T1
62914	Participate in criminal group assist criminal activity-T2
62915	Assault person intend criminal activity of criminal group-T1
76994	Participate criminal group contribute criminal activity-T2
76995	Knowingly participate in criminal group assist crime-T1
76996	Knowingly direct activities of criminal group-T1
76997	Knowingly derive material benefit from criminal group-T2
76998	Habitually consort with convicted offenders after warning-T2

## C.9 Other offences

Law Part Code	Law Part Title
831	Receiving or Handling Proceeds of Crime
1229	Environmental Pollution
1311	Disorderly Conduct
1312	Disorderly Conduct
1313	Disorderly Conduct
1531	Offences Against Government Security
1562	Offences Against Justice Procedures, Government Security and Government Operations
1569	Offences Against Justice Procedures, Government Security and Government Operations
812	Motor Vehicle Theft and Related Offences
911	Fraud, Forgery or False Financial Instruments


## Appendix D: List of submissions

We received submissions from the following parties.

Anti-Discrimination Board of NSW  
Cabramatta Community Centre  
Civil Liberties Australia  
Enough is Enough  
Gun Policy Org  
Law Society of NSW  
Law Society of NSW Young Lawyers Criminal Law Committee  
NSW Bar Association  
NSW Police Force  
Shooters and Fishers Party  
Shooters Union NSW  
Mr Peter Cunningham  
Mr David Leyonhjelm  
Ms Phavy Mann  
Victims of Crime Assistance League (VOCAL)







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