

Office of the President

21 August 2019

Our ref: HS-CrLC

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
Brisbane Qld 4000

By email: iacsc@parliament.qld.gov.au

Dear Committee Secretary

**Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019
(Private Member's Bill) - Response to questions taken on notice**

Thank you for the opportunity to appear before the Legal Affairs and Community Safety Committee at the public hearing on the Weapons and Other Legislation (Firearm Offences) Amendment Bill 2019 (the Bill).

Queensland Law Society (QLS) took two questions on notice and provides the following response:

Question one - Provide the source material containing the statistics referred to in the Queensland Law Society's evidence regarding use of police search powers in relation to firearm prohibition orders in New South Wales.

The statistics referred to by the QLS were sourced from page 3 of the **enclosed** article 'Now they're extraordinary powers': firearms prohibition orders and warrantless search powers in New South Wales.¹ The author of that article relied upon the report of the New South Wales Ombudsman, 'Review of police use of the firearms prohibition order search powers: section 74A of the Firearms Act 1996'.²

Question two - Outline the differences between the relevant Queensland and New South Wales search provisions.

The search powers referred to in the above documents are contained in section 74A of the *Firearms Act 1996* (NSW), which provides:

¹ Available online at <http://classic.austlii.edu.au/au/journals/CICrimJust/2017/5.html>

² Available online at https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0016/37132/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf

**Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019
(Private Member's Bill) – Response to questions taken on notice**

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).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.

(Emphasis and footnote added).

The relevant Queensland search powers are contained in sections 29 to 32 of the *Police Powers and Responsibilities Act 2000* (**enclosed**). The committee will see that sections 29 and 31 allow that 'a police officer who reasonably suspects any of the prescribed circumstances for searching a [person in section 29/vehicle in section 31] without a warrant exist may, without warrant,' exercise a number of powers relating to stopping, detaining and searching persons or vehicles and seizing things.

The prescribed circumstances include that the person has or the vehicle contains⁴ something that may be 'a weapon, knife or explosive the/a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order'.⁵

The prescribed circumstances under which warrantless searches are allowed also include certain circumstances relating to antique firearms and where the person has or the vehicle contains something that may be evidence of the commission of certain offences.

We draw the committee's attention to the difference between the warrantless search thresholds in Queensland and New South Wales. In Queensland, if the Bill is passed, in order to exercise warrantless search powers in relation to a person the subject of an FPO, the police officer must reasonably suspect that the person has, or that the vehicle contains, something that may be a weapon, knife or explosive a person may not lawfully possess or another thing that the person is prohibited from possessing under a firearm prohibition order. In contrast, the New South Wales search power does not require a police officer to reasonably suspect any unlawful activity. New South Wales police officers' interpretations of section 74A are discussed in the material referred to in response to question one.

³ These subsections relate to the prohibition on a person who is subject to a firearms prohibition order from acquiring, possessing or using firearms, firearm parts or ammunition.

⁴ s30(a)(i) and s32(10)(a) respectively.

⁵ The Bill proposes to amend subparagraphs 30(a)(i) and paragraph 32(1)(a) to read 'a weapon, knife or explosive the/a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order, an interstate domestic violence order or a firearms prohibition order'.

**Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019
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If you have any queries regarding the contents of this letter, please do not hesitate to contact our policy team by phone on [REDACTED] or by email to [REDACTED]

Yours faithfully



Bill Potts
President



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McElhone, Megan --- "Now They're Extraordinary Powers": Firearms Prohibition Orders and Warrantless Search Powers in New South Wales" [2017] CICrimJust 5; (2017) 28(3) Current Issues in Criminal Justice 329

Contemporary Comment

'Now They're Extraordinary Powers': Firearms

Prohibition Orders and Warrantless Search Powers

in New South Wales

Megan McElhone^[*]

Abstract

In November 2013, the *Firearms Act 1996* (NSW) was amended to provide police in New South Wales with new powers to allow them to search for firearms, firearm parts and ammunition without obtaining a warrant. The New South Wales Government's ostensible aim in introducing these new search powers was to assist police to ensure that individuals who had been issued with a Firearms Prohibition Order were complying with the terms of that order, with a broader view to reducing firearms-related crime in New South Wales. However, the exercise of these powers has not always aligned with the apparent rationale for introducing them, and firearms, firearm parts and ammunition were found in just two per cent of the searches conducted by police in the two years following the amendment of the *Firearms Act*. In this period, police also conducted more than 200 unlawful searches of people who were not subject to an Order. This comment questions the extent to which Firearms Prohibition Order search powers can be justified as an effective and necessary law enforcement tool.

Keywords: [Firearms Act](#) – firearms – Firearms Prohibition Orders – police –

police powers – search powers – New South Wales – Australia

Introduction: what are Firearms Prohibition Orders?

[P]olice [now have] the right to stop, to search, to enter premises to ensure that [subjects of a Firearms Prohibition Order] don't have a firearm, they haven't got ammunition or parts of a firearm. All of that without a warrant. Now they're extraordinary powers.

Andrew Scipione, New South Wales Police Commissioner, 2014

Since 1973, the New South Wales ('NSW') Police Commissioner has been empowered to make a Firearms Prohibition Order ('FPO') against any person he or she believes is unfit to possess a firearm 'in the public interest' (*Firearms and Dangerous Weapons Act 1973* (NSW), s 69(1); *Firearms Act 1989* (NSW), s 39(1); *Firearms Act 1996* (NSW), [s 73\(1\)](#) ('[Firearms Act](#)')). Prior to 2013, the effect of a FPO was to prohibit any FPO subject from owning or using a firearm. However, since the introduction of the *Firearms and Criminal*

Groups Legislation Amendment Act 2013 (NSW) ('Amendment Act') by the O'Farrell Liberal Government, the scope of FPOs has been broadened. It is now an offence for a FPO subject to possess a firearm or firearms parts, subject to a maximum penalty of 14 years' imprisonment. It is also an offence for a FPO subject to possess ammunition, subject to a maximum penalty of five years' imprisonment (Firearms Act s 74). The *Amendment Act* also introduced broad new police search powers (*Firearms and Criminal Groups Legislation Act 2013* (NSW)). This comment will focus on those powers.

The police's new search powers are contained in s 74A of the *Firearms Act*, and are ostensibly intended to help police ensure that FPO subjects are complying with the terms of their FPOs. In short, FPO search powers enable police to search a person subject to a FPO, or any vehicle or premises that the person occupies, controls or manages, 'as reasonably required' without a warrant (Firearms Act s 74A(1)). The *Amendment Act* also stipulated that the NSW Ombudsman would review these new powers during the first two years of their operation (Firearms Act s 74B(1)).

Drawing on the findings reported by the Ombudsman at the conclusion of the review period, this comment will critique the police's FPO search powers. It will be argued that these powers are not properly constrained by accepted legal thresholds, meaning that police are not prevented from searching FPO subjects and their associates arbitrarily. On the contrary, given the lack of such constraints, police have developed a practice of exercising their FPO search powers pre-emptively to 'target emerging crime figures' (Benny-Morrison 2016). It is also apparent that the police do not always properly understand when they can discharge their FPO search powers. Police searched 233 people who were not subject to a FPO using their FPO search powers during the review period (NSW Ombudsman 2016a:74). Despite the extensive use of these new powers, firearms, firearm parts and ammunition were seized in only two per cent of all FPO search events in the review period (NSW Ombudsman 2016a:34). As such, this comment will argue that FPO search powers cannot be justified as a necessary tool to prevent firearms-related crime in NSW.

Parliament's intent in introducing FPO search powers

Drive-by shootings and other firearms-related crimes have been the subject of extensive media coverage in NSW in the last two decades. Reporting has tended to focus on 'gun crime' in Sydney's west and south-west (Collins et al 2000; Cuneo et al 2012; Bashan 2013). In 2012, the NSW Bureau of Crime Statistics and Research ('BOCSAR') stated that the incidence of drive-by shootings in NSW had doubled between 1995 and 2011 (Birdsey 2012:8). However, BOCSAR later corrected this information and reported that there had not actually been a statistically significant increase in the number of shootings. Rather, the shootings tended to occur in close succession, giving the false impression that they were happening more frequently (Fitzgerald 2013:6).

Nevertheless, in October 2013, then Premier Barry O'Farrell sought to legislatively address the alleged upturn in shootings in NSW. When introducing the *Firearms and Criminal Groups Legislation Amendment Bill* to the Legislative Assembly, O'Farrell asserted the need for enhanced police powers to address firearms-related crime in NSW:

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 new weapons to help tackle criminals with 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 (O'Farrell 2013:23564).

The proposed amendments passed through Parliament largely unopposed, though one Independent member of Parliament expressed concern that the Bill was rushed through the House, preventing members from taking the time to consult experts and their constituents about the proposed changes to the *Firearms Act* (Greenwich 2013:23680). As a result of the amendments, a police officer in NSW may now:

- (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 (*Firearms Act s 74A(2)*).

These search powers are subject to just one condition:

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 74A(1), (2) or (3) (Firearms Act s 74A(1))*.

The criminal offences created by *s 74* are that the FPO subject must not acquire, possess or use a firearm, a firearm part or ammunition (*Firearms Act pt 7*).

As will be discussed below, these FPO search powers can be categorised as 'suspicionless' search powers as they do not require the police to first have a reasonable suspicion that an individual has committed, or is about to commit, an offence. Rather, FPO search powers have been executed as a roving search power, which is not subject to established checks and balances. The use of the powers in this way is contrary to Parliament's ostensible intention for the powers to be used to determine whether FPO subjects are complying with the Orders that have been made against them. However, the use of FPO search powers in this way also stems, in part, from the poor formulation of the *Amendment Act*.

The exercise of FPO search powers by the NSW police force

Between 1 November 2013 and 31 October 2015, 1317 people in NSW were served with a FPO (NSW Ombudsman 2016a:5). Meanwhile, in the first 22 months of the Ombudsman's review period, police used FPO search powers to conduct 2571 searches of 634 people, 227 of whom were not subject to a FPO. These searches could be grouped into 1343 separate interactions, which were termed 'search events' by the police and the Ombudsman. More than half of these search events took place in Sydney's south-west (NSW Ombudsman 2016a:6). Despite conducting more than 2500 searches using their FPO search powers in the two-year review period, police seized 35 firearms, nine firearm parts, and 26 lots of ammunition — meaning that police found a firearm, part of a firearm or ammunition in just two per cent of all FPO searches (NSW Ombudsman 2016a:113). While these seizures are important, the small proportion of firearms, firearm parts and ammunition found in the FPO searches does not lend much credibility to the notion that these powers are an effective mechanism to disarm those people who are committing firearms-related crime in NSW; unless FPO search powers are reconceptualised as a deterrent, pre-emptive and 'disruptive' policing strategy.

Although O'Farrell asserted that FPO search powers should only concern those people engaged in criminal activities involving guns (O'Farrell 2013:23564), the most commonly seized item during the review period was small quantities of illicit drugs. Other seized items included knives, mobile phones, computers and money (NSW Ombudsman 2016a:34). It is unsurprising then that only 84 of the 1343 search events in the review period resulted in a charge being laid, and that the majority of these charges were not related to offences against a FPO (NSW Ombudsman 2016a:35). Indeed, the Ombudsman found that only 15 of the 1343 search events conducted in the review period resulted in a charge for committing a firearms-related offence, while the charges laid were proven for just eight of these search events (NSW Ombudsman 2016a:36).

One of the most common reasons for issuing a FPO was because the FPO subject had alleged links with an organised crime group or 'gang', most of which were outlaw motor cycle gangs ('OMCGs') or 'Middle Eastern organised crime groups' (NSW Ombudsman 2016a:44). In fact, Detective Chief Superintendent Ken Finch rationalised the issuing of FPOs as a 'deliberate strategy' to target 'bikies' and Middle Eastern background crime targets, providing an explanation for the 200 per cent increase in the number of FPOs issued between 2014 and 2015 (Benny-Morrison 2016). According to Finch, FPOs give police 'tools we can actually utilise to try and disrupt and prevent gun-related violence ... [However] notwithstanding the extraordinary nature of the powers ... We exercise them judiciously and responsibly' (Benny-Morrison 2016).

Despite Finch's confidence in the ability of police to use their FPO search powers judiciously, the potential for their misuse has drawn concern from legal groups and politicians alike. As noted in a submission from the NSW Bar Association, the criteria for issuing a FPO does not hinge on a person actually having a firearm; FPOs are regularly issued based on untested police intelligence, and allegations that an individual is fraternising with members of criminal organisations (NSW Ombudsman 2016a:73). An individual may find it difficult to avoid associating with reputed members of crime groups by virtue of the family or environment into which he or she is born. Similar criticisms have been made of consorting laws, with commentators observing that individuals keeping 'undesirable company' may be pulled into the ambit of the criminal justice system merely because they have associated with certain people, and not because they are actually guilty of any substantive wrongdoing (*Jan v Fingleton*; McNamara 2014; Brown et al 2015:1211–23). Issuing a person with a FPO because he or she is alleged to be involved with an organised crime group places unfair limits on freedom of association and, as will be discussed, makes them vulnerable to arbitrary search by police.

Further, a Member of the Legislative Council argued that using FPO search powers can legitimate the impingement of a person's civil liberties by the police: 'Nothing stops them [police] 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' (Shoebridge 2013:23903).

There is evidence to support these concerns about police repeatedly searching FPO subjects. The FPO search powers Issues Paper published by the NSW Ombudsman in July 2015 contains a case study concerning a Torres Strait Islander man given the pseudonym 'Alan', whose only gun-related conviction was for using an imitation firearm to commit an armed robbery. Fourteen years later, in 2014, Alan was issued with a FPO. Though police did not record any information about Alan possessing a firearm or attempting to acquire one, Alan was searched using FPO search powers on 21 separate occasions over a seven-month period. Most searches were instigated because Alan was begging, loitering or suspected to be under the influence of drugs outside of a busy suburban railway station (NSW Ombudsman 2015:17). These searches were completely unrelated to any attempt to curb gun crime in NSW, but do provide further evidence of police targeting Aboriginal and Torres Strait Islander Australians for minor public order offences under the guise of serious crime prevention (NSW Ombudsman 2016b). Police narratives also revealed that on more than one occasion Alan was searched owing entirely to the fact that he was a FPO subject, and not because of any 'reasonable requirement' to determine whether he had acted in contravention of the terms of his FPO (NSW Ombudsman 2015:17).

The ambiguity inherent in conducting searches 'as reasonably required'

Importantly, FPO search powers are not the only powers that police officers in NSW can use to search for firearms, firearms parts and ammunition. In the event that police obtain information that a person may be in possession of a firearm they can apply for a search warrant. So long as police are able to provide sufficient information or evidence ('reasonable grounds') to support their belief that 'things' associated with an offence will be found on a premises, a Magistrate, registrar of the Local Court or an employee of the Attorney General's Department can issue police with a search warrant. The warrant then authorises police to enter, search and seize relevant property on that premises ([Law Enforcement \(Powers and Responsibilities\) Act 2002](#) (NSW) s 47). Searches under a warrant are subject to several safeguards under the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) ('LEPRA'), which aim to prevent police from conducting arbitrary or oppressive searches. For example, police are only empowered by a warrant to search a premises for a designated period of time (ordinarily 72 hours) (LEPRA s 73(3)). Additionally, police can only seize items described in the warrant, unless they have reasonable grounds to believe that an additional item relates to an offence (LEPRA s 49(1)). However, FPO search powers are not subject to these same checks and balances ([Firearms Act](#) pt 7).

Police can also search for firearms, firearm parts and ammunition without a warrant in a range of circumstances. These search powers are codified in LEPRA, which dictates that searches can be conducted as a result of arrest, reasonable suspicion or consent ([pt 4](#)). If police reasonably suspect that a person is in possession of a firearm, firearm part or ammunition, and that person is under arrest, they can conduct a person search (LEPRA s 23). If the individual is not under arrest but is in a public place, or is in a vehicle in a public place, police can also conduct a person search or a search of the vehicle (LEPRA ss 21(1)(c), 35)). The only circumstance under which police do not require reasonable suspicion to conduct a search using

the powers contained in *LEPRA* is if an individual consents to a search of his or her person, premises or vehicle (*LEPRA* s 34A). A 'reasonable suspicion' is 'less than a reasonable belief but more than a possibility ... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence' (*R v Rondo* at [53]).

Though the powers already described can only be exercised when police form reasonable suspicion, [s 74A\(1\)](#) of the *Firearms Act* contains the unusual stipulation that FPO search powers can be discharged by police 'as reasonably required'. However, police currently have no policies or guidelines in place to assist them in determining whether a FPO search is 'reasonably required' (NSW Ombudsman 2016a:49). During the review period the NSW Ombudsman welcomed submissions from key stakeholders about the meaning of 'reasonably required'. While some stakeholders held that a FPO search could only be 'reasonable' if a FPO subject had done something to arouse the police's suspicion, others felt it necessary for the police's suspicion to relate directly to firearms offences to justify the use of FPO search powers (NSW Ombudsman 2016a:48). In any case, in the view of these stakeholders, some element of suspicion is still required to necessitate the use of FPO search powers.

The Ombudsman reviewed police records and spoke to operational police about their understanding of the meaning of 'reasonably required', and found a wide range of interpretations about when FPO search powers should be exercised. Some police concurred with the above view that a reasonable requirement to search a person using FPO search powers should be grounded in some level of suspicion that an offence had been committed, although this suspicion need not amount to 'a reasonable suspicion'. However, other police believed that they are empowered by the *Firearms Act* to search a person entirely on the grounds that the person is subject to a FPO (NSW Ombudsman 2016a:49). One significant concern about the use of the FPO search powers in this way is that FPO subjects may become vulnerable to frequent and repeat searches that cannot be justified on other grounds.

The extent of the ambiguity in [s 74A\(1\)](#) of the *Firearms Act* is such that police mistakenly exercised their FPO search powers to search 227 people who were not subject to a FPO in the first 22 months of the Ombudsman's review period. Most of these were person searches, conducted on individuals who were in the company of FPO subjects at the time that they were searched (NSW Ombudsman 2016a:74). The application of the FPO search powers in this way is erroneous, unlawful and wholly unacceptable, as no provision is made in the *Firearms Act* for FPO search powers to be exercised against individuals who are not subject to a FPO. If police have reasonable grounds to suspect that the associates of FPO subjects are engaged in criminal behaviour, they should exercise their powers to conduct a search under *LEPRA*.

Challenging a FPO

Concerns about FPO search powers being used incorrectly and oppressively are compounded by the fact that FPOs do not expire. Avenues to appeal a FPO are also very limited. Once served with a FPO, an individual has 28 days to request that the Police Force review the decision (*Administrative Decisions Review Act 1997* (NSW) [s 53\(2\)\(d\)](#)). If this review process is not favourable to the FPO subject, some subjects are eligible to apply to the NSW Civil Administrative Tribunal ('NCAT') and request a further review (*Firearms Act* [s 75\(1\)\(f\)](#)). However, a broad range of individuals are exempt from this option. An individual cannot apply for an NCAT review if he or she is under 18 years of age or: has been convicted of certain prescribed offences including firearms offences, drug offences, fraud, robbery, dishonesty or stealing; has been subject to an Apprehended Violence Order ('AVO') within the last ten years unless the AVO was revoked; or is subject to a good behaviour bond for certain offences, which are similar to those described above (*Firearms Regulation 2006* NSW) cl 5(1), (2)). After this 28-day period an individual can appeal to the Commissioner to revoke the FPO (*Firearms Act* [s 73\(3\)](#)), but it is impossible to estimate the likelihood of the Commissioner doing so upon the basis of the data that is currently available.

In addition, no protocol exists whereby FPOs are reviewed to ensure that they are based on current information or intelligence (NSW Ombudsman 2016a:86). In effect, this means that a FPO subject and his or her home or vehicle can be searched whenever police decide to use their FPO search powers. However, in contrast, firearms licences expire, and will never be in force for more than a five-year period before the Commissioner is required to reconsider whether a person is still fit to possess a firearm (*Firearms Act* [s 21\(1\)](#); NSW Ombudsman 2016a:103). This requirement recognises that an individual's circumstances may change. However, this recognition is unidirectional; while the need to review firearms licences indicates

that an individual may cease to be a fit to possess a firearm, the perpetual nature of FPOs implies that FPO subjects cannot change for the better.

Conclusion

Firearms Prohibition Order search powers were created with the stated aim of helping police to reduce firearms-related crime in NSW, and the provision of FPO search powers has encouraged police to move toward the use of pre-emptive policing strategies. However, police only made very small seizures of firearms, firearm parts and ammunition in the two years after the powers were introduced. Police have also tended to use their new powers in a way that is incongruous with Parliament's intent in amending the *Firearms Act*. Though the misuse of these powers is attributable, in part, to the poor wording of the amending Act, the fact remains that police conducted over 200 unlawful searches of persons not subject to a FPO during the Ombudsman's two-year review period. Individuals who are subject to a FPO are also vulnerable to arbitrary and frequent searches. As such, it is proposed that s 74A(1) of the *Firearms Act* is reviewed, to clarify when police can use FPO search powers. A protocol should also be introduced to ensure that FPOs are reviewed, and based on current information and intelligence about the commission of firearms-related offences.

Cases

Jan v Fingleton (1983) 32 SASR 379

R v Rondo [2001] NSWCCA 540 (24 December 2001)

Legislation

Administrative Decisions Review Act 1997 (NSW)

Firearms Act 1989 (NSW)

Firearms Act 1996 (NSW)

Firearms and Criminal Groups Legislation Act 2013 (NSW)

Firearms and Dangerous Weapons Act 1973 (NSW)

Firearms Regulation 2006 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

References

Bashan Y (2013) 'Sydney is a City under Fire', *The Australian* (online), 7 February 2013 <<http://www.dailymail.co.uk/sydney-is-a-city-under-fire/news-story/1b5fe014607f87a95dd84a46dcc3361f>>

Benny-Morrison A (2016) 'Firearms Prohibition Orders Increase by 200% as Gun Crime Falls in Sydney', *The Sydney Morning Herald* (online), 16 October 2016 <<http://www.smh.com.au/nsw/firearms-prohibition-orders-increase-by-200-as-gun-crime-falls-in-sydney-20161014-gs2i3k.html>>

Birdsey E (2012) '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

Brown D, Farrier D, McNamara L, Steel A, Grewcock M, Quilter J and Schwartz M (2015) *Criminal Laws: Materials and Commentary on Criminal Laws and Process in New South Wales* (6th ed), Federation Press

Collins J, Noble G, Poynting S and Tabar P (2000) *Kebabs, Kids, Cops & Crime*, Pluto Press

Cuneo C, Klein N and Van Den Broeke L (2012) 'Wild West Rocked by Spree of Shootings', *The Daily Telegraph* (online), 20 April 2012 <<http://www.dailyleague.com.au/news/nsw/wild-west-rocked-by-spree-of-shootings/news-story/af76b08f43a8f26427fa15863987de81>>

Fitzgerald J (2013) 'Non-Fatal Shootings in New South Wales', *Crime and Justice Statistics: Bureau Brief, Issue Paper No 85*, NSW Bureau of Crime Statistics and Research

Greenwich A (2013) New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 2013, 23680

McNamara L (2014) 'Careful Who You Chat With: It Could Turn You into a Criminal',

The Conversation <<https://theconversation.com/careful-who-you-chat-with-it-could-turn-you-into-a-criminal-32727>>

New South Wales Ombudsman (2015) 'Review of Police Use of Firearms Prohibition Order Search Powers: Issues Paper, Section 74A of the *Firearms Act 1996*'

New South Wales Ombudsman (2016a) 'Review of Police Use of the Firearms Prohibition Order Search Powers: Section 74A of the *Firearms Act 1996*'

New South Wales Ombudsman (2016b) 'The Consorting Law: Report on the Operation of Part 3A, Division 7 of the *Crimes Act 1900*'

O'Farrell B (2013) New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 2013, 23564

Scipione A (2014) Interview with Simon Bouda, *Nine News — Saturday Extra*, 13 December 2014

Shoebridge D (2013) New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 2013, 23903

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[s 28]

- (a) the effect the roadblock may have on road safety and public safety; and
 - (b) the likelihood of a dangerous situation happening if a person sought is located at the roadblock; and
 - (c) any other relevant safety considerations.

Example—

If the person sought is believed to be armed and dangerous, the police officer establishing the roadblock may decide not to establish it in a populated location.

28 Record of roadblock to be made

The senior police officer present at a roadblock must ensure—

- (a) a record is made of relevant details of the roadblock including, for example, the reasons for establishing it, when and where it was established, for how long, and whether the roadblock led to a person sought being located or arrested; and
 - (b) a copy of the record is given to a person nominated by the commissioner for the purpose.

Division 2 **Searching persons without warrant**

29 Searching persons without warrant

- (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following—

 - (a) stop and detain a person;
 - (b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.

(2) The police officer may seize all or part of a thing—

[s 30]

- (a) that may provide evidence of the commission of an offence; or
- (b) that the person intends to use to cause harm to himself, herself or someone else; or
- (c) if section 30(b) applies, that is an antique firearm.

30 Prescribed circumstances for searching persons without warrant

The prescribed circumstances for searching a person without a warrant are as follows—

- (a) the person has something that may be—
 - (i) a weapon, knife or explosive the person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or
 - (ii) an unlawful dangerous drug; or
 - (iii) stolen property; or
 - (iv) unlawfully obtained property; or
 - (v) tainted property; or
 - (vi) evidence of the commission of a seven year imprisonment offence that may be concealed on the person or destroyed; or
 - (vii) evidence of the commission of an offence against the Criminal Code, section 469 that may be concealed on the person or destroyed if, in the circumstances of the offence, the offence is not a seven year imprisonment offence; or
 - (viii) evidence of the commission of an offence against the *Summary Offences Act 2005*, section 17, 23B or 23C; or
 - (ix) evidence of the commission of an offence against the *Liquor Act 1992*, section 168B or 168C;

- (b) the person possesses an antique firearm and is not a fit and proper person to be in possession of the firearm—
 - (i) because of the person's mental and physical fitness; or
 - (ii) because a domestic violence order has been made against the person; or
 - (iii) because the person has been found guilty of an offence involving the use, carriage, discharge or possession of a weapon;
- (c) the person has something that may have been used, is being used, is intended to be used, or is primarily designed for use, as an implement of housebreaking, for unlawfully using or stealing a vehicle, or for the administration of a dangerous drug;
- (d) the person has something the person intends to use to cause harm to himself, herself or someone else;
- (e) the person is at a casino and may have contravened, or attempted to contravene, the *Casino Control Act 1982*, section 103 or 104;
- (f) the person has committed, is committing, or is about to commit—
 - (i) an offence against the *Racing Act 2002* or *Racing Integrity Act 2016*; or
 - (ii) an offence against the *Corrective Services Act 2006*, section 128, 129 or 132, or the repealed *Corrective Services Act 2000*, section 96, 97 or 100; or
 - (iii) an offence that may threaten the security or management of a prison or the security of a prisoner;
- (g) the person has committed, is committing, or is about to commit an offence against the *Penalties and Sentences Act 1992*, section 161ZI;

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- (h) the person has committed, or is committing, an offence against the *Summary Offences Act 2005*, section 10C;
- (i) the person has consorted, is consorting, or is likely to consort with 1 or more recognised offenders.

Division 3 **Searching vehicles without warrant**

31 **Searching vehicles without warrant**

- (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—
 - (a) stop a vehicle;
 - (b) detain a vehicle and the occupants of the vehicle;
 - (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.
- (2) Also, a police officer may stop, detain and search a vehicle and anything in it if the police officer reasonably suspects—
 - (a) the vehicle is being used unlawfully; or
 - (b) a person in the vehicle may be arrested without warrant under section 365 or under a warrant under the *Corrective Services Act 2006*.
- (3) If the driver or a passenger in the vehicle is arrested for an offence involving something the police officer may search for under this part without a warrant, a police officer may also detain the vehicle and anyone in it and search the vehicle and anything in it.
- (4) If it is impracticable to search for a thing that may be concealed in a vehicle at the place where the vehicle is stopped, the police officer may take the vehicle to a place with appropriate facilities for searching the vehicle and search the vehicle at that place.
- (5) The police officer may seize all or part of a thing—

- (a) that may provide evidence of the commission of an offence; or
 - (b) that the person intends to use to cause harm to himself, herself or someone else; or
 - (c) if section 32(1)(b) applies, that is an antique firearm.
- (6) Power under this section to search a vehicle includes power to enter the vehicle, stay in it and re-enter it as often as necessary to remove from it a thing seized under subsection (5).

32 Prescribed circumstances for searching vehicle without warrant

- (1) It is a prescribed circumstance for searching a vehicle without a warrant that there is something in the vehicle that—
 - (a) may be a weapon, knife or explosive a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or
 - (b) may be an antique firearm that a person possesses and the person is not a fit and proper person to possess the firearm—
 - (i) because of the person's mental and physical fitness; or
 - (ii) because a domestic violence order has been made against the person; or
 - (iii) because the person has been found guilty of an offence involving the use, carriage, discharge or possession of a weapon; or
 - (c) may be an unlawful dangerous drug; or
 - (d) may be stolen property; or
 - (e) may be unlawfully obtained property; or
 - (f) may have been used, is being used, is intended to be used, or is primarily designed for use, as an implement

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- of housebreaking, for unlawfully using or stealing a vehicle, or for the administration of a dangerous drug; or
- (g) may be evidence of the commission of an offence against any of the following—
- the *Racing Act 2002*
 - the *Racing Integrity Act 2016*
 - the *Corrective Services Act 2006*, section 128, 129 or 132
 - the *Nature Conservation Act 1992*; or
- (h) may have been used, is being used, or is intended to be used, to commit an offence that may threaten the security or management of a prison or the security of a prisoner; or
- (i) may be tainted property; or
- (j) may be evidence of the commission of a seven year imprisonment offence that may be concealed or destroyed; or
- (k) may be evidence of the commission of an offence against the Criminal Code, section 469 that may be concealed on the person or destroyed if, in the circumstances of the offence, the offence is not a seven year imprisonment offence; or
- (l) may be evidence of the commission of an offence against the *Summary Offences Act 2005*, section 17, 23B or 23C; or
- (m) may be something the person intends to use to cause harm to himself, herself or someone else; or
- (n) may be evidence of the commission of an offence against the *Penalties and Sentences Act 1992*, section 161ZI.
- (2) Also, the following are prescribed circumstances for searching a vehicle without a warrant—

- (a) the driver or a passenger in the vehicle has committed, or is committing, an offence against the *Summary Offences Act 2005*, section 10C;
- (b) the vehicle is being used by, or is in the possession of, a person who has consort, is consorting, or is likely to consort with 1 or more recognised offenders.

Division 4 **Searching public places without warrant**

33 Searching public places without warrant

- (1) It is lawful for a police officer to exercise the following powers in a public place without a search warrant—
 - (a) power to enter the public place and to stay on it for the time reasonably necessary to exercise powers mentioned in paragraphs (b) to (f);
 - (b) power to search the public place for anything that may be evidence of the commission of an offence;
 - (c) power to seize a thing found at the public place, or on a person found at the public place, that a police officer reasonably suspects may be evidence of the commission of an offence;
 - (d) power to photograph anything the police officer reasonably suspects may provide evidence of the commission of an offence;
 - (e) power to dig up land;
 - (f) power to open anything that is locked.
- (2) However, if this section applies to a place because it is a public place while it is ordinarily open to the public, the police officer may search the place only—
 - (a) with the consent of the occupier of the place; or
 - (b) under a search warrant; or