

Reviews

NSW Ombudsman (2000) Policing Public Safety, Office of the NSW Ombudsman, Sydney, ISBN 0731312600

Background

The *Crimes Amendment (Police and Public Safety) Act 1998* (NSW) came into force on 1 July 1998. Through amendments to the *Crimes Act* and the *Summary Offences Act*, the Act:

- created new knife-related offences, including having custody of a knife or blade in a public place;
- gave police new powers to search for knives and other weapons in public places and schools;
- gave police the power to issue directions to people in public places and made it an offence to disobey such a direction; and
- gave police the power to demand names and addresses of people thought to be witnesses to indictable offences.

The legislation was precipitated by an apparent increase in violent offences involving knives, including the fatal stabbing of a police officer.

The apparent need for tough action on knives gave the government the perfect opportunity to tack on some other amendments, creating significant new police powers that had nothing to do with knives. But with the panic surrounding knife-related violence, and the precedent set by gun control laws in the aftermath of the Port Arthur massacre, who was going to argue with this legislation?

Well, some people did argue. Cross-benchers and civil liberties groups were justifiably concerned about the amount of power given to the police and the probable adverse impact upon young, indigenous, homeless and non-English-speaking-background people. These concerns were not addressed by amendments to the Act, but by a legislative requirement that the Ombudsman review the Act's operation after twelve months.

The Ombudsman's office conducted a very thorough review of the operation of the Act. It conducted research, received public submissions, and consulted widely with police, community groups, legal practitioners, and young people.

The Ombudsman completed the review report in November 1999, and presented it to the Minister for Police as required. The Police Ministry then conducted its own review of the legislation, and finally tabled the Ombudsman's report and its own response in parliament on 29 June 2000.

The Ombudsman's Findings

The Ombudsman's report is comprehensive, well-informed, and makes some worrying findings about the operation of the legislation.

For those with an understanding of the poor relationship between the police and young and Indigenous people, the Ombudsman's findings were predictable. They appear to confirm the existence of a long-standing police practice of harassing people who are young, homeless, or from certain racial groups.

The old adage that 'a picture paints a thousand words' is very true of the maps and graphs in the report. These show a very high incidence of searches and police directions in parts of New South Wales with large Indigenous populations. They also show an alarmingly high rate of searches and directions among young people.

42% of searches were carried out on people aged under 18, and the age group most frequently searched was 16 and 17 year olds. 48% of all police directions were issued to people under 18, with the peak age being 16.

6.6% of people searched were Aboriginal or Torres Strait Islanders, and 22% of all directions were issued to Indigenous people.

The percentage of searches which found a weapon was low overall, but the proportion of successful searches of young people was very low indeed. This suggests that many searches of young people are based merely on the person's age (possibly combined with some other factor such location or racial appearance) rather than on truly reasonable grounds.

Another concern is that police often search people without specifying which search power they are using, and without stating the grounds for the search. On some occasions, they conduct strip searches for knives. Strip searches are not authorised under the *Police and Public Safety* amendments.

Police directions have become the bane of my life - or, more accurately, my clients' lives - in the last two years. A direction may be issued to a person whose conduct or presence in a public place is obstructing, harassing, or intimidating anyone, or is likely to cause fear to a person 'of reasonable firmness'.

According to the police narratives analysed by the Ombudsman, directions were given for a variety of reasons, including that people were begging, intoxicated, in a high crime area, or merely had no reason to be there. In the Ombudsman's opinion, about 50% of the directions analysed were issued without a valid reason.

It seems that the mere presence of young people in groups, or street sex workers, was often thought to be intimidating. The report acknowledges that there are real problems with the 'presence' element of the legislation, and that this needs further clarification.

The Ombudsman also reported some problems with other aspects of the legislation. These include police fining people for knife offences without giving the person the opportunity to provide a lawful excuse for possessing the knife, failure to consider using warnings and cautions for juveniles caught in possession of knives, and incorrect use of the power to demand names and addresses.

The Ombudsman's Recommendations

Given the findings about the apparent misuse of the legislation, the Ombudsman's recommendations are disappointingly weak.

The Ombudsman does not recommend substantial legislative change, apart from the proposal that all police search powers be codified into one piece of legislation. At the time of writing, I understand the legislation is likely to be released as an exposure draft later this year.

The Ombudsman suggests that the use of the legislation be clarified through a police code of practice. This would include a clear statement that factors such as age or racial appearance cannot in themselves form the basis for a search or direction. It also recommends better training of police officers and the monitoring of the use of police powers.

The Ombudsman recommends that the NSW Police Service obtain legal advice and provide guidance to police about the meaning and application of some elements of the legislation. This includes 'obstruction' and how it relates to activities such as begging, busking or sleeping in public areas. In my opinion, this is a step in the right direction, but does not go far enough. It appears obvious that the legislation (particularly the directions power) is far too broad, or at the very least ambiguous. In these circumstances, surely some legislative amendment is called for.

The Police Ministry's Response

If the Ombudsman's recommendations are somewhat weak, the Police Ministry's response is even more so.

In a self-congratulatory tone, it extols the success of the *Police and Public Safety* legislation. It cites research by the NSW Bureau of Crime Statistics and Research (Issue Paper no. 8, June 2000) which shows a reduction in robberies involving knives since mid-1998.

The Police Ministry fails to acknowledge the serious civil liberties concerns raised by the operation of the Act, in particular its apparently discriminatory use against young and Indigenous people.

It notes the concerns of youth organisations about community perceptions of young people and their use of public space, but dismisses them as outside the scope of the inquiry. When young people are being routinely dispersed from public places for looking 'intimidating', I would suggest that these concerns go to the very heart of the matter!

The Police Ministry rejects the idea of a code of practice, saying that it would 'promote, rather than reduce, ambiguity', and that 'the breaking down of stereotypes is not something that can be legislated for'.

There is support for the proposed codification of police search powers, and some acknowledgment of the need for improved police training.

The Police Ministry recommends a government Plan of Action, involving the police and other government agencies, with regular feedback from the Ombudsman. Given the Ombudsman's lack of power and apparent reluctance to make strong recommendations, I would suggest that the police have little to fear from the Ombudsman's involvement.

Conclusion

The Ombudsman's report only covers the Act's first 12 months of operation, to the end of June 1999.

Since then, police have continued to use their powers under the Act, in many cases without challenge. Statistics from the NSW Bureau of Crime Statistics and Research (Issue Paper no. 8, June 2000) show that the number of searches (particularly unsuccessful ones) seems to have declined since mid-1999, but the incidence of police directions has continued to increase.

While it is true that knife-related violence seems to have declined, and that this may be attributable to the legislation, does this come at too high a price?

We have seen the racially discriminatory impact of the Northern Territory's mandatory sentencing regime. Most of our legislators, and the New South Wales public, can see the injustice of locking up young Aboriginal people for stealing biscuits, textas and towels. Similarly, the *Police and Public Safety* legislation appears neutral on its face, but is having a strong negative impact on certain parts of our community. Do we really want to live in a state where people are repeatedly moved on, or routinely stopped and searched, just because they happen to be young, non-white, or have nowhere to go?

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