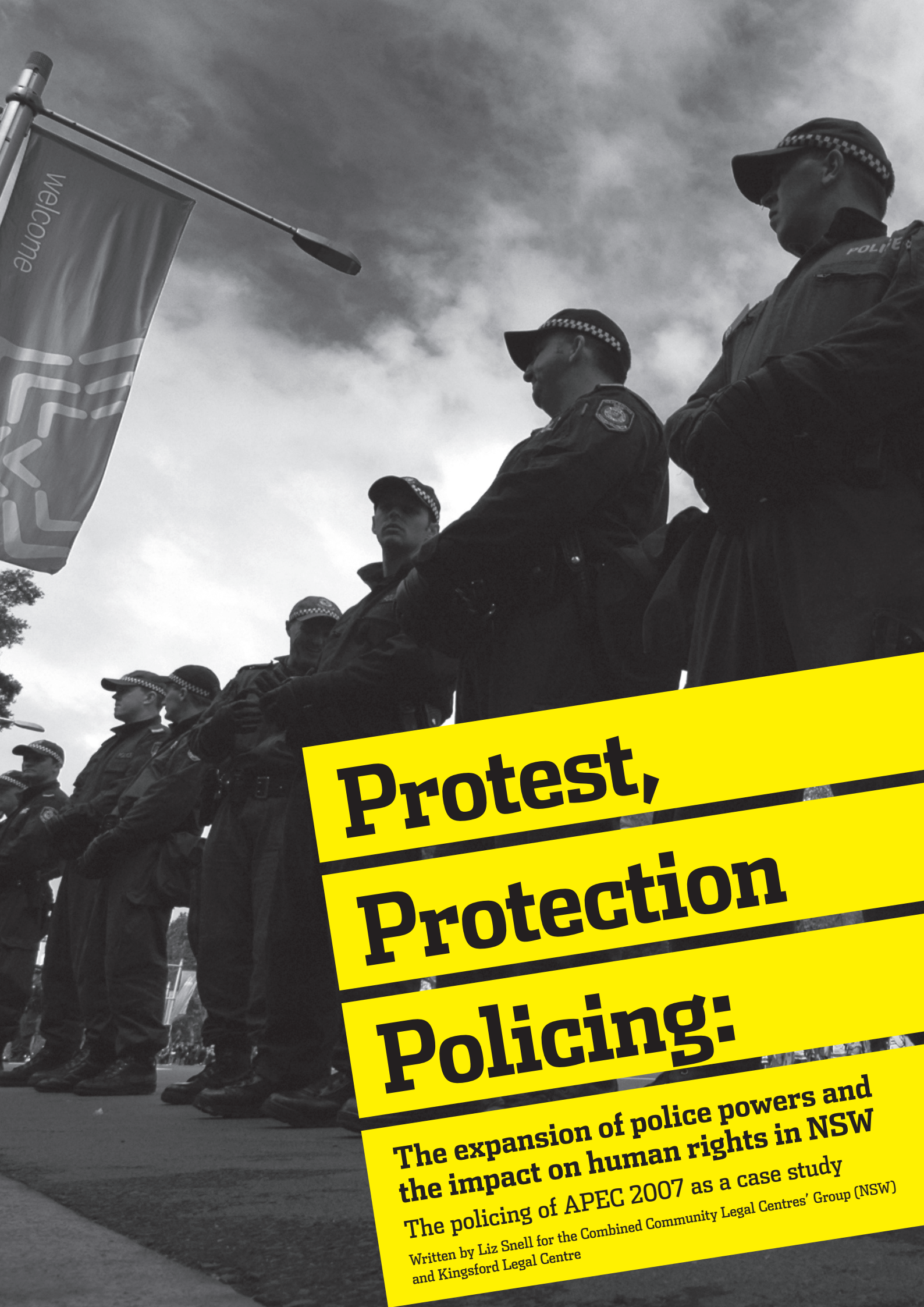




Protest, Protection Policing:

**The expansion of police powers and
the impact on human rights in NSW**
The policing of APEC 2007 as a case study
Written by Liz Snell for the Combined Community Legal Centres' Group (NSW)
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Additional research by Dale Mills of Human Rights Monitors

Published in 2008 by:



Combined Community Legal Centres Group (NSW)

C17/99 Jones Street, Ultimo, NSW 2007



Kingsford Legal Centre

Law Building

University of New South Wales, NSW, 2052

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ISBN 978-0-9805439-0-2

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Acknowledgements

We would like to thank the large number of people who have given their time and assistance in researching and preparing this report. While we are unable to name everybody who has contributed, we would like to specifically thank:

Alison Aggarwal, Alex Bainbridge, Teena Balgi, Elisabeth Baraka, Hazel Blunden, Margot Egan, Alexandra Faraguna, Sylvia Hale, Pip Hinman, Michael Kennedy, Kirrillee Moore, Miranda Nagy, Annie Pettitt, Jane Sanders, Anna Samson, Lizzie Simpson, Shirley Southgate, Linda Steele, Linda Tucker.

We specifically acknowledge the earlier research towards this report undertaken by Dale Mills of Human Rights Monitors, and his important contribution to the report in terms of the research on the APEC protests and related events and the media documentation of the APEC meetings.

We also thank all Human Rights Monitors for the extensive documentation of events during the APEC protests and for sharing that information with CCLCG for this report.

Executive summary

There is currently a significant lack of transparency and accountability with respect to the enactment of laws which expand NSW Police powers. This is evident in the continued introduction of legislation which expands NSW Police powers;¹ the speed with which such legislation is introduced;² the lack of close analysis, consultation and debate about such laws;³ and the questionable safeguards surrounding the implementation of the legislation.⁴ Arguably there has been an expansion of police powers in NSW by stealth.

This report examines the *APEC Meeting (Police Powers) Act 2007 (NSW)* (*APEC Meeting Act*) within a human rights framework and considers what happened in the lead up to, during and post APEC. It critically analyses the process of how the legislation came to be enacted and the effectiveness or otherwise of mechanisms of accountability of police with respect to the powers authorised. This report also considers the impact of the legislation upon socially and economically disadvantaged groups, such as the homeless and intellectually disabled, as well as protestors. The report highlights that it is time to look closely at existing NSW Police powers and the reasons behind the insistence for further expansion of such powers. Moreover, given the Australian Government's recent vocal commitment to domestic enforceability of international human rights⁵ and support for the United Nations,⁶ combined with upcoming events of international significance, such as World Youth Day and the Climate Change Camp,⁷ the need to adequately review APEC powers and police powers in general is important and timely.

The *APEC Meeting Act* particularly expanded police powers within APEC security areas from 30 August – 12 September 2007 inclusive.⁸ These areas were divided into "restricted"⁹ and "declared"¹⁰ areas. The latter were further divided into "core declared areas", which were designated prior to the start of the APEC period¹¹ and a pool of 38 local government areas from which, if certain criteria be met, "additional declared areas" could be designated.¹²

Under the *APEC Meeting Act* police had the power within the APEC security areas to establish roadblocks, checkpoints and cordons;¹³ search people,¹⁴ vehicles and vessels;¹⁵ seize and detail prohibited items;¹⁶ give reasonable directions;¹⁷ exclude or remove people from APEC security areas.¹⁸ Further powers applied to the restricted areas, including powers of entry and search of premises¹⁹ and the power to request disclosure of identity.²⁰ It was also an offence, punishable with up to 6 months imprisonment (2 years in circumstances of aggravation, namely, possession of a prohibited item without special justification) to be in a restricted area without special justification.²¹ The injustice of the severity of this penalty is compounded by the confusion apparent, even among law enforcement officers, as to what constituted a restricted area.²² Provisions were

1 For example Part 6A *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA) (NSW)*; *Terrorism (Police Powers) Act 2002 (NSW)*; *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW)*;
2 Part 6A LEPRA was introduced and assented to on the same day, namely 15 December 2005; *APEC Meeting (Police Powers) Act 2007 (NSW)* was introduced and assented to within three weeks.
3 See, for example, Parliamentary Hansard with respect to introduction of Part 6A LEPRA and *APEC Meeting (Police Powers) Act 2007 (NSW)*.
4 For example, sunset clauses which are later repealed, as discussed in Section 5 of this paper.
5 Robert McClelland, "Australia and International Human Rights: Coming in from the Cold" HREOC, 23 May 2008 accessed on 23 May 2008 at: <http://www.hreoc.gov.au/legal/seminars/index.html>
6 Prime Minister Of Australia, Press Conference, United Nations, New York, 30 March 2008 accessed on 7 April 2008 at: http://www.pm.gov.au/media/Interview/2008/interview_0154.cfm
7 This camp is to be held in Newcastle in July 2008.
8 APEC security area defined in s5 *APEC Meeting (Police Powers) Act 2007 (NSW)*; APEC period defined in s3 *APEC Meeting (Police Powers) Act 2007 (NSW)*
9 Sect 7 *APEC Meeting (Police Powers) Act 2007 (NSW)*
10 Sect 6 *APEC Meeting (Police Powers) Act 2007 (NSW)*
11 Described in Schedule 2 *APEC Meeting (Police Powers) Act 2007 (NSW)*
12 See Schedule 1 *APEC Meeting (Police Powers) Act 2007 (NSW)*
13 Sect 10 *APEC Meeting (Police Powers) Act 2007 (NSW)*
14 Sect 12 *APEC Meeting (Police Powers) Act 2007 (NSW)*
15 Sect 11 *APEC Meeting (Police Powers) Act 2007 (NSW)*
16 Sect 13 *APEC Meeting (Police Powers) Act 2007 (NSW)*
17 Sect 14 *APEC Meeting (Police Powers) Act 2007 (NSW)*
18 Sections 24-26 *APEC Meeting (Police Powers) Act 2007 (NSW)*
19 Sect 21 *APEC Meeting (Police Powers) Act 2007 (NSW)*
20 Sect 22 *APEC Meeting (Police Powers) Act 2007 (NSW)*
21 Sect 19; "prohibited item: defined s3; "special justification" defined s37 *APEC Meeting (Police Powers) Act 2007 (NSW)*
22 For example, the Chaser incident. See: "Chaser APEC Charges Dropped," *SBS World News Australia*, 28 April 2008 accessed on 28 April 2008 at: http://news.sbs.com.au/worldnewsaustralia/chaser_apec_charges_dropped_545833 Also see further reference to the Chaser incident in Section 3.

also included to provide for a presumption against bail for certain offences²³ and to provide law enforcement officials with immunity in nuisance.²⁴

Police powers were expanded under the *APEC Meeting Act* such as to impinge upon basic human rights provided for by the *International Covenant on Civil and Political Rights (ICCPR)*.²⁵ These include the right to freedom of movement,²⁶ the right to freedom of expression,²⁷ the right to peaceful assembly²⁸ and the right to privacy.²⁹ The *UN Code of Conduct for Law Enforcement Officials* was also allegedly violated particularly with respect to the upholding of human dignity and human rights of all persons³⁰ and the use of force only when strictly necessary.³¹

A number of concerns about the *APEC Meeting Act* and police powers exercised during the APEC period were raised by the NSW Legislation Review Committee,³² The Greens,³³ Community Legal Centres (CLCs),³⁴ members of the homelessness network,³⁵ Human Rights Monitors³⁶ and protestors.³⁷ These concerns were said to be addressed by the number of safeguards said to accompany the *APEC Meeting Act*.³⁸

The safeguards included: the powers being applied within designated and limited areas; public notification of variations to APEC security areas; police receiving specialist training with respect to the use of the powers; a joint review of the powers by the Attorney General and Minister for Police; and a sunset clause such that the powers applied only for the APEC period and would then terminate automatically.³⁹ As this report highlights, the so called “safeguards” seem to be of limited effect.

Following an analysis of the effectiveness or otherwise of the safeguards and the outlining of some case studies of alleged abuse of police powers, this report makes a series of recommendations. They include:

- That an independent review of police actions during APEC be undertaken. That this review includes mechanisms for public consultations and submissions.
- That an independent inquiry into the general expansion of NSW Police powers be undertaken before any further expansions be considered.
- That alternative models of policing, other than the expansion of police powers, be considered.
- That more effective and inclusive police consultation and communication strategies be developed in the event of future international events requiring a security presence.

That more effective and enforceable mechanisms for ensuring the protection of human rights within NSW and Australia be introduced, including, for example, a Charter of Rights and Responsibilities.

Now is the time for closer scrutiny, transparency and accountability with respect to NSW Police powers.

23 Sect 31 *APEC Meeting (Police Powers) Act 2007 (NSW)*

24 Sect 35 *APEC Meeting (Police Powers) Act 2007 (NSW)*

25 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia 13 August 1980, entered into force for Australia 13 November 1980.

26 Article 12 ICCPR

27 Article 19 ICCPR

28 Article 21 ICCPR

29 Article 17 ICCPR

30 Article 2 *UN Code of Conduct for Law Enforcement Officials*, A/Res/34/169, 17 December 1979 accessed on 7 May 2008 at: <http://www.un.org/Depts/dhl/resguide/resins.htm>

31 Article 3 *UN Code of Conduct for Law Enforcement Officials*

32 Parliament of NSW, *Legislation Review Committee: Legislation Review Digest*, No 1 of 2007, accessed on 16 April 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/eb56b637c31b7479ca2573fa007fded4/\\$FILE/2008.1%20Legislation%20Review%20Digest.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/eb56b637c31b7479ca2573fa007fded4/$FILE/2008.1%20Legislation%20Review%20Digest.pdf)

33 For example, see Sylvia Hale “Second Reading APEC Meeting (Police Powers) Act 2007,” *NSW Legislative Council Hansard and Papers*, 21 June 2007 at 1506-1508 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LC20070621/\\$File/541LC014.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LC20070621/$File/541LC014.pdf)

34 Interview Kirillie Moore, Redfern Legal Centre, 2 May 2008, transcript held by CCLCG; Personal communication, Alexandra Faraguna, Intellectual Disability Rights Services, 20 May 2008.

35 Including Homeless Persons Legal Services. See Elisabeth Baraka, “The Use of the Protocol for Homeless People During APEC” in *Parity*, 21(1) February 2008 at 34.

36 For example, see: Jordan Baker, “Identity Parade of the Secret Police,” *Sydney Morning Herald*, 10 September 2007 accessed on 21 May 2008 at: <http://www.smh.com.au/articles/2007/09/09/1189276546303.html>

37 For example, interview with Anna Samson, organiser with Stop the War Coalition, 10 January 2008.

38 David Campbell, “APEC Meeting (Police Powers) Bill 2007, Agreement in Principle”, *NSW Legislative Assembly Hansard and Papers at 1092*, 7 June 2007 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20070607/\\$File/541LA010.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20070607/$File/541LA010.pdf)

39 Ibid.

Methodology

A range of sources were examined in the preparation of this report. These include:

- Australian Legislation
- United Nations agreements
- Case law
- NSW Parliamentary Hansard records
- Reports from Parliamentary Inquiries
- Joint Review of the APEC legislation by the NSW Attorney General and Minister for Police
- Media releases from the Prime Minister's Department
- Speeches by the Federal Attorney General
- NSW Ombudsman reports
- Media reports and commentary relating to APEC
- Interviews with staff from CLCs
- Expert legal advice about APEC legislation
- Report about the APEC legal hotline
- Commentary about a Charter of Rights
- Commentary about G20

Research about counter-terrorism policing

Every attempt was made to access NSW Police policies and procedures in operation from August 2007-October 2007. Between 24 January 2008 – 2 June 2008, 11 attempts were made, including letters and phone calls. The policies and procedures were not made available prior to the conclusion of this report.

Section 1: Setting the context

In the lead up to and since the 2000 Olympic Games held in Sydney (indeed even well before this), there has been an ever increasing expansion of police powers within NSW. Some expansions of power have been precipitated by public order disturbances and riots, such as the Cronulla riots, others by international events such as the Olympics and APEC. The perceived threat of terrorism is also a significant factor with respect to expansion of police powers.

The purpose of this report is to use an examination of the *APEC Meeting (Police Powers) Act (APEC Meeting Act)* as but one case study of the expansion of NSW Police powers. The report examines the legislation within a human rights framework and considers what happened in the lead up to, during and post APEC. It critically analyses the process of how the legislation was able to be enacted and the effectiveness of mechanisms of accountability of police and government that were put in place. It also considers the impact of the legislation upon socially and economically disadvantaged groups, such as the homeless and intellectually disabled, as well as protestors.

This report calls for:

- An independent review of police actions during APEC
- An urgent review of existing NSW Police powers and the reasons for continued expansion of NSW Police powers;
- Alternative approaches to the expansion of police powers;
- The development of more effective and inclusive police consultation and communication strategies in the event of future international events requiring a security presence;

Stronger protection of human rights within Australia.

Why focus on this issue now?

Overview

The last few years have seen the introduction of numerous pieces of legislation which have expanded police powers thereby infringing upon people's basic human rights.⁴⁰ The speed with which such legislation has been introduced,⁴¹ the lack of close analysis, consultation and debate⁴² and the questionable safeguards implemented, such as sunset clauses which are later repealed,⁴³ raise questions around the lack of transparency and accountability in enacting such laws. Arguably, there has been an expansion of police powers in NSW by stealth.

Lessons from *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*

Part 6A *LEPRA* emergency police powers were introduced in response to the Cronulla riots in December 2005. These powers have only been used on rare occasions.⁴⁴ This is significant as their limited use suggests there may be no need for such powers. Indeed, a review of the *LEPRA* emergency powers indicates that the police had sufficient existing powers, for example, to request disclosure of identity and search vehicles.⁴⁵ Furthermore, if the *LEPRA* emergency powers were still able to be invoked during the APEC period,⁴⁶ there appears to be little basis for further emergency police powers in the form of the *APEC Meeting Act*.⁴⁷

⁴⁰ For example, see note 1.

⁴¹ Note 2.

⁴² See note 3.

⁴³ This is discussed in Section 5 of the paper.

⁴⁴ NSW Ombudsman notes they have been used on four occasions. NSW Ombudsman, *Review of Emergency Powers to Prevent or Control Disorder*, September 2007 at 42, accessed on 21 May 2008 at: <http://www.ombo.nsw.gov.au/publication/PDF/Other%20Reports/Review%20of%20Emergency%20Powers%20to%20Prevent%20or%20Control%20Disorder.pdf>

⁴⁵ For example, ss171-173 of the *Road Transport (General) Act 2005 (NSW)* require drivers, passengers and owners to provide name, address and driver's licence to police in certain circumstances.

⁴⁶ Sect 87P *LEPRA* sunset provision originally provided for the repeal of Part 6A in December 2007. The sunset provision was repealed on 22 December 2007, Schedule 1, [6] *Law Enforcement and Other Legislation Amendment Act 2007 (NSW)*

⁴⁷ It should also be noted that it seems contrary to the intended purpose of *LEPRA*, that is, the consolidation of legislation relating to police powers into one act, to introduce further legislation outside this act. See Bob Debus, "Law Enforcement (Powers and Responsibilities) Bill – Second Reading," *Legislative Assembly Hansard*, 17 September 2002 at 4846 accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20020917/\\$File/523la045.pdf](http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20020917/$File/523la045.pdf)

From “one-off” to permanent

Recent events with the Olympic Games relay torch in the ACT clearly highlight how seemingly extraordinary “one-off” powers are becoming a permanent fixture within Australian legislation. In 1999 the *Olympic Events Security Act (ACT)* was introduced to “ensure that Olympic events ... to be held in Canberra [in 2000]... are conducted safely and without incidents of violence”.⁴⁸ In 2000, the *Olympic Events Security Amendment Bill (ACT)* was introduced to amend the *Olympic Events Security Act 1999 (ACT)*. Amendments included extending the Act’s operation to “major events” as declared by the Executive⁴⁹ and changing the title of the Act to *Major Events Security Act 2000 (ACT)*. It was under the *Major Events Security Act 2000 (ACT)* that the Chief Minister was able to declare the torch relay a “major event” and so expand police powers during that time.⁵⁰ This illustrates that, despite the rhetoric of using expanded police powers as “one-off” powers, they can quickly, seemingly without public knowledge and with little transparency and accountability, become permanent.

The potential for this to happen in NSW is apparent from comments made in the joint *Review of the APEC Meeting (Police Powers) Act* undertaken by the NSW Attorney General and Minister for Police and tabled in Parliament on 11 March 2008. The Ministers found “declared area powers are appropriate for a more generalist crowd control situation and restricted area powers for those situations of high risk or threat as in the case of APEC”.⁵¹ This suggests that the “one off” APEC Meeting Police Powers may become a permanent fixture in NSW legislation.

Federal Government support for human rights

Finally, in recent times, Prime Minister Rudd has been vocal regarding the Australian Government’s commitment to international human rights and Australia’s desire to play a more active role in the United Nations.⁵² This is further supported by recent comments made by Federal Attorney General Robert McClelland with respect to the importance of the rule of law and the Australian Government’s respect for fundamental human rights.⁵³ This commitment needs to be reflected domestically through mechanisms which allow people to enforce their civil and political rights.

Such rights can be further protected through a Charter of Rights which is currently under consideration at both the federal and NSW levels. A Charter of Rights can serve an important function of drawing Parliament’s attention to any inconsistency in legislation which would impinge upon Australia’s human rights obligations. Some would argue this function is currently exercised by the NSW Parliament’s Legislation Review Committee.⁵⁴ However, Parliament’s lack of response to the issues this committee raised with respect to the *APEC Meeting Act*, as discussed below in Section 5 on accountability, suggests an alternative accountability mechanism is required. It therefore seems an opportune time to critically reflect upon the adequacy of protection of human rights within Australia including in relation to the expansion of police powers.

Thus the time is ripe for an urgent review of existing police powers and critical analysis of the rationale for further expansion of existing powers. Given World Youth Day is fast approaching and other events, such as the Climate Change Camp to be held in Newcastle in July 2008, are planned, the need to adequately review APEC powers and police powers in general is important and timely.

48 “Explanatory Memorandum, Olympic Events Security Bill 1999”, *Legislative Assembly for the ACT* at 2, accessed on 10 April 2008 at: http://www.legislation.act.gov.au/es/db_11830/19990325-13600/pdf/db_11830.pdf

49 Sect 4 *Major Events Security Act 2000(ACT)*

50 “Enhanced Security Arrangements for Olympic Torch Relay,” 16/4/08 accessed on 20/4/08 at: <http://www.chiefminister.act.gov.au/media.asp?media=3647§ion=52&title=Media%20Release&id=52>

51 The *Review of the APEC Meeting (Police Powers) Act 2007*, tabled in Parliament 11 March 2008 at 9.

52 Note 6.

53 Note 5.

54 The establishment of the NSW Legislation Review Council was recommended as an alternative to a NSW Bill of Rights by the Standing Committee on Law and Justice, *A NSW Bill of Rights, Report 17*, October 2001, at xii-xiv, 132, accessed on 20 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/o/8569eddf31da5dbca256ad90082a3d3/\\$FILE/A%20NSW%20Bill%20oof%20Rights%20Report%20October%202001.pdf](http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/o/8569eddf31da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20oof%20Rights%20Report%20October%202001.pdf)

Section 2: International human rights framework

During APEC, limits authorised by the NSW Parliament were placed on civil and political rights. These limits impacted upon many rights delineated in the *International Covenant on Civil and Political Rights (ICCPR)* and the *UN Code of Conduct for Law Enforcement Officials* in particular.

The Australian Government ratified the ICCPR on 13 August 1980. In doing so Australia agreed to make the Covenant part of domestic law. Elements of the ICCPR are incorporated into federal anti-discrimination legislation. However, as Williams notes, the ICCPR has not been enacted in full by the Federal Government.⁵⁵ Notably, while the ICCPR is included as Schedule 2 in the Human Rights and Equal Opportunity Commission Act 1986 (Cth)⁵⁶ the Covenant is not enforceable under the Act. As Williams argues, this effectively means Australia is in breach of international law.⁵⁷

Federal Attorney General Robert McClelland recently delivered a paper regarding the enforceability of international human rights in Australia. In it he affirmed the Federal Government's commitment to engaging in discussions with states and territories with respect to mechanisms to ensure the enforceability of ratified international agreements.⁵⁸ Mechanisms to ensure the enforceability of the *ICCPR* should form part of those discussions.

McClelland also indicated his commitment to ensuring "human rights consultation takes place at the policy development stage" and that "drafting of any Commonwealth legislation consistently takes account of implications for our international human rights obligations" and that "it not be just a formality or afterthought". While further information as to how this would take effect is required, this may be an improvement upon the current form of review in NSW where Bills are currently reviewed for consistency with a number of criteria, including the undefined and ambiguous reference to "personal rights and liberties". Moreover, this review process takes place after the Bills have been drafted and, depending upon the speed with which Bills are assented, may not be completed until after the Bill has been enacted.⁵⁹

For now, let us turn our attention to the rights within the *ICCPR* that were limited during the APEC period. These include:

- The right to liberty of movement⁶⁰
- The right to freedom of expression⁶¹
- The right of peaceful assembly⁶²
- The right to liberty and security of person⁶³
- The right to presumption of innocence⁶⁴
- The right to privacy⁶⁵
- The right to participatory democracy⁶⁶

An analysis of the limitations on these rights is provided below in Section 3 relating to the APEC legislation.

CCLCG argues that the human rights outlined here are in fact so fundamental that no restrictions upon or derogation of these rights can take place.⁶⁷ In the event that the government is determined to place restrictions upon some of these rights, as deemed necessary to protect national security, public order, health and morals or the rights and freedoms of others, minimum safeguards must be met. These should

55 George Williams, *A Charter of Rights for Australia*, UNSW Press, Sydney, 2007 at 15.

56 Schedule 2, *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

57 Williams, note 55 at 15.

58 Robert McClelland, note 5.

59 The effectiveness or otherwise of the Legislation Review Committee as provided for in Section 3 of the *Legislative Review Act 1987* (NSW) is discussed below in the section on accountability.

60 Article 12(1) *ICCPR*

61 Article 19(2) *ICCPR*

62 Article 21 *ICCPR*

63 Article 9(1) *ICCPR*

64 Article 14(2) *ICCPR*

65 Article 17(1) *ICCPR*

66 Article 25 *ICCPR*

67 Article 5(2) *ICCPR*, Schedule 2, *HREOCA 1986* (Cth)

include an explanation as to why such restrictions are necessary and safeguards which serve to uphold an appropriate balance between rights and other community interests.

The United Nations General Assembly adopted the *UN Code of Conduct for Law Enforcement Officials* on 17 December 1979. The Code acknowledges that law enforcement officers have an important task of performing their duties in compliance with human rights and that there is potential for abuse in the exercise of such duties. The United Nations General Assembly viewed the establishment of the Code as “one of several important measures for providing the citizenry served by law enforcement officials with protection of all their rights and interests”.⁶⁸

While the *UN Code of Conduct for Law Enforcement Officials* is not binding, the United Nations General Assembly has recommended “favourable consideration should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials”.⁶⁹ This Code requires law enforcement officers to:

- protect human dignity and maintain and uphold the human rights of all persons;⁷⁰
- use force only when strictly necessary and to the extent required for the performance of their duty;⁷¹
- keep matters of a confidential nature in the possession of law enforcement officials confidential, unless the performance of duty or the needs of justice strictly require otherwise;⁷²

refrain from inflicting, instigating or tolerating any act of torture or other cruel, inhuman or degrading treatment or punishment.⁷³

Prime Minister Rudd, at a United Nations press conference on 30 March 2008, following his meeting with the UN Secretary General Ban Ki-moon, made several statements expressing his strong support for the United Nations. Rudd indicated that one of the reasons for putting forward Australia’s name for the UN Security General “was that the Australian Government is a strong supporter of the United Nations system”. He also encouraged “people of good will to support the activities of the United Nations around the world”. Finally, Prime Minister Rudd asserted the “need to enhance the United Nations activities” in terms of several activities, including human rights.⁷⁴ To uphold the *United Nations Code of Conduct for Law Enforcement Officials* would be a practical demonstration of such a commitment. While noting this commitment to adhering to international human rights has been made post APEC, it should be acknowledged that any continued failure on Australia’s part to adhere to the Code would contradict Prime Minister Rudd’s recent statements.

68 *UN Code of Conduct for Law Enforcement Officials*, A/Res/34/169, 17 December 1979 accessed on 7 May 2008 at: <http://www.un.org/Depts/dhl/resguide/resins.htm>

69 Ibid

70 Article 2, *UN Code of Conduct for Law Enforcement Officials*

71 Article 3, *UN Code of Conduct for Law Enforcement Officials*

72 Article 4, *UN Code of Conduct for Law Enforcement Officials*

73 Article 5, *UN Code of Conduct for Law Enforcement Officials*

74 Note 6.

Section 3: The APEC legislation

A description of the main sections of the APEC legislation by Jane Sanders of Shopfront Youth Legal Centre is outlined in the boxes below. This is followed by a close examination of how this legislation further expands police powers and its consistency or otherwise with international human rights.

In examining the expansion of police powers within NSW, most comparisons are made between Part 6A LEPRA, emergency police powers introduced in response to the Cronulla riots in December 2005 and the *APEC Meeting Act*.

1. The APEC legislation

The *APEC Meeting (Police Powers) Act 2007* provides police with extraordinary powers in parts of the Sydney CBD during the APEC meeting. The APEC period covered by the Act is 30 August to 12 September 2007 inclusive.

2. APEC security areas

The Act will affect access to, and police powers within, **APEC security areas**, which are defined in s5 to mean any **restricted area**, and any other part of the **declared areas**.

2.1 Declared areas

The **core declared areas** are defined in s6(1) and Schedule 2. These include:

- A large chunk of the CBD bounded by Clarence St, King St, Macquarie St and the harbour;
- Circular Quay and part of The Rocks;
- Most of the Botanic Gardens and Bennelong Point;
- The part of Darling Harbour around the Convention Centre;
- Part of Hickson Road in Millers Point; and
- Part of the harbour from Circular Quay across to Kirribilli.

Further areas can be declared by order of the Police Minister, published in the Gazette (s6(2)-(4)). Additional declared areas include the airport, the Richmond RAAF base, the areas around Admiralty and Kirribilli Houses, some city hotels (Hilton, Observatory, Sheraton on the Park, Marriott) and the Bondi Icebergs.

2.2 Restricted areas

These are not specified in the Act, but s7 provides for them to be designated by the Commissioner of Police, by written order.

The Commissioner must take reasonable steps to notify the public (by erection of signs/barriers, newspaper advertisements and/or publication in the Gazette) unless this would significantly compromise security arrangements.

Restricted areas included the conference venues and their immediate vicinity (eg the Opera House, Government House, Sydney Convention and Exhibition Centre).

2.3 No review or appeal against designation of declared or restricted areas

Section 8 provides that an order or decision made by the Commissioner or Minister under s6 or s7 is not open to any form of legal challenge or appeal.

3. Access to APEC security areas

3.1 Declared areas

In general, there is no restriction on access to declared areas (other than restricted areas).

However, s24 permits police to exclude or remove a person (for the whole or part of the APEC period) if the person:

- fails to submit to a search as a condition of entry;
- fails to surrender a prohibited item as a condition of entry;
- hinders/resists/obstructs police who are performing a search;
- fails to obey a reasonable direction given by police;
- is on a road that is closed under the Act, without lawful excuse; or

is on the **excluded persons list**.

3.2. Restricted areas

Section 19 creates an offence of entering a restricted area without **special justification**. The offence is aggravated if the person has possession or control of a **prohibited item** without special justification.

The maximum penalty is 6 months imprisonment, or 2 years imprisonment in circumstances of aggravation.

Prohibited items are listed in s3 and are:

- (a) spray paint cans;
- (b) chains;
- (c) handcuffs or other devices capable of being

- used to lock persons to other persons or things;
- (d) poles more than 1 metre in length;
- (e) marbles, ball bearings or other similar spherical items;
- (f) smoke devices;
- (g) flares;
- (h) flammable or noxious liquids or substances;
- (i) laser pointers;
- (j) devices capable of being used to interfere with broadcast or communication devices;
- (k) any other things (or things belonging to a class of things) prescribed by the Regulations.

A person has **special justification** to be in a restricted area in circumstances set out in s37(2). Persons with special justification include residents, police officers on duty in the area, or those persons required to be in or pass through the area for work purposes.

Special justification for possession of a prohibited item is covered by s37(3) and encompasses a similar range of circumstances.

The onus of proof of special justification lies on the person accused of the offence or who claims to have the special justification (s38).

Section 25 provides powers to exclude persons from restricted areas. A police officer may prevent a person from entering a restricted area, if the person, without lawful excuse, fails to comply with a request to disclose (or provide proof of) their

identity as a condition of entry.

Section 25 also empowers police to remove persons from restricted areas if they are there without special justification, are in possession or control of a prohibited item without special justification, or if they fail without lawful excuse to comply with a request to disclose (or provide proof of) their identity.

3.3 Excluded persons list

Section 26 provides for the Commissioner to compile an **excluded persons list**, comprising persons that the Commissioner is satisfied would pose serious threats to the safety of persons or property (or both) in an APEC security area during the APEC period.

The Commissioner may (but is not obliged to) publish the list by such means as he thinks appropriate, including in the Gazette, in a newspaper or on a website. Failure to notify the public of the contents of the list does not affect the validity of the list or limit any powers in relation to persons named in the list.

The prospect of an excluded persons list has caused much concern among civil liberties groups, as it is anticipated that it may restrict legitimate protest.

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Expansion of police powers and human rights implications

Designation of APEC Security area

The basis on which large geographical areas were designated “declared” or “restricted” areas in the context of APEC involved a significant expansion of police powers. To highlight the extent of this expansion it is helpful to compare the *APEC Meeting Act* to the operation of Part 6A *LEPRA* emergency powers.

Part 6A *LEPRA* provides police with emergency powers in the context of a public disorder. Sect 87D provides authorisation for the exercise of such powers on the basis of two co-existing conditions. Firstly, the police officer giving the authorisation has reasonable grounds for belief that there is a large-scale public disorder occurring or a threat of such disorder occurring in the near future. Secondly, the police officer is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder. In the case of APEC, areas were largely designated “declared” or “restricted” areas on a spurious basis: namely according to where the APEC meeting and related events were being held. There was no additional requirement of the existence or threat of public disorder. The condition which had to be met was that it be “necessary to promote the security or safety of the venues or facilities for an APEC meeting or participants in the meeting”.⁷⁵ This provides broad grounds and thus a much lower threshold for designating APEC security areas.

Period of authorisation

Under *LEPRA* emergency powers, the period of authorisation must not exceed 48 hours. The police officer

⁷⁵ Sect 6(2)(b); Sect 7(2)(b) *APEC Meeting (Police Powers) Act 2007(NSW)*

giving the authorisation must also consider the authorisation to be reasonably necessary for the purpose for which it is given.⁷⁶ In contrast, the APEC powers were in operation for the duration of the APEC period, namely 30 August – 12 September 2007 inclusive.⁷⁷ Furthermore, while the period of authorisation can be extended under s87G(3)(b) *LEPRA*, judicial oversight is required and thus application must be made to the Supreme Court. In contrast, under s8 the *APEC Meeting Act*, any order made or purportedly made with respect to APEC security areas and any decision or purported decision of the Police Minister or Commissioner with respect to the order or purported order may not be “challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings”. This means there is no safeguard in place to address possible abuses of these discretionary powers.

The size of the area that could potentially be designated a “declared area”, namely “metropolitan Sydney” as defined in Schedule 1, and the temporal period in which powers applied, namely 30 August – 12 September 2007 inclusive, significantly increased the likelihood of exposing many thousands of members of the public entirely unconnected with any actual or threatened public disorder to arbitrary use of APEC powers. These powers, as well as s24 powers, which allow police to exclude or remove a person from an APEC security area, potentially infringed upon a person’s right to liberty of movement⁷⁸ and the right of peaceful assembly.⁷⁹

Strict liability offence with severe penalties and reversal of onus of proof

Given it is not mandatory for the Commissioner to notify the public of all restricted areas,⁸⁰ there is a real potential for a person to unwittingly commit an offence under the *APEC Meeting Act*, for which the person may face severe penalties. Furthermore, even if the public is notified of all restricted areas as the Minister for Police insisted would happen,⁸¹ this does not guarantee a clear and common understanding of what constitutes a restricted area. This is perhaps best illustrated by the *Chaser* stunt where it was unclear whether the Chaser team did in fact enter a restricted area.⁸² In the event that they did enter a restricted area, the NSW Director for Public Prosecutions, Nicholas Cowdery acknowledged that police gave tacit permission for them to be there by waving them through security checkpoints.⁸³ Regardless of the technicalities, this incident indicates a level of police ignorance with respect to restricted areas. Strict liability in such circumstances would arguably amount to a breach of fair process.

Furthermore, to shift the onus of proof such that the accused must establish “special justification” for being in a restricted area is inconsistent with the right to presumption of innocence.⁸⁴ This injustice is compounded when reversal of onus of proof is imposed in circumstances of strict liability with severe penalties.

Excluded persons list

The existence of an “excluded persons list” far exceeds previously existing police powers. To create a list to exclude people from a public space impinges upon several human rights.

Given this power had the effect of excluding people from the APEC security area, the right to liberty of movement,⁸⁵ the right of freedom of expression,⁸⁶ the right of peaceful assembly⁸⁷ and the right to presumption of innocence⁸⁸ were potentially violated.

⁷⁶ Sect 87G(2) *LEPRA (NSW)*

⁷⁷ For applicability of APEC powers see s 9, s20. For the definition of “APEC period” see sect 3 *APEC Meeting (Police Powers) Act 2007(NSW)*.

⁷⁸ Note 60.

⁷⁹ Note 62.

⁸⁰ Sect 7(5) *APEC Meeting (Police Powers) Act 2007 (NSW)*.

⁸¹ David Campbell, “APEC Meeting (Police Powers) Bill 2007, Agreement in Principle”, *NSW Legislative Assembly Hansard and Papers at 1092*, 7 June 2007 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20070607/\\$File/541LA010.pdf](http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20070607/$File/541LA010.pdf)

⁸² The Chaser’s War on Everything is an ABC satirical television program. On September 6 2007, several of its cast, crew and hired drivers tested APEC security measures by driving within metres of the Intercontinental Hotel in a fake motorcade displaying Canadian flags. It was only after executive producer, Julian Morrow, turned the motorcade around and Chas Lucciardello, dressed as Osama bin Laden, alighted from the vehicle that after a short delay, the police interceded. 11 arrests were made. ABC news, “11 Charged over Chaser APEC Stunt,” accessed on 11 June 2008 at: <http://www.abc.net.au/news/stories/2007/09/06/2026372.htm>; video footage available at You Tube, “Chasers APEC Motorcade Stunt,” accessed on 11 June 2008 at: <http://www.youtube.com/watch?v=TdnAaQon5-8>

⁸³ “Chaser APEC Charges Dropped,” *SBS World News Australia*, 28 April 2008 accessed on 28 April 2008 at: http://news.sbs.com.au/worldnewsaustralia/chaser_apec_charges_dropped_545833

⁸⁴ Sect 38 *APEC Meeting (Police Powers) Act 2007(NSW)*; See note 64.

⁸⁵ Note 60.

⁸⁶ Note 61.

⁸⁷ Note 62.

⁸⁸ Note 64.

As The Greens MP, Sylvia Hale, notes: “the bill contains no criteria as to who is to be placed on the excluded persons list beyond ... that the commissioner ‘is satisfied’”.⁸⁹ This belief need not be based on past, relevant criminal convictions.⁹⁰ In effect a person may be on an excluded persons list because of predictions of future behaviour based on what Hale describes as “political views [which] represent a potential threat to person or property”.⁹¹ Furthermore, as there is a lack of transparency in determining who is included on the list, Hale suggests the list is “potentially based on gossip, hearsay and malicious rumour”.⁹² If this is the case, this is an issue of serious concern because the *APEC Meeting Act* contains no right to judicial review of the list, nor appeal against being placed on such a list.

Paddy Gibson, Daniel Jones, Daniel Robins and Timothy Davis-Frank, all of whom were included on the excluded persons list, sought to challenge the constitutional validity of the exclusion orders before the Supreme Court.⁹³ They did this in the face of a lack of judicial review of the list. The Court was prepared to assume that s24(1)(g) and s26 of the *APEC Meeting Act* constituted a burden on freedom of communication on political matters. However, in applying the second limb of *Lange v Australian Broadcasting Corporation* (1997)⁹⁴ as adapted in *Coleman v Power & Ors*,⁹⁵ the Supreme Court held the law was “reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible Government”.⁹⁶ The Court acknowledged a general right to protest, but upheld as constitutionally valid the restriction that those on the excluded persons list were unable to exercise this right in the APEC security area.

Further, there was no mandatory requirement for informing individuals that they are included on this list. Minister for Police, David Campbell, proposed that those on the list “do not need to be told they will be on the list” as “they know they will be on the list because of their previous activities”.⁹⁷ At the same time, provisions were made for the publication of this list in the Gazette, any newspaper or on an internet website. This is inconsistent with the right to privacy⁹⁸ and may constitute unlawful attacks on honour and reputation. It also potentially breaches the requirement within the *UN Code of Conduct for Law Enforcement Officials* not to disclose matters of a confidential nature in the possession of law enforcement officials.

During Parliamentary debate about the *APEC Meeting (Police Powers) Bill 2007 (APEC Meeting Bill)*, Independent MP Clover Moore stated she “share[d] the concerns of the Redfern Legal Centre that publication provisions of the list could be defamatory and could result in discrimination against protestors in the future”.⁹⁹ The Greens MP, Lee Rhiannon, also drew upon the experiences of a former Executive Member of the Privacy Committee, Bill Orme, who provided examples of “unfair consequences flowing from secret blacklists”.¹⁰⁰

Given the wide discretionary powers to exclude people from the APEC security areas and police powers within the *APEC Meeting Act* to give reasonable directions,¹⁰¹ the inclusion of the excluded persons list seems superfluous. This invites the question, for what other purpose is this provision intended? Hale describes it as “a device created to intimidate people who may wish to attend a protest rally during the APEC summit”.¹⁰² The issue of intimidation is discussed in Section 4 of this paper.

89 Sylvia Hale, “APEC Meeting (Police Powers) Bill 2007, Third Reading, In Committee,” *NSW Legislative Council Hansard and Papers* at 1676, 26 June 2007 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LC20070626/\\$File/541LC016.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LC20070626/$File/541LC016.pdf)

90 The representative of the Minister for Police noted that a prior conviction was not a prerequisite for inclusion on the excluded persons list and that “criminal intelligence relates to more than convictions.” Response to Question 0727 *Legislative Council Questions and Answers, Paper No 31*, 27 November 2007 at 1137. This raises questions as to what circumstances may give rise to treatment which can be prejudicial in effect? Furthermore, what forms of scrutiny are in place to provide a check on the extent of such powers? The same questions apply even if a person has a criminal record.

91 Note 89.

92 Ibid.

93 *Padraic Gibson & v Commissioner of Police & Ors* [2007] NSWCA 251 (6 September 2007) accessed on 21 May 2008 at: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2007/251.html>

94 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

95 *Coleman v Power & Ors* (2004) 220 CLR 1.

96 Padraic Gibson, note 93.

97 David Campbell, “APEC Meeting (Police Powers) Bill 2007 Agreement in Principle,” *NSW Legislative Assembly Hansard and Papers*, 19 June 2007 at 1241, accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20070619/\\$File/541LA012.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20070619/$File/541LA012.pdf)

98 Note 65.

99 Clover Moore, note 97 at 1240.

100 Bill Orme cited by Rhiannon Lee, note 89 at 1660.

101 Sect 14 *APEC Meeting (Police Powers) Act 2007(NSW)*

102 Sylvia Hale, note 89 at 1653.

4. Special police powers in APEC security areas

Police will have the following powers in relation to all APEC security areas (that is, both the declared areas and restricted areas):

4.1 Roadblocks, checkpoints, cordons

Section 10 empowers police to establish checkpoints or roadblocks, or to cordon off a security area, for the purpose of:

- stopping and searching persons, vehicles or vessels; or
- preventing persons entering or leaving the APEC security area without police permission (however, police must not prevent a person from leaving an APEC security area unless it is reasonably necessary to avoid a risk to public safety or to the person's own safety).

4.2 Power to search people, vehicles and vessels

Sections 11 and 12 give police the power to stop and search a person, vehicle or vessel inside, or seeking to enter, a security area. *No warrant or reasonable suspicion is required.*

The safeguards in Part 4 Division 4 of the *Law Enforcement (Powers and Responsibilities) Act (LEPRA)* apply to personal searches under section 12, except to the extent that they authorise strip searches.

A strip search will be permitted under *LEPRA* if police suspect on reasonable grounds that the person is in possession of something listed in *LEPRA* s21, or if the person has been arrested, and if the seriousness and urgency of the circumstances warrant a strip search (see *LEPRA* ss21, 23, 24, 31).

4.3 Power to seize and detain prohibited items

Section 13 empowers police to seize and detain **prohibited items** (see 3.2 above) as a condition of entry to a security area, unless the person has **special justification** (see 3.2 above) to have the item.

Items seized do not have to be returned to the person and may be forfeited to the Crown (without any compensation being payable to its owner) if not returned to the owner within 24 hours of seizure.

4.4 Power to give directions

Section 14 provides that police may give a direction to any person, or any group of persons assembled, in an APEC security area.

Such a direction must be reasonable in the circumstances for the purpose of substantially assisting in promoting the security or safety of the APEC meeting, its participants or the public or in preventing or controlling a public disorder.

The section sets out procedures for the giving of directions. Failure to comply is not an offence but may lead to exclusion or removal from the area.

Police also have direction-giving powers under *LEPRA*, with related offences. The main directions power is in ss197-199. However, s200 prohibits this power from being used in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession or an organised assembly.

LEPRA s87MA empowers police to disperse groups in situations of "large-scale public disorder".

"Public disorder" is defined in s87A as "a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations". "Large-scale" is not defined.

4.5 Road closures

Section 15 empowers the Commissioner to direct the closure of roads in an APEC security area for various purposes set out in the section. It is not necessary to give public notice of the road closure.

Section 17 provides that a person or vehicle may not use a road while it is closed under s15, unless the person is a police officer or authorised person, or the vehicle is a police vehicle or other authorised vehicle. There is no offence associated with this; however, s18 gives police the power to remove (or direct removal of) unauthorised vehicles. A person on a road that is closed may also be excluded or removed from the APEC security area.

4.6 Powers to exclude or remove persons from APEC security areas

See 3.1 above.

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Expansion of police powers and human rights implications

Power to seize and detain items

Police powers were also expanded during APEC with respect to the kinds of items which could be seized. Sect 87M(1) *LEPRA* originally provided police with the power to seize and detain "a vehicle, mobile phone or

other communication device” if this would assist in preventing or controlling a public disorder or an officer suspects on reasonable grounds it may provide evidence of commission of a serious indictable offence.¹⁰³ In contrast, the list of prohibited items outlined in s3 of the *APEC Meeting Act* is extensive, including poles of more than one metre in length. Such poles are often used for supporting placards and holding banners during a peaceful assembly. The restriction on the use of such materials therefore can potentially impact upon a comprehensive right to freedom of expression,¹⁰⁴ peaceful assembly¹⁰⁵ and participatory democracy.¹⁰⁶ Furthermore, while items could be seized for “no more than 7 days” under s87M *LEPRA*, there is no requirement to return seized items under s13(3) of the *APEC Meeting Act*. Additionally, if the item is not returned within 24 hours it is deemed forfeited¹⁰⁷ and no compensation is payable with respect to that forfeiture.¹⁰⁸

Establish check points and stop and search powers

Under the *APEC Meeting Act*, police had powers to establish roadblocks, checkpoints and cordons and to stop and search persons, vehicles or vessels. This could take place without a warrant, without grounds of reasonable suspicion and without reasonable grounds for believing there is, for example, an imminent threat or occurrence of large-scale public disorder.¹⁰⁹ This amounts to both the expansion of police powers and a significant incursion upon civil and political rights. The establishment of roadblocks and checkpoints and stop and search powers were triggered as a “condition of entry” into the APEC security zone during the APEC period.¹¹⁰ This means the powers could be exercised arbitrarily and insufficient checks and balances appear to be in place to prevent the potential abuse of these powers.

Furthermore, the power in s10 extends beyond “preventing persons *entering* an APEC security area without the permission of a police officer” to include “preventing persons *leaving* an APEC security area without the permission of a police officer”.¹¹¹ The latter power is qualified such that a police officer “must not refuse permission for a person to leave the APEC security area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety”.¹¹² However, given the inclusion of the power to give reasonable directions¹¹³ this seems superfluous. Such powers impinge upon the right to liberty of movement,¹¹⁴ the right not to be subjected to arbitrary interference with one’s privacy¹¹⁵ and potentially on the right to liberty and security of person.¹¹⁶

5 Special police powers in restricted areas

The following additional powers apply to restricted areas:

5.1 Powers of entry and search

Section 21 provides that police may, without warrant, enter and search any premises located in a restricted area. They must do as little damage as possible.

Police are not authorised to enter residential premises except with the consent of the occupier, or under the authority of a search warrant or other law that authorises the entry.

5.2 Power to request disclosure of identity

Section 22 empowers a police officer to request a person to disclose his or her identity if the person’s identity is unknown to the police officer, and the person is in (or seeking to enter) a restricted area (whether or not in a vehicle or vessel). A person

¹⁰³ It is significant to note that police powers in s87M(1) *LEPRA*(NSW) have recently been expanded. The *Law Enforcement and Other Legislation Amendment Act 2007 (NSW)* amended this section such that “other communication device” was replaced with “other thing”, thus widening the kind of items that can be seized and detained by police. This came into effect on 21 December 2007.

¹⁰⁴ Note 61.

¹⁰⁵ Note 62.

¹⁰⁶ Note 66.

¹⁰⁷ Sect 13(7) (a) *APEC Meeting (Police Powers) Act 2007(NSW)*

¹⁰⁸ Sect 13(7) (b) *APEC Meeting (Police Powers) Act 2007(NSW)*

¹⁰⁹ The powers under Division 3 of Part 6A *LEPRA (NSW)*, which include establishing of cordon or roadblock (s87I), power to stop and search vehicles (s87J), power to search persons (s87K) are only activated with authorisation. Sect 87D sets out the conditions for authorisation which include a police officer having reasonable grounds for believing there is a large-scale public disorder occurring or threat of such disorder occurring in the near future and the powers are reasonably necessary to prevent or control the public disorder.

¹¹⁰ Sect 11(1) (a); s12(1) (a) *APEC period defined s3 APEC Meeting (Police Powers) Act 2007(NSW)*

¹¹¹ Sect 10(1) *APEC Meeting (Police Powers) Act 2007(NSW)*

¹¹² Sect 10(2) *APEC Meeting (Police Powers) Act 2007(NSW)*

¹¹³ See particularly s14(2) *APEC Meeting (Police Powers) Act 2007(NSW)*

¹¹⁴ Note 60.

¹¹⁵ Note 65.

¹¹⁶ Note 63.

may also be requested to provide proof of his or her identity.

There is no offence associated with this power, but failure to disclose identity would enable police to exclude or remove the person from the restricted area under s25.

5.3 Powers to exclude or remove persons from restricted areas

See 3.2 above.

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Expansion of police powers and human rights implications

The power to enter and search premises within a restricted area

The power to enter and search premises within a restricted area without a warrant, without grounds of reasonable suspicion and without limiting it, for example, to the most serious of public order offences or a public emergency does not strike the correct balance between respecting civil rights and protecting public safety. While s21(3) of the *APEC Meeting Act* indicates a police officer is not authorised to “enter any part of premises being used for residential purposes”, there are exceptions to this, including with the consent of the occupier.

The Ombudsman notes that many people consent to police requests without requiring police to draw upon legislative authority.¹¹⁷ In the case of requesting disclosure of identity during the Cronulla riots, the NSW Ombudsman notes “when officers were professional in their approach, people generally complied” without police relying on their statutory powers.¹¹⁸

Sanders asserts that people often “consent” to searches, for example, because they are unaware of their right to refuse.¹¹⁹ Furthermore, there appears to be little incentive for police to ensure informed consent. For example, as Sanders notes, in *DPP v Leonard*¹²⁰ it was held that a person may validly consent to a search even if unaware of the right to refuse, although it was held that such lack of awareness may be relevant to the issue of consent in some cases.¹²¹

Furthermore, Sanders notes that it is unclear whether the safeguards in s201 *LEPRA* apply to a search by “consent”. Sect 201(1) *LEPRA* provides that a police officer must give a person subject to the exercise of the power: evidence that s/he is a police officer; the officer’s name and place of duty; and reason for the exercise of the power. On one view Sanders acknowledges the safeguards apply, because s201 applies to search powers exercised at common law, not just under *LEPRA*.¹²² However, Sanders also notes the counter-argument is that s201 does not apply, because the voluntary handing over of property on request is not a “search” at all.¹²³

The “safeguard” of consent of the occupier to search premises is therefore a very weak safeguard to protect civil and political rights.

Power to obtain disclosure of identity

Under Part 6A *LEPRA*, the police have the power to obtain disclosure of identity if the person is in an authorised target area and the officer reasonably suspects the person has been involved or is likely to be involved in a public disorder. There are significant penalties for failure to disclose identity¹²⁴ or for providing incorrect identification details¹²⁵ without a reasonable excuse. The Ombudsman’s Review of Part 6A *LEPRA* particularly asked for comments relating to the requirement of reasonable suspicion. Many submissions advocated the retaining of this requirement. Notably, the Minister for Police and the Police Association of NSW deemed the provision adequate and appropriate and the NSW Police Force requested no change to this

¹¹⁷ Note 44 at 42.

¹¹⁸ Ibid.

¹¹⁹ Jane Sanders, “Police Powers to Search and Arrest: *the Law Enforcement (Powers and Responsibilities) Act*,” *Legal Aid Criminal Law Conference*, August 2007 at 9 accessed on 9 June 2008 at: <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/24961001186536719130.pdf>

¹²⁰ *DPP v Leonard* (2001) 53 NSWLR 227

¹²¹ Note 119.

¹²² Ibid at 10.

¹²³ Ibid.

¹²⁴ Maximum penalty 50 penalty units or 12 months imprisonment: S87L(2) *LEPRA*

¹²⁵ Maximum penalty 50 penalty units or 12 months imprisonment: S87L(3) *LEPRA*

core power.¹²⁶ The severity of the penalties for non-compliance under s87L *LEPRA* necessitates a minimum safeguard of reasonable suspicion.¹²⁷ While there is no penalty imposed for failure to disclose identity under s22 of the *APEC Meeting Act*, the removal of the reasonable suspicion provision in s22 of the *APEC Meeting Act*, is a further expansion of police powers.

The power to obtain disclosure of identity interferes with a person's right to privacy.¹²⁸ It is also unclear whether names are recorded, how this might take place and for what purpose. The issue of prejudicial effect with respect to future interactions with police was raised as an issue by two local area commanders in the Ombudsman's Review of the Part 6A powers.¹²⁹ The *Review of the APEC Meeting (Police Powers) Act 2007* provided only brief comments about the use of s22, indicating the powers exercised "were minimal in number".¹³⁰

Furthermore, while there is no offence associated with failure to disclose identity and therefore no strict legal penalty, the power under s25 of the *APEC Meeting Act* for police to exclude or remove persons from restricted areas who fail to disclose their identity infringes upon a person's right to freedom of movement¹³¹ and potentially their right to peaceful assembly.¹³²

6. Limits and safeguards applying to police powers

As mentioned in 4.2 above, the search safeguard provisions of *LEPRA* apply to searches conducted under the *APEC Meeting (Police Powers) Act 2007*.

In addition, s201 of *LEPRA* will apply to many of the powers exercised under the Act, including stopping and searching, requesting identity, and issuing directions.

Section 201 applies to powers exercised under *LEPRA* or any other Act or law, except Acts listed in Schedule 1 of *LEPRA* (the *APEC Meeting (Police Powers) Act 2007* is not listed in Schedule 1).

Section 201 requires police to provide their name and place of duty and the reason for the exercise of the power. If the power involves the making of a request or direction that the person is required to comply with by law, and the person does not comply, police must also issue a warning that the person is legally required to comply and that failure to do so may be an offence.

7. Presumption against bail for certain offences

Perhaps the most worrying provision of the Act is s31, which creates a presumption against bail for any offence allegedly committed in an APEC security area during the APEC period that involves:

- the assault of a police officer; or

- malicious damage to property; or throwing a missile at a police officer.

It is also worth noting that s8D of the *Bail Act* creates a presumption against bail for:

- the offence of riot, and any offence punishable by imprisonment for 2 years or more that is allegedly committed in the course of the accused person participating in a "large-scale public disorder", or in connection with the exercise of police powers to prevent or control such a disorder or the threat of such a disorder.

8. Use of police officers from outside NSW

Sections 27 and 28 allow the Commissioner or a Deputy Commissioner to appoint members of other police forces (Australian Federal Police, other States and Territories, New Zealand) as recognised law enforcement officers for the APEC period. Such officers may exercise all the functions and powers that a constable may exercise in NSW.

9. Miscellaneous

There are also some miscellaneous provisions concerning the control of air space, use of police animals including dogs and horses, and the use of reasonable force (see ss30, 33, 32).

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¹²⁶ Note 44 at 43.

¹²⁷ Shopfront Youth Legal Centre and Redfern Legal Centre are both cited in the Ombudsman's Review with respect to their concerns raised about the severity of penalties for non-compliance with s87L. Ibid at 44.

¹²⁸ Note 65

¹²⁹ This was raised in the context of the recording of names in instances of the exercise of stop and search powers under Part 6A *LEPRA*. Under s87J and s87K *LEPRA* there is no requirement for a warrant or reasonable grounds for suspicion to conduct a search provided the person is in the authorised target area. Two local area commanders felt there was a risk that "low value" records could potentially prejudice a person's future interactions with police if frontline officers are unable to easily distinguish records of stops and searches under Part 6A from records relating to general stop-search powers, where a police officer must have grounds for reasonable suspicion. Cited in NSW Ombudsman, Note 44 at 43.

¹³⁰ Note 51 at 12.

¹³¹ Note 60.

¹³² Note 62.

Expansion of police powers and human rights implications

Presumption against bail

The presumption against bail for certain offences infringes upon the right to presumption of innocence.¹³³

Section 8D of the *Bail Act 1978 (NSW)* was introduced through Schedule 3 of the *Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW)* in response to the Cronulla riots in December 2005. Powers prior to the introduction of the *APEC Meeting Act* therefore already existed with respect to presumption against bail for certain offences relating to or allegedly committed in the course of a riot. It should be noted that arguably the Part 6A *LEPRA* powers are already an unjustified expansion of police powers. Therefore, the question must be asked: what justified the introduction of these further powers relating to presumption against bail? Again, the correct balance between respecting civil rights and freedoms and protecting public safety has not been met.

Recognised law enforcement officers

As a consequence of expanding the category of those who are deemed recognised law enforcement officers in NSW there is a potential loss of advantage of having local police who have a good understanding of local context and strong relationships with local communities. Such an advantage was acknowledged by the NSW Ombudsman in the Review of Part 6A *LEPRA*. The Ombudsman noted a police commander and an ethnic liaison officer were able to use their “strong ties with community” to “appeal for calm and defuse a highly volatile situation”.¹³⁴ Where trust was established and police adopted a consultative approach with the community, the NSW Ombudsman also reported that “intelligence gained ... was accurate”.¹³⁵ Notably, several organisations working with marginalised groups, such as homeless people, expressed concern prior to APEC about policing undertaken by those unaware of the local context and local people.¹³⁶

No liability in nuisance

In circumstances of significant incursion into civil and political rights there is an expectation of appropriate safeguards to prevent the abuse of discretionary powers. Sect 35 of the *APEC Meeting Act* provides police and others “exercis[ing] functions under this Act or regulations” protection from liability in nuisance. Such immunity has the potential to undermine public confidence in the appropriate use of police powers and raises issues with respect to the rule of law.

At the heart of the rule of law lies the principle that every person and organisation is subject to the same rules. Federal Attorney General McClelland recently stated he considers promoting respect for the rule of law to be “one of the most important aspects of my role”.¹³⁷ He commented on the importance of the rule of law not only in providing justice for victims of human rights abuses but “more importantly, [in] preventing these abuses from occurring in the first place”.¹³⁸ A practical way to show respect for the rule of law would be to exclude provisions within legislation which provide police with protection from liability in nuisance.

¹³³ Note 64.

¹³⁴ On 12 December 2005, police received reports that a crowd of about 4,000 people had gathered at the Lakemba Mosque to protect it from a threatened attack. NSW Ombudsman, Note 44 at 67.

¹³⁵ Ibid.

¹³⁶ For example, see Elisabeth Baraka, “The Use of the Protocol for Homeless People During APEC” in *Parity*, 21 (1) February 2008 at 34. This is discussed further in the section on consultation with different stakeholders.

¹³⁷ Note 5.

¹³⁸ Ibid.

Section 4: What happened in the lead up to and during APEC?

In order to adequately consider the impact of the *APEC Meeting Act*, it is necessary to analyse what happened in the lead up to, throughout and following APEC. This section focuses on three areas: intimidation; the role of the media; and police consultations with different stakeholders.

a) Intimidation

In order to understand the impact of the expansion of police powers and the climate of fear and intimidation that seemed evident during APEC it is necessary to examine what took place in the lead up to APEC. A series of events took place that suggest the police and NSW Government sought to intimidate key people who intended to protest during APEC. The following is only a small sample from many examples.

Prior to APEC

Prior to APEC, Tim Davis-Frank recounts two experiences of encounters with counter-terrorism agents in relation to his involvement in the G20 protest of November 2006. Firstly, he wrote in the *Green Left Weekly* of his experiences of “being snatched by about eight unidentifiable men and forced into an unmarked white van” while walking with friends in Melbourne on the evening of November 18, 2006. Davis-Frank writes “Without identifying themselves, the men in the van tied my hands behind my back, forced me to lie face down on the floor and proceeded to interrogate me, punching me repeatedly in the face if I didn’t answer their questions quickly enough and once for accidentally calling one of them ‘mate’”.¹³⁹

The second incident took place at 6am on 14 March 2007 at his parents’ house at Bronte. As David Marr notes, Davis-Frank was one of a number whose houses were raided by teams of up to ten police in a “dawn sweep through Sydney” to arrest G20 demonstrators four months after the event.¹⁴⁰

Honora Ryan was also targeted, as outlined by Marr.¹⁴¹ Ryan was not at G20. However, “opposition to the Iraq war had seen her demonstrating when Condoleezza Rice and Dick Cheney visited Sydney”.¹⁴² Ryan had gone to court to support those who had been arrested with respect to the G20 protest. After leaving court, Ryan describes going down the hill to choir practice at Christ Church St Laurence near Central. When choir practice was finished she emerged into the dark to be confronted by “two men in suits and dark glasses”.¹⁴³ Ryan explains: “They told me to stop going to rallies. They said they had a file like this on me” – she held her hands a couple of feet apart – “and to watch out or the same thing would happen to me”. Marr notes that Ryan took this to mean her house would be raided, too.¹⁴⁴

Incidents at anti-Cheney rally

It was reported to a CLC that, at the beginning of the anti-Cheney protest on 22 February 2007, police were seen examining a large book of photos, pointing to individuals in the crowd and then some of those individuals were approached by police. In Marr’s *Quarterly Essay*, Daniel Jones claims that “after arguing for the right of the demonstrators to move into George Street, he was punched three times in the face, had his shirt ripped and was being held on the ground when a group of demonstrators dragged him back into the crowd”.¹⁴⁵ Dan Robins claims he was “dragged behind a police truck, held briefly on the ground, kicked in the groin and grabbed in a move known as the nipple cripple”. He also says a policeman repeatedly told him: “You’ve been identified as a wanted person”. Another policeman added “You’re not allowed to be in the CBD today or tomorrow”.¹⁴⁶

The next day another anti-Cheney rally was held. Marr notes “barely 100 demonstrators turned out”.¹⁴⁷

¹³⁹ Tim Davis-Frank, G20 Protestor: We are not the Dangerous Ones, *Green Left Weekly*, 23 March 2007.

¹⁴⁰ David Marr, “His Master’s Voice: Corruption of Public Debate Under Howard,” *Quarterly Essay*(26) Black Inc, Melbourne, 2007 at 33.

¹⁴¹ Ibid at 36.

¹⁴² Ibid.

¹⁴³ Ibid at 36.

¹⁴⁴ Ibid at 37.

¹⁴⁵ Ibid at 39.

¹⁴⁶ Ibid at 39.

¹⁴⁷ Ibid at 39.

However, there were “sixty police standing shoulder to shoulder” to protect the hotel and “a further fifty officers, including mounted police and dog handlers plus water cannon, were in reserve”.¹⁴⁸

If these incidents did occur they are significant for several reasons. Firstly, the incidents seem to suggest that certain individuals known to police were targeted in the lead up to APEC in an attempt to warn them off protesting during APEC. This is further supported by the inclusion of the “excluded persons list” in the *APEC Meeting Act* and its later publication in *The Daily Telegraph*.¹⁴⁹ It is also supported by Police Commissioner Scipione’s statement on 30 August 2007 that if “excluded persons” were not deterred from coming into town they would be “dealt with”.¹⁵⁰ Such strategies are inconsistent with the right to liberty of movement,¹⁵¹ the right to freedom of expression,¹⁵² the right of peaceful assembly,¹⁵³ the right to presumption of innocence¹⁵⁴ and the right to privacy.¹⁵⁵

Secondly, while acknowledging the need to balance a person’s right to freedom of expression¹⁵⁶ and peaceful assembly¹⁵⁷ with public safety and security, the *ICCPR* makes clear that such limitations must “conform with the law” and be “necessary”.¹⁵⁸ The number of police present at the anti-Cheney protests, the allegations of police use of violence and the potential use of dogs and a water cannon suggest the police response was disproportionate to the situation and in breach of the *UN Code of Conduct for Law Enforcement Officials*.¹⁵⁹

During APEC – The APEC legal hotline in action¹⁶⁰

The APEC legal hotline was set up by a group of Sydney lawyers troubled by the APEC Meeting Act and concerned by the NSW Government’s repeated statements regarding the suppression of “violent protests”. It was funded by law firm Maurice Blackburn and designed to provide information, advice and legal referrals to members of the public during the APEC period.¹⁶¹

At approximately 9.45am on September 8 2007 a caller to the APEC legal hotline reported that she was at the Sydney Town Hall where people had begun to gather for the main public rally and speeches. She reported that police around her were confiscating banner poles from members of the public, citing the APEC legislation as justification. Police were not giving receipts for the confiscated property. The caller said the mood of the small crowd was and had been calm but people were unhappy about the confiscations and that she was concerned that the police action was likely to cause friction between police and protestors.

Sydney Town Hall did not fall within an “APEC security area”.¹⁶² As such, police did not have the power to remove “prohibited items”, which included poles more than 1 metre in length.¹⁶³ Owing to the pre-APEC liaison with police, the legal hotline lawyer taking the call was able to contact the NSW Police’s APEC Deputy Security Commander. The APEC Deputy Security Commander (who was not then at work) agreed in principle that police were not authorised to take such action outside of an APEC security area if the mood of the crowd was peaceful and there was no imminent threat of violence. The Deputy Security Commander also acknowledged police should be issuing receipts for the confiscated property. He undertook to immediately contact the Sydney Command Centre to find out what was happening and to, additionally, pass on to officers at the Sydney Command Centre the need to provide receipts for seized property. The Deputy Security Commander also immediately put the legal hotline lawyer in contact with a senior sergeant who was present at the Sydney Command Centre, who initially advised the legal hotline

148 Ibid at 40.

149 Rhett Watson, “The Faces Police Do Not Want to See,” *The Daily Telegraph*, 1 September 2007.

150 Brian Robins, “Police Get Special APEC Powers,” *The Sydney Morning Herald*, 30 August 2007.

151 Note 60.

152 Note 61.

153 Note 62.

154 Note 64.

155 Note 65.

156 Note 61.

157 Note 62.

158 Article 19(3) & Article 21 *ICCPR*.

159 Particularly Articles 2 & 3 *UN Code of Conduct for Law Enforcement Officials*, note 30.

160 The following is from a personal communication with Miranda Nagy, 12 June 2008.

161 See Appendix 2 for further information.

162 Defined in s5 *APEC Meeting (Police Powers) Act 2007(NSW)*

163 Sect 13(1)(a) *APEC Meeting (Police Powers) Act 2007(NSW)*; prohibited item defined in s3(d) *APEC Meeting (Police Powers) Act 2007(NSW)*

lawyer that the common law empowered police to confiscate the banner poles to prevent a breach of peace. When the legal hotline lawyer pointed out that all was presently peaceful at Town Hall and that no breach of peace was imminent, the officer stated that he had a “reasonable suspicion” of a breach of the peace but refused to elaborate on the subject and immediately terminated the telephone call.

It may be questioned whether police action was pre-empting a breach of the peace (whether by accident or design). However, shortly afterwards, it was reported to the hotline that police had ceased to confiscate banner poles at Town Hall and no altercation did in fact result.

However, the *Sydney Morning Herald*¹⁶⁴ reported that later that day, police at Hyde Park forcibly confiscated (without explanation and without issuing any receipt) a banner held by two fire fighters who were protesting with a contingent from the NSW Fire Brigades Employees Union. These police officers were not wearing name tags. The fire fighters were told they could collect the banner from Sydney Police Centre that afternoon but in fact it was not returned to them until some 6 months later, following a complaint to the Police Integrity Commission, a referral to the NSW Ombudsman and the last-minute intervention of the Police Minister, David Campbell.

This seizure, which also took place outside the APEC security areas, was not authorised by the APEC legislation. In the absence of any indication that the confiscation was needed to prevent an imminent breach of the peace, it also appears to have been beyond the common law powers of police. Both incidents highlight the importance of community education with respect to people’s knowledge, understanding and awareness of existing legislation and their rights. These incidents also reveal either a concerning ignorance, among police, of the APEC laws or, potentially, the deliberate or reckless misuse of both those special legislative powers and the common law powers normally exercised by police in relation to public gatherings.

Post-APEC

Sylvia Hale asserts that intimidation of people seeking to participate in rallies continued after APEC. She describes being present at a rally in Martin Place on 15 September 2007, three days after the repeal of the *APEC Meeting Act*. Hale asserts that about 25 people had gathered and that over the course of about one hour “more than 40 police officers surrounded participants—about 23 were in attendance at any one time—and the Riot Squad circled the block”.¹⁶⁵ Hale raised several questions with respect to this incident in parliament.¹⁶⁶ She refers to such police presence as “excessive over-policing”.¹⁶⁷

b) Communication strategy - The role of the media

In examining the role of the media with respect to APEC it is helpful to draw upon the lessons learnt from the portrayal of previous public disorder and riot incidents.

In the review of the Cronulla emergency powers, the NSW Ombudsman reflects upon the role of the media in fuelling the riots in December 2005. Notably, the Ombudsman’s critique begins with the first police media release concerning the initial incident on Cronulla beach.

The Ombudsman notes that on the morning of 5 December 2005 the Police Media Unit distributed a brief media release regarding an incident between off-duty lifeguards and a small number of males from Middle Eastern backgrounds. The release was entitled “Surf Lifesavers bashed – North Cronulla Beach”. It began:

Police are investigating an attack on two surf lifesavers at North Cronulla Beach in Sydney’s South.

About 3pm yesterday (4 December), four males of Middle Eastern appearance have confronted the male

¹⁶⁴ Andrew West, “Firemen read riot act over heavy handed police”, SMH 29 March 2008 accessed on 12 June 2008 at: <http://www.smh.com.au/news/apec/firemen-read-riot-act-over-heavyhanded-police/2008/03/28/1206207408019.html>

¹⁶⁵ Sylvia Hale, Law Enforcements (Powers and Responsibilities) Amendment Bill 2007, Second Reading, *Legislative Council Hansard*, 6 November 2007 at 3518 accessed on 21 May 2008 at: <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LC20071106050>

¹⁶⁶ Sylvia Hale, “Question 0774 Budget Estimates”, *Legislative Council Questions and Answers Paper No 23*, 24 October 2007 at 499-500, accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/\\$file/Q071024.23.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/$file/Q071024.23.pdf); Brief responses were provided by the NSW Police Force, see *Legislative Council Questions and Answers Paper No 31*, 27 November 2007 at 1147-1148 accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/\\$file/Q071127.31.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/$file/Q071127.31.pdf)

¹⁶⁷ Note 165.

lifeguards and a verbal altercation has occurred. One of the lifesavers has then been punched in the face. A large number of Middle Eastern males have then converged on the area, surrounding the guards.

*The pair was set upon and sustained several blows to the head.*¹⁶⁸

The Ombudsman notes that this portrayal of the incident as “an unprovoked and cowardly attack” is not consistent with the computerised operational policing reports (COPS reports) entry relating to the incident which indicated that it began “with verbal abuse from each side”.¹⁶⁹ Furthermore, the Ombudsman suggests that “‘a large number of Middle Eastern males have then converged on the area’ possibly implies that the number of Middle Eastern Australian youth present was more than the eight who were there” (and there from early on in the day).¹⁷⁰ Such an inaccurate account “set the scene for inflammatory media debate” in the lead up to the riot at Cronulla on 11 December 2005. The Ombudsman suggests that “a more balanced and complete account” of the 4 December incident may have “defused some of the more inflammatory media coverage that ensued”.¹⁷¹

This incident illustrates the importance of police providing accurate information and avoiding emotive language. It also highlights how easily an incident can be sensationalised, particularly in the media and that such sensationalism can result in inflaming rather than defusing the situation. This runs counter to seeking to ensure public safety and has the potential consequence of allowing the justification of incursions upon political and civil rights.

Following the Cronulla riots, the Ombudsman notes that the NSW Police revised their media policy to recognise “the need for clear media and communication strategies as part of the police response to public disturbances”.¹⁷² The Ombudsman recommended that, in addition to the general principles outlined in the media policy, more detailed guidelines regarding the use of Part 6A powers and providing advice to the public should be developed.¹⁷³ While attempts were made to obtain a copy of this policy, this was not made available prior to the completion of this report. Additionally, attempts were also made to access police media releases relating to APEC online. If these media releases were once available, they are either no longer available or not easy to locate and access. It is therefore difficult to make an assessment about the effectiveness of police media in the context of APEC. This in itself raises questions concerning transparency and accountability.

Analysis is also required in regards to the evidence the police, politicians or media had to support assertions that the protestors at APEC would be violent.¹⁷⁴ Such assertions can serve to promote a climate of fear, general apprehension and distrust. Arguably, in such a context it is easier for governments to purport and for the general public to accept that public safety and security comes at the cost of impinging upon human rights. In such a context, the need for transparency and accountability is amplified. If there was evidence that protestors would be violent, why had this not been shared and protestors given an opportunity to respond to allegations? If there was no such evidence, what mechanisms can be instituted or strengthened to ensure more accurate reporting and penalties for deliberate misinformation?

It should also be noted there were reports that at times the media were restricted in what they could film during APEC. Questions relating to this and the arrest of freelance photographer Graham Pritchard were raised by Sylvia Hale at the Budget Estimates.¹⁷⁵ The NSW Police Force advised it was “inappropriate to comment” as “the matter is before the court”.¹⁷⁶

¹⁶⁸ Note 44 at 68.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid at 69.

¹⁷³ Ibid at 69.

¹⁷⁴ Appendix 1 provides an overview of media coverage of APEC.

¹⁷⁵ Sylvia Hale, Question 0731 *Questions and Answers Legislative Council Paper No 23*, 24 October 2007 at 485, accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/\\$file/Qo71024.23.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/$file/Qo71024.23.pdf)

¹⁷⁶ Response to Question 0731 *Questions and Answers Legislative Council Paper No 31*, 27 November 2007 at 1137-1138, accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/\\$file/Qo71127.31.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/$file/Qo71127.31.pdf)

c) Police consultation with different stakeholders

Residents and businesses

When the *APEC Meeting Bill* was introduced into Parliament, Minister for Police David Campbell made a commitment that the government would “roll out a communication plan”.¹⁷⁷ “Residents and businesses” were named as one particular group of affected people who would be informed of the “impact of the proposed power”.¹⁷⁸ While we are unsure as to what forms of print media were used in this process, information regarding road closures, restrictions in accessing specific areas, private and public transport issues were covered in issues of the “Sydney Bulletin” which commenced on 13 July 2007.

Businesses and residents in the CBD were said to receive a flyer by email containing maps and details of public transport and traffic arrangements.¹⁷⁹

Some businesses, however, suggested they did not receive adequate information. Paul Lockery, owner of the Museum of Sydney Café across the street from the Intercontinental Hotel, tried contacting a number of agencies to learn more about the effect of APEC on his business. These included the Prime Minister’s office, the Premier’s office, the APEC hotline and the office of NSW Industrial Relations Minister John Della Bosca. He said he rang them because “there hasn’t really been much correspondence”.¹⁸⁰ He was reported as receiving little feedback from the phone calls. Lockery also commented on the impact on his business: “This is the worst day I’ve had in business in 13 years”.¹⁸¹

City-Extra, a 24-hour café near the ferry terminal at Circular Quay, said that half of its business had dropped. “I understand that security measures have to be taken, but I am concerned they have gone over the top”, said the owner Steven Duff.¹⁸²

Hamish Gibson of Young Alfred eatery, located on the eastern corner of the ground floor at Customs House, estimated a down turn of 75%.¹⁸³

The homeless

The prospects of the Sydney CBD being in “lockdown”, the influx of 3,500 security personnel, including those travelling from intrastate, interstate, and New Zealand, and the special powers available to police and security forces through the *APEC Meeting Act*, created particular concern among those who assist the homeless people of Sydney.

Significant efforts were made by many groups who work directly with the homeless to liaise with police and other authorities, including the NSW Ombudsman,¹⁸⁴ to ensure the human rights of the homeless were considered and protected during APEC.

The Homeless Persons’ Legal Services NSW (HPLS) met with the police in the months leading up to APEC to raise a number of concerns. These concerns included the difficulties associated with policing by large numbers of people unfamiliar with the local context and local homeless community; and the potential impact of designating places frequented by homeless people, including the places they lived, as “declared” or “restricted” areas.¹⁸⁵

HPLS and other agencies working directly with the homeless, including other Community Legal Centres, urged police to adhere to the *Protocol for Homeless People in Public Places (The Protocol)* during APEC.¹⁸⁶ As

¹⁷⁷ Note 81.

¹⁷⁸ Tony Kelly, “Second Reading APEC Meeting (Police Powers) Act 2007,” *NSW Legislative Council Hansard and Papers*, 21 June 2007 at 1501 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlament/hanstrans.nsf/V3ByKey/LC20070621/\\$File/541LC014.pdf](http://www.parliament.nsw.gov.au/prod/parlament/hanstrans.nsf/V3ByKey/LC20070621/$File/541LC014.pdf)

¹⁷⁹ Jordan Baker, “Fortress Sydney: The Lockdown Begins”, *The Sydney Morning Herald*, 30 August 2007 accessed on 25 May 2008 at: <http://www.smh.com.au/news/national/fortress-sydney-the-lockdown-begins/2007/08/29/1188067191583.html>

¹⁸⁰ Lauren Wilson, “Wall keeps cafes free of customers,” *The Australian*, 4 September 2007.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Interview with Kirillie Moore, Redfern Legal Centre, 2 May 2008.

¹⁸⁵ Elisabeth Baraka, note 136 at 34.

¹⁸⁶ This protocol was developed at the time of the Sydney 2000 Olympic Games. *The Protocol* states that a homeless person should be left alone unless: they require assistance; appear to be distressed or in need of assistance; their behaviour threatens their safety or the safety and security of people around them; their behaviour is likely to result in damage to property or the environment. *Protocol for Homeless People in Public Places*.

Baraka notes, in August 2007, the police confirmed that all APEC security personnel would be trained and expected to adhere to *The Protocol*.¹⁸⁷ An extract from *The Protocol* was included in the handbook of the APEC 2007 NSW Police Security Command, Operation CONTEGO.¹⁸⁸

It should be noted that efforts were made over several months to obtain copies of police policies and procedures operational during the lead up to and throughout APEC from NSW Police. This material was not made available prior to the completion of this report. While we are therefore unable to comment on the content of such policy and procedure, it is reasonable to conclude that the willingness of both those working directly with the homeless and the police to liaise and consult about the issues facing homeless people assisted in minimising the impact of APEC upon homeless people.

Impact upon the homeless

Despite consultation and the operation of *The Protocol*, Baraka notes that she is aware of one homeless person who was told to “move on” by security personnel during APEC.¹⁸⁹

There was also an incident reported which involved a vendor of the “Big Issue” being charged with theft after finding a mobile phone. The bail conditions imposed upon the vendor prevented him from returning to the CBD during APEC, thereby impacting upon his ability to earn a livelihood.

Baraka also notes that those who lived in “restricted areas” were temporarily accommodated by the Department of Housing. Some homeless were assigned to boarding house accommodation in Burwood, some to emergency accommodation in the city, and others to a caravan park in Nowra.¹⁹⁰ Baraka acknowledges that by the time APEC started “most homeless people living in the APEC security areas had voluntarily moved away”.¹⁹¹

The Intellectual Disability Rights Service (IDRS) also had concerns about the possibility of some of their homeless clients with an intellectual disability having their usual day-to-day actions criminalised.¹⁹² However, there were no issues to their knowledge involving clients of the IDRS either immediately prior to or during APEC.¹⁹³

While careful consideration of options for accommodating homeless people during APEC may have been considered and appropriate liaising did take place, which likely fostered the co-operation of homeless people in temporarily relocating, this does not deny that freedom of movement was impinged upon during the APEC period. This raises questions as to whether similar arrangements will be made with respect to other large international events which may be held in NSW. What protections are in place if homeless people do not wish for their right to freedom of movement, for example, to be repeatedly constrained? Furthermore, what permanent policies, procedures and structures are in place such that the needs of and the impact upon vulnerable groups, such as homeless people and the intellectually disabled, are always considered?

Protestors

Negotiations between police and those wishing to organise the main protest march during APEC were said to be initiated by the Stop Bush Coalition. This occurred when the original Notice of Intention to march from Sydney Town Hall to the Opera House on 8 September 2007 was submitted to NSW Police in May 2007. In order for a public assembly to be “authorised”, a notice of intention must be submitted in writing to the Commissioner.¹⁹⁴ This notice needs to outline the date, time, place, proposed route of procession, purpose for which the proposed public assembly is to be held and the number of participants expected.¹⁹⁵ The Commissioner then notifies the organiser that s/he does not oppose the holding of the public assembly.¹⁹⁶ The main benefit in holding an authorised public assembly is that provided the public assembly is “held

¹⁸⁷ Note 136.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid at 35.

¹⁹⁰ Interview with Elisabeth Baraka, 20 May 2008.

¹⁹¹ Note 136 at 35.

¹⁹² Personal communication, Alexandra Faraguna, Intellectual Disability Rights Services, 20 May 2008.

¹⁹³ Ibid.

¹⁹⁴ Sect 23(1)(a) *Summary Offences Act 1988 (NSW)*

¹⁹⁵ Sect 23(1)(c), s23(1)(d) *Summary Offences Act 1988 (NSW)*

¹⁹⁶ Sect 23(1)(f) *Summary Offences Act 1988 (NSW)*

substantially in accordance with the particulars of the notice of intention”¹⁹⁷ for the purposes only of participating in that public assembly, a person is not guilty of an offence relating to unlawful assembly or obstruction of any person, vehicle or vessel in a public place.

Once it became known that the Opera House would be a key venue for APEC delegates, the organisers amended their notice of intention. A revised notice of intention pursuant to the *Summary Offences Act 1988* was lodged on 8 August 2007. The new route started at Town Hall, travelled down George Street to Martin Place, along Macquarie Street, ending in Hyde Park. On 23 August 2007, it was reported that then Deputy Commissioner Scipione indicated that officers were still in talks with protesters with respect to the route of the march and warned the issue would go to the Supreme Court if they did not agree.¹⁹⁸

Police challenged the proposed route for the protest march in the Supreme Court.¹⁹⁹ The hearing took place on 5 September 2007, days before the scheduled protest. By this time, drawing upon their powers under the *APEC Meeting Act*, the police had decided to close King Street at the intersection of George Street where the march was proposed to pass. In

such circumstances, in the view of presiding judge, Justice Adams, a protest march with significant numbers expected, using the proposed route, did pose a public safety risk. The Supreme Court found in favour of the police. The final route of the protest march did not pass through the APEC security zone.

It was widely reported that protest organisers felt frustrated at what they experienced as a lack of genuine negotiations. Anna Sampson from the Stop the War Coalition reflected the sentiment of many protestors:

*I think the police negotiations were not conducted in good faith by and large. They were also largely conducted by people who didn't have the power to make any commitment to anything - which was a bit useless.... It was presented to us as take it or leave it. And we were the ones who were asked to negotiate and compromise.*²⁰⁰

¹⁹⁷ Sect 24 *Summary Offences Act 1988 (NSW)*

¹⁹⁸ ABC News, “APEC Protestors Warned of Supreme Court Action,” 23 August 2007 accessed on 31 May 2008 at: <http://www.abc.net.au/news/stories/2007/08/23/2013152.htm>

¹⁹⁹ *Commissioner of Police v Bainbridge* [2007] NSWSC 1015.

²⁰⁰ Interview with Anna Samson, 10 January 2008.

Section 5: Mechanisms of accountability

Good governance in a democratic society is reliant upon public access to information and knowledge, transparency and accountability. The following is an examination of the extent to which each of these was present with respect to the introduction and review of the *APEC Meeting Act*.

Process of introduction of the APEC Meeting Act

The *APEC Meeting Bill* was introduced into the NSW Legislative Assembly as the last item on the evening of 7 June 2007. It was briefly debated on the evening of 19 June 2007 starting at 7.30pm and 21 June 2007 starting at 5.15pm. On 26 June 2007 it was read for the second time and, after further debate that afternoon, was referred for consideration of amendments in Committee. The amendments were not carried. The Bill was read for the third time on 26 June, passed without amendment and returned to the Legislative Assembly.

This history is important as it raises several issues with respect to public information, transparency and accountability. Firstly, the timing of the Bill's introduction is noteworthy - namely the last item on the evening of 7 June 2007, a time when arguably the general public are unlikely to be tuning in to parliament and media outlets are unlikely to be reporting parliamentary proceedings. Secondly, there was limited debate about the Bill and the concerns raised by The Greens, discussed below, were not adequately addressed. Similar concerns were raised by the Legislation Review Committee, also discussed below, and they also were not addressed. Additionally, while several members of parliament acknowledged the APEC legislation involved a significant expansion of police powers,²⁰¹ instead of robust debate about the need or otherwise for such expansion of power, many relied upon the so called safeguards as justification for such expansion.²⁰²

The absence of scrutiny and debate suggest there was no real opportunity to consider the need to balance public safety with protection of basic civil and political rights.

Purpose of the APEC Meeting Act

Minister for Police David Campbell first introduced the *APEC Meeting Bill* to Parliament on the basis that NSW Police required the "necessary powers to keep the event and Sydneysiders safe".²⁰³ While Campbell asserted that citizens "have the right" to "express strongly held views by protesting peacefully in public places", he warned of the "threat of large organised and sustained protests during Leaders Week".²⁰⁴ Campbell further supported this with reference to "footage of extremely violent and organised protestors engage[d] in planned attacks on police" who "destroy[ed] property and terri[fied] the public".²⁰⁵

Comments in parliamentary debate seem to suggest the *APEC Meeting Bill* served multiple purposes. The Leader of the Opposition in the Legislative Council saw the bill as ensuring that "protestors will not get within a bull's roar of APEC delegates, who will not hear or see protestors or even know they exist".²⁰⁶ He also stated that the purpose of declaring a public holiday on 7 September 2007 was "to ensure that as many people as possible stay out of Sydney".²⁰⁷ Clover Moore's comments also lend support to this view. Moore said that the expanded police powers "provide reason for many to actively avoid declared areas".²⁰⁸

Concerns raised in parliament about the APEC Meeting Act

Sylvia Hale articulated The Greens opposition to the *APEC Meeting Bill* based on three grounds. Firstly, Hale argued the Bill provides police with powers that are "disproportionate to the risk our city faces".²⁰⁹ While the media,²¹⁰ politicians and the police during the lead up to APEC often referred to anticipated violent protests at APEC, this was not borne out. Nor does there appear to be evidence publicly shared to support the assertions

201 Ninos Khoshaba, note 97 at 1237; Anthony Roberts, note 97 at 1238; Tanya Gadiel, note 97 at 1239; Tony Kelly, note 178 at 1504; Robert Brown, note 89 at 1661.

202 Ninos Khoshaba, note 97 at 1237; Tony Kelly, note 178 at 1501; Robert Brown, note 89 at 1661. See Section 5 for further discussion about safeguards.

203 Note 81 at 1091.

204 Ibid.

205 Ibid.

206 Michael Gallacher, note 178 at 1506.

207 Ibid at 1505.

208 Clover Moore, note 97 at 1240.

209 Sylvia Hale, note 178 at 1506.

210 See Appendix 1.

that there would be violent protests at APEC.

Hale also raised The Greens' concerns that "the new powers are not subject to proper judicial review or oversight and are part of an ongoing process of creeping expansion of discretionary police powers in this State".²¹¹ This is particularly evident in certain provisions of the Act, such as those relating to the determination of APEC security areas and the excluded persons list, not being open to judicial review. Additionally, the expansion of discretionary powers is illustrated by legislation such as the *Sydney Harbour Foreshore Authority Act 1998 (NSW)* and *Regulations 2006 (NSW)* which, for example, limits use of public space.²¹² It is also seen in the "spate of anti-terrorism laws" introduced²¹³ and the Part 6A *LEPRA* powers instituted in response to the Cronulla riots.²¹⁴

Finally, Hale expresses concern that "the bill dramatically diminishes the ability of this State's citizens to exercise their right to peacefully protest in public places". This issue has been discussed throughout the paper.

Legislation Review Committee

The *APEC Meeting Bill* was examined by the Legislation Review Committee which provided its report on 27 June 2007, the day after the bill was passed in parliament.²¹⁵ The timing itself raises several questions as to the role of the Committee.²¹⁶ As part of its functions outlined in s8A of the *Legislation Review Act 1987 (NSW)*, the Committee raised a number of concerns including:

- that the police search powers significantly trespass on rights to privacy and property;²¹⁷
 - that the powers exercised as a result of the act should be balanced with the need for reasonable suspicion;²¹⁸
 - that strict liability would be imposed for offences in circumstances where the public may not be notified of designated restricted areas or may not have read the publication of the order describing the restricted areas;²¹⁹
 - the inappropriateness of strict liability offences incurring heavy penalties such as imprisonment;²²⁰
 - reversal of onus of proof with respect to establishing lawful excuse or special justification to be in a restricted area, thus undermining presumption of innocence;²²¹
 - lack of balance between a person's right to privacy and the community's reasonable expectations as to safety and security as reflected in the excluded persons list;²²²
 - presumption against bail infringing the right to the presumption of innocence;²²³
- lack of provisions regarding the making of a complaint against police.²²⁴

Many of the issues raised by this Committee also reflect a breach of the rights protected by the *ICCPR*, as discussed above.

Despite this so called "review" of the *APEC Meeting Bill* there is no requirement for Parliament to respond to the questions raised or recommendations made. As of 16 April 2008, by which point the *APEC Meeting Act* had been repealed,²²⁵ there has been no response by the Parliament to the questions raised. This raises further questions about what other more effective accountability mechanisms should be introduced to ensure legislation is consistent with Australia's human rights obligations.

²¹¹ Sylvia Hale, note 178 at 1506.

²¹² See Part 2, *Sydney Harbour Foreshore Authority Regulation 2006 (NSW)*. Also note Hale's comments at note 178 at 1507.

²¹³ See Sylvia Hale's comments at note 178 at 1507.

²¹⁴ Sylvia Hale outlines these at note 178 at 1507.

²¹⁵ Note 32.

²¹⁶ If one of the roles of the Committee is to review legislation to determine its consistency or otherwise with a series of criteria, including the undefined "personal rights and liberties", what mechanisms can be introduced to ensure the Committee has adequate time to do this before the Bill is assented to by Parliament?

²¹⁷ Note 32 at 7.

²¹⁸ Ibid.

²¹⁹ Note 32 at 8.

²²⁰ Ibid.

²²¹ Note 32 at 9.

²²² Ibid.

²²³ Note 32 at 10.

²²⁴ Note 32 at 11.

²²⁵ The *APEC Meeting (Police Powers) Act 2007 (NSW)* was repealed on 13 September 2007 by virtue of s41 *APEC Meeting (Police Powers) Act 2007 (NSW)*.

Safeguards

While several members of Parliament noted that the Act did result in an expansion of police powers,²²⁶ this was often justified by reference to the safeguards associated with the Act.²²⁷ It is therefore important to examine the effectiveness or otherwise of the safeguards put in place.

On 7 June 2007, the Minister for Police outlined a number of safeguards to accompany the *APEC Meeting Act*. These included:

The powers would apply “only within designated and limited areas”;

- Maps and descriptions of security areas would be provided to “ensure no doubt as to where the powers apply”;
- Any variations to the APEC security area “will be notified to the public”;
- Police will receive specialist training on the use of powers;
- A joint review of the powers will be conducted by the Attorney General and Minister for Police;

A sunset clause such that the Act applied “only to this APEC meeting and will then terminate automatically”.²²⁸

Each of these will be examined in turn.

The powers would apply “only within designated and limited areas”

As outlined in Sect 3 on the APEC legislation above, the APEC security zone is defined in ss5-7. The “core declared areas” are described in Schedule 2. While powers were primarily exercised in “restricted” and “core declared areas”, this covered a large area of the city and did restrict the right to peaceful assemblies and freedom of movement. In the event of arrest, restrictions were also placed upon where an arrestee could be processed as a number of courts were closed as a result of the declared public holiday on the 7 September 2007.

The Minister for Police and Attorney General state in the *Review of the APEC Meeting Act* that the declared areas powers were used in a “limited area”.²²⁹ If this were to be accepted this does not address the underlying issue, namely the *potential* size of the declared area and the discretion which the Police Commissioner had to designate such areas. The safeguard in this case was therefore dependent on the way in which a Ministerial discretion was exercised.

Furthermore, s6(2) the *APEC Meeting Act* provides the Police Minister with the powers to “designate any area within metropolitan Sydney” an additional declared area if the criteria of s6(2) be met. Metropolitan Sydney is defined in Schedule 1 and includes 38 local government areas. It is questionable whether such a large geographical area can be described as “limited”. Furthermore, the Minister did exercise his powers by designating an additional 9 declared areas during APEC.²³⁰

Maps and descriptions of security areas would be provided to “ensure no doubt as to where the powers apply”

While maps and descriptions of security areas were available both as Schedules to the Act and through other communication tools, it would seem that there was confusion, even amongst law enforcement officials, as to what constituted the different security areas and therefore what powers applied. This was exemplified through the Chaser stunt as discussed above in Section 3 and is further discussed in Section 5 below with respect to unlawful arrest.

²²⁶ Note 201.

²²⁷ Note 202.

²²⁸ Note 81 at 1092.

²²⁹ Note 51 at 8.

²³⁰ Nine additional areas were designated “declared areas” including: Sydney Airport; RAAF Airbase Richmond and surrounds; Sheraton-on-the-Park Hotel and immediate surrounds; Hilton Hotel and immediate surrounds; Observatory Hotel and immediate surrounds; Marriott Hotel College Street and immediate surrounds; Parts of Kirribilli including Kirribilli House and Admiralty House (9am to 5pm on Saturday 8 September 2007); Icebergs Club at Bondi (9am to 5pm on Sunday 9 September 2007); The Australian National Maritime Museum and surrounds (12.01am to midnight on 6 September 2007) cited in *The Review of the APEC Meeting (Police Powers) Act*, note 51 at 7-8.

Any variations to the APEC security area “will be notified to the public”

While the Minister of Police stated in Parliament that the Police Commissioner would inform the public of declared and restricted areas, as Clover Moore and others noted at the time, this is not reflected in the legislation itself.²³¹ While “core declared areas” were described in Schedule 2, Moore expressed concern that “the bill does not require the Minister to inform affected local government, services, residents, businesses or communication networks, including newspapers and television”.²³²

There is no expressed mandatory requirement in s6 to inform the public of the declared areas and s7(5) provides for exceptions to notifying the public if “it would significantly compromise security arrangements”. Thus, while the police may have notified the public about the designated security areas, this was not strictly “required” as is suggested in the review of the APEC Act.²³³

Police will receive specialist training on the use of powers

Despite efforts being made to ascertain police policy and procedure with respect to APEC, this was not made available before the completion of this report.

Reference is made in the joint review of the APEC Act to a total of 144 officers from “all states, territories and New Zealand” who were sworn in as law enforcement officers.²³⁴ These officers were mainly deployed in “key personal protection or anti-terrorist operations”.²³⁵ Very little is said about the training for these or other law enforcement officials. Despite this, the Review concludes “there were no significant issues with the training or preparedness of specialist officers, evidenced by the overall success of police operations. However, there was some criticism in the media of the generalist officers’ understanding and use of these powers”.²³⁶

A joint review of the powers will be conducted by the Attorney General and Minister for Police

Schedule 5 of the *APEC Meeting Act* required a report on the said Act by the Police Commissioner within three months after the repeal of the Act. While the contents of this report could provide helpful information, such as a description of the result of the use of powers and information about the number of complaints made and investigated,²³⁷ there are no provisions that this report must be made public. While attempts have been made to obtain a copy of this report, it was not made available before the completion of this paper.

Schedule 5 of the *APEC Meeting Act* also requires a joint review of the Act by the Minister for Police and Attorney General within six months of the Act’s repeal. The purpose of the Review is to determine whether the policy objectives of the Act were met and whether the terms of the Act would be appropriate for future events.

Several MPs raised the joint review in parliamentary debate as an important safeguard to justify introduction of the *APEC Meeting Act*. A review can, in principle, be a useful tool for promoting transparency and accountability and it is helpful to hear from both the Minister of Police and Attorney General as to how the APEC police powers were used and the extent of their impact. It is problematic, however, to limit this review such that it is authored by the two departments largely responsible for the implementation of the legislation.

Additionally, the methodology and parameters of the review are unclear. The review is said to be based on a report by the Police Commissioner with respect to the exercise of powers by police officers under the Act; original intent of the Government as reflected in the Second Reading speech; legal outcomes of the use of powers; and public perception of the Act.²³⁸ It is unclear how public perceptions were determined. There is the occasional reference to “criticism in the media”²³⁹ and “criticism within the media and Parliament.”²⁴⁰ The source of these criticisms is not noted.

²³¹ Clover Moore, note 97 at 1239.

²³² Ibid at 1240.

²³³ Note 51 at 8.

²³⁴ Ibid at 16.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ The required content of the report is outline in Schedule 5(2) *APEC Meeting (Police Powers) Act 2007 (NSW)*

²³⁸ Ibid at 4.

²³⁹ Ibid at 16.

²⁴⁰ Ibid at 12.

Of significant concern is the briefest of comments with respect to the appropriate balance between public safety and protection of civil and political rights. As mentioned, given the speed with which the legislation was introduced, much attention was placed on safeguards to ensure the appropriate use of expanded police powers. Safeguards, however, do little to address the underlying issues of whether there was a need for further expansion of police powers in the first place.

In making recommendations for future legislation, the Review concludes “the maintenance of integrity of the security area and the balance with the rights for peaceful demonstration marches is [an] area of consideration.”²⁴¹ While this issue was raised by several members in parliamentary debate prior to the introduction of the *APEC Meeting Act* it was not adequately addressed. Parliament now has precedent for the use of such powers and, as Hale warns, will likely use such precedent “the next time there is an expectation of public protest and so the increased powers slowly will become entrenched”.²⁴²

This raises important questions: what evidence is there for the conclusion that police powers should be expanded in the first place? If this evidence exists, how has it been tested? If there is a proven need for expansion of police powers what different mechanisms can be implemented such that adequate rather than cursory consideration is given to the protection of civil and political rights?

An independent review which invites submissions and input from the public should be undertaken if these issues are going to be properly dealt with.

A sunset clause such that the Act applied “only to this APEC meeting and will then terminate automatically”

Section 41 of the *APEC Meeting Act* provides for the repeal of the *APEC Meeting Act* and any regulation or other instrument made under the Act as of 13 September 2007. This particular safeguard was often referred to in parliamentary debate regarding the bill. Yet the joint review of the Act concludes “this report finds that the powers are appropriate if it is later decided that similar legislation is required for future events of a comparable nature”.²⁴³ This suggests a significant possibility of the introduction of more permanent APEC-like police powers.

It is important to note that this would not be the first time that powers originally purported to be time bound are extended. There has been a growing trend of extending sunset clauses with respect to expansion of police powers. The following are only some examples.

The Part 6A *LEPRA* emergency powers were introduced with very little parliamentary debate at the time of the Cronulla riots. Section 87P *LEPRA* provided for the repeal of Part 6A powers in December 2007. Instead, s87P was repealed on 22 December 2007²⁴⁴ thus making Part 6A permanent. Additionally, Part 6B of the *Crimes Act 1900*, which includes provisions relating to terrorism, was amended such that the sunset clause was extended from “the second anniversary of its commencement”, namely September 2007 to 13 September 2008.²⁴⁵ Furthermore, in response to the Cronulla riots the *Law Enforcement Amendment (Public Safety) Act 2005* introduced s8D into the *Bail Act 1978*.²⁴⁶ Section 8D, relates to presumption against bail for offences committed in the course of riots or other civil disturbances and was due to be repealed on the second anniversary of the commencement of the section. Instead, the sunset provision was repealed on 21 December 2007.

²⁴¹ Ibid at 9.

²⁴² Sylvia Hale, note 178 at 1506.

²⁴³ Note 51 at 23.

²⁴⁴ Schedule 1, [6] *Law Enforcement and other Legislation Amendment Act 2007 (NSW)*

²⁴⁵ Schedule 3.1 *APEC Meeting (Police Powers) Act 2007 (NSW)*

²⁴⁶ Schedule 3 *Law Enforcement and other Legislation Amendment Act 2007 (NSW)*

Case studies of alleged abuse of police powers

Throughout the APEC period a series of concerns were raised with respect to incidents of the failure of a significant number of police officers wearing identification tags; unlawful arrest; and excessive use of force by police. These were documented by the Human Rights Monitors.²⁴⁷ The avenue for making a complaint and the way such complaints are addressed can be important tools of accountability. Each of these issues of concern and related mechanisms of accountability will be addressed in turn.

Police identification badges

It was documented by Human Rights Monitors and reported by media that “200 photos of police without identification” were taken during the APEC period.²⁴⁸ In the event of a complaint about a police officer it is important to be able to identify the police officer by name. Identification badges provide such information and are therefore considered a check on police powers. NSW Police Force policy requires that uniformed officers wear name badges.²⁴⁹

In responding to complaints about police failing to wear identification badges, Police Commissioner Scipione commented that identification badges have been used as weapons against police in the past.²⁵⁰ These comments were repeated again when Scipione appeared before the General Purpose Standing Committee. When asked to provide examples, Scipione took the question on notice and later reported back that “a search of available data has not identified any records of incidents where a pin badge has been used as a weapon”.²⁵¹

Scipione also told the General Purpose Standing Committee that he had asked the Commander of the Professional Standards Command to “examine the circumstances surrounding allegations that there were a number of police deployed who were not wearing their identification plates”.²⁵²

The internal Professional Standards Command inquiry took place a month before the General Purpose Standing Committee Meeting. The inquiry reportedly “cleared officers of wrongdoing for not wearing name badges at protests during APEC” as “Operational Support Group officers from outlying areas of Sydney were called in at the last minute to assist with crowd control because mounted police were not available because of the outbreak of horse flu”.²⁵³ Notably, it is reported that this internal inquiry did not investigate individual officers.²⁵⁴ Members of parliament have raised concerns about the effectiveness of this mechanism of accountability.²⁵⁵

Unlawful arrest

At the conclusion of the march held on 8 September 2007, two persons on the excluded persons list, Paddy Gibson and Daniel Jones, were allegedly arrested in Hyde Park. It is alleged the basis for the arrests was their presence in a “declared area”.²⁵⁶ Hyde Park was not designated a “declared area”. Several of those present at the time of the arrests allegedly challenged the arrests as unlawful. Soon after, a number of those challenging the arrests were themselves arrested on charges including assaulting police, offensive conduct, resisting

²⁴⁷ Human Rights Monitors, formally called Legal Observers, are individuals who attend public demonstrations, protests and other activities where there is a potential for conflict between demonstrators and law enforcement officers. The purpose of the observers is to monitor any illegal or improper behaviour by the police. In preparation for APEC, the Sydney based group held a series of training sessions to raise community awareness about police powers in operation during APEC. Additionally, over 30 human rights monitors were present at the APEC protests. The monitors, identified by their bright yellow vests, worked in pairs, “with one focusing on recording the action on video and the other noting the location and time of the incident, both of which may be used as evidence in court.” See: Sarah Elks, “Free legal advice offered to demonstrators,” *Weekend Australian* 1-2 September 2007; For a detailed chronology of events of 8 September 2007 see Appendix 3.

²⁴⁸ Jordan Baker, “Identity Parade of the Secret Police,” *Sydney Morning Herald*, 10 September 2007 accessed on 21 May 2008 at: <http://www.smh.com.au/articles/2007/09/09/1189276546303.html>

²⁴⁹ NSW Police Force Intranet Policy and Procedures Guidelines

²⁵⁰ Note 248.

²⁵¹ Parliament of NSW, *Legislative Council Questions and Answers No 23, 0717 Budget Estimates – Police Identification Tags*, 24 October 2007 accessed on 16 April 2008 at: <http://www.parliament.nsw.gov.au/prod/lc/qalc.nsf/18101dc36b638302ca257146007ee41a/928a83837cef8c54ca25737e00281523!OpenDocument>

²⁵² Commissioner Scipione, *General Purpose Standing Committee No 3*, 22 October 2007 at 44 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/Committee.nsf/0/fbd9fb43dc843c53ca25737c0081cf42/\\$FILE/071022%20Police,%20Illawarra%20CORRECTED.pdf](http://www.parliament.nsw.gov.au/prod/parliament/Committee.nsf/0/fbd9fb43dc843c53ca25737c0081cf42/$FILE/071022%20Police,%20Illawarra%20CORRECTED.pdf)

²⁵³ Commissioner Scipione quoted by David Braithwaite, “APEC Violence Reports go to Ombudsman,” *The Sydney Morning Herald*, 19 September 2007 accessed on 30 May 2008 at: <http://www.smh.com.au/news/national/apec-violence-reports-go-to-ombudsman/2007/09/18/1189881513677.html>

²⁵⁴ Ibid.

²⁵⁵ See Sylvia Hale, “Police Amendment Bill 2007 Second Reading,” *NSW Legislative Council Hansard and Papers*, 27 November 2007 at 4364 accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parliament/hansans.nsf/V3ByKey/LC20071127/\\$File/541LC038.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hansans.nsf/V3ByKey/LC20071127/$File/541LC038.pdf)

²⁵⁶ “Police Show Force at APEC, 17 Arrests,” *The Sydney Morning Herald*, 8 September 2007 accessed on 30 May 2008 at: <http://www.smh.com.au/news/National/Nine-arrested-at-Sydney-APEC-protests/2007/09/08/1188783528898.html#>

arrest, affray, breaching a secure area and hindering police.²⁵⁷ It was reported that the two initially arrested were released shortly afterwards.²⁵⁸

On 19 September 2007 it was reported that Paddy Gibson and Daniel Jones intended lodging a complaint with the Ombudsman and were considering “civil court action” over their alleged wrongful arrest.²⁵⁹

On 22 October 2007, before the General Purpose Standing Committee, Police Commissioner Scipione indicated that Gibson was “detained and released after being removed from a declared area”.²⁶⁰

On 24 October 2007, Hale asked the Minister for Police’s representative whether Commissioner Scipione’s comments before the General Purpose Standing Committee on 22 October 2007, with respect to the arrest of Paddy Gibson in a declared area, were incorrect. She also inquired how the police could confuse the declared and restricted areas.²⁶¹ The NSW Police Force responded that the “Commissioner’s comments were later corrected in a letter sent to the Committee” and that “Mr Gibson is to commence civil action” and so “it is not appropriate to respond to th[e] question[s]”.²⁶²

On 24 October 2007 Sylvia Hale raised a series of questions relating to police strategy with respect to the march on 8 September 2007.²⁶³ Hale’s questions related to the arrests made in Hyde Park as well as to the reasons for detaining members of the public in the park. Hale inquired whether it was standard practice after a football match or concert for police to “use a cordon of hundreds of police to prevent large numbers of people from leaving an area”? This was answered in the negative.²⁶⁴ She then inquired what particular safety issue meant police prevented people from leaving the area? The response “police concerns were keeping the peace, public safety and preventing damage to property”.²⁶⁵

On 6 May 2008, Sylvia Hale posed a series of questions in Parliament to the Minister for Police’s representative relating to arrests and charges laid during APEC. These questions relate to: the number of people arrested and charged during the APEC protests; the number of charges dismissed; the number of people found guilty of the charges and the number of matters pending. An answer is due by 10 June 2008.²⁶⁶ As of 12 June 2008 no answer has been published.

A series of accountability mechanisms have been referred to in this section. Parliamentary questioning is one way of raising the issues on the public record and seeking to hold the government to account. However, questions are not always answered and responses are often brief. The role of the NSW Ombudsman is also an important one for promoting accountability, though the procedure of referring complaints back to police for investigation can be perceived as lacking in independence and transparency. The option of civil court action for alleged wrongful arrest is also another mechanism to hold police accountable for their actions, though arguably a costly option with respects to time, money and emotional investment.

257 Ibid

258 Ibid.

259 David Braithwaite, note 253.

260 Note 252.

261 Sylvia Hale, Question 0738, *Questions and Answers Legislative Council Hansard, Paper No 23*, 24 October 2007 at 487-488 accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/\\$file/Q071024.23.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~23/$file/Q071024.23.pdf)

262 Response to question 0738, *Questions and Answers Legislative Council Hansard, Paper No 31*, 27 November 2007 1139, accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/\\$file/Q071127.31.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/V3QnBySN/541~31/$file/Q071127.31.pdf)

263 Sylvia Hale, “Budget Estimates – APEC Police Strategy”, *Legislative Council Questions and Answers*, No 23, 24 October 2007 at 496-497 accessed on 20 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/759B269C452C7044CA25737E0030F89C/\\$file/Q071024.23.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/759B269C452C7044CA25737E0030F89C/$file/Q071024.23.pdf)

264 Answers to questions raised by Sylvia Hale “Budget Estimates – APEC Police Strategy,” *Legislative Council Questions and Answers*, No 31, 27 November 2007 at 1145, accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/BoFE24134D1D3B6DCA2573A0002E4B9E/\\$file/Q071127.31.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/BoFE24134D1D3B6DCA2573A0002E4B9E/$file/Q071127.31.pdf)

265 Ibid.

266 Sylvia Hale, “Police – APEC – Arrests and Charges” *Legislative Council Questions and Answers*, No 48, 6 May 2008 at 2019 accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/649890DE9FC12A69CA25744100367B78/\\$file/Q080506.48.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/649890DE9FC12A69CA25744100367B78/$file/Q080506.48.pdf)

Excessive use of force

It is alleged that, in the course of photographing an arrest at the protest march on 8 September 2007, international photographer, Paula Bronstein, was pushed on to a concrete pathway by police. It was reported that Bronstein suffered minor bruising to her neck and jaw and that her camera lens was smashed. This incident was captured on film.²⁶⁷

Bronstein described the incident as “unprovoked aggression” and “would like to see an inquiry so something constructive comes out of it, so that the police do a better job with a bit more trust and respect next time”.²⁶⁸

On 5 December 2007 Hale asked the Minister for Police’s representative about the investigation on the assault of Bronstein. In particular, Hale inquired why it had taken the police “three months from the incident to identify a police officer from a video recording”?²⁶⁹ The NSW Police Force advised that the officers in the incident had been identified and that the matter was the subject of ongoing inquiries by the Professional Standards Command.²⁷⁰ It was also noted that “Ms Bronstein has indicated to police that she does not wish to pursue the matter any further”.²⁷¹ The relevance of this comment is unclear.

This is only one of several incidents of reported alleged excessive use of force.²⁷²

NSW Ombudsman

Complaints about public authorities, including police, can be made to the NSW Ombudsman.²⁷³ Once received by the Ombudsman, complaints about police are generally referred to the Police Commissioner for investigation.²⁷⁴ Section 29 of the *Ombudsman Act 1974*(NSW) provides the NSW Ombudsman with the power to report to the complainant on the progress and results of the investigation. Each year the NSW Ombudsman produces an annual report outlining the kinds of complaints it has received and the action taken.²⁷⁵ These reports are available to the public.²⁷⁶

On 19 September 2007 it was reported that the NSW Ombudsman had received seven complaints about police conduct during APEC.²⁷⁷ It is not known how many of these complaints have been referred to the NSW Police Force and what the outcome may be. The NSW Ombudsman’s Annual Report 2007-2008 is due for release later this year.

267 “Calls for Inquiry into APEC Police Operation,” *ABC News*, (Video excerpt) 9 September 2007 accessed on 30 May 2008 at: <http://www.abc.net.au/news/video/2007/09/09/2028003.htm>

268 Paul Bibby, “Call for Inquiry into Clash that Felled Photographer,” *The Sydney Morning Herald*, 11 September 2007 accessed on 26 May 2008 at: <http://www.smh.com.au/news/apec/call-for-inquiry-into-clash-that-felled-photographer/2007/09/10/1189276633581.html>

269 Sylvia Hale, Question 1329 “Investigation on Assault on Photographer” *Legislative Council Questions and Answers Paper No 35*, 5 December 2007 at 1381 accessed on 20 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/BD6383D00768F600CA2573A8004449AD/\\$file/Qo71205.35.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/BD6383D00768F600CA2573A8004449AD/$file/Qo71205.35.pdf)

270 Response to Question 1329 *Legislative Council Questions and Answers Paper No 36*, 26 February 2008 at 1740 accessed on 30 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/16BCA4600EA0066ACA2573FB00287E13/\\$file/Qo80226.36.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/16BCA4600EA0066ACA2573FB00287E13/$file/Qo80226.36.pdf)

271 Ibid.

272 Other alleged reported incidents include: “Question 0778 Budget Estimates – Police – Arrest of Ms Emma Torzillo and Others,” *Legislative Council Questions and Answers Paper No 23*, 24 October 2007 at 501 accessed on 30 May 2008 at [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/759B269C452C7044CA25737E0030F89C/\\$file/Qo71024.23.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/759B269C452C7044CA25737E0030F89C/$file/Qo71024.23.pdf); “Calls for Inquiry into APEC Police Operation,” *ABC News*, (Video excerpt) 9 September 2007 accessed on 30 May 2008 at: <http://www.abc.net.au/news/video/2007/09/09/2028003.htm>; David Braithwaite, “APEC Violence Reports go to Ombudsman,” *The Sydney Morning Herald*, 19 September 2007 accessed on 30 May 2008 at: <http://www.smh.com.au/news/national/apec-violence-reports-go-to-ombudsman/2007/09/18/1189881513677.html>

273 Sect 12 *Ombudsman Act 1974*

274 Sect 132 *Police Act 1990*

275 Sect 30 *Ombudsman Act 1974*

276 Sect 30A *Ombudsman Act 1974*

277 David Braithwaite, note 249.

Section 6: Recommendations

Independent inquiry specific to APEC

There is, at the least, a perception that the review of APEC legislation undertaken by the Minister of Police and Attorney General and the internal inquiry conducted by the NSW Police Professional Standards Command into incidents involving police behaviour during APEC could not be fully independent. Such reviews are unlikely to provide the scrutiny required, given the significant expansion of police powers and consequent incursion upon civil and political rights. It is important that an independent inquiry be conducted into police actions during APEC which allows for input by the public.

The Greens and the Human Rights Monitor Group called for an independent inquiry into police actions during APEC on 10 September 2007.²⁷⁸ Sylvia Hale has since repeated her calls for such an inquiry. On 26 September 2007 Hale sought to have the standing and sessional orders suspended in order to urgently debate the issue of the “unprecedented security measures of APEC”.²⁷⁹ She was supported by Ian Cohen and John Kaye. They each spoke of their concerns about overpolicing, Kaye noting the danger of “State moves against the rights of individuals to express dissent” and the “Police Force [being] used to suppress dissent”.²⁸⁰ In response, the Leader of the Opposition in the Legislative Council, Michael Gallacher, argued that the motion was not urgent. He stated that “Allegations of serious misconduct undoubtedly would fall within the domain of the Police Integrity Commission” and that “a parliamentary inquiry into this matter would interfere with those criminal investigations”.²⁸¹

On 26 September 2007, Hale catalogued her concerns relating to the use of police powers during APEC, including that the success of the Chaser Team’s activities “evidenced that the security of those attending the APEC conference was of lesser concern to the police than repressing civil dissent and the right to peaceful protest”.²⁸² Hale put on notice her wish to move that the House “appoint a select committee to inquire into police activity during the APEC weekend”.²⁸³ This notice of motion has appeared in each notice paper since 25 September 2007.

CCLCG recommends an independent review be undertaken. This could take the form of a parliamentary inquiry, as Sylvia Hale suggests or could be a special report commissioned by the NSW Ombudsman. Whatever the form, the opportunity for public consultations and submissions is of vital importance.

The independent inquiry or report should consider the following:

- An analysis of police powers prior to their further expansion under the *APEC Meeting Act* and whether police could have exercised powers under existing legislation;
- The basis upon which police formed the view that protestors would be violent;
- Whether the police response was proportionate to the threat of violence during protest events;
- Any incidence of alleged abuse or misuse of police powers.²⁸⁴

Recommendation 1: That an independent review of police actions during APEC be undertaken. That this review includes mechanisms for public consultations and submissions.

²⁷⁸ Edmund Tadros, “Greens Call for APEC Inquiry,” *The Sydney Morning Herald*, 10 September 2007 accessed on 31 May 2008 at: <http://www.smh.com.au/news/national/greens-call-for-apec-inquiry/2007/09/10/1189276602377.html>

²⁷⁹ Sylvia Hale, *Legislative Council Hansard*, 26 September 2007 at 2267 accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LC20070926/\\$File/541LC020.pdf](http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LC20070926/$File/541LC020.pdf)

²⁸⁰ Ibid at 2269.

²⁸¹ Ibid at 2270.

²⁸² Notice of motion by Sylvia Hale, *Legislative Council Notice Paper No 16*, 26 September 2007 at 465 accessed on 31 May 2008 at: [http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/F69EE3ED524759A4CA257361002B67DC/\\$file/Notice%20Paper%2016%20-%2026%20September%202007.pdf](http://www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/o/F69EE3ED524759A4CA257361002B67DC/$file/Notice%20Paper%2016%20-%2026%20September%202007.pdf)

²⁸³ Ibid at 465-466.

²⁸⁴ This has incorporated some of Hale’s terms of reference for a select committee inquiry. See notice of motion by Sylvia Hale, note 282 at 466.

Independent inquiry of general expansion of NSW Police powers

This paper has only briefly touched upon the trend in continually expanding police powers within NSW. While one of the reasons for establishing *LEPRA* was to consolidate police powers into one act,²⁸⁵ police powers have been expanding through either amendments of existing acts or introduction of new legislation. Given the possibility of the introduction of more permanent APEC-like powers, it is timely to undertake an independent review of the broader issue of continued expansion of police powers. Such a review should critically analyse:

- The extent and effectiveness of existing legislation with respect to police powers;
- The underlying reasons why there is a perceived need for expansion of police power;
- Evidence to support the need for further expansion or otherwise of police powers;
- Who is most affected by the expansion of police powers? Why is this the case?
- What are the underlying causes of social unrest?

Alternative approaches to law and order issues other than the expansion of police powers – including a comparative study of similar jurisdictions.

Recommendation 2: That an independent inquiry into the general expansion of NSW Police powers be undertaken before any further expansions be considered.

Alternative models of policing: community policing

Throughout 2004-05 there were a series of public disturbances and riots within Sydney: the Redfern riot in February 2004; Macquarie Fields public disturbance in January 2005; and the Cronulla riots and revenge attacks in December 2005. Following these incidents, recommendations were made with respect to ways to promote a more effective response to public disorders.

The Parliamentary Inquiry into the Public Disturbances at Macquarie Fields made several recommendations including:

- Establishing and/or further developing and/or strengthening of relationships of trust between police and local communities, with a particular focus on police and young people;
- The need for a strategy that ensures adequate liaison with and dissemination of information to the community, particularly in the context of a public order incident;

The importance of continued training for NSW Police to heighten awareness of the cultural and social issues facing disadvantaged communities.²⁸⁶

Building on the learning from these riots and public disturbances there is a greater understanding of how good relations between police and members of the community can often foster relationships of trust. Such relationships take time to develop. However their value cannot be underestimated. For example, good relations between police, including an ethnic liaison officer, and the community were considered vital in defusing volatile situations during the Cronulla riots and in gathering good intelligence from within the community.²⁸⁷ As the NSW Ombudsman notes in the Review of Part 6A powers, there is an “operational advantage to police maintaining good relations with all parts of the community”.²⁸⁸

It should also be acknowledged that relationships of trust are very difficult to foster and develop in a climate of fear and when they are built upon a foundation of denigrating “the other”. This is an issue in the context of policing protests. As Ian Cohen states in parliamentary debate:

In my experience, where protests have occurred peacefully, where the right balance has been struck between conducting meetings and allowing people to express a dissenting view, it has been good communication between protesters and police that

²⁸⁵ Note 47.

²⁸⁶ Standing Committee on Social Issues, “Public Disturbances at Macquarie Fields,” *Report 38, Legislative Council*, tabled in Parliament 16 June 2006 at 43-50; 58-59;

²⁸⁷ Note 44 at 67.

²⁸⁸ *Ibid* at 41.

has gotten results. Police continually appeal to the activist community for information and cooperation ahead of events where there is a potential for conflict. When police start creating secret lists they are not modelling the behaviour that they expect to see in the activist community. This will have a corrosive effect on trust and goodwill, which are crucial ingredients of any negotiations between police and protesters.²⁸⁹

With respect to protest situations, the use of Crowd Safety Officers at G20 can be seen as an element of community policing. These officers were selected from a “pool of mature and experienced police”, patrolled the areas outside police barriers and were clearly identified by their yellow vests. They liaised and communicated with protest groups and were said to be responsible for “giving fair warning and advice to the crowd”.²⁹⁰ Human Rights Observers noted that Crowd Safety Officers were present and speaking with protestors in the early stages of G20, but were absent after the police barriers were breached by groups of protestors early Saturday afternoon.²⁹¹ Given the sense of frustration experienced on the part of APEC protestors, partly as a result of liaising with officers whom they believed did not have the power to make agreements, better strategies of police engagement with protestors in good faith are required. Learning from policing at G20 may be relevant.

Community policing in the context of counter-terrorism has been the subject of recent research. Monash University in partnership with Victoria Police have produced a report entitled *Counter-Terrorism Policing and Culturally Diverse Communities*. The report notes the “precariousness of police-community relationships when put under pressure”²⁹² and the importance of “increased communication and training within the policing organisation”.²⁹³ While acknowledging the study was specific to counter-terrorism policing in culturally diverse communities, the issues raised may bear some relevance to a broader discussion about general community policing models.

While perhaps an effective sound bite to suggest the government is tough on crime, the expansion of police powers is not the only nor necessarily the most appropriate or effective strategy in dealing with public disorder or expected large scale protests. NSW Police’s response to the recent riots and public disturbances and the NSW Police’s efforts to liaise with homeless peoples’ networks during APEC indicates that alternatives, such as community policing, are possible. Further study should be undertaken to investigate whether community policing operates in other domestic as well as international jurisdictions, the form it takes, the contexts in which it is used and its effectiveness. Where appropriate, findings and recommendations should be applied by NSW Police and new strategies and models of policing should be developed.

Recommendation 3: That alternative models of policing, other than the expansion of police powers, be considered.

Effective and inclusive consultation and communication strategy

NSW Police’s engagement with the relevant organisations to ensure homeless people were adequately informed and prepared for APEC is a strategy of good practice.

There are, however, areas of concern with respect to police consultations with different stakeholders and communication strategies. An independent evaluation of communication strategies with each of the key stakeholder groups in relation to APEC is required. From this, building upon existing strengths and combining learning, a more effective and inclusive consultation and communication strategy could be developed.

²⁸⁹ Ian Cohen, note 89 at 1657.

²⁹⁰ Cited in *Human Rights Observer Team Final Report: G20 Protests*, Federation of Community Legal Centres (Vic), 2007 at 12.

²⁹¹ Ibid at 13.

²⁹² Sharon Pickering, David Wright-Neville, Jude McCulloch, Pete Lentini, *Counter-Terrorism Policing and Culturally Diverse Communities*, Australian Research Council Linkage Project, 2007 at 5 accessed on 7 March 2008 at: <http://arts.monash.edu.au/criminology/news-and-events/counterterrorreport-07.pdf>.

²⁹³ Ibid at 6.

Recommendation 4: That more effective and inclusive police consultation and communication strategies be developed in the event of future international events requiring a security presence.

Mechanism of ensuring human rights protection

This paper has raised significant concerns with respect to the protection of basic human rights within Australia. While Australia is a party to and has ratified the *ICCPR*, the rights protected in this Covenant are not comprehensively enforceable at either the NSW or federal level.

Furthermore, it has been argued in this paper that the Legislation Review Committee, designed as an alternative to a NSW Charter or Bill of Rights,²⁹⁴ provides inadequate protection of human rights.

The Federal Government has allocated money in the recent budget for a national consultation into human rights and responsibilities.²⁹⁵ Now is an opportune time to consider more effective and enforceable mechanisms for ensuring the protection of human rights, not only in providing justice for victims of human rights abuses but “more importantly, [in] preventing these abuses from occurring in the first place”.²⁹⁶ A Charter of Rights and Responsibilities is one such option which should be carefully considered.

Recommendation 5: That more effective and enforceable mechanisms for ensuring the protection of human rights within NSW and Australia be introduced, including, for example, a Charter of Rights and Responsibilities.

²⁹⁴ Note 54.

²⁹⁵ Attorney General Department, *Portfolio Budget Statement 2008-2009* at 19, 28 accessed on 31 May 2008 at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(o84A3429FD57AC0744737F8EA134BACB\)~o2+pbso8-09_AGD_final.pdf/\\$file/o2+pbso8-09_AGD_final.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(o84A3429FD57AC0744737F8EA134BACB)~o2+pbso8-09_AGD_final.pdf/$file/o2+pbso8-09_AGD_final.pdf)

²⁹⁶ Note 5.

Appendix 1

APEC – SYDNEY 2007 AND THE MEDIA

by Margot Egan

The messages being dispersed by the media prior to and during APEC was that it was inadvisable for anyone to consider venturing into any “declared” or “restricted” areas in or around Sydney, the later being limited to entry only on the grounds of “special justification”²⁹⁷.

Media reports of APEC also focused upon anticipated acts of violence and the potential for terrorism. Media reported that “the threat of a terrorist attack is high on every security agenda and as many as 3,500 NSW Police will work with Commonwealth agencies including the Australian Federal Police, ASIO and the Australian Defence Force to provide an impenetrable cordon of security around the [APEC] summiteers”.²⁹⁸ At the same time, NSW Police were also said to be “monitor[ing] protesters”²⁹⁹ who plan to rally and march in the Sydney CBD.

“As well as the 3500 NSW Police, and small contingents from other states and even from New Zealand, 450 AFP officers will descend on Sydney for leaders’ week. They will form specialist teams for close personal protection, intelligence analysis, “investigations, dog bomb squads and airport security”.³⁰⁰

“Water security will be a priority and during the crucial week more than six police boats will patrol Sydney Harbour, along with police-driven jet skis. Boats from Customs and the navy will be pressed into service”.³⁰¹

“In the air, police will use helicopters to help with venue security, motorcade security and traffic and protest monitoring. The military will have helicopters on standby and it is likely the Special Air Service and commandos will be ready somewhere below the horizon, although Lennon says the military deployment will not be seen if it isn’t needed”³⁰².

All forms of media warned of the expectations of authorities that there would be daily protests from 2 to 9 September, with the most violent demonstrations being held in Sydney on Saturday 8 September which would involve up to 15,000 demonstrators.³⁰³

Sydney was portrayed by the media as a city in “lock down” during APEC.³⁰⁴ This was also being reported well before APEC.³⁰⁵

Where did the language of the media come from? Was it simply sensationalism by the media, or was the media simply the conduit for the government to communicate the realities of APEC to the community?

Communication with Residents and Business

Prior to the implementation of the *Act*, it was the government’s intention to communicate with residents and businesses within the Sydney CBD to “inform affected people of the impact of the proposed power [and that this would] involve liaising with residents and businesses”³⁰⁶. We are unsure as to what forms of print media were used in this process, however information regarding road closures, restrictions in accessing specific areas, private and public transport issues etc. were covered in issues of the “Sydney Bulletin” which commenced on 13 July 2007.

297 “Special Justification” is defined in s37 of the *APEC Meeting (Police Powers) Act 2007 (NSW)*.

298 Sian Powell, “Caught in the Line of Ire,” *The Australian*, 28 July 2007 accessed on 26 May 2008 at: <http://www.theaustralian.news.com.au/story/0,,22145672-28737,00.html>

299 Ibid.

300 Ibid.

301 Ibid.

302 Ibid.

303 Kara Lawrence, “Prisons Emptied to Make Way for APEC Arrests”, *Daily Telegraph*, 24 August 2007, accessed on 26 May 2008 at: <http://www.news.com.au/dailytelegraph/story/0,22049,22295866-5013719,00.html>

304 “Police Defend Lockdown,” *The Sydney Morning Herald*, 9 September 2007 accessed on 26 May 2008 at: <http://www.smh.com.au/news/apec/police-defend-lockdown/2007/09/09/1189276520316.html>

305 “Spy Chief Issues Warning on APEC Meeting,” *Nine MSN* 11 December 2006 accessed on 26 May 2008 at: <http://news.ninensn.com.au/article.aspx?id=170160>

306 Tony Kelly, “Second Reading APEC Meeting (Police Powers) Act 2007,” *NSW Legislative Council Hansard and Papers*, 21 June 2007 at 1501 accessed on 21 May 2008 at: [http://www.parliament.nsw.gov.au/prod/parlament/hanstrans.nsf/V3ByKey/LC20070621/\\$File/541LC014.pdf](http://www.parliament.nsw.gov.au/prod/parlament/hanstrans.nsf/V3ByKey/LC20070621/$File/541LC014.pdf)

Businesses and residents in the CBD were said to receive a flyer by email containing maps and details of public transport and traffic arrangements.³⁰⁷

The language and tone of these communications was informative and benign.

Print media and threats of violence

The language used in the commercial print media was unambiguous – APEC would bring with it riots, violence, and civil unrest.

As early as June, print media were describing “a taste of things to come during APEC” when, on 5 June, “thirty anti-Howard protestors demonstrating outside the Shangri-La Hotel in Sydney where Prime Minister Howard was giving an address, were surrounded by twice as many riot police and mounted officers. At least another sixty officers stood by near the hotel while others patrolled adjacent to intersections, as a police helicopter hovered above shining its powerful spotlight on the protestors below”.³⁰⁸

Closer to the event, but well in advance of the arrival of APEC delegates, print media were predicting “mayhem involving every major protest group in Sydney [causing] mass CBD disruption”.³⁰⁹

Parents were also being warned by police authorities that police could not guarantee the safety of their children who may be caught up in the protests.³¹⁰ “Police will be roaming trains, buses and the central business district as part of a crackdown on students who truant to join protests”, the Police Commissioner, Andrew Scipione... warned.³¹¹ Scipione said “police would arrest students if they broke the law”.³¹²

Print media also provided a timely insight into the various pieces of equipment being prepared for use in the event of an “imminent” riot. Such equipment included a water cannon which, although acknowledged by the Premier, Morris Iemma, to have the potential to “cause serious injury”,³¹³ he nevertheless advised that “any protestors who are considering violent disruptions during the APEC conference should count this as a warning”.³¹⁴

In one article, it was claimed that an “anarchist political movement” “announced its intention to violently disrupt [the] APEC summit and ... issued a call to action to recruit more people for a ‘mass, strategic intervention’”.³¹⁵

On 4 September 2007, protestors from the Stop Bush Coalition and Peacebus, gathered at Railway Square and were “out-numbered by a heavy police presence...a barrage of police officers and a large media contingent, bracing themselves for violent incidents with police”.³¹⁶

In the aftermath of the 4 September gathering, the main protests scheduled for 8 September were pre-empted with print media headlines quoting Riot Squad Commander Steven Cullen in his address to the Supreme Court on 5 September 2007: that “Full-scale Riot Likely in Sydney”³¹⁷, and stating that “police are

307 Jordan Baker, “Fortress Sydney: The Lockdown Begins”, *The Sydney Morning Herald*, 30 August 2007 accessed on 25 May 2008 at: <http://www.smh.com.au/news/national/fortress-sydney-the-lockdown-begins/2007/08/29/1188067191583.html>

308 “Police Outnumber Anti-Howard Protestors”, *Sydney Morning Herald*, 6 June 2007 accessed on 26 May 2008 at:

<http://www.smh.com.au/news/National/Police-outnumber-antiHoward-protesters/2007/06/06/1181089150177.html>

309 Kara Lawrence, “APEC Protestors Target Sydney” *The Daily Telegraph*, 22 August 2007 accessed on 26 May 2008 at: <http://www.news.com.au/dailytelegraph/story/0,22049,22284976-5013719,00.html>; Kara Lawrence and Joe Hildebrand, “APEC Protest Mayhem Plan”, *The Courier Mail*, 22 August 2007, accessed on 26 May 2008 at: <http://www.news.com.au/couriermail/story/0,23739,22287122-952,00.html>

310 Ibid.

311 Alexandra Smith, Jordan Baker and Edmund Tadros, “Five More Activists Added to Blacklist”, *The Sydney Morning Herald*, 5 September 2007, accessed on 26 May 2008 at: <http://www.smh.com.au/news/apec/activists-listed/2007/09/04/1188783236873.html>

312 Ibid.

313 Andrew Clennell “Wet v Wild: Riot Squad Shows Off Its \$700,000 Weapon”, *The Sydney Morning Herald*, 21 August 2007, accessed on 26 May 2008 at: <http://www.smh.com.au/news/national/wet-v-wild-riot-squad-shows-off-its-700000-weapon/2007/08/20/1187462176707.html>

314 “Iemma’s APEC Stream Machine”, *The Daily Telegraph*, 20 August 2007, accessed on 26 May 2008 at: <http://www.news.com.au/dailytelegraph/story/0,22049,22275620-5013719,00.html>

315 Sarah Elks, “Protesters Warn of Violent Challenge”, *The Australian*, 30 August 2007, accessed on 26 May 2008 at: <http://www.theaustralian.news.com.au/story/0,25197,22331224-2702,00.html>

316 Rhett Watson, Justin Vallejo, Joel Christie, “Police Out-Number APEC Protesters in Railway Square”, *The Daily Telegraph*, 4 September 2007 accessed on 26 May 2008 at: <http://www.news.com.au/dailytelegraph/story/0,22049,22362825-5013719,00.html>

317 Andrea Petrie, “‘Full Scale Riot Likely’ in Sydney”, *The Age*, 6 September 2007 accessed on 26 May 2008 at: <http://www.theage.com.au/news/national/fullscale-riot-likely-in-sydney/2007/09/05/118878321102.html>

expecting up to 20,000 people to attend an anti-APEC protest” where “police lines will come under attack”.³¹⁸

The protest on 8 September became “APEC fear central. The balcony of the Sydney Town Hall, off limits to speakers wanting to address the throng below, became a vantage point for hooded police video cameras. Police in Darth Vader gear stood, batons at the ready. Dogs were waiting in reserve. There were machines for pumping gas. The famous black water cannon crawled behind the demonstrators being funnelled [*sic*] into Hyde Park”³¹⁹. It was claimed that “the main show of force came from heavily armed police”³²⁰.

Human Rights Monitors attending the protest claimed that “some police overstepped their authority” and were “particularly concerned with police use of force on some members of the public, officers not carrying necessary identification and the use of crowd control measures outside the declared APEC security areas”.³²¹ In a consistent show of strength, “police helicopters hovered overhead and officers were stationed on rooftops...The newly purchased water cannon was moved to several locations during the protest”.³²²

“Blacklists”

As protestors’ plans to demonstrate against APEC were increasingly curtailed, print media reported on the “blacklists” of excluded persons who were prohibited from entering the various zones. Initially these individuals were not identified – they were expected to just “know who they were”, according to the NSW Police Minister, David Campbell.³²³ A person’s inclusion on the list would be based on whether or not he/she had “been involved in violent and disruptive protests in the past”.³²⁴ Such blacklists were seen as “an act of political intimidation of which the late Joh Bjelke-Petersen would be proud”, and which “will make people think twice before participating in legitimate protest”.³²⁵

While the list remained unpublished, “people who did not know they were on the list could face jail for being in a restricted area without special justification”.³²⁶ Once the list was published, it is impossible to speculate on the extent to which being blacklisted would affect not only the preparedness of others to risk being placed on the blacklist as a result of association with protestors, but also, participation in protests. It is also impossible to speculate on the extent to which those blacklisted would face discrimination in the future.

Prisons being “emptied” to make way for arrests

Print media headlines informed the public that prisons were being “emptied to make way for APEC arrests”.³²⁷ Readers were advised that “the massive number of jail beds set aside takes into account new laws which created a presumption against bail for people who commit certain offences, such as assaulting police and malicious damage, during the APEC summit”.³²⁸

Radio

As arguably Australia’s most prominent and influential radio announcer,³²⁹ Alan Jones’ influence cannot be underestimated. For this reason, his broadcasts surrounding the “climate” in Sydney – in particular in the lead-up to APEC, are noteworthy.

In his editorials, available on the Radio 2GB website, Alan Jones challenged authorities, in particular the newly appointed Police Minister, Andrew Scipione, to “listen to the law abiders, not the law breakers, tell them they can’t be trusted to behave in APEC week, tell them that our police and security service are not

³¹⁸ Ibid.

³¹⁹ David Marr, “Lucky We All Got Out Alive in Fear City”, *The Sydney Morning Herald*, 10 September 2007, accessed on 26 May 2008 at: <http://www.smh.com.au/news/apec/lucky-we-all-got-out-alive-in-fear-city/2007/09/09/1189276546306.html>

³²⁰ Danielle Teutsch and Daniel Dasey, “Protesters No Match As Police Rule Streets”, *The Sydney Morning Herald*, 9 September 2007, accessed on 26 May 2008 at: <http://www.smh.com.au/news/apec/protesters-no-match-as-police-rule-streets/2007/09/08/1188783554824.html>

³²¹ Ibid.

³²² Ibid.

³²³ Edmund Tadros, “Those on APEC Black List ‘Know Who They Are’”, *The Sydney Morning Herald*, 19 June 2007, accessed on 26 May 2008 at: <http://www.smh.com.au/news/national/those-on-apec-black-list-know-who-they-are/2007/06/18/1182019030464.html>

³²⁴ Ibid.

³²⁵ NSW Council of Civil Liberties cited in “Secret APEC List Worries Libertarians”, *The Australian*, 20 June 2007, accessed on 26 May 2008 at: <http://www.theage.com.au/news/National/Secret-APEC-list-worries-libertarians/2007/06/20/1182019171014.html>

³²⁶ Ibid.

³²⁷ Note 7.

³²⁸ Ibid.

³²⁹ Ray Chesterton reports in *The Daily Telegraph* on 19 February 2008 that Alan Jones has now won top slot in the radio ratings survey for the 132nd time, thereby reinforcing his “now massive on-going presence in Sydney radio.”

going to be made frontline fodder for their violence, and if there's a \$600,000 water cannon which we've purchased, use it. If it can knock protesters off their feet, if they defy the law in numbers, use it....If there's a 12,000 litre tank with shatterproof glass and a push bar in the front that can clear barricades and other obstacles, use it. Or will we be too pigeon-livered to do that".³³⁰

He continued, "I hope the Police Commissioner...understands his obligation to the law abiders in our community instead of caving into the law breakers. Mind you, if we were to cave in again to the law breakers it would be no surprise. We've done it so many times in the past we're almost used to it. The memories of Redfern, Cronulla and Macquarie Fields are very fresh in our minds. Are we being softened up to accept that APEC can be added to the shameful list"?³³¹

Alan Jones subsequently broadcast that he had been criticised and accused of "inciting violence in relation to APEC...by the Stop Bush Coalition...[T]hat I'm inciting the police to violently repress peaceful protesters. Peaceful protesters? When did we have them"?³³²

It is not unreasonable to assert that Jones' broadcasts in the lead up to APEC could have influenced the police and government to seriously consider taking the heavy-handed approach they did in both their communications with the public via the media, and indeed their direct interaction with the public. The authorities would also know the importance of gleanings favourable analysis from commentators such as Alan Jones post-APEC – especially in consideration of a looming Federal Election.

Sydney television & internet news networks

In the weeks leading up to APEC, TV and internet news media in Sydney were warning of delays, restrictions in freedom of movement in and around restricted zones and "significant disruptions" to Sydneysiders prior to and during APEC and even the threat of "targeted action against global companies" who were located within the restricted zones.³³³

Elsewhere, from as early as June 2007, the public was being warned of "anarchist" groups preparing for violent confrontations during APEC.³³⁴

The public was frequently subjected to warnings of security measures – a "huge concrete wall will be built around Sydney's CBD in a bid to protect potential targets from terrorists and protestors",³³⁵ likening the structures to "the Berlin Wall, an iconic symbol of the Cold War which split the European city for 28 years",³³⁶ Viewers were advised that police had "bought a \$600,000 water cannon for use if protests get violent and more than 30 buses will serve as mobile detention cells",³³⁷ and that "troublemakers" would be dealt with under new laws specially passed by parliament to apply for the duration of APEC.³³⁸ Suggestions of the use of taser guns by riot police as a means of "crowd control" were also mooted.³³⁹

Some concerns were raised as to the draconian nature of the APEC laws which were a threat to civil rights and liberties. "If you are charged with any of [the] offences under the Act" then there is a presumption against the granting of bail, and that means that effectively for the duration of the APEC meeting you ... will be locked up and denied bail".³⁴⁰

330 "APEC and Police" in *Alan Jones' Comments on 2GB*, 23 August 2007, accessed on 26 May 2008 at www.2gb.com.au

331 "APEC Protests" in *Alan Jones' Comments on 2GB*, 24 August 2007, accessed on 26 May 2008 at www.2gb.com.au

332 "APEC Protests" in *Alan Jones' Comments on 2GB*, 28 August 2007, accessed on 26 May 2008 at www.2gb.com.au

333 "More APEC Restrictions Announced for Sydney", ABC News website, 24 August 2007, accessed on 26 May 2008 at: <http://www.abc.net.au/news/stories/2007/08/24/2014090.htm?section=justin>

334 Shaun Davies, "Anarchists Ready for APEC Violence" National Nine News, 4 June 2007, accessed on 26 May 2008 at: <http://news.ninemsn.com.au/article.aspx?id=271050>

335 "Concrete Fence to Encircle Sydney for APEC" National Nine News, 2 August 2007, accessed on 26 May 2008 at: <http://news.ninemsn.com.au/article.aspx?id=282953>

336 Ibid.

337 Ibid.

338 Reporter: John Stewart, "Concerns Over Tough APEC Police Powers", *Lateline*, 14 August 2007, accessed on 26 May 2008 at: <http://www.abc.net.au/lateline/content/2007/s2005230.htm>

339 "Police Union Questions Taser Use Decision", ABC News Website, Monday 6 August 2007, accessed on 26 May 2008 at: <http://www.abc.net.au/news/stories/2007/08/06/1997973.htm>

340 Note 43.

To attempt to describe in writing the material which was viewed via television and internet news services is grossly inadequate when considering the graphic and confronting images which were presented of riot police, water tanks, police lines, fences, water cannon, and confrontation with “protestors”, media personnel, and ordinary citizens. If the objective of the police and government was to deter even the most law abiding citizen from considering joining peaceful protests or gatherings, it is arguable that these images were, in themselves, sufficient to achieve the authorities’ objectives.

Appendix 2

THE APEC LEGAL HOTLINE

Miranda Nagy³⁴¹ and Alison Aggarwal³⁴²

Phase 1: Establishing legal support structures and informing the public regarding the APEC powers

In the weeks prior to APEC, a group of Sydney lawyers troubled by the draconian *APEC Meeting (Police Powers) Act 2007* (NSW) and the NSW government’s mantra on the suppression of “violent protests”, came together to build legal support structures for members of the public affected by the APEC powers and infrastructure or those attending the demonstrations.

Besides liaising with NSW Police, the NSW Legal Aid Commission, NSW Courts and the community legal sector regarding court sitting arrangements over the APEC weekend, an education session on the APEC legislation and police powers was organised with the assistance of NSW Legal Aid Commission trainers. The session was attended by lawyers who were likely, because of their work, to deal with clients affected directly or indirectly by the APEC powers, such as Legal Aid lawyers and lawyers working with homeless people through the Homeless People’s Legal Clinic. It was also attended by lawyers wishing to facilitate legal support to protesters over the APEC weekend.

The lawyers (including criminal specialists, practitioners at private firms, Legal Aid and in the community legal sector) were also concerned by numerous misstatements by police and the lemma Government as to the effect of the APEC legislation – such as police informing all persons on the “excluded persons” list that police had directed their exclusion from all APEC security areas from 30 August 2007 to 12 September 2007. In fact the legislation did not go so far as to ban any person from APEC security areas. Rather, it granted police a broad discretion to physically prevent entry to or remove members of the public from APEC security areas in a wide array of circumstances. Persons on the excluded persons list merely became potentially “excludable” persons under the legislation³⁴³. Police Commissioner Scipione’s statement on 30 August 2007 that if “excluded persons” were not deterred from coming into town they would be “dealt with”³⁴⁴ only compounded public uncertainty. In view of these statements and the confusing matrix of “APEC security areas” gazetted in a piecemeal fashion in the weeks, days and even hours leading up to the APEC weekend, the lawyers also prepared and distributed an information leaflet on the APEC legislation, complete with maps.

Phase 2: The APEC Legal Hotline at the APEC protests

The major legal support project organised by the lawyers was a first for a Sydney demonstration, involving the establishment of a legal hotline to provide information, advice and legal referrals to members of the public. Funded by the law firm Maurice Blackburn, the APEC Legal Hotline staffed a roster of 25 lawyers, 2 paralegals and a legal coordinator across the APEC weekend from Friday 7 September to Sunday 9 September, for a week before and 2 weeks following. Based at a city office with phone, fax and email access, the lawyers also had a roving capacity where needed. Following requests from concerned members of the public and Human Rights Monitors, some lawyers worked their shift on the move at the various events, actions and demonstrations, particularly on Saturday 8 September 2007 when most APEC-related arrests occurred.

The APEC Legal Hotline lawyers worked in co-operation with the Human Rights Monitors who observed and

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³⁴³ Sect 24 *APEC Meeting (Police Powers) Act 2007* (NSW)

³⁴⁴ Brian Robins, “Police get special APEC powers” *Sydney Morning Herald* 30 August 2007 accessed on 12 June 2008 at: <http://www.smh.com.au/news/national/police-get-special-apec-powers/2007/08/30/1188067252738.html>

monitored police behaviour at the protests, and made reports of arrests to the lawyers. The lawyers provided advice and information on police powers and the APEC legislation, tracked the arrests of protesters from calls made by protesters and the Human Rights Monitors, and provided a point of contact for persons who believed their friends or family members had been arrested. In addition, the legal hotline lawyers provided information regarding arrests to the Legal Aid lawyers rostered over that weekend to provide legal representation to persons brought before a Magistrate having been refused bail by police.

Some useful liaison with police was also undertaken by legal hotline lawyers on an as needed basis, contact details for senior police officers involved in the APEC operation having been provided during the liaison in relation to court sitting arrangements.

In addition, on the afternoon of Saturday 8 September two APEC Legal Hotline lawyers spent several hours at Sydney Police Centre following the main body of arrests, with a legal coordinator and a criminal lawyer present at the legal hotline office. Front desk police did provide initial information to the two APEC Legal Hotline lawyers as to the charges to be laid against arrestees, likely processing times, and which arrestees had been refused bail. As police were refusing members of the public access even to the public areas of the Sydney Police Centre for most of the afternoon, the limited information given by police to the APEC Legal Hotline lawyers was the only source of information regarding those persons until the release of some began hours later. At least 2 persons arrested and detained at Sydney Police Centre were not ultimately charged with any criminal offence.

While police did not allow the two APEC Legal Hotline lawyers present at Sydney Police Centre access to arrested persons, and several of the persons arrested and detained that afternoon reported on release that they had asked to contact a lawyer via the APEC Legal Hotline, it appears that police did not attempt to interview any of the arrestees during their processing, conducting forensic procedures and charging each person before determining whether each should be granted police bail.

Police refused bail to 5 persons on Saturday 8 September, including 1 woman. Those persons spent a night in the cells at Sydney Police Centre apparently in the custody of NSW Correctional Services, with family members repeatedly attempting to contact them via telephone numbers provided by the front desk officers at Sydney Police Centre staff that were never answered or which were transferred with the callers on hold with no human response for in excess of 12 minutes. One of the persons refused bail was permitted on Saturday evening to contact the APEC Legal Hotline to obtain advice in relation to her situation and contact was made by the APEC Legal Hotline lawyers with members of her family following this call. All others who police refused bail were afforded access to Legal Aid lawyers the following morning prior to their bail hearing. The bail court at Parramatta refused bail again to 3 of those people, of whom 2 were granted bail on Monday 10 September 2007.

Phase 3: Follow up legal support and referrals

Following the APEC weekend, the two legal hotline numbers remained active for 2 weeks, enabling arrested persons and witnesses to call in with details of arrests or to seek assistance in finding legal representation. The APEC Legal Hotline lawyers then liaised with a number of law firms and criminal practitioners to facilitate legal representation, including DLA Phillips Fox, who accepted instructions from 7 of the arrestees through its pro bono programme. All arrestees contacting the legal hotline were linked up with solicitors and none remain unrepresented.

Impact of the APEC Legal Hotline

There were 2 dimensions to the legal support structures established around the APEC weekend in Sydney. The first, public education and information, was perhaps more significant in the APEC protests than the second, more obvious aim of providing direct legal assistance to persons arrested during the APEC weekend.

Organising and staffing a hotline with such a degree of mobility, expertise and resourcing was a new development in activist legal support in NSW. Originally the hotline had been conceived of as a way to provide direct legal assistance for arrested persons, as police planning appeared to be around the likelihood of large numbers of arrests. However, with few arrests eventuating most callers to the hotline over the APEC weekend

were members of the public requesting legal information regarding police powers under the APEC legislation (including the effect of the “excluded persons” list) and general law. One reason that it was difficult for arrestees to access the APEC Legal Hotline was that, unusually in NSW, police at the APEC demonstrations appear to have confiscated people’s mobile telephones immediately on arrest rather than waiting until arrival at the station of processing, putting them out of contact with friends, family and legal support for longer periods of time than would normally be the case.

The importance of public information was obvious early in the lead up to APEC. Because of the complexity of the APEC legislation, the aggressive (and sometimes misleading) public statements by members of the NSW Labor Government and the NSW Police Force in the lead up to the APEC weekend, and the siege-like atmosphere that developed within Sydney (with military helicopters regularly seen and heard around the CBD for weeks prior to the APEC meeting) an unusual degree of fear developed within the general community regarding what might transpire in the city during the APEC period.

The lawyers involved in organising the APEC Legal Hotline and the people involved in Human Rights Monitors therefore cooperated to disseminate information regarding the actual effect of the legislation on people’s rights to move about their city. This was done through the creation of a pamphlet dealing with police powers generally and the APEC legislation in particular. The pamphlet was distributed in the fortnight leading up to the APEC weekend, through community and government organisations, through websites and through activist-oriented events and workshops organised by the Human Rights Monitors. Several thousand business cards and stickers with the telephone numbers for the APEC Legal Hotline were also distributed both prior to and throughout the APEC weekend by the Human Rights Monitors. Many persons ultimately attending the protest displayed the stickers with the legal hotline numbers on their clothing.

The central aim of the legal support structures established was that members of the public would be better informed about their rights and their ability to move around their city and thus reassured of their ability to exercise these, notwithstanding the unprecedented security environment.

Summary of arrests:

Friday 7/9/07

- Reports of 4 arrests, of whom at least 2 were charged.
- A North Shore accountant (whose story was reported by Miranda Devine in the Sun Herald on Sunday 9 September) was arrested after allegedly crossing a road and inadvertently breaching an APEC security area. He was refused bail by police.
- Another person was arrested and charged with assaulting police after an alleged encounter with pro-Bush protesters in Hyde Park in which tomato sauce was alleged to have been thrown on a flag.
- A third person was arrested and subsequently extradited to Victoria to face charges relating to the G20 protests in November 2006 after allegedly failing to appear in Court in Victoria.

Saturday 8/9/07

- Reports of 24 arrests, of whom at least 8 and possibly more appear to have been released without charge. Media reports 18 arrests.
- 2 persons released without charge were held for up to 2 hours in police vehicles and at Sydney Police Centre and were processed, photographed and fingerprinted before their release. Others released without charge appear to have spent only seconds or minutes in police custody.
- 2 of those arrested were independent media personnel filming the events.

Sunday 9/9/07

No charges

Appendix 3

HUMAN RIGHTS MONITORS CHRONOLOGY OF 8 SEPTEMBER 2007

Note: the following times of events were collected by the 30 Human Rights Monitors who volunteered over the APEC period to attend demonstrations in order to monitor police behaviour. Some identities have not been included and some events have been omitted. Times are accurate to within 5 minutes.

Saturday 8 September 2007 (Saturday)

09.25	police officers at Belmore Park asking for organiser. ³⁴⁵	11.00	Park st now entirely blocked off on the northern side between George and Elizabeth Sts. ³⁶⁵
09.30	at Belmore Park, police start to seize poles.	11.55	Pitt St north blocked by police. ³⁶⁶
09.39	police seize poles at the main rally. Police officer says, when questioned, that they were operating under the Public Order Management Act [there is, in fact, no such law]. The police officer was not wearing ID and refused to provide it. When further challenged that the police had no authority, officers said "we don't care, we're doing it anyway". ³⁴⁶	11.07	march from Town Hall begins. ³⁶⁷
		11.08	police officer pushes protester for unclear reason near Market and Pitt St. ³⁶⁸
		11.09	march begins. ³⁶⁹
		11.10	rightwing group chants "corporate greed, not human need". ³⁷⁰
09.35	police officers confiscate poles at the corner of Pitt and Campbell Sts. ³⁴⁷	11.10	police officer at Starbucks on corner of Elizabeth and Park Sts in plain clothes shows police ID and stops protesters entering to buy coffee. Officer says "this is private property you are not allowed to enter." ³⁷¹
09.50	huge police presence, otherwise very quiet. ³⁴⁸		Castlereagh St cordoned off. ³⁷²
09.55	police cordon off Town Hall, with about 600-700 people present. ³⁴⁹	11.10	sit down protest begins. ³⁷³
10.05	music and band playing. Student protesters from Resistance arrive. Police officers wear yellow vests which obscures any ID they might be wearing. ³⁵⁰	11.10	sit down protest finished. ³⁷⁴
		11.15	report of arrest. ³⁷⁵
10.05	helicopter above crowd. ³⁵¹	11.20	sit-it by protesters on corner of Park Castlereagh.. ³⁷⁶
10.10	police not allowing protesters on road. Congestion in Town Hall Square [also known as Sydney Square]. ³⁵²	11.20	Main body of protest still at Castlereagh st. ³⁷⁷
		11.20	burning of US flag. ³⁷⁸
10.10	unions march down George street. Police move out of the way. ³⁵³	11.25	Human Rights Monitor on the corner of George and Park Sts threatened with arrest by police for "obstruction" for filming him. ³⁷⁹
10.11	3, 000 to 4,000 protesters estimated. ³⁵⁴		man arrested. ³⁸⁰
10.15	protest talks begins. ³⁵⁵	11.25	about "half" of police officers not wearing badges.
10.15	police on Town Hall balcony taking photographs of crowd below. ³⁵⁶	11.30	police buses moved to block George St.. ³⁸¹
10.15	police cordon off access section of George St. from Town Hall. ³⁵⁷	11.31	man arrested. ³⁸²
10.25	police talking to counter-demonstrators, joking, holding signs saying "socialism sucks". ³⁵⁸	11.35	corner of Goulburn and Pitt Sts 10 bikes, 30 on foot. ³⁸³
10.28	lines of police blocking off George and Park Sts. ³⁵⁹	11.37	water cannon observed at the rear of the protest. ³⁸⁴
10.30	man says "get your hands off me!" police confiscate protesters flag and police cut pole off. ³⁶⁰	11.38	march restarts main march. ³⁸⁵
10.35	police inspect wheelie bin on corner of Park St and George St. ³⁶¹	11.40	police knock over old guy main march. ³⁸⁶
10.37	police seize more poles. ³⁶²	11.40	Sergeant [name withheld] near St James train station informed us that individuals who participated in march will not be allowed into Green Zone. They will be 'filtering' the crowd. Not checking IDs but not allowing anyone with banners or signs through or anyone who looks "alternative". ³⁸⁷
10.52	6 buses in place, 7 motorbikes, 4 buses down Park Street with groups of 30 police. ³⁶³	11.46	at St. James train station, police sergeant said "permission
10.54	report of fascist group. ³⁶⁴		
10.55	police beginning to line up along Market St.		

345 HRM notes ref: P 08

346 HRM notes ref: P 11

347 HRM notes ref: A 14

348 HRM notes ref: T 14

349 HRM notes ref: F 18

350 HRM notes ref: T 11

351 HRM notes ref: T 09

352 HRM notes ref: T 09

353 HRM notes ref: T 21

354 HRM notes ref: F 22

355 HRM notes ref: T 23

356 HRM notes ref: F 24

357 HRM notes ref: A 28

358 HRM notes ref: F 11

359 HRM notes ref: BD G+S 14

360 HRM notes ref: T 33

361 HRM notes ref: BD G+S 15

362 HRM notes ref: P 35

363 HRM notes ref: BD G+S 15

364 HRM notes ref: A 22

365 HRM notes ref: T 34

366 HRM notes ref: F 34

367 HRM notes ref: F 32

368 HRM notes ref: F 12

369 HRM notes ref: J 13

370 HRM notes ref: P 15

371 HRM notes ref: T 16

372 HRM notes ref: F 22

373 HRM notes ref: F 23

374 HRM notes ref: F 24

375 HRM notes ref: J 31

376 HRM notes ref: T 14

377 HRM notes ref: F 41

378 HRM notes ref: N 23

379 HRM notes ref: J 22

380 HRM notes ref: J 21

381 HRM notes ref: P 23

382 HRM notes ref: N 27

383 HRM notes ref: A 23

384 HRM notes ref: F 33

385 HRM notes ref: BD G+S 44

386 HRM notes ref: BD G+S 45

387 HRM notes ref: T 35

	has only been granted for protesters to march in designated areas. ³⁸⁸	12.40	entire park in lockdown. People trying to leave Hyde Park are being sent from one end of the park to the other by the police. ⁴¹¹
11.50	people with few clothes on. ³⁸⁹	12.45	police transfer one or more protesters from detention bus, heading southwards.
11.50	police advise Human Rights Monitor that details of lawyers willing to advise can not be given to man detained in police bus near corner of Pitt and Park Sts.	12.46	people can't get out of Hyde Park. ⁴¹²
11.55	two semi-naked men arrested. ³⁹⁰	13.10	park street open to traffic. ⁴¹³
11.55	police form lines around buses near Elizabeth Street. ³⁹¹	13.30	Elizabeth Street remains blocked off, with police helicopter flying overhead. ⁴¹⁴
11.57	police blocking off Elizabeth St 2 buses, 24 police on either side of Hyde Park blocking Elizabeth St. ³⁹²	13.30	man with wheelie bin being subjected to search. ⁴¹⁵
12.04	police helicopter hovering over main march. ³⁹³	13.38	guy thrown out of McDonalds. ⁴¹⁶
12.05	water cannon on corner of Pitt and Market Sts. ³⁹⁴	13.40	DJ sitting on wall and arrested. PG speaking with police, about 20 police ran after him and pushed on the ground and arrested him. ⁴¹⁷
12.05	at St James station a group of 5 people had their bags searched at Macquarie street entrance to green zone. ³⁹⁵		crowd dispersing. ⁴¹⁸
12.05	WS arrested. ³⁹⁶	13.48	report of ambulance on site. ⁴¹⁹
12.10	police pushing protestors along market street - hands on protesters. ³⁹⁷	13.48	about 200 people in Belmore Park. About 58 police.]
12.10	market street cleared by police pushing them back to Hyde Park. Cordon both sides of Elizabeth street. 200 police and market at Elizabeth pushing crowd along into park street. ³⁹⁸	13.55	3 police officers question a man – who was wearing many political badges – on the corner of Park and Elizabeth street and then issue a fine for \$200 for throwing a cigarette butt on the ground. ⁴²⁰
12.12	“police push people up Park St.” ³⁹⁹	14.30	man tackled to the ground in Hyde park near café by about 20 police surrounding man. ⁴²¹
12.15	Human Rights Monitor pushed by police officer. ⁴⁰⁰	14.30	reported arrest of two women. ⁴²²
12.20	Pedestrian flow prohibited across Elizabeth street and along Hyde park. Asked officer why and he said “I have no idea.” ⁴⁰¹	14.34	report of man arrested at St. James station. ⁴²³
12.20	Human Rights Monitor are threatened with arrest after documenting conversation between police and two protesters. Protesters not arrested. Corner of Elizabeth St. and St. James Road. ⁴⁰²	14.40	pepper spray was used at initial altercation according to other protester. Member of Indymedia arrested because he would not hand over his camera.
12.25	non-protesters not able to get through. ⁴⁰³	14.41	police officer near st James station attempt to take camera from photographer. Police snatches camera and drops it on the ground. ⁴²⁴
12.30	police lines both sides of Elizabeth St across Park Street.. ⁴⁰⁴	14.45	person arrested by 5 police officers. “policeman crushing head and neck, then 3 assembled behind truck to obstruct view. Can see feet kicking under truck, noise as if was pushed against it forcefully. Was put into cell at back 2 further protesters initially arrested were released back into crowd.” ⁴²⁵
12.30	Most police officers on Elizabeth St not wearing badges. ⁴⁰⁵	14.50	police officer pushes Human Rights Monitors with hands at Hyde Park. ⁴²⁶
12.30	man attempted to cross road with arms in the air saying I just wanted to go home. 2 policeman held him and took him back to original side of road. Most people starting to get angry.	15.31	being urged to leave Hyde Park by police. ⁴²⁷
12.30	report of being “totally surrounded” by police with no exit. ⁴⁰⁶	16.45	police buses leaving. ⁴²⁸
12.33	police pushing protesters at Elizabeth Street ⁴⁰⁷		
12.35	police officers escorting man into police bus at market street near Hyde park. ⁴⁰⁸		
12.35	no one is being permitted entry all along the north west corner of Hyde Park. ⁴⁰⁹		
12.37	tourists cant get home. Looks like Hyde park north enclosed by line of cops. ⁴¹⁰		

388	HRM notes ref: T 36
389	HRM notes ref: BD G+S 46
390	HRM notes ref: J 33
391	HRM notes ref: BD G+S 43
392	HRM notes ref: BD G+S 47
393	HRM notes ref: P 33
394	HRM notes ref: F 38
395	HRM notes ref: T 38
396	HRM notes ref: J 41
397	HRM notes ref: F 46
398	HRM notes ref: F 49
399	HRM notes ref: P 49
400	HRM notes ref: F 48
401	HRM notes ref: T 48
402	HRM notes ref: N 50
403	HRM notes ref: P 51
404	HRM notes ref: P 53
405	HRM notes ref: T 52
406	HRM notes ref: F 52
407	HRM notes ref: P 27
408	HRM notes ref: T 56
409	HRM notes ref: T 53
410	HRM notes ref: P 57

411	HRM notes ref: T 58
412	HRM notes ref: P 51
413	HRM notes ref: F 46
414	HRM notes ref: T 46
415	HRM notes ref: T 39
416	HRM notes ref: P 51
417	HRM notes ref: F 43
418	HRM notes ref: P 57
419	HRM notes ref: Po 44
420	HRM notes ref: A 45
421	HRM notes ref: T 67
422	HRM notes ref: F 54
423	HRM notes ref: Pe 56
424	HRM notes ref: Pe 54
425	HRM notes ref: T 61
426	HRM notes ref: F 53
427	HRM notes ref: Pe 58
428	HRM notes ref: F 54

