Police directions (*Summary Offences Act* s28F) - issues of concern in relation to Cabramatta

1 History of section 28F

Section 28F of the *Summary Offences Act* 1988 gives police power to issue directions to people in public places. It commenced on 1 July 1998, with the enactment of the *Crimes Amendment (Police and Public Safety) Act* 1998. At the time, it was promoted as an "anti-gang" measure, designed to allow police to disperse people acting in a disruptive manner before the situation got out of hand.

On 1 July 2001, further amendments were made to the section by the *Police Powers (Drug Premises) Act* 2001. These amendments allow police to give directions to people who are thought to be in public places to buy or sell drugs.

2 The Shopfront's experience

The Shopfront Youth Legal Centre works with homeless and disadvantaged people aged 25 and under. We are based in the Kings Cross area but work with clients from all over the Sydney metropolitan area, including a significant number of clients in Cabramatta. Many of our clients who have been given police directions under section 28F. In our opinion, many of these directions have been unlawful.

The Shopfront expressed its concern in its submission to the Ombudsman's review of the *Crimes Amendment (Police and Public Safety) Act* 1998 (see Shopfront Youth Legal Centre submission dated 7 July 1999). In preparing our submission, we surveyed 33 young people. 32 of them (97%) said they had been asked to move from a public place by a police officer or security guard. 16 had been asked 5 times or more during the previous 12 months.

Our concerns were borne out by the Ombudsman's findings, published in its *Policing Public Safety* report in November 1999. Among the findings were that 48% of all directions were issued to people under 18, with the peak age being 16, and that 22% of all directions were issued to Aboriginal and Torres Strait Islander people. Based on an analysis of COPS narratives, the Ombudsman concluded that a high proportion (as many of 50%) of directions appeared to have been issued without a valid reason.

Since the *Policing Public Safety* report, the situation has not improved for our clients. On the contrary, it has worsened. In particular, since the "drug premises" amendments

in July 2001, many of our clients have been given "seven day" directions by Cabramatta police.

Since 1998, several of our clients have been given infringement notices (or charged) with disobeying police directions. We have assisted these people to defend their matters in court. *Not one* of them has been found guilty. The charges have all been withdrawn or dismissed, for various reasons including that there were no reasonable grounds to issue the direction, the direction was not reasonable, the police failed to follow the procedural requirements, or the defendant had a lawful excuse to disobey the direction.

We wish to comment on the policing practice in Cabramatta since the 2001 amendments. In our opinion, their use of the direction-giving power is unlawful and inappropriate, and is arguably dangerous on public health grounds.

3 Policing practice in Cabramatta since 2001 amendments

Police in Cabramatta have adopted the practice of issuing directions to people who do not live in Cabramatta, who are thought to be in the area for the purpose of buying, selling or using drugs.

In our experience, many people are given directions merely because they have syringes in their possession, have track marks on their arm, admit to being drug users or appear to be under the influence of drugs.

Police give each person substantially the same direction - not to come within a certain radius of the Cabramatta railway station for seven days. The radius varies but is typically somewhere between 1km and 3km.

If the person is found in Cabramatta within the 7-day period, the police (not necessarily the same officer) will issue another direction in similar terms. If the person is found in Cabramatta again within the next seven days, they will be arrested, charged with disobeying a police direction, and granted conditional bail. The bail condition is in the same terms as the direction - that the person not come within a certain radius of the Cabramatta CBD or railway station .

4 Lawfulness of directions issued by Cabramatta police

For a person to be guilty of an offence of disobeying a police direction under section 28F:

(a) The police officer must believe on reasonable grounds that the defendant's behaviour or presence in a public place is of a type covered by paragraphs (a) to (e) of subsection 28F(1). In this case, we assume that the prosecution is relying on the defendant's behaviour or presence being "*for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess*".

(b) The direction must be reasonable in the circumstances for the purpose of stopping the relevant conduct (28F(3)).

(c) The police officer must comply with certain procedural requirements when giving the direction. This includes identifying themselves, providing the reason for the direction and warning the person that failure to comply may be an offence (28F(4)).

(d) If the defendant initially refuses to comply with the direction, the police officer may again give the direction, with another warning that failure to comply may be an offence. It is only after disobeying a second time, without lawful excuse, that the defendant commits an offence (28F(5) and (6)).

(e) It must be established that the defendant persisted with the relevant conduct after the direction was made (28F(7)).

In our opinion, many directions given by Cabramatta police are unlawful, because they are issued without reasonable grounds and/or are not reasonable in the circumstances.

Further, even if these directions were lawful, we believe that most defendants charged with disobeying directions would not be guilty of an offence. This is because there was no initial refusal to comply with the direction and the second direction was not issued in accordance with subsection (5). Further, there is often no evidence that the defendant persisted with the relevant conduct.

4.2 No reasonable grounds for issue of a direction

As mentioned above, several of our clients have been given directions because they have syringes in their possession, have track marks on their arm, admit to being drug users or appear to be under the influence of drugs.

Evidence that a person is a user of prohibited drugs is not sufficient grounds to issue a direction. Even if the police believe that the person is visiting Cabramatta to purchase and/or use drugs, we suggest this is not sufficient.

We submit that there are grounds to issue a direction only if police believe on reasonable grounds the defendant is *currently in that particular public place for the purpose of obtaining or supplying* drugs. If police believe the person has *already* purchased and used their drugs, or may be on their way to *private premises* (such as a drug house) to obtain drugs, this would not be sufficient.

The power to give directions to people present in a public place to obtain or purchase drugs was added to section 28F in mid-2001 by the *Police Powers (Drug Premises) Bill* 2001. We note that second reading speech indicates that it was aimed at dispersing people who congregate around the railway station and other public areas of Cabramatta to buy and sell drugs or act as "runners". There was no suggestion that it was aimed at sweeping the streets of people who may be purchasing or using drugs in private places nearby.

4.3 Direction itself not reasonable

Even if there are grounds for the issue of a direction, we suggest that most of the 7-day directions issued in Cabramatta are unlawful because *they are not reasonable in the circumstances.*

(a) **Legislative intention**

While it may be reasonable to direct a person to leave an area for a short period of time, it is, in our view, totally unreasonable to direct a person to stay away from a public area for an entire week (unless perhaps a person has repeatedly engaged in serious and persistent problem behaviour such as blatant street dealing or violence).

Banning a person for long periods of time is not what was contemplated by the legislation (in its original or amended form). In the second reading speech to the *Crimes Amendment (Police and Public Safety) Act* 1998, the then Attorney-General, Mr Shaw, said *"The key purpose of this provision is to enable police to disperse persons acting in a disruptive manner before a situation gets out of hand."* (Legislative Council Hansard, p4277, 5 May 1998).

The 2001 amendments (allowing police to issue directions to persons thought to be in public places for the purpose of obtaining or supplying drugs) do not alter this position. Nothing in the second reading speech to the *Police Powers (Drug Premises) Bill 2001* suggests that the parliament intended to change the fundamental nature of the direction-giving power. We submit that it was not intended to ban drug users from Cabramatta or to discourage them from using drug treatment and needle exchange services in the area.

The practice of issuing the same standard direction to everyone, regardless of their circumstances, is arbitrary. Such a direction is unreasonable unless the police can demonstrate reasonable grounds for issuing the particular direction to the particular person in the particular circumstances. This view was recently expressed by a magistrate in a case in which we were involved at Liverpool Local Court (we are awaiting the transcript and will forward it to you when it becomes available).

(b) **Public Health**

We would also argue that practice of issuing 7-day directions to known or suspected drug users is unreasonable from a public health point of view. There are important services in Cabramatta, including the Drug Intervention Service Cabramatta (DISC), and its needle exchange van. We do not suggest that the Cabramatta police loiter near the needle exchange van and search everyone who accesses it. However, it appears that they sometimes come fairly close to this. Police routinely search suspected drug users in Cabramatta, not far from where the van operates, and will issue a direction if they find syringes in a person's possession.

The practice of issuing directions to people with syringes or who appear drug-affected discourages use of the needle and syringe exchange programme. In fact, use of the Cabramatta needle exchange van has been down significantly since police adopted the practice of issuing 7-day directions. This increases the risk of unsafe injecting practices, leading to the spread of diseases such as HIV and Hepatitis C.

The use of the directions power in this manner is at odds with the harm minimisation strategy which is a well-established plank of NSW government policy. It is also arguably in breach of the NSW Police Service guidelines for support of needle and syringe exchange and methadone programs. It has long been acknowledged that safe injecting practices should be promoted, and that access to needle and syringe exchange programmes in an important part of this.

We believe it is in the interests of public health to allow drug users to enter Cabramatta so they can access needle exchange and counselling services which may not be readily

available elsewhere. We concede that Cabramatta is not the *only* place where such programs exist, but it is one of the few places in Western Sydney where people can access a range of appropriate alcohol and other drug services.

Anecdotal evidence from health and welfare workers suggests that there has been a displacement effect. Drug users who have been driven out of Cabramatta are now in surrounding areas such as Canley Vale, Green Valley and Liverpool. They are still using drugs, but many are no longer accessing services such as clean needles and safe injecting information. Drug and alcohol workers report finding it more difficult to reach these clients now that they are dispersed throughout different areas.

(c) **Needs of people who live in Cabramatta or are part of the local community**

Cabramatta of course is a particularly important centre for people of Indo-Chinese background. Many feel they are part of the Cabramatta community even if they do not live in the immediate vicinity; they can access services and support there which may not be readily available in other areas. They should not be excluded from this community because they have a drug problem; instead they should be embraced by it and assisted to overcome their problems.

We have been told by Cabramatta police that they do not issue directions to people who live in Cabramatta or have otherwise lawful reasons to be there. However, anecdotal evidence from our clients suggests that this is not the case. Some clients report that they live in Cabramatta (for example, sharing a flat or staying temporarily with friends) but because their name is not on a lease or utility bill, they cannot prove it and are therefore assumed to live elsewhere. We also see numerous clients who have legitimate reasons to be in Cabramatta (for example to visit relatives, to see drug and alcohol counsellors) but who are banned because they also but their drugs in Cabramatta.

Even if it were desirable to keep drug users out of central Cabramatta, we would suggest that a 3km radius of is excessive. This takes in several neighbouring suburbs, including significant parts of Liverpool and Fairfield. Many people who receive these directions live in surrounding suburbs such as Bossley Park, Mount Pritchard, Green Valley, and Canley Vale. While these areas may be outside the 3km radius, it would be virtually impossible for a resident of one of these areas to carry out their daily life, including accessing drug treatment and other health services, without going within 3km of Cabramatta.

(d) **Civil liberties and freedom of movement**

Finally, we would say that a person's need to be in Cabramatta is not the only reason why it is unreasonable for police to ban them from the area. Citizens should have the right to access public space whether they *need* to be there or not. This right should only be taken away in exceptional circumstances. Further, we would say that such a decision should not be made by police officers but by a court, after giving the person the opportunity to be heard.

4.4 Procedural requirements

Police sometimes fail to follow the procedural requirements, which include identifying themselves, providing the reason for the direction, and giving a warning that failure to comply is an office.

Many of our clients have reported that police have given them directions without providing a reason. Sometimes the police express the reason in vague terms such as "you're intimidating people", without explaining the nature of the allegedly intimidatory behaviour.

Failure to follow the correct procedural requirements renders a direction invalid.

5 Appropriateness of arrest and charge as a means of dealing with alleged offences under section 28F

An offence under section 28F carries a maximum penalty of 2 penalty units. There is no custodial penalty prescribed. In most areas, police issue infringement notices for alleged offences under section 28F.

However, in Cabramatta, police have adopted an general policy of arresting and charging everyone whom they believe to have committed an offence under section 28F. When charged, defendants are required to enter bail undertakings with a condition prohibiting them from being within a certain radius of Cabramatta.

Police justify this practice on the grounds that disobeying a direction by being in Cabramatta is a "continuing offence", and arresting the person and imposing bail conditions is necessary to stop the offence from continuing.

We do not share this view and regard it as generally inappropriate to arrest and charge a person for a minor summary offence, especially one which does not carry a custodial penalty.

If an infringement notice is not appropriate for whatever reason, and court proceedings are necessary, a Field Court Attendance Notice would be appropriate. In our view, arrest and charge are only appropriate where the defendant's conduct is extremely disruptive or violent (in which case they would probably be charged with a more serious offence in any event) or where the police are able to establish the defendant's identity.

The courts have commented on the inappropriateness of arresting people for minor summary offences. Recently, in the case of *DPP v Lance Carr* ([2002] NSWSC 194, 25 January 2002) the Supreme Court held that it was inappropriate to arrest the defendant for offensive language, in circumstances where police knew his identity and address, and could have issued a summons or court attendance notice instead. Smart AJ said (at para 35):

"This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power

of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

> The bail conditions imposed by the Cabramatta police are far more onerous than is warranted by the nature of the charge, and we suggest that they are being used inappropriately as a means of punishment and social control. If a defendant is found in Cabramatta while still on bail, they will invariably be arrested for breach of bail and will have to spend a night in the police cells before being taken to court the following morning. Most will then plead guilty to the offence, and be released with a fine. [With their bail conditions no longer in force, they are then free to return to Cabramatta - until the police give them another direction!]
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> We also know of at least one case in which police failed to update their system after a defendant's matter was finalised in the manner just described. According to the COPS system he was still on bail with his court date pending. He was arrested for breach of bail, and had to spend a night in custody before the court alerted the police to their error and released him.
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> We are gravely concerned that people are spending time in custody (both during the initial arrest and charge process, and after any actual or alleged breach of bail) for an offence which does not carry a custodial penalty.
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> We are also concerned that defendants often plead guilty to this offence, in circumstances where the prosecution would have great difficulty proving its case if the matter were defended. [The Shopfront has assisted clients to defend several of these cases - in each case, the charge has either been withdrawn by the prosecution or dismissed by the court.] There are powerful pressures to plead guilty - the desire to get rid of onerous bail conditions being the one most commonly cited by clients. Many of these people are very disemepowered, with a poor grasp of how the legal system works. Many do not realise that they can apply to vary their bail conditions; nor do they realise that they have a good chance of successfully defending the charge. It appears that some Legal Aid solicitors may not be assisting clients to defend these charges because "it only carries a fine". We acknowledge that the Leal Aid Commission has severe funding constraints and must prioritise more serious cases; however, it concerns us that many defendants do not appear to be getting access to appropriate legal assistance on such an important civil liberties issue.

6 Conclusion

In our view, the practices adopted by Cabramatta police are an innovative but grossly inappropriate application section 28F, going far beyond the original legislative intention. We find it alarming that, in a democratic and free society, people can be effectively banned from large areas of public space for extended periods of time, simply on the grounds that they use prohibited drugs.

Police elsewhere also appear to be misusing the section (for example, by moving young people on merely because they are "hanging out" in public places, or by issuing

directions merely on the grounds that a person is a street sex worker). However, we are not aware of such a systematic abuse of section 28F as the one adopted in Cabramatta.

We believe there is a need for legislative amendment, or at least the issue of guidelines, to make it clear that directions imposing long-term bans are not reasonable. There is also an urgent need for a change to the police practice of using arrest, charge and conditional bail to deal with alleged offences under section 28F.

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