Young People and Public Space

Workshop at NCOSS "Scales of Justice" conference, 24 July 2002

Presented by Youth Justice Coalition (YJC) and Youth Action and Policy Association (YAPA) - Kristy Delaney, Mia Prodigalidad and Jane Sanders

1 Introduction

Public space is important to young people for a variety of reasons. Young people need a free and democratic space where they can relax or socialise without close parental supervision. Many entertainment venues are off limits to under 18s, or are priced beyond reach. Reliance on public transport also means using public space.

Although young people are members of the public, many people in our community have trouble with young people's use of public space. What is normal social interaction for young people is often branded anti-social behaviour. Media stories about "youth gangs" and "graffiti hooligans" fuel perceptions of young people as a threat. This is especially so for young people who are male, of non-English speaking background or who hang around in groups.

The stereotype of unruly teens terrorising senior citizens - and the fear this engenders - is misplaced. Crime statistics show that young people are much more likely to be victims than offenders. Young people are also much more likely to be victims of crime than older people, especially where personal assaults are concerned.

Governments tend to address this misplaced fear of young people by introducing tougher legislation and policing policies. They aim to "make the community safer" by targeting young people for a range of police interventions and sweeping them off the streets. In New South Wales, the Carr government has enacted numerous laws of this type. Some of these laws apply to people of all ages, but are clearly targeted at young people and the public places where they spend time.

Another disturbing trend is the increasing privatisation of public space and policing. What was once the town square or shopping strip is gradually being replaced by the shopping centre. Most people would think of shopping centres as public spaces, but they are privately-owned. The owners (or the security guards they employ) are the arbiters of who is and isn't welcome there.

2 Young people and the police: a difficult relationship

Historically, young people and police have had a bad relationship.

In a 1997 report, 78% of 843 people surveyed said that police never or only sometimes treated young people with respect. *(Seen and Heard: Young People and the Legal*

Process, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, 1997)

Young people are also less likely than adults to complain if they feel they have been mistreated by the police.

The NSW Police has made some attempts to improve its relationship with young people. Examples include the development of a police youth policy, the enhancement of the role of the Youth Liaison Officer, and efforts to encourage young victims to report crimes.

Unfortunately, much of this is undermined by police practices and political trends which pull strongly in the opposite direction. Young people are frequently targeted for police intervention - for lacking "respect", for being "rowdy", for being part of the "rave" culture, or simply for being young and out in public.

Police operations or "blitzes" have been a popular policing tool for some time, and have attracted media attention in recent months. These operations usually take place in public areas where there are large numbers of young people. Entertainment areas such as cinema strips and beaches, as well as suburban shopping areas, are popular targets. Young people have reported being searched, harassed and told to move on for no apparent reason. Even if no specific operation is taking place, police intervention is a fact of daily life for young people in many areas.

The fact that we are approaching a state election, with its customary "law and order auction", makes matters worse for young people. Under 18s don't vote, of course, and there are political points to be gained from promising to "make our streets safer" by putting more police on the beat and cracking down on "anti-social" behaviour.

We have a Premier and a Police Minister who have expressed their willingness to give police whatever powers they say they need. Not only does this attitude encourage police to seek more powers, but it seems to embolden many police officers to stretch or misuse the powers they already have. Even if the law is not on their side, politics certainly is!

3 The *Crimes Amendment (Police and Public Safety Act)* 1998

The *Crimes Amendment (Police and Public Safety Act)* 1998 commenced on 1 July 1998 after an apparent escalation in knife-related violence. The Act amended the *Summary Offences Act* 1998, creating various knife-related offences and search powers. It also gave police new "move-on" powers.

3.1 Move-on powers

Section 28F of the *Summary Offences Act* 1988 gives police the power to issue directions to people in public places. It was promoted as an "anti-gang" measure, designed to allow police to "disperse people acting in a disruptive manner before the situation gets out of hand". On 1 July 2001, the *Police Powers (Drug Premises) Act* 2001 amended the section to allow police to give directions to people who are thought to be in public places to buy or sell drugs.

The legislation is extremely broad and has a significant impact on the civil liberties of young people (and other marginalised groups such as drug users and indigenous people) in public places. It is used by police quite broadly and often arbitrarily. In some areas police use the power systematically to get rid of particular types of people (eg drug users in Cabramatta, young Koori people in country towns).

A person can be issued a direction if they are in a public place and the police believe the person's presence or behaviour:

- is obstructing another person or traffic;
- constitutes harassment or intimidation:
- is likely to cause fear to a "person of reasonable firmness" (including a hypothetical person!); or
- is for the purpose of supplying or obtaining a prohibited drug.

The direction issued must be reasonable in the circumstances to reduce or eliminate the obstruction, harassment, intimidation or fear, or to stop a drug sale or purchase. For example, if a group were engaged in a fight on the street, it would be reasonable to issue a direction to break up and move down the road. We believe it is unreasonable to tell a person to leave an entire area (eg a 2km radius of a certain railway station) for a long period (eg 7 days).

Before giving a direction a police officer must provide evidence that he or she is a police officer (unless in uniform), provide his or her name or place of duty, tell the person the reason for the direction, and warn that failure to comply is an offence.

A person who disobeys a reasonable direction, after two warnings, may be guilty of an offence, carrying a maximum penalty of 2 penalty units ($220). Police will usually issue an infringement notice, but sometimes they may instead arrest and charge the person.

3.2 Case study: David

David was walking home late one Saturday night with a friend. His friend was rolling a beer keg down the road and a police officer driving past stopped to question his friend. David being drunk, said "leave him alone" The officer asked him to "move on". David again said "leave him alone, he has done nothing wrong". Again, the police officer asked him to "move on". David walked up the road, turned around and said "youse don't know what you are doing, this is corrupt and you're going to be in trouble". The officer again directed him to move on. David kept walking but turned around and said " I don't have to go fucking anywhere".

David was charged with offensive language and failure to obey police direction. With help from a lawyer, he successfully defended both charges. The court found that the police direction was issued unreasonably, as David had moved away and was not obstructing, harassing, intimidating or causing fear to anyone. He was just asking questions. Furthermore, the police officer did not provide David with any reasons for the direction. David was also found not guilty of offensive language, on the grounds that the word "fucking" was not offensive in the context in which it was used.

3.3 Knife search powers

The Act gave police increased powers to search people in public places or schools, if the police believe "on reasonable grounds" that the person has a dangerous implement in his or her custody. Police are allowed to do a frisk/pat-down search, run a metal detector over the person or their belongings, or check the person's bag or school locker. They may require the person to remove outer garments (eg coat, hat) but may not do a strip search.

In deciding whether they have "reasonable grounds" to search someone, police may take into account whether the person is in an area with a high incidence of violent crime (colloquially known as a "crime hot spot").

3.4 Other concerning aspects of this legislation

Police can demand a person's name and address if the person is near the scene of an indictable offence and if the police "reasonably believe" the person may be a witness. This is one of the many laws that is whittling away the individual's general right to silence.

3.5 The Ombudsman's *Policing Public Safety* report, 1999

The Ombudsman was required to review the *Crimes Amendment (Police and Public Safety Act)*, and published its report in late 1999. The report highlighted some problems with the way section the Act was being used by the police. The main findings were:

- 48% of all directions were issued to people under 18, with the peak age being 16.
- 22% of all directions were issued to Aboriginal and Torres Strait Islander people.
- Use of the directions power was much higher in western and north-western New South Wales than in other parts of the state.
- According to narratives from the NSW Police "COPS" computer system, directions were given for a variety of reasons, including that people were begging, intoxicated, in a high crime area, or merely had no reason to be there. In the Ombudsman's opinion, about 50% of the directions were issued without a valid reason.
- Young people in groups, or street sex workers, were often thought to be intimidating or likely to cause fear by their mere presence. The report acknowledges that there are real problems with the "presence" element of the legislation.
- 42% of knife searches were carried out on people aged under 18. The age group most frequently searched was 16 and 17 year olds.
- The percentage of successful searches (ie searches where a knife or dangerous implement was found) of young people was very low, while the percentage of successful searches among people aged 25 and over is a lot higher. This would

suggest that police are searching many young people without reasonable grounds to do so.

- 6.6% of people searched were Aboriginal or Torres Strait Islanders.
- The rate of searches in western and north-western New South Wales (where there is a high indigenous population) was a lot higher than in other areas.
- On some occasions police have conducted strip searches, purportedly using their powers under the Act. Strip searches are not authorised under the Act. It also seems that police often search people without specifying what they are looking for or which search power they are using.

4 The *Children (Protection and Parental Responsibility) Act 1997*

This Act's predecessor, the *Children (Parental Responsibility) Act 1994* was enacted ostensibly to confront a rising juvenile crime problem caused by lack of parental supervision. However, it focuses on under 16 year olds who are not over-represented in crime statistics. The NSW Bureau of Crime Statistics and Research show that the group of people most likely to offend are aged between 20 and 29 years.

The Act was amended and re-named in 1997.

4.1 What the Act does

There are two main aspects to the Act. One part gives the Children's Court the power to compel parents to attend court with their children, to make them sign undertakings as to their children's behaviour, and (and, in extreme cases) to punish parents whose wilful neglect has causes their children's offending. These powers are very rarely used.

The other main part of the Act allows police to 'safely escort' a young person from a public place, if police reasonably believe the young person is under 16, not supervised by a responsible adult, and is "at risk" (by either being in danger of being abused or injured, or about to break the law).

Police can then take the young person home or to the home of a parent, carer, relative or an "approved person" or to DOCS. This can happen at any time of the day or night.

This part of the Act only applies in areas that have been declared "operational" by the Attorney-General. Currently, it only applies in Orange, Ballina, Coonamble and Moree - arguably areas with a large Aboriginal population (eg in Moree between 30-40% of people under 14 are of Aboriginal descent).

4.2 Attorney-General's Department committee evaluation

The 1994 Act was evaluated by a committee set up by the Attorney-General's Department. The committee's report expressed serious concerns, including:

- The call for the Act is motivated by racial tensions and the desire to remove Aboriginal people from the streets rather than a genuine concern to address juvenile crime or the welfare of Aboriginal young people in the local community.

- The Act has the potential to inappropriately draw young people who have not committed offences into the criminal justice system.
- The Act infringes basic human rights (young people no longer have the right to know why they are being detained or the right to be in public spaces without adults).
- The Act is unlikely to have any effect in protecting children from situations where there is a likelihood that they may commit a crime or "be exposed to some risk."

The consultant's report commissioned by the evaluation committee warned about the possible effect on Aboriginal people, who are already over-represented in the Juvenile Justice system:

> "in towns or urban areas where Aboriginal people are at odds with police, the local council and other community organisations, the effect in terms of discrimination, abuse of human rights and community cohesion is likely to be devastating."

In 1997 the United Nations Committee on the Rights of the Child said in relation to this Act:

> " The Committee is concerned by local legislation that allows the local police to remove children and young people congregating which is an infringement on children's civil rights, including the right to assemble."

Despite this evaluation, the 1997 legislation was introduced which in substance mirrored the 1994 legislation. However, Councils had to apply to become an "operational area". The application would not be granted unless the Council could show it had some appropriate juvenile crime prevention initiatives.

5 Non-association and place restriction orders

The *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* was introduced in late 2001. It is fully operational as of 22 July 2002.

The Act is ostensibly aimed at breaking up gangs by stopping members from associating with each other and hanging out in certain places. It is strongly influenced by US research showing that gangs share certain characteristics, including identification with a particular territory.

The reality is somewhat different. Firstly, patterns of crime and gang activity in Australia and the USA are very different. Secondly, rather than have any significant impact on organised gangs, the Act is likely to affect young people who hang around in public spaces or who associate with friends who are seen by police to be "undesirable".

5.1 What the Act does

The Act allows a court to impose an order prohibiting contact with certain people, or entry to certain areas. An order may be made if the court is sentencing a person for an offence carrying a maximum penalty of 6 months or more (in practice, this includes just about any offence!).

An order may be made in addition to any other sentence that is imposed (eg fine, bond, community service) but can't be made if the court dismisses the matter under section 10 of the *Crimes (Sentencing Procedure) Act* (adult courts) or section 33(1)(a) of the *Children (Criminal Proceedings) Act* (Children's Court).

The order may be made for up to 12 months.

The court has to be satisfied that the order is reasonably necessary to ensure the person does not commit further offences. However, there is no requirement that the person(s) or place(s) specified in the order have anything to do with the criminal activity the defendant is being sentenced for.

The court may make one or both of the following orders:

- a non-association order, prohibiting the person from associating with certain people - either by prohibiting them from being in company (hanging out together) or by prohibiting all forms of contact (phone, email, etc). The order cannot stop a person from associating with close family members (eg children, siblings, spouses, parents, grandparents, guardians or carers); however, the extended family relationships of indigenous and other cultural groups in not recognised.
- a place restriction order, prohibiting the person from going to certain areas. The order cannot stop a person from going to their own home, any close family member's home, or to their regular workplace, educational institution or place of worship.

It will be an offence to breach a non-association or place restriction order, unless the person has a reasonable excuse (eg they accidentally ran into someone they were not supposed to associate with, or there was an emergency that required them to go to a certain area). The maximum penalty for a breach is 6 months' imprisonment and/or a fine of 10 penalty units ($1,100).

The Act also allows non-association or place restriction conditions to be imposed as part of a person's bail, parole or leave from a detention centre. This part of the Act commenced in May 2002. However, this is really nothing new - courts have always had power to set bail and parole conditions as they see fit.

5.2 Problems with the Act

- While it is true that young people may commit offences if they "hang out with the wrong crowd", this problem would be better addressed by giving young people some positive alternatives.
- Young people (particularly if they are homeless or live in a "high-crime" or "undesirable" area) may find it very difficult to abide by these orders. They will then be charged with breaching an order - yet another public order offence. They could end up with a penalty such as a bond with stricter conditions, a fine, or a custodial sentence (which would guarantee exposure to negative peer influences!).

- The Act contradicts efforts to reduce the over-representation of disadvantaged and vulnerable people, particularly young people and indigenous people, in the criminal justice system.
- The Act contravenes international human rights to freedom of association and peaceful assembly.

6 Sniffer dogs

The *Police Powers (Drug Detection Dogs) Act 2001* came into force on 22 February 2002.

This Act gives police the powers to conduct random drug searches in public places with the help of sniffer dogs. The dogs may be used in designated public places including pubs, nightclubs, dance parties, railway stations, and streets in popular "entertainment" areas - all places frequented by high numbers of young people.

The Police Minister, Michael Costa, claimed that the powers were aimed at "smashing the back of drug lords". However, sniffer dog searches do not address serious drug crime. They waste police resources on catching recreational drug users, or drug-dependent people, who are carrying small quantities of drugs. This is contrary to recommendations made at the NSW Drug Summit in 1999, which endorsed the policy of harm minimisation and promoted the diversion of drug users away from the criminal justice system.

7 Public order offences and the trifecta

Young people (especially if they are Aboriginal) are vulnerable to police intervention for public order or "street" offences. Inappropriate arrests for trivial offences like offensive language often result in a young person being charged with the "trifecta": offensive language, resist arrest and assault police.

Despite numerous calls for the law against offensive language to be repealed, it remains an offence. Fortunately, courts have been critical of the way police deal with people who swear at them.

7.1 Case study: Shannon Dunn

The case of *Police v Shannon Thomas Dunn* was decided by a magistrate, David Heilpern, at Dubbo Local Court on 27 August 1999.

Dunn was an 18 year old Aboriginal male who was riding a pushbike into a petrol station in Dubbo. He was stopped by police and asked "who owns the bike?". He said "Wayne. I don't know his last name...Wayne gave me a lend of the bike. It's not stolen". The police said "unless you can tell us who he is we will have to take the bike and make enquires as to the owner". Dunn said something like "fuck off you are not taking the bike". The police arrested him for offensive language.

The Magistrate was of the view that community standards had changed and the word "fuck" in the context used was not offensive within the meaning of the legislation. He said:

> "The word "fuck" is extremely commonplace now and has lost much of its punch. One cannot walk down the streets of any of the towns in which I sit, day or night, without hearing the word or its derivatives used as a noun, verb, adjective, and indeed, a term of affection. It is used in every school playground every day. In court I am regularly confronted by witnesses that seem physically unable to speak without using the word in every sentence - it has become as common in their language as any other word and they use it without intent to offend, or without any knowledge that other would find it other than completely normal. I know that this may be difficult to comprehend from the leafy suburbs of Sydney."

The magistrate also took into account public policy grounds in his determination. He said that he conducted some short research on the point and the following is apparent:

- A majority of offenders are still arrested for this offence, despite the maximum penalty only being a fine. In other words the police are, as in this case, most likely to impose a deprivation of liberty on an offender even though the Courts are not empowered to do so.
- Aboriginal people account for fifteen times as many offensive language offences as would be expected by their population in the community.
- In 1997 there were 3,609 charges under this section, while in 1998 the number rose to 4,115, an increase of 14%. That is about 200 cases every court day in Local Courts around NSW.

7.2 Case study: Lance Carr

The case of *DPP v Lance Carr* was decided by Justice Smart in the NSW Supreme Court on 25 January 2002. Lance Carr, an Aboriginal man, was charged with offensive language, resist arrest and assault police - " the trifecta".

Police saw rocks being thrown onto the roadway; one hit a passing police vehicle. Carr was asked "who threw the rocks?". He wouldn't tell the police and used the word "fucking" a number of times. He then attempted to walk away. The police attempted to arrest him for offensive language.

Carr ran, and the police crash tackled him and bundled him into the paddy wagon. They took him to the police station where he was charged with offensive language, resist arrest and assault police.

Carr's lawyer argued that offensive language is a minor charge and an arrest was unnecessary. The magistrate agreed that an arrest should be a measure of last resort and was inappropriate where a Field Court Attendance Notice or a summons would suffice.

The police appealed and the Supreme Court agreed that it was open to the magistrate to find that the police had acted improperly in the circumstances:

> "This Court ... 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 police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

8 Shopping centres

8.1 Background

Shopping centres are privately owned places that can include shops, cinemas and fast food outlets. Legally they are privately owned places because they are owned and controlled by private individuals. There are some 260 Shopping Centres in NSW with about 20 owners. These include and are not limited to AMP, Bivan, Centro, Gandel, Jones Lang, QIC and Westfields.

Many young people use shopping centres as places to express themselves and socialise without the close supervision of parents or adults. Shopping centres are also free and can be accessed with little cost. In general, young people feel safe at shopping centres because they are well lit and provide protection from violence.

8.2 Security Guards

In privately owned spaces such as shopping centres, security guards are employed to enforce the rules of the owner. For example security guards can ask to search a person's bag if it is a condition of entry. However security guards and shop staff can only search a young person or their bags with their consent. If a young person refuses a bag search, the security guards has three options that include:

(a) telling the young person to leave the store

If the young person refuses to leave the private space, police can charge them with remaining on inclosed lands, which is sometimes called trespass under the *Inclosed Lands Protection Act* 1901. This is a criminal offence and the only defence is if the young person has a reasonable excuse for being on the inclosed land.

(b) banning notice

Shopping Centre management can also give young people a banning notice, which prohibits entry to a specific area. A banning notice should explain the reason for the ban. There are no limits to length of the ban. Banning notices generally range from 1 year to life. In one place, a double life ban was given.

The period of the life ban is totally arbitrary and young people are rarely given the opportunity to express their side of the story. This can be unjust when security guards are the instigators of conflict.

Banning notices can have extremely harsh consequences especially in rural areas where shopping centres provide the main sources of employment and may be quite far from each other. Furthermore, if a young person ignores the banning notice, they can be charged with trespass under the *Inclosed Lands Protection Act* 1901.

(c) making a citizen's arrest

Security guards generally only have citizen's arrest power. Therefore in most cases security guards only have the powers of "ordinary" people. A citizen's arrest power can only be used when a crime has been committed or attempted, or there is immediate danger of a breach of the peace. Breach of the peace can include an incitement to violence or assault. It does not include mere annoyance, abusive language or general disturbances. Unlike the police, security guards cannot act on mere suspicion. If a security guard detains a young person due to a suspicion of wrongdoing, they are probably committing an assault or false imprisonment. If security guards use their citizens arrest powers, they must contact the police immediately.

8.3 Case Study: Jackie

Jackie, 16, was shopping with her friend Lisa. They were approached by two security guards who told them that a shopkeeper suspected Lisa had stolen something, and asked to search their bags. Jackie had a mobile phone and the telephone number for a youth legal service. She rang and asked a solicitor whether she had to let the security guards search her bag.

While Jackie was speaking to her solicitor, the security guards grabbed her, told her she had to go to the security office with them ,and told her to turn off her phone. When she refused, a security guard took her phone and turned it off. They then frogmarched Jackie and Lisa back to the security office and called the police. When the police arrived, they searched both Jackie and Lisa but did not find any stolen property. They were both released.

Jackie's solicitor spoke to one of the security guards, who eventually admitted that Jackie and Lisa had not accompanied them to the office voluntarily, and that they had been detained on the basis of a mere suspicion. Jackie's lawyers wrote to the security guards' employer seeking compensation for assault and false imprisonment. They settled the matter by paying Jackie some compensation.

8.4 Shopping Centre Protocol

The Youth Justice Coalition was successful in making an application to the Crime Prevention Division of the Attorney-General's Department to develop a shopping centre protocol. Participants in the Public Space Committee include representatives from YAPA, Shopping Council Australia, Police, Solicitors and Youth Workers. Having so many participants being representatives of various parts of the community in the development of the protocol is one of the main strengths of the project.

The shopping centre protocol hopes to address issues such as:

- improve young people's access to public space as major users of shopping centres
- establish a grievance procedure for both parties to be heard
- reduction in crime such as graffiti and trespass
- development of guidelines to respond to different incidents
- establish minimal interventionist security

The shopping centre protocol is not a mandatory form of legislation. It will serve mainly as a benchmark for shopping centres to gauge and improve their services. The public space committee are currently in the process of advertising for a consultant to oversee the project and develop the protocol.