Ombudsman
New South Wales

Preventative detention and covert search warrants: Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*

Review period 2014-16

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NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: 02 9283 2911
Website: www.ombo.nsw.gov.au
Email nswombo@ombo.nsw.gov.au

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Foreword

Amendments made in 2005 to the *Terrorism (Police Powers) Act 2002* gave special powers to police and the NSW Crime Commission to deal with suspected terrorist acts. Under Part 2A of the Act, police may apply to the Supreme Court for a preventative detention order to detain a person without charge for up to two weeks, in order to prevent a suspected imminent terrorist act or to preserve evidence of a terrorist act which has occurred. Under Part 3, police may apply for a covert search warrant to search premises without notifying the current owner.

The NSW Ombudsman is required to report to the Attorney General and Minister for Police every three years in relation to the exercise of the powers under Parts 2A and 3 of the Act. This is the Ombudsman's fourth report, and covers the exercise of the powers in the 2014, 2015 and 2016 calendar years.

The Part 3 covert search powers were not used since the previous Ombudsman report in September 2014.

Previous Ombudsman reports have documented an ongoing debate about whether the national framework for preventative detention should be allowed to expire in the face of the strong concerns of police that the powers were operationally ineffective. Since we last raised that concern in our 2014 report, the preventative detention powers were used by police once in September 2014. This was the first and only use since those powers commenced in 2005. The Act was also amended in 2016 to include new powers in Part 2AA for pre-investigation detention for the purpose of investigating a person suspected of being involved in a terrorist act. These new powers were designed to overcome the concerns held by police (as discussed in our 2014 report) about the operational effectiveness of the Part 2A preventative detention powers.

The Part 2AA powers conferred in 2016 effectively make the Part 2A powers redundant. This report recommends accordingly that the Part 2A powers be allowed to expire in December 2018.

This will be the final Ombudsman report under the Terrorism (Police Powers) Act. In early 2017 the Ombudsman's oversight functions in relation to police are being transferred to the Law Enforcement Conduct Commission (LECC). Recommendations are made in this report to ensure that arrangements under the Act for civilian oversight by LECC will remain effective. This is in line with Parliament's recognition of the need for a robust system of independent oversight of the extraordinary powers given to police under the Act.

In this reporting period we identified serious limitations on our ability under the Act to undertake proper oversight of police exercise of the Part 2A powers. This report recommends that amendments be made to the Act, and to certain Commonwealth legislation, to ensure that the LECC will not be fettered in obtaining information it may require to keep the exercise of Part 2A powers under scrutiny. This report also recommends that the Act be amended so that the new powers for pre-investigation detention in Part 2AA are made the subject of oversight by LECC. Implementation of these recommendations can ensure that the arrangements for independent oversight keep pace with the conferral of extraordinary counter-terrorism powers upon police.

Professor John McMillan AO
Acting Ombudsman

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Acronyms and Glossary

AFP	Australian Federal Police
ANZCTC	Australia-New Zealand Counter-Terrorism Committee
ASIO	Australian Security Intelligence Organisation
COAG	Council of Australian Governments
Corrective Services or CSNSW	Corrective Services NSW
JCCT	Joint Counter Terrorism Team
Juvenile Justice or JJ	Juvenile Justice NSW
LECC	Law Enforcement Conduct Commission
LECC Act 2016	*Law Enforcement Conduct Commission Act 2016*
NSWPF	NSW Police Force
NTTAS	National Terrorism Threat Advisory System
NTAC	National Threat Assessment Centre
PDO	preventative detention order
SOPs	standard operating procedures
the Act	*Terrorism (Police Powers) Act 2002*

Terms used in this report

preventative detention order	an order made by the Supreme Court under section 26I of the *Terrorism (Police Powers) Act 2002*, authorising detention of a person for a specified period
reporting period	1 January 2014 to 31 December 2016
section 310J offence	offence under section 310J of the *Crimes Act 1900* regarding membership of a terrorist organisation
Security Legislation Monitor	Independent National Security Legislation Monitor
terrorist act	An act as defined in section 3 of the *Terrorism (Police Powers) Act 2002*, including, for example, an act that causes serious harm to a person, serious damage to property or a person's death and which is done with the intention of advancing a political, religious or ideological cause, and coercing, or influencing by intimidation, the government of the Commonwealth or a state, or intimidating the public or a section of the public
young person	A person aged 16 or 17
2014 statutory review	*Review of the Terrorism (Police Powers) Act 2002*, conducted on behalf of the Attorney General by the Department of Attorney General and Justice, and tabled in Parliament by the Attorney General in November 2014

Chapter 1. Introduction

This report is required under the *Terrorism (Police Powers) Act 2002* (the Act) and relates to preventative detention and covert search powers. Since 2005, the Ombudsman has been required to keep under scrutiny how the NSW Police Force (NSWPF) and the NSW Crime Commission use these powers and to provide a report to the Minister every three years. Our previous reports regarding this review were tabled in 2008,[1] 2011,[2] and 2014.[3]

This report covers the period 1 January 2014 to 31 December 2016 (the reporting period).

This chapter sets out our role and the purpose of this report and describes the powers that we are required to scrutinise. It also provides information about the implementation of recommendations made in our 2014 report and changes made to the Act during the reporting period.

The covert search powers under review were not used in the reporting period. The preventative detention powers were used by police on one occasion in September 2015, which is discussed in Chapter 4.

1.1. Role of the Ombudsman and the purpose of this report

The Ombudsman is required to keep under scrutiny the exercise of preventative detention powers conferred on police officers and correctional officers under Part 2A of the Act.[4] The Ombudsman is also required to keep under scrutiny the exercise of covert search powers conferred on members of the NSWPF, the NSW Crime Commissioner and staff members of the NSW Crime Commission under Part 3 of the Act.[5] Other special powers that may be exercised by police under Part 2 of the Act are not the subject of the Ombudsman's review.

The Ombudsman must report on the exercise of the powers under Parts 2A and 3 every three years and furnish a copy of the report to the Attorney General and the Minister for Police. The Attorney General is then required to table the report in Parliament as soon as practicable after it is received.[6] This is our fourth report in relation to the powers under Parts 2A and 3 of the Act.

1.2. Powers we are required to scrutinise

1.2.1. Preventative detention orders (Part 2A)

Part 2A of the Act came into force in December 2005. New South Wales, like all other States and Territories, introduced laws to provide for the detention of a person for up to 14 days for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act.[7]

The Act adopts substantially the same definition of a 'terrorist act' as the Criminal Code (Cth).[8] Under section 3 of the Act, a terrorist act includes an action which causes serious physical harm to a person or serious damage to property; causes a person's death; endangers a person's life, other than the life of the person taking the action; or creates a serious public health risk. It also includes an action which seriously interferes with information, telecommunications, transport, essential service delivery, financial or other public utility systems.

1. NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008.
2. NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011.
3. NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2014.
4. *Terrorism (Police Powers) Act 2002*, s. 26ZO.
5. *Terrorism (Police Powers) Act 2002*, s. 27ZC.
6. *Terrorism (Police Powers) Act 2002*, ss. 26ZO and 27ZC.
7. *Terrorism (Police Powers) Act 2002*, s. 27C.
8. See *Terrorism (Police Powers) Act 2002*, s. 3 and Criminal Code (Cth), s. 101.1.

To qualify as a 'terrorist act', an act must be done with the intention of advancing a political, religious or ideological cause and must be done with the intention to coerce or influence by intimidation a government, or to intimidate the public or a section of the public.[9] The definition of terrorist act specifically excludes advocacy, protest, dissent or industrial action which is not intended to cause serious harm or death, endanger life, or create serious public health or safety risks.[10]

Part 2A of the Act permits police to apply to the Supreme Court for an order for the detention of a person aged 16 or above to prevent an imminent terrorist act or to preserve evidence of a terrorist act that has occurred. A police officer must obtain approval to make an application for a preventative detention order (PDO) from the Commissioner of Police, a Deputy Commissioner, or an Assistant Commissioner responsible for counter-terrorism operations.[11]

The Supreme Court may make an interim PDO for up to 48 hours. This can occur in the absence of the person subject to the order.[12] The court must fix a date to hear the substantive application at the time the interim order is made.[13] After hearing the substantive application, the Supreme Court will either grant the application and make a PDO or refuse the application.[14] The detained person is entitled to give evidence and have legal representation at this hearing.[15] A person subject to a PDO can be detained under a confirmed order for up to 14 days (which includes the 48-hour period of the interim order).[16] If the date on which the terrorist act is expected to occur changes, a further order can be made, to take effect on the expiry of the existing order.[17] Police must apply to have a PDO revoked if the grounds on which the order was made cease to exist.[18]

Police can also apply to the Supreme Court for a prohibited contact order, if this is reasonably necessary for achieving the purposes of the PDO.[19] Subject to any prohibited contact order, a person in preventative detention is entitled to contact a family member, a person they live with or their employer, but only to let them know that they are safe and are being detained.[20] The person may also contact a lawyer, the Ombudsman and the Police Integrity Commission.[21] Police may monitor all contact made by the detainee, except contact with the Ombudsman or Police Integrity Commission.

Police can arrange for a person in preventative detention to be detained at a correctional centre.[22] A person in preventative detention must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.[23] Police cannot question a person in preventative detention other than for the purposes of identification, the person's welfare or complying with other legislative requirements.[24] Young people – that is, people aged 16 and 17 years – may be subject to a PDO,[25] but generally must be detained separately from adults.[26] A young person or a person with impaired intellectual functioning who is subject to a PDO has 'special contact rules' that entitle them to visits from certain people, including parents or guardians.[27]

9. *Terrorism (Police Powers) Act 2002*, s. 3.
10. *Terrorism (Police Powers) Act 2002*, s. 3(3).
11. *Terrorism (Police Powers) Act 2002*, s. 26F.
12. *Terrorism (Police Powers) Act 2002*, s. 26H.
13. *Terrorism (Police Powers) Act 2002*, s. 26H(4).
14. *Terrorism (Police Powers) Act 2002*, s. 26I(1).
15. *Terrorism (Police Powers) Act 2002*, s. 26I(3).
16. *Terrorism (Police Powers) Act 2002*, s. 26K.
17. *Terrorism (Police Powers) Act 2002*, s. 26K(7)(a).
18. *Terrorism (Police Powers) Act 2002*, s. 26M(2).
19. *Terrorism (Police Powers) Act 2002*, s. 26N.
20. *Terrorism (Police Powers) Act 2002*, s. 26ZE.
21. *Terrorism (Police Powers) Act 2002*, ss. 26ZG and 26ZF.
22. *Terrorism (Police Powers) Act 2002*, s. 26X(1).
23. *Terrorism (Police Powers) Act 2002*, s. 26ZC.
24. *Terrorism (Police Powers) Act 2002*, s. 26ZK.
25. *Terrorism (Police Powers) Act 2002*, s. 26E.
26. *Terrorism (Police Powers) Act 2002*, s. 26X(6).
27. *Terrorism (Police Powers) Act 2002*, s. 26ZH(4).

Part 2A also provides police with powers to enter premises to execute a PDO, search detained persons and seize items.[28] Police can request disclosure of identity to assist in executing the order, and penalties apply to non-compliance.[29]

Part 2A was originally enacted to expire after 10 years, that is, on 16 December 2015.[30] In October 2016 the sunset clause was amended and Part 2A is now due to expire on 16 December 2018.[31]

1.2.2. Covert search warrants (Part 3)

Part 3 of the Act contains covert search powers. This part came into operation in 2005 and enables certain police officers to make an application to an eligible judge for a covert search warrant if they believe or suspect on reasonable grounds that:

- a terrorist act has been, is being or is likely to be committed
- searching the premises will substantially assist in responding to or preventing the terrorist act, and
- it is necessary that the search be conducted without the occupier's knowledge.[32]

A covert search warrant authorises a nominated officer to enter and search premises (and, where authorised, premises adjoining the subject premises) without the occupier's knowledge, and to search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test any thing described in the warrant.[33] Any force that is reasonably necessary to enter the premises may be used.[34] After the covert search warrant has been executed, the officer who executed the warrant must report back to the judge within 10 days stating what action was taken, who took those actions, and whether or not execution of the warrant assisted in the prevention of, or response to, the specified terrorist act.[35] Within six months of executing the search warrant, the officer who executed the warrant must provide the issuing judge with a notice to occupiers, for the judge's approval.[36] Once approved, the occupier's notice must be given to the occupier of the premises searched. A judge may postpone the giving of an occupier's notice, for a maximum of 18 months, if satisfied that there are reasonable grounds for that postponement.[37]

For the purposes of Part 3, a terrorist act includes an offence under section 310J of the *Crimes Act 1900*, which prohibits intentional membership of a terrorist organisation.[38]

28. *Terrorism (Police Powers) Act 2002*, ss. 26U and 26V.
29. *Terrorism (Police Powers) Act 2002*, s. 26T.
30. *Terrorism (Police Powers) Act 2002*, s. 26ZS.
31. *Terrorism (Police Powers) Amendment Act 2015*
32. *Terrorism (Police Powers) Act 2002*, s. 27C.
33. *Terrorism (Police Powers) Act 2002*, s. 27O.
34. *Terrorism (Police Powers) Act 2002*, s. 27O (1)(c).
35. *Terrorism (Police Powers) Act 2002*, s. 27S.
36. *Terrorism (Police Powers) Act 2002*, s. 27U(3).
37. *Terrorism (Police Powers) Act 2002*, ss. 27U(7) and 27U(9).
38. Terrorist organisation is defined in the Criminal Code (Cth), s. 102.1.

Chapter 2. Developments during the reporting period

2.1. Changing security context of NSW

Previous Ombudsman reports provide a detailed overview of the development of the *Terrorism (Police Powers) Act 2002*, (the Act), between 2005 and our last report in 2014, within a national legislative framework for counter-terrorism. The reports are available on our website and provide important information that is not reproduced in this report about the changing security context in NSW.

In September 2014, following the siege at the Lindt Cafe in Martin Place Sydney, the National Threat Assessment Centre raised the general terrorism threat level for Australia to 'High'.

In November 2015, the Australian Government announced the introduction of a new National Terrorism Threat Advisory System (NTTAS) to inform the public about the likelihood of an act of terrorism occurring in Australia. NTTAS has five levels to indicate the national threat level. The levels are:

- Certain (red)
- Expected (orange)
- Probable (yellow)
- Possible (blue)
- Not expected (green)

The threat level in Australia is now known as Probable. This reflects the intelligence assessment by the National Threat Assessment Centre (NTAC) within the Australian Security intelligence Organisation (ASIO) that individuals or groups have developed both an intent and capability to conduct a terrorist attack in Australia.[39] The NTAC provides the following advice to the public about the current security environment:

> *International terrorist groups have proven adept at using their extremist ideology to motivate individuals or small groups to use violence in their home countries. Individuals in Australia can be influenced directly by overseas-based extremists as well as by broad propaganda which provides inspiration and encouragement for terrorist attacks onshore. External influence has been a feature of several prevented terrorism plots and attacks in Australia and also in terrorist incidents across Europe, the United States and Asia.*
>
> *The terrorist threat in Australia remains escalated: one attack and five disrupted terrorist plots so far in 2016 demonstrate the fluid nature of attack planning and reinforces the threat from lone actors. Australia and Australians are viewed as legitimate targets and those who wish to do us harm believe they have an ideological justification to conduct attacks.*

In his most recent annual report the Independent National Security Monitor described the changing domestic security context as follows:

> *Whilst the threat level was not raised during the Reporting Period, security agencies have reported that the nature of the threat faced by Australia is evolving, with an increased risk of low-level attacks conducted entirely by individuals or by small groups of people on 'soft targets' such as shopping centres and sporting events. These attacks can be carried out with minimal planning and within short timeframes. The perpetrators, who are younger, can now be radicalised online without any face-to-face contact. Perpetrators are also becoming more careful with communications, utilising encryption methods to make detection more difficult. These factors have led law enforcement bodies to increasingly rely upon sensitive intelligence sources to identify persons of interest.*

39. New National Terrorism Threat Advisory System Joint media release, Minister for Justice, Minister Assisting the Prime Minister on Counter Terrorism, The Hon Michael Keenan MP and the Attorney-General Senator the Hon George Brandis QC 26 November 2015.

The Australian Federal Police (AFP) advises that during the Reporting Period, 23 individuals were charged for a range of counter-terrorism and non-counter-terrorism offences as a result of 10 counter-terrorism operations. Charges were subsequently dropped against one individual. Of the 10 operations, one was in Brisbane, three were in Melbourne, and six were in Sydney. The majority of AFP investigations related to imminent onshore attack planning. However, several investigations related to suspected breaches of foreign incursions legislation.

As at 1 September 2015, ASIO were undertaking over 400 active, high-priority investigations. These investigations included 120 Australians overseas either fighting with, or supporting, Islamist extremist groups in Iraq and Syria, and approximately 170 people in Australia supporting Syrian and Iraqi extremist groups. At least 32 Australian foreign fighters have been killed in Iraq and Syria since the conflicts began as a result of their involvement in those conflicts.

The flow of both foreign fighters and finance to overseas conflicts, and the return of foreign fighters to Australia, remain priority concerns of the AFP and the intelligence agencies.[40]

It is beyond the scope of this report to provide a detailed analysis of all the terrorist incidents across the world including those within Australia that may be relevant to a proper understanding of the security context within NSW. However, the reporting period was characterised by a heightened level of police activity in joint counter-terrorism operations in NSW and other Australian jurisdictions.

For example, in 2016 the NSW Joint Counter Terrorism Team comprising the AFP, the NSWPF, ASIO, and the NSW Crime Commission – reported approximately 90 charges being laid against 25 people.[41] More than half of these charges were terror-related and include offences such as 'acts done in preparation for planning terrorist acts',[42] being a member of a terrorist organisation,[43] or 'foreign incursion offences'[44] involving people attempting to travel to, or returning from, conflict zones in Syria and Iraq. Other criminal offences charged included firearms offences, participating in a criminal group, and failing to answer questions as required under the provisions of section 25(2)(b) of the *Crime Commission Act 2012*.

2.2. 2014 statutory review of the Act

Section 36 of the Act requires the Attorney General to conduct a statutory review every three years, as soon as possible after the reports of the Ombudsman under sections 26ZO and 27ZC of the Act have been tabled in each House of Parliament. The statutory review was conducted by the NSW Department of Justice (DoJ), Justice Strategy and Policy and tabled by the Attorney General in the Parliament in October 2015.

Our 2014 report recommended that the Attorney General consider an amendment to Part 3 of the Act to remove powers conferred on the Crime Commissioner and staff of the NSW Crime Commission relating to covert search warrants. The statutory review supported this recommendation.

We also provided information in our 2014 report to assist the Attorney General to determine whether the preventative detention powers under Part 2A should be retained or allowed to expire on 16 December 2015 in accordance with the sunset clause in the Act. The discussion was summarised in the 2014 statutory review report as follows:

The Ombudsman's 2011 Report noted serious concerns expressed by some police in NSW about the operational effectiveness of the PDO powers. As noted earlier, similar concerns are included in the 2013 COAG Review of Counter-Terrorism Legislation and the 2012 Annual Report of the Independent National

40. Independent National Security Monitor, Annual Report 2015-2016, p 2.
41. Australian Federal Police and the NSW Police Force, Joint media releases 1 January to 31 December 2016, www.afp.gov.au/news-media/media-releases, viewed 6 February 2017.
42. Section 101.6 Criminal Code Act (Cth) 1995.
43. Section 102.3 Criminal Code Act (Cth) 1995.
44. For example, doing an act preparatory to engaging in foreign hostile activities, contrary to section 7(1)(a) of the *Crimes (Foreign Incursion and Recruitment) Act 1978*.

Security Legislation Monitor, both of which recommended the repeal of these types of powers. At the time of the Ombudsman's 2014 Review the PDO powers had not been used and the Ombudsman was not in a position to scrutinise and report on whether concerns about their operations utility have been realised. However, as noted above, these powers were first used in NSW in September 2014 in Operation Appleby.

The Ombudsman's 2014 Report noted that these powers were designed to complement Commonwealth powers to combat terrorism. The Ombudsman's 2014 Report noted that [sic] the time of writing, there was heightened debate about the adequacy of Commonwealth counter-terrorism laws, including proposed new measures announced by the Commonwealth Government, which included an extension of the Commonwealth PDO powers that were due to expire in 2015. At the time of the 2014 Report, the NSW Commissioner of Police supported retaining the preventative detention powers, arguing that repealing these powers would result in a gap in law enforcement capability to prevent a suspected terrorist attack. The Ombudsman's 2014 Report considered the Commissioner's arguments, and concluded that the expiry of these powers would appear to leave a gap in law enforcement powers. However, the Ombudsman noted that it remained to be considered whether this gap is of such a magnitude and significance that it justifies the continuation of these extraordinary powers, and weather [sic] this gap could be appropriately addressed through other existing provisions.[45]

The 2014 statutory review report discussed submissions of other stakeholders including submissions of the AFP and the NSWPF that the PDO powers be retained. The report recommended that Part 2A be extended for a further three years.

While the Review notes the concerns raised by stakeholders regarding the retention of the powers, the Review considers that there are adequate safeguards in place to guard against the abuse of such extraordinary powers. Therefore, the Review concludes that the PDO provisions should be retained, and the sunset clause should be extended for a further three years, until December 2018.[46]

The Attorney General tabled the 2014 statutory review report at the same time as introducing the Terrorism (Police Powers) Amendment Bill 2015 into the Parliament. The legislation enacted the recommendations to remove the powers given to the Crime Commission under Part 3A relating to covert search warrants and extended the sunset clause relating to the preventative detention powers for a further 3 years. The powers under Part 2A now expire on 16 December 2018.

2.3. Amendments to the Act to include powers for pre-investigation detention

The 41st meeting of the Coalition of Australian Governments (COAG) was held in Sydney in December 2015. The following statement about countering violent extremism was included in its communiqué:

Since COAG met in July, tragic terrorist events have occurred overseas. Australia has also been affected by terrorism with the shooting of a New South Wales police employee by a fifteen-year old school boy.

All governments have made significant efforts to address violent extremism. However, keeping Australians safe from home-grown terrorism is a complex and evolving field that requires ongoing attention.

COAG agreed to take forward a range of initiatives to counter violent extremism. These will support families, schools, youth and communities impacted by violent extremism and help young people avoid the risk of online engagement with violent extremists.

COAG also agreed to prioritise work to implement nationally consistent legislation on pre-charge detention, consistent with the recommendations of the Australia-New Zealand Counter-Terrorism Committee (ANZCTC).[47]

45. NSW Department of Justice, Justice Strategy and Policy, *Statutory Review of the Terrorism (Police Powers) Act 2002 October 2015*, p 15.
46. Ibid. p. 19.
47. COAG Meeting Communiqué, 11 December 2015, https://www.coag.gov.au/meeting-outcomes/coag-meeting-communiqu%C3%A9-11-december-2015, viewed 6 Feb 2017.

Following a subsequent COAG meeting on 1 April 2015, the Commonwealth Attorney General announced that the Commonwealth would draft legislation to introduce a nationally consistent post-sentence preventative detention scheme for high risk terrorist offenders. In addition he advised:

> *The Commonwealth, States and Territories continue to work collaboratively to ensure that Australia's counter-terrorism framework remains able to respond to new and emerging terrorist threats.*
>
> *Given the changing security environment, the rapid nature in which terrorism plots can emerge, as well as the lengths individuals and groups go to avoid detection, we must ensure that our law enforcement and security agencies have every tool they need. In this context, COAG agreed in-principle, with the ACT reserving its decision, to consider the New South Wales model for a pre-charge detention scheme for terrorism suspects, with jurisdictions' Solicitors-General to engage on the issue and Attorneys-General to finalise the details.*[48]

On 4 May 2016, the NSW Premier introduced a Bill to amend the Act to provide police with powers for pre-charge detention to meet the evolving nature of violent extremism.[49]

> *The terrorist threat is evolving and our response must therefore evolve and respond to that threat. Terrorism plots are developing more quickly than ever before and often it is only a matter of days before they are enacted. Terrorism organisations are waging war through social media. ISIS has used social media to effectively turn 30,000 people into fighters for their cause. We know they are targeting messages to young Australians. Because of this capability, the forensic requirements in terrorism cases are incredibly complex and time consuming. At the same time, the age of those perpetrating acts of terrorism continues to fall. Younger and younger people are getting caught up in this brutal web. We must adapt to the shifting terrorism landscape.*[50]

In explaining the provisions the Premier identified that the new powers for pre-investigation detention had been provided to police to overcome the limitations of the existing preventative detention powers provided under Part 2A of the Act.

> *We must be vigilant in ensuring that our police can respond effectively to the changing terrorism threat. Since using the preventative detention provisions in applications during Operation Appleby, New South Wales police have identified some critical operational gaps in our counterterrorism provisions and we must address these operational gaps. The bill does so, giving increased powers to New South Wales police to keep our communities safe.*
>
> *The bill is modelled on a similar scheme to one that has operated in the United Kingdom for many years. The United Kingdom scheme has been an important tool for that country in its fight against terrorism. We have support for this bill from the Council of Australian Governments [COAG] with the Australian Capital Territory reserving its position. This bill was agreed in principle in April and COAG supported the New South Wales model for investigative detention of terrorist suspects being used as a basis for a nationally consistent model. In addition, New South Wales would introduce its legislation and, through this process, consult with other jurisdictions.*[51]

The new pre-investigation detention powers are included in Part 2AA, which provides police with a power to arrest, without warrant, a person as young as 14 years old, if the police officer has reasonable grounds to suspect that:

- the person has committed a terrorist act or will commit a terrorist act
- the person is or has been involved in preparing or planning for a terrorist act, or
- the person possesses a thing connected with the commission, preparation or planning for a terrorist act.

48. Senator the Hon George Brandis QC, Commonwealth Attorney General: COAG to strengthen national security legislation, media release 1 April 2016.
49. *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016.*
50. Mike Baird, Premier NSW, NSWPD (Hansard),Legislative Assembly 4 May 2016.
51. Mike Baird, Premier NSW, NSWPD (Hansard),Legislative Assembly 4 May 2016.

In addition, in order for police to exercise the powers the terrorist act must have occurred within the 28 days preceding the arrest or the police officer must have reasonable grounds to suspect that the terrorist act could occur at some time in the next 14 days and the officer must be satisfied that the detention will substantially assist in responding to, or preventing, the relevant terrorist act. The Part allows police to detain a person for up to 4 days, which can be extended to a period of no more than 14 days upon an application to an eligible judge for a detention warrant.

The provisions under Part 2A were not amended or repealed.

2.3.1. Amendments to the arrangements for civilian oversight of Parts 2A and 3 of the Act

On 9 November 2016, the *Law Enforcement Conduct Commission Act 2016* was passed and, when commenced, will create a new civilian agency, the Law Enforcement Conduct Commission, or LECC, to oversight the NSWPF and NSW Crime Commission. The new agency will take over functions currently undertaken by the Police Integrity Commission and the NSW Ombudsman's Police Division, including the Ombudsman's oversight functions relating to Parts 2A and 3 of this Act. As a consequence, this will be the Ombudsman's final report in relation to this legislation.

Chapter 3. Covert search warrant powers

Certain police may apply to an eligible judge for a covert search warrant under Part 3 of the *Terrorism (Police Powers) Act 2002* (the Act). This type of search warrant allows a nominated officer to enter and search premises without the occupier's knowledge, and to search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test anything described in the warrant.[52]

In our last report we recommended that the Attorney General in the next statutory review of the Act consider removing the powers given to the NSW Crime Commissioner and staff of the NSW Crime Commission under Part 3. As outlined in section 2.2, the Act has since been amended such that the powers are no longer conferred on the NSW Crime Commission.

No covert search warrants were sought or executed using these powers during the reporting period. In the absence of any further use of the powers we have no further comments or recommendations to make about the exercise of these powers.

The powers under Part 3 of the Act are ongoing and have no sunset clause and will be the subject of oversight by the LECC following commencement of the *Law Enforcement Conduct Commission Act 2016*.

52. *Terrorism (Police Powers) Act 2002*, s. 27O.

Chapter 4. Preventative detention

4.1. Our previous recommendations about procedures for preventative detention

Our 2014 report made two recommendations relating to agency procedures to ensure that the NSWPF, Corrective Services and Juvenile Justice were operationally ready for the use of preventative detention powers. In February 2015 we were advised that these recommendations had been implemented by these agencies.

4.2. Use of the preventative detention powers during the reporting period

On 18 and 19 September 2014, for the first time since the preventative detention powers were enacted, police in NSW obtained interim preventative detention orders and took three people into preventative detention. The people were held for two days and then released when the interim orders expired. No charges were laid.

The preventative detention powers were used as part of a counter-terrorism operation called Operation Appleby. This operation was conducted by the NSW Joint Counter Terrorism Team (JCCT), which includes officers from the Australian Federal Police (AFP), the NSWPF and the Australian Security and Intelligence Organisation (ASIO). Participation from a range of State and Federal bodies enables the sharing of relevant information between them. Decisions made by the NSWPF about when and how to exercise the preventative detention powers are made in light of information that has been shared with it by those other agencies.

The NSWPF notified the Ombudsman of the existence of the interim orders, as required under section 26ZO (3) (a) of the *Terrorism (Police powers) Act 2002* and provided us with copies of those orders. Although the Supreme Court issued a non-publication order in relation to the interim orders, this did not prevent the NSWPF from providing the Ombudsman with this information.

Consistent with our functions under the Act to keep under scrutiny the exercise of the preventative detention powers, our officers visited the facility where the detainees were held, spoke to the detainees, and consulted with senior police during, and directly after, the detention period.

During this period we found police to be cooperative and helpful in their advice and the information they provided.

4.2.1. Our observations about the exercise of the preventative detention powers

On the basis of the information provided to our office it appeared that police generally complied with the provisions under Part 2A of the Act and with the *Preventative Detention Orders (NSW) Standard Operating Procedures of 30 July 2014* (the PDO SOPS).

However, our consultations with police identified three issues that, in our view, warrant further consideration by the NSWPF. As outlined below, it is our recommendation that the Act and the PDO SOPS be amended to facilitate a more effective and reasonable exercise of the Part 2A powers by police.

4.2.1.1. Compliance with section 26J - Summary of grounds

Section 26J(1) of the Act sets out five terms that must be included in a PDO or interim PDO:

- the name of the person authorised to be detained under the order, and

- the period for which the person is authorised to be detained (not exceeding the period provided by this Part), and
- the date on which, and the time at which, the order is made, and
- the date and time after which the person may not be taken into custody under the order (not exceeding 48 hours after the order is made), and
- a summary of the grounds on which the order is made.

The Act also provides that the PDO is not required to include in the summary of grounds any information that may 'prejudice national security' (s 26J(2)).

Section 3.1 of the PDO SOPS provides that, in preparation for the hearing of an application, police should take the following documents to court:

- an application form
- a sworn affidavit
- draft form of interim PDO, which conforms with section 26J
- a copy of the approval to make an application.

We found that PDOs in relation to the three people taken into detention on 18 September 2014 did not include the information referred to above in paragraphs (c) and (e). There was no explanation in the PDO as to whether information about the grounds for the order had been excluded under section 26J(2) on national security grounds.

To ensure that future orders comply with the Act, consideration should be given to amending the PDO SOPS to require that the draft form of the interim PDO conforms with section 26J. The PDO SOPS should require police to include the summary of grounds in the draft order or, if applicable, to indicate in the draft order that information has been excluded pursuant to section 26J (2).

When our officers discussed this issue with counter terrorism police in November 2015, they expressed the view that the NSWPF would have no objections to this suggestion.

4.2.1.2. Impact of section 26ZL on police custody procedures

When our officers visited the detainees at the facility on 18 September 2014, they spoke to one of the detainees who had a facial injury. The detainee was provided with an opportunity to make a complaint relating to his injuries but declined to do so.

During the consultation between our officers and police on that day, police advised that they had not taken any photographs of the detainee's injuries, which had evidently occurred prior to the detainee arriving in preventative detention. Police advised that they were being extremely cautious about any actions that might be seen as collecting evidence from a person subject to a PDO. This is because section 26ZL of the Act provides that identification material, including fingerprints and photographs, may only be taken from a detainee with the person's consent, or where it is necessary to do so to confirm the person's identity. There is a maximum penalty of two years imprisonment for any officer who unlawfully takes identification material from a detainee.

We are concerned that section 26ZL may have an unintended effect of preventing police from making proper records, including photographs of detainees that may ordinarily be taken as part of police custody procedures.

A photographic record of an injury may be necessary for the welfare of the detainee, to ensure police are accountable for any injury that may occur during custody and to protect officers from any false accusations. There may be an issue as to whether section 26ZL unnecessarily restricts an officer's ability to take a photograph of a detainee's injury for these purposes.

Subsequently, the NSWPF conducted an investigation to determine whether the detainee had been assaulted by police while being arrested and found the allegation to be 'not sustained'.

It is notable that equivalent preventative detention powers in Victoria, in the *Terrorism (Community Protection) Act 2003* (Vic), allow for this type of recording of an injury where 'the police officer believes on reasonable grounds that it is necessary to do so for the purpose of documenting an illness or injury suffered by the person while being detained under the order' (s 13ZL(2)(c)).

When we discussed this issue with police again in November 2015, they expressed the view that they would not object if the Act was changed to be similar to the equivalent Victorian legislation.

In our view, consideration should be given to seeking an amendment to the Act to give NSW police officers similar powers.

4.2.1.3. Monitoring of telephone calls

The Act provides that any contact between a detainee and their lawyer may take place only if it is conducted in such a way that it can be effectively monitored by police (s 26ZI). The Act does not require that a lawyer or the detainee be advised that their communication is being monitored. There is also no provision for this in the PDO SOPS.

On 24 November 2015, Paul Farrell from the Guardian Australia online news service reported that the legal representative for one of the detainees was concerned he was not advised initially that his communication on the telephone with his client was being monitored.[53]

In our view, it would be in the interests of transparency that, prior to any telephone conversation taking place between the detainee and the detainee's lawyer, both of them be informed that:

- the Act provides that any such conversation may only take place if it can be monitored by a police officer (s. 26ZI), and
- the police intend to monitor the conversation by listening to the telephone call.

When we discussed this issue with police on 9 November 2015, they advised that the telephone conversation in question had not, in fact, been monitored.

However, in anticipation that police do monitor such a conversation in the future, consideration should be given to explicitly providing in the PD SOPS that the parties to the telephone call be advised that it will be monitored.

4.3. Police concerns about the limitations of the preventative detention powers

During our consultations with police, immediately following the expiry of the interim orders, they expressed concerns about certain aspects of the operation of Part 2A. They explained that the Supreme Court made the interim orders, consistent with the Act, in the absence of, and without notice to, the three men named in the order or their legal representatives. The application for the interim orders was supported by sensitive national security information. Under the Act, an application by police for an extension of the interim orders was not sought by police because it would require them to disclose the sensitive information to the persons named in the orders and/or to their legal representatives. Police expressed the view that these requirements created serious limitations on using the powers effectively.

Similar concerns were outlined by the NSWPF in their submission to the 2014 statutory review of the Act conducted by the Department of Justice and tabled by the Attorney General in the Parliament in October 2015.

53. Paul Farrell, '*Police listened to lawyer-client phone call after Sydney counter-terrorism raid,'* The Guardian, Mon 24 Nov 2014.

> *[T]he NSWPF were concerned that, while the interim PDO application is ex parte, the NSW Act does not allow the court to rely on protected information when making a further PDO. This means that any evidence relied on at the further hearing would need to be disclosed to the person and their legal representative. The NSWPF are concerned that such applications are likely to contain highly sensitive material which, if released, risks compromising ongoing investigations. The AFP identified the same issues raised by the NSWPF regarding the absence of an effective mechanism to protect sensitive material in PDO applications.*

The Department of Justice report did not make recommendations to resolve police concerns on the grounds that the Commonwealth Government was already considering amendments to the counter-terrorism legislative framework

> *Given that discussions between jurisdictions and the Commonwealth are ongoing in the development of further proposed counter terrorism reforms, the Review considers that it is preferable to await the outcome of those amendments, to determine whether changes are required in NSW.*

As outlined above in Section 2.3 the COAG subsequently supported recommendations by NSWPF for the introduction of new powers for pre-investigation detention and subsequently Part 2AA was enacted in May 2016. The Part 2AA provisions resolve the concerns raised by the NSWPF about the requirement under Part 2A to disclose sensitive information to the subject of a PDO in making an application to obtain an extension to an interim PDO. Under the new provisions an eligible judge may issue a warrant to extend pre-investigation for a further 7 days which can be extended further by the court up to a maximum period of 14 days. In granting a warrant the court may grant an application by police that information provided by police be treated as 'criminal intelligence' and that it not be disclosed to the person the subject of the warrant.

Part 2AA also appears to resolve many of the police concerns documented in our previous reports that the Part 2A powers would be operationally difficult to implement and limited by the restriction Part 2A imposes on police by preventing them from interviewing the persons being detained.

It is our view that it is unlikely that police will exercise the powers under Part 2A again in the future. We discuss the implications of this situation further in Chapter 5.

4.4. Concerns about the information provisions in the Act relating to the oversight of preventative detention.

In this section we discuss concerns about the operation of the provisions in the Act that enable the Ombudsman to require the NSWPF to provide information for the purpose of oversight of preventative detention. We identify the need for amendments to the Act to ensure that there are adequate safeguards to ensure that future oversight is effective.

4.4.1. Police response to requirements to provide information to the Ombudsman

On 24 September 2014, the Acting Deputy Ombudsman (Police) formally required the Commissioner of Police to provide records, in accordance with section 26ZO(2) of the Act, including any documents used to support the police application for PDOs (such as an affidavit), information regarding the execution of the orders, including when and how detainees were taken into custody, and records of how police managed detainees while they were in custody.

After assessing the Commissioner's response of 22 October 2015, the Acting Deputy Ombudsman issued a second formal requirement for information, dated 4 November 2014. In that correspondence the Acting Deputy Ombudsman noted that the documents the Commissioner had provided up to that time did not include a response to a number of the items that had been required.

On 19 May 2015, an Acting Deputy Commissioner provided our office with more documents. Following the exchange of further correspondence some of these documents were provided in full and others contained redactions.

We were provided with full access to records including:

- the PDOs made by the Supreme Court
- custody management records, that included details such as who the detainees spoke with while they were in custody, the food they were provided with and requests they made to police officers during that period, and
- documents relating to the release of the detainees.

The following documents were also provided, but with some information redacted:

- briefing documents for officers who were to be involved in executing the orders
- records made at the time the PDOs were executed and the individuals subject to the orders were taken into custody.

The NSWPF did not provide our office with a copy of the affidavit police prepared to support their application for the orders. The NSWPF gave two reasons for limiting this office's access to information in this way:

- some information could not be provided because of secrecy provisions under Commonwealth law
- the Commissioner wished to make a claim for public interest immunity in relation to certain documents.

The NSWPF provided copies of legal advice that the Commissioner had received from the Crown Solicitor and the Solicitor General advising that the Commissioner could lawfully resist the requirement to provide documents to the Ombudsman under section 26ZO(2) by making a claim of public interest immunity.

4.4.1.1. Police submission about the information requirements to the DoJ 2014 statutory review of the Act

The NSWPF made a submission to the 2014 statutory review of the Act as outlined below:

> *The NSWPF submitted that the exercise of the Ombudsman's powers under section 26ZO of the NSW Act following the first use of the interim PDOs in September 2014 brought to attention significant practical issues that require further attention. The NSWPF advised that the Ombudsman issued to [sic] 'requirements to produce information' following the use of the powers, and that responding to the Ombudsman's requests required extensive police resources (including obtaining legal advice regarding the highly sensitive nature of the information being requested).*
>
> *The NSWPF submission also noted that they are often not the single source of information, given that the NSWPF works with the AFP, NSW Crime Commission and ASIO as part of the Joint Counter Terrorism Team (JCCT), and that this gives rise to a question as to whether information sough [sic] is subject to Commonwealth legislative secrecy provisions that trigger criminal sanctions if breached. The NSWPF also expressed concern that the information sought by the Ombudsman may involve confidential human sources and an ongoing investigation. The submission notes that its partner agencies have also raised concerns regarding the documents and information being disclosed to the NSW Ombudsman, which would affect the NSWPF's relationship with its JCCT partners.*[54]

The Department of Justice report included the following comments about the issue:

> *The Review considers that the Ombudsman's oversight of Parts 2A and 3 of the NSW Act are crucial, as these powers are extraordinary in that they depart from long-established principles regarding the detention of individuals. In enacting these special powers, the NSW Parliament considered that it was necessary to*

54. NSW Department of Justice, Justice Strategy and Policy, *Statutory Review of the Terrorism (Police Powers) Act 2002 October 2015*, p 25.

establish a robust scrutiny function for the NSW Ombudsman. These safeguards have been reiterated by the Commonwealth Government, which also noted the continuing importance of proper oversight of counter terrorism powers. The Ombudsman's 2014 Report notes that each State and Territory also has reporting requirements or oversight mechanisms attached to the PDO provisions, to ensure ongoing scrutiny of these powers. As such, the Review considers that it is appropriate for the Ombudsman to retain this oversight function, but that work should continue between the NSWPF, the office of the Ombudsman and the DoJ to address the issues identified in the NSWPF submission.[55]

4.4.2. Comments about the information provisions

In our view the restrictions on this office's ability to access information during the reporting period made us less effective in providing a comprehensive and independent view of the exercise of the preventative detention powers in practice.

We agree that certain information can be restricted without impacting effective oversight, such as information that identifies informants or officers who are operating covertly. Restriction of such information should not adversely affect an oversight agency's ability to understand the circumstances and context of the use of the powers. However, without access to key documents, such as the supporting affidavit, we were not able to form a comprehensive and informed view about the operation of the Act.

As outlined in Chapter 2, the oversight functions under the Act performed by the Ombudsman will soon be transferred to the LECC. If the two issues identified in this report are not addressed – future claims of public interest immunity by the NSWPF, and the operation of Commonwealth secrecy provisions – there is the risk that the LECC's function of keeping the exercise of the preventative detention powers under scrutiny will be seriously undermined.

Claims of public interest immunity cannot be made in other areas of the Ombudsman's investigation and oversight work. For example, an agency being investigated under the *Ombudsman Act 1974* cannot claim public interest immunity to resist either an Ombudsman requirement to produce documents or information (s 21(3) of the Ombudsman Act), or any exercise of the Ombudsman's powers to enter public premises and inspect documents when conducting an investigation (s 21A(2)).

Similarly, specific statutory provisions provide that any requirement for information that the Ombudsman makes in order to inspect police records related to telephone intercepts (under the *Telecommunications (Interception and Access) (New South Wales) Act 1987*) and controlled operations (under the *Law Enforcement (Controlled Operations) Act 1997*) do not have to be set aside due to a claim of public interest immunity. Indeed, the Telecommunications (Interception and Access) (New South Wales) Act provides that, to perform these inspections, the Ombudsman must be given full and free access to information, notwithstanding other laws, and a person is not excused from providing information on the ground that to do so would be contrary to the public interest.

Those legislative provisions embody Parliament's recognition of a strong public interest in enabling the Ombudsman to have access to information in order to properly scrutinise agency conduct. This outweighs the public interest in those circumstances in not disclosing sensitive information to the Ombudsman. Generally, public interest immunity claims are more relevant to the exercise of adjudicative or investigative functions, than to the exercise of a general scrutiny or monitoring function of the kind exercised by the Ombudsman in the circumstances mentioned.

In our view, the same strong public interest arguments apply to the Ombudsman's function of keeping under scrutiny police use of the preventative detention powers. It is important that the Ombudsman has the ability to access information for this function.

55. NSW Department of Justice, Justice Strategy and Policy, *Statutory Review of the Terrorism (Police Powers) Act 2002,* October 2015, p 25.

Importantly, section 56 of the *Law Enforcement Conduct Commission Act 2016* (Abrogation of privileges) prevents the NSWPF from making a public interest immunity claim in response to a requirement to provide information to the LECC. In our view, consideration should be given to amending the Act so that it is consistent with section 56 of the *LECC Act 2016*. The NSWPF should be required to provide the LECC with information for the purposes of keeping under scrutiny the exercise of the preventative detention powers, even in circumstances where a public interest immunity claim may have otherwise been available.

4.4.2.1. Impact of Commonwealth secrecy provisions on effective oversight

There are a number of Commonwealth laws that contain secrecy provisions that posed a barrier to NSWPF providing information to this office for the purposes of our scrutiny of the use of the preventative detention powers. The significant and relevant laws are:

Australian Security and Intelligence Organisation Act 1979

Telecommunications (Interception and Access) Act 1979

Anti-Money Laundering and Counter Terrorism Financing Act 2006

Proceeds of Crime Act 2002

Surveillance Devices Act 2004

Those Acts contain provisions that authorise Federal bodies that have obtained or created certain sensitive information to share that information with the NSWPF for select purposes. Other provisions restrict the NSWPF from disclosing that information to any other parties.

The *Surveillance Devices Act 2007* also prevents NSWPF from disclosing certain information obtained from, or related to, the use of a surveillance device.

In our view, it is in the public interest that the scrutiny of the use of the preventative detention powers should not be hampered by the operation of these secrecy provisions. The scrutiny function is part of a national oversight framework put in place to maintain the integrity of extraordinary powers available to law enforcement and intelligence agencies. Restricting access to the information that is required to properly fulfil that scrutiny function is inconsistent with those objectives.

Consideration should be given to seeking relevant amendments to Commonwealth Acts to authorise the NSWPF to provide the LECC with any information required by the LECC, for the limited purpose of the LECC's scrutiny of the preventative detention powers.

We observe that recent changes were made to the *Telecommunications (Interception and Access) Act 1979* (Cth) by Schedule 9 to the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016,* which appear to have this effect in relation to some information lawfully obtained through telecommunications interception. The amendments to the definitions of 'permitted purpose' and 'PDO' in section 5(1) appear to have the effect of making it a permitted purpose for the NSWPF to communicate to the LECC certain records for the purposes of the LECC's exercise of its oversight functions under the Act.

We note that if such authority was provided under the other Commonwealth Acts, the LECC would itself be restricted from disclosing that information to any other parties (including in a report to Parliament) under those existing secrecy provisions.

Chapter 5. Conclusion

Police have rarely exercised the extraordinary powers given to them under Part 2A and Part 3 of the *Terrorism (Police Powers) Act 2002* since these commenced operation in 2005. In the three previous Ombudsman reports to the Minister and the Commissioner of Police, we have made practical recommendations that have been implemented to ensure that the powers are exercised in a fair and reasonable manner.

This is our final report under the Act, as the LECC will soon become responsible for keeping under scrutiny the exercise of these powers following proclamation of Schedule 6 of the *Law Enforcement Conduct Commission Act 2016*.

The Parliament has supported amendments to this Act to ensure that police are provided with adequate tools to combat terrorism and to improve their capacity to meet the evolving nature of the security environment. At the same time, the Parliament has recognised the need for robust and effective civilian oversight of these extraordinary powers. On the basis of our 11 years experience of civilian oversight of these powers, we recommend that the Act be reviewed by the Minister and amended to ensure that the LECC is able to perform its oversight functions effectively. It is essential that the oversight provisions be amended to keep pace with the changes to police powers to ensure ongoing public confidence in police is maintained.

The transfer of responsibilities to the LECC for oversight of the preventative detention powers will require that agency to consider and give advice to the Minister about whether Part 2A should be allowed to expire on 16 December 2018. It is clear from the history of Part 2A documented in our previous reports that it is highly unlikely that police will exercise the Part 2A powers in the future. Police concerns about these powers have been addressed by the enactment of the pre-investigation detention powers under Part 2AA, thereby removing any occasion for future use of the Part 2A powers. It is our recommendation that the Part 2A powers be allowed to expire in December 2018. For that reason we have not made any formal recommendations to address the implementation issues that we identified in Chapter 4 in reviewing the use of the Part 2A powers during the reporting period as part of Operation Appleby. Those issues related to compliance with section 26J, the impact of section 26ZL on police custody procedures, and police practices relating to monitoring of telephone calls.

The introduction of Part 2AA provides police with a new set of extraordinary powers to detain people as young as 14 years old for up to 4 days without a warrant; an eligible judge may extend this detention to up to 14 days. Surprisingly, the amending legislation did not include a provision for civilian oversight of these powers. This creates a significant gap in the scope of civilian oversight. In our view there is a strong public interest that the exercise of the Part 2AA powers be the subject of independent civilian oversight. It is our recommendation that the Minister should give consideration to amending the Act to provide the LECC with the same oversight functions in relation to powers exercised by police under Part 2AA of the Act as the Ombudsman currently performs in relation to Part 2A.

There is also an urgent need for the Act to be amended to ensure that the LECC is able to require the NSWPF and other relevant agencies to provide it with the information it requires to perform its oversight function effectively. The LECC should not be subject to claims by the NSWPF or other relevant agencies of public interest immunity. The LECC should have unambiguous authority to determine independently of the NSWPF whether it is in the public interest for LECC to require that information be provided, and then included in a report to the Minister for tabling in the Parliament. Similarly, in order to ensure that the LECC is able to obtain relevant information relied upon by the NSWPF to exercise its functions under Part 2A, Part 2AA and Part 3, we recommend that the Minister make submissions to the relevant Commonwealth Ministers and agencies to seek amendments to relevant legislation, as outlined in Chapter 4, to remove restrictions that currently prevent the NSWPF from providing that information to the Ombudsman.

Recommendations

1. Part 2A of the *Terrorism (Police Powers) Act 2002* should be allowed to expire on 16 December 2018.
2. The *Terrorism (Police Powers) Act 2002* should be amended so that the Law Enforcement Conduct Commission is not subject to claims of public interest immunity in requiring information from police or other relevant agencies in performing its functions under the Act.
3. The *Terrorism (Police Powers) Act 2002* should be amended so that the Law Enforcement Conduct Commission is required to keep under scrutiny the exercise of powers by police under Part 2AA of the Act in identical terms to its functions under Part 2A and Part 3.
4. To ensure that the Law Enforcement Conduct Commission is able to perform its oversight role effectively, the Attorney General should make representations to the Council of Australia Governments and the relevant Commonwealth Ministers and agencies to seek amendments to relevant legislation, as outlined in Chapter 4 of this report.

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: (02) 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
Tel. typewriter (TTY): (02) 9264 8050
Facsimile: (02) 9283 2911

Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au