NSW Ombudsman

Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*

Preventative detention — interim report

Covert search warrants — final report

September 2008

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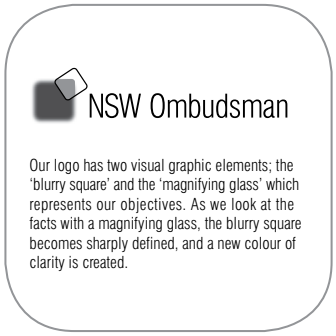

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Review of Parts 2A and 3 of the Terrorism *(Police Powers) Act 2002*

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ISBN 978-1-921132-23-0

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The Honourable John Hatzistergos MLC
NSW Attorney-General
Level 33, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Mr Hatzistergos

Under sections 26ZO and 27ZC of the *Terrorism (Police Powers) Act 2002* I have been required to keep under scrutiny the exercise of powers conferred on police and other officers under Parts 2A and 3 of the Act, relating to preventative detention and covert search warrants.

Preventative detention powers are to be kept under scrutiny for five years, with an interim report after two years. Covert search warrant powers are to be reported on after two years. The reports are to be combined in the one report as provided for in sections 26ZO(8) and 27ZC(7).

I am pleased to provide you with the printed copy of my interim report on preventative detention and final report on covert search warrant powers. The original copy was provided to you on 10 September 2008.

A copy of this report has also been provided to the Minister for Police.

I draw your attention to the tabling process provided for in the Act and the apparent confusion between section 26ZO(5) and section 27ZC(4). I leave the decision as to which minister tables the report to you and the Minister for Police.

Yours sincerely

Bruce Barbour
Ombudsman

September 2008

NSW Ombudsman

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The Honourable Tony Kelly, ALGA MLC
Minister for Police
Governor Macquarie Tower
Level 34, 1 Farrer Place,
Sydney NSW 2000

Dear Mr Kelly

Under sections 26ZO and 27ZC of the *Terrorism (Police Powers) Act 2002* I have been required to keep under scrutiny the exercise of powers conferred on police and other officers under Parts 2A and 3 of the Act, relating to preventative detention and covert search warrants.

Preventative detention powers are to be kept under scrutiny for five years, with an interim report after two years. Covert search warrant powers are to be reported on after two years. The reports are to be combined in the one report as provided for in sections 26ZO(8) and 27ZC(7).

I am pleased to provide you with the printed copy of my interim report on preventative detention and final report on covert search warrant powers.

The original copy of this report was given to the previous Minister for Police on 10 September 2008. A copy has also been provided to the Attorney-General.

I draw your attention to the tabling process provided for in the Act and the apparent confusion between section 26ZO(5) and section 27ZC(4). I leave the decision as to which minister tables the report to you and the Attorney General.

Yours sincerely

Bruce Barbour
Ombudsman

Foreword

There has been widespread debate and controversy about terrorism laws enacted in Australia and other western democracies in the years since 2001. Governments have sought extraordinary powers to prevent and prosecute acts of terrorism, while attempting to maintain and protect the human rights of their citizens. Finding a proper balance between these competing priorities is fundamental to the health and stability of a functioning democracy.

While the Australian States and Territories have referred constitutional powers relating to terrorism offences to the Commonwealth, some powers, such as those under review in this report, remain with the States. In New South Wales the *Terrorism (Police Powers) Act 2002* gives special powers to police and other agencies to deal with suspected terrorist acts. This includes police powers to apply for court orders to detain people without charge for up to two weeks, to prevent an imminent terrorist act or preserve evidence of terrorist acts which have occurred. It also includes powers to apply for covert search warrants, enabling police and NSW Crime Commission officers to search premises, without notifying the owner until such time as there are no longer reasonable grounds for postponing notification.

The Act requires that I keep under scrutiny the exercise of preventative detention and covert search warrant powers and report to Parliament after two years. The report focuses on how the legislation has been implemented by the relevant agencies and whether those who are exercising the powers comply with their legislative obligations. It also looks at whether the legislation is being implemented fairly and effectively both from the perspective of those who can exercise the powers and those who are searched or detained. While it is not my role to review the merits or otherwise of the legislation, my role in scrutinising the implementation of the legislation does unavoidably overlap with some policy considerations. I have made a number of recommendations for the consideration of Parliament and for those agencies conferred with the powers.

The report includes extensive comment about preventative detention powers even though the powers were not exercised during the review period. I sought the advice of senior counsel on the scope of the Ombudsman's legislative review function and in particular whether the function was limited to examining the actual use of those powers under review. Our advice was that the Ombudsman's function is likely to encompass an examination of issues concerning the limited use of those powers or the failure to use those powers.

My view is that Parliament has tasked me with reviewing the implementation and operation of the powers, and given the powers were not exercised, my duty is to outline the review activities conducted by my staff and highlight relevant concerns identified from submissions I received and other activities I conducted. Many of the submissions received raised concerns which could potentially impact on the decision making of police as to whether they exercise preventative detention powers, or whether in fact other powers of detention are more effective and appropriate. I have recommended that those agencies potentially involved in the exercise of preventative detention powers, including the NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice, finalise as a matter of priority, their standard operating procedures on preventative detention and any agreements required to facilitate the use of preventative detention powers. I have also made a number of recommendations that may be of practical assistance to police and provide detainees with greater access to information and legal advice.

Police and NSW Crime Commission officers have exercised the covert search warrant powers during this period. I found these powers were used infrequently and in the investigation of serious offences and there is no evidence of misuse of the powers. I am concerned however that without ongoing scrutiny of covert search warrant powers the balance will be tilted towards the interests of law enforcement agencies and the rights and interests of occupiers will not be sufficiently protected. For this reason, I have recommended that Parliament consider providing for ongoing external scrutiny of covert search warrant powers. It was of some concern to me that police failed to report the exercise of the powers to Parliament in the annual reporting period as required of them under the Act. In my view this lack of compliance supports a case for ongoing scrutiny. I have also made a number of recommendations which aim to strengthen safeguards, not only for the occupiers of searched premises but also for the protection of officers engaged in the search.

The powers subject to this review are extraordinary and raise serious questions about the departure from long established legal principles, Australia's obligations under international law, the impact on innocent parties and whether a proper balance has been struck between protecting national security and civil liberties. Consequently, this is a significant report.

I trust it will be of practical assistance to those potentially exercising the powers and assist Parliament in assessing the ongoing utility of the legislation.

Bruce Barbour
Ombudsman

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Chapter 1. Introduction

This is a report by the Ombudsman as required under the *Terrorism (Police Powers) Act 2002*, relating to the exercise of powers conferred on police and NSW Crime Commission officers under the covert search warrant provisions, and police and correctional officers under the preventative detention order provisions. Our role and the purpose of this report is further discussed under section 1.3. below.

1.1. Background

In this chapter, we briefly set out the recent history of counter-terrorism laws in Australia, and detail the provisions of the *Terrorism (Police Powers) Act 2002*. We also provide information concerning our review function which has resulted in this report. In April 2002, Commonwealth, State and Territory leaders decided on a new national framework to combat terrorism, and agreed to form the National Counter-Terrorism Committee. They agreed that the Commonwealth would take charge of the strategic coordination of Commonwealth, State and Territory resources in the event of a terrorist incident. Each jurisdiction agreed to review its legislation and counter-terrorism arrangements, to ensure they were sufficiently strong.[1] The *Inter-Governmental Agreement on Australia's National Counter-Terrorism Arrangements* was signed in October 2002 and the first meeting of the National Counter-Terrorism Committee was held in November 2002.[2] States and Territories also agreed to refer constitutional powers relating to terrorism to the Commonwealth.[3]

In December 2002, the New South Wales Parliament enacted the *Terrorism (Police Powers) Act 2002* (the Act). The new legislation, which is explained in further detail below, gave police officers significant powers to prevent imminent terrorist acts and to investigate terrorist acts after they have occurred. Then Premier Bob Carr made it clear that the new powers were 'confined to limited circumstances' and were 'not intended for general use.'[4]

In June 2005, the Act was amended to provide for covert search warrant powers, for use by the NSW Police Force and the NSW Crime Commission in their investigation of, and response to, terrorist acts. Again, it was made clear that the powers were 'extraordinary' and were 'not designed or intended to be used for general policing.'[5] The powers were intended to be an interim measure, pending the enactment of a federal covert search warrant scheme.[6]

In September 2005, the Council of Australian Governments (COAG) met to consider the adequacy of Australia's counter-terrorism arrangements. It reported:

> *COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate.*[7]

State and Territory leaders agreed to enact legislation which, because of constitutional constraints, the Commonwealth could not enact, including legislation providing for preventative detention for up to 14 days.[8] Following this, provisions for making preventative detention orders and prohibited contact orders were inserted into the Terrorism (Police Powers) Act in New South Wales. These laws enable police to obtain orders to detain persons, without charge, for up to 14 days. As with the other powers contained in the Act, these were designed for use only in extraordinary circumstances, in order to prevent a terrorist attack or preserve evidence following a terrorist attack. Preventative detention regimes have now been enacted in all Australian States and Territories, to complement the federal scheme.

Since 2001, the Commonwealth Parliament has introduced in excess of fifty pieces of legislation relating to terrorism and national security.[9] The legislation has created new terrorism offences, such as preparing for a terrorist act and financing terrorism. Old offences, such as sedition, have been modernised to target activity which promotes terrorism. The Australian Security Intelligence Organisation (ASIO) has been given new detention and questioning powers, and control orders and preventative detention have been introduced for dealing with people who are not charged with an offence but are suspected of terrorist activity. Telephone intercept legislation has been changed to allow access to stored communications such as emails and text messages, and to enable law enforcement agencies to obtain interception warrants for 'B parties' (that is, people who are not suspects). Airport and maritime security laws have been bolstered to combat terrorism. Reforms are being made to Australia's anti money laundering and terrorist financing laws which expand the role of the Australian Transaction Reports Analysis Centre (AUSTRAC) and impose obligations on business groups to implement accountability measures. Classification laws have been amended so that publications, films or computer games which advocate terrorist acts must be refused classification. At the time of writing, the Commonwealth government was proposing an expansion of the black list of Internet addresses (URLs) maintained by the Australian Communications and Media Authority to include crime and terrorism related websites.

1.1.1. Concerns about the legislation

Many different parties, including members of Parliament, academics, journalists, legal groups, service providers and members of the public, have expressed concerns about elements of the new counter-terrorism laws. Concerns have been raised about:

- the speed with which the laws were enacted
- how intrusive the laws are, and whether they strike an appropriate balance between national security and civil liberties
- whether the laws are effective
- the impact the laws are having on innocent parties, who may have no connection to the matters under investigation
- the laws targeting particular groups in the community, in particular the Muslim community
- the laws departing from long established legal principles, and
- whether the laws are consistent with Australia's obligations under international law.

1.2. Terrorism legislation — key provisions

1.2.1. Terrorism offences

In Australia, federal terrorism offences are set out in Part 5.3 of the Commonwealth Criminal Code. It is an offence to commit a terrorist act, provide or receive training connected with terrorist acts, possess things connected with terrorist acts, collect or make documents likely to facilitate terrorist acts, plan or prepare for terrorist acts, direct the activities of a terrorist organisation, be a member of a terrorist organisation, recruit for a terrorist organisation, train or receive training from a terrorist organisation, or support, associate with, fund or receive funds from a terrorist organisation.[10] Terrorism offences carry substantial maximum penalties, ranging between 3 years (for associating with terrorist organisations) and life imprisonment (for engaging in a terrorist act, preparing for or planning a terrorist act, or financing terrorism).[11] Unlike the New South Wales legislation, the Commonwealth Criminal Code also applies to threats of action that constitute terrorist acts, as well as actions that relate to terrorist acts but do not themselves constitute terrorist acts (known as 'preliminary acts').[12]

Because the New South Wales Parliament referred its power to make laws with respect to terrorism to the Commonwealth Parliament in 2002, most terrorism offences are governed by federal rather than state law.[13] However, section 310J of the *Crimes Act 1900* (NSW) provides that it is an offence to be a member of a terrorist organisation, provided the person knows it is a terrorist organisation and intends to be a member.[14] Also, other acts which may be terrorism related may constitute offences under the ordinary criminal law.

1.2.2. Terrorism (Police Powers) Act

The Terrorism (Police Powers) Act gives special powers to police to deal with terrorist acts and protect people. It contains three sets of discrete powers: special powers (Part 2), preventative detention orders (Part 2A) and covert search warrants (Part 3). The Act adopts substantially the same definition of a 'terrorist act' as the Commonwealth Criminal Code.[15] A terrorist act includes 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 person committing the act); or creates serious public health or safety risks. It also includes action which seriously interferes with information, telecommunications, transport, essential service delivery, financial or other public utility systems.

In addition, to be a terrorist act, the action 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 intimidate the public or a section of the public.

The 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 — these are not 'terrorist acts'.

1.2.3. Special powers (Part 2)

Part 2 of the Terrorism (Police Powers) Act provided additional powers for police officers for the purpose of finding particular persons or vehicles, and preventing terrorist acts in particular areas, or apprehending in these areas persons responsible for a terrorist act. It enables police to request a person disclose their identity, stop and search (including strip search) particular people, vehicles and premises, and seize and detain things where there

are reasonable grounds to believe there is an imminent threat of a terrorist act, and the use of the powers would substantially assist in preventing it. Police may also exercise these powers where they would substantially assist in apprehending perpetrators immediately after a terrorist act. The new powers were not intended for general use, but for use only in particular circumstances, where there is a credible terrorist threat and use of the powers would reasonably assist police.[16] Any use of the powers has to be authorised by the Commissioner or a Deputy Commissioner of Police with the concurrence of the Police Minister (provided the Minister can be contacted). Where an authorisation is sought as a matter of urgency, a police officer above the rank of superintendent may give it.[17]

Part 2 powers were authorised for the first time in November 2005. However, the powers were not exercised.[18] We are not aware of the powers being authorised on any other occasion. We note the Ombudsman was not given a monitoring role in relation to the Part 2 special powers.

1.2.4. Preventative detention orders (Part 2A)

Part 2A of the Terrorism (Police Powers) Act came into force in December 2005, following agreement by COAG at a Special Meeting on Counter-Terrorism in September 2005 to strengthen counter-terrorism laws across state and federal jurisdictions.[19] Part 2A permits police to apply to the Supreme Court for orders for the detention of a person aged 16 or above to prevent an imminent terrorist act, or to preserve evidence of terrorist acts that have occurred.

Police can apply for an interim preventative detention order of up to 48 hours, in the absence of the person they wish to detain. The hearing for a confirmed preventative detention order must take place during this period or the order will cease to have effect. The person is entitled to give evidence and have legal representation at this hearing. A person in relation to whom the order is to be made can be detained under a confirmed order for up to 14 days (which includes the 48 hour period of the interim order). 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. Police must apply to have a preventative detention order revoked if the grounds on which the order were made cease to exist.

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

Police can arrange for a person in preventative detention to be detained at a correctional centre. 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. Police cannot question a person in preventative detention other than for the purposes of identification, welfare, or complying with other legislative requirements. Preventative detention orders can only be made in relation to people aged 16 and above, but people aged 16 or 17 generally have to be detained separately from adults.

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

Part 2A expires after 10 years, that is, in December 2015.

Relationship to the Commonwealth legislation

Following the September 2005 COAG agreement, the Commonwealth Criminal Code was amended to provide for control orders and preventative detention in order to protect the public from suspected terrorist acts. The governments agreed to amendments to the federal Code to provide for preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community.[20] State and Territory governments agreed to enact legislation providing for preventative detention for up to 14 days, which could not be enacted by the Commonwealth because of constitutional constraints.[21]

1.2.5. Covert search warrants (Part 3)

Part 3 of the Terrorism (Police Powers) Act deals with covert search warrants, and came into operation in September 2005. It enables certain police officers and staff members of the NSW Crime Commission to apply to an eligible judge for a covert search warrant, should they suspect on reasonable grounds that:

- a terrorist act has been, or is likely to be committed
- searching the premises will substantially assist in responding to, or preventing the terrorist act, and
- it is necessary to conduct the search without the knowledge of the occupier.[22]

A covert search warrant authorises the nominated officer and assistants to enter the subject premises (and premises adjoining the subject premises where authorised) without the occupier's knowledge, and search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test any thing described in the warrant. After executing a covert search warrant, the officer must report back to the judge within 10 days, stating what actions were taken, who took those actions, and whether or not execution of the warrant assisted in the prevention of, or response to, the specified terrorist offence. Details relating to the execution of the warrant must be recorded in an occupier's notice, which is to be provided to the issuing judge within six months of the warrant being executed. Following approval of the notice by the judge, the notice is to be provided to the subject of the covert search warrant and occupiers of premises searched. A judge may postpone the giving of an occupier's notice if they are satisfied there are reasonable grounds for that postponement.

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.[23] In the case of an application relating to an offence under section 31OJ, the offence must be being committed and the execution of a covert warrant would provide evidence relating to the commission of that offence.

1.3. The role of the Ombudsman and the purpose of this report

The Terrorism (Police Powers) Act requires the Ombudsman to keep under scrutiny the exercise of the powers conferred on police and Crime Commission officers under the covert search warrant provisions for two years (from September 2005 to September 2007), and the powers conferred on police and correctional officers under the preventative detention order provisions for five years (from December 2005 to December 2010), with an interim report after two years.[24] This report constitutes our final report on our review of the covert search warrant powers, and our interim report on the preventative detention powers. The Attorney General must table this report in Parliament as soon as practicable after receiving it.

We used a range of research strategies to inform this report. These included analysing information and documents held by relevant agencies (including the NSW Police Force, the NSW Crime Commission, the Department of Corrective Services and the Attorney General's Department), inspecting the facilities where people subject to preventative detention orders may be detained, consulting police and correctional officers about the way the powers have been or may be used, analysing complaints about police conduct which relate to counter-terrorism powers, tracking media coverage of relevant events and comparing the New South Wales experience with developments in other jurisdictions.

We also consulted stakeholders and the broader community by publishing an Issues Paper. We received 34 submissions in response. A list of these submissions is at Annexure 2. The police portfolio submission we received from the Ministry for Police offered no comment on the preventative detention powers, or actions taken to implement the exercise of those powers into police procedures. The Ministry later provided comment on the recommendations made in our consultation draft report. We also received comment on preventative detention issues directly from police attached to the Counter Terrorism and Special Tactics Command, both in a written submission and in meetings. We note the Ministry's response that police 'presented this information as personal opinion' and their 'comments do not reflect the Police Portfolio position'.[25] This is further discussed under section 3.1.4.

We have entered into a monitoring agreement with the NSW Police Force and the Department of Corrective Services so that we can directly observe the use of preventative detention powers. In light of recent advice that 16 or 17 year old detainees may be held in juvenile justice facilities, we anticipate entering into similar agreements with the Department of Juvenile Justice.

1.3.1. Our approach

Much of the debate around terrorism legislation in New South Wales and elsewhere has focused on policy considerations, such as whether law enforcement agencies should be able to search people's houses in secret, or detain people who have not been charged with an offence.

Our role, as determined by Parliament, is to keep under scrutiny the exercise of powers conferred on police, correctional officers and Crime Commission staff. For this reason, our review focuses on how the legislation has been implemented by the relevant agencies, and whether those who are exercising the new powers are complying with their legislative obligations. We have also looked at whether the legislation is being implemented fairly and effectively, both from the perspective of those who can exercise the powers, and those who can be searched or detained. While our role is not to review the merits or otherwise of the legislation, our role in scrutinising the implementation of the legislation does, unavoidably, overlap with some policy considerations.

1.3.2. Other review mechanisms

We note that in addition to our role in scrutinising the exercise of these powers, the Commissioner of Police must report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants and preventative detention. The Commissioner is also required to report as soon as practicable to these Ministers after the cessation of an authorisation to exercise 'special powers' under Part 2 of the Act. The Crime Commissioner is required to report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants.[26]

The Attorney General is also required to review the Terrorism (Police Powers) Act to determine whether its policy objectives remain valid, and whether the terms of the Act are appropriate for securing those objectives.[27] When the legislation was enacted, the Attorney General was required to review the Act every 12 months, but this was changed to a review every 2 years.[28] The first report under this section was finalised in August 2006. It concluded that the policy and objectives of the Act remain valid.[29]

Endnotes

1 'National move to combat terror', media release on the Leaders Summit on Terrorism and Multi-jurisdictional Crime by former federal Attorney General Daryl Williams, 7 April 2002.
2 'Counter terrorism review', media release by Prime Minister John Howard, 24 October 2002.
3 'Reference of terrorism power', media release by former federal Attorney General Daryl Williams, 8 November 2002.
4 The Hon. Bob Carr, then Premier, Legislative Assembly Hansard, 19 November 2002.
5 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
6 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
7 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
8 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
9 Australian Terrorism Law, Parliamentary Library website, www.aph.gov.au/library/intguide/law/terrorism.
10 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
11 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
12 *Criminal Code Act 1995* (Cth) ss.100.1 and 100.4. A note in the *Terrorism (Police Powers) Act 2002* explains that in the context in which the expression 'terrorist act' is used, it is not necessary to include threats of terrorist acts.
13 See *Terrorism (Commonwealth Powers) Act 2002* (NSW).
14 When introduced, this provision was subject to a two year sunset clause, and was to be repealed on 15 December 2007. However, the repeal was postponed by the *APEC Meeting (Police Powers) Act 2007*. It is now to be repealed on 13 September 2008.
15 See *Terrorism (Police Powers) Act* s.3 and *Criminal Code Act 1995* (Cth) s.100.1.
16 The Hon. Bob Carr, then Premier, Legislative Assembly Hansard, 19 November 2002.
17 *Terrorism (Police Powers) Act 2002* ss.8 and 9.
18 NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002*, August 2006.
19 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
20 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
21 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
22 *Terrorism (Police Powers) Act 2002* s.27C.
23 The definition of terrorist organisation under this section has the meaning given under the Commonwealth Criminal Code at s.102.1.
24 *Terrorism (Police Powers) Act 2002* ss.27ZC and 26ZO.
25 Ministry for Police submission, 4 July 2008.
26 *Terrorism (Police Powers) Act 2002* ss.26ZN and 27ZB.
27 *Terrorism (Police Powers) Act 2002* s.36.
28 *Police Powers Legislation Amendment Act 2006*.
29 NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002*, August 2006.

Chapter 2.
Preventative detention and covert searches in other jurisdictions

This chapter looks at preventative detention and covert search powers in other jurisdictions.

2.1. Preventative detention in other jurisdictions

2.1.1. Commonwealth

Division 105 of the Commonwealth Criminal Code provides for preventative detention orders. The Commonwealth scheme differs from the New South Wales scheme in a number of significant ways:

- the maximum period of detention under a New South Wales order is 14 days, as opposed to 48 hours under a Commonwealth order
- New South Wales orders are confirmed by the Supreme Court, whereas Commonwealth orders are confirmed by judicial officers acting in a personal capacity
- people detained under New South Wales orders are entitled to give evidence before a hearing of the court. Commonwealth orders operate similarly to New South Wales interim orders, which do not provide for the person to be present or give evidence at the hearing
- unlike the Commonwealth scheme, people detained under New South Wales orders can apply to have the order revoked, and
- the Commonwealth scheme contains a number of disclosure offences which do not apply in New South Wales.

We are not aware of any preventative detention orders having been made under Division 105 of the Commonwealth Criminal Code.

Division 104 of the Commonwealth Criminal Code also provides for control orders, to allow restrictions and obligations to be imposed on a person to protect the public from a terrorist act. Control orders can be requested from the courts by a senior Australian Federal Police (AFP) member, with the Attorney General's written consent, if the member: considers on reasonable grounds that the order would substantially assist in preventing a terrorist act; or suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation. The court can impose an interim or confirmed control order if it is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act

At the time of writing two interim control orders had been made and one confirmed.

In August 2006, an interim control order was imposed on Joseph Thomas, after his conviction for providing resources to a terrorist organisation was overturned on appeal.[30] The grounds for the order cited Mr Thomas' training with Al Qa'ida, his 'vulnerability' to extremist views and beliefs and his potential as an available resource to 'aspirant extremists'. The order placed a curfew on Mr Thomas, required him to report regularly to Victorian police, and prohibited him from using certain devices and associating with prescribed individuals and organisations.[31] Mr Thomas commenced proceedings in the High Court to challenge the constitutional validity of the control order. A hearing to determine whether the interim order should be confirmed was postponed while the High Court proceedings were afoot. The High Court upheld the validity of Division 104 of the Criminal Code.[32] However, the hearing for a confirmed control order ultimately did not proceed. Mr Thomas reportedly offered an undertaking on similar terms to the interim control order, while awaiting retrial on the original terrorism charge.[33] The retrial was ordered by the Victorian Court of Appeal on 16 June 2008.[34]

In December 2007 an interim control order was imposed on David Hicks after his release from custody at Adelaide's Yatala prison. Mr Hicks was charged with terrorism offences by a United States military commission after spending five years imprisoned at the US naval base at Guantanamo Bay. Mr Hicks pleaded guilty to providing material support to terrorism in a plea bargain arrangement which allowed him to serve the remainder of his sentence in Australia.

The Federal Magistrate's Court made the interim control order on the grounds that Mr Hicks trained with Lashkar-e-Tayyiba and Al-Qa'ida between 2000 and 2001 (both organisations were proscribed terrorist organisations in 2002) and due to his knowledge and skills, was considered 'a potential resource for the planning or preparation of a terrorist

act'.[35] The order required that Mr Hicks remain at agreed premises in South Australia between specified times of the day, report to police regularly, submit to fingerprint testing and prohibited him from possessing prescribed things such as firearms, using phones other than those approved by federal police or communicating or associating with any persons known to be a member of a terrorist organisation. The order was confirmed in February 2008 with some relaxation of the reporting and curfew requirements.[36] The order remains in force until December 2008.

2.1.2. Other Australian States and Territories

Preventative detention regimes have been enacted in all Australian States and Territories to complement the federal scheme.[37]

State and Territory laws all provide for a detention period of up to 14 days for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act that has occurred. Each regime provides for an initial or interim order for a period of 48 hours detention, after which application must be made to a prescribed issuing authority at a hearing in which the person is entitled to legal representation. The regimes also provide for prohibited contact orders while a person is detained. In each of the States and Territories, the detainee is entitled to contact a relevant oversight or complaint handling agency.

There are some notable differences between the New South Wales scheme and other State and Territory laws:

- **Disclosure offences:** With the exception of the Australian Capital Territory and New South Wales, other States and Territories, like the Commonwealth, have made it an offence for prescribed persons to disclose the fact that a person has been detained under an order. Prescribed persons vary between jurisdictions but generally apply to detainees, their lawyers, parents/guardians, interpreters and other 'disclosure recipients'. While disclosure offences in New South Wales apply to persons monitoring communication between a detainee and their lawyer, there is no offence for disclosing the fact a person has been detained and there are no disclosure offences applying to detainees or members of their families.
- **Oversight arrangements:** Queensland and the Australian Capital Territory provide for public interest monitoring in relation to preventative detention. This is discussed in further detail in Chapter 5.

Otherwise, only the Australian Capital Territory legislation is significantly different from the other Australian jurisdictions. It differs in the following respects:

- The court can only make a preventative detention order where detaining the person is the least restrictive way of preventing the specified terrorist act from occurring.[38]
- Police can release the person from the order, however the order then lapses and the person cannot be taken back into custody under the order.[39] Application can be made to reinstate the order where the order lapsed due to the detention of the person under the *Crimes Act 1900* (ACT) or the *Australian Security Intelligence Organisation Act 1979* (Cth). The reinstated order ceases to have effect at the end of the period stated in the original order.[40]
- Children under 18 years of age cannot be detained. All reasonable enquiries must be made to determine a person's age and where there is reasonable belief the person is under 18 they must be immediately released — failure to comply is an offence carrying a penalty of up to two years imprisonment.[41]
- The applicant must provide the legal aid commission with a copy of a preventative detention order application and the commission must appoint a person from the public interest monitor panel.[42] The legal aid commission must provide assistance to the person subject to the application by arranging for a suitable lawyer to represent them.[43]
- Where the application relates to person with impaired decision-making ability, the applicant must notify the public advocate, who is entitled to attend the hearing.[44]
- The facts and other grounds relied on in the application must not have been obtained, directly or indirectly, through torture.[45]

We also note the comments of the Queensland Corrective Services in its submission to our review, indicating it has introduced specific procedures for the proper management of persons detained under the Queensland preventative detention regime.[46] The procedures outline the roles and responsibilities of correctional officers and others while a person is detained in a correctional centre. Queensland Corrective Services indicated the legislation and supporting procedures made it clear any exercise of the powers is subject to review by the court, and that a detainee is able to contact an official visitor, the Ombudsman and the Crime and Misconduct Commission.

We are not aware of any preventative detention orders having been made in any Australian States or Territories.

2.1.3. United Kingdom

Section 41 of the *Terrorism Act 2000* (UK) provides for the detention of suspected terrorists, without charge, for up to 28 days.[47] A 'terrorist' is a person who has committed a terrorist offence, or 'is or has been concerned in the commission, preparation or instigation of acts of terrorism.'[48]

The person can be detained by police, for up to 48 hours, if detention is necessary to obtain or preserve relevant evidence, or pending: the examination or analysis of relevant evidence, a decision as to whether the detainee should be charged, or a decision to deport the detainee. The relevant investigation has to be conducted diligently and expeditiously, and the person's detention has to be reviewed at least every 12 hours, by a senior police officer who is independent from the investigation.

Detention beyond the initial 48 hours must be authorised by a judge, who must be satisfied it is necessary to obtain or preserve relevant evidence. The detainee may be legally represented, and is entitled to make submissions to the court, although certain information may be withheld from the detainee and the detainee's legal representative. A detainee must be released immediately if the grounds for continued detention cease to apply.

When it came into force, the *Terrorism Act 2000* (UK) provided for a maximum detention period of 7 days. In 2003, this was increased to 14 days.[49] In 2005, the government introduced a Bill into Parliament proposing a maximum detention period of 90 days. The government based its proposal on advice from police that 14 days was not long enough to undertake investigative activities such as making inquiries in other countries, examining and decrypting computer data, analysing forensic evidence, establishing the identity of suspects, and obtaining data from mobile phones.

The proposed maximum detention period of 90 days was widely criticised, and ultimately, was not enacted. However, Parliament did accept the case for extending the maximum detention period beyond 14 days, and increased the maximum period to 28 days. The law as it currently stands provides for detention without charge for up to 28 days, although the person's continued detention has to be assessed at least every seven days by a judge.[50]

This may change with the Counter-Terrorism Bill 2007–8, which was passed by the House of Commons in June 2008 and is currently before the House of Lords. The Bill allows for the pre-charge detention of terrorist suspects to be extended from 28 days to 42 days. It provides the Secretary of State with reserve powers to extend detention beyond 28 days where the Secretary of State is satisfied a grave exceptional terrorist threat has occurred or is occurring.[51] The Secretary of State must lay a statement before the Parliament saying he or she is satisfied there is a grave exceptional terrorist threat, the reserve power is needed, the need for the power is urgent and the order is compatible with convention rights.[52]

We will continue to monitor legislative changes in the United Kingdom.

We note the United Kingdom Home Affairs Committee has inquired into the police case for increasing the maximum period of detention to 90 days. In its July 2006 report, the Committee concluded that while there was no evidence that a maximum detention of 90 days was essential, the 28 day maximum could in future prove inadequate. The Committee recommended stronger judicial oversight of detention without charge, and recommended an independent committee be created to keep the maximum detention period under review.

The Committee found that the nature of terrorism meant that suspects were arrested earlier than they otherwise would be, in order to protect the public, by preventing a terrorist act being committed:

> *The change in the nature of the terrorist threat has led to an increasing number of cases in which the arrest has come earlier than would be otherwise the case, because these arrests are primarily intended to protect the public by disrupting terrorist conspiracies.*[53]

The Committee also commented that detention for the purpose of preventing a terrorist act is significantly different from detention for the purpose of gathering evidence of an offence which has already been committed. It described prevention of terrorism as an 'important new purpose of pre-charge detention', which should be reflected in the legislation:

> *One of the key conclusions of our inquiry is that the preventative element of some arrests under the Terrorism Acts should be given clearer and more explicit recognition... Preventative detention is a significant new development, and one that was not made explicit during the passage of the Bill, during which extended detention was primarily justified on the grounds of the time needed to collect and analyse evidence.*[54]

However, in its response to the report, the Government emphasised that prevention of terrorism is *not* the rationale for detention without charge:

> *The idea that arrest and detention of some terrorist suspects is carried out solely as a 'preventative' measure, is misleading. While an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, the legislation does*

not allow continued detention on this basis. Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence, or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings.

There is an important distinction between the need for extended periods of pre-charge detention and the need for a separate power of arrest.[55]

The Government commented that there may be some value in having a 'preventative arrest power', but indicated that section 41 of the *Terrorism Act 2000* (UK) did not actually permit this. Indeed, the Act states that continued detention can only be authorised if it is necessary to obtain or preserve relevant evidence, or pending some other decision. It does not authorise detention for the purpose of preventing a terrorist offence being committed.

In July 2007, the United Kingdom Joint Committee on Human Rights reported on the 28 day period available for detention without charge. The Committee was unconvinced by the case for an increase in the period of pre-charge detention from 28 days, and recommended stronger judicial safeguards and parliamentary oversight. The Committee considered the Parliament, rather than the courts, should set an upper limit on detention, based on consideration of the evidence contained in the report. The Committee concluded that post-charge questioning and the use of telephone intercept material in criminal proceedings would be more useful than extending the pre-charge detention period.[56]

In June 2008 the Committee reported on the proposed use of reserve powers to extend the period of pre-charge detention to 42 days, as is currently being considered by the Parliament.[57] The Committee held the view that 'no amount of additional parliamentary or judicial safeguards can render the proposal for a reserve power of 42 days' pre-charge detention compatible with the right of a terrorism suspect to be informed "promptly" of the charge against him under Article 5(2) European Convention on Human Rights'.[58] They noted Article 15 of the European Convention on Human Rights already provides for the possibility of extending the period of pre-charge detention in a case of genuine public emergency threatening the life of a nation. The Committee stated that if there was a genuine emergency the Government should make its case for a derogation from the UK's obligations under Article 15, rather than seek new legislation. The Committee's view was that the Government had not made its case.[59]

A comparison of the United Kingdom and New South Wales regimes shows significant differences in the rationale for detention. There are two possible purposes for detaining a person in New South Wales — to prevent an imminent terrorist act, or to preserve evidence of a terrorist act which has already been committed. In the United Kingdom, by contrast, the purpose of detention is to enable police to keep a suspect in custody while the investigation continues, with a view to charging the suspect at the end of the detention period. While questioning is generally prohibited under the New South Wales legislation, the United Kingdom legislation specifically envisages that detainees will be questioned and may be subject to other types of investigative procedures, like DNA sampling.

To date, no person has been detained under the New South Wales preventative detention provisions. However, police in the United Kingdom have used their detention without charge powers on a number of occasions. Between January 2004 and September 2005, 36 people spent more than a week in detention under the *Terrorism Act 2000* (UK). Of these, 10 were released without charge at the end of the detention period.[60] Between July 2006 and July 2007, 10 people were held for over 14 days in detention under the *Terrorism Act 2000* (UK). Of these, seven were charged. The other three were released without charge, it appears at the end of the maximum detention period of 28 days.[61] During 2006, a total of 185 people were arrested under the *Terrorism Act 2000* (UK) and associated legislation, 94 of whom were released without charge.[62]

The United Kingdom has introduced other legislative measures which aim to prevent terrorist activity. The *Anti-Terrorism, Crime and Security Act 2001* (UK) provided, among other things, for the indefinite detention of foreign nationals suspected of terrorism. In 2004, the House of Lords held this was incompatible with the European Convention on Human Rights. The court found the law discriminated against foreign nationals and was disproportionate to the threat of terrorism.[63]

Following this ruling, Parliament enacted the *Prevention of Terrorism Act 2005* (UK), which allows control orders to be imposed on people suspected of being involved in terrorist activity. Control orders impose conditions upon individuals ranging from prohibitions on access to specific items or services, such as the internet, and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews. The Act provides for two types of control orders, those which derogate from the European Convention on Human Rights, and those which do not. Non-derogating orders can be made by the Secretary of State with the permission of the courts, and derogating orders can be made by the courts on application by the Secretary of State. To make a non-derogating order, or to apply for a derogating order, the Secretary of State must have reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, and must consider that it is necessary, for the protection of members of the public, to make a control order imposing obligations on that individual. To make a derogating order, the court must be satisfied the individual has been involved in terrorism, it is necessary to impose conditions on him to protect the public, and the risk is associated with a public emergency in which there

is a designated derogation under Article 5 of the European Convention on Human Rights.[64] Control orders may be imposed for a period of up to 12 months, but can be renewed. Breach of a control order is a criminal offence.

Control orders made under the *Prevention of Terrorism Act 2005* (UK) were challenged in the following cases:

- *Secretary of State for the Home Department v JJ and others* involved six men who were subject to control orders. The men were only allowed out of their small flats between 10am and 4pm each day, and were only allowed within a permitted area. They were electronically tagged, and had to report to the monitoring company when they left and returned to their homes. They could not meet any person outside the house, or receive any visitors, without the approval of the Home Office. Police could enter the controlled person's flat at any time, to search the place, remove any items, install equipment or take the controlled person's photograph. The men were not allowed to use mobile phones or the internet, or have more than one bank account, and had to provide monthly bank statements to the Secretary of State. The High Court held that the obligations imposed by the control orders were so severe they amounted to deprivation of liberty, contrary to Article 5 of the European Convention on Human Rights. The Court quashed the orders on the basis that the Secretary of State had no power to make them.[65] The Secretary of State appealed against the decision. The Court of Appeal dismissed the appeal, agreeing that the orders amounted to a deprivation of liberty contrary to Article 5. The court noted, however, that the Secretary of State could impose new control orders on the men, provided the new package of obligations did not amount to a deprivation of liberty.[66]
- In *Secretary of State for the Home Department v MB*, the High Court found the procedure for making control orders, as set out in the *Prevention of Terrorism Act 2005* (UK), was incompatible with the right to a fair hearing required by Article 6 of the European Convention on Human Rights, on the basis that the court performed only the limited function of considering whether the Secretary of State's decision was flawed; it could not review the merits of the case; it was required to apply a particularly low standard of proof; and reach its decision on the basis of closed evidence, of which the controlled person was not aware and was therefore not able to contest. The court described this procedure as 'conspicuously unfair', and concluded that the controlled person's rights 'were being determined not by an independent court… but by executive decision-making, untrammelled by any prospect of effective judicial supervision.'[67] The Secretary of State appealed against the decision. The appeal was allowed, on the basis that the provisions for judicial review of non-derogating control orders were compatible with Article 6.[68]

2.1.4. Views on the UK model

In their submission to our review the Centre of Public Law did not consider the United Kingdom model should be adopted in New South Wales, because of the broader range of investigative and prosecution powers available to Australian agencies.[69] The Centre also noted that detention regimes in the United Kingdom, as well as other jurisdictions such as Victoria, the Australian Capital Territory and Canada, "are all subject to a significant safeguard that is absent in NSW — a charter of rights".

New South Wales counter terrorism police submitted the detention after arrest model used in the United Kingdom is a better system than preventative detention.[70] They referred to the benefits for police in being allowed to interview the suspect and obtain and use forensic samples. They also considered the United Kingdom's detention powers 'are balanced by stringent judicial oversight'.

Victoria Police submitted the UK model, 'seems to fit the criteria from an operational policy perspective' for reasons including:

- the model uses detention to prevent terrorist acts and enables investigators to gather evidence with a view to charging
- a 28 day timeframe is more in keeping with difficulties in counter terrorism related investigations which can encounter encrypted computers, convoluted communications networks and internet materials
- a 48 hour timeframe for detention by police with 12 hourly review by an independent officer is appropriate and easier than having to apply for a court order
- detainees can be questioned about their involvement in the alleged offence, and
- there is no 'imminence' requirement, so people suspected of involvement in planned terrorist acts can be taken into custody earlier.

We note there are various investigative detention regimes available to state and federal law enforcement agencies investigating suspected terrorism offences, which are further discussed under section 3.11. below. These alternatives reduce the force of any argument to change the preventative detention scheme to investigative detention.

2.1.5. Canada

In 2001, the Criminal Code of Canada was amended to provide for warrantless arrests by 'peace officers' for up to 24 hours and a maximum detention period of 72 hours. This was designed as a preliminary step towards the imposition of a 'recognizance with conditions'.[71] A person could be taken into custody in two circumstances:

- If 'exigent circumstances' exist, so that it is impractical to lay an information before the court, an officer may arrest a person without a warrant where the officer believes on reasonable grounds that a terrorist activity will be carried out and 'suspects on reasonable grounds that the detention of the person… is necessary to prevent a terrorist activity.'
- Where there are no 'exigent circumstances', but the officer believes that a terrorist activity will be carried out and that either the arrest or the imposition of recognizance with conditions on the person is necessary to prevent the terrorist activity, they must lay an information before the court. The judge may then issue a summons or, if it is considered necessary in the public interest, issue an arrest warrant.

The person taken into custody had to be brought before a provincial judge within 24 hours, or if no judge was available within 24 hours, as soon as possible. The judge would order the release of the person, unless the peace officer could show that detention was necessary; either to ensure the person appeared at their next hearing, to protect the safety of the public or witnesses, or for 'any other just case' including maintaining confidence in the administration of justice. This is the same general formula that is used for bail in the Canadian system. If the person continued to be detained, then the hearing to determine whether recognizance conditions should be imposed had to occur within 48 hours, bringing the maximum time in detention to 72 hours. A recognizance could be made by the judge that the person keep the peace and be of good behaviour, and comply with any other reasonable conditions prescribed in the recognizance, for a period of up to 12 months. Annual reports by the Attorney General with respect to the use of the preventative arrest powers had to be submitted to the Canadian Parliament (along with reports by the responsible Minister concerning the number of arrests without warrant).[72]

The provisions were due to expire in 2007, unless extended by Parliament.[73] A 2006 interim report by the Standing Committee on Public Safety and National Security recommended that the provisions remain in force for another five years, and be subject to further review.[74] However, Parliament decided not to extend the measures, so they are no longer in force.[75]

2.2. Covert searches in other jurisdictions

2.2.1. Commonwealth

While a federal covert search warrant scheme has been proposed there is currently no federal scheme in force. In November 2006 the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth) was introduced. It proposed to allow police officers to enter and search premises covertly, to prevent or investigate terrorism or other serious Commonwealth offences, 'without giving notice to the occupier of the premises until operational sensitivities allow.'[76] The proposed scheme was similar to that in New South Wales. The main differences included:

- Warrants are referred to as 'delayed notification search warrants' rather than covert search warrants. Notification is generally delayed for six months from the time of the search but can be delayed for a further 18 months if there are grounds.
- Warrants can be issued in relation to a number of Commonwealth offences, and state offences with a federal aspect, as well as terrorism offences. The Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Bill, and recommended that the offences in relation to which warrants can be issued be limited to organised crime, terrorism and offences involving death or serious injury with a maximum penalty of life imprisonment.[77]

When membership of a terrorist organisation became an offence under New South Wales law, the then Attorney General, Bob Debus explained:

> *The Government considers that this provision is necessary as a temporary measure because membership of a terrorist organisation is not an offence known to New South Wales law, and New South Wales is constitutionally prevented from enacting a covert search warrant scheme for the investigation of Commonwealth terrorism offences. Honourable members will note that this offence is subject to a sunset clause after two years. It is hoped in that time that the development of a covert search warrant scheme can be dealt with at the national level by the Commonwealth and other Australian jurisdictions, and a federal scheme enacted... This would be a more appropriate arrangement, given the 2002 reference of power that New South Wales and the other States*

made to the Commonwealth in relation to terrorism; and if that should occur, New South Wales would consider repealing this scheme in order to avoid constitutional and operational inconsistencies.[78]

However, the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill lapsed with the 2007 federal election and at the time of writing no alternative federal scheme has been proposed.

2.2.2. Other Australian States and Territories

Victoria, Queensland, Northern Territory and Western Australia have similar covert search warrant powers to New South Wales, although there are some key differences. The most notable departures include:

- Unlike New South Wales, the other jurisdictions do not include membership of a terrorist organisation as grounds for issuing a covert search warrant.
- In Queensland, covert search warrants are available in relation to organised crime and certain other serious offences, as well as terrorism offences.[79]
- In Victoria, Queensland, Northern Territory and Western Australia, there do not appear to be any provisions requiring occupants of searched premises to be notified of the search. In New South Wales, occupants must be notified of the search within six months, or longer where the issuing judge is satisfied there are reasonable grounds for postponement.[80]

In Victoria, police can apply to the Supreme Court for a covert search warrant under the *Terrorism (Community Protection) Act 2003* (Vic). The grounds for application are similar to New South Wales although the suspicion or belief need not relate to a specific terrorist act.[81] The covert search warrant authorises entry into the premises, 'or any other specified premises adjoining or providing access to the premises'. The court can direct that anything seized during the execution of the warrant be returned to the owner, if it can be returned consistently with the interests of justice.[82] Except where provided, the rules of the *Magistrates Court Act 1989* (Vic) are to be observed and applied to warrants under this Act.[83] The person to whom the warrant is issued must make a report to the court no later than seven days after the warrant expires. It is an offence not to provide the court with this report, carrying a penalty of one year imprisonment. The Chief Commissioner must submit an annual report relating to covert search warrants to the relevant Minister who must table the report in Parliament within 12 sitting days.

In Queensland, Chapter 9 of the *Police Powers and Responsibilities Act 2000* (Qld) provides for covert search warrant powers.[84] A police officer of at least the rank of inspector can apply to a Supreme Court judge for a covert search warrant. The applicant must advise the Public Interest Monitor of the application under arrangements decided by the monitor. The judge must hear the application in the absence of the person who is the subject of the application or anyone likely to inform that person. The factors the judge must take into consideration are similar to those in New South Wales. In addition, the judge must take into account any submissions by the Public Interest Monitor. In issuing a warrant, the judge may impose any conditions which are necessary in the public interest. The requirements for the contents of the warrant are similar to New South Wales but also state, that 'if practicable, the search must be videotaped'.[85] The powers are similar to those in New South Wales, except they do not include a power of entry to adjoining properties, except to 'pass over, through, along or under another place to enter the relevant place'.[86] A report must be presented to the court which issued the warrant, or the Public Interest Monitor, as stated on the warrant, within seven days of the warrant being executed.[87]

In the Northern Territory, police can apply for covert search warrants under Part 3A of the *Terrorism (Emergency Powers) Act 2003* (NT). The scheme is similar to that in New South Wales, except there is no provision requiring occupants to be notified of the search.

In Western Australia, Part 3 of the *Terrorism (Extraordinary Powers) Act 2005* (WA) provides for covert search warrant powers. Police can apply to a judge for a covert search warrant on similar grounds to New South Wales. The judge must not issue a covert search warrant that confers a power to enter an adjoining place, unless satisfied that it is reasonably necessary to facilitate entry into the target place, to prevent the search from being frustrated or jeopardised, or for any other good reason.[88] A covert search warrant allows an officer to conduct a basic search or strip search of any person who is in the target place when the warrant is being executed for any thing or class of thing described in the warrant.[89] A report must be presented to the issuing judge within seven days of either serving the warrant or its expiry date. It is an offence not to provide the report with a penalty of one year imprisonment. The Commissioner must present an annual report containing information relating to covert search warrants to the Minister. The report can form part of the *Financial Administration and Audit Act 1985* (WA). If it is presented separately, it must be tabled in Parliament within 30 days.

Submissions to our review did not indicate strong support for adopting any of the features of covert search warrant schemes in other jurisdictions.

Endnotes

[30] *R v Thomas* [2006] VSCA 165.
[31] Order, Federal Magistrate Mowbray, Federal Magistrates Court of Australia in Canberra, 27 August 2006.
[32] *Thomas v Mowbray* [2007] HCA 33 (2 August 2007).
[33] 'Jack Thomas order relaxed', the Australian online, 24 August 2007.
[34] 'Thomas faces new trial', the Sydney Morning Herald online, 16 June 2008.
[35] Jabbour v Hicks [2007] FMCA 2139 (21 December 2007).
[36] Magistrate confirms revised Hicks control order, ABC News online, 19 February 2008.
[37] See *Terrorism (Preventative Detention) Act 2005* (Qld), *Terrorism (Community Protection) (Amendment) Act 2006* (Vic). *Terrorism (Preventative Detention) Act 2006* (WA), *Terrorism (Preventative Detention) Act 2005* (SA), *Terrorism (Preventative Detention) Act 2005* (Tas) and *Terrorism (Emergency Powers) Act 2003* (NT) and *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).
[38] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.18(4)(c).
[39] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.42.
[40] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss.27, 28, 29.
[41] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.11.
[42] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.14.
[43] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.52(4).
[44] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.15.
[45] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.17(1)(f).
[46] Queensland Corrective Services submission, 29 May 2007.
[47] This may be amended to allow for up to 42 days pre-charge detention. At the time of writing, the Counter Terrorism Bill 2007–8 was before the UK Parliament proposing an extension of the period to 42 days.
[48] *Terrorism Act 2000* (UK) s.40.
[49] *Criminal Justice Act 2003* (UK) s.306.
[50] *Terrorism Act 2006* (UK) s.23.
[51] Counter-Terrorism Bill 2007–8 (UK) ss.23 and 24.
[52] Counter-Terrorism Bill 2007–8 (UK) s.27.
[53] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 93.
[54] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 94.
[55] United Kingdom, Government Reply to Home Affairs Committee Report, *Terrorism Detention Powers*, September 2006, at p10.
[56] Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, Joint Committee on Human Rights, July 2007.
[57] Counter-Terrorism Policy and Human Rights: 42 Days and Public Emergencies, Joint Committee on Human Rights, June 2008.
[58] The UK was an original signatory and ratifying state in 1951 of the European Convention of Human Rights.
[59] Counter-Terrorism Policy and Human Rights: 42 Days and Public Emergencies, Joint Committee on Human Rights, June 2008, p4.
[60] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 133.
[61] United Kingdom, House of Commons Hansard Written Answers for 16 July 2007, www.parliament.uk, accessed 6 September 2007.
[62] United Kingdom, *Report on the Operation in 2006 of the Terrorism Act 2000*, Lord Carlile of Berriew QC, June 2007.
[63] See *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[64] *Prevention of Terrorism Act 2005* (UK).
[65] *Secretary of State for the Home Department v JJ; KK; GG; HH; NN and LL* [2006] EWHC 1623 (Admin).
[66] *Secretary of State for the Home Department v JJ; KK; GG; HH; NN and LL* [2006] EWCA Civ 1141.
[67] *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin).
[68] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.
[69] University of NSW, Gilbert and Tobin Centre of Public Law submission, 13 June 2007.
[70] Counter Terrorism and Special Tactics Command submission, December 2007.
[71] Criminal Code of Canada s.83.3. A 'peace officer' refers to a range of prescribed persons including police, correctional service officers, customs officers, immigration officers, fisheries officers, a mayor, a pilot in command of an aircraft, a sheriff's officer or a justice of the peace.
[72] Criminal Code of Canada s.83.31. See Public Safety and Emergency Preparedness Canada, *Annual Report Concerning Recognizance with Conditions: Arrests without Warrant*, December 2004 to December 2005. Available at www.psepc.gc.ca, accessed 17 October 2006.
[73] Criminal Code of Canada s.83.32.
[74] Canada, Standing Committee on Public Safety and National Security, *Review of the Anti-Terrorism Act Investigative Hearings and Recognizance with Conditions Program*, October 2006. Available at www.parl.gc.ca, accessed 21 November 2006.
[75] Ian Austen, 'Canadian Parliament Decides to Let 2 Measures Passed after 9/11 Expire', www.nytimes.com, accessed 1 March 2007.
[76] Commonwealth Parliament, *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 Explanatory Memoranda*, 29 October 2006, p2.
[77] Commonwealth of Australia, Standing Committee on Legal and Constitutional Affairs, Report on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, 7 February 2007, Recommendation 6.
[78] The Attorney General, Mr Bob Debus, Legislative Assembly Hansard, 9 June 2005.
[79] *Police Powers and Responsibilities Act 2000* (Qld) s.212.

[80] *Terrorism (Police Powers) Act 2002* s.27U.
[81] *Terrorism (Community Protection) Act 2003* (Vic) s.6(1A).
[82] *Terrorism (Community Protection) Act 2003* (Vic) s.9(2).
[83] *Terrorism (Community Protection) Act 2003* (Vic) s.9(3).
[84] See *Police Powers and Responsibilities Act 2000* (Qld) ss.211 to 220.
[85] *Police Powers and Responsibilities Act 2000* (Qld) s.216(e).
[86] *Police Powers and Responsibilities Act 2000* (Qld) s.219(1)(b).
[87] *Police Powers and Responsibilities Act 2000* (Qld) s.220.
[88] *Terrorism (Extraordinary Powers) Act 2005* (WA) s.26(2).
[89] *Terrorism (Extraordinary Powers) Act 2005* (WA) s.27(f).

Chapter 3. Preventative detention

At the time of writing, no preventative detention orders had been sought in New South Wales, and it appears preventative detention powers have not been used in any Australian jurisdiction. This chapter reports on the Ombudsman's activities in scrutinising the development of policies and procedures to facilitate the exercise of preventative detention powers by relevant New South Wales agencies.

3.1. Implementation of the legislation

3.1.1. Agency procedures and interagency agreements

Although the preventative detention legislation has been in force since 2005, the key agencies are still putting in place systems for exercising preventative detention powers.

Both the NSW Police Force and the Department of Corrective Services have drafted Standard Operating Procedures (SOPs), but neither have finalised or implemented them. The NSW Police Force is currently negotiating a Memorandum of Understanding with the Australian Federal Police on preventative detention as it is possible that a person will be taken into preventative detention under a Commonwealth order, and then transferred into NSW Police Force custody, given the longer detention periods available under the State scheme. The NSW Police Force and the Department of Corrective Services also intend to enter into a Memorandum of Understanding on preventative detention.[90] The NSW Police Force and the Department of Corrective Services have advised they will finalise their SOPs on preventative detention once the relevant agreements with the AFP and each other are in place. The Department of Corrective Services also needs to revise its draft preventative detention policy in light of legislative amendments made in 2007.[91] Although there is no formal policy in place, the intention of the agencies is that a person detained under an interim order would be taken to a nearby police station and entered into custody, and if the order is confirmed, police may transport the detainee to a correctional centre.

The Department of Juvenile Justice initially indicated it would not be responsible for detaining any person subject to a preventative detention order, as any 16 or 17 year old preventative detainee would be detained in a juvenile correctional centre, which is administered by the Department of Corrective Services. However, in its submission to our review, the Department of Juvenile Justice advised that in light of legislative changes made by the *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Act 2007*, 16 or 17 year olds subject to preventative detention orders may in fact be detained in Department of Juvenile Justice facilities. In particular, while it is expected male preventative detainees aged 16 or 17 would be detained at Kariong Juvenile Correctional Centre, it is possible a male detainee may be detained in a juvenile justice centre, 'due to regional location or for any other reason'. Further, female preventative detainees aged 16 or 17 would be detained in a juvenile justice centre.[92] In light of this advice we have requested details of arrangements put in place to facilitate preventative detention in juvenile justice facilities, including policies or other material relating to the implementation of the legislation. The Department of Juvenile Justice indicated discussions are underway with the NSW Police Force and the Department of Corrective Services to give effect to preventative detention arrangements through a Memorandum of Understanding.[93]

In their response to our consultation draft report the Ministry for Police indicated there was a working party including the Department of Juvenile Justice, the Department of Corrective Services and the NSW Police Force, involved in negotiations concerning a draft memorandum of understanding.[94] They indicated the draft memorandum of understanding would be reflected in any NSW Police Force SOPs.

In its submission to our review, the Police Integrity Commission expressed concern that police had yet to finalise a draft policy on their use of preventative detention powers. Given the nature of the powers, the Commission considered the Commissioner of Police 'should be requested to address this as a matter of priority and within a defined timeframe.'[95] The Council for Civil Liberties suggested that the draft police operating procedures should be released to the public before being adopted.[96]

We agree with the Police Integrity Commission that it is of concern that preventative detention powers have been in force since 2005, but the relevant agencies have not put systems in place to facilitate the exercise of the powers, should they be used.

We appreciate there may be security issues in making available, in their entirety, relevant agency procedures or agreements. However, to the extent this information can be published or made available without compromising operations, our own view, consistent with our views about other information held by government agencies, is that this should occur. Until the policies are finalised, we make no specific recommendations concerning this.

Recommendations

1. The NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority.
2. The NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice finalise Standard Operating Procedures on preventative detention as a matter of priority.

3.1.2. Interaction between Commonwealth and NSW preventative detention schemes

In its submission to our review, the Centre of Public Law commented:

> *The interaction of the Commonwealth State schemes remains confusing. This is contributed to by the disparity between the schemes in different jurisdictions. However, we wish to commend the NSW Parliament on adopting a judicial scheme that provides additional safeguards.*[97]

However, the Commonwealth Attorney General's Department submitted there is a sound level of consistency between the Commonwealth and State and Territory preventative detention regimes.[98] We will consider the interaction of the Commonwealth and New South Wales schemes further as the AFP, NSW Police Force and the Department of Corrective Services develop arrangements for exercising preventative detention powers.

3.1.3. Appointment of senior officers to oversee detention orders

The Terrorism (Police Powers) Act states that a senior police officer must be appointed to oversee the functions of the preventative detention order. The nominated officer must be of or above the rank of superintendent, and must not have been involved in the application for the order.[99] The nominated officer must ensure compliance with the obligation to apply for a preventative detention order or related prohibited contact order to be revoked where the grounds for the order cease to exist. The officer must also consider any representations made by the detained person, the person's lawyer or (for those under 18 or incapable of managing their affairs) other contact person, in relation to the exercise of functions under the order or application for the order to be revoked.

The NSW Police Force Counter Terrorism and Special Tactics Command advised it would train about eight superintendents in preventative detention, so there will be a pool to draw from, should the powers be used. Some superintendents would be from the Counter Terrorism and Special Tactics Command and others would be from metropolitan local area commands. It is likely the nominated senior police officer would change during any period in which a preventative detention order is in force as the order runs continuously, and officers would go on and off duty according to their rostered shifts. It is likely only substantive superintendents (rather than acting superintendents) will be used.[100]

3.1.4. Submissions from the key agencies

In its initial submission to our review the Ministry for Police, representing the law enforcement portfolio, noted the preventative detention powers had not been used and on that basis declined to comment for the purposes of our review.[101] The Ministry advised it had raised a range of policy issues relating to the preventative detention regime with the Attorney General, but did not provide any details.

The Police Ministry did provide a response to the recommendations made in our consultation draft of this report. Those comments have been addressed in the report and represent the police portfolio position.

The Ministry expressed concern about the extent of comment made about preventative detention powers in this report, given that the powers have not been exercised. The Ministry stated, 'the report acknowledges that the preventative detention orders have not been used, yet the report includes an entire chapter on preventative detention'.[102]

Our view, as expressed to the Ministry, is that we have been tasked by Parliament to review the implementation and operation of the powers and, given the powers have not been exercised, our duty is to highlight any relevant concerns identified in submissions we received, and the review activities we have conducted. In addition, our understanding is that our statutory role is not limited to the actual use of prescribed powers but encompasses an examination of issues concerning the limited use, or the lack of use of those powers. Submissions to our review

identified issues which could potentially impact on the decision making of police as to whether or not they exercise preventative detention powers. In our view it is appropriate that we canvass these issues in our review.

The views of individual police officers attached to the Counter Terrorism and Special Tactics Command have been referred to in this report. These views were expressed in a submission prepared by the command in response to our issues paper, but were not included in the police portfolio submission. We asked for a copy of the command's submission and were provided with it. We also sought the views of individual officers from the command during a series of meetings.

In response to our consultation draft the Ministry expressed concern about the representation of views of individual officers where those views did not reflect the police portfolio position. Their submission stated, 'There are various references to informal conversations with the Counter Terrorism and Special Tactics Command (CT&STC) personnel who confirm that they did not believe this advice would be included in the report. They presented this information as personal opinion. The comments do not reflect the Police Portfolio position'.[103]

We note that where references are made to views expressed by individual officers, or in submissions provided by individual commands, they are personal opinions and do not reflect the position of the police portfolio.

3.2. What powers are available?

3.2.1. Police powers

Police have the following powers when executing preventative detention orders:

- Police may request any person to disclose his or her identity if they believe on reasonable grounds that the person may be able to assist in executing a preventative detention order. It is an offence not to comply with such a request, or to give false information.[104]
- Police may, if they believe on reasonable grounds that the person the subject of an order is on any premises, enter and search the premises for the purpose of taking the person into custody. Police can use such force as is reasonably necessary to enter the premises. They can only enter premises at night when it would not be practicable to do so during the day, or entry at night is necessary to prevent a terrorist act or preserve evidence relating to a terrorist act.[105]
- When taking a person into custody pursuant to a preventative detention order, police can search the person and anything in possession of the person, and seize any evidence relating to a terrorist act, and anything which would present a danger to the person, could assist the person to escape, or could be used to contact another person.[106]

In our issues paper, we asked whether police powers to deal with detainees are sufficient and appropriate. NSW counter terrorism police consider the powers provided to police are adequate and necessary to execute a preventative detention order.[107] Victoria Police responded that preventative detention powers in New South Wales, which are similar to those in Victoria, are appropriate, and 'appear to be mindful of the implications of persons being detained without charge, the safety and operational considerations of police faced with executing such an order.'[108]

3.2.2. Correctional powers

Section 26X of the Terrorism (Police Powers) Act provides that police can arrange, with the Commissioner of Corrective Services, for a person in preventative detention to be detained at a correctional centre, and states that 'the preventative detention order is taken to authorise the person in charge of the correctional centre to detain the subject at the correctional centre while the order is in force in relation to the subject.'[109] Prior to amendments to the Act in 2007, it did not otherwise confer powers on correctional officers for dealing with detainees.

When the legislation was enacted, the Department of Corrective Services raised concerns that correctional officers may not be sufficiently authorised to deal with people held under preventative detention orders. Most of the powers conferred on correctional officers are contained in the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2001*. These include powers to use reasonable force, for example to search an inmate, or to prevent an inmate from escaping, and powers to give directions to inmates for the purpose of maintaining good order and discipline in the correctional centre.[110] They also provide for the security classification of inmates, directions for holding an inmate in segregated custody, and permit compulsory medical treatment of inmates.[111] Similarly, the *Children (Detention Centres) Act 1987* and *Children (Detention Centres) Regulation 2005* confer powers and functions on juvenile justice officers to deal with juvenile detainees.

The Department of Corrective Services sought advice from the Crown Solicitor's Office to clarify whether the Crimes (Administration of Sentences) Act applies to people held in preventative detention. The Crown Solicitor's Office concluded that the Crimes (Administration of Sentences) Act did not apply to people held in preventative detention, and advised that correctional officers did not have the authority to exercise the functions available to them under the Crimes (Administration of Sentences) Act in relation to people held in preventative detention. Nor did they have the authority to exercise the functions set out in the Terrorism (Police Powers) Act which are conferred specifically on police officers.[112] This was an issue we highlighted in our April 2007 issues paper, wherein we sought submissions about the adequacy of correctional officers' powers.

In June 2007, the NSW Parliament passed the Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007 to give effect to the original intention of the legislation, which was that people held in correctional facilities on preventative detention orders be subject to the same rules regarding their care, control and management as other inmates.[113] The Act now provides that the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* generally apply to any persons detained under a preventative detention order. They do not apply where provisions are inconsistent with a requirement under Part 2A of the Terrorism (Police Powers) Act, or an arrangement made under that Act for the person's detention. Entitlements to communication or visits under the Crimes (Administration of Sentences) Act or the Children (Detention Centres) Act do not apply unless they are provided for under Part 2A of the Terrorism (Police Powers) Act. Further, the Government intends to pass regulations which would specify other provisions of the Crimes (Administration of Sentences) Act and the Children (Detention Centres) Act which would not apply to people held in preventative detention.[114] The Department of Corrective Services anticipates the regulations will only exempt provisions of the Crimes (Administration of Sentences) Act which are inconsistent with the objectives of Part 2A powers.[115] We understand the regulations are being drafted by the Attorney General's Department in consultation with the Department of Corrective Services, and were expected to be enacted before the end of 2007.[116] At the date of writing, the regulations had not yet been enacted.

We will continue to monitor this issue and will include further information in our final report on preventative detention.

3.3. When can preventative detention orders be made?

A preventative detention order can be made against a person:

- to prevent an imminent terrorist act, or
- to preserve evidence relating to a terrorist act which has recently occurred.

To detain a person in order to prevent a terrorist attack, there must be reasonable grounds to suspect the person will engage in a terrorist act, possesses a thing connected to the preparation of a terrorist act or has done an act in preparation for or planning a terrorist act. The order can only be made if doing so would substantially assist in preventing a terrorist act occurring and detaining the person is reasonably necessary for that purpose. The suspected terrorist act must be imminent and, in any event, be expected to occur at some time within 14 days.[117]

To detain a person in order to preserve evidence of a terrorist act that has occurred, an order can be made if the terrorist act has occurred in the last 28 days, it is necessary to detain the person to preserve evidence relating to the act, and the period of detention is reasonably necessary for that purpose.[118] The location of the terrorist act could be in New South Wales or elsewhere.

3.3.1. Utility of preventative detention powers

A range of stakeholders have expressed doubts about the utility of preventative detention powers.

During informal discussions in 2006, New South Wales counter-terrorism police commented that they would prefer to use ordinary investigation and questioning provisions rather than preventative detention orders, to detain a person in relation to an alleged terrorist act. One officer we spoke to commented that the Commonwealth provisions permitted quite lengthy 'dead time', which would, for example, permit law enforcement agencies to conduct inquiries overseas and examine computers for evidence while a person was in detention following arrest for an offence. The officer suggested that a suspect could be detained for quite a long time under those provisions, and in that case there would be no need to use preventative detention powers.[119] At the time of that discussion, the Commonwealth investigation and questioning powers had not been tested. Since then, they have been used to detain a person for 12 days without charge.[120]

Under the Commonwealth law, it is an offence if a person 'does any act in preparation for, or planning, a terrorist act', even if a terrorist act does not occur, or the person's act is not done in preparation for a specific terrorist act. It is also an offence if a person provides or receives training, possesses a thing, or collects or makes a document that is connected with preparation for, the engagement of a person in, or assistance in a terrorist act.[121]

New South Wales counter-terrorism police officers we spoke to on this issue in 2007 again stated that with the availability of these precursor terrorism offences under the Commonwealth legislation, and the requirement that a terrorist act be imminent before police can apply for a preventative detention order, it is unlikely a preventative detention order would ever be useful to prevent a terrorist act. They were of the view that if there is enough evidence to demonstrate reasonable grounds to suspect a person will engage in an imminent terrorist act, or has done an act in preparation for an imminent terrorist act, there would be enough evidence to arrest and detain the person under the ordinary criminal law. They were also of the view that arrest under the ordinary criminal law would be preferable to arrest under a preventative detention order as a person under arrest for an offence can be questioned and asked to participate in other investigative procedures, whereas a person held in preventative detention, while simply removed from the community, cannot be questioned except for very limited purposes not related to the suspected terrorist act. For this reason, they suggested preventative detention is of little operational utility. Officers we spoke to also expressed reluctance to use the powers because preventative detention requires such close supervision, and exposes police to criminal liability for breaching legislative obligations. In their submission to our review counter terrorism police described the overall preventative detention scheme as 'cumbersome, burdensome and difficult to practically implement'.[122]

In its submission to our review, Victoria Police similarly argued that combining the 'reasonable grounds to suspect' threshold with an 'imminence' requirement sets a very high bar for applying for a preventative detention order. Victoria Police commented that from an investigative or operational standpoint:

> *There would seem to be very few circumstances in which this might arise: either, a rapidly developing or recently exposed plot which was well down the path of execution (in any event… within the next 14 days); or a more protracted investigation which has reached a critical juncture where the lack of evidence for a substantive Commonwealth or State offence precludes an arrest, in the face of a realist (sic) threat of attack which is adjudged to be just short of the 'believing on reasonable grounds' arrest criteria.*[123]

Victoria Police commented it is unlikely police would allow a protracted investigation to run up to two weeks before any planned event, and in any case the Commonwealth legislation provides for precursor offences which would enable those involved to be arrested and charged with a substantive criminal offence. The view of Victoria Police was that removing the 'imminence' requirement would make preventative detention orders more effective, as a person could be detained before the planned act reached a critical or dangerous stage.[124]

In its submission, the Centre of Public Law also questioned the necessity of preventative detention laws with reference to existing Commonwealth powers available in preventing terrorist acts from occurring:

> *A person could be charged with and prosecuted for a number of preparatory offences under Division 101 of the Criminal Code (Cth), which would certainly avoid the intended terrorist act from taking place. A suspect could be held in custody pending trial, and could be subject to the presumption against bail for terrorism offences. Additionally, the Australian Security and Intelligence Organisation Act 1979 (Cth) empowers ASIO, where an investigation may be otherwise hampered, to seek a warrant for the detention for seven days of any persons who may have information about a terrorism offence (including its planning). So even if there is not enough evidence to charge a person for offences in Division 101 of the Criminal Code, provision still exists under the law for their detention and questioning about what they know of any planned attack.*[125]

In summary, we note that the preventative detention powers have been in force since 2005. Not only have they not been used, but the key agencies have not put in place the agreements, policies or systems necessary to facilitate use of the powers. Police from both New South Wales and other jurisdictions have expressed doubts about the utility of the powers, in particular because arrest under the ordinary criminal law would be the preferred option. Further, officers have expressed reluctance to use the powers because of the risk of exposure to criminal liability for breaching obligations imposed on them by the Act.

We note that preventative detention orders are also available to preserve evidence of a terrorist act which has occurred within the last 28 days. It appears preventative detention may be more useful for preserving evidence, than for preventing terrorist acts.

We will continue to monitor the issue of the utility or otherwise of the preventative detention powers through the review period, and will include further comment in our final report.

3.3.2. Submissions opposed to preventative detention

While our issues paper focused on practical issues concerning the preventative detention powers, we note that a significant number of submissions to our review disagreed with the retention of preventative detention powers, or called for the repeal of the legislation.[126] The Centre of Public Law for example objected to the use of preventative detention orders and argued:

Preventative detention powers are inconsistent with basic democratic, judicial and rights-based principles. Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct, or where it serves a legitimate protective function and existing powers are insufficient.[127]

Submissions raising concerns or issues about preventative detention powers did so for a range of reasons. Some argued that a person who is involved in terrorist activity should be charged with a terrorism offence and dealt with under the criminal law.[128] Other submissions previously referred to, argued that from an operational perspective it is unlikely that preventative detention would ever be a preferred option.[129] One submission raised concerns about the impact of the powers on community harmony, noting perceptions among Muslim communities in New South Wales they may be unfairly targeted, particularly as they are reportedly experiencing social alienation and cultural stigmatisation.[130] Other submissions argued that providing for detention without charge highlights the need for a charter of rights, available in other jurisdictions such as Victoria, the Australian Capital Territory, the United Kingdom and Canada.[131]

We make no comment on these matters as they concern the policy of having a preventative detention regime. Our review is required to examine the actions of police officers and other officials. These questions are outside the scope of our review as set down in legislation. However, consistent with our practice in previous reviews, and given these submissions have been made to us, we note them here for the consideration of Parliament when considering preventative detention powers.

3.4. Applying for preventative detention orders

A police officer can apply for a preventative detention order where he or she is satisfied there are sufficient grounds. Approval to make the application must be obtained from either the Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner responsible for counter-terrorism operations.[132] Applications must be in writing and sworn, and contain the facts and other grounds of the application, the period of detention sought by the applicant, and information relating to the age of the subject person. Applications must also contain any information relating to previous applications made against the person and information about whether any detention or control order has been made against the person under the Commonwealth Criminal Code or corresponding law of another State or Territory. The applicant must fully disclose all relevant matters of which they are aware, whether favourable or adverse to the making of the order.[133]

3.4.1. Interim and confirmed preventative detention orders

The Supreme Court can make interim and confirmed preventative detention orders.

Interim orders can be made where the court is satisfied with the grounds of the application but cannot proceed immediately to the hearing and determination of the final order.[134] An interim order can be made in the absence of the subject person and without their notice, but the court must fix a time and date for hearing the application for a confirmed order, and must give directions for notice of the date and time for a resumed hearing to be given to the person subject to the detention order. The interim order cannot remain in force for more than 48 hours after the person has been taken into custody.[135] An application and interim order can be made via telephone, fax or other electronic communication where it is required urgently, and a written record of the application and order must be made as soon as practicable afterwards or at the direction of the court.[136]

Confirmed orders can be made after a hearing, where the court is satisfied with the grounds of the application. The subject person is entitled to give evidence and be legally represented at the hearing.[137] However, the court may determine an application in the absence of the person, if the court is satisfied the person was properly notified of the proceedings.[138]

We did not receive any submissions arguing against court oversight. Some were strongly supportive.[139] NSW counter terrorism police regarded judicial approval as desirable, but noted the operational impact of a court application will unavoidably delay the obtaining of preventative detention orders in 'urgent or time critical circumstances'.[140] They noted the current legislation does provide for expedited applications by way of fax, email and the like, and considered this to be appropriate.

PIAC submitted the requirement that preventative detention and prohibited contact orders be made by the Supreme Court provides an important balance to the powers conferred on police and it is appropriate that the court supervise the exercise of the powers.[141] The submission of Victoria Police also commented that the process whereby orders need to be made prior to a person being detained is entirely appropriate.

3.4.2. Access to the evidence or other information on which orders are based

The Act provides that in proceedings for preventative detention orders and prohibited contact orders, the ordinary rules of evidence do not apply:

> *The Supreme Court may take into account any evidence or information that the Court considers credible or trustworthy in the circumstances and, in that regard, is not bound by principles or rules governing the admission of evidence.*[142]

The Act requires that applications for detention orders set out the facts and other grounds on which police consider the order should be made.[143] However, there is no requirement that the person subject to the order be given access to the application in its entirety. Further, a person who is the subject of a preventative detention application may not be given access to all the evidence or other information on which the application is based. This would impact on the person's opportunity to contest the making of the order.

A person in preventative detention may not have access to the information on which an order is based even after it is made. The Act provides that a preventative detention order must set out a summary of the grounds on which the order is made, rather than the grounds in full. Further, information need not be included in the summary if its disclosure 'is likely to prejudice national security.'[144]

'National security' is defined in the *National Security Information (Criminal And Civil Proceedings) Act 2004* (Cth) and means Australia's defence, security, international relations or law enforcement interests. 'Security' means protection from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference, whether committed within Australia or not. 'International relations' means political, military and economic relations with foreign governments and international organisations. 'Law enforcement interests' includes interests in avoiding disruption to national and international efforts relating to law enforcement, criminal investigation and intelligence; protecting informants and other methods of collecting intelligence; and ensuring intelligence and law enforcement agencies are not discouraged from giving information to another nation's government.[145] The *National Security Information (Criminal And Civil Proceedings) Act 2004* (Cth) also provides that 'a disclosure of national security information is 'likely to prejudice national security' if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.'[146]

There are several stages in the preventative detention regime where a person subject to a detention order may not have access to the information on which an order is based. First, after being taken into custody in accordance with an interim order, the person is entitled only to a summary of the grounds on which the order is made, and this is subject to national security considerations. Second, at the hearing for a confirmed order, there is no requirement that the person be given access to the information or documents on which the application is based. In this respect, the power of the Supreme Court to control proceedings in relation to the application for an order is specifically provided for.[147] Third, if the detention order is confirmed, the person will again be given only a summary of the grounds for the order, which can exclude information likely to prejudice national security. Fourth, should the person apply for the order to be revoked, the person may not have access to all the information on which the order was based. Throughout these proceedings, the ordinary rules of evidence will not apply.

Concerns about a detainee's access to the evidence or other information on which orders are based were raised during Parliamentary debates.[148] The Law Society of NSW, the NSW Bar Association and PIAC each expressed concern about these provisions.[149] Several submissions to our review raised similar concerns about this issue.

For example, Victoria Police argued that a summary of the relevant information which excludes national security information, 'would appear to contradict the issue of transparency in judicial proceedings'. They suggested it may be more appropriate that the decision to exclude any such information be a matter for the discretion of the presiding judge.[150]

Legal Aid NSW was also concerned the application process makes it very difficult for a person to defend a preventative detention order application.[151] Legal Aid submitted the normal rules of evidence should generally apply, except where police can demonstrate there are reasonable grounds for denying the detainee or the detainee's lawyer access to the evidence and information relied on. Legal Aid maintained that if the rules of evidence cannot be preserved intact, there should be, at a minimum:

- requirement that a summary of the grounds of the application be provided to the detainee or the detainee's lawyer
- police have to apply to the Supreme Court to seek an order dispensing with the requirement to provide such a summary, demonstrating it is reasonable and appropriate in the circumstances, and
- the detainee or the detainee's lawyer be provided with access to other evidence and information as the Supreme Court directs.

The Bar Association raised concerns that preventative detention orders could be made in the absence of the person subject of the application.[152] They argued orders should only be made in the presence of the subject person. They were also concerned that there is no express requirement for the judge to provide reasons for making or extending an order, in the terms of preventative detention orders. They argued that although the requirement may be implied it ought to be an explicit one, as providing reasons 'is an important aspect of procedural fairness and serves to assist in the understanding and acceptance of decisions'.

The Law Society's Criminal Law Committee reviewed the provisions of the Act following the publication of our issues paper.[153] The Committee could see no justification for the rules of evidence not applying. They submitted that, given the serious impact of an order on a person's liberty, it is appropriate the rules of evidence should be applied by the court. The committee was strongly opposed to provisions which effectively deny a detainee's lawyer the opportunity to review the evidence against his or her client. They submitted a person subject to an order should be provided with all the information and evidence that forms the basis of the application.

Other submissions raised similar concerns about detainees not being entitled to all relevant information, concluding the application process was 'one sided' in favour of the authorities:

> *Obviously if the detainee is only fed chaff then he/she will have a difficult task in defending such an application. In such circumstances one wonders why the Government even bothers with supplying information/paperwork to the detainee, apart from going through the motions. There is no doubt that it is a one sided process all on the basis of security.*[154]

3.4.3. Comment

We agree with Legal Aid NSW that police should be required to provide a detainee and the detainee's legal representative with a summary of the grounds for the application prior to the hearing for a confirmed order. In practice it is likely the grounds will be similar to the grounds for the interim order, which the detainee will already have. However, police may introduce new or additional information in their application for a confirmed order and we agree that it would be preferable for this to be provided to the detainee to enable the detainee to prepare for the hearing.

We note again that the court has ultimate control over proceedings. Persons who are or may be the subject of an order have a right to be heard. Without some evidence of a real problem, it is premature to make any further recommendation. However, the Attorney General may wish to consider these submissions in the review of the Act.

3.5. Where is a person detained?

The Act does not specify where a person in preventative detention is to be detained. However, it does provide that police can arrange for a person to be detained at a correctional centre, or in the case of children aged 16 or 17, a juvenile detention or juvenile correctional centre.[155] The police officer who makes the arrangement is considered to be the person detaining the subject, and police officers can enter the centre at any time to visit the detainee for the purpose of exercising functions under the detention order.[156] The police annual report on preventative detention must specify whether people detained under preventative detention orders were principally detained in a correctional centre, juvenile correctional centre, juvenile detention facility, police facility or 'other place.'[157]

The NSW Police Force and Department of Corrective Services have indicated that a person detained under Part 2A would be held in high security, either in police custody or at a correctional facility. The Department of Juvenile Justice has advised that a 16 or 17 year old may be detained in a Juvenile justice centre.[158] It does not appear that a person would be detained in any other place.

3.5.1. Detention by police

The NSW Police Force has advised that a person who is detained under an interim order will be taken into custody and detained by police. They will not be transferred to a correctional centre unless the order is confirmed.

The NSW Police Force has developed a new computerised custody management system for preventative detention. It is based on the ordinary police custody management system, but has been modified specifically for preventative detention. Only officers with a relevant Counter Terrorism and Special Tactics Command profile can access the preventative detention custody management system. The system is not linked to the ordinary custody management system so if a police officer anywhere in New South Wales subsequently enters the name of a person who has previously been in preventative detention into the computer system, it will not indicate that the person has a preventative detention history. Police indicated this system protects the detainee's privacy and the Command's security interests. They also indicated that while it would have been significantly cheaper and easier to record

preventative detention custody details manually, it was decided to develop a computerised system as this would create a permanent, contemporaneous record of each detainee's management.

The preventative detention custody management system reflects the legislative obligations of police under the Act. For example, it requires police to enter certain information, such as details of the nominated senior officer and any detention served by the detainee under related orders. It also calculates the time by which a detainee must be released, and clearly displays the detention period remaining.[159] Some of the questions from the general custody management system have been removed, as police were of the view that asking them may breach the general prohibition on questioning detainees.

We understand the preventative detention custody management system is still in development and there are still some changes to be made. We were told by counter terrorism police in February 2008 the system had not yet been activated, however, if a person were taken into preventative detention, the system could be activated immediately.[160]

3.5.2. Detention in a correctional centre

Although there is no formal preventative detention policy in place, it appears that adults who are detained under a confirmed detention order will be detained in a maximum security facility under the control of the Department of Corrective Services.

In 2006 the Department provided the following preliminary advice on preventative detention.[161] The policy is still under consideration, so the information provided here may change.

- Management regime: Detainees will be given a Master Index Number (an identification number given to all inmates) and will be put on an individual management plan. They will be 'confined to special facilities within a secure physical barrier that includes towers, or electronic surveillance equipment or a security police or cell complex as determined by the Commissioner', which is consistent with the management of all maximum security inmates. Detainees will be housed in Special Management Placement Units, in single cell accommodation areas, and may be placed under observation. Access to religious services depends on availability. Detainees are to have exercise time out of their cell 'of no fewer than four hours per day where practicable'.
- Contact with staff: All conversations with detainees are to be recorded in the detainee's case file. At least two correctional officers have to be present for all contact with detainees.
- Clothes and property: Upon reception, all personal property will be taken from the detainee. It will be sealed and stored until the detainee is discharged. The detainee will be given clothing, bedding, toiletries, a towel, a television, a kettle and, if requested, tobacco. Detainees will not be given razors. Detainees are to wear green standard issue prison clothing, but 'shall be required to wear clothing designated for extreme high security inmates during visits and whenever deemed necessary for reasons of security.' Clothing designated for extreme high security inmates is an orange jumpsuit.
- Searches: Detainees will have their cell searched at least once a day and must change cells every seven days. When moved, detainees will be strip searched, and their property will be searched using a metal detector. Detainees will be strip searched after any visit, including any visit by a legal practitioner.
- Visits: Detainees can only be visited by a legal practitioner or, in the case of a child detainee or incapable adult, by a parent, guardian or other acceptable person. Visits are non-contact, with constant supervision, and all visitors are to be screened by the Corrections Intelligence Group. Visitors must produce certain forms of identification and (except for legal practitioners) must undergo biometrics identification. Visits must be booked in advanced and as far as practicable should occur outside normal visiting hours. If either the detainee or visitor needs to use the toilet the visit will be terminated, regardless of any medical considerations. Visits must be recorded on closed circuit television, where possible. During visits detainees must wear clothing designed for extreme high security inmates.
- Movement of detainees: the NSW Police Force will be responsible for moving detainees outside correctional centres. The Department of Corrective Services will be responsible for moving detainees inside correctional centres. Detainees in correctional centres will be moved and treated in accordance with the Department of Corrective Services' Extreme High Risk protocols, and must be recorded on video. When being moved, detainees will be put in handcuffs, placed in a restraining belt, and may be put in ankle cuffs.
- Activities: Detainees are not allowed to work or participate in education or other programs. They may be provided with some materials (such as drawing or writing materials) if approved by the Manager Security.
- Meals: Dietary requirements will be assessed on a case by case basis and where possible, 'special cultural and religious diets may be catered for'. Meals will be x-rayed where possible.

The Department of Corrective Services is revisiting its 2006 draft policy in light of amendments made to the Act in 2007, which clarify that correctional officers can deal with detainees as if they were inmates. The Department noted that in addition to considering the amendments there were a range of operational issues which needed to be resolved in consultation with the NSW Police Force and the Department of Juvenile Justice, before its policy could be finalised.[162]

We will continue to monitor the development of the Department's policy and will include further information about preventative detention conditions in our final report on preventative detention.

3.5.3. Detention of young people in correctional facilities

The Act provides that a detainee who is under 18 may be detained at a juvenile justice centre or juvenile correctional centre.[163] Children under 16 years of age cannot be detained under a preventative detention order.

Juvenile justice centres are managed by the Department of Juvenile Justice. There are eight in New South Wales, one of which has facilities for young women. Juvenile justice centres provide educational, recreational and vocational programs, as well as specialised counselling and assistance in personal development.[164] Juvenile justice centres are governed by the *Children (Detention Centres) Act 1987*, which provides for the care, control and management of juvenile detainees in New South Wales. The legislation provides that the welfare and interests of detainees must be given paramount consideration, and punishment imposed by a court is the only punishment for the offence.[165] The provisions of the Children (Detention Centres) Act generally apply to a person detained in a juvenile justice centre under a preventative detention order in the same way as they apply to ordinary juvenile detainees.[166]

There is only one juvenile correctional centre in New South Wales, Kariong Juvenile Correctional Centre (Kariong). Kariong was designed to accommodate the state's most serious juvenile offenders and those presenting behavioural management difficulties. In 2004, the administration and management of Kariong were transferred from the Department of Juvenile Justice to the Department of Corrective Services. In the second reading speech for the legislation giving effect to this handover, the Hon. Tony Kelly stated:

> *Some older detainees are better suited to the environment of the Department of Corrective Services, either due to the seriousness of their offence or because of their behaviour... The detainees located at Kariong are the worst behaved in the juvenile justice system. They are there either due to the severity of their offending, or due to a history of disruption or violence in the juvenile justice system.*[167]

As previously noted, the Department of Juvenile Justice initially advised that 16 and 17 year olds held in preventative detention would not be detained in juvenile justice centres. Rather, they would be detained at Kariong, under the management of the Department of Corrective Services. However, in its submission to our review the Department of Juvenile Justice advised that 16 or 17 year old detainees may in fact be detained in Department of Juvenile Justice facilities. In particular, while it is expected male preventative detainees aged 16 or 17 would be detained in maximum security at Kariong, it is possible a male detainee may be detained in a juvenile justice centre, 'due to regional location or for any other reason.' Female preventative detainees aged 16 or 17 would be detained in a juvenile justice centre, as Kariong does not have adequate facilities to accommodate female detainees.[168]

3.5.4. Concerns about children in correctional facilities

A number of submissions to our review expressed concern about children subject to preventative detention orders being detained in correctional facilities. The Department of Community Services (DoCS) submitted it is preferable for children to be held in a juvenile justice centre or an alternative facility rather than in a juvenile correctional centre, and considered it inappropriate and inconsistent with the preventative rationale that child detainees be placed in institutions with the state's most serious juvenile offenders.[169] PIAC was similarly concerned about children being detained in a correctional facility administered by the Department Corrective Services, rather than a juvenile justice centre administered by the Department of Juvenile Justice.[170] The Council for Civil Liberties argued that holding children in correctional facilities is contrary to international instruments which require that children, and persons who have not been found guilty of an offence, should not be held together with convicted criminals.[171] The Council also argued that children are particularly susceptible to 'corruption by association with hardened criminals.'[172] Another submission similarly referred to the danger to juveniles of 'criminal contamination' whilst in detention, and stressed the 'need for alternative measures to be made for juveniles.'[173]

3.5.5. Will detainees be held in segregated custody?

Whether a detainee is permitted to associate with other inmates or detainees is likely to depend on his or her individual management plan.

We note the Crimes (Administration of Sentences) Act provides that an inmate may be held in segregated custody if the association of the inmate with other inmates threatens the safety of any other person, or the security or good order of a correctional centre.[174]

Similarly, the Children (Detention Centres) Act provides that juvenile detainees can be segregated for the safety of the detainee or other detainees, where there is no practicable alternative. The duration of segregation must be as short as practicable and requires the approval of the Director General if it is to be longer than three hours.[175] If a juvenile detainee is segregated for more than 24 hours, the detainee must be visited daily by a Justice Health officer, and the segregation plan must be monitored by a psychologist. The detainee must be checked on by a juvenile justice officer at least every ten minutes if he or she is at risk of self-harm. The Ombudsman also has to be notified where a juvenile detainee is held in segregation for longer than 24 hours.[176]

Should the preventative detention powers be used within the review period, we will monitor the circumstances of detention, including whether detainees are segregated from others.

3.5.6. Classification for security purposes

The *Crimes (Administration of Sentences) Regulation 2001* provides for the security classification of inmates. The highest security classifications — Category AA for men and Category 5 for women — are given to those who:

> *In the opinion of the Commissioner, represent a special risk to national security (for example because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.*[177]

Category AA and Category 5 were introduced into the Regulation in 2005 when nine males were taken into custody on terrorist related charges.[178] To date, 10 male inmates have been classified Category AA and one female inmate has been classified Category 5, although the female's classification has now been reduced to Category 4.

During the review period, we have inspected each of the facilities the Department of Corrective Services has nominated may be used for preventative detention. From these visits and other information provided, we understand that persons held in preventative detention will be managed as the highest risk category of inmate — that is, Category AA for men, and Category 5 for women.

The *Children (Detention Centres) Regulation 2005* similarly provides for the classification of juvenile detainees. It prescribes two classes of detainees — detainees who are potentially dangerous and should be detained within a secure barrier at all times are Class A, and all others are Class B.[179]

The Department of Juvenile Justice have indicated that all 16 or 17 year old males in preventative detention would be detained at Kariong Juvenile Correctional Centre and hence would be classified by the Department of Corrective Services under their regulations. Juvenile Justice anticipated such detainees would be classified within the highest risk category.[180] They did not advise as to the classification of preventative detainees in the custody of Juvenile Justice.

3.5.7. Conditions of detention in a maximum security facility

The Department of Corrective Services has written new operational procedures covering the management of Category AA/5 inmates which severely restrict many of their amenities and privileges, including association with other inmates.[181] In 2006 Faheem Lodhi was convicted of preparing for a terrorist act, sentenced to 20 years imprisonment and given Category AA classification. The Supreme Court described his management regime:

> *Whatever the terminology, the reality is that this is solitary confinement. There is a small exercise yard outside his cell where he may exercise for a brief period each day. In practical terms, this period of exercise outside the cell varies on a daily basis. The variation may, on any particular day, involve an exercise period between one and a half to three hours. The offender is required to wear an orange set of overalls whenever he is out of his cell and moved to another part of the complex. On those occasions, he is shackled. The reason for these procedures is presumably related to security.*
>
> *The offender is constantly monitored and filmed by a video camera. If he has visits with his family, the visits are monitored in the sense that the conversations are within hearing distance of a Corrective Services officer and the visit itself is video taped. All telephone calls the offender makes are recorded other than those to his lawyers. All of his mail is read. He is not allowed access to a computer...*
>
> *The offender is to have a cell change every two weeks. His cell is to be searched daily. He may not be employed within the prison system unless approval in writing is given by the Governor. He is not allowed to be employed in a sweeper/domestic position. The offender is not permitted to use the gymnasium nor is he*

allowed access to the prison oval. Barring exceptional situations, he is not allowed to leave his cell after 15.30 hours and he must be secured in the cell from that time. The offender is not entitled to and not permitted to speak to an Official Visitor.[182]

The court commented that 'there is no doubt that the conditions of imprisonment, while ever he remains classified as AA, are harsh', and recommended he be reclassified by the prison authorities.[183]

A man held on remand in Victoria recently applied for bail, arguing the conditions of his detention in the maximum security unit at Barwon Prison were 'extremely onerous'.[184] Mr Ezzit Raad has been charged with being a member of a terrorist group and financing terrorism. The judge refused his bail application but criticised the conditions terrorism suspects were kept under, which reportedly include being segregated, shackled, strip searched and confined to cells for more than 20 hours a day. The judge described the conditions as 'very troubling from the court's perspective' and commented 'it is very difficult not to see this as some sort of pre-emptive punishment being imposed'. The judge also commented that treating remandees in this way risked undermining the rule of law by treating those awaiting trial in the same way as inmates convicted of the worst offences.[185]

In his determination the judge said:

The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are of course, innocent of any wrongdoing.[186]

The judge also suggested the prison conditions of the terrorist suspects should be further considered by the court, but not in context of the bail application.

In March 2008, Justice Bongiorno adjourned the trial of the thirteen Melbourne terror suspects until their conditions of incarceration and classification were altered, after hearing concerns that the conditions were affecting the psychological capabilities of the accused. The accused were detained at the Acacia Unit in Barwon maximum security prison. Due to their classification, they were entitled to limited visits, and at times had spent up to 23 hours a day in cells. During the trial, the accused were strip searched when leaving and re-entering the prison and were shackled with handcuffs attached to a waist belt. The length of time the men spent in transport limited their ability to access their lawyers and legal material. Justice Bongiorno was presented with psychiatric opinions that the conditions in the Acacia Unit could be expected to cause anxiety, fatigue, depression, and would impair the concentration and memory of the accused, and that their condition would be likely to deteriorate as the trial proceeded. He said that their classification and their treatment was 'in terms of the fairness of this trial, intolerable'[187]. The suspects were relocated to Melbourne's Metropolitan Remand Centre.

3.5.8. Concerns about detention in a correctional centre

During Parliamentary debates, some members of Parliament stressed that detention under the Act is merely detention, and was not detention for the purpose of punishment or interrogation:

I want to be clear that the legislation states expressly that those detained will not be shackled against a wall and fed bread and water. They are simply detained.[188]

However, others argued that the term 'detention' is misleading, in circumstances where the person is actually imprisoned in a correctional centre:

Here we see the emergence of Orwellian language: they are detainees, as if what they are called materially alters the reality of what they experience. They are still behind razor wire. But language is important… the word 'detention' aims to mask the fact that the person is imprisoned.[189]

Some members of Parliament made the point that detainees were effectively receiving harsher punishment than persons facing charges:

These are people who have not been charged with any offence. There may well be good reasons — and I certainly hope there are good reasons — for a person to be taken into preventative detention, but the type of prison is not specified. In the event that one of us were charged with an offence we would be taken to a remand centre. We would not be thrown into a prison with murderers and dangerous criminals, and we would not be carted off to the other side of Australia to be detained. It is regrettable that the type of prison in which a person will be detained is not spelled out in the legislation.[190]

PIAC argued that it is a breach of international human rights law to detain a person who has not been convicted of any criminal offence in correctional facilities.

> *Article 9(2)(a) of the International Covenant on the Civil and Political Rights (ICCPR) provides that 'accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons'. This principle of segregation should be taken further where the person being detained is not even an accused in the criminal justice system. The Bill ought properly establish an appropriate mechanism for detention that ensures individuals detained are not detained with accused persons or convicted prisoners.*[191]

Other submissions to our review supported this view and argued that persons who have not been charged with any offence should not be detained with persons already convicted of a crime and serving a sentence.[192]

In its submission to our review, PIAC expressed disappointment that detainees can now be treated as inmates under the Crimes (Administration of Sentences) Act. PIAC considered this privileged 'political expediency and administrative convenience over the protection of fundamental civil and human rights.'[193] It emphasised that the proposed Memorandum of Understanding between the NSW Police Force and the Department of Corrective Services should protect the rights of detainees, and urged the agencies to take into consideration the principles established by international law, which apply to the detention of persons who have not been charged or sentenced under the criminal law. PIAC recommended that section 26X of the Act, which enables police to arrange for detainees to be held in correctional facilities, be amended to provide for detention in places other than prisons, such as home detention. PIAC also recommended the Supreme Court be provided with powers to 'make specific provision for the health, assistance, contact, location and other matters specific to the needs of the person detained.'[194]

The Council for Civil Liberties also expressed disappointment with the decision to keep detainees in correctional facilities.[195] The Council considered that correctional officers have an ethos which is formed by having to deal with dangerous and difficult prisoners, and so should not be responsible for supervising people held under preventative detention orders, who will not have been charged with an offence. The Council's preference was for specially trained staff and centres created for preventative detention. It submitted that if detainees are to be held in correctional facilities, correctional officers should not have the same powers and functions they have in relation to convicted criminals. Rather, detainees should only be subject to the powers necessary to keep them detained.[196]

The NSW Bar Association submitted that the provisions of the Crimes (Administration of Sentences) Act should not automatically apply to persons detained for short periods under the Terrorism (Police Powers) Act.[197] The Association argued that directions for inmates to work for example, would not be appropriate for preventative detainees. We note, as outlined previously, that the Crimes (Administration of Sentences) Act applies generally to preventative detainees but does not apply where this is inconsistent with a requirement or arrangement under Part 2A. In addition, the government intends to further regulate which provisions of the Crimes (Administration of Sentences) Act will not apply to preventative detainees. We will continue to monitor this issue and include this information in our final report.

Other submissions to our review considered detention in correctional facilities was warranted. Victoria Police reflected that, when balancing the human rights of an individual who is not under arrest for an offence, and the possible risk to the community if a terrorist act is imminent, the balance should be struck 'on the side of the community'.[198]

3.5.9. Religious practices

The Department of Corrective Services advised that under its draft policy, detainees would be free to practice their religious observances and would be entitled to certain religious items through an accredited chaplain.[199] Such items include the major book of faith for the nominated religious tradition, a prayer mat for Muslim inmates and a skullcap for Jewish inmates. The Department said it has existing policies in relation to the provision of food in accordance with an inmate's religious beliefs. Detainees would be catered for by one of the three meal plans generally available to inmates. This includes a meal which replaces ingredients considered unacceptable to some cultures and religions.

We will continue to monitor this issue as the NSW Police Force, Department of Corrective Services and Department of Juvenile Justice policies on preventative detention are developed. The issue as to whether a detainee is entitled to access an accredited Departmental chaplain is further discussed under section 3.8.4 below.

3.5.10. Access to health care

Justice Health is responsible for providing health services to offenders, juvenile detainees and other persons in custody, and to monitor the provision of health services in correctional centres.[200] Justice Health does not have any specific policies or procedures for preventative detention. While it remains unclear what contact detainees will have with other inmates or detainees it is likely the Justice Health Policy on Segregated Custody will apply to people

held in preventative detention. The policy applies to any inmate in segregation and states they should be seen at least daily by nursing staff and at least weekly in the clinic. If a nurse has any concerns, the detainee should be seen by a medical officer within 24 hours. Detainees should also be offered an appointment with a medical officer once a week. Daily examinations should include a discussion with the detainee to assess his or her physical and mental state, and any potential risks. Physical examinations are not usually necessary. The policy also reminds staff that 'prolonged segregation may adversely affect a patient's physical and mental health.'[201] The draft preventative detention policy prepared by the Department of Corrective Services in 2006 provides that Justice Health staff are to be notified that a detainee is in custody upon reception, and are to work closely with Departmental staff in the management of the detainee.

The Department of Corrective Services noted that detainees have the same entitlement to medical care as other inmates under the Crimes (Administration of Sentences) Act.[202] The Act provides that inmates must be supplied with such medical attention, treatment and medicine as the medical officer considers necessary for the preservation of the health of the inmate and any other person. It also provides that a medical practitioner may carry out medical treatment on an inmate without the inmate's consent if it is necessary to save the inmate's life or to prevent serious damage to the inmate's health.[203] The Children (Detention Centres) Act and Regulation make similar provisions for juvenile detainees.[204] Further, juvenile detainees must, as soon as practicable after being admitted to a detention centre, be subjected to an examination by a registered medical practitioner or registered nurse for the purpose of determining the detainee's state of health.[205] Juvenile detainees who are held in segregation for longer than 24 hours must be monitored by a psychologist and visited daily by a Justice Health officer.[206]

We note that in its submission, the Council for Civil Liberties argued that a person in preventative detention should be permitted to see his or her own doctor.[207]

We will continue to monitor the issue of access to health care as the NSW Police Force, Department of Corrective Services and Department of Juvenile Justice policies on preventative detention are developed.

3.5.11. Protection of dignity

The Act requires that detainees be treated with humanity and respect for human dignity, and makes it an offence to subject detainees to cruel, inhuman or degrading treatment.[208]

PIAC and the Council of Civil Liberties submitted the maximum penalty of two years imprisonment for breaches of the provisions for the humane treatment of detainees was insufficient.[209] They submitted the penalty should reflect the seriousness of a breach of international conventions against torture of which Australia is a state party. The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* provides that 'each state party shall make these offences punishable by appropriate penalties which take into account their grave nature.'[210] PIAC considered a more appropriate penalty, reflecting the gravity of breaching the right to freedom from cruel, inhuman and degrading treatment, would be 20 years imprisonment.[211] The Council for Civil Liberties considered two years imprisonment as a penalty for possible torture to be 'startlingly light', by comparison with five years penalty for disclosure of information as a monitor.[212]

We note the general criminal law still applies to the treatment of detainees, in particular offences such as common assault, which carries a penalty of two years imprisonment, assault occasioning actual bodily harm, which carries a five year penalty, and malicious wounding or infliction of grievous bodily harm, which carries a penalty of seven years.[213]

3.5.12. Comment

While the Act does not restrict where a person in preventative detention may be detained, we note the relevant agencies intend that a person held under a confirmed preventative detention order would be held in a correctional facility, in maximum detention. Many submissions to our review expressed concern about this.

The approach by the NSW Police Force and the Department of Corrective Services assumes that any person held under a preventative detention order would necessarily represent a special risk to security and should at all times be confined in special facilities, in accordance with a maximum security regime.

Given the Act does not require a person in preventative detention to be detained in a correctional facility, there may be merit in police conducting a risk assessment prior to determining where a person should be detained, and under what conditions. For example, a person could be detained in the least restrictive facility, under the least restrictive conditions, which would still meet the objective of the preventative detention order. This may better reflect the nature of the detention. That is, the person is being detained to prevent an act, or to preserve evidence, and not because the person has been charged or convicted of an offence.

Our preliminary view is that police should develop a risk based assessment to use in preventative detention, rather than automatically hold all people subject to confirmed preventative detention orders under extremely restrictive conditions, in maximum security facilities.

The Department of Corrective Services expressed concern with this view, as they felt it would result in police determining the classification of an inmate in a correctional centre. In their response to our consultation draft report, they commented:

> *The inmate classification system is the foundation of correctional centre security, and it is vital that responsibility for it remain with the Commissioner.*[214]

As we communicated to the Commissioner, we are suggesting police consider using the least restrictive form of detention that meets with the objective of the preventative detention order, *prior* to making any decision as to detention in a correctional facility.[215] We agree the classification of inmates in any correctional centre is properly the responsibility of the Commissioner, as provided for in the *Crimes (Administration of Sentences) Act 1999*.

Another option for consideration is greater supervision of the conditions of detention by the courts, consistent with submissions we received advocating involvement by the courts in determining other entitlements for the detainee, such as access to information, contact provisions and monitoring of lawyer contact by police. A risk based assessment by police may assist the courts in this regard. Alternatively the conditions of detention could be subject to greater scrutiny by an external oversight agency such as the Ombudsman or a public interest monitor. However we note the policies and procedures of relevant agencies are not yet finalised. We will continue to monitor the issue through the remainder of the review period and will provide further information and a considered view in our final report.

3.6. How long can a person be detained?

Under an interim order a person can be detained for up to 48 hours, during which time an application for a confirmed order must be heard.[216]

Section 26K of the Terrorism (Police Powers) Act provides that the maximum period for which a person can be detained under a confirmed order is 14 days. However, it also provides that multiple preventative detention orders may be made in relation to the same person. It is worth setting out section 26K in full, before discussing its implications.

> *Maximum period of detention and multiple preventative detention orders*
>
> *(1) In this section:*
>
> *related order, in relation to a person, means an interim preventative detention order, another preventative detention order or an order under a corresponding law that is made against the person.*
>
> *(2) The maximum period for which a person may be detained under a preventative detention order (other than an interim order) is 14 days. That maximum period is reduced by any period of actual detention under a related order against the person in relation to the same terrorist act.*
>
> *Note. Under section 26L an interim order expires 48 hours after the person is first taken into custody under the order if the application for the order has not been heard and finally determined by that time.*
>
> *(3) Despite subsection (2), the maximum period for which a person may be detained under a preventative detention order made on the basis of preserving evidence of, or relating to, a terrorist act that has occurred is not to be reduced by any period for which the person is detained under a preventative detention order or related order made on the basis of preventing a terrorist act.*
>
> *(4) Subject to subsection (5), more than one preventative detention order may be made in relation to the same terrorist act (whether or not against the same person).*
>
> *(5) Not more than one interim preventative detention order may be made against the same person in relation to the same terrorist act. This subsection does not prevent:*
>
> > *(a) an extension of an interim order under section 26H(5), or*
> >
> > *(b) the making of another interim order following a further application for an order.*
>
> *(6) A preventative detention order can be made against a person to take effect on the expiration of detention under a related order against the person.*
>
> *Note. This Division does not authorise the extension of the period of an order. However, if the initial order does not authorise detention for the maximum period of detention in respect of the same terrorist act that is*

authorised by this section, further orders may be applied for and made (so long as that maximum period is not exceeded in respect of the total period of those orders).

(7) For the purposes of this section:

(a) a terrorist act ceases to be the same terrorist act if there is a change in the date on which the terrorist act is expected to occur, and

(b) a terrorist act that is expected to occur at a particular time does not cease to be the same terrorist act merely because of:

(i) a change in the persons expected to carry out the act at that time, or

(ii) a change in how or where the act is expected to be carried out at that time.

3.6.1. Detention for longer than 14 days

More than one order can be made in relation to the same terrorist act, provided the total time in detention is less than 14 days. A preventative detention order can be made against a person to take effect on expiry of detention under a 'related order.'[217] A related order means an interim order, another preventative detention order or an order under a corresponding law made against the person.[218] More than one preventative detention order may be made in relation to the same terrorist act, whether or not against the same person.[219] The maximum period for which a person can be detained is still 14 days though, which includes any actual period of detention already served under a related order.[220]

While orders relating to the same terrorist act by the same person have a maximum detention period, the same person could be subject to a separate detention order in relation to a separate terrorist act. Section 26K(7) defines when a terrorist act remains the same act and when it becomes a separate act. A terrorist act ceases to be the same act where the date on which it is expected to occur changes. An act is not deemed to be a separate act merely because of a change in the persons expected to carry it out, or a change in how or where the act is expected to be carried out, if it is expected to occur at a particular time.[221] This means that further preventative detention orders could be made against the same person where the date on which a terrorist act is to occur changes.

3.6.2. Concerns with the 'maximum' detention period

Concerns with the possibility of rolling detention orders over an indefinite period have been raised by a number of groups. For example, PIAC has argued:

> *Section 26K(7)(a) provides a loophole to allow for the potential of rolling orders to be made and could be used where the intelligence relied on has been misinterpreted as to the date of the anticipated terrorist act. PIAC acknowledges the Government is… seeking to protect the ability of law enforcement officers to seek a further preventative detention order in relation to the same person for a plan to commit a terrorist act where the date for the act is changed. However… the change of date provision allows for potentially open-ended rolling preventative detention orders.*[222]

The Law Society and Bar Association raised similar concerns that the Act permitted open ended rolling orders. The Law Society noted:

> *Multiple and consecutive preventative orders may be issued in relation to a particular terrorist act, provided that the maximum period of detention is not exceeded. However, if the relevant act does not take place within the anticipated 14 day period and the date of the suspected terrorist act is revised, s 26K(7) provides an opportunity for people to be subject to further orders and thus they may effectively be detained for very lengthy periods.*[223]

In response to such concerns, the Attorney General, The Hon. Bob Debus, made the following comment:

> *A number of submissions have raised the possibility of cumulative or rolling warrants. I make it clear to the House that the aim of this preventative detention scheme is not to provide the ability for law enforcement agencies to keep a person in a constant state of preventative detention. Proposed section 26K is designed to prevent rolling warrants. However, it is difficult to justify on policy grounds the complete prohibition of a second or subsequent order in relation to a particular person where the rest of the test, which is set out in proposed section 26D, is met, remembering that the test requires the reasonable suspicion that the detention of the person will prevent an imminent terrorist attack.*
>
> *A number of strong safeguards will count against the use of rolling warrants. Those safeguards are that these orders will be overseen by the Supreme Court, the requirement that each application must contain details of*

previous applications and orders, allowing the Supreme Court to detect improper use, and, most important, the fact that a person who appears to be intimately involved in an imminent terrorist attack will be charged with a substantive offence rather than preventatively detained. Those concerns that have been expressed about rolling warrants, although understandable, have been sufficiently answered by those observations.[224]

In our issues paper we asked whether the permitted periods of detention were sufficiently clear, flexible enough to deal with changing operational circumstances, and adequate in length to achieve the purposes of preventative detention.

Some submissions argued that detention without charge for 14 days is excessive. The Law Society's Criminal Law Committee submitted the maximum period of preventative detention should not exceed 48 hours, consistent with the Commonwealth scheme.[225]

Other submissions expressed continuing concern about the availability of multiple orders in relation to the same person, which in effect permit detention for longer than 14 days. The Bar Association submitted that the language of section 26K should be clearer so there is a prescribed absolute maximum period of preventative detention.[226] They argued this maximum period should be 14 days regardless of any other circumstance. PIAC recommended the number of consecutive orders that may be granted against the same person be limited to two; that a second application can only be brought against the same person on the basis of new facts or evidence; that there be a 'no application' period following the expiry of the two preventative detention orders; and that the onus of proof be raised to the criminal standard for a third or subsequent application for an order against the same person.[227] The Council for Civil Liberties also argued the Act does not provide 'appropriate safeguards against indefinitely repeated detention,' as there is no way of determining 'what is one potential act and what is another.' The Council submitted that the flexibility of obtaining multiple orders was in effect permitting additional powers of detention.[228]

Legal Aid NSW considered the open ended nature of the provisions for maximum detention were of 'great concern', and recommended that a provision be inserted which clearly states a maximum period of time for multiple detention orders.[229] They argued the maximum period of preventative detention should be 14 days, with only one court approved extension permitted, under exceptional circumstances, allowing for a maximum of no longer than 28 days.

The Centre of Public Law commented that as preventative detention orders can only be obtained to protect against imminent attack, 'any extension in time would cast doubt over this purpose and raises concerns about the use of preventative detention order to hold people without charge or trial.'[230]

While NSW counter terrorism police submitted the legislation was sufficiently clear as to the maximum period of detention, they argued consideration should be given to a longer detention period.[231]

Victoria Police noted the Victorian legislation also left it open to interpretation when a further terrorist act ceases to be the same terrorist act, providing an opportunity to apply for further orders. However, they considered abuse of the process was not a significant risk, as the applicant is required to inform the court of the outcome of all previous applications for preventative detention orders made in relation to the person, and the amount of time the person has already spent in detention under orders made under corresponding laws. They also considered it 'fanciful' to suggest investigators 'would opt for keeping someone in preventative detention once a substantive relevant offence was established, rather than to introduce them into investigative custody where they are able to arrest, charge and remand.'[232] We note that New South Wales police officers we have spoken to during the review period have expressed similar views.

In their response to our consultation draft report the Ministry for Police stated, 'The maximum period that a person should be detained is an operational issue'.[233]

3.6.3. Legal advice

We obtained legal advice to clarify the maximum period a person could be detained under a preventative detention order or orders, in respect of the same terrorist act. We were advised:

The maximum period that a person may be detained under a preventative detention order, or orders, in respect of the one terrorist act is 14 days. However, that limit can potentially be extended to 28 days where two or more orders are made against a person and the underlying purposes of the orders differ (ie one order relates to prevention of an expected terrorist act and the second relates the preservation of evidence following an act). Where two or more different acts are expected to occur, and/or have occurred, the 14/28 day limit applies to each act.[234]

We also sought advice as to whether there is anything to prevent a person being detained under rolling preventative detention orders, in a situation where the date on which a terrorist act is expected to occur changes on more than one occasion. We were advised:

While the Court which makes a preventative detention order is required to be informed of the number of previous orders made against a person, there is no statutory prohibition on the use of 'rolling' orders where the date on which a terrorist act is expected to occur changes on one or more occasions.[235]

The advice also made the following points:

- The legislation does not give any indication as to how the date on which a terrorist act is expected to occur should be determined, but contemplates that a re-analysis of existing information or the obtaining of additional information may result in an alteration of the date on which a terrorist act is expected to occur.
- The number of previous detention orders made against a person must be disclosed in the application for an order, so the court would be in a position to assess whether multiple re-determinations of the expected date of a terrorist act had been made in good faith.
- The potential for rolling orders will only apply in relation to anticipated terrorist acts, not in relation to acts that have already occurred.

3.6.4. Comment

The requirement that a court be informed of the outcome of previous preventative detention applications, and any time the person has already spent in preventative detention under corresponding laws, provides some protection against detention for longer than 14 days, which is ostensibly the maximum detention period.

However, if the date on which the terrorist act is expected to occur changes, then a new preventative detention order can be made, with a new 14 day maximum detention period. Given the criteria for obtaining the order includes that it is necessary to detain the person to prevent the terrorist act, detention of the person in itself may be enough for the date on which the terrorist act is expected to occur to change. Ultimately this issue is for the determination of the court.

We also note the other additional grounds for extending the order beyond 14 days — where the underlying purpose of the order changes.

At this time, and given the powers have not been used, it is difficult to assess the appropriateness of the current maximum periods from an operational perspective. It is clearly a very important issue. Despite safeguards in the Act, rolling warrants are permitted and may occur. We will closely monitor this issue if the powers are used during the review period. We recommend the Attorney General, in his review, take into consideration the views expressed on this issue.

Recommendation

3. The Attorney General, in conducting his review of the policy objectives of the Act, take into account the various submissions and views set out in this report in relation to the maximum detention period.

3.7. What information is a detained person entitled to?

Police must provide a detained person with a copy of the interim order as soon as practicable after being taken into custody, and a copy of a confirmed order as soon as practicable after it is made. There is no requirement that police produce a copy of an interim or confirmed preventative detention order when taking a person into custody.[236]

In addition to providing a detainee with a copy of the preventative detention order, police are required to explain the effect of the order as soon as practicable after the person is taken into detention. It is an offence for police not to do so.[237] However, this does not apply if the actions of the detainee make it impracticable for police to comply.[238]

Police must explain the fact that an interim or confirmed order has been made authorising the person's detention. In relation to interim orders, police must inform the person of the date and time of the court hearing for the confirmed order.[239] In relation to confirmed orders, police must inform the person of the period for which detention is authorised.

Police must also inform the person of a range of prescribed matters such as their right to contact certain people and the restrictions that apply to that contact. They must inform the person of their right to contact a lawyer, make a complaint to the Ombudsman concerning the application for the order or their treatment by police in detention, and their entitlements in relation to applying for revocation of the order.[240] The information need not be precise or technical, but must cover the substance of the matters required. Police must arrange for an interpreter to assist the person if the officer detaining the person has reasonable grounds to believe the person is unable, because of inadequate knowledge of English or a disability, to communicate with reasonable fluency.[241]

We note that while detainees must be informed of their right to make a complaint to the Ombudsman about their treatment by police, there is no requirement to inform them of their right to make a complaint about their treatment by a correctional officer, although detainees have such a right under the ordinary provisions of the *Ombudsman Act 1974*. We raised this issue, and the Department of Corrective Services advised its draft policy would state that when a detainee is received into a correctional facility they will be advised of their right to contact the Ombudsman at any point during their detention to complain about a police officer or correctional officer.[242] The detainee will also be asked to sign a form acknowledging they were informed of their right to contact the Ombudsman at any time.

In its submission to our review PIAC noted that recent amendments to the Act authorising correctional officers to deal with detainees as though they are inmates made it more important that detainees be informed of their right to complain about their treatment by correctional officers.[243] Victoria Police supported the right of detainees to complain about any aspect of detention.[244]

The Police Integrity Commission raised concerns that a detainee's right to contact the Commission is not included in the information which must be provided to detainees.[245] The Commission's view was that detainees should be informed of their right to contact the Commission, and be provided with information about the role and function of the Commission. This would be consistent with section 26ZF, which provides that detainees are entitled to contact the Police Integrity Commission and the Ombudsman.

3.7.1. Comment

In our view there should be a legislative requirement to inform detainees held in correctional facilities of their right to contact the Ombudsman to make a complaint about the conduct of a correctional officer. This would be consistent with the Department of Corrective Services draft policy on preventative detention.

In his response to our consultation draft report, the Commissioner of Corrective Services expressed the view that such a legislative requirement was unnecessary.[246] The Commissioner stated, 'My Department has already agreed to your request to provide all preventative detainees with details of the dedicated mobile phone number to your Office; and clause 5 of the *Crimes (Administration of Sentences) Regulation 2001* already contains a requirement for the general manager of a correctional centre to inform all reception inmates of a number of the inmate's rights and obligations including the authorised methods of seeking information and making complaints (which includes complaints to the Ombudsman)'.

The *Crimes (Administration of Sentences) Regulation 2001* requires that the general manager of a correctional facility, as soon as practicable after an inmate is first received, must cause the inmate to be informed of 'the authorised methods of seeking information and making complaints'.[247] However, in our view this does not amount to an explicit legislative requirement that a detainee be informed of their right to make a complaint to the Ombudsman about the conduct of a correctional officer. The 'authorised methods' of making complaints may be simply interpreted as the internal complaint handling processes available to inmates. For example, information about complaints currently made available to inmates informs them of a four step process for resolving grievances within the Department and makes no reference to their right to complain to the Ombudsman.[248]

For these reasons it is our view there should be a legislative requirement that preventative detainees be informed of their right to complain to the Ombudsman about the conduct of correctional officers.

We also agree it would be useful for detainees to be informed that they can contact the Police Integrity Commission when they are informed they can contact the Ombudsman.

In their response to the following recommendations the Ministry for Police stated, 'The NSW Police Force will consider the matters raised by the Ombudsman and include them in SOPs where appropriate.'[249]

Recommendations

4. Parliament consider amending the Act so that the nominated senior officer must inform persons who are detained at correctional centres of their right to contact the Ombudsman to make a complaint about the conduct of any correctional officer.
5. Parliament consider amending sections 26Y and 26Z of the Act so as to include a reference to the right of persons detained to complain to the Police Integrity Commission about the conduct of any police officers.

6. Until any legislative amendment is made, the NSW Police Force SOPs specifically provide that detainees must be informed they may contact the Police Integrity Commission to complain about the conduct of any police officer.

3.7.2. When must the information be provided?

On the issue of police providing information 'as soon as practicable', some members of Parliament expressed concern this may be abused by police:

> *It is bad enough that citizens might be detained merely on suspicion without having committed any crime, but now the Bill, with its poorly worded, hopelessly vague 'as soon as practicable' standard, raises the possibility of detainees not even being informed of the reason for their detention until considerable time has passed. What exactly does 'as soon as practicable' mean? It is quite subjective. Does it mean when the police officer gets a chance? If he or she is busy, that could mean many hours. The provision is wide open to abuse because an officer could easily manufacture reasons for delay.*[250]

Ms Rhiannon MLC moved an amendment to the original Bill which proposed that the information must be conveyed as soon as practicable 'but in any event not later than two hours after a detention order is made or a detainee is taken into custody'. The Government opposed the amendment on the basis some flexibility of timeframes was required.[251] The Hon. Tony Kelly also suggested the two hour limit might invite police to use all of the available time before acting.[252]

PIAC and the Council for Civil Liberties recommended that police be required to provide the relevant information within a specified time period, in particular to ensure that a person has adequate time to instruct a solicitor before a hearing for a confirmed order.[253] The Council for Civil Liberties submitted this time limit be no longer than two hours after being taken into detention.[254] PIAC suggested two hours for interim orders and six hours for confirmed orders.[255] The Bar Association submitted the term 'as soon as practicable' does not require the information to be conveyed immediately, and argued there is no reason to delay in providing all relevant information to a detainee.[256]

NSW counter terrorism police argued that circumstances may be such that it is not practicable to provide the information at the immediate time of detention, and the term 'as soon as practicable' provides police with reasonable operational latitude to cater for all contingencies that may arise.[257]

Victoria Police described it as 'mischievous' to suggest the term 'as soon as practicable' may be subject to abuse by police, commenting that the meaning of the phrase was clear to police and the courts. They stated operational police generally interpret 'as soon as practicable' to mean 'as soon as possible, unless some critical imperative impedes it'. They said it was 'nonsense to suggest manipulating adherence to timeframes and the interpretation of the phrase would take any part in the prioritisation process of procedural tasks for operational police.'[258]

3.7.3. Consequences of failing to comply with requirements to provide information

In our issues paper we asked whether people considered it appropriate that police may be charged with an offence for failing to provide information to detainees.

Some organisations have indicated support for criminal penalties where police fail to provide the required information. The Law Society has argued that police should have to provide the required information, regardless of whether this is practicable.[259] PIAC has recommended the application of a penalty where police fail to give the person a copy of the detention order or summary of the grounds. PIAC also considered the Crown should be liable for any civil damages occasioned by the failure of police to provide the detainee with the proper information.[260] The Council for Civil Liberties expressed concern that failure to provide the required information may deny detainees a fair hearing.[261]

Others did not support criminal penalties for failing to provide the information in accordance with the Act. One submission to our review considered it would be sufficient for police to face any disciplinary action deemed appropriate by senior police.[262] This submission also argued that as long as the information provided to a detainee was in a standard form, namely in English, then officers would not have to spend much additional time explaining rights.

NSW counter terrorism police 'strenuously objected to' all offence creating provisions with respect to police.[263] They commented that, 'Police always strive to comply with the laws they swear an oath to enforce'.

Victoria Police noted the inclusion of offences for non-compliance does encourage rigorous adherence to the required processes.[264] However, they also considered it 'operationally cogent' to recognise that a detainee's actions may make it impossible to give them the information they are entitled to, and emphasised that 'police should not be in jeopardy of committing offences because of the behaviour of the detainee'. New South Wales police officers have also raised concerns with us about liability to prosecution through the exercise of preventative detention functions.

In our view, given that the powers have not been used, there is insufficient evidence to recommend any change to the current provisions at this time. We agree the penalty provisions reinforce the obligations of police, and in some respects provide a counterbalance for the failure to specify a maximum timeframe before information is given. In Chapter 5 we discuss the possibility of ongoing monitoring of preventative detention powers. In our view scrutiny of preventative detention by an independent agency could also help to ensure the required information is provided to detainees within a reasonable timeframe.

There is merit in the NSW Police Force SOPs providing clear guidance to police officers of what is meant by 'as soon as practicable'. It would also be useful if the SOPs included a statement of the required information in clear and simple language to assist police in complying with their legislative obligations. Also, the SOPs should specify, where the information is not provided because it is not practicable, detailed reasons for the information not being provided should be recorded. This serves to protect not only the police officer, but also the detainee.

In their response to our draft recommendations on this issue the Ministry for Police stated, 'The NSW Police Force will consider the matters raised by the Ombudsman and act on them where appropriate.'[265]

Recommendations

7. The NSW Police Force SOPs include a statement of the information which has to be provided to detainees.
8. The NSW Police Force SOPs provide guidance as to the meaning of 'as soon as practicable'.
9. The NSW Police Force SOPs provide that where information is not provided because it is not practicable, detailed reasons for the information not being provided should be recorded.

3.7.4. Entitlement to know about prohibited contact orders

Police can apply to the court for prohibited contact orders which deny the detainee contact with specified persons while they are being detained. Police must provide grounds on which the order should be made and the court must be satisfied that making such an order is reasonably necessary for achieving the purposes of the preventative detention order.[266] The Act does not require that police inform a person detained whether a prohibited contact order has been made, or the name of a person specified in such an order.[267]

During Parliamentary debates, there was some discussion about a detainee's right to know of the existence of a prohibited contact order:

> *Why should a detainee not be entitled to know that there is an order in place by the Supreme Court prohibiting that person from having contact with another person or persons? Simply knowing of the prohibition will in no way weaken or subvert that prohibition, but it would provide for greater procedural fairness and would also be more practical. After all, it is difficult to comply with, let alone challenge, a prohibited contact order if one does not know of its existence.*[268]

Ms Rhiannon MLC moved that those sections be omitted from the Bill, which provided that police were not required to inform the detainee of prohibited contact orders. The Government opposed these amendments on the basis 'they would make the Bill inconsistent with similar Commonwealth provisions'.[269]

In its analysis of the legislation, PIAC could find no rationale for not informing detainees about the existence of prohibited contact orders:

> *There is an absence of a rationale for a person not to be informed of the existence of a prohibited contact order and in relation to whom such an order applies. The Bill clearly provides that other than the entitlements under proposed sections 26E, F, G and H there is no entitlement to contact any other person. As these are entitlements and can only be overridden where there is a prohibited contact order, the absence of an obligation to inform the person of this prohibition is without basis. It will become clear to a detained person when they ask to contact a particular person whether or not that person may be subject to a prohibited contact order.*[270]

In its submission to our review, the Centre of Public Law agreed that a detainee should be entitled to know of the existence of a prohibited contact order, and agreed there was no apparent rationale for withholding the information. The Bar Association were also of this view.[271] Other submissions described it as 'absurd' and 'ludicrous' that a detainee would not be informed of the existence of a prohibited contact order.[272] The Council for Civil Liberties argued that a refusal by police or correctional officers to facilitate contact because of the existence of a prohibited contact order may be seen as an 'arbitrary abuse of power, and give rise to resentment and disrespect for the law in the communities of which the detainee is a member,' if the reason for refusing the contact is not disclosed.[273]

Victoria Police noted that in Victoria, a detainee is entitled to be informed of an application for a prohibited contact order and can give evidence and make submissions in relation to the application. A detainee can also apply for a prohibited contact order to be varied or revoked.[274] Victorian legislation entitles a detainee to know about the existence of any prohibited contact orders and what that entails. However, they also stated they could 'thoroughly understand that there may be operational imperatives which give good reason to not alerting detainees to that fact.'[275]

Some submissions to our review raised concerns that people could be punished for breaching prohibited contact orders where they can be prevented from knowing about the restrictions to which they are expected to adhere. One submission suggested that it may amount to entrapment by law enforcement authorities where a person is released from detention but is not told about any prohibited contact orders in force.[276] In our view these concerns are unfounded. It is not an offence to breach a prohibited contact order, it simply means that police and correctional officers can prevent a detainee from contacting a person who the detainee would otherwise be permitted to contact. Also, prohibited contact orders are only in force while the person is in detention.[277] Once a person is released from preventative detention there is no restriction under the Act on who the person can contact, regardless of any prohibited contact order which may have been in place while the person was in detention.

However, we agree there are good reasons for informing detainees of the existence of prohibited contact orders, in particular where the detainee wishes to contact a person they would otherwise be entitled to contact, but are prevented from doing so because a prohibited contact order has been imposed. We note that the legislation does not prohibit police or correctional officers from informing a detainee about the existence of a prohibited contact order, it merely states that police are not required by law to inform the person being detained of the fact that a prohibited contact order has been made, or the name of the person specified in the order.[278]

It is not clear what the operational advantages would be for withholding the information, given that the person in detention will not be able to contact the person named in the prohibited contact order while in detention. Once the person is released from detention, there is no restriction on who they can contact, and the prohibited contact order ceases to have any relevance. This is an issue we will closely monitor during the remainder of our review. However, without some clear evidence, it is unlikely to be persuasive. We also note the original basis for opposing amendments, that is, consistency with the Commonwealth provisions, is weakened by the different approach taken in jurisdictions such as Victoria.

In their response to our recommendation on this issue the Ministry for Police stated, 'Whether or not the detainee is informed of the existence of the prohibited contact order would be best determined on a case by case basis by the police involved.'[279]

Recommendation

10. Police consider informing detainees of the existence of prohibited contact orders, in particular where the detainee wishes to contact a person they would otherwise be entitled to contact, but are prevented from doing so because a prohibited contact order has been imposed.

3.8. Who can a detainee contact?

Subject to any prohibited contact order, a person in preventative detention is only entitled to contact, in a limited way, a family member or person they live with, their employer (or, if relevant, an employee or business partner) or another person with the agreement of police.[280] The detainee is also entitled to contact a lawyer, the Ombudsman and the Police Integrity Commission.[281] The detainee is not otherwise entitled to any contact and may be prevented from contacting another person.[282]

3.8.1. Contact with a family member, employer or other prescribed person

A person in preventative detention who contacts a family member or person they live with, employer or other person can only let them know he or she is safe and is being detained. This means the detainee is entitled to disclose the fact a preventative detention order has been made, and the period for which he or she is being detained.[283]

The Commonwealth Attorney General's Department, in its submission to our review, referred to differences between the Commonwealth and New South Wales preventative detention regimes, in relation to what detainees can inform family members:

> *The Commonwealth does not allow a person to disclose that they are being detained as it was considered that this could impede any existing operations and could frustrate the very objective of preventative detention, which is to prevent an imminent terrorist attack, or preserve evidence following a terrorist attack.*[284]

Under the New South Wales scheme, contact with family members and others may be by phone, fax or email. The Act does not entitle a detainee to make the contact in person, other than for detainees who are under 18 or are incapable of managing their affairs.[285] Police can monitor all contact made by the detainee with his or her family member, employer or other prescribed person. Communication in a language other than English can only take place if it can be monitored with the assistance of an interpreter.[286]

We note that while the Crimes (Administration of Sentences) Act and Children (Detention Centres) Act now apply to persons held in preventative detention, preventative detainees are excluded from the visits and communications provided to other inmates or juvenile detainees under Part 4 of the *Crimes (Administration of Sentences) Regulation 2001* and Part 3 of the *Children (Detention Centres) Regulation 2001* respectively. A person in preventative detention is only entitled to contact with another person where the Terrorism (Police Powers) Act also confers the entitlement.[287]

The Department of Corrective Services' draft policy provides that detainees can only be visited by a legal practitioner or, in the case of a child detainee or incapable adult, by a parent, guardian or other acceptable person. Visits must be non-contact, with constant supervision, and must be recorded on closed circuit television where possible. During visits detainees must wear clothing designed for extreme high security inmates and if either the detainee or visitor needs to use the toilet the visit will be terminated, regardless of any medical considerations. The Department's draft policy also provides that detainees would not be allowed to send or receive any mail while in detention, and that any mail received would be given to the detainee when they are discharged from the correctional centre.[288] As explained above, the policy is under revision, so this information may change.

We will continue to monitor this issue as the NSW Police Force and Department of Corrective Services policies on preventative detention are developed.

3.8.2. Contacting the Ombudsman or Police Integrity Commission

A person in detention is entitled to contact the Ombudsman and the Police Integrity Commission. Police are not entitled to monitor this contact.[289]

The Ombudsman has provided the NSW Police Force, the Department of Corrective Services and Department of Juvenile Justice with a dedicated mobile phone number, so a person in detention can speak to an Ombudsman officer who is in a position to address the detainee's concerns at any time. We have asked for the number to be included in the agency policies.

3.8.3. Contacting a chaplain

In 2006 the Department of Corrective Services advised that its draft policy on preventative detention provided that detainees could be visited by an accredited departmental chaplain, provided this takes place within sight of a correctional officer at all times. Where the detainee speaks English, it is preferred that any interaction be conducted in English, and the chaplain would be advised of this preference. Detainees could also be provided with religious items through the chaplain, including the major book of faith, prayer mats for Muslim inmates and skullcaps for Jewish inmates.[290] The Department recently advised that access to chaplains is one of the issues being considered in the revision of its policy.[291]

Submissions to our review generally supported permitting access to a chaplain. Victoria Police considered contact with a recognised chaplain should be allowed as a facilitation of human rights.[292] PIAC, the Council for Civil Liberties and the Bar Association submitted that detainees should have access to chaplains.[293] Other submissions commented that in circumstances where family visits are not allowed, there is an even stronger case for permitting access to a chaplain.

3.8.4. Comment

It is appropriate to consider this issue in light of the possibility that the basis for a person's detention may be linked to their involvement with a religious group or their advancement of a religious cause.[294] Under such circumstances it is of significant public interest that a balance is struck between the rights of an individual to practice their faith and the needs of law enforcement.

Our view is that access to religious guidance from an accredited chaplain should be a detainee's right. This is consistent with the duty to provide humane treatment to a person being detained.[295] Where police have concerns that such contact is contrary to the purposes of the preventative detention order, application for a prohibited contact order is available to them. Balanced in favour of law enforcement is the fact that normal rules of evidence do not apply in that process and, consistent with other contact provisions, the contact can be monitored by police.

We note that no submissions we received were against detainee contact with a chaplain. In our consultation draft report we recommended Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains. The Police Ministry made no comment. The Department of Corrective Services expressed the view that legislative amendment was unnecessary.[296] The Commissioner noted contact with chaplains 'reflects existing Departmental policy'. The Commissioner also stated, 'Clause 66 of the *Crimes (Administration of Sentences) Regulation 2001* provides that an accredited chaplain is entitled to visit a correctional centre at which he or she is accredited at all reasonable hours, and to have access to inmates of the chaplain's denomination'.

As mentioned, the effect of section 26X(2A)(b) would appear to be, to exclude any contact entitlements conferred under the Crimes (Administration of Sentences) Act, unless those entitlements are also conferred in the Terrorism (Police Powers) Act. If this view is correct, a detainee has no right to access a chaplain and, for the reasons outlined above, our view is that Parliament should consider amending the Act to entitle detainees contact with an accredited Departmental chaplain.

Recommendation

11. Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains.

3.8.5. Official visitors

Inmates usually have access to Official Visitors, under section 228 of the *Crimes (Administration of Sentences) Act 1999*. Official Visitors are appointed by the Minister to interview inmates and receive complaints and inquiries.[297] The Department of Corrective Services advised that people detained under preventative detention orders will not have access to Official Visitors.[298] This is consistent with AA and Category 5 classification inmates.

Submissions on this issue were mixed. Victoria Police submitted that in relation to preventative detention, 'official visitations have no validity whatsoever.'[299] However, PIAC, the Council for Civil Liberties and the Bar Association submitted that detainees should have access to official visitors.[300] As with chaplains, some submissions argued that in circumstances where family visits are not allowed, there is a stronger case for permitting access to Official Visitors.

The reason for refusing access to official visitors is not clear. We note the consistency with provisions for certain other inmates held in similar conditions. During the period of our review, and given the requirement to notify the Ombudsman of preventative detention orders, and our capacity to speak with detainees and take complaints, we do not consider it is necessary to make any further recommendations. Given the Ombudsman's general role and access to prisoners and detainees, an expanded official visitors function for preventative detainees is not considered necessary.

3.8.6. Adequacy of the contact provisions

In our issues paper we asked about the adequacy of the contact provisions, in particular whether personal visits should be allowed. Some organisations supported the current contact provisions. For example, Victoria Police commented the provisions are satisfactory, particularly having regard to the operational imperatives surrounding the making of a preventative detention order.[301]

Other submissions argued people held in preventative detention should be permitted to have more contact with other people. The Bar Association made the point that personal contact may depend on the period of time a person is detained. If it was a very short period, they argued, it may not be practical to arrange for personal contact, however

if the person was detained for extended periods such as 14 days, the Association considered it was unclear as to why the person should not have broader contact with family members.[302]

PIAC submitted the contact entitlements of detainees should not be at the discretion of police or correctional officers, as detainees would not have been charged or sentenced with any offence. PIAC's view is that the court should be given discretion to make orders reflecting the individual needs and circumstances of detainees. If relevant evidence were given by the applicant for restrictive contact the court could make appropriate orders. In the absence of such evidence 'permissive orders as to contact' should be the norm.[303]

The Council for Civil Liberties agreed with PIAC that family visits should be permitted unless the court orders otherwise.[304] The Council also argued that the list of people a detainee is entitled to contact should be amended to include a fiancé.[305] Under the legislation, 'family member' only includes a spouse, de facto spouse or same-sex partner, parent, step-parent or grandparent, child, step-child or grandchild, brother, sister, step-brother or step-sister, or guardian or carer.[306]

Other submissions agreed that contact in person should be allowed with a family member 'unless it can be shown at least on the balance of probabilities that such a visit relates to an act of terrorism.'[307]

3.8.7. Comment

We agree that fourteen days is a long time for a person to be detained with no personal contact other than the initial contact to advise a family member or other person that the person is safe and in detention. The potentially negative impact of this on a detainee could be considered harsh in light of the preventative, rather than punitive, rationale for their detention.

Our preliminary view is that consideration should be given to permitting further contact (subject to any prohibited contact order), if such contact is not inconsistent with the purpose of the preventative detention order. However, as this is a matter of policy and the powers have not been exercised to date, we do not make any recommendation at this time. We will keep this issue under scrutiny should the preventative detention powers be exercised, and any evidence relating to the impact of the contact provisions would be considered in our final report.

3.9. Access to legal advice

A person in preventative detention is entitled to contact a lawyer, provided the individual lawyer is not subject to a prohibited contact order. Police are required to advise a detainee of their entitlement to contact a lawyer. If the detainee cannot contact their lawyer (because of a prohibited contact order or because their attempt to contact the lawyer is unsuccessful), police must provide reasonable assistance to help the person choose another lawyer. Contact includes being visited by the lawyer, and communication by phone, fax or email.[308]

3.9.1. Limitation of communication to certain matters

The Act limits the purposes for which a detainee can communicate with a legal practitioner. These purposes (the permitted purposes) are:[309]

- obtaining advice about the detainee's legal rights in relation to the preventative detention order or the treatment of the person in detention, or
- arranging for the lawyer to act for the detainee:
  - in proceedings relating to the making or revocation of a preventative detention order
  - in proceedings for a remedy relating to the preventative detention order or treatment under the order
  - in relation to a complaint to the Ombudsman or Police Integrity Commission in relation to the application for, or making of, the preventative detention order, or the treatment of the person by a police officer in connection with the person's detention under the order, or
  - in relation to a court appearance or hearing which is to take place while the person is in preventative detention.

3.9.2. Police monitoring of communication with lawyer

Police can monitor a detainee's communication with a lawyer. Provided the communication is for a permitted purpose, it is inadmissible in evidence against the detainee.[310] It is an offence for the police officer or interpreter monitoring the contact ('the monitor') to disclose to another person any information relating to contact made for a

permitted purpose.[311] The offence appears to be committed simply through disclosure, and the maximum penalty is five years imprisonment.

Concerns about police monitoring a detainee's contact with a lawyer were raised in a number of submissions and during Parliamentary debate. Mr Paul Lynch MP described this monitoring as 'wrong in principle and bad in practice'.[312] Mr Barry Collier MP also raised concerns that a lawyer could not receive proper instructions from a client where the conversation was being monitored, and argued this effectively denied a detainee access to the legal system.[313] The Bar Association raised concerns that protections against communications being used in evidence against the detainee would not apply where topics discussed fell outside the permitted purposes.[314]

The Law Society described the monitoring of client-lawyer communications as an 'unacceptable obstruction to lawyers performing their duty to their client' which undermined the rationale for 'legal professional privilege of full and frank disclosure by the client to the lawyer'. The Law Society recommended removing the provision, or failing that, including a threshold test along the lines of that in the United States and United Kingdom:

> *In the United States the Attorney General must certify that 'reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further facilitate acts of violence or terrorism' [and] In the United Kingdom the Terrorism Act 2000 allows for consultation between lawyer and detainee to be held in sight and hearing of a police officer, if a senior police officer has 'reasonable grounds to believe that such consultation would lead to interference with the investigation'.*[315]

In our issues paper we noted that while the question of whether communications with lawyers should be monitored was not one directly relevant to our review, certain issues, such as how communication with a lawyer is facilitated, and which lawyer is engaged, are directly relevant to the exercise of police and correctional functions under the Act.

Many submissions we received were strongly opposed to police monitoring of communication between detainees and lawyers. Victoria Police submitted that the issue of monitoring communications between detainees and lawyers 'would seem to be at odds with traditional values in Australia of being able to brief your counsel appropriately to enable a proper defence' and considered monitoring should only occur if there was some reason to suspect the communication would be used to facilitate terrorist acts.[316] We note the Victorian legislation provides that a preventative detention order may contain a provision directing that the contact the detainee has with a lawyer must not be monitored by police, if the court is satisfied that it is appropriate to give such a direction. Otherwise, contact with a lawyer can only take place if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer.[317]

Legal Aid NSW and the Bar Association submitted that preserving confidentiality of lawyer-client communications should only be undermined if there is a clear case that monitoring is necessary.[318] Both agreed a threshold test should apply. The Law Society's Criminal Law Committee reiterated the Law Society's opposition to police monitoring of lawyer-client communication and argued that if monitoring continues to be permitted, a threshold test such as the tests in the United Kingdom and United States should be adopted.[319] Other submissions made similar comments.[320] Legal Aid submitted the threshold be met where the 'NSW Attorney General is satisfied that there is a reasonable suspicion that the communication between the lawyer and client will be used to facilitate further acts of violence and terrorism'. The Bar Association considered the threshold should involve a criterion more stringent than that of mere *reasonable* 'suspicion' or 'grounds' as in the United Kingdom and United States tests respectively. The Association submitted that a threshold more analogous to that on which the common law/fraud exception to client privilege would be appropriate.[321] They submitted that a 'monitoring order' should be obtained in the same manner as a prohibited contact order, on application to the courts, where there was 'a high degree of probability that a detainee will use communications with his or her lawyer to facilitate acts of terrorism'.[322]

PIAC was opposed to police monitoring of lawyer-client contact and as such did not consider the question of a threshold should arise. While PIAC considered the protections afforded by the non-disclosure and non-admissibility provisions were an inadequate substitute for ordinary client legal privilege, it suggested these provisions should be extended to apply to all communications, and not be limited to the permitted communications. PIAC supported the current disclosure offences which apply to monitors.[323]

The Council for Civil Liberties submitted that provisions enabling police to monitor lawyer-client communication should be repealed. The Council considered that monitoring would inhibit full and frank discussion and would affect the lawyer's advice in ways which may be adverse to both the client and the purposes of detention. It supported the current non-disclosure and non-admissibility provisions on the basis they remove any incentive for police to detain on false grounds or offer threats or inducement to obtain information or admissions.[324]

A solicitor working for a community legal organisation submitted that many of her clients would not raise concerns about their conditions of detention if their contact with her was being monitored by police.[325] She referred to a number of examples where her clients had complaints about the conditions of their detention which seriously affected their welfare. The solicitor commented:

If these clients had had to see me with police listening I don't think they would have told me about these problems and I couldn't have helped to improve their conditions of detention. One of the checks would have been removed. No one would have taken the man with the head injury to the doctor. The woman without adequate clothes would have had to sit in the cold for the rest of the day. I wouldn't be able to make file notes of injuries, or advocate with officials about conditions of detention. People might ask for a doctor, but if Corrective Services refused then no one would be able to argue with them to insist someone be taken to hospital.

(I should say that most of the time people do receive adequate medical care and most cops and Corrective Services officials are very careful about this issue, but lawyers are at court for the times that officials fail.)

Detainees must be given private communication with lawyers. It is fundamental to lawyers making sure they are detained humanely.

The Police Integrity Commission submitted that communication between detainees and lawyers should not be monitored by police where the purpose of the communication is to make a complaint to the Commission, given that police are not entitled to monitor direct communication between a detainee and the Commission.[326]

We note that in April 2007 the Queensland government announced it would change its preventative detention legislation to remove the provisions limiting contact to certain permitted purposes, instead allowing detainees to contact a lawyer 'on any matter'. Police would only be allowed to monitor contact between a detainee and lawyer if the lawyer does not hold a security clearance, or the judge makes a monitoring order.[327] At the time of writing, these amendments had not been made to the Queensland Act.[328]

3.9.3. Security vetting of lawyers

The Act provides:

> *In recommending lawyers to the person being detained… the police officer who is detaining the person may give priority to lawyers who have been given a security clearance at an appropriate level by the Attorney-General's Department of the Commonwealth… but subject to any prohibited contact order, the person being detained is entitled under this section to contact a lawyer who does not have a security clearance.*[329]

The Council for Civil Liberties expressed a lack of confidence in the process of providing security clearance and the power of the Commonwealth Attorney General to deny access to evidence even to security cleared lawyers.[330]

The Bar Association considered security clearances for lawyers unnecessary and undesirable, on the basis the courts can protect sensitive security information through orders, and lawyers have responsibilities to the courts, which prevail over their clients, and which would secure the confidentiality of such material.[331] The Association made the point that the time required for the process of security clearance was uncertain. They raised concern that no legislative or administrative arrangements had been made to expedite the process to meet the exigent requirements of a detainee seeking the assistance of a lawyer not already given security clearance. They also considered the decision about who a detainee retains as his or her lawyer should be one in which the police have no part.

PIAC supported current arrangements and welcomed the opportunity to make further submissions if changes to this arrangement were being contemplated.[332]

3.9.4. Banning of lawyers from correctional facilities

The Department of Corrective Services noted the Commissioner of Corrective Services is entitled to ban visitors from entering a correctional facility, and that lawyers are occasionally banned from visiting correctional centres.[333] The Department advised that banned lawyers would not be granted access to preventative detainees.

We note the Commissioner may prevent a person from entering any correctional centre if of the opinion the visit would prejudice the good order and security of the centre, or the visitor during any visit, has acted in a threatening, offensive, indecent or abusive manner.[334]

We understand three solicitors are currently banned from entering NSW prisons.[335] One solicitor took civil action in the Supreme Court against the Commissioner's decision to ban him in 2004.[336] The Commissioner prohibited this solicitor, and two members of his staff, from entering any NSW Correctional Centres until the decision was revoked by the Commissioner. This occurred after an incident at the High Risk Management Unit at Goulburn Correctional Centre when it was alleged the solicitor received documents from his inmate client in breach of regulations prohibiting delivery of articles to and from inmates. The court found the exercise of the Commissioner's powers in banning the solicitor had important consequences for both the solicitor's practice and the interests of the inmate. The court was of the opinion judicial review should be available to the plaintiff (the solicitor) in regards both the exercise of the Commissioner's powers and in the circumstances of the present case. However, the court did not regard the

Commissioner's decision in this case, on the materials known to him, was unreasonable or disproportionate. The summons was dismissed.

A female solicitor was banned for two years after being accused of having an improper relationship with a prisoner also classified under the highest risk category.[337] We are not aware of the circumstances surrounding the other banned solicitor.

3.9.5. Comment

We note that submissions to our review generally opposed the monitoring of contact between lawyers and detainees. There is little doubt such monitoring will not enhance, and instead likely hinder, the purpose of the contact. Evidence for this, if such was needed, includes the submission of the community lawyer.

Striking the most appropriate arrangements for detainees accessing lawyers will assist those exercising functions under the Act, including through reducing unnecessary monitoring of conversations, ensuring appropriate lawyers are available to provide advice, facilitating both court and detention processes, and ensuring any issues arising from preventative detention are raised, so that they can be remedied. It is worthy to note that a number of other arrangements, seeking to strike a balance between the primary objective of achieving the purpose of the preventative detention order, and ensuring proper representation for the detainee, are in place.

There is merit, for example, in the proposed Queensland model, where there is no limitation on the matters a detainee may discuss with his or her lawyer, and police are only entitled to monitor the communication if the detainee's lawyer does not hold a security clearance, or the judge makes a monitoring order. This could also address the Police Integrity Commission's concerns about police monitoring communication between a detainee and his or her lawyer which is made for the purpose of instructing the lawyer to make a complaint about the detainee's treatment.

We also note the support of Victoria Police for the Victorian regime, where the court is left to determine the appropriate monitoring arrangement. Alternatively, a threshold test applied by police officers may be considered, as has been enacted in the United Kingdom. We remain concerned about the potential strict liability for police officers. At the least, police ought be able to consult a lawyer about whether any disclosure would breach section 26ZI. Provided these communications are also protected, it would ensure police officers can execute functions with some certainty.

Our preliminary view, therefore, is that the current arrangements are not flexible enough for either police or detainees. Increased flexibility through accrediting lawyers, providing courts with the discretion to make appropriate monitoring orders, and requiring police to have a proper basis (or reasonable ground) to monitor lawyer-detainee communications, are all worthy of consideration. In addition, we are of the view that a police officer ought be specifically permitted to contact a lawyer, including a NSW Police Force lawyer, to obtain advice should the officer be concerned about their obligations under section 26ZI in respect of any specific information.

In response to our consultation draft report the Ministry for Police stated:

> *Most of the matters raised by the Ombudsman in relation to Recommendation [12] refer to lawyer client confidentiality and that any such monitoring would hinder the purpose of the contact. The suggestion by the Ombudsman that allowing the Court to determine whether the contact between lawyer and the detainee is monitored would afford some protection to the NSW Police monitoring the conversation. This may have some merit and could possibly be considered by the court at the time of application for the PDO or at a later time if necessary.*[338]

Recommendation

12. Parliament further consider the arrangements for monitoring of detainee-lawyer communication, having regard to the matters set out in this report.

3.9.6. Eligibility for legal aid

Concerns were raised by members of Parliament and PIAC that a person detained under a preventative detention order may not be eligible for legal aid:

> *When people are detained and not charged they will no longer qualify for legal aid. People qualify for legal aid only if they have been charged.*[339]

> *This Bill makes no explicit recognition of the right of a detained person to legal aid. This will be a case where people with the means to do so can contest a preventative detention order. If they do not qualify for legal aid, then they contest the order at their own expense or as a self-represented litigant.*[340]

In Victoria, the court may order Victoria Legal Aid to provide representation for the subject of a preventative detention order application, 'if satisfied that it is in the interests of justice to do so having regard to the financial circumstances of that person or any other circumstances.' Legal Aid must comply with such an order, regardless of anything in the *Legal Aid Act 1978* (Vic).[341] PIAC has previously recommended that similar provisions be included in the New South Wales legislation.[342]

In the Australian Capital Territory, a preventative detention order application must be provided to the Legal Aid Commission.[343] The Commission must appoint a public interest monitor from the public interest monitor panel, who is entitled to attend the application hearing. In addition, the person subject to the application is entitled to contact the Commission and the Commission is required to assist the person in finding a legal representative.[344]

Proposed amendments to the Queensland preventative detention legislation similarly provide that the judge must arrange for Legal Aid Queensland to represent detainees who do not have legal representation.[345]

In our issues paper we asked whether legal aid entitlements may assist in police officers facilitating legal representation for detainees, and if so, what arrangements would be appropriate. The Council of Civil Liberties supported the provision of legal aid and recommended New South Wales adopt the Victorian model in this regard.[346] Victoria Police also considered legal aid should be available for detainees in circumstances where it was warranted.[347]

In August 2007 Legal Aid NSW informed us it had considered the issue of providing legal aid to detainees as a result of the concerns raised in our issues paper.[348] The Board approved an amendment to its criminal law policy, effective from 1 August 2007, which makes legal aid available for advice and representation (subject to a means test and availability of funds test) to a person who is detained under a preventative detention order. Legal Aid also considered there should be a positive obligation on police to seek legal assistance for detainees:

> *Legal Aid NSW further submits that a person detained under Part 2A of the Act is likely to be at significant disadvantage and therefore recommends that s.26ZG be amended to require Police to refer a person who is in detention to Legal Aid NSW for advice in any situation where the person who is detained has been unable to secure the services of a lawyer through any other means. A positive obligation provision ensures that Police will be required to actively seek legal aid for a person in detention who is otherwise unable to secure legal representation, thereby providing an important safety mechanism within the legislation against any possible civil rights violations.*[349]

We are pleased that Legal Aid NSW has decided to make legal aid available for advice and representation to a person who is held in preventative detention. There may be some value in this entitlement being made specific in the Act, as is the case in other jurisdictions.

Given the availability of legal aid, we agree it would be beneficial if police were required to refer a person in preventative detention to Legal Aid where the person is otherwise unable to secure legal advice or representation. In the meantime, and given the Legal Aid NSW policy, we recommend such advice be included in police SOPs.

In response to our consultation draft report the Ministry for Police stated, 'In terms of Recommendation [13 below] if the Act is not amended then this would be a matter for consideration by operational police on a case by case basis'.[350]

Recommendations

13. Parliament consider amending the Act:
    - to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, where the court is satisfied this is in the interests of justice.
    - to require police to refer a person in preventative detention to Legal Aid where such an order is in place, or where the person is otherwise unable to contact a lawyer.
14. The NSW Police Force SOPs provide that police are to assist a person in preventative detention to contact Legal Aid if the person is otherwise unable to secure legal advice or representation.

3.10. Access to interpreters

The Act provides that police must arrange for the assistance of an interpreter to explain the effect of a preventative detention order, 'if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language'.[351] A telephone interpreter may be used. Failure to provide an interpreter does not, however, affect the lawfulness of a person's detention.[352]

This section of the Act was amended in December 2007 by the insertion of subsection 26ZA(3A) which provides that a police officer need not arrange for an interpreter to be present if the officer believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable.[353]

We asked for people's views on the adequacy of the provisions for interpreters. PIAC submitted the provision of interpreters should not be at the discretion of police, arguing the legislation should be amended so that detainees are entitled to an interpreter on request, and are automatically provided an interpreter or communications assistant where the detainee has an impairment. The Bar Association considered it was inappropriate that the circumstances in which an interpreter is called be left exclusively to the opinion of a police officer and submitted interpreters should be provided on request by a detainee.[354] The Council for Civil Liberties also submitted that interpreters should be made available to detainees who are not fluent in English, for the entire period of the person's detention.

PIAC and the Council for Civil Liberties considered failure to provide interpreters where required may be considered a failure under the provisions making it an offence for police not to inform the detainee of certain matters. PIAC also commented that interpreters engaged for the purpose of monitoring lawyer-client communication, and those engaged for the purpose of facilitating communication between the police and detainee, should be different individuals.[355]

One submission expressed concern about the implications of failing to provide an interpreter where a person is questioned:

> *It is important that the detainee understand what is going on and understands any questions which may be posed by police or ASIO. It is easy for a person, who does not properly understand a question or a statement by some person in authority to agree to things which are put to him/her. In situations like this, there could be charges of terrorism, based on a misunderstanding of what is said.*[356]

We note, however, that police are generally prohibited from questioning a person who is detained under a preventative detention order.

In discussions with counter-terrorism police officers we asked about the provision of interpreters. The officers we spoke to indicated that if there was any doubt whatsoever about a person's capacity to speak English, they would use an interpreter, making comments to the effect that 'with terrorism, we can't afford to get it wrong.'[357]

We will monitor whether and how interpreters are used, should the powers be used during the review period, and will include any further information and our recommendations in our final report. We will also examine provisions in relevant police procedures.

3.11. Questioning people in preventative detention

Police cannot question a person in preventative detention other than for the purposes of determining whether the person is the person specified in the order, ensuring the person's safety and well being, or complying with other Part 2A legislative requirements. It is an offence for police to question a person in relation to any other matters.[358]

When the legislation was being debated, some members of Parliament questioned the basis for the general prohibition on questioning:

> *It seems unusual that they should not be questioned, particularly as, if they were willing to co-operate, further information could be gained from them while they are being detained.*[359]

While police are generally prohibited from questioning a person in preventative detention, a person suspected of involvement in terrorism can be detained and questioned under a number of other regimes. These include:

- detention after arrest for an offence under New South Wales law
- detention after arrest for an offence under Commonwealth law
- detention for questioning by the NSW Crime Commission, and
- detention for questioning by ASIO.

These regimes are outlined on the following page.

3.11.1. Detention after arrest for an offence against New South Wales law

Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides for a period of time that a person who is under arrest can be detained by police, to enable police to investigate the person's involvement in the commission of an offence. The investigation period begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but it must not exceed the maximum investigation period.

The maximum investigation period is four hours but can be extended by a detention warrant.[360] A magistrate or other authorised officer may issue a detention warrant that extends the investigation period by up to eight hours on the basis of a range of considerations including the nature of the offence, the evidence against the person, the cooperation shown by the detainee and provided continued detention is reasonably necessary to complete the investigation.[361] The maximum investigation period cannot be extended more than once.[362] If a person is arrested more than once within any 48 hour period, the investigation period for the subsequent arrest is reduced by the amount of time the person spent in detention following the first arrest, unless the subsequent arrest relates to an offence the person is suspected of having committed in the meantime.[363] In calculating the investigation period, certain time is to be disregarded, such as time spent taking a suspect to a police station, time waiting for the suspect to communicate with a friend, relative or legal practitioner, or time for the suspect to receive refreshments or medical attention.[364]

A person who is detained after arrest, under Part 9 of the Law Enforcement (Powers and Responsibilities) Act, must be cautioned as soon as practicable and provided with a summary of the provisions relating to the investigation period. The person has a right to refuse to participate in questioning, and is entitled to a legal practitioner. The person is also entitled to communicate with a friend, relative or guardian (unless the custody manager has reasonable grounds to believe this is likely to result in certain things, such as injury or loss of evidence).[365]

During Parliamentary debate about the proposed preventative detention regime, some members of Parliament discussed the general powers police have to question people about their involvement in the commission of an offence:

> *I understand that under the present legislation, police already have those powers, and that they would be able to take a person into custody, interrogate them, and ascertain particular aspects of police intelligence in relation to a future, forthcoming, or past terrorist act. However, the irony is that when a person is taken into custody under this legislation, police will not be able to talk to the person; he or she will simply be detained. It will prevent people from being able to talk to other people who police suspect have untoward aims.*[366]

Our understanding is that while the Terrorism (Police Powers) Act does not create new powers to question detainees, any other powers police have to question a person are still available. So, for example:

- Police could arrest a person on suspicion for a terrorist offence. If there is insufficient evidence to charge the person at the end of the investigation period permitted by Part 9 of the Law Enforcement (Powers and Responsibilities) Act, they could apply for a preventative detention order to keep the person in custody, if detention would substantially assist in preventing a terrorist act occurring, or would preserve evidence of a terrorist act which has already been committed.
- Police could take a person into custody pursuant to a preventative detention order. If, during the period of detention, police discover further evidence of the person's involvement in the commission of an offence, police could release the person from preventative detention, so he or she can be arrested and charged with the offence.

In its submission to our review, Victoria Police commented:

> *Whilst it seems fundamentally flawed that you have a person in custody for being suspected of committing terrorist acts and they cannot be questioned, the ability to take someone from that detention and put them into an investigative custody regime relevant to the suspicions seems entirely appropriate.*[367]

Victoria Police also commented it is likely a person questioned in relation to a suspected terrorism offence would be dealt with under the Commonwealth rather than a State investigative custody regime.[368]

We sought legal advice to clarify the relationship between the preventative detention regime and the ordinary detention under arrest provisions contained in the Law Enforcement (Powers and Responsibilities) Act. The advice confirmed:[369]

- Police are permitted to release a person from preventative detention and immediately arrest the person on suspicion of a terrorist act or other crime. Police can then exercise their investigative functions permitted under the Law Enforcement (Powers and Responsibilities) Act.
- Where a person is released from detention during an investigation period under the Law Enforcement (Powers and Responsibilities) Act, police are permitted to detain the person again, immediately, pursuant to an existing preventative detention order.

- Police could apply for an interim preventative detention order while a person is in custody for an offence under the Law Enforcement (Powers and Responsibilities) Act. However, police could not detain a person solely for the purpose of applying for an interim preventative detention order.

3.11.2. Detention after arrest for a terrorism offence under Commonwealth law

The Commonwealth *Crimes Act 1914* provides that a person can generally be detained for up to four hours after arrest for the purpose of investigating whether the person committed an offence.[370] If the person is under arrest for a serious offence, the investigation period can be extended by up to eight hours in addition to the original investigation period (that is, to a total of 12 hours).[371] If the person is under arrest for a terrorism offence, the investigation period can be extended by up to 20 hours in addition to the original investigation period (that is, to a total of 24 hours).[372] To obtain an extension, further detention must be necessary to preserve or obtain evidence of the offence, and the investigation must be conducted properly and without delay.[373]

In determining the investigation period, certain time can be disregarded. This includes time required to convey the person to a police station, time to enable the person to communicate with a legal practitioner, and time to allow the person to receive medical treatment or to rest. Investigating officials can also apply for a certain period to be specified as time to be disregarded in determining the investigation period. This can include, for example, time needed to collect, collate and analyse information from outside Australia, and time needed to translate information. A magistrate may allow the questioning of the person to be suspended or delayed for this period of time, and the time is to be disregarded in determining the investigation period.[374]

These provisions were used in July 2007, in the matter concerning Dr Mohamed Haneef. Dr Haneef was arrested at Brisbane airport on 2 July 2007 by the AFP and Queensland Police following terrorist incidents in London and Glasgow. He was alleged to have provided support to a terrorist organisation. Dr Haneef was detained for 12 days before being charged on 14 July 2007 with intentionally providing resources to a terrorist organisation, and being reckless as to whether the organisation was a terrorist organisation, an offence carrying a maximum penalty of 15 years imprisonment.[375] Dr Haneef allegedly provided resources to a terrorist organisation by giving his second cousin a SIM card before he left the United Kingdom in 2006.[376] Reasons for his extended detention prior to charge included that police had about 31,000 pages of computer information to read and that the investigation was operating across different time zones.[377]

Dr Haneef applied for bail. Because he had been charged with a terrorism offence, bail could only be granted if the Magistrate was satisfied the circumstances were exceptional.[378] The Magistrate was satisfied the circumstances were exceptional, and granted bail on 16 July 2007. Reasons for granting bail included that Dr Haneef was not alleged to have been directly involved with the people allegedly responsible for the attempted terrorist attacks, that the SIM card he gave his relative was not alleged to have been used in the attempted attack, he had no criminal history, he had a good employment record, his passport had been taken from him and he was likely to be kept under surveillance if released.[379]

Concerns have been expressed about a number of aspects of Dr Haneef's case, including concern about the lengthy detention periods permitted under the Commonwealth *Crimes Act*. The Law Council commented that the time which can be disregarded while questioning is suspended, effectively means a person can be detained indefinitely without charge. The Council commented:

> *The maximum legal investigation period during which a person can be held without charge is 24 hours. This time limit ceases to operate as a safeguard and becomes irrelevant, bordering on farcical, when a person can in fact be detained for very lengthy periods to account for so called 'dead time'... The 'dead time' provisions of the Crimes Act are proving capable of unlimited extension. They are subject to judicial oversight, but not to a time cap.*[380]

Amnesty International raised similar concerns, while Dr Haneef remained in detention, prior to being charged:

> *As it stands the legislation allows for an extension of detention for certain reasons, but places no cap on the total amount of time a person can be held in custody. Haneef is being detained without any definite idea as to when he will be finally charged or released.*[381]

It appears neither the Commonwealth or Queensland preventative detention powers were used in relation to Dr Haneef.

3.11.3. Detention for questioning by ASIO

During Parliamentary debates concerns were raised that despite the general prohibition on questioning, detainees could still be questioned by ASIO:

> *As the Australian Security Intelligence Organisation powers override this legislation, persons may be detained under those powers; under the warrant they may be subject to seven days or 168 hours of questioning. The passage of 168 hours will start when the person is first brought before a prescribed authority under the warrant. The legislation then provides a series of time periods in which questioning can occur. The Australian Security Intelligence Organisation Act does not detail the extent of the questioning, but obviously it is much more invasive and detailed than the sort of questions a New South Wales authority may ask… While the Government is doing everything in this Bill to protect the rights of individuals, those rights will be subject to the powers of the Australian Security Intelligence Organisation Act. Therefore I am concerned that this legislation may simply be a post box in terms of the operation of the Act.*[382]

The federal preventative detention scheme anticipates that preventative detention orders operate in conjunction with ASIO's questioning and detention powers.[383] Our understanding is that ASIO's questioning and detention powers operate outside of the New South Wales preventative detention powers. That is, a person could be released from preventative detention for the purpose of being questioned by ASIO, and could then be put back in detention afterwards, provided the preventative detention order has not lapsed (the order continues to run during the person's release from detention). This is discussed further at section 3.14. We note that anything said by the person subject to questioning by a prescribed authority under the *Australian Security Intelligence Organisation Act 1979* is not admissible in evidence against that person.[384]

The conduct of ASIO officers in detaining and questioning a 21 year old medical student, Mr Izhar Ul-Haque, has been the subject of recent criticism by a judge of the Supreme Court in NSW.[385] Mr Ul-Haque was charged with receiving training from a terrorist organisation, namely Lashkar-e-Taiba (a group committed to the restoration of Muslim control of Indian occupied Kashmir), between 12 January 2003 and 2 February 2003, while at the time knowing that organisation to be a terrorist organisation.

In November 2003 ASIO and federal police officers executed a search warrant on the Ul-Haque family residence. The warrant authorised a search of the premises but did not justify the detention of any person except if to do so were necessary for the purpose of conducting the search. Mr Izhar Ul-Haque was detained separately by three ASIO officers while en-route to his home from his university. He was detained at a car park at Blacktown train station, driven to a nearby park where he was taken for a walk, then taken to his family home, where the search was underway, and he was detained in a bedroom. During this period he was continually questioned by the ASIO officers. While detained in his bedroom Mr Ul-Haque was interviewed, on and off, between 12.04am to 3.45am by ASIO officers in the presence of a federal police officer. ASIO subsequently arranged for Mr Ul-Haque to attend federal police headquarters and take part in a formal record of interview, which he agreed to participate in.

The judge considered any citizen of 'ordinary fortitude' would have found the confrontation with the ASIO officers frightening and intimidating, particularly as he was taken to a park rather than any official place. The judge considered:

> *The accused was intentionally given to understand that he was under an obligation to accompany the ASIO officers and answer their questions. The nature of this obligation was, not surprisingly, not spelled out. It could not be, because the officers knew perfectly well that the accused was not obliged to accompany them or to answer their questions or provide any information. But I do not doubt that he felt under compulsion to obey the directions he was given lest some action be taken against him or his family by ASIO or some other instrument of government.*

The judge found the language used by the ASIO officers was deliberately calculated to suggest they were legally empowered to detain and question Mr Ul-Haque. As such the judge was satisfied that two of the ASIO officers had committed the criminal offence of false imprisonment and kidnapping at common law, as well as an offence under section 86 of the *Crimes Act 1900* (NSW), of kidnapping with the intention of holding the person to ransom, or with the intention of obtaining any other advantage. The judge further noted the impropriety of the officers was intended to produce the admissions which were made by Mr Ul-Haque.

Interviews subsequently conducted by AFP officers, in which Mr Ul-Haque again made the admissions, and which were relied on by the prosecution, were excluded by the judge on the basis they were influenced by oppressive conduct. The oppressive conduct of the ASIO officers was continued by the presence of a particular AFP officer at both ASIO and AFP interviews and was 'a clear signal to the accused of the inextricable link between ASIO and the AFP and an implicit reminder that he should not depart from anything already said'. The judge noted the accused quite rightly regarded ASIO and the AFP as arms of the state acting together.

The judge further noted, 'There is no suggestion that the officers acted contrary to ASIO protocols and good reason for thinking they did not. There are a number of ways by which the evidence might have been obtained, including the use of detention warrants, which were not sought'.

Following the Ul-Haque judgement, the Director-General of ASIO, Mr Paul O'Sullivan said there was no suggestion charges would be laid against the involved ASIO officers but rather changes needed to be made to ensure ASIO procedures conformed fully with legal requirements.[386] He said:

> *ASIO as an organisation has had to adapt its procedures and the way it behaves as an intelligence organisation which is now subject to more, more likely to be subject to examination in a legal case so that the transmission from intelligence to evidence is becoming a more common feature of the behaviour of officers in ASIO. In that process we're learning.*[387]

When considering the handling of the Ul-Haque matter it is of some concern that persons detained under interim or confirmed preventative detention orders may be released for the purpose of questioning by ASIO. It is not clear whether evidence obtained by ASIO officers, using powers intended for intelligence gathering purposes, could be used against the detainee in further application hearings for preventative detention orders.

Release of the detainee from police custody into ASIO custody also has ramifications for oversight. This is further discussed under section 5.8. We note the Inspector General of Intelligence and Security, with oversight jurisdiction over ASIO, and the Commonwealth Ombudsman, with jurisdiction over the AFP, have signed a memorandum of understanding (MOU), which aims to facilitate the exchange of information and coordination of complaint handling where multiple agencies under different oversight jurisdictions are involved. The MOU appears to anticipate the questioning of a person released from a preventative detention order which is still running. It provides for liaison between the oversight agencies where a federal preventative detention order and a questioning warrant under the ASIO Act have been issued in respect to the same person.[388]

3.11.4. Detention for questioning by the NSW Crime Commission

The NSW Crime Commission has a current reference to 'investigate matters associated with terrorist acts in NSW.' This was first referred by the Crime Commission's management committee in December 2002 and has been reissued a number of times, most recently in May 2007.[389] The Crime Commission works closely with the NSW Police Force in conducting counter-terrorism investigations, and depends on close cooperation with State and Commonwealth agencies. In the 2005–2006 financial year there were 15 arrests made and 39 charges laid under the reference, and in 2006–2007 there were three arrests and 41 charges laid.[390]

The Crime Commission has the power to summon a person to appear at a hearing and produce documents or other things referred to in the summons.[391] It is an offence to fail to attend as required by the summons, or fail to attend on a day to day basis unless excused or released from further attendance.[392] The witness may be conditionally released subject to conditions in an order. Conditions may involve reporting to the Commission in accordance with the terms of the order, or conditions ensuring the witness' further attendance before the Commission, such as providing sureties, surrender of passport, or a requirement as to where the witness is to live.[393]

A witness summoned to appear at a hearing is not excused from answering any question or producing any document or thing on the ground that the answer or production may incriminate the witness, or on any other ground. An answer made, or document or thing produced, by a witness at a hearing is not admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.[394] It is an offence for a person to knowingly give false or misleading information before a hearing of the Commission.[395]

Under recent amendments to the *Police Integrity Commission Act*, the Police Integrity Commission now has certain oversight powers over the Crime Commission.[396] The Police Integrity Commission has the power to investigate any potential complaints made by a person temporarily released from a preventative detention order for the purposes of compulsory questioning by the Crime Commission.[397]

3.11.5. Whether questioning of a person in preventative detention should be permitted

In light of concerns about the utility of a preventative detention regime, which prohibits questioning and other investigative procedures, we asked whether police should be able to question a person held in preventative detention. We referred to the model adopted by the United Kingdom, where suspected terrorists can be detained for up to 28 days without charge, so police can obtain relevant evidence, whether by questioning the person in detention or otherwise.[398] The UK model has been discussed further at sections 2.1.3 and 2.1.4 above. Victoria Police submitted a number of arguments in favour of adopting this model, as outlined in section 2.1.4.

NSW counter terrorism police argued police should be allowed to question a detained person generally while they are detained but 'within limits'.[399] They said that 'should new information be obtained that police wish to put to the detainee, then police should be allowed to do so. This is in line with the UK detention scheme'.

Submissions to our review generally did not support changing the preventative detention regime to permit detainees to be questioned about their involvement in suspected terrorist activity. The Centre of Public Law argued that permitting questioning of detainees would substantially change the nature of the scheme 'from its public justification of prevention to investigation.'[400] PIAC similarly submitted that combining preventative detention with interrogatory powers would exceed the limited purposes for which the Act was created, reduce the effectiveness of the court's supervision of the powers, and increase the risk of abuse of the powers.[401] The Council for Civil Liberties supported the current restriction on questioning.[402]

The Centre of Public Law also referred to alternative investigation powers which are available to Australian law enforcement agencies which are not available in the United Kingdom, and explained that the United Kingdom scheme 'was designed to fill a lacuna in investigatory powers which does not exist in Australia due to the presence of other laws.'[403] We note that a recent United Kingdom parliamentary report, which considered whether the 28 day maximum detention and questioning period should be extended, recommended changes to the United Kingdom laws to allow electronic surveillance material into evidence for the prosecution of terrorism offences. The report cited the positive experience of Australian law enforcement agencies, who routinely use this material in the prosecution of serious crime, and suggested the powers available to Australian law enforcement agencies were more effective in fighting terrorism than the power to detain and question for longer periods of time.[404]

We agree that the preventative detention scheme is of limited utility from an investigative perspective, given that people in detention cannot be questioned, other than to be asked limited questions about their identity and welfare. However, given the availability of questioning powers under alternative detention regimes, we have found little evidence at this time in support of changing the preventative detention legislation to permit people in preventative detention to be questioned more broadly about their involvement in the suspected terrorist act.

3.11.6. Other investigative procedures

In addition to questioning a person for the purpose of determining whether the person is the person specified in the preventative detention order, police can also take identification material from a detainee where they have that person's consent in writing or they believe on reasonable grounds that it is necessary.[405] Police can use such force as is necessary and reasonable to do so. Identification material includes such things as finger and other prints, photographs, voice recordings and handwriting.[406] The officer taking the material, or causing it to be taken, must be of the rank of sergeant or above.

Police can take finger and other prints from persons under 18 years or who are incapable of managing their own affairs, but require court orders to take other forms of identification material. A parent, guardian or other appropriate person (not a police officer) must be present when the material is taken.[407] A court order is not required by police where they have the consent in writing of a juvenile who is capable of managing his or her own affairs and their parent, guardian or other appropriate person.[408]

The identification material can only be used for the purpose of determining whether the person is the person specified in the order.[409] It is an offence to use the material for any other purpose.[410] The Commissioner of Police has the responsibility to ensure that all identification materials are destroyed as soon as practicable after 12 months has elapsed from taking the material, provided any proceedings relating to the order or the detainee's treatment under the order have not been brought, or have been brought and discontinued or completed within that 12 month period.[411]

During debate about the legislation PIAC recommended the destruction of identification materials should be subject to a certification process and the 'certification of destruction be one of the matters upon which the Attorney General should be required to report under section 26ZN'.[412] The Government amended the Bill to include provisions that a statement confirming the destruction of identification material be included in the annual report by police on the exercise of preventative detention powers to the Attorney General.[413]

Mr Neville Newell MP raised concerns that the dissemination of identification material among other jurisdictions would limit the capacity of police to ensure its destruction:

> *Proposed section 26ZM deals with the use and destruction of material taken for identification purposes. That is fine, if material and evidence is retained in New South Wales and is destroyed after 12 months, as in the case with fingerprints taken after the commission of a misdemeanour. However, I know, and all honourable members know, that under this legislation that person's identification information will not be retained within Australia. It will be sent to police forces overseas to be checked. I do not disagree with that course. What I disagree with is the implication in the section that such material will be destroyed. Everyone knows that once that material is sent overseas, neither the New South Wales police nor the Federal police will have control of it. It will not be destroyed, despite the fact that there are treaties in place. I see that as a mere sop to civil libertarians, something they would expect but something that will never happen.*[414]

We note that while the Ombudsman is required to keep the exercise of preventative detention powers under scrutiny for five years, there is no oversight mechanism to ensure that identifying material is destroyed in accordance with the legislation beyond the initial review period. We consider whether ongoing independent monitoring of preventative detention powers is warranted below in Chapter 5.

3.11.7. Establishing a person's identity

Police can question a person, or take identification material, 'for the purpose of determining whether the person is the person specified in the order.'[415]

NSW Police Force counter terrorism officers we have spoken to expressed concern that determining whether a person is the person specified in the order is different from establishing a person's identity. In their submission, counter terrorism police reiterated the distinction between 'establishing who the person actually is as opposed to whether they are merely the person named in the order'.[416]

Victoria Police also submitted that it is fundamental to detention processes to establish the identity of the person who is detained in addition to establishing whether they are the person named in the order.[417]

On the other hand, PIAC submitted that police should not be permitted to ask questions to establish the identity of the detainee (as opposed to asking questions to establish whether the detainee is the person named in the order) as police 'should be certain of a person's identity before taking them into custody.' PIAC was of the view that if there is uncertainty as to the person's identity, 'the detention cannot be said to be pursuant to the relevant order and is unlawful.'[418]

The NSW Police Force did not make any corporate level comment on this issue in its submission to our review and in the absence of any further information evidencing difficulties or operational issues, we do not recommend any change to the current provisions at this time. It is a matter we will continue to monitor during the remainder of this review.

3.11.8. Taking DNA samples

The power to take identification material in the Terrorism (Police Powers) Act does not include the power to take a DNA sample. However, police have the power to take DNA samples under the *Crimes (Forensic Procedures) Act 2000*. Where a person is not under arrest, police can only take DNA samples by consent or by court order. A DNA sample can only be taken in the absence of consent if certain criteria are met.

NSW counter terrorism police argued that police should be permitted to use any identification material obtained to assist in confirming the detainee's identity, including DNA, which is 'the most reliable means of establishing identity'. They said police should also be allowed to send copies of the identification material to partner law enforcement agencies, whether domestic or international. They commented that 'given the seriousness of this legislation and the rationale behind it, it is appropriate police have all available identification means at hand'.[419] The Ministry for Police have not provided any corporate response to this issue.

One submission to our review argued that police should be allowed to take DNA material in any circumstances the police think necessary, including to confirm the person's identity or to collect evidence to link the detainee to an offence.[420] Other submissions, including those from PIAC, Victoria Police and the Council for Civil Liberties opposed the collection of forensic material from detainees other than under the *Crimes (Forensic Procedures) Act 2000*.[421]

In the absence of any further information evidencing difficulties or operational issues, we agree the current provisions applying to DNA sampling appear adequate and appropriate. We will consider this matter again at the end of our review.

3.12. Impact on young people

Children under 16 years of age cannot be detained under a preventative detention order, and there are special provisions for child detainees aged 16 or 17. They cannot be detained with adults unless there are exceptional circumstances,[422] and are entitled to have contact (including through visits) with a parent or guardian, or another person who is acceptable to the child detainee and police, and able to represent the child's interests.[423] This contact is to be for a minimum period of two hours each day or for longer periods where the court has specified in the order.[424]

Concerns were raised during Parliamentary debate that the Act breached the Convention on the Rights of the Child, in particular Article 37 (which sets out the right not to be deprived of liberty unlawfully or arbitrarily) and Article 40 (which sets out the right to be presumed innocent until proven guilty).[425] Many submissions we received expressed opposition to the preventative detention of children and agreed it may give rise to breaches of international law. The Bar Association for example submitted that detention of children in circumstances other than as a last resort may

breach the Convention of the Rights of the Child, and argued 'the only way to address this is to make it clear that preventative detention orders may only be made with respect to persons over the age of 18.[426]

We note that in the Australian Capital Territory, preventative detention orders can only be made in relation to adults (that is, people 18 or above).[427]

3.12.1. Police custody

Where a 16 or 17 year old is detained by police under a preventative detention order, the young person cannot be detained with adults unless the nominated senior police officer considers there are exceptional circumstances.[428]

The discretion of police to detain children with adults was a source of some concern. In its submission, the Department of Community Services noted the Act does not specify what constitutes the 'exceptional circumstances' which empower police to detain children with adults, and suggested the police SOPs provide guidance on this issue.[429] Other submissions argued that police should not have any discretion to decide whether to hold child detainees with adults.[430]

We agree there would be merit in the NSW Police Force SOPs providing guidance on when children in preventative detention should be permitted to be detained with adults, while in police custody. We will continue to monitor this issue as we monitor the development of the SOPs.

3.12.2. Correctional custody

A number of submissions to our review expressed concern about children subject to preventative detention orders being detained in correctional facilities. These have been discussed further at section 3.5.8 above.

3.12.3. Visiting rights

The Act provides that 16 and 17 year old detainees are entitled to have contact — including visits, or communication via telephone, fax or email — with a parent or guardian, or another person who is acceptable to the person and the police officer detaining the person, and able to represent the child's interests (not a police officer), for at least two hours each day, or longer if specified in the order or permitted by the detaining police officer.[431]

In its submission to our review, DoCS recommended a more flexible approach to visiting rights for parents and guardians, particularly where long distances had to be travelled or parents were unable to visit their child every day.[432] PIAC submitted that the legislative presumption of a two hour limit for contact with another person was inappropriately short for a young person. It suggested that children should be entitled to contact with parents and guardians on request, and should there be reasons for limiting contact, these should be detailed in the orders made by the court.[433]

The Act provides a legislated minimum contact for children detained. We agree police and others involved in detaining children should be encouraged to provide flexibility beyond this to the parents or guardians contacting those children. Subject to such contact not being inconsistent with the purpose of the preventative detention order, or the effective management of the place where the child is detained, extended visit time should be able to be provided. The relevant agency procedures should reflect this.

In addition, the terms of a preventative detention order, as it relates to a child, could be amended to set out the period of contact the detained person is entitled to. This would ensure the court's attention is drawn to this matter, and require its active consideration by all concerned — the court, police and the detained person or their representative. This is a matter Parliament may wish to consider.

3.12.4. Provision of information to young people and their parents or guardians

During Parliamentary debate there were concerns raised that there was no requirement to provide relevant information to the parent or guardian of a detainee who is under 18.[434]

On this issue, PIAC submitted that parents and guardians should be notified immediately of a child's detention, the reasons for it and the location of their detention. They argued that parents and guardians 'have important legal and moral obligations to protect the interests of their children and defend their rights.' PIAC commented that parental advice to children 'may be crucial for the liberty of the children, or for the prevention of the terrorist act that is feared' and argued that children should be allowed contact with an independent third person who is entitled to all the information relevant to their detention.[435] Other submissions agreed that parents and guardians of child detainees

should be provided with information about the reason for the child's detention, and information about the child's rights and entitlements under the legislation.[436]

Where a person who is under 18 is detained after arrest for an offence, there are a number of legislative safeguards to protect the young person's interests. The police custody manager must, as far as practicable, assist the young person in exercising the person's rights, including the right to contact a support person. The young person is entitled to have a support person present, and cannot waive this right. Further, where police take a young person into custody, the custody manager must, as soon as practicable, find out who is responsible for the welfare of the young person, contact the responsible person and advise the person of the detained person's whereabouts and the grounds for the detention.[437]

We note that while a young person in preventative detention is entitled to contact in person with a parent, guardian or other person who is able to represent the detainee's interests, there is no positive obligation on police or correctional officers to facilitate such contact. In our view police should be required to facilitate contact with a parent, guardian or other person who is able to represent the young person's interests, ensure the interests of the young person are properly protected, and should have to provide the required information to the young person's parent, guardian or other support person. This would be consistent with the ordinary obligations of police custody managers in relation to young people in police custody.

3.12.5. Children under 16

Children under 16 years of age cannot be detained under a preventative detention order or made the subject of an application. If a person is being detained and police become aware that person is under 16, police must release the person as soon as is practicable.[438]

In December 2007 section 26E was amended and now includes provision that a person under 16 years of age is to be released into the care of a parent or other appropriate person.[439] We note the Department of Community Services (DoCS) recommended such an amendment in their submission to our review.[440] DoCs considered police should release the child into the care of a parent or guardian 'immediately' rather than 'as soon as is practicable'. We shared DoCs' concern and had provisionally recommended the Act be amended so that under 16 year olds be immediately released into the custody of a parent or guardian. In light of the amendment, we make no further recommendation.

The Ministry for Police commented on the amendment in response to our consultation draft report, and noted, "there is no definition or criteria to establish who may or may not be an 'appropriate person', however provided the decision is based on reasonable grounds this should not be a significant issue'.[441] We will continue to monitor this issue.

3.12.6. Comment

Submissions to our review expressed concern about a number of aspects of the preventative detention of children, including the detention of young people with adults, the detention of young people in correctional facilities, restrictions on visiting, and whether relevant information should be provided to the parent or guardian of a young person in detention. Concerns were also raised about the welfare of children under 16 who are erroneously taken into preventative detention, and of children of adults who are taken into preventative detention. In view of these concerns, we make the recommendations below.

The Ministry for Police, in their response to Recommendation 16, indicated the working party including the NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice would consider any such security assessments during their discussions about their memorandum of understanding.[442] They considered the issues raised in Recommendation 18 and 19 below are matters 'for the operational police who use the T(PP) Act to determine what is included any SOPs'.

Recommendations

15. In developing the Memorandum of Understanding on preventative detention, the NSW Police Force, Department of Corrective Services and Department of Juvenile Justice consider requiring a security assessment of young people to be held in preventative detention, with a view to the detention being the least restrictive reasonably practicable.

16. Parliament consider amending the Act so, in relation to detainees who are under 18:

    - Police, as far as practicable, are required to assist the detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.
    - Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of the detainee, that they are required to provide to the detainee.

17. The NSW Police Force SOPs provide for the following:

    - Police are required, as far as practicable, to assist a young person in preventative detention to exercise their contact rights with a parent, guardian or other person who is able to represent the detainee's interests.
    - Where police are required to provide information to a young person in preventative detention, this information should be provided to the young person's parent or guardian as well as the young person.
    - Police should consider any request by a young person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular, police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours.
    - Clear guidance on what would constitute 'exceptional circumstances' such that a senior police officer might approve 16 or 17 year old detainees being detained with persons 18 years and over.
    - Guidance on what would constitute an 'appropriate person' to release an under 16 year old.

3.12.7. Young people in the care of a person held in preventative detention

The Community Relations Commission raised concerns about the welfare of dependants of persons detained under a preventative detention order, asking whether there is any requirement by police to check on the welfare of a detained person's dependants, and what the implications may be in terms of social security status.[443] The Department of Community Services was also concerned about the welfare of children whose parents are taken into custody, and recommended procedures be developed by police in consultation with the Department to ensure police respond appropriately where the issue of parental responsibility arises.[444]

Recommendation

18. The NSW Police Force SOPs provide that police should consider the welfare of any known dependents of a person who is taken into custody under a preventative detention order, and make appropriate arrangements in consultation with the Department of Community Services.

3.13. Impact on people incapable of managing their affairs

The Act also has special provisions for people who are incapable of managing their affairs. They are entitled to have contact (including through visits) with a parent or guardian, or another person who is acceptable to the person and police and able to represent the person's interests (not a police officer).[445] They are entitled to have contact for a minimum period of two hours each day or for longer periods where the court has specified this in the order, or as permitted by the detaining police officer.[446]

A number of submissions we received raised concerns about the identification and entitlements of people incapable of managing their affairs in the context of preventative detention.

3.13.1. Meaning of 'incapable of managing his or her affairs'

The Guardianship Tribunal, whose core work involves 'making determinations about whether people with disabilities have the capacity to make certain personal and financial decisions', explained that the term 'incapable of managing his or her affairs' has a particular legal meaning where the Supreme Court and Tribunal must be satisfied that a

person is 'incapable of managing their affairs' before an order can be made placing a person's estate under financial management. Such a finding can be made whether or not the person suffers from a disability.[447] The Tribunal recommended a different test be applied in the context of preventative detention. That test should reflect whether the person has the ability to make decisions or avail themselves of any available rights under the Act. The Tribunal considered a number of factors were relevant, including:

- any disability the person has which may impact on the person's ability to make informed decisions
- whether the person was under some type of special disadvantage making the person vulnerable to abuse, exploitation or manipulation
- whether the person can understand and retain information provided
- whether the person can use that information to make a decision
- whether special assistance is required to communicate with the person, and
- whether the person would be disadvantaged by not having contact with a parent or guardian.

The Tribunal noted the decision as to whether a person is incapable or otherwise was a significant one, as it impacted on the conditions of the person's detention. The Tribunal's view was that the purpose of the provisions was to offer incapable persons protection while being detained, and argued this purpose may be frustrated if police officers made 'unstructured and discretionary' decisions, particularly where they may not have the relevant experience or knowledge. The Tribunal suggested the Act should specify who constitutes a person incapable of managing his or her affairs. In the absence of legislative criteria, police should develop internal guidelines outlining the types of factors that should be taken into account. In either case, only officers with the requisite knowledge should make the decision.

The Tribunal also suggested that further involvement of the Supreme Court in making decisions as to a detainee's capacity may enhance the fair and just administration of the provisions. Having the court decide on a person's capacity would be consistent with the current role of the court in determining whether an incapable person is entitled to more than two hours personal contact, and whether police can take identification material from the person. The Bar Association suggested that if a person is incapable, by reason of disability or some other impairment, and is subject of a preventative detention order then these matters should be directly raised before the courts, as they are relevant circumstances as to whether or not the person should be detained.[448]

Before the preventative detention legislation was enacted, PIAC argued against use of the term 'incapable of managing his or her affairs':

> *PIAC strongly recommends throughout the Bill the substitution of the term 'incapable of managing their own affairs', with the term, 'person under special disadvantage'. This is proposed in order to reflect the need to ensure that persons who have intellectual or psychiatric disabilities, for example, but who do manage their own affairs, are afforded appropriate protections while subject to a preventative detention order.*[449]

In its submission to our review, PIAC commented that the term 'incapable of managing his or her affairs' sets a very high level of incapacity before a person is considered to require assistance, and again suggested the term 'under special disadvantage' would be more appropriate. PIAC also suggested that if there is any doubt as to whether a person is 'under special disadvantage', a relevantly qualified person such as an employee of Justice Health could make the determination.[450] Other submissions agreed the term 'incapable of managing their affairs' should be replaced by 'people under special disadvantage.'[451]

We note there are alternative legislative tests used to identify people who may require particular assistance because of a degree of incapacity. For example:

- For the purposes of conducting strip searches under the Terrorism (Police Powers) Act, there are special rules where the person searched has 'impaired intellectual functioning.' Impaired intellectual functioning means 'total or partial loss of a person's mental functions, or a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.'[452] It is not clear why the test for incapacity for the purposes of preventative detention is different from the test for impaired intellectual functioning in Schedule 1 to the Terrorism (Police Powers) Act, given they are in the same Act. The test for incapacity for the purposes of preventative detention appears to set a higher threshold than the test for impaired intellectual functioning.
- For the purpose of detention after arrest to investigate an offence under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, there are safeguards for certain persons, including people with 'impaired intellectual functioning.' Impaired intellectual functioning has the same meaning as it does in the Terrorism (Police Powers) Act — that is, it means 'total or partial loss of a person's mental functions, or a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perceptions

of reality, emotions or judgment, or that results in disturbed behaviour.'[453] The *Law Enforcement (Powers and Responsibilities) Regulation 2005* sets out a number of factors police officers should consider to help determine whether a detained person has impaired intellectual functioning — whether the detained person appears to have difficulty understanding questions and instructions, to respond inappropriately or inconsistently to questions, to have a short attention span, to receive a disability support pension, to reside at a group home or institution, or be employed at a sheltered workshop, to be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school, or to have an inability to understand a caution.[454] The custody manager must, as far as practicable, assist a person with impaired intellectual functioning in exercising the person's rights, including any right to contact a legal practitioner, support person or other person. The custody manager is also required to ascertain the identity of the person responsible for the welfare of a detainee with impaired intellectual functioning, and contact the responsible person to advise of the detainee's whereabouts and the grounds for detention.[455]

- For the purposes of the *Crimes (Forensic Procedures) Act 2000*, an incapable person is a person who 'is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.'[456]

These tests are not dependent on whether the person is capable of managing his or her affairs, but are more closely tied to whether the person has the ability to make decisions or avail themselves of their rights under the relevant legislation.

We also note there are policy guidelines for police when attempting to decide if someone they are dealing with has impaired intellectual functioning. In the Code of Practice for CRIME police are given further indicators to consider (in addition to the legislative guidelines outlined), such as when:

- the person identifies themselves as someone with impaired intellectual functioning
- someone else, such as family, tells police the person has impaired intellectual functioning
- the person exhibits inappropriate social distance, such as being overly friendly
- the person acts much younger than their age
- the person is dressed inappropriately for the season or occasion
- the person has difficulty reading and writing
- the person has difficulty identifying money values or calculating change
- the person has difficulty locating their telephone number in a directory, and
- the person displays problems with memory or concentration.[457]

The Code says that if an officer has a suspicion someone is a vulnerable person, which includes people with impaired intellectual functioning, they will be treated as such for the purposes of the Code. In the absence of evidence to the contrary, anyone appearing to be visually impaired, unable to read, hearing impaired or who has difficulty speaking, will be treated as such for the purposes of the Code.

We agree that in determining whether a person is incapable for the purposes of Part 2A of the Terrorism (Police Powers) Act, it would be preferable to use a test which focuses on the person's capacity to understand information provided, make decisions and rely on rights available under the Act, rather than on whether the person is capable of managing his or her affairs. This would be more consistent with Schedule 1 of the Terrorism (Police Powers) Act and other legislation, such as the Crimes (Forensic Procedures) Act and Law Enforcement (Powers and Responsibilities) Act.

In previous legislative reviews, we have found evidence to suggest police may not always be properly identifying people who are incapable or intellectually impaired.[458] For this reason, and in light of the Guardianship Tribunal's submission, it would be preferable for the NSW Police Force preventative detention SOPs to include guidelines on how to identify and communicate with incapable people. Consideration might be given to the existing policy guidelines for identifying people with impaired intellectual functioning. Guidelines for identifying incapable people in preventative detention could be developed in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing a detainee's capacity.

In response to our consultation draft report the Ministry for Police stated:

> *A consistent definition of "incapable person" throughout the T(PP) Act may be beneficial. The difficulty is determining what the appropriate definition is and whether police officers or some other appropriately trained medical professional should make this decision.*[459]

3.13.2. Visiting rights

A detainee who is identified as an incapable person is entitled to have contact — including visits, or communication via telephone, fax or email — with a parent or guardian, or another person who is acceptable to the person and the

police officer detaining the person; and able to represent the person's interests (not a police officer).[460] The detainee is entitled to have contact for a minimum period of two hours each day or for longer periods where the court has specified this in the order, or as permitted by the detaining police officer.[461]

In its submission, the Guardianship Tribunal considered two issues should be considered by police when determining whether an incapable person be allowed more than two hours personal contact. First, whether the person has a disability that significantly impacts on the person's ability to communicate, and second, whether the person requires an interpreter to be present if they are unable to communicate in English with the contact person. PIAC submitted that any detainee who has a sensory, cognitive or intellectual disability should automatically be provided with an interpreter or communication assistant, and that incapable detainees should have access to an independent observer at all times, who can accompany the detainee when interacting with police and correctional officers. PIAC also submitted that incapable detainees should be entitled to visitors as requested and required by them to exercise their rights under the Act.[462] The Council for Civil Liberties considered persons with disabilities, or special disadvantages, should be provided full time care appropriate to their needs, and unlimited access to parents or guardians.[463]

We note that while an incapable person is entitled to contact in person with a parent, guardian or other person who is able to represent the detainee's interests, there is no positive obligation on police or correctional officers to facilitate such contact. In our view police should be required to facilitate contact with a parent, guardian or other person who is able to represent the detainee's interests, to ensure the interests of the detainee are properly protected. This would be consistent with the ordinary obligations of police custody managers, who must assist a person with impaired intellectual functioning in exercising the person's rights, including any right to contact a legal practitioner, support person or other person, and contact the person responsible for the person's welfare to advise of the person's whereabouts and the grounds for detention.[464]

3.13.3. Providing information to incapable people and their parents or guardians

As discussed above, police are required to provide certain information to detainees, but need not do so if the person's actions make it impracticable.[465] During Parliamentary debate there were concerns raised that if an incapable person is held in preventative detention, there is no requirement that the relevant information be provided to the person's parent or guardian.[466] In its submission to our review, the Guardianship Tribunal raised concerns that 26ZA(1) may be used inappropriately when dealing with persons incapable of managing their affairs.[467] They noted 'it may be easier for police to inappropriately interpret the demeanour or behaviour of a person who is incapable of managing their affairs as behaviour which makes it 'impractical' for them to provide information'. The Tribunal suggested the potential for discrimination in this regard would be limited if police were obliged to provide parents and guardians of incapable persons with the same information provided to capable adult detainees. The Council for Civil Liberties similarly submitted that where an incapable person in detention has a support person, the support person should be provided with all the information the detainee is entitled to.[468]

We agree that police should be required to provide the required information to a parent, guardian or other person who can represent the interests of a detainee who is incapable of managing his or her affairs. The Act already provides for contact with such a person, and in our view the contact person would be in a better position to represent the detainee's interests if provided with the information the detainee is entitled to. This arrangement would also address the Guardianship Tribunal's concerns that relevant information may not be provided to the detainee where the detainee's incapacity makes it impracticable to do so. Again, it would be consistent with the ordinary obligations of police custody managers, who must contact the person responsible for the welfare of a person with impaired intellectual functioning, to advise of the person's whereabouts and the grounds for detention.[469]

Recommendations

19. Parliament consider amending the Act so:
    - The definition and meaning of incapable person is consistent throughout the Act.
    - The meaning of incapable person include a person who is unable to understand the information provided, make decisions under the Act, or rely on rights available under the Act.
    - Police are required, as far as practicable, to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.
    - Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of an incapable detainee, that they are required to provide to the detainee.

20. The NSW Police Force SOPs provide for the following:

- Guidelines on identifying and communicating with incapable people. These guidelines should be established in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing whether a detainee is incapable for the purposes of the Terrorism (Police Powers) Act.
- Police are required to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.
- Where police are required to provide information to an incapable person in preventative detention, this information should be provided to the detainee's parent, guardian or other person who is able to represent the interests of the detainee.
- Police should consider any request by an incapable person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular, police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours.

3.14. Revocation of a preventative detention order and release from detention

A confirmed preventative detention order can be revoked by the court on application by the subject person or on application by a police officer.[470] Police must apply to have a preventative detention order revoked if they are satisfied the grounds on which the order was made have ceased to exist.[471] An application for revocation must set out any relevant information that was not provided to the court at the time the order was made. The court may reject an application for revocation.

A police officer detaining a person under an order can release the detainee at any time provided the detainee is given a written statement, signed by the officer, stating that the person is being released from detention.[472] A detainee may be released from detention under the order but taken into custody on some other basis immediately after being informed of their release, such as for the purposes of being arrested and charged with an offence.[473]

In our issues paper we asked whether it is appropriate that police have the power to release a detainee without authority of the court. The Council for Civil Liberties submitted that a preventative detention order should be treated as permission to detain, not a requirement to do so, and the Act should be amended to reflect this.[474] Victoria Police similarly submitted that it is appropriate that police be allowed to release a detainee under their own authority.[475] The Bar Association submitted 'there seems to be no good reason to require the police to seek a court order to release the detainee'.[476]

We note that the legislation as currently drafted provides that where the grounds for the detention order no longer exist, police are required to apply for the order to be revoked. Police may, but are not required to, release the person detained. In our view there are significant accountability advantages in keeping the courts involved. For this reason we consider police should seek revocation of the order from the courts where the grounds for detention no longer exist. We are also of the view that legislation should require officers to release the person from detention immediately when the grounds for detention no longer exist.

3.14.1. Taking a person back into custody under the same order

A person may be taken back into detention under the same order, after being released, provided the order remains in force in relation to that person.[477] Release from detention under an order does not extend the period for which the order remains in force. In other words, the time for which the person may be detained under the order continues to run while the person is released.[478]

The Law Society raised concerns about the release from detention and return to custody being misused:

> *People released can be returned to detention at any time while the order remains in force. This section could be used to provide an opportunity for people to be harassed and families disrupted, by people being released from detention during the day only for police to enter their premises and return them to custody each night during the life of the order.*[479]

We note that in the Australian Capital Territory, a preventative detention order lapses if a person is released, and the person cannot be taken back into custody under the same order.[480] Application can be made to reinstate the order where the order lapses due to the detention of the person under the *Crimes Act 1900* (ACT) or the *Australian Security Intelligence Organisation Act 1979* (Cth). The reinstated order ceases to have effect at the end of the period stated in the original order.[481]

In our issues paper we asked whether an order should be considered to have lapsed once a detainee is released into the community. Several submissions supported this. The Council for Civil Liberties considered that a detention order should lapse if police release the detainee, and police should not be able to detain the person under the same order.[482] The Bar Association was also in favour of the order lapsing, on the basis it protects the detainee from potential abuse of the process by police and provided certainty for both parties.[483] Victoria Police submitted that if police release a detainee from detention without court authority, this action should stop police reapplying the order and taking the detainee back into custody.[484] PIAC recommended amending the Act so that release of the detainee would automatically revoke the preventative detention order.[485]

In our view, where a person is released from the preventative detention regime but remains in custody on some other basis, for example where a person is questioned by ASIO or is arrested and questioned under the ordinary criminal law, it is appropriate that the order remain in force, so the person can be taken back into custody under the preventative detention order if the grounds for the order still exist. However, it is not clear why an order should remain in force where a detainee is released into the community. It would seem that a person would only be released into the community where the grounds for obtaining the order — that detaining the person for the period permitted under the order is necessary to assist in preventing a terrorist act, or to preserve evidence of a terrorist act — cease to exist.

It is possible there may be operational reasons for releasing a detainee into the community and then taking the person back into custody under the same order. We note the NSW Police Force did not make a submission on this issue.

At this time, and without use of the legislation, we have not come to any final view. It is a matter we will consider closely in our next report at the completion of our review.

3.14.2. Assessment of continued detention

In the United Kingdom, a judge is required, every 7 days, to assess the continued detention of a person. There is no equivalent requirement under the New South Wales scheme.

PIAC has raised concerns that police are not required to inform themselves of any changes to the grounds or make a timely application for revocation:

> *[The Act] provides, appropriately, for the police officer to seek a revocation of the order where the grounds for the order have ceased to exist. However, there is no obligation on the police officer to make enquiries or be informed of any change in circumstances that affects the existence of the grounds. Further, there is no maximum time allowed before the police officer, having determined that the grounds no longer exist, to make the revocation application… Given the seriousness of the removal of liberty, it is PIAC's view that the maximum time permissible ought properly be two hours.*[486]

In our issues paper, we asked whether police, or the court, should be required to assess at regular intervals whether the continued detention of a person is necessary. The Council for Civil Liberties submitted that the detention should be reviewed every 12 hours, and briefings provided to the Ombudsman, the nominated senior police officer and a public interest monitor at least that often, or upon request at any time. The Council also considered that the court should be required to reconsider the order within seven days of its issue.[487]

The Act provides that a police officer detaining a person under a preventative detention order must apply for the order to be revoked if satisfied that the grounds on which the order was made have ceased to exist. The nominated senior police officer must ensure compliance with this obligation, and must consider any representations about revocation made by the detainee, the detainee's legal representative or a person with whom the detainee has contact.[488] In their submission, NSW counter terrorism police indicated that 'continual review' of the reason for detention by police would be incorporated into their SOPs. As previously stated, the NSW Police Force preventative detention SOPs are yet to be finalised.

Given the obligations imposed on detaining police officers and the nominated senior police officer, we consider there would be merit in the NSW Police Force SOPs requiring officers to consider at regular intervals of no less than 24 hours, whether the grounds on which the order was made still exist. In our view, these considerations should be documented by the nominated senior officer to demonstrate accountability, and provide increased assurance of relevant matters being considered.

3.14.3. Provision of information on release

In its submission to Parliament, PIAC argued police should be required to explain the effects of release from a preventative detention order to persons upon their release, to ensure detainees understand what is happening to them. This should include whether the order has lapsed, whether the person may be taken into detention again (for example because the order has not lapsed), whether the person is going to be taken into custody under another regime (such as questioning by ASIO or being charged under the criminal law) as well as information about what rights of appeal and complaint mechanisms apply.[489]

In response to our issues paper, the Department of Corrective Services advised that it would be the responsibility of the NSW Police Force to provide information to detainees about their rights and status upon release from detention.[490] NSW counter terrorism police submitted that a detainee's entitlement to information about their rights and status upon release should be addressed in police SOPs, as opposed to seeking any legislative amendment.[491]

In our view police who release a person from preventative detention should explain the effects of release to the person, in particular whether the order is still in force, and whether the person can be taken into preventative detention again under the same order. Where the person is a child or incapable person, this information ought also to be provided to the parent, guardian or other person.

3.14.4. Protection from unwanted media exposure

During the Parliamentary debates concerns were expressed that detainees would not be protected from unwelcome publicity on their release.[492] PIAC raised these concerns:

> *This provision places no obligation on the police officer to provide the person released from detention with protection from unwelcome media exposure or the means to return to their residence or place of arrest. Nor does it provide any protection against the police officer releasing information about the pending release of a person detained [under an order] without that person's consent… Given the level of media interest and community tension in relation to people suspected of involvement in terrorist acts, it is vital that they are protected from potential retribution on release and are provided with the means to return to their preferred location.*[493]

In its response to our issues paper, PIAC suggested that protection of the privacy of the detainee from media exposure should form part of the memorandum of understanding between the NSW Police Force and the Department of Corrective Services.[494]

NSW counter terrorism police commented that it is not the role of police to protect a person from unwanted media exposure, unless a criminal offence is being or is likely to be, or has been committed.[495]

The Department of Corrective Services commented that it is capable of managing unwanted media attention, and advised it has significant experience in ensuring the release of high profile inmates is free from incident. The Department advised it has policies and procedures in place to deal with the release of short term sentence inmates to ensure their successful transition back into the community. Exit screening programs in their policies require the manager of the detention facility to address issues such as proof of identification, housing, clothing, transport needs, financial issues and the identification of any mental health issues. The Department considered that a person being released from preventative detention in a correctional facility should have access to these services, and advised this would be addressed in its preventative detention policy.[496]

Victoria Police submitted that detainees should be entitled to anonymity on release, and referred to offences in other jurisdictions, including Victoria, which prohibit the disclosure of information about a person's detention.[497] Victoria Police argued that the absence of disclosure offences in New South Wales may exacerbate the risk of media and public interest being focused on the detainee.

We note that in most other Australian jurisdictions it is an offence for a prescribed person to disclose the fact that a person is in preventative detention. Prescribed persons vary between jurisdictions but generally include detainees, lawyers and others. Under the Commonwealth preventative detention regime, as in Victoria, it is an offence for the detainee, their lawyer, the parent/guardian, the interpreter, the recipient of any disclosure, or the monitor to intentionally disclose the fact that a person is being detained, provided the disclosure is not made for certain prescribed purposes.[498]

We also note that application hearings for preventative detention orders must be made in the absence of the public, and the Supreme Court can make orders to suppress publication of the proceedings, or evidence given, where it is necessary to secure the object of the Act.[499] It is an offence for a person to contravene such an order.

3.14.5. Comment

We share concerns that preventative detainees are at risk of media exposure which could have long term detrimental impacts on their reputations, careers and families. The high profile reporting of recent terrorist related cases, such as the Haneef matter, reflects the media's intense interest in this area. As many submissions to our review have pointed out, preventative detainees are in a different position to persons who have been charged with, or convicted of a criminal offence. The evidence relied on to confirm preventative detention orders may not have been made fully available to detainees and the normal rules of evidence do not apply. While accepting the media have a role in public accountability, we consider that under the circumstances outlined, unwanted media exposure is unfair to detainees and all possible protections should be provided.

We do not consider reliance on police or corrective services policy and practice in this area provides sufficient protection. In our view it is appropriate that formal sanctions apply to those who disclose the fact that a person is being detained under an order. We agree with Victoria Police that the absence of disclosure offences may heighten the risk of unwanted media exposure for the detainee. Inclusion of disclosure offences in the New South Wales regime would also make the laws consistent with other key jurisdictions.

In our view disclosure offences should not be limited to prescribed persons. It is noteworthy that disclosure offences in Australian jurisdictions generally apply to the detainee and those representing their interests. However disclosures may also come from the agencies exercising the powers. Disclosure offences should apply to any person who intentionally discloses the fact that a person is being detained, other than for prescribed purposes.

3.14.6. Arrangements for children and incapable persons

In their submission to our review the Department of Juvenile Justice noted the police officer who makes arrangements with the Department to detain a child is considered to be the person detaining the subject. They submitted that, under these circumstances it is appropriate for the NSW Police Force to develop procedures in consultation with the Department to return a young person to an appropriate location on their release from preventative detention.[500]

In our view it is important that children and incapable persons released from detention under an order, and returned into the community, are released into the care of a parent or guardian. We agree this should be a responsibility of the officer detaining the subject, and appropriate arrangements should be provided for in NSW Police Force preventative detention SOPs. Such procedures also need to be developed in conjunction with the Department of Juvenile Justice and the Department of Corrective Services.

In their response to the following recommendations the Ministry for Police stated, 'It is a matter for the operational police who use the T(PP) Act to determine what is included in any SOPs'.[501]

Recommendations

21. The NSW Police Force SOPs require the nominated senior police officer and detaining officers to consider at regular intervals, and at least every 24 hours, whether the grounds on which the order was made continue to exist, and to document such considerations.
22. The NSW Police Force SOPs include information to be provided to detainees (and, for children and incapable persons, their parent, guardians or other nominated person) upon release, including whether or not the person can be taken into preventative detention again under the same order.
23. The NSW Police Force SOPs include arrangements for the release of children and incapable persons into the care of a parent or guardian.
24. Parliament consider amending the Act to require the nominated senior police officer to immediately release a person from preventative detention where the grounds for detention no longer exist.
25. Parliament consider the concerns raised about a detainees' exposure to unwanted media attention, and whether it is appropriate to provide the detainee with greater protection in the form of disclosure offences.

Endnotes

[90] Department of Corrective Services advice, 18 January 2007.
[91] Department of Corrective Services submission, 19 July 2007. The amendments were made by the *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007* and are discussed below under Correctional powers.
[92] Department of Juvenile Justice submission, 3 July 2007.
[93] Department of Juvenile Justice submission, 3 July 2007.
[94] Ministry for Police submission, 4 July 2008.
[95] Police Integrity Commission submission, 15 June 2007.
[96] Council for Civil Liberties submission, 22 June 2007.
[97] University of NSW, Gilbert and Tobin Centre of Public Law submission, 13 June 2007.
[98] Australian Government, Attorney General's Department submission, 24 May 2007.
[99] *Terrorism (Police Powers) Act 2002* s.26R.
[100] Advice from the NSW Police Force Counter Terrorism and Special Tactics Command officers, 2 August 2007.
[101] Ministry for Police submission, 14 August 2007.
[102] Ministry for Police submission, 4 July 2008.
[103] Ministry for Police submission, 4 July 2008.
[104] *Terrorism (Police Powers) Act 2002* s.26T.
[105] *Terrorism (Police Powers) Act 2002* s.26U.
[106] *Terrorism (Police Powers) Act 2002* s.26V.
[107] Counter Terrorism and Special Tactics Command submission, December 2007.
[108] Victoria Police submission, 18 June 2007.
[109] *Terrorism (Police Powers) Act 2002* s.26X(2)(b).
[110] See *Crimes (Administration of Sentences) Act 1999* s.79 and the *Crimes (Administration of Sentences) Regulation 2001* cl 120 and 121.
[111] See *Crimes (Administration of Sentences) Regulation 2001* cl 22 and 23 and *Crimes (Administration of Sentences) Act 1999* ss.10 and 73.
[112] Crown Solicitor's Office, Advice on application of Crimes (Administration of Sentences) Act to preventative detention orders, 17 January 2007.
[113] The Hon. Henry Tsang on behalf of the Hon. Eric Roozendaal, Second reading speech, Legislative Council Hansard, 6 June 2007.
[114] The Hon. Henry Tsang on behalf of the Hon. Eric Roozendaal, Second reading speech, Legislative Council Hansard, 6 June 2007.
[115] Department of Corrective Services submission, 19 July 2007.
[116] Advice from the Department of Corrective Services, 30 August 2007.
[117] *Terrorism (Police Powers) Act 2002* s.26D(1).
[118] *Terrorism (Police Powers) Act 2002* s.26D(2).
[119] Discussion with NSW Police Force officer, 7 July 2006.
[120] This is discussed in further detail below, at section 3.11.2.
[121] See *Criminal Code Act 1995* (Cth) ss.101.2 to 101.6.
[122] Counter Terrorism and Special Tactics Command submission, December 2007.
[123] Victoria Police submission, 18 June 2007.
[124] Victoria Police submission, 18 June 2007.
[125] University of NSW, Gilbert and Tobin Centre of Public Law submission, 13 June 2007.
[126] For example, Public Interest Advocacy Centre submission, 3 July 2007, the Council for Civil Liberties submission, 22 June 2007 and Law Society of NSW submission, 12 June 2007, The NSW Bar Association submission, 26 September 2007.
[127] University of NSW, Gilbert and Tobin Centre of Public Law submission, 13 June 2007.
[128] Submission H, 15 June 2007.
[129] Victoria Police submission, 18 June 2007.
[130] Community Relations Commission submission, 30 May 2007.
[131] NSW Council for Civil Liberties submission, 22 June 2007, and Australian Arabic Council submission, 15 June 2007.
[132] *Terrorism (Police Powers) Act 2002* s.26F.
[133] *Terrorism (Police Powers) Act 2002* s.26G(1).
[134] *Terrorism (Police Powers) Act 2002* s.26H.
[135] *Terrorism (Police Powers) Act 2002* s.26L.
[136] *Terrorism (Police Powers) Act 2002* s.26G(2).
[137] *Terrorism (Police Powers) Act 2002* s.26I(3).
[138] *Terrorism (Police Powers) Act 2002* s.26I(5).
[139] For example, NSW Council for Civil Liberties submission, 22 June 2007 and University of NSW, Gilbert + Tobin Centre of Public Law submission, 13 June 2007.
[140] Counter Terrorism and Special Tactics Command submission, December 2007.
[141] Public Interest Advocacy Centre submission, 3 July 2007.
[142] *Terrorism (Police Powers) Act 2002* s.26O.
[143] *Terrorism (Police Powers) Act 2002* s.26G(1)(a).
[144] *Terrorism (Police Powers) Act 2002* s.26J.
[145] *Terrorism (Police Powers) Act 2002* s.26J(2), *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) Part 2 and *Australian Security Intelligence Organisation Act 1979* (Cth) s.4.
[146] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s.17.

[147] *Terrorism (Police Powers) Act 2002* s.26I(4).
[148] See the Hon. Dr. Arthur Chesterfield-Evans, Legislative Council Hansard, 30 November 2005.
[149] Law Society of NSW, submission to NSW Parliament, 28 November 2005; NSW Bar Association, summary points of the submissions made to the Crossbench members of the Legislative Council, 29 November 2005 and Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[150] Victoria Police submission, 18 June 2007.
[151] Legal Aid NSW submission, 10 August 2007.
[152] NSW Bar Association submission, 27 September 2007.
[153] Law Society of NSW submission, 12 June 2007.
[154] Submission H, 15 June 2007.
[155] *Terrorism (Police Powers) Act 2002* s.26X(1).
[156] *Terrorism (Police Powers) Act 2002* s.26X(2)(e).
[157] *Terrorism (Police Powers) Act 2002* s.26ZN(2)(f).
[158] Department of Juvenile Justice submission, 3 July 2007.
[159] Preventative Detention User Guide, Business and Technology Services, June 2007.
[160] Advice from the NSW Police Force Counter Terrorism and Special Tactics Command officers, 2 August 2007.
[161] Department of Corrective Services advice, 31 July 2006.
[162] Department of Corrective Services submission, 19 July 2007.
[163] *Terrorism (Police Powers) Act 2002* s.26X.
[164] Department of Juvenile Justice website, www.djj.nsw.gov.au accessed 7 August 2006.
[165] *Children (Detention Centres) Act 1987* s.4.
[166] *Terrorism (Police Powers) Act 2002* s.26X(2A).
[167] The Hon. Tony Kelly, Legislative Council Hansard, 9 December 2004.
[168] Department of Juvenile Justice submission, 3 July 2007.
[169] Department of Community Services submission, 18 June 2007.
[170] Public Interest Advocacy Centre submission, 3 July 2007.
[171] The Council of Civil Liberties submission, 22 June 2007.
[172] The Council of Civil Liberties submission, 22 June 2007.
[173] Submission G, 14 June 2007.
[174] *Crimes (Administration of Sentences) Act 1998* s.10.
[175] *Children (Detention Centres) Act 1987* s.19.
[176] *Children (Detention Centres) Regulation 2005* cl 10(2).
[177] *Crimes (Administration of Sentences) Regulation 2001* cl 22 and 23.
[178] NSW Ombudsman Annual Report 2005–2006, p93.
[179] *Children (Detention Centres) Regulation 2005* cl 7.
[180] Department of Juvenile Justice submission, 3 July 2007.
[181] NSW Ombudsman Annual Report 2005–2006, p93.
[182] *R v Lodhi* [2006] NSWSC 691, 23 August 2006 (Whealy J) at paragraphs 79 and 80.
[183] *R v Lodhi* [2006] NSWSC 691, 23 August 2006 (Whealy J) at paragraphs 84 and 88.
[184] Raad v DPP [2007] (6 September 2007).
[185] 'Terror suspect denied bail', www.the Australian.news.com.au, accessed 10 September 2007.
[186] Raad v DPP [2007] (6 September 2007) at paragraph 6.
[187] R v Benbrika and Ors (Ruling No. 2) [2008] VSC 80 at paragraph 97.
[188] The Hon. Eric Roozendaal, Legislative Council Hansard, 30 November 2005.
[189] Ms Sylvia Hale MLC, Legislative Council Hansard, 30 November 2005.
[190] Mr Neville Newell MP, Legislative Assembly Hansard, 17 November 2005.
[191] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[192] NSW Bar Association submission, 26 September 2007 and the Council of Civil Liberties submission, 26 June 2007.
[193] Public Interest Advocacy Centre submission, 3 July 2007.
[194] Public Interest Advocacy Centre submission, 3 July 2007.
[195] The Council for Civil Liberties submission, 22 June 2007.
[196] NSW Council for Civil Liberties submission, 22 June 2007.
[197] NSW Bar Association submission, 26 September 2007.
[198] Victoria Police submission, 18 June 2007.
[199] The Department of Corrective Services submission, 19 July 2007.
[200] *Crimes (Administration of Sentences) Act 1999* s.236A and *Children (Detention Centres) Act 1987* s.37E.
[201] Justice Health, 'Policy Segregated Custody', April 2006.
[202] The Department of Corrective Services submission, 19 July 2007.
[203] *Crimes (Administration of Sentences) Act 1999* s.72A and 73.
[204] *Children (Detention Centres) Act 1987* s.27 and *Children (Detention Centres) Regulation 2005* cl 8.
[205] *Children (Detention Centres) Act 1987* cl 8.
[206] *Children (Detention Centres) Regulation 2005* cl 10(2).
[207] NSW Council for Civil Liberties submission, 22 June 2007.
[208] *Terrorism (Police Powers) Act 2002* s.26ZC.

[209] Public Interest Advocacy Centre submission, 3 July 2007 and the Council of Civil Liberties submission, 22 June 2007.
[210] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 4.
[211] Public Interest Advocacy Centre submission, 3 July 2007.
[212] Council of Civil Liberties submission, 22 June 2007.
[213] *Crimes Act 1900* ss 61, 59 and 35.
[214] Letter from Commissioner for Corrective Services, 8 May 2008.
[215] Letter to the Commissioner for Corrective Services, 3 June 2008.
[216] *Terrorism (Police Powers) Act 2002* s.26L(1).
[217] *Terrorism (Police Powers) Act 2002* s.26K(6).
[218] *Terrorism (Police Powers) Act 2002* s.26K(1).
[219] *Terrorism (Police Powers) Act 2002* s.26K(4).
[220] *Terrorism (Police Powers) Act 2002* s.26K(2).
[221] *Terrorism (Police Powers) Act 2002* s.26K(7)(b).
[222] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[223] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[224] The Hon. Bob Debus, Legislative Assembly Hansard, 17 November 2005.
[225] Law Society of NSW submission, 12 June 2007.
[226] NSW Bar Association submission, 27 September 2007.
[227] Public Interest Advocacy Centre submission, 3 July 2007.
[228] The Council for Civil Liberties submission, 22 June 2007.
[229] Legal Aid NSW submission, 10 August 2007.
[230] University of NSW, Gilbert and Tobin Centre of Public Law, 13 June 2007.
[231] Counter Terrorism and Special Tactics Command submission, December 2007.
[232] Victoria Police submission, 18 June 2007.
[233] Ministry for Police submission, 4 July 2008.
[234] Legal advice, 3 May 2007.
[235] Legal advice, 3 May 2007.
[236] *Terrorism (Police Powers) Act 2002* s.26ZB(2).
[237] *Terrorism (Police Powers) Act 2002* ss.26Y and 26Z(1).
[238] *Terrorism (Police Powers) Act 2002* s.26ZA(1).
[239] *Terrorism (Police Powers) Act 2002* s.26Y(2)(b).
[240] *Terrorism (Police Powers) Act 2002* s.26Z(2).
[241] *Terrorism (Police Powers) Act 2002* s.26ZA(3).
[242] Department of Corrective Services submission, 19 July 2007.
[243] Public Interest Advocacy Centre submission, 3 July 2007.
[244] Victoria Police submission, 18 June 2007.
[245] Police Integrity Commission submission, 15 June 2007.
[246] Department of Corrective Services submission, 25 June 2008.
[247] *Crimes (Administration of Sentences) Regulation 2001* clause 6(e).
[248] "Got a problem?" posters, Multi-media Unit, Department of Corrective Services, 2002.
[249] Ministry for Police submission, 4 July 2008.
[250] Ms Lee Rhiannon MLC, Legislative Council Hansard, 30 November 2005.
[251] The Hon. Tony Kelly, Legislative Council Hansard, 30 November 2005.
[252] The Hon. Tony Kelly, Legislative Council Hansard, 30 November 2005.
[253] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005 and Council for Civil Liberties submission, 22 June 2007.
[254] The Council for Civil Liberties submission, 22 June 2007.
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Chapter 4.
Covert search warrants

This chapter reports on the Ombudsman's activities in keeping the covert search warrant powers under scrutiny.

We note at the outset that some submissions to our review expressed general opposition to covert searches.[502] The Law Society's Criminal Law Committee indicated it is 'strenuously opposed to the concept of covert search warrants' and argued that the covert search scheme 'seriously undermines the balance between the State's right to investigate and prosecute crime and the rights of individuals to carry out their proper business and lives without fear of intrusion by the State.'[503] The Law Council noted that law enforcement agencies have significant powers already, including powers to conduct controlled operations, enter premises covertly to install listening devices, intercept telecommunications, and access stored communications.[504] The Council for Civil Liberties argued that the risks of secret surveillance include the use of extraordinary powers for fishing expeditions, the possibility of harassment where police discover private information, and the risk that evidence may be planted.[505] The Bar Association considered the need to extend search warrant powers had not been demonstrated and there were insufficient protections for the privacy of occupiers 'while their operation is shrouded in secrecy'.[506]

Comments made by these organisations included in this chapter should therefore be read in light of their opposition to covert searches in general.

4.1.1. Summary of the use of covert search powers during the review period

During the review period, the NSW Police Force applied for five covert search warrants.[507] All five were issued, but only three were executed. One was not executed because there was no opportunity to execute it covertly, and another because the address on the application was incorrect. Police realised the address was incorrect before attempting to execute the warrant. No further warrants have been sought since we published our issues paper in April 2007.

Each of the warrants was obtained because police suspected the preparation or planning of a terrorist act. None were obtained solely on the basis of suspicion of membership of a terrorist organisation.

No arrests have been made as a direct result of the three covert search warrants executed. However, some people have been arrested and charged with terrorist related offences as part of ongoing related investigations. We note one such matter has now been finalised by the courts with an acquittal of the accused. Ms Jill Courtney was charged with terrorist related offences after allegedly conspiring with her boyfriend to detonate a car bomb in Sydney's Kings Cross. The matter was heard in the Supreme Court before a jury. After completion of the crown case the Judge told the court the evidence was insufficient to establish the charges and directed the jury to make a not guilty verdict.[508]

Occupier's notices have been served in relation to all three warrants executed. Two of these warrants were granted postponements and served approximately two years and six months after execution. The table below shows the use of covert search powers during the review period.

Warrant	In force	Powers authorised	Executed	Report to judge due	Date reported	Outcomes reported	Occupiers notice
1	13/10/05–12/11/05	Powers conferred under s.27O(1) excluding 27O(1)(d) enter adjoining premises	No	22/11/05	7/12/05	N/A	N/A
2	4/11/05–3/12/05	Powers conferred under s.27O(1)	No	13/12/05	29/11/05	N/A	N/A

Warrant	In force	Powers authorised	Executed	Report to judge due	Date reported	Outcomes reported	Occupiers notice
3	4/11/05–3/12/05	Powers conferred under s.27O(1)	Yes on 5/11/05	15/11/05	29/11/05	Hard drive copied, documents copied, nothing seized.	Postponed on 4/5/06, 25/10/06, 3/5/07 and 1/11/07. Served 5/5/08.
4	4/11/05–3/12/05	Powers conferred under s.27O(1)	Yes on 5/11/05	15/11/05	29/11/05	Nothing seized.	Postponed on 4/5/06, 25/10/06, 3/5/07 and 1/11/07. Served 5/5/08.
5	23/3/06–24/3/06	Powers conferred under s.27O(1)	Yes on 23/3/06	2/4/06	11/4/06	Swabs taken, nothing seized.	Served 27/9/06

4.1.2. Overview of monitoring

Through our scrutiny of the powers, we found no evidence of misuse of the powers. The powers were used infrequently and were used in the investigation of serious offences. On each occasion where police have sought to postpone service of the occupier's notice, the court was satisfied postponement was justified.

Subject to the amendments we recommend below, we are satisfied the use of covert search powers during the review period achieved an appropriate balance between the operational requirements of law enforcement, and the privacy and other interests of occupiers of premises.

However, we are concerned that without ongoing scrutiny of covert search powers, the balance would be tilted towards the interests of law enforcement agencies, and the rights and interests of occupiers would not be sufficiently protected. It is of considerable concern that the exercise of the powers were not reported to Parliament in the relevant annual reporting period, as required under the Act. This issue is canvassed in section 5.6. The failure of the NSW Police Force to comply with the Act in this regard demonstrates the need for ongoing scrutiny.

4.2. Implementation of the legislation

Only certain police officers and staff members of the Crime Commission are eligible to apply for covert search warrants. An 'eligible police officer' means a police officer employed within a group designated by the Commissioner of Police as the terrorism investigation group. In the NSW Police Force, this is the Counter Terrorism and Special Tactics Command. An 'eligible staff member of the Crime Commission' means a person employed within a group of staff of the NSW Crime Commission that is designated by the Crime Commissioner as the terrorism investigation group. Applications must be authorised by the Commissioner of Police, Crime Commissioner or certain delegates.[509]

When exercising covert search warrant powers, the NSW Police Force and the Crime Commission act as a single unit. The NSW Police Force makes all applications and we have been advised it is unlikely the Crime Commission would apply for a covert warrant itself.

The NSW Police Force Counter Terrorism and Special Tactics Command drafted Standard Operating Procedures (SOPs) for covert search warrants in September 2005, which have been amended from time to time, as needed. The SOPs indicate that the Crime Commission may be an 'external partner agency' in the execution of a covert search warrant, and that Crime Commission staff may assist in the execution of a covert warrant. ASIO and the Australian Federal Police (AFP) may also be 'external partner agencies'.[510] The Crime Commission has not drafted any SOPs for use of covert search warrant powers.

4.3. Applying for a covert search warrant

An eligible police officer or staff member of the Crime Commission applying for a covert search warrant must be properly authorised by the Police Commissioner or Crime Commissioner. According to the *Terrorism (Police Powers) Regulation 2005*, the Police Commissioner may delegate this power to the Assistant Commissioner, Counter Terrorism or the Commander, Counter Terrorist Coordination Command, and the Crime Commissioner may delegate the power to the Assistant Commissioner of the Crime Commission.[511] It appears the Regulation should be amended as the Counter Terrorist Coordination Command is now known as the Counter-Terrorism and Special Tactics Command.

Authority to apply for a warrant may be given if the person giving the authorisation suspects or believes on reasonable grounds that a terrorist act has been, is being or is likely to be committed, the entry and search of premises will substantially assist in responding to or preventing the terrorist act, and it is 'necessary' to conduct the entry and service without the knowledge of any occupier of the premises.[512] The Supreme Court has commented that 'the test of necessity rather than that of desirability or mere convenience has been selected by the legislature and sets the bar at a high level before authorisation may be given for such a warrant to issue.'[513] The definition of terrorist act includes intentionally being a member of a terrorist organisation.[514] An eligible judge is a Supreme Court judge who has consented to the role, and has been declared by the Attorney General as eligible.[515] Applications are dealt with in the absence of the public, and may be made in person or by telephone.[516]

The application for a warrant must include certain details including the grounds on which the application is based, the address or description of the subject premises, the names of persons believed to be knowingly concerned in the commission of the terrorist act, and if no such person is the occupier of the premises, the names (if known) of the occupier of the subject premises.[517] Where it is proposed that adjoining premises be entered, the address and reasons for entry are required.

The application must state the powers that are proposed to be exercised on entry to the premises, and a description of the kinds of things to be searched for, seized, substituted, copied, operated or tested.[518] The application must also contain information relating to any previous applications for covert search warrants on the subject premises, either issued or refused.[519] Where a warrant has been refused no further application can be made to any judge unless there is additional information that justifies making the application.[520]

A person is prohibited from knowingly providing false or misleading information to the judge, when applying for a covert search warrant. This applies to telephone warrant applications as well as applications made in person. The offence carries a maximum penalty of two years imprisonment or a fine of $11,000.[521]

4.3.1. Determination of applications made

In determining whether there are reasonable grounds to issue the warrant, the eligible judge must consider a range of matters including the reliability of the information, the connection between the terrorist act and the thing proposed to be searched for, the nature and gravity of the terrorist act, and the extent to which execution of the warrant would assist in the prevention of, or response to, the act.[522] The judge is also to consider whether there may be alternative means of obtaining the information sought and the extent to which executing the warrant would affect the privacy of any person who is not believed to be knowingly involved in the commission of the terrorist act.[523] Where entry to adjoining premises is sought, the judge must consider whether this is reasonably necessary to enable access to the subject premises or to avoid compromising the investigation of the terrorist act.

The judge must record the grounds upon which he or she has relied to justify the issue of the warrant or his or her refusal to issue the warrant.[524] For example, one judge who issued a covert search warrant recorded the grounds justifying the issue of the warrant as including:

- the reliability of the information
- the connection between the terrorist act and the items and goods for which the search is to occur
- the potential gravity and the actual gravity of the alleged acts and the possible effects of the acts
- the extent to which the order would assist in the prevention of a terrorist act
- the lack of alternative means of obtaining the information or the unlikelihood of their success
- that any effect on the privacy of individuals not concerned in the terrorist act is not significant and is substantially outweighed by the necessity for the warrant, and
- that damage to adjoining property would be limited to that which is reasonably necessary to enable access and avoid compromising the investigation.

4.3.2. Conditions

A judge can issue a covert search warrant and impose conditions in relation to its execution, and any such conditions must be set out in the contents of the warrant.[525]

None of the covert search warrants issued to date were subject to conditions.

4.3.3. Concerns about covert search warrants

The Legislation Review Committee of the Parliament of New South Wales, whose functions are set out in the *Legislation Review Act 1987* and include reporting to Parliament on whether a Bill trespasses unduly on personal rights and liberties, raised a number of concerns with the grounds for issuing a covert warrant. It noted the Bill authorised 'very significant powers against those who may not be involved in terrorist acts'. In particular:

- *the threshold for invoking the powers is suspicion on reasonable grounds (which will inevitably lead to the covert entry and search of premises of innocent people);*
- *it is not necessary that all or any occupiers of the premises be suspected of any criminal acts, although the Judge is to consider the extent to which the privacy of the person who is believed to be knowingly concerned in the commission of the terrorist act is likely to be affected;*
- *the Bill allows use of covert search powers on the basis of actions which may have very little connection with any act which might harm a person, such as taking steps to join an organisation that has been proscribed by Commonwealth regulation, although the Judge must consider the nature and gravity of the 'terrorist act';*
- *there is no requirement of imminent threat before a warrant may be issued.*[526]

The Committee noted the Bill appeared to enable 'persons not concerned with a terrorist act who occupy the same premises as a person suspected of committing a terrorist act, or are visited by such a person, to be subject to the full force of a covert search warrant'.[527]

The Committee raised concerns with the breadth of the offence of 'being a member of a terrorist organisation', which may be the basis for using extensive covert entry, search and seizure powers. The Committee noted the meaning of terrorist organisation included any organisation specified in regulations made by the Governor-General on the advice of the Commonwealth Attorney General. The Committee suggested this had the 'potential to trespass on personal rights by criminalising association with that organisation on the basis of political assessment of that organisation, rather than an impartial assessment of the actions or objectives of that organisation'.[528] There are currently 19 proscribed terrorist organisations. These are listed in the Annexure to this report.

The Commonwealth Security Legislation Review Committee, in its report into the Commonwealth security scheme, was critical of the process of proscribing terrorist organisations. It noted that proscription was 'an executive act' with 'no sufficient process in place that would enable persons affected by such proscription to be informed in advance that the Governor-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation'.[529] The Committee believed a 'fairer and more transparent' proscription process should be devised and recommended the process be amended to meet the requirements of administrative law.

In its submission to this review, the Council for Civil Liberties argued that covert searches should not be used to find out whether a person is a member of a terrorist organisation, on the basis that investigation of an alleged membership offence does not present an emergency, and does not warrant the use of emergency powers.[530]

We note that each of the warrants obtained during the review period was obtained because police suspected the preparation or planning of a terrorist act. None were obtained solely on the basis of suspicion of membership of a terrorist organisation. We understand New South Wales is the only state where covert search powers are available for the investigation of suspected membership offences. We also note that when membership of a terrorist organisation became an offence under New South Wales law, the offence was subject to a sunset clause, so the provisions would be repealed after two years (that is, in December 2007). However, the repeal was postponed by the *APEC Meeting (Police Powers) Act 2007*, and the provisions are now due to be repealed on 13 September 2008.

In light of these considerations, our view is that there is insufficient evidence to recommend change to the current arrangements permitting covert search warrants on the basis of membership of a terrorist organisation only. It is clearly an issue of significant importance. If the covert search warrant scheme continues, it is a matter that would, in our view, warrant close ongoing consideration.

4.3.4. Capacity for testing information contained in warrant applications

Some submissions to this review expressed concern about whether information contained in covert search warrant applications is adequately tested, under the current application procedure.

The Council for Civil Liberties submitted that a public interest monitor should be present at covert search warrant applications 'to question the specific powers requested, and to explore any lack of thought shown about what is really necessary.' The Council submitted that the monitor should be able to cross-examine the applicant and any witnesses, and make submissions to the judge.[531] We have discussed public interest monitoring in more detail in Chapter 5.

In its report, the New South Wales Legislation Review Committee noted that while it is an offence to knowingly give false or misleading information to a judge when making an application, 'there is no prohibition on being reckless or negligent regarding the truthfulness or accuracy of such information'. The Committee stated, 'The Bill appears to enable… applications for a covert search warrant to be made without sufficient care being taken, given the gravity of the powers sought, to test the grounds of suspicion of the terrorist act.'[532]

The NSW Police Force and the Crime Commission submitted that the current application process is adequate. They commented that as covert searches are conducted to obtain evidence of an alleged offence, requiring a higher standard of proof 'would render this legislation ineffectual.'[533]

We note the exercise of other covert law enforcement powers such as controlled operations are regulated by a code of conduct. In applying for an authority to exercise powers under the *Law Enforcement (Controlled Operations) Act 1997*, applicants must at all times act in good faith, in particular by disclosing all information which could affect the way the application is determined, they must ensure the application does not contain anything that is incorrect or misleading, and report any information the applicant subsequently becomes aware of which could have affected the way the application was determined.[534]

4.3.5. Applying in person, or by phone or fax

Covert search warrant applications may be made in person or by telephone. An application in person must be in writing and given before an eligible judge on oath, affirmation or affidavit.[535] The judge may administer an oath, affirmation or take an affidavit for the purposes of the application.

Telephone warrants can be issued where the judge is satisfied the warrant is required urgently and it is not practicable to be made in person.[536] The judge need not administer an oath, affirmation or take an affidavit for the purposes of the application. The application must be made by facsimile where such facilities are readily available. If it is not practicable to make an application by telephone directly to an eligible judge, it may be transmitted to the judge by another person. If the judge issues the warrant but cannot provide it to the applicant, the applicant can complete a form of warrant in the terms indicated by the judge, sign it, naming the judge and the date, and provide it to the judge within two business days of issue.

One submission to our review argued that because of the extraordinary nature of the powers, covert warrant applications should have to be made in person, and should not be able to be made by telephone.[537] Another submission argued that police should be able to make warrant applications by telephone where this is expedient.[538] The NSW Police Force submitted that 'urgent or time critical circumstances may arise where it is necessary to make applications as a matter of urgency' and submitted the current provisions, which permit applications by phone or fax, are necessary and appropriate.[539]

In our view the current application arrangements are appropriate and there is insufficient basis for recommending any change. We recognise that flexibility is preferable in critical matters. The current arrangements are consistent with the general search warrant scheme. To date, all covert search warrant applications made have been made in writing before an eligible judge on oath, demonstrating an appropriate use of the application process.

4.4. Conducting covert searches

4.4.1. Who can conduct a covert search?

Eligible police officers or staff of the Crime Commission may execute a covert search warrant, with the aid of assistants as considered necessary.[540]

The NSW Police Force SOPs outline the roles and responsibilities of officers involved in the application and execution of covert search warrants. Roles to be assigned include an authorising officer, operation commander, case officer,

applicant (warrant holder), searching officer, exhibit officer, independent officer (where practicable), video operator (where practicable) and specialist assistants. It is anticipated all roles would be performed by the NSW Police Force with the exception of specialist assistants, who may be persons from outside the NSW Police Force such as Crime Commission staff, chemists, translators and analysts. Staff from Commonwealth agencies, such as ASIO, the AFP or the Australian Customs Service, may also assist.

For the three covert search warrants which have been executed to date, the following assistants were used:

- In one warrant ten assistants were used, including an independent officer, five police from the State Technical Investigation Branch, two police from Forensic Services Group, one officer from the State Electronic Evidence Branch and one firearms and explosives detection dog handler.
- In another warrant three assistants were used including an independent officer and two police from the State Technical Investigation Branch.
- In the third warrant seven assistants were used including an independent officer, five police from the State Technical Investigation Branch and one officer from Forensic Services Group.

The NSW Police Force and the Crime Commission commented that the use of specialist assistants in executing covert search warrants is necessary. The Crime Commission commented, 'the training of assistants is not sensible as a general proposition, as police use locksmiths, forensic experts, etc and make judgements about safety issues on a case-by-case basis.'[541]

We note that during Parliamentary debates, concerns were raised about the use of assistants:

> *The Bill also allows the person who is granted a secret search warrant to use assistants to carry out the terms of the warrant. There is no obligation to accredit, train or vet that assistant who will then be tramping through innocent people's homes and bugging or searching others.*[542]

Under New South Wales controlled operations legislation, a person must not be authorised to participate in a controlled operation unless the chief executive officer of the relevant agency is satisfied that the person has the appropriate skills to participate in the operation.[543]

In its submission to our review, the Police Integrity Commission commented:

> *The extraordinary nature of covert searches under the Act may necessitate additional safeguards. The Commission is concerned that a misconduct risk may arise from the use of an assistant in the execution of a search warrant who may not have been trained or security vetted. In the Commission's view, consideration should be given to establishing guidelines regarding training and security vetting for assistants prior to them being used in covert searches.*[544]

While it may be preferable to use assistants who have obtained security clearance, we note that to date, only police officers have assisted in the execution of covert search warrants. We recognise that in some foreseeable circumstances, additional skills may be required to execute the warrant.

In our view any assistants used should be properly briefed about relevant matters, such as the powers available under the warrant and the need to keep the search results confidential. Assistants should also provide an undertaking to abide by the terms of the warrant and maintain confidentiality. This would be consistent with the obligations on police and civilian participants under the code of conduct in the *Law Enforcement (Controlled Operations) Regulation 2007*.[545] Parliament may consider the insertion of a code of conduct into the *Terrorism (Police Powers) Regulation 2005* relevant to the use of assistants by police in executing covert search warrants.

Recommendation

26. Parliament consider amending the Act to include a code of conduct applicable to law enforcement officers and assistants executing covert search warrants requiring that they be properly briefed, abide by the terms of the warrant and maintain confidentiality.

4.4.2. How long were the covert warrants in force?

A covert search warrant must specify the date on which the warrant expires, which cannot be more than 30 days after its issue.[546]

Four of the five warrants obtained to date specified they expired 30 days after the date of issue. Of these, one was executed the day after issue, one two days after issue, and the other two were not executed at all.

The fifth warrant specified it would expire two days after issue. It was executed the day after issue.

4.4.3. What did officers do when conducting covert searches?

A covert search warrant authorises eligible persons to enter the subject premises without the occupier's knowledge and search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print from or test any thing which is either described in the warrant or is a relevant thing.[547] A relevant thing is a reference to a thing that the eligible person has reasonable grounds to suspect or believe will substantially assist in responding to or preventing a terrorist act.[548] Eligible persons can use reasonable force to enter the premises and impersonate another person for the purposes of executing the warrant.[549] Officers can also break open any receptacle in or on the premises for the purposes of the search.[550] Those executing the warrant can do anything reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier of the premises.[551]

For the three warrants executed to date, the following actions were taken:

- For one warrant officers executing the warrant searched premises and copied the hard drive of a computer and video taped documents. They also located and recorded plans of buildings and premises. Nothing was seized.
- For another warrant officers executing the warrant searched premises. Nothing was seized or otherwise copied, recorded or tested.
- For the third warrant officers executing the warrant searched a vehicle and took swabs for forensic analysis. We were informed by police that of the twelve swabs taken, only three had possible traces of a relevant substance, and the results may not be admissible in evidence.[552] No items were seized.

Covert search warrants must describe the kinds of things that may be searched for, seized, substituted, copied, photographed, operated, printed or tested.[553] The warrants issued to date contained a standard list of 29 things. The list included:

- financial records, including account documentation, banking correspondence, bank statements, vouchers for account transactions, records relating to the transfer of money within Australia or overseas, loan documentation, credit card documentation
- identification documentation, passports
- personal computers, hard disk drives, portable computer storage devices, computer files and computer data, including recovered deleted computer files and data
- photographs
- telephone listings, telephone messages, telephone account records, telephone/address books, mobile phones, SIM cards
- magnetic and digital storage media
- business cards
- personal records, diaries, handwritten notes, typed notes, personal correspondence
- weapons or explosives, chemicals and apparatus that may be used in the manufacture of weapons or explosives, documentation relating to weapons or explosives, and
- maps or diagrams, military training manuals, publications, and political, extremist or religious propaganda.

The list also included any storage device which contains any of these things, and any manual, instruction or password needed to gain access to or decode any of the things.

Each warrant granted also set out a standard list of powers the applicant and assistants may exercise when conducting the covert search. As the warrant is a pro forma document, it appears these powers are granted, unless the judge crosses any of them out.

The NSW Police Force and Crime Commission submitted that 'the provisions setting out the various acts permitted under a warrant are sufficient and appropriate' and that 'all specified powers are necessary given the nature of the matter being investigated and to enable police to adequately investigate such matters.'[554]

Other submissions to our review expressed concern about the fact that all warrants issued to date authorised police to exercise powers in relation to a standard list of many different types of items. For example, the Law Council commented:

> *This suggests that police are not being required to specify and justify in sufficient detail why they require the warrant and what it is they expect or hope to find. In order to obtain the warrant police are required to suspect or believe on reasonable grounds that the entry and search of the premises* ***will substantially assist in responding to or preventing the terrorist act****. The warrant is not intended to facilitate a fishing expedition. The Law Council acknowledges that, regardless of what items are listed, police are afforded the power under the Act to seize or detain anything that they find in the course of executing the warrant that is connected with a serious indictable offence. Nonetheless, the Law Council believes that as part of the application process, police officers should be required to turn their minds to precisely what they think might be located at the target premises which will provide 'substantial assistance' to them in their counter-terror operations.*[555]

Our scrutiny of covert searches has not identified any problems with the particular powers exercised during searches. While we acknowledge the concerns raised about what powers police might request, we note that police have used a variety of the powers given, even in the small number of warrants executed. For this reason, and given the potentially serious offences these warrants are designed to assist police in investigating or preventing, we do not recommend any change to the current arrangements. However, we note that the warrants issued authorised a much broader range of powers than were actually exercised during the search, and in our view this lends weight to the case for ongoing independent scrutiny of covert search powers. We discuss this further below, in section 5.9.

4.4.4. Seizing evidence of other offences

The Act provides that covert search warrants authorise an eligible person to seize and detain any thing that the person finds in the course of executing the warrant that is connected with a serious indictable offence — that is, an offence punishable by five or more years imprisonment.[556] There must be reasonable grounds for suspecting the thing has been or will be used in the commission of the offence.[557]

The Legislation Review Committee raised the issue of covert warrants being 'used to gather evidence for a serious indictable offence unconnected with a terrorist act, using powers that could not otherwise be used for an investigation of that offence.'[558] It noted:

> *Once a warrant has been issued, the Bill allows the covert search powers to be used to seize 'any other thing… that is connected with a serious indictable offence', without the need for any evidence of connection between that thing and a terrorist act.*[559]

The Law Society raised the following issues with evidence obtained:

> *We are concerned by covert warrants. They're open to abuse…They could be used as fishing expeditions — using covert warrants to look for evidence of other crimes on the pretext that there's a terrorism suspicion. Any evidence of a serious crime found during a covert search may be admissible in Court.*[560]

PIAC similarly submitted that providing for seizure of evidence of other offences is not consistent with the preventative rationale of the legislation.[561]

The NSW Police Force submitted that there should not be any additional requirements where officers executing a covert search warrant seize things which are not related to terrorism, but to some other serious indictable offence.[562]

Through our monitoring of covert searches, we have not found any evidence that police or Crime Commission officers have used their covert search powers to look for evidence of other crimes on the pretext of a suspected terrorism offence. Counter-terrorism investigation is operationally distinct from the investigation of other types of crime. One police officer from the Counter Terrorism and Special Tactics Command commented, in words to the following effect, 'It's not like someone from the drug squad can come along and say look can we do this search together so we can use your covert search powers.'[563] This is also reflected in the restricted approval arrangements for covert search warrant applications, that is, only the Commissioner and two senior Counter-Terrorism and Special Tactics Command officers can approve applications.

The application process also acts as a safeguard against using covert search warrants as a pretext for investigating other types of crime, as the judge must take into account factors including the nature and gravity of the suspected terrorist act, and the extent to which the exercise of covert search powers would assist in preventing or responding to it.

We found that covert search powers are not being used very often — five warrants have been obtained in two years — which again suggests the powers are not being used for the investigation of other types of crime.

Finally, we note that during the execution of ordinary search warrants, police may seize any thing the police officer believes on reasonable grounds is connected with any offence.[564]

For these reasons, and while we acknowledge the potential for abuse, we are of the view there is insufficient basis at this time for recommending any change to the current arrangements.

4.4.5. Collection of DNA

The Act does not specifically authorise the collection of DNA samples during the execution of a covert search warrant. However, it does authorise 'testing of a kind of thing' where authorised by the warrant. The warrants authorised so far have not specifically authorised the collection of DNA.

One submission to our review commented that the collection of DNA samples under the auspices of a covert search warrant is a dubious practice and is open to manipulation by law enforcement agencies.[565] Another submitted that evidence obtained through collection of DNA during a covert search should be inadmissible.[566] Other submissions argued that police should be able to collect DNA if it is relevant evidence.[567]

The then Attorney General Mr Bob Debus addressed the issue of DNA collection during execution of search warrants in his second reading speech:

> *An important issue that arose during drafting of the Bill was the possible collection of DNA samples during covert searches. Given the desirability of regulating the covert collection of DNA samples for law enforcement generally — for example, in executing a search warrant, or by collecting discarded samples from used cups or cigarettes — it has been decided that the possible collection of DNA under a covert search warrant will be regulated as part of a general regulatory framework to be developed by my department. I have asked my department to consult with the NSW Police Force in developing this policy.*[568]

We dealt with covert DNA sampling in our report, *Review of the Crimes (Forensic Procedures) Act 2000* (2006). We observed that collection of DNA other than directly from a person is essentially unregulated, although a court may find such evidence inadmissible, if it has been obtained improperly. We recommended that Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.[569]

Representatives of the Attorney General's Department have indicated that the proposed regulation of covert collection of DNA samples for law enforcement purposes is still under consideration.[570] We recommend that the Attorney General's Department, in developing any new regulatory framework, take into consideration the submissions on this issue made to this review.

In response to our consultation draft report the Ministry for Police stated,

> *This recommendation [Recommendation 27 below] arises as the T(PP) Act does not specifically authorise the collection of DNA samples during the execution of a covert search warrant, but does authorise "testing of a kind of thing" which could arguably include the collection of DNA samples. It may well be appropriate to have a legislative protocol regarding this issue.*[571]

Recommendation

27. The Attorney General's Department, in developing any new regulatory framework governing the covert collection of DNA samples, consider the submissions made to the Ombudsman's review of covert search warrant powers.

4.4.6. Installation of cameras, listening devices etc

The Act does not specifically deal with the installation or use of electronic surveillance devices. It is possible that such devices, which are governed by other laws, may be used in conjunction with a covert search warrant. In particular:

- To plant a listening device, or 'bug', or covertly install an optical surveillance device such as a camera or video, officers have to comply with the provisions of the *Surveillances Devices Act 2007*. Such surveillance devices can generally only be used in accordance with a warrant granted by a judicial officer.
- To intercept phone calls and other telecommunications, officers have to comply with the provisions of the *Telecommunications (Interception) (New South Wales) Act 1987*, and its Commonwealth equivalent. Again, telephone intercepts must be authorised by a warrant granted by a judicial officer or member of the Commonwealth Administrative Appeals Tribunal.

In our monitoring of covert search powers we asked whether listening devices were used in conjunction with covert search powers. Police advised that listening devices were obtained under the former *Listening Devices Act 1984*, in relation to the three of the five premises for which warrants were obtained:

- One of these premises was already under surveillance using listening devices at the time the warrant was obtained.
- For one of the premises, police obtained a listening device warrant the day after obtaining the covert search warrant, from the same judge.
- For one of the premises, police obtained a listening device warrant authorising the installation of listening devices into any premises used by the suspect. In executing the covert search warrant, police searched a vehicle used by the suspect, but did not install a listening device.

Police advised that listening devices were not used in conjunction with the other two covert search warrants obtained.

4.4.7. Should searches have to be recorded on video?

The NSW Police Force SOPs on covert search warrants provide that covert searches should be recorded on video 'where practicable', and state that the video operator is not to take part in the actual search of the premises.[572]

Several submissions to our review argued that in the interests of accountability, police should be required to record covert searches on video.[573] The Bar Association raised concerns that property may be damaged or go missing during a search, and this had ramifications 'given that the agencies which exist to provide protection against such activities are responsible not only for the activities, but for concealing them'.[574] The Police Integrity Commission commented that recording covert searches on video would reduce opportunities for police misconduct, reduce the risk of unjustified complaints, and offset the need for covert searches to be observed by an independent agency. The Commission submitted:

> *There would be merit in the SOPs being amended so as to have the effect that, as a general position covert searches will be videotaped unless there are compelling reasons as to why they should not be. The current test of 'if practicable' does not seem to give due weight to the potential benefits to be derived from this practice.*[575]

The Law Council has commented, in response to the proposed Commonwealth delayed notification search warrants (since lapsed), that the legislation should require the search to be recorded on video and this would 'protect police as much as it does the occupier.' The Law Council submitted that a copy of the video should be provided to the occupier when the occupier is notified that the search has taken place.[576]

We note that in Queensland, the covert search warrant laws require a search to be videotaped, if practicable.[577]

The NSW Police Force argued that the legislation should not require covert searches be recorded on video, on the basis that it is police policy to record searches where practicable.[578] We note that NSW Police Force training packages concerning the video recording of general search warrants state that video recording searches is not mandatory, however it is 'strongly recommended and is to be regarded as best practice'.[579] We note the videotaping of covert searches may be more difficult than videotaping ordinary searches due to the practical challenges of maintaining the covert nature of the search.

In our view there is considerable merit in police video and audio recording covert searches. A video recording creates an objective, contemporaneous record of the search that can be used for later analysis. As pointed out in submissions, it reduces opportunities for police misconduct and protects officers against unjustified allegations of misconduct. We note that police routinely record the execution of ordinary search warrants on video and this practice has been strongly encouraged by the courts.[580] For covert search warrants, where the occupier is neither present nor aware of the search, the reasons for recording the search are even more cogent. Police have also moved to record other policing actions, including through in-car video and closed circuit television in charge rooms and custody areas.

In our view police and Crime Commission officers exercising covert search powers should be required by law to conduct covert searches in their entirety on video unless there are compelling reasons why this is impracticable. Police SOPs should include advice as to what compelling reasons might be. We also recommend that advice as to whether the search was recorded on video should be provided to the judge in the warrant report. If no recording was made, reasons should be provided in the report.

4.4.8. Effectiveness of recorded material as an accountability tool

There were video records of the three covert search warrants executed. We viewed footage of the execution of these warrants for the purpose of this review. The effectiveness of the footage as a tool of accountability varied between the searches. All three searches were properly introduced by the warrant applicant and the independent officer identified. Two of the searches contained clear audio commentary on the activities undertaken including the introduction of forensic services police and explanation as to what actions were taken by them. Not all of the

assistants were introduced, and in one search it appeared there were many officers involved and only a small amount of the activity undertaken was recorded.

Much of the footage was out of focus, in darkness or blank. One search had a clear audio commentary on what was occurring but was mostly a black screen. While we accept there may be operational reasons for this, such as poor lighting to maintain the covert nature of the search, it does weaken the case that video recording the search is an effective accountability tool. Other searches contained periods where the camera was not directed at the search activity as it appeared the camera operator was otherwise engaged. The footage was better in quality when it came to recording documents, or other items located, apparently considered significant to police in their investigations. Such documents were well lit by torchlight, closely filmed and clear in visual detail. Any possible lines of inquiry located, such as names and mobile phone numbers, were clearly enunciated by officers for the audio recording.

We note SOPs for video recording general search warrants acknowledge that searching premises is a high risk policing function and video recording the activities of police 'provides the most reliable account of what occurred and serves as an additional valuable tool to eliminate both corruption and unjustified complaints'.[581] Training packages identify the rationale for video recording search warrants as being twofold; for probative or evidentiary value, and to 'protect the integrity of the procedure and the police involved in it'.[582]

We note there are police sensitivities surrounding disclosure of methodologies used in conducting covert search warrants. The covert search warrant SOPs stipulate that 'care is to be taken during video recording that methodology is not disclosed'.[583] In our view legitimate operational concerns such as this need to be balanced against accountability concerns.

The footage we saw was inconsistent as an effective record of the actions taken by police for the purposes of accountability. For the reasons outlined, much of the footage could not be relied upon to protect the integrity of the procedure of the searches or be of value in refuting any allegations of police misconduct.

As such we consider it is worth reinforcing in the NSW Police Force covert search warrant SOPs, consistent with policy for video recording general search warrants, that the rationale for this recording is both probative and to provide accountability for the actions taken by police during the search.

The Ministry for Police stated, 'It is a matter for the operational police who use the T(PP) Act to determine what is included in any SOPs'.[584]

Recommendations

28. The legislation be amended to require covert searches to be recorded in their entirety on video, unless there are compelling circumstances which make this impracticable.
29. The report to the judge on the outcome of the search include advice as to whether the covert search was recorded on video (including a copy of the video if recorded) and if not, the reasons why it was not practicable to record the search.
30. Police SOPs should require covert searches to be recorded in their entirety unless there are compelling circumstances which make this impracticable. The SOPs should also include advice as to what circumstances might be 'compelling'.

4.4.9. Re-entry

A covert search warrant may authorise the return of a seized thing or the retrieval of a thing placed in the subject premises. Under these circumstances the officer may re-enter the premises within seven days of the first entry or within the period provided for by the judge, but only for the purposes of returning or retrieving the thing. Re-entry must be expressly authorised in the warrant.[585]

Re-entry was not authorised by any of the covert search warrants issued to date.

4.5. Adjoining premises

An eligible officer may apply to enter premises adjoining or providing access to the subject premises. The application must set out the address or other description of the adjoining premises and the grounds on which entry to those premises is required.[586] The judge is to consider whether this is reasonably necessary to enable access

to the subject premises, or to avoid compromising the investigation of the suspected terrorist act.[587] If the warrant authorises entry the adjoining premises may be entered using whatever force is reasonably necessary for the purposes of entering.[588]

In its review of the Bill, the Legislation Review Committee expressed concern that the legislation 'specifically provides for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises'. The Committee noted this further significantly trespassed on 'the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act.'[589] Concerns were also raised during Parliamentary debates:

> *I remind members that in voting for this Bill they will support a regime that will allow homes in New South Wales to be secretly entered by police for no reason other than the proximity of their property to a suspect's property. It is quite extraordinary that anyone would sign off on that.*[590]

We note that the recently implemented *Surveillances Devices Act 2007* provides a similar regime for authorising entry to premises adjoining or providing access to target premises or vehicles, to install surveillance devices subject to warrants.[591]

4.5.1. Default authorisation to enter adjoining premises

No adjoining premises were entered during the execution of the five covert search warrants issued to date. However, entry to adjoining premises was authorised in four warrants out of five:

- In three warrants authority to enter adjoining premises was provided. The NSW Police Force subsequently advised that the applicants did not intend to apply for entry to adjoining premises, but did so by default because entry to adjoining premises was included in the pro forma application and warrant documents. In each case the judge signed the warrant without crossing out the reference to entry to adjoining premises.
- In one warrant no request to enter adjoining premises was made. The judge crossed out the reference to entry to adjoining premises and so the power was not authorised.
- In one warrant authority to enter adjoining premises was provided. The NSW Police Force subsequently advised that the application did not in fact provide any grounds upon which entry was required or provide the address or other description of the adjoining premises, and that 'the request in the affidavit to exercise this particular power was erroneous.'

The NSW Police Force amended its SOPs to emphasise that any application to enter adjoining premises must include the address or other description of the adjoining premises, and the grounds for entry. However, entry to adjoining premises is still included in the pro forma application document. This means that, unless the applicant or the judge crosses out the relevant part of the document, the default position will still be that the power to enter adjoining premises will be granted.

4.5.2. Submissions

One submission to our review commented that police need the right to enter adjoining premises so they can gain access to the subject premises, otherwise offenders could organise their circumstances so that entry was not readily possible other than through adjoining premises.[592]

The NSW Police Force and Crime Commission commented that 'it is often operationally necessary that the only means of covert access is via adjoining premises' and submitted that the provisions governing entry to adjoining premises are appropriate.[593]

However, several submissions to our review expressed concern that entry to adjoining premises was authorised on a number of occasions, despite the fact it was not necessary, or even requested by the applicant. Privacy NSW commented:

> *We are of the view that the procedure relating to covert entry to adjoining premises should be tightened up. Given that this measure significantly affects the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act, it should be the subject of legislation as a last resort option only and should require extra justification. To avoid unintentional authorisations, a separate warrant should be required to enter into premises adjoining the subject premises.*[594]

The Law Council commented:

> *Entry to adjoining premises was authorised in four of the five covert search warrants issued to date. In three cases, such authorisation was not actually sought or required by police, it was simply obtained by default*

because it formed part of the pro forma search warrant application and was not crossed out by the issuing Judge. In the fourth case, police stated that 'the request in the affidavit to exercise this particular power was erroneous.'... This suggests that the application process is not sufficiently rigorous. The police did not actually access adjoining premises in any of the cases reported. However, the fact remains that they appear to have been authorised to gain secret entry to adjoining premises, using whatever force was reasonably necessary, without having to proactively satisfy the issuing Judge that such entry was reasonably necessary to enable access to the target premises or to avoid compromising the investigation.[595]

The Council for Civil Liberties commented:

The CCL is disturbed by the Ombudsman's revelation that on three occasions police have asked for the power to enter adjoining premises, apparently without questioning whether the powers were really needed, and that the judge in each case granted the warrant, including the power, apparently as a matter of course.[596]

Some submissions from members of the public made similar comments:

I do not believe that the powers to covertly enter adjoining premises are appropriate. It is obvious that the pro forma warrant document should be changed and such a power would then not be authorised by default, particularly when there has been no request for such a search.[597]

4.5.3. Conclusion

There is clearly some concern about law enforcement agencies being authorised to enter premises adjoining or providing access to premises the subject of a covert search, where such entry is neither required nor specifically requested.

In our view there is merit in the proposal that the pro forma warrant application document be changed so that there is less chance of entry to adjoining premises being authorised by default.

Another option is for the standard warrant document to state words to the effect: 'In executing this search warrant the applicant is/is not authorised to enter premises adjoining or providing access to the subject premises, using such force as is reasonably necessary, for the purposes of entering the subject premises.' Applicants would have to indicate whether they were applying for the power to enter adjoining premises or not, and the judge would be prompted to consider whether entry to adjoining premises should be permitted or not.

Clause 7 of the *Terrorism (Police Powers) Regulation 2005* provides that the Attorney General may approve such forms as may be necessary or convenient for the administration of the Act. In their response to our consultation draft report the Ministry for Police noted that there were no approved forms under Clause 7. They stated, 'The forms currently in use by the NSWPF could be submitted for approval by the Attorney General'.

In our view if the Attorney General approved a covert search warrant application form, and warrant form, these could be designed so that applicants would only apply for, and judges would only grant, access to adjoining premises where the legislative criteria are met; that is, whether entry to adjoining premises is reasonably necessary to enable access to the subject premises, or to avoid compromising the investigation of the suspected terrorist act.

It would assist if the Attorney General approved the forms, necessary or convenient for the administration of the Act. In the interim the NSW Police Force should take steps to amend the forms currently in use.

Recommendations

31. The Attorney General consider developing forms to be used by applicants and judges in the administration of the Act. Should forms be developed, the application form and warrant form should clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.
32. The NSW Police Force amend the standard covert search warrant document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.
33. The NSW Police Force standard operating procedures include the standard application form used by police and the standard covert search warrant document.

4.6. Outcomes

A person who executes a covert search warrant must provide the judge with a written report within 10 days. The report must include information such as when the warrant was executed, what actions were taken and who took those actions.[598] The report is to provide descriptions of any things seized, copied, photographed, recorded, operated or tested. Where things were found in the course of the search, which were not expressly authorised to be seized or copied etc, the report must state the grounds on which the thing was considered to be relevant or connected with a serious indictable offence.[599]

The report must state whether or not execution of the warrant assisted in the prevention or response to the specified terrorist act, or any serious indictable offence, and how it assisted.[600]

The report must include the names of persons who executed the warrant including any police officers, Crime Commission staff or other intelligence gathering officers assisting.[601] This may include police from the AFP or other States or Territories, or people employed by ASIO or any other intelligence agencies.[602]

A report is also required where a warrant is not executed, setting out the reasons why it was not executed.

A person is prohibited from knowingly providing false or misleading information to the judge, when providing a covert search warrant report. The offence carries a maximum penalty of 2 years imprisonment or a fine of $11,000.[603]

4.6.1. Reported outcomes for warrants issued to date

Police reported back to the issuing judges that the three covert search warrants executed to date did assist in the prevention of, or response to, the terrorist act in respect of which the warrant was executed. Two reports indicated the warrant enabled investigators to rule out the subject premises as a site that may have been connected with the manufacture of an improvised explosive device. One report indicated the warrant assisted in that it eliminated a vehicle as being a storage facility for an improvised explosive device or equipment for the manufacture of an improvised explosive device.

Some submissions to our review emphasised that the reporting requirement following execution of a warrant is an important safeguard against the misuse or overuse of covert search powers. In discussing the reporting requirements, the Law Council commented, 'This final requirement is designed to ensure that claims made by police about the necessity for the use of this extraordinary power are subject to some form of review after the execution of the warrant.' Referring to the information contained in our Issues Paper, the Law Council commented:

> *[The reports] appear to indicate that, according to police, the warrants were useful because they found nothing. If the ability to rule out premises or a particular person as being involved in the commission of a terrorist act is sufficient to justify the warrant as 'of assistance in the prevention or response to a specified terrorist attack' then the value of the reporting obligation is somewhat diminished. Every covert search will automatically be of assistance, even if its value is simply to review that police intelligence is incorrect or inaccurate.*[604]

Some submissions argued that where nothing is found during a covert search, the report back to the judge 'should explore whether or why the intelligence on which the application was based may have been incorrect.'[605]

4.6.2. Comments

The Act requires the report to the judge to state 'whether or not the execution of the warrant assisted in the prevention of, or response to, the terrorist act in respect of which the warrant was executed and, if so, how it assisted.'[606] For the three warrants which were executed, police reported to the judge that the covert search did assist in the prevention of, or response to, the relevant suspected terrorist act, as the subject premises were able to be ruled out as a site connected with the storage or manufacture of an improvised explosive device.

Being able to rule out the subject premises may have been useful from an operational perspective, and it could be said that the searches assisted in the broader sense, as ruling out the subject premises may have enabled police to pursue other lines of inquiry and make more effective use of their limited resources. However, where nothing of interest is found, it is more difficult to positively state that the search 'assisted in the prevention of, or response to, the terrorist act in respect of which the warrant was executed'.

It would be of some concern if police or Crime Commission staff were conducting a significant number of covert searches which did not yield evidence of a suspected terrorist act. However, only three covert searches have been conducted since the legislation came into force in September 2005. The fact that nothing of interest was found during the covert search does not affect the validity of the warrant, the lawfulness of the search or the reasonableness of the grounds for the application.

We also note that the Act requires police to report not only whether or not a covert search assisted in the prevention of, or response to the terrorist act, but 'how it assisted' as well. In our view, where nothing of interest is found, but police nevertheless report that a search did assist in the prevention of, or response to the terrorist act, particular care should be taken to explain in the report how the search assisted.

4.6.3. Reporting to the judge within ten days

The Act requires the person who executes a covert search warrant to report back to the judge within 10 days.

We found that for four of the five warrants issued, the report was not provided to the judge within the required timeframe. For three warrants the report was provided between 14 to 16 days after expiry of the 10 day timeframe and police indicated the delay was due to the operational focus following a number of arrests. For one warrant the report was provided 9 days after the 10 day timeframe, and police indicated the delay was a result of the investigative focus on inquiries subsequent to the arrest of the offender.

One submission to our review argued that police should have 30 days to report back to the judge, as 10 days was too short.[607] Other submissions argued the 10 day timeframe is too long.[608] The NSW Police Force and Crime Commission submitted that the reporting requirements as currently drafted are appropriate.[609]

We note ordinary search warrants also require the person to whom the warrant is issued to report to the authorising officer within 10 days after the execution of the warrant.[610] Reports on controlled operations, by comparison, must be given to the chief executive officer of the relevant agency within two months after completing an authorised operation.[611] Reports to the judge on surveillance device warrants must be furnished within the time specified by the judge in the warrant.[612]

4.6.4. Failure to comply with reporting requirements

Failure to comply with covert search warrant reporting requirements does not carry a criminal penalty. This is the same for most other warrants in New South Wales, with the exception of surveillance device warrants. Failure to comply with the reporting requirements for surveillance device warrants carries a maximum penalty of one year imprisonment.[613] Penalties apply to covert search warrant reporting requirements in some other state jurisdictions. In Victoria, a person to whom a covert search warrant is issued must report back to the Supreme Court no later than 7 days after the warrant expires. Failure to comply with this requirement carries a maximum penalty of one year imprisonment or a fine of approximately $13,000.[614] Similarly in Western Australia, the authorised applicant named in a covert search warrant must give the judge who issued the warrant a written report about the execution of the warrant within 7 days of the execution of the warrant or, if the warrant is not executed, within 7 days of its expiry. Failure to comply with this requirement carries a maximum penalty of imprisonment for one year or a fine of $12,000.[615]

The NSW Police Force and Crime Commission submitted there should not be a penalty for failing to report to the judge. The Crime Commission commented that 'failure to report is not in the same category as making false statements.'[616] Similarly, a submission from a member of the public argued that 'penalties should not be placed on police for things like this' and that it was more appropriate that police who failed to fulfil their legislative obligations be dealt with managerially or through the disciplinary system, as appropriate.[617] Other submissions argued that given the importance of reporting back to the eligible judge, there should be a penalty for failing to do so.[618]

4.6.5. Comments

Through our scrutiny of covert search warrant powers, we found that police did report back to the judge following the execution or expiry of each of the warrants issued, but they generally failed to do so within the required timeframe. For the five covert search warrants obtained during the review period, only one report was provided to the judge within the permitted time.

The failure of police to meet this legislative deadline may support a case that the timeframe is too short. However this was not raised in submissions to us by the NSW Police Force or the Crime Commission. In our view it is not appropriate for police to put aside legislative requirements, even where other inquiries are on foot and there may be competing priorities. Given the nature of the powers and their controversial nature, police and Crime Commission officers should be scrupulous in their adherence to the Act. We note in this respect the criminal penalties in other jurisdictions, which reflect the importance of this reporting function being carried out in a timely manner. At this time, we do not recommend criminal penalties for police failures, although that may be an issue Parliament may have a different view about.

The importance of reporting, and the failure to meet requirements on most occasions, also emphasises the value of external oversight of the covert search warrant scheme. The possibility of ongoing oversight is discussed further under section 5.9.

4.6.6. Retention or destruction of records

The Act requires the destruction of any records made in the execution of the search warrant as soon as practicable after determining that its retention is no longer reasonably required for an investigation or proceedings.[619] The Police and Crime Commissioners are to determine whether such records are reasonably required within 12 months of the execution of the search warrant, and within each subsequent 12 months for so long as the record remains in existence.[620]

During Parliamentary debates, concerns were expressed that the destruction requirements would reduce the accountability of law enforcement agencies:

> *The Bill... gives the Commissioner of Police or the New South Wales Crime Commissioner the power to destroy documents relating to the search of premises. When an aggrieved person uses those documents to challenge the lawfulness of a secret search, the Government effectively promotes the shredding of that important evidence.*[621]

The Council for Civil Liberties submitted that the destruction of records, and reasons for any delay in destroying records, should be certified to the Ombudsman.[622] Again, as the Ombudsman's scrutiny of the powers finished in September 2007, there is no ongoing independent oversight of the destruction requirements.

In its submission, the Police Integrity Commission commented:

> *The Commission is concerned that section 27W of the Act relating to records disposal may not adequately balance the competing concerns of privacy and police accountability. While it is desirable that a record made in the execution of a covert search warrant is disposed of if not required for the purpose of an investigation or proceeding, it is equally desirable that oversight agencies have access to records to carry out their own investigations if the need arises. The risk this may pose to police accountability would appear magnified by the fact that records disposal is not oversighted.*
>
> *The Commission considers that procedures be put in place to more effectively balance the needs of privacy and accountability relevant to section 27W. Furthermore, that expanded criteria be specified relating to records disposal, and that safeguards be introduced to ensure that records that might be required for an oversight purpose are not destroyed.*[623]

We sought advice from police as to whether any records have been destroyed pursuant to section 27W. Police informed us that no records from the execution of covert search warrants had been destroyed.[624] The Crime Commission submitted that the arrangements for destruction of records seized in a covert search should be no different from the destruction arrangements in relation to overt searches.[625]

While we recognise the privacy implications of retaining records made in the execution of a covert search warrant, we agree with the Police Integrity Commission that the current arrangements for destruction of records mean that police or Crime Commission officers involved in covert searches may not be properly accountable for their actions, or alternatively in a position to respond to allegations of misconduct. At section 5.2 we recommend regular inspection of covert search records by an independent body, and to ensure this scrutiny is effective, all relevant records need to be retained. In our view the privacy implications of retaining these records, as with other confidential information, could be adequately managed by ensuring the records are kept secure and are not accessible other than by those officers who require access. We note that the reason for a special case for these records has not been made out. In those circumstances, our own view is that a longer period of retention is appropriate.

In their response to our consultation draft report the Ministry for Police stated, 'Provided privacy and confidentiality of the records can be properly managed a longer period of retention may be appropriate to ensure any inspection regime or other scrutiny remains transparent'.[626]

Recommendation

34. The Act be amended so covert search records are retained rather than destroyed, to enable proper oversight of covert search functions.

4.7. Notifying people that premises were searched

The Act requires an occupier's notice to be served following the execution of a covert search warrant. The notice must set out a range of details including who applied for the warrant, who issued it, when it was executed and the number of persons who entered the premises.[627] It must contain a summary of the nature of the warrant, including the grounds upon which a covert search warrant may be issued, and the powers conferred and exercised by the warrant.[628] It must describe any things seized, substituted, returned or retrieved.[629] Where the occupier was not believed to be knowingly concerned in the commission of the suspected terrorist act relating to the executed warrant, the notice must state this.[630]

A person is prohibited from knowingly providing false or misleading information to the judge in an occupier's notice. The offence carries a maximum penalty of 2 years imprisonment or a fine of $11,000.[631]

It is also an offence to intentionally or recklessly publish a covert search warrant application, report or notice, or any information derived from those documents, unless the occupier's notice has been given or the judge has made directions where the occupier's whereabouts are not known.[632] It is not an offence to publish such information if the publication is for the purposes of exercising functions under Part 3 of the Act or the internal management of police, staff of the Crime Commission, the Supreme Court or the Attorney General's Department.[633]

4.7.1. Approval by the judge within six months of the search

The occupier's notice must be provided to the issuing judge for approval before it is served on the occupier. Police must provide the notice to the judge within six months of conducting the search.[634]

For two of the covert searches which were carried out, police provided the judge with the occupier's notices exactly six months after the warrant was executed. For the other search, police provided the judge with the occupier's notice six months and four days after the warrant was executed, and served it by mail that day, on the legal representative of the person whose property was searched. Police advised that the notice was not approved by the judge within the required six month period 'due to a miscalculation of dates'. However, police advised that the person and her legal representative were already aware that a covert search warrant had been executed, as the person had been charged with an offence, and a copy of the warrant was included in the brief of evidence.[635]

4.7.2. Postponing notification

The occupier's notice must be provided as soon as practicable after the judge approves it.[636] However, the judge may postpone service of the occupier's notice where he or she is satisfied there are reasonable grounds for such postponement.[637] The judge can postpone service on more than one occasion, in maximum six month periods, but the total period of postponement must not exceed 18 months unless the judge is satisfied there are exceptional circumstances.[638] This means that a judge cannot order that an occupier's notice never be served. However, it is possible for a judge to postpone service for six months, and where there are exceptional circumstances, do this indefinitely, with a six monthly review.

Occupier's notices have been served in relation to all three of the warrants executed. As previously discussed, one occupier's notice was provided to the legal representative of the person believed to be involved in the relevant terrorist act, six months and four days after the search was conducted. However, the person and the person's legal adviser were already aware the search had been conducted, as the person had been charged with an offence, and a copy of the warrant was included in the brief of evidence.

For the other two covert searches conducted, service of the occupier's notice was postponed on four occasions, each time for six months. The judge indicated he was satisfied that there were exceptional circumstances justifying the postponement beyond a total period of 18 months.[639] Police provided reasons for seeking postponement which satisfied the court. These included that some of the people named in the warrants had not been charged with any offence, that police may conduct further covert searches in their investigation, and that disclosing the fact police had conducted covert searches 'is likely to result in the suspects modifying their behaviour to act in a more clandestine manner that would adversely affect ongoing operations.'

The occupier's notices for these two searches were served in May 2008, about two years and six months after they were conducted. We were told by police the reason the notices were served at that time was because the 'exceptional circumstances' for postponement no longer applied.[640] While the matters were still before the courts, some of the investigations had been finalised and there had been a large amount of information disclosed through subpoenas and court hearings, and documents had been declassified by other agencies. We were told the reason for delaying service of the occupier's notices had to do with the number of other agencies involved and the complexity of investigating conspiracy offences across state jurisdictions. As discussed below (at 4.7.4) occupier's

notices were originally required to be given to any person knowingly concerned in the commission of the terrorist act subject of the warrant.

4.7.3. Whether notification is necessary

As is discussed further below, other States with similar covert search powers (specifically Victoria, Queensland and Western Australia) do not provide for occupiers to be notified they have been searched.

Two submissions to our review argued that police should not be required to notify an occupier of a covert search.

One submission, from a member of the public, commented that notification is not necessary as 'in many cases it would probably be evident anyway due to subsequent arrest/detention or by the occupier noticing a disturbance in their premises.'[641] Through our monitoring of the covert searches powers, we do not support this view. On the contrary, the rationale behind a covert search is that it is conducted without disturbing the premises. Further, where nothing is found, or no action is taken against the occupier, it is unlikely the occupier would ever be aware the search was conducted, unless they are formally notified.

The other submission, from Victoria Police, argued against notification on the basis that it may disrupt an investigation:

> *The nature of covert warrants are such that they will almost certainly focus on persons who are linked to terrorism activities, and the nature of terrorism activities are recognised as being underpinned by patience and long term determination. To alert persons associated with covert warrants of the interest of authorities may interrupt a long term investigation, or inadvertently interrupt other investigations of associates.*[642]

Victoria Police also argued that judicial supervision of covert searches, the presence of an independent officer at the search, and recording covert searches on video are sufficient safeguards and that notification of the occupier is not necessary.

Through our monitoring of covert searches, we found the availability of quite lengthy extensions has meant that notification of occupiers has not disrupted long term investigations. For two of the three warrants executed, notification was postponed for two and a half years after the relevant search was conducted. In these cases police still had the option available to them to apply to the judge for further postponement, had they considered the exceptional circumstances still existed for doing so.

For the other warrant which was executed, the occupier's notice was served after the suspect had been charged and served with the brief of evidence, so the suspect already knew about it.

Other submissions to our review were adamant that occupiers be notified their premises were searched. For example, the Law Society's Criminal Law Committee commented, 'The requirement for notice of an intended search is an important safeguard and in its absence the potential for abuse is extreme.'[643] Another submission commented, 'If no offences have been detected, I can see no reason why the notice could not be served ASAP.'[644] The author also submitted that occupiers should be permitted to inspect the relevant records of police, subject to any security considerations.

When the covert search powers were introduced, the former Attorney General Bob Debus stated that notifying the occupier was a fundamental tenet of the covert warrant scheme:

> *The giving of an occupier's notice must not be postponed for a total of more than 18 months unless the eligible judge is satisfied that there are exceptional circumstances justifying the postponement. This formulation makes it clear that a fundamental tenet of the scheme is that an occupier's notice will be served at some time and that there is no provision for a court to approve a notice never being served.*[645]

Notifying the occupier that a search was conducted was a key feature of the covert search regime when it was introduced. There remains strong support for notification and the arguments against notification were not supported. We support the current provisions which require notice of the search at some point.

4.7.4. Who must be notified of the search?

In December 2007 amendments were made to the legislation surrounding the notification requirements for covert search warrants. Section 27U(5) of the Act formerly provided that the person who executes the warrant must give the occupier's notice to:

> *(a) any person who, at the time the warrant was executed, was believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed, and*

(b) if no such person was an occupier of the subject premises when the warrant was executed — a person of or above the age of 18 years known to have occupied the premises at the time the warrant was executed.

In their submission to our review the Ministry for Police stated that, in its view this part of the legislation was unclear, and it was open to interpretation whether the occupier's notice needed to be served on all people knowingly concerned in the commission of the relevant terrorist act, or only on the occupier.[646] Our view was that these notification requirements were potentially very broad and occupier's notices should only be given to the occupier of the premises searched. We could see no compelling reason why a non-occupier should be informed that the subject premises were searched, simply because they are believed to be knowingly concerned in the commission of a terrorist act in respect of which the warrant was executed.

Police sought legislative amendment, and section 27U(5)(a) was amended so that the person who executes the warrant must cause the occupier's notice to be given to:

(a) any person who, at the time the warrant was executed, occupied the subject premises and was believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed

If no such person was an occupier of the premises when the warrant was executed, the notice must be given to a person known to occupy the premises at the time, provided they are 18 or older.[647] If the occupier at the time is unknown, or the whereabouts of the occupier is unknown, the person who executed the warrant is to report back to the eligible judge, who may give directions about the giving of the notice as the judge thinks fit.[648] We consider this an adequate and appropriate safeguard.

4.7.5. Notifications given

The legislative amendments outlined above were not made retrospectively and did not apply at the time of issue of the three covert search warrants executed to date.

Police took the view their legislative obligations were to provide a copy of the occupier's notice on each of the persons who, at the time the warrant was executed, were believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed.

While one of these warrants involved only one person of interest in the commission of the act, two warrants involved an alleged conspiracy involving many people. Police served occupier's notices on 13 people in relation to these two warrants. Ten of these people have been charged and are currently before the courts. Three occupier's notices were served on persons of interest who have not been charged. Police informed us there were two more persons of interest who were not served occupier's notices due to the inability of police to contact them.[649]

As we have discussed previously (at section 4.7.2) occupier's notices for two warrants were postponed for a two and a half year period. One of the reasons police sought postponement was because some of the people named in the warrants had not been charged with any offence but remained under investigation. Now that non-occupiers named in the warrant do not have to be notified of the search, it may be that occupiers can be notified sooner that their premises were searched.

At the time of writing, police were still undertaking inquiries to locate the two persons of interest who have not been served occupier's notices. Under section 27U(6) police are required to report back to the judge who issued the warrant under circumstances where the occupier's whereabouts are unknown.[650] It is not clear to us whether this is applicable to these occupier's notices in light of the postponements granted under section 27U(8) and (9). If it is applicable, it is not clear how long police can delay giving the notices without seeking further postponement. Section 27U(5) provides that the occupier's notice be given 'as soon as practicable' after the eligible judge approves the notice. In the case of these two notices postponement was granted until May 2008.

The third warrant related to the search of a vehicle parked in a car park at private premises. The person believed to be concerned in the commission of a terrorist act was not an occupier of those premises. The occupier's notice was served on the suspect, whose vehicle was searched, but was not served on an occupier of the relevant premises.

In these circumstances it was not clear to us that the requirements of the unamended section 27U(5) had been met. In our consultation draft report we recommended the NSW Police Force seek legal advice on this issue.

In their response the Ministry for Police told us the police prosecutions command had provided advice to the counter terrorism command on this issue. The Ministry stated:

The advice would be that the requirements of the section were arguably not satisfied in these circumstances by service on the suspect. This issue in this case has been remedied in that the definition of premises under the T(PP) Act has now been extended to include a vehicle and vessel. At the time of the execution of this warrant the vehicle in question was on the specified premises but had no connection with those premises or

any occupiers of those premises. (The vehicle was parked in a car park of a block of residential units but the suspect had no connection to those units). A covert search warrant at that time could only be issued in respect of premises but would include any vehicle on the premises.

There is no purpose in serving a copy of the notice on the occupier of the units. The only appropriate way to comply would be to serve the notice on the Body Corporate in respect of the unit block as against any or all of the unit occupiers. A person was subsequently charged with an offence but has since been acquitted. The only search that took place was of the suspect's vehicle which at the time was in the car park of the units, an area open to and obviously used by the public (the suspect). To now serve of copy of the occupier's notice on the Body Corporate would be a empty exercise simply (which has since been clarified by amendments to the legislation) [sic]. The person affected by the execution of the warrant has been notified and to now serve the occupier's notice on the Body Corporate would be a "token effort" for no real effect'.[651]

We note section 27A of the Act was amended in December 2007 with the insertion of the definition "premises includes vehicle".[652] This would appear to make the owner of the vehicle the 'occupant' for the purposes of section 27U, if the vehicle was identified as the premises subject of the warrant. While this may remedy future searches, it did not apply at the time of issue of this warrant. We accept the Ministry's submission that there is little utility in police now serving the occupier's notice on the occupiers in this instance, having regard to all the circumstances. However, the fact police did not met the requirements of section 27U supports the case for ongoing external scrutiny of the exercise of covert search warrant powers, as is outlined in section 5.9 below.

4.7.6. Occupiers of adjoining premises

Notices to occupiers of adjoining premises are to be prepared, approved and given at the same time as notices relating to the subject of the warrant and occupants of the subject premises.[653] Such notices are only required to specify who applied and issued the warrant, when it was issued and executed and the address or description of the subject premises.[654] No summary of the nature of the warrant is required.

None of the warrants executed involved entry into adjoining premises and so no occupier's notices have been required for occupants of adjoining premises.

4.7.7. Ensuring relevant people are notified

The Ombudsman's role in monitoring covert search powers ended in September 2007. The Act does not provide for any ongoing independent oversight of covert searches and accordingly there is no external oversight mechanism for ensuring that judges are provided with occupier's notices for approval, or that occupiers are notified of covert searches. Whether ongoing oversight is warranted is discussed further in Chapter 6.

4.7.8. Inspection of records

The *Terrorism (Police Powers) Regulation 2005* commenced in September 2005 and prescribes the documents to be kept relating to the issue of covert search warrants, and the manner in which those documents may be inspected. The regulation provides that the documents may be inspected by the occupier of the premises to which the covert search warrant relates or by any other person who is given an occupier's notice relating to the warrant under the Act.

The regulation also provides for the prevention of certain documents from being made available for inspection if their disclosure is likely to identify a person and is likely to jeopardise that or any other person's safety, and may seriously compromise the investigation of any matter.[655] We are aware that certificates precluding inspection of records were issued for three of the covert search warrants by the judge who issued the warrants.

4.8. Covert versus overt search warrants

4.8.1. Prohibition on executing ordinary search warrants covertly

Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* sets out the general powers police have to search and seize pursuant to a warrant. Police can apply for a search warrant on the reasonable belief that a thing connected with a particular offence is on the premises. When executing a search warrant, police can use force to enter the premises, and may seize and detain any thing mentioned in the warrant or any other thing reasonably believed to be connected with any offence.[656]

When executing an ordinary search warrant, police must on entry or as soon as practicable after entry, serve an occupier's notice. If no adult occupier is present, police must serve the notice as soon as practicable after executing the warrant. However, service of the notice can be postponed by the authorised officer who issued the warrant, if satisfied there are reasonable grounds for postponing service. Service may be postponed more than once, provided it is not postponed for more than six months at a time.[657] These requirements also apply to search warrants executed by Crime Commission staff.[658]

In the past, law enforcement agencies have taken the view that being able to postpone service meant that searches of private premises can be deliberately conducted covertly, under the ordinary search warrant provisions contained in the Law Enforcement (Powers and Responsibilities) Act, provided there is nobody present when the search is conducted, and the issuing officer is satisfied there are reasonable grounds for postponing notification. In evidence to the Joint Parliamentary Committee on the Ombudsman and Police Integrity Commission, the Crime Commissioner, Phillip Bradley described a 'regime of covert searching' which had been 'going on for several years' under the general search warrant provisions:

> *Obviously the difficulty with covert search warrants is that police and others are authorised to go into private premises of people and go through their belongings without telling them that they have done it. That is one of the things that has been fairly fundamental to search warrants for a very long time, that people need to be served with an occupier's notice and know that people have been in there and know the reason that they have been in there. There are provisions in the Search Warrants Act [which are now in the Law Enforcement (Powers and Responsibilities) Act] for deferral of occupier's notices in some cases and there has been a regime of covert searching going on for several years.*
>
> *A typical example is going into a drug laboratory when it is unattended and examining the status of the process. With amphetamines laboratories, obviously they take the precursors and they cook them and turn them into speed or MDMA or Ice or something. It is a significant advantage to the police to know what stage the process is at and when people are likely to be there and things like that. There have been instances of searches being conducted in those circumstances and the occupier's notice being deferred until the people are arrested, usually. So it [covert searching] has a place.*[659]

In *Ballis v Randall* (2007), the Supreme Court of NSW held that ordinary search warrants cannot be executed covertly merely for operational convenience, or to enhance the effectiveness of the police investigation. They are to be used for search and seizure, not for covert intelligence and evidence gathering. In that matter, police obtained three ordinary search warrants in order to investigate suspected drug offences. The search warrant applications disclosed that police intended to execute the warrants covertly, and apply for service of the occupier's notice to be postponed. This court commented:

> *In determining an application for a search warrant and an application for postponement of service of an Occupier's Notice upon entry into or onto premises, an authorised justice must adopt an impartial role between police and the citizen. In other words, he or she is not permitted to exercise the statutory powers under the Act in a partial manner such that the interests of law enforcement agencies impermissibly trump the statutory safeguards the Parliament has put in place for the protection of occupiers.. In the present case, the effect of the approach taken by each applicant and those executing the warrants was to give priority to operational considerations over and at the expense of the procedural safeguards...*
>
> *There is not to be found in the Act's detailed regime governing the issue and execution of search warrants authorisation for their execution covertly. The provisions of the Act, in fact, point in the opposite direction. The regulatory regime is clearly intended to protect persons as occupiers of premises that are the subject of a warrant, by requiring, inter alia, that they be given a notice of rights. The covert execution of each of the warrants was, in my opinion, clearly contrary to the provisions of the Act.*[660]

Following the Supreme Court decision in *Ballis v Randall* the NSW Police Force published an article in the *Police Weekly* explaining that officers should no longer deliberately execute ordinary search warrants covertly: 'a deliberate strategy of covert entry and delayed service of the Occupier's Notice to gain an operational advantage is not permitted.'[661] It advised that evidence obtained through the covert execution of ordinary search warrants was likely to be inadmissible. The article indicated that police are seeking an extension of the covert search scheme to other serious offences. The Ministry for Police has also indicated this is under consideration.[662]

We note that during the first two years that covert search warrant powers were available for the investigation of suspected terrorist acts, only three such warrants were executed. We considered whether it is possible that ordinary search warrant powers were used to conduct other covert searches for the purpose of investigating suspected terrorist acts, prior to the *Ballis v Randall* decision. When we raised this with officers from the Counter Terrorism and Special Tactics Command they indicated that they had not executed ordinary search warrants covertly to investigate suspected terrorism offences, pointing out that police can do a great deal more under a covert search warrant than

under an ordinary warrant.[663] Under an ordinary search warrant police are limited to seizing things mentioned in the warrant or any other things connected to an offence.[664] Under a covert search warrant, police can copy, photograph or record things, test and substitute things, as well as seize things.[665]

4.8.2. When covert searches become overt

The NSW Police Force SOPs provide for the contingency that officers executing a covert search warrant may be required to move from a covert to overt phase during the warrant's execution. The SOPs cite a variety of reasons for this transition including possible detection in the covert stage, and the locating of weapons or chemicals that cannot be preserved covertly. The case officer is to prepare a risk assessment to be included in operational orders and provided to senior police within the Counter Terrorism and Special Tactics Command. The case officer is also to brief all relevant staff engaged in the operation, covering the roles of staff and any factors impacting upon their safety and security.

The SOPs also cite a range of considerations, which should be taken into account when planning the execution of a covert search warrant, such as the safety and security of members of the public and staff, methods of entry and departure, perimeters (covert and overt), assembly points and the conditions under which the warrant will move to overt phase.

Police advised that for two of the warrants executed no risk assessment was completed 'due to the immediacy and nature of the investigation'. Risk factors were taken into consideration, however, during the planning application and execution phases. Such matters included profile and criminal history of the suspects, location and access to the subject premises and likelihood of operational compromise.

The Legislation Review Committee identified some risks associated with these operations, particularly with the power to enter premises when the occupants are present. The Committee noted that the Bill authorised eligible officers to impersonate another person for the purpose of executing the warrant without any 'required prior exploration of whether impersonation is appropriate, either in the application for the warrant…or in the determination of whether it should be granted'.[666] The Committee stated:

> *There are clearly risks in this situation that an innocent occupier will react violently to an ineffective impersonation in purported exercise of a power of self defence. While it would appear that in these circumstances the occupier would have available to them a complete defence of self defence under s 418 of the Crimes Act, the exposure to the risk of prosecution in these circumstances can be viewed as trespassing on personal liberties, particularly where the possible provocation and resultant risk is created by law enforcement agencies… The Bill provides no protection in relation to reasonable responses by occupiers discovering covert intruders who are executing a warrant.*[667]

In its submission to our review, the Community Relations Commission expressed concern about the possible consequences of a situation where an occupier who does not speak English discovers law enforcement officers executing a covert search warrant.[668]

The Act does not specifically deal with the directions police might give in circumstances where officers executing the warrant are discovered, or whether such directions must be followed. Such matters are considered in general search warrant powers — see section 50 (search of persons) and section 52 (obstruction or hindrance prohibited) of the Law Enforcement (Powers and Responsibilities) Act 2002. We note the West Australian covert search warrant scheme allows for the searching of persons.[669]

The NSW Police Force submitted that operational police are able to deal with a situation where a covert search warrant becomes overt, and commented that the issue is adequately addressed by the police Standard Operating Procedures.[670]

We agree that at this stage, there is insufficient evidence to recommend any change to the current arrangements.

4.8.3. Extended crime scene warrants for terrorism offences

In December 2005, new legislative provisions governing crime scenes came into force. These provisions clarify police powers to establish and manage crime scenes. Once a crime scene has been established, police may exercise certain 'crime scene powers'. There is no limit on the amount of time for which a crime scene can be established where it is established in a public place or on private premises, provided the occupier consents. In the absence of the occupier's consent, a crime scene can only be established on private premises for up to 3 hours, without a crime scene warrant. If police obtain a crime scene warrant the scene can generally be established for up to 3 days, which can be extended to 6 days where 3 days is not long enough.[671]

In July 2007 the New South Wales Government announced it would increase the amount of time allowed for crime scene search warrants from 6 days to 30 days in terrorism cases. We note that 30 days would be a lengthy period for

police to have control over private premises. We also note that the offence of membership of a terrorist organisation, which is the only terrorism offence under New South Wales law, is to be repealed in September 2008. We are presently reviewing crime scene powers pursuant to our legislative review function under section 242 of the *Law Enforcement (Powers and Responsibilities) Act 2002.* We expect to report on this review later in 2008.

Endnotes

[502] Law Society of NSW submission, 12 June 2007, Submission I, 15 June 2007.
[503] Law Society of NSW submission, 12 June 2007.
[504] Law Council of Australia submission, 18 June 2007.
[505] NSW Council for Civil Liberties submission, 22 June 2007.
[506] NSW Bar Association submission, 26 September 2007.
[507] Confirmed in correspondence from the Office of the Commissioner dated 25 February 2008.
[508] 'Judge seeks acquittal in love bomb case', Sydney Morning Herald online, 29 February 2008.
[509] *Terrorism (Police Powers) Act 2002* ss.27D, 27E and 27F.
[510] NSW Police Force, Standard Operating Procedures, Covert Search Warrants, 22 May 2006.
[511] *Terrorism (Police Powers) Act 2002* ss.27D, 27E and 27F and *Terrorism (Police Powers) Regulation 2005* clause 4.
[512] *Terrorism (Police Powers) Act 2002* s.27C(a),(b) and (c).
[513] *Ballis v Randall* [2007] NSWSC 422 at paragraph 135 (Hall J).
[514] *Terrorism (Police Powers) Act 2002* s.27A(2) and *Crimes Act 1900* s.310J.
[515] *Terrorism (Police Powers) Act 2002* s.27B.
[516] *Terrorism (Police Powers) Act 2002* ss.27Y, 27H and 27I.
[517] *Terrorism (Police Powers) Act 2002* s.27J(b) (c) and (d).
[518] *Terrorism (Police Powers) Act 2002* s.27J(f) and (g).
[519] *Terrorism (Police Powers) Act 2002* s.27J(h).
[520] *Terrorism (Police Powers) Act 2002* s.27M.
[521] *Terrorism (Police Powers) Act 2002* s.27Z.
[522] *Terrorism (Police Powers) Act 2002* s.27K.
[523] *Terrorism (Police Powers) Act 2002* s.27K(2)(f).
[524] *Terrorism (Police Powers) Act 2002* s.27L.
[525] *Terrorism (Police Powers) Act 2002* ss.27K(h) and 27N.
[526] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[527] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[528] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[529] Commonwealth of Australia, Report of the Security Legislation Review Committee, June 2006, p4.
[530] NSW Council for Civil Liberties submission, 22 June 2007.
[531] NSW Council for Civil Liberties submission, 22 June 2007.
[532] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[533] Ministry for Police submission, 14 August 2007.
[534] *Law Enforcement (Controlled Operations) Regulation 2007*, Schedule 2, s.1.
[535] *Terrorism (Police Powers) Act 2002* s.27H.
[536] *Terrorism (Police Powers) Act 2002* s.27I.
[537] Submission H, 15 June 2007.
[538] Submission J, 15 June 2007.
[539] Ministry for Police submission, 14 August 2007.
[540] *Terrorism (Police Powers) Act 2002* s.27P.
[541] Ministry for Police submission, 14 August 2007.
[542] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.
[543] *Law Enforcement (Controlled Operations) Act 1997* s.7(2).
[544] Police Integrity Commission submission, 15 June 2007.
[545] Law Enforcement (Controlled Operations) Regulation 2007 Schedule 2 s.3.
[546] *Terrorism (Police Powers) Act 2002* s.27N(f).
[547] *Terrorism (Police Powers) Act 2002* s.27O.
[548] *Terrorism (Police Powers) Act 2002* s.27O(3).
[549] *Terrorism (Police Powers) Act 2002* s.27O(1)(b) and (c).
[550] *Terrorism (Police Powers) Act 2002* s.27O(1)(f).
[551] *Terrorism (Police Powers) Act 2002* s.27O(1)(m).
[552] Correspondence from the Office of the Commissioner dated 25 February 2008.
[553] *Terrorism (Police Powers) Act 2002* s.27N(d).
[554] Ministry for Police submission, 14 August 2007.
[555] Law Council of Australia submission, 18 June 2007.
[556] In New South Wales, many hundreds of offences are punishable by five years imprisonment or more. Some examples include murder, sexual assault, robbery, possession of explosives with intent to injure, money laundering, prejudicing the safe operation of an aircraft, making a false instrument, sabotage, causing a bushfire, and supply of prohibited drugs.
[557] *Terrorism (Police Powers) Act 2002* s.27O(1)(h).

[558] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[559] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[560] Law Society of NSW, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of the NSW Police Force counter-terrorism and other powers, 14 June 2006.
[561] Public Interest Advocacy Centre submission, 3 July 2007.
[562] Ministry for Police submission, 14 August 2007.
[563] Discussion with police officer from NSW Police Force Counter Terrorism and Special Tactics Command, 2 August 2007.
[564] *Law Enforcement (Powers and Responsibilities) Act 2002* s.49(1)(b).
[565] Submission H, 15 June 2007.
[566] Public Interest Advocacy Centre submission, 3 July 2007.
[567] Submission J, 15 June 2007.
[568] The Attorney General Mr Bob Debus, Legislative Assembly Hansard, 9 June 2005.
[569] NSW Ombudsman, *DNA Sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000*, October 2006 at 9.2.
[570] Meeting with representatives from the Criminal Law Review Division of the Attorney General's Department, 9 August 2007.
[571] Ministry for Police submission, 4 July 2008.
[572] NSW Police Force, Standard Operating Procedures, Covert Search Warrants, 22 May 2006.
[573] Police Integrity Commission submission, 15 June 2007, Submission H, 15 June 2007, Submission J, 15 June 2007, NSW Bar Association submission, 26 September 2007 and NSW Council for Civil Liberties submission, 22 June 2007.
[574] NSW Bar Association submission, 26 September 2007.
[575] Police Integrity Commission submission, 15 June 2007.
[576] Law Council of Australia submission, 18 June 2007.
[577] *Police Powers and Responsibilities Act 2000* (Qld) s.216(e).
[578] Ministry for Police submission, 14 August 2007.
[579] 10 Commonly asked questions about video recording the execution of search warrants answered, Law News 36.
[580] For example, see *R v Jimenez* [2000] NSWCCA 390 (6 October 2000).
[581] Standard Operating Procedures for Video/Audio Recording of Search Warrants and Planned Operations, June 2000.
[582] 10 Commonly asked questions about video recording the execution of search warrants answered, Law News 36.
[583] New South Wales Police Force, Standard Operating Procedures, Covert Search Warrants, 22 May 2006.
[584] Ministry for Police submission, 4 July 2008.
[585] *Terrorism (Police Powers) Act 2002* s.27R.
[586] *Terrorism (Police Powers) Act 2002* s.27J(1)(e).
[587] *Terrorism (Police Powers) Act 2002* s.27K (g).
[588] *Terrorism (Police Powers) Act 2002* s.27O(d).
[589] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[590] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.
[591] Proclaimed on 1 August 2008.
[592] Submission J, 15 June 2007.
[593] Ministry for Police submission, 14 August 2007.
[594] Privacy NSW submission, 22 May 2007.
[595] Law Council of Australia submission, 18 June 2007.
[596] NSW Council for Civil Liberties submission, 22 June 2007.
[597] Submission H, 15 June 2007.
[598] *Terrorism (Police Powers) Act 2002* s.27S(1)(c).
[599] *Terrorism (Police Powers) Act 2002* s.27S(1)(c)(vii).
[600] *Terrorism (Police Powers) Act 2002* s.27U.
[601] *Terrorism (Police Powers) Act 2002* s.27S(1)(c)(iii).
[602] *Terrorism (Police Powers) Act 2002* s.27S(6).
[603] *Terrorism (Police Powers) Act 2002* s.27Z.
[604] Law Council of Australia submission, 18 June 2007.
[605] Law Council of Australia submission, 18 June 2007. Submission H, 15 June 2007 made the same point.
[606] *Terrorism (Police Powers) Act 2002* s.27S(1)(ix).
[607] Submission J, 15 June 2007.
[608] NSW Council for Civil Liberties submission, 22 June 2007 and Public Interest Advocacy Centre submission, 3 July 2007.
[609] Ministry for Police submission, 14 August 2007.
[610] *Law Enforcement (Powers and Responsibilities) Act 2002* s.74(2).
[611] *Law Enforcement (Controlled Operations) Act 1997* s.15.
[612] *Surveillance Devices Act 2007* s.44.
[613] *Surveillance Devices Act 2007* s.44.
[614] *Terrorism (Community Protection) Act 2003* (Vic) s.11. The penalty may include a fine of up to 120 penalty units and at the time of writing, a penalty unit in Victoria was $110.12.
[615] *Terrorism (Extraordinary Powers) Act* (WA) s.28.
[616] Ministry for Police submission, 14 August 2007.
[617] Submission J, 15 June 2007.
[618] NSW Council for Civil Liberties submission, 22 June 2007, Public Interest Advocacy Centre submission, 3 July 2007.
[619] *Terrorism (Police Powers) Act 2002* s.27W(3).
[620] *Terrorism (Police Powers) Act 2002* s.27W(2) and (3).
[621] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.

[622] NSW Council for Civil Liberties submission, 22 June 2007.
[623] Police Integrity Commission submission, 15 June 2007.
[624] Correspondence from the Office of the Commissioner dated 25 February 2008.
[625] Ministry for Police submission, 14 August 2007.
[626] Ministry for Police submission, 4 July 2008.
[627] *Terrorism (Police Powers) Act 2002* s.27U(1).
[628] *Terrorism (Police Powers) Act 2002* s.27U(2)(g).
[629] *Terrorism (Police Powers) Act 2002* s.27U(2)(h) and (i).
[630] *Terrorism (Police Powers) Act 2002* s.27U(2)(k).
[631] *Terrorism (Police Powers) Act 2002* s.27Z.
[632] *Terrorism (Police Powers) Act 2002* s.27ZA(1).
[633] *Terrorism (Police Powers) Act 2002* s.27ZA(2).
[634] *Terrorism (Police Powers) Act 2002* s.27U(3).
[635] Advice from the NSW Police Force, 11 October 2006.
[636] *Terrorism (Police Powers) Act 2002* s.27U(5).
[637] *Terrorism (Police Powers) Act 2002* s.27U(7).
[638] *Terrorism (Police Powers) Act 2002* s.27U(9)(b).
[639] As required under *Terrorism (Police Powers) Act 2002* s.27U(9)(b).
[640] Advice received from Anti-Terrorism and Security Group on 7 July 2008.
[641] Submission J, 15 June 2007.
[642] Victoria Police submission, 18 June 2007.
[643] Law Society of NSW submission, 12 June 2007.
[644] Submission H, 15 June 2007.
[645] The Attorney General Mr Bob Debus, Legislative Assembly Hansard, 9 June 2005.
[646] Ministry for Police submission, 14 August 2007.
[647] *Terrorism (Police Powers) Act 2002* s.27U(5)(b).
[648] *Terrorism (Police Powers) Act 2002* s.27U(6).
[649] Information provided by the Terrorism Investigation Squad, 9 July 2008.
[650] *Terrorism (Police Powers) Act 2002* s.27U(6).
[651] Ministry for Police submission, 4 July 2008.
[652] *Terrorism (Police Powers) Act 2002* s.27A(1).
[653] *Terrorism (Police Powers) Act 2002* s.27V(3) and (4).
[654] *Terrorism (Police Powers) Act 2002* s.27U(2)(a) to (e).
[655] Terrorism (Police Powers) Regulations 2005 clause 6(2).
[656] *Law Enforcement (Powers and Responsibilities) Act 2002* Part 5, Division 2. Note that search warrant powers were formerly contained in the *Search Warrants Act 1985*.
[657] *Law Enforcement (Powers and Responsibilities) Act 2002* s.67(3).
[658] *Law Enforcement (Powers and Responsibilities) Act 2002* s.59(1)(b) and *NSW Crime Commission Act 1985* s.11.
[659] Mr Phillip Bradley, NSW Crime Commissioner, evidence given before the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 20 September 2006.
[660] *Ballis v Randall* [2007] NSWSC 422 at paragraph 83, 119 and 126 (Hall J).
[661] NSW Police Force, *Police Weekly*, Vol 16 No 25 (16 July 2007).
[662] Discussion with staff from Ministry for Police, 13 September 2007.
[663] Discussion with police officer from NSW Police Force Counter Terrorism and Special Tactics Command, 2 August 2007.
[664] *Law Enforcement (Powers and Responsibilities) Act 2002* s.49.
[665] *Terrorism (Police Powers) Act* s.27O.
[666] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[667] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[668] Community Relations Commission submission, 30 May 2007.
[669] *Terrorism (Extraordinary Powers) Act* (WA) s.27(7)(f).
[670] Ministry for Police submission, 14 August 2007.
[671] Part 7 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Chapter 5.
Scrutiny of counter-terrorism powers

In our Issues Paper, we asked whether special counter-terrorism powers should be subject to ongoing scrutiny, and if so, what form that scrutiny should take. We raised this question in the context of existing safeguards in the Act. Briefly, these safeguards include, for preventative detention powers:

- judicial issue of orders at a hearing in which the subject and their lawyer can give evidence
- appointment of a senior officer to oversee the order
- protection of the dignity of detainees
- a detainee's entitlement to complain about their treatment
- annual reporting
- a period of review, and
- a sunset clause.

Safeguards for covert search warrant powers include:

- judicial oversight
- penalties for providing misleading information
- reporting mechanisms, and
- a review period.

Many submissions we received emphasised the extraordinary nature of the covert search and preventative detention powers, and stressed the need for external scrutiny commensurate with the extraordinary nature of the powers:

> *Obviously, the very nature of a covert search warrant will deny individuals [the rights provided under the ordinary search warrant regime] and as a consequence introduce greater opportunity for police powers to be misused and rights to be infringed. The power to enter and search premises, and seize property is clearly intrusive. It represents a blatant invasion of privacy and directly interferes with an individual's right to the security of their premises. Such a power should be carefully confined and subject to strictly enforced conditions. This task is made very difficult if search warrants are executed in secret, without the knowledge of the person who has the greatest interest in ensuring that both the issue and execution strictly accords with the law.*[672]

Many submissions were strongly in favour of ongoing or expanded scrutiny. For example:

- the Law Society said the 10 year sunset clause for preventative detention was excessively long and should be subject to parliamentary review within a maximum period of five years[673]
- the Centre for Public Law said that counter terrorism laws in all jurisdictions in Australia should be subject to review by an independent reviewer, and the Ombudsman should have an ongoing scrutiny role in regards to the exercise of police powers in NSW[674]
- the Police Integrity Commission raised concerns with the effective exercise of oversight by agencies such as theirs, where the laws were operating in a cross jurisdictional framework[675]
- PIAC said the Supreme Court's supervisory function should be expanded, the Ombudsman's review role extended for the life of the Act and a public interest monitor introduced,[676] and
- the Council for Civil Liberties said a public interest monitor or the Ombudsman should be present for all application hearings for preventative detention orders and covert search warrants and be able to cross examine applicants and other witnesses.[677]

Other proposals and the sufficiency of the current oversight arrangements are further discussed below.

The NSW Police Force did not support specific oversight of counter-terrorism powers. The Ministry for Police simply stated that the existing general safeguards are sufficient.[678] Unfortunately, no reasons were provided for this assertion. The Crime Commission did not comment on this issue.

5.1. Further legislative review

5.1.1. Extending the Ombudsman's review period

Some submissions commented that the Ombudsman's review of the legislation offers 'valuable insights' because 'so often the debate about whether there is a need for increased police powers... is only able to occur on a theoretical level, uninformed by actual police practice.'[679]

However, the Ombudsman's role in keeping special counter-terrorism powers under scrutiny is limited to the initial period of the legislation being in force. The Ombudsman was required to monitor the covert search warrant provisions for two years (from September 2005 to September 2007), and the preventative detention order provisions for five years (from December 2005 to December 2010), with an interim report after two years. There is no provision for ongoing monitoring by the Ombudsman beyond each of the review periods.

Other reviews we have conducted required us to examine police powers which are used frequently, such as powers to take DNA samples or use drug detection dogs. At the end of a review period, we are usually able to gauge whether the new powers are being used effectively and fairly, for both police and the wider community, based on detailed research into the way police officers are using their powers. The preventative detention and covert search warrant powers differ, however, in that they are not used routinely by police. Although we have made some recommendations based on what we have observed, we cannot confidently provide a view on the effectiveness or fairness of powers conferred on police and other officers for either regime.

During the review period for covert search warrants, five warrants were obtained, and three covert searches were conducted. The obligations of those who exercised the covert search powers extend beyond the end of the review period because:

- Police are required to serve an occupier's notice within six months of executing a covert search warrant. This can be postponed for six monthly periods and for more than 18 months in exceptional circumstances.[680] Of the three covert warrants which were executed during the review period, the occupier's notice was served for one warrant, but has been postponed on a number of occasions for the other two.
- Police are required to destroy any records made in the execution of a search warrant as soon as practicable after determining that retention is no longer reasonably required for an investigation or proceedings.[681] We have not been advised yet of the destruction of any such records.

During the first two years of the preventative detention review period, no preventative detention orders were sought. However, preventative detention powers also carry ongoing obligations, for example police are required to ensure any identification material taken from a person in preventative detention is destroyed 12 months after the completion of any proceedings relating to the order or the detainee's treatment under the order.[682]

Because the Ombudsman's monitoring role ends at the end of the statutory review period, there is no way of independently monitoring and reporting upon compliance with these obligations.

Several submissions argued that the Ombudsman's scrutiny of preventative detention and covert search powers should be extended beyond the current review periods. The Centre of Public Law submitted:

> *Preventative detention powers are of an extraordinary nature and have not yet been used in NSW. An ongoing scrutiny role is necessary for the Ombudsman to effectively review the use of powers under the Act, which may be used infrequently or not at all within the current review period and once used have ongoing obligations, such as the destruction of identification material taken from a detainee after 12 months.*

The Community Relations Commission, PIAC, Privacy NSW and Submission 8 also argued that the powers should be subject to Ombudsman oversight for as long as they remain in force.[683]

5.1.2. Information gathering function

For the purpose of keeping under scrutiny covert search powers, the Ombudsman was able to require information about the exercise of the powers from 'the Commissioner of Police, the Crime Commissioner or the Director-General of the Attorney General's Department.'[684]

The Ombudsman's usual practice in scrutinising the use of new powers is to seek information from a range of sources. For our review of the covert search warrant powers, we requested access to documents held by the courts, including warrants, judge's records of determination and reports to the judge following execution or expiry of a warrant. Given the Attorney General's Department's role in administering the court system, we negotiated access to these documents through the Department. It was agreed that Ombudsman officers would periodically inspect

relevant documents held by the court. It was decided that documents should be viewed in the chambers of the judge who issued the warrant, to ensure access was not provided to information which could not lawfully be provided.[685]

During the review period Ombudsman officers met a number of judges to inspect documents relating to covert search warrants. Each of the judges expressed reservations about whether they were in fact able to provide access to the information sought. Some judges provided copies of some of the documents requested. Another confirmed he had the documents requested, but was of the view he was not able to provide access to them. After explaining their concerns, the judges provided access to information as they thought appropriate, and provided general comments to Ombudsman officers about how the legislation was operating.

Many Acts which confer a legislative review function on the Ombudsman permit the Ombudsman to require information from 'any public authority' for the purpose of keeping powers under scrutiny.[686] Unlike the covert search provision, the preventative detention monitoring provision also enables the Ombudsman to require information from 'the Commissioner of Police or any public authority.'[687]

It would have been preferable for the Ombudsman to be able to require information from 'any public authority' for each of the Ombudsman's legislative reviews. This would mean the monitoring functions conferred on the Ombudsman by Parliament were consistent, and would enable the Ombudsman to obtain information necessary for proper scrutiny.

The Ombudsman wrote to the Director General of the Cabinet Office, as it then was, in June 2006 requesting that the monitoring provisions for each legislative review, including the review of the covert search provisions, allow the Ombudsman to require information from 'any public authority'.[688] Unfortunately, at the time of completing this review, amendments had not been made to the Act, and some records which ideally should have been reviewed by Ombudsman officers, have not been.

5.1.3. Independent Reviewer

At the time of writing, the federal government is considering an opposition Bill to appoint an Independent Reviewer of Terrorism Laws. A spokesperson for the federal Attorney General has indicated the Bill would be considered alongside recommendations arising out of a number of legislative reviews including those conducted by the Sheller Committee and the Parliamentary Joint Committee on Intelligence and Security.[689]

Both of these reviews recommended the appointment of an Independent Reviewer to monitor the operation of counter-terrorism legislation on an ongoing basis. The Sheller Committee noted it was important that the ongoing operations of the Commonwealth laws, including interpretation of the laws by the courts, were 'closely monitored and that Australian governments have an independent source of expert commentary on the legislation'.[690] The Committee recommended either an Independent Reviewer be appointed to perform this function or the Committee itself conduct a further review in three years.

The Parliamentary Joint Committee on Intelligence and Security agreed with this proposal at the time, and in its most recent review of the proscription of terrorist organisations, reiterated its support for the establishment of an Independent Reviewer.[691] The Committee held the view:

> *that an Independent Reviewer would provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia. The establishment of a mechanism of this kind would contribute positively to community confidence as well as provide the Parliament with regular factual reports.*

The Committee recommended an Independent Reviewer be established to monitor the application of terrorism laws, including the use of special police and intelligence powers, on an ongoing basis.[692] It also recommended the Independent Reviewer report annually to Parliament and the Committee have responsibility for examining these reports.

Submissions to our review have also recommended the establishment of an Independent Reviewer of counter-terrorism laws in Australian jurisdictions. The Centre of Public Law submitted that counter-terrorism powers in all Australian jurisdictions should be subject to review by an independent reviewer:

> *Ideally, this person would be appointed federally and review Commonwealth and State and Territory laws, such as the Terrorism (Police Powers) Act. Debate and consideration of existing and proposed legislation is currently hindered by the reactive nature of amendments, limited access to security intelligence and an unwillingness to oppose amendments for fear of being seen to expose the community to danger. Under the Independent Reviewer model, consideration is given to the operation and effectiveness of current and proposed amendments to ensure that counter-terrorism laws and amendments are necessary and appropriate. This would result in a more sustainable counter-terrorism framework, with carefully targeted offences and sufficient enforcement powers subject to adequate safeguards and forms of review.*[693]

In the United Kingdom an independent reviewer was established in the *Terrorism Act 2000* (UK) and the *Prevention of Terrorism Act 2005* (UK) to review the working of those Acts and report to the Secretary of State every 12 months for tabling in Parliament.[694]

The Independent Reviewer of Terrorism Laws Bill 2008 was first introduced in federal Parliament in March 2008 by Mr Petro Georgiou MP. Mr Georgiou stated:

> *It is vital that parliament and the executive receive expert advice on an ongoing basis about the effectiveness and impact of the regime of counterterrorism measures that have been put in place. A legislatively provided for Independent Reviewer of Terrorism Laws would provide a much needed additional safeguard for the protection of our security and our rights.*[695]

The Bill was dismissed in the House of Representatives. In June 2008 the Bill was introduced in the Senate by Senator Judith Troeth where it is currently being considered.

The Bill provides for the appointment of an 'independent person to ensure ongoing and integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism'.[696] The independent reviewer would have the power to obtain information and documents from relevant agencies, including those with national security classification, and require persons to attend and answer questions.[697] The reviewer is to report on each review, as well as annually to the relevant minister for tabling of reports in Parliament.[698] These reports must also be considered by the Parliamentary Joint Committee on Intelligence and Security.

We have recommended the NSW Attorney General provide a copy of our report to the Standing Committee of Attorneys General for consideration of any additional arrangements or review to facilitate or further examine cross-jurisdictional oversight of counter terrorism laws — see section 5.8. In their response to our consultation draft report the Ministry for Police indicated the Independent Reviewer of Terrorism Laws Bill should be part of any consideration by the Attorneys General of any additional review arrangements.[699]

We are monitoring progress of the Bill for our final report on preventative detention.

5.2. Inspection of records

Several submissions argued that agencies exercising extraordinary counter-terrorism powers should have their records inspected periodically to ensure they are complying with their legislative obligations. Some suggested the Ombudsman could perform this function, and report on the extent to which the agencies are compliant.[700] Some submissions argued that ongoing scrutiny through inspection of records is particularly important given that some of the obligations imposed on law enforcement agencies extend beyond an initial statutory review period.[701]

5.2.1. Inspection regime for proposed Commonwealth covert search powers

The proposed regime for federal covert search powers, as provided for in the lapsed Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth), was to be monitored by the Commonwealth Ombudsman, by way of regular inspections. The Senate Standing Committee on Legal and Constitutional Affairs explained the Ombudsman's role in monitoring the covert search scheme was 'to determine whether the records kept are accurate and whether an authorising agency is complying with its obligations' under the relevant legislation. The Committee also explained:

> *The Ombudsman is empowered to enter premises occupied by the authorising agency at any reasonable time after notifying the chief officer of the agency. The Ombudsman is then entitled to full and free access at all reasonable times to all records of the delayed notification search warrants scheme that are relevant to the inspection. Agency staff are required to co-operate with requests for assistance and to retrieve information reasonably required by the Ombudsman.*
>
> *The Ombudsman may also require written and oral information from any officer of an agency where the Ombudsman has reason to think the officer can assist with inquiries. Failure to comply with requests from the Ombudsman for information are not excused on the grounds that doing so would contravene a law, would be contrary to the public interest or might tend to incriminate the person or make them liable to a penalty, or to disclose certain advice of a legal nature. The Ombudsman may also pass information to an equivalent state or territory inspecting authority where it is considered necessary for that authority to carry out its functions. The maximum penalty for failure to comply with the Ombudsman's request for information is six months imprisonment.*[702]

The Bill proposed the Commonwealth Ombudsman must inspect the records kept by the relevant law enforcement agencies at least once every six months. The original Bill proposed annual inspections, but this was changed

to require inspections at least every six months, in accordance with a recommendation made by the Senate Committee.[703] The Ombudsman was required to report to the Minister every six months, who must table each report in Parliament within 15 days.

5.2.2. Inspection regimes for other covert functions

The NSW Ombudsman monitors compliance with legislative regimes for other covert functions of law enforcement agencies which deal with highly confidential information. This is a role performed also by most other Ombudsman offices across Australia for their particular jurisdictions.

Within the NSW Ombudsman, there is a specialist unit which is responsible for discharging the Ombudsman's compliance monitoring roles in relation to telephone intercepts, surveillance devices and controlled operations. These roles are as follows:

- Under the Commonwealth *Telecommunications (Interception and Access) Act 1979* (the *Interception Act*), certain law enforcement agencies can apply to a judicial officer or member of the Commonwealth Administrative Appeals Tribunal (AAT) for a telephone intercept warrant. The Ombudsman oversights four agencies who can use these powers — the NSW Police Force, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption pursuant to the *Telecommunications (Intercept and Access) (New South Wales) Act 1987*. The Ombudsman performs an auditing role by ascertaining the extent of compliance by an agency's officers with the record keeping and destruction requirements set out in Part 2 of the Act. The Ombudsman does not have any role in scrutinising the process of obtaining or granting warrants, this is the role of the judicial officer or AAT member who grants the warrant. The Ombudsman is required to inspect each agency's records at least twice a year, and has discretionary power to inspect their records for compliance at any time. Our practice is to conduct spot inspections as well as routine six monthly audits.
- The monitoring regime set up by the *Law Enforcement (Controlled Operations) Act 1998* (the *Controlled Operations Act*) aims to minimise any possible abuse of the powers that have been given to agencies whose officers do undercover work in the investigation of corruption and criminal activity. The Ombudsman oversights four state law enforcement agencies — the NSW Police Force, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption. We also oversight three Commonwealth law enforcement agencies that are eligible to conduct operations under the NSW Act — the Australian Federal Police, the Australian Customs Service and the Australian Crime Commission. We have found, through our monitoring activities, that most applications, authorities, variations and reports are in order, and that agencies generally comply with the relevant legislative requirements. Where we do identify deficiencies, we raise these with the agency directly. We also provide details of some of these matters in our Controlled Operations Annual Report. Through our review, we have found that the standard of record keeping by the NSW Police Force has greatly improved over recent years, especially considering the continuing increase in the number of operations authorised.
- The *Surveillances Devices Act 2007* regulates the covert use of data surveillance devices, listening devices, optical surveillance devices and tracking devices, or any combination of them in NSW by the NSW Police Force, the NSW Crime Commission, Police Integrity Commission and the Independent Commission Against Corruption, the Australian Crime Commission and other prescribed agencies. A key monitoring and accountability feature of the Act is the provision for regular inspection of the records of each New South Wales law enforcement agency by the Ombudsman to determine the extent of compliance with the Act by the agency and its officers. The Ombudsman is also required to provide written reports to the Minister at six monthly intervals which will be tabled in Parliament.

The Ombudsman's secure monitoring unit has developed sound methodologies for conducting these inspections. In addition, given the highly sensitive nature of intelligence and security information accessed in order to perform our functions, we have in place rigorous internal policies and procedures for maintaining the integrity of such information. The specialist unit is housed in a reinforced secure office that has biometric entry security with limited access. An Assistant Ombudsman supervises the unit, and participates in inspections directly. Staff of the unit have undergone an external vetting process to obtain appropriate security clearances.

5.2.3. Discussion

Conferring an inspection role on an independent external agency, similar to the Commonwealth Ombudsman's role in relation to proposed 'delayed notification search warrants', would be an effective way to ensure the relevant law enforcement agencies comply with their legislative obligations in exercising counter terrorism powers, particularly where those obligations extend for some time beyond the actual use of the powers. Such an arrangement:

- would bring accountability arrangements for these powers into line with other similar powers exercised by law enforcement agencies
- has strong support from a number of government and other agencies
- would reflect similar arrangements proposed at a Commonwealth level
- would, in all likelihood, serve to improve agency processes through independent review and recommendation
- provide a balance between the investigative needs of law enforcement agencies and the general rights and expectations of the community
- does not impose any significant resource imposts on the agency concerned — only to provide access or information and respond to any reports or recommendations.

5.3. Direct observation

Some submissions argued there should be independent observation of the use of counter-terrorism powers, to ensure compliance with legislative obligations.

5.3.1. Monitoring of preventative detention

Preventative detention legislation in some other jurisdictions specifically provides for external monitoring of a detainee's treatment and conditions of detention. For example, section 39 of the *Terrorism (Preventative Detention Act) 2006* (WA) provides that the Inspector of Custodial Services may, at any time, review the detainee's detention under a preventative detention order to determine whether the detainee is treated with humanity and respect, and is not subjected to cruel, inhuman or degrading treatment.

The NSW legislation does not specifically provide for monitoring of a detainee's treatment in this way. However, detainees are entitled to contact the Ombudsman or Police Integrity Commission (section 26ZF) and must be informed of their right to make a complaint to the Ombudsman about their treatment by police in detention (section 26Z(2)(d)(ii)). The legislation does not require that the detainee be informed of their right to make a complaint to the Ombudsman about their treatment by a correctional officer while in detention. However, it is Department of Corrective Services policy to provide this information.

Also, the Ombudsman has entered into an observation agreement with the NSW Police Force and the Department of Corrective Services to enable Ombudsman researchers to observe police and correctional officers exercising preventative detention powers. The agreement outlines the responsibilities of the agencies and of the Ombudsman, includes guidelines for Ombudsman observers, and provides an information sheet explaining the benefit of direct observation for police or correctional officers who are observed. As the preventative detention powers have not been used, there has not been any opportunity to observe the exercise of the powers. However, Ombudsman officers have inspected the facilities the Department of Corrective Services has indicated would be used if a person was taken into preventative detention.

While the Ombudsman has arranged to monitor preventative detention directly during the review period, and a detainee is entitled to contact the Ombudsman should he or she wish to make a complaint about a police or correctional officer, the position in New South Wales appears less robust than that in Western Australia. The principal difference is that in Western Australia, the Inspector of Custodial Services may review the detainee's treatment in detention 'at any time', while in New South Wales the Ombudsman has arranged, by agreement with the NSW Police Force and the Department of Corrective Services, to observe the use of preventative detention powers during the review period only. If the powers are used after the review period ends, then the Ombudsman would likely only become involved should the detainee make a complaint under the ordinary provisions of the complaint handling legislation (the *Ombudsman Act 1974* and the *Police Act 1990*).

Several submissions argued that an appropriate external agency should be entitled to inspect preventative detention conditions at any time. The Council for Civil Liberties submitted that this should occur whether or not the person in detention makes a complaint.[704] The Police Integrity Commission commented that the failure of the Act to specify the location or facilities in which detainees will be held 'may contribute to circumstances conducive to police misconduct,' in particular 'if detainees are removed to remote locations in NSW or beyond NSW.' The Commission commented 'there may be merit in assigning an external agency or a statutory appointee with the function of monitoring the actual condition of detainees.'[705]

5.3.2. Observation of covert searches

In a submission to Parliament, the Council for Civil Liberties has previously argued that covert search warrant powers call for special scrutiny of police actions, and recommended that either the Ombudsman or the Police Integrity Commission:

> *be required to observe each covert search, and that it be a condition of the legality of the searches and of the subsequent use of what is discovered in evidence in legal proceedings, that they do so observe. The Ombudsman's Office or the PIC should prepare a report on each search, to be given to the owner/occupier of the premises searched at the same time that the occupier's notice is given.*[706]

The Council for Civil Liberties further recommended the Ombudsman keep records of covert searches and report each three months on the number of covert searches, outcomes in relation to the saving of life and on the use of evidence in laying charges for terrorist offences and other offences.

The Law Society also recommended that all covert search warrants be overseen by either an officer of the Police Integrity Commission or the Ombudsman's office, and a report of each search should be prepared by that officer. It also recommended these agencies monitor and report regularly on all searches and outcomes including any charges laid, whether terrorist related or otherwise.[707]

Some submissions to our review argued that an independent person should always be present at covert searches, and suggested this person could be from the Ombudsman or the Police Integrity Commission. Alternatively, it could be a role conferred on a public interest monitor.[708]

The Crime Commission argued that 'the presence of a third party at search warrants, particularly covert search warrants where the danger levels are much higher, is not sensible.'[709] The NSW Police Force did not comment on this issue.

We note that in this report we recommend that the Act be amended to require covert searches to be recorded in their entirety on video, where practicable, and also that the report to the judge on the outcome of the search include advice as to whether the covert search was recorded on video and if not, the reasons why it was not practicable to record the search. If covert searches are recorded on video this may alleviate the need to have an observer from an independent agency observe a covert search directly.

5.3.3. The role of the Police Integrity Commission

Some submissions argued that the Police Integrity Commission should have a more active role in supervising the use of counter-terrorism powers. For example, PIAC submitted that the Police Integrity Commission should be responsible for overseeing the exercise of functions under preventative detention orders, rather than a senior police officer.[710] As discussed above, the Council for Civil Liberties and Law Society have suggested that the Police Integrity Commission should observe the execution of covert search warrants.

The Police Integrity Commission does not support these proposals, on the basis that such a role would be inconsistent with the principal objectives of the Commission, as stated in the *Police Integrity Commission Act 1996*.[711]

5.4. Introduction of a public interest monitor

5.4.1. Other jurisdictions

Two Australian jurisdictions currently provide for public interest monitoring of counter-terrorism powers.

In Queensland, the Public Interest Monitor (PIM) is appointed under the *Police Powers and Responsibilities Act 2000* (Qld). The PIM monitors applications for surveillance and covert search warrants, federal control orders and preventative detention orders.[712] The PIM has oversight functions under the Commonwealth Criminal Code in relation to control orders and under the *Terrorism (Preventative Detention) Act 2005* (Qld) in relation to preventative detention. The then Queensland Premier, Mr Peter Beattie compared the oversight role of the PIM with oversight regimes in other States:

> *Other jurisdictions use reactive mechanisms that only apply after the event, such as complaints, inspections and reports. There is no doubt a role for these back end accountability measures, but they are immeasurably enhanced by proactive safeguards like the Public Interest Monitor at the front end… the Public Interest Monitor will be notified of initial and final PDO [preventative detention order] applications and will be entitled to make representations to the senior police officer or the serving retired judge.*[713]

Police must notify the PIM when applying for preventative detention orders. The PIM is entitled to be present when an application is heard for a preventative detention order, and can ask questions and make representations to the issuing authority.[714] It is not the role of the PIM to legally represent the person subject to a preventative detention order application (the person is entitled to be legally represented) rather to represent the 'public interest'. The PIM can also gather statistical information about the use and effectiveness of control and preventative detention orders. Whenever considered appropriate the PIM can give the police commissioner a report on non-compliance by police officers with the covert search warrant or preventative detention laws.[715]

In the Australian Capital Territory, the Minister must appoint people to a public interest monitor panel. Each person appointed must be a lawyer, with appropriate security clearance, with the qualities and experience suitable to being a public interest monitor. For each application for a preventative detention order, the Legal Aid Commission must appoint a person from the panel to be the public interest monitor for the application. The monitor is entitled to be present at the hearing of the application, to ask questions of anyone giving evidence to the court and to make any submissions to the court. Police must also consult with the public interest monitor before directing that contact between a detainee and his or her lawyer be monitored by police.[716]

5.4.2. NSW Parliamentary Committee on the Ombudsman and Police Integrity Commission

The current Queensland PIM gave evidence in 2006 before the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission.[717] He stated that no preventative detention orders had been sought at that time, but that the PIM was routinely involved in applications for warrants for various covert investigative techniques. He explained that prior to making an application, the law enforcement agency discusses the proposed application with the PIM, and provides the relevant material in draft form. The PIM may ask for further information or may explain any concerns about the proposed application. The law enforcement agency may amend the application in response to the PIM's concerns, for example by applying for a warrant subject to certain conditions, or may proceed regardless of the PIM's concerns. At the hearing the PIM may make submissions, if appropriate, to the judicial officer determining the application.

The PIM maintained he has a good working relationship with the law enforcement agencies and the courts, and that both appreciated the PIM's input. He commented that in his view, the system was useful because 'it helps the police work out what applications they should be bringing and which ones they should ditch.' He clarified that the PIM does not stand in the shoes of the person whose rights are directly affected by the application, but represents the public interest:

> *Essentially, the Public Interest Monitors who preceded me and I hold the same view and have always worked on the same basis that there is intense public interest in this country in seeing serious and major crime — and it follows, of course, even more so perhaps, terrorism — detected and prevented wherever possible... The public has an interest in having that sort of crime detected and prevented and the culprits prosecuted. But on the other hand there is also the very significant public interest in the privacy and the rights of the individuals who make up our society that have to be guarded and secured. It is a fine balancing exercise between those and that is the job that my deputies and I do on a daily basis when we assess these applications and in the submissions that we make to the court.*[718]

In its Report on the Inquiry into Scrutiny of NSW Police Counter-Terrorism and Other Powers, the Parliamentary Committee commented that it saw a number of advantages of public interest monitoring, including a level of oversight which is 'discrete, appropriate and not intrusive or onerous in terms of creating extra layers of procedures for law enforcement agencies to have to satisfy.' It also found that public interest monitoring is a cost effective form of oversight.[719] The Committee recommended that the Attorney General make a referral to the Law Reform Commission to consider a Public Interest Monitor for New South Wales.[720]

We note that in its 2001 publication, *Surveillance: an interim report*, the NSW Law Reform Commission considered the possibility of public interest monitoring of surveillance powers in NSW. The Commission concluded that at the time, the other accountability measures it recommended were sufficient to ensure that public interest concerns would be addressed, without the need for a public interest monitor. It commented:

> *Courts and tribunals (regardless of which forum is selected to authorise covert public interest surveillance) have been accustomed to identifying and assessing notions of public interest for some time. The Commission considers that the inclusion of a PIM model in the proposed surveillance legislation would not improve the level of scrutiny which the appropriate issuing authority would ordinarily give to each application for a public interest authorisation. Accordingly, the Commission makes no recommendation on this issue, but raises it for further consideration.*[721]

5.4.3. Submissions to this review

Submissions from PIAC, the Council for Civil Liberties, the Australian Arabic Council, Queensland Corrective Services and Submission 8 recommended the introduction of public interest monitoring in New South Wales. Possible roles for the proposed monitor included observing the execution of covert search warrants, making submissions in preventative detention order hearings and inspecting agency records to check for compliance with legislative obligations.

The NSW Police Force commented that the current arrangements for external oversight are sufficient and appropriate. The Crime Commission does not support the introduction of public interest monitoring on the basis that 'the presence of a public interest monitor has not been shown to be of any advantage at the application stage' and 'a judicial officer is more than capable of bringing public interest factors to bear upon any application for a search warrant.'[722]

5.5. The complaints system as an avenue of redress

Part 8A of the *Police Act 1990* sets up a regime for dealing with complaints about the conduct of police officers. The NSW Police Force has principal responsibility for investigating or resolving complaints about the conduct of individual officers, or about police practice. The NSW Police Force is required to conduct timely and effective investigations into complaints, advise complainants as to the progress and outcome of inquiries, and find out whether complainants are satisfied with the way their concerns have been addressed.

The Ombudsman is the primary oversight agency for complaints about police officers. The Ombudsman is required to consider the adequacy of the police handling and resolution of individual complaints, and keep complaint handling systems under scrutiny, to ensure standards of integrity and fair dealing are maintained. The Ombudsman may also monitor investigations (for example, through Ombudsman staff observing interviews during complaint investigations) and conduct direct investigations into complaints about police where it is in the public interest to do so. Direct investigations may also be concerned with the NSW Police Force investigation of a complaint. Complaints about police conduct may be made by members of the public or by police officers. Under clause 20 of the *Police Regulation 2000*, police officers are required to report allegations of criminal or other misconduct to a senior officer.

Complaints about correctional officers are dealt with under the provisions of the *Ombudsman Act*, which provide that any person may complain to the Ombudsman about the conduct of a public authority.[723] If a person is detained by a public authority and he or she informs that authority they wish to complain, the authority must take all steps to facilitate the making of the complaint.[724]

A person who is detained under a preventative detention order is entitled to contact the Ombudsman and the Police Integrity Commission, and may complain to the Ombudsman about the conduct of a police officer or correctional officer.[725]

5.5.1. Complaints received during the review period

Complaints about officers in counter-terrorism are handled in the same manner as complaints about the conduct of any police officer, in accordance with Part 8A of the *Police Act* and Part 4 of the *Police Integrity Commission Act*. During the period of our review 15 complaints were made concerning counter terrorism issues or involving counter terrorist police, however none of the complaints related to the exercise of police powers under the Terrorism (Police Powers) Act.[726]

5.5.2. Adequacy of complaint handling as an accountability mechanism

The importance of complaint handling systems was recognised by the federal Parliamentary Joint Committee on Intelligence and Security recently, when they recommended Australia's counter terrorism strategy include wide dissemination of information about mechanisms for complaint or redress in relation to law enforcement, intelligence agencies and the media.[727] However complaint handling, by its nature, has its limitations as an oversight mechanism. It is essentially reactive, and relies on individuals bringing grievances to the attention of the Ombudsman, the NSW Police Force or the Police Integrity Commission. Because of this limitation, the Ombudsman also relies on more proactive mechanisms, such as auditing, to ensure our complaint handling oversight is comprehensive, and that systems are working properly. This role is conferred by specific legislation.[728]

The limitation of the complaints system as an oversight mechanism is of particular relevance when considering its adequacy as a check on the exercise of covert counter-terrorism powers. The occupier of a house which has been secretly searched, for example, will not be in a position to make a complaint about police conduct. For this reason, the exercise of covert powers may warrant closer scrutiny than the exercise of other, overt police powers.

5.6. Other reporting mechanisms

The Commissioner of Police and the Crime Commissioner must each report annually to the Police Minister and Attorney General on the exercise of covert search warrant powers by police officers and eligible staff members of the Crime Commission respectively. The reports must specify prescribed matters including: the number of warrant applications, the number of warrants executed, the number of arrests made in connection with a terrorist act in respect of which a covert search warrant was executed, the number of those arrests which resulted in charges, and the number of complaints made about conduct relating to the execution of a covert search warrant.[729]

The reports may be combined with any other annual report of the NSW Police Force or the NSW Crime Commission and are to be tabled in each House of Parliament as soon as practicable after they are received by the Attorney General.[730]

We were unable to find any reference to the exercise of covert search warrant powers in the annual reports of the NSW Police Force or the NSW Crime Commission. It was of concern to us that the covert search warrants executed in the 2005–2006 period did not appear to have been reported to Parliament. We wrote to both police and the Crime Commission requesting copies of the reports to the Attorney General and Police Minister and advice as to the dates they were provided.

The Commissioner of Police informed us the 2005–2006 annual report as required by section 27ZB, 'does not exist'. The Commissioner indicated the Counter Terrorism and Special Tactics Command had taken action to prevent that omission in the future, and the 2006–2007 report had been submitted as required.[731]

The Crime Commission have not indicated to us whether any annual reports were prepared as required by section 27ZB.

The Commissioner of Police must also report annually to the Minister and Attorney General in relation to the exercise of preventative detention powers. The report must specify certain matters including the number of applications for preventative detention and prohibited contact orders, the duration of the orders, whether the orders were to prevent a terrorist act or preserve evidence, the types of facilities used for detention and particulars of any complaints made about preventative detention. The report must also include a statement confirming the destruction of identification material required to be destroyed under the Act.[732]

5.6.1. Comment

It is not clear whether annual reports as required under section 27ZB (exercise of covert search powers) and section 26ZN (exercise of preventative detention) should be prepared where there has been no exercise of the powers. Clearly however, when the covert search warrant powers were exercised, the specifics provided for in the Act should have been reported to the Police Minister and the Attorney General. This apparently did not occur. As the NSW Police Force applied for and executed the covert search warrants the Police Commissioner was required to report the exercise of the powers. It is less clear from the material available to us what involvement eligible members of the Crime Commission had in the execution of the warrants and therefore what the obligations of the Crime Commissioner were to report to the ministers.

Police have recognised the omission and sought to redress such omissions in the future. In our consultation draft report we expressed the view that some action should be taken to retrospectively report the exercise of the powers, consistent with the intention of the Parliament that it be informed of the exercise of covert search powers, and in proper compliance with the legislation.

In response to our consultation draft report the Ministry for Police stated:

> *For completeness it may be appropriate for NSWPF to now report any use of the powers that have not been previously reported as required by the legislation. This would ensure that there can be no suggestion of any lack of transparency on behalf of NSWPF.*[733]

5.6.2. Review by the Attorney General

The Attorney General is also required to review the Terrorism (Police Powers) Act to determine whether its policy objectives remain valid, and whether the terms of the Act are appropriate for securing those objectives.[734] The Attorney General is required to review the Act every two years. The first report under this section was finalised in August 2006. It concluded that the policy and objectives of the Act remain valid.[735]

The Attorney General informs the public about how often the powers are used and what they are used for, and also ensures the policy objectives of the legislation are kept under review. However, it is not their purpose to provide external scrutiny of the actual exercise of the powers. That is, they do not provide for an independent assessment of whether those exercising the powers are complying with their legislative obligations.

5.7. A charter of rights

Some submissions pointed out that the existence of a charter of rights in jurisdictions such as Victoria, the ACT, the United Kingdom and Canada means that counter terrorism powers in those jurisdictions are subject to an additional significant safeguard which is absent in New South Wales.[736]

The Centre of Public Law submitted that 'the introduction of a NSW charter of rights would provide an important safeguard to the NSW preventative detention order model. It would provide an effective mechanism to determine whether rights have been unduly undermined by anti-terrorism laws.'[737]

We note these matters for the information of the Parliament. However, consideration of this broader issue is outside the scope of this review.

5.8. Cross-jurisdictional oversight

In 2002, the *Inter-Governmental Agreement on Australia's National Counter-Terrorism Arrangements* was signed, and the first meeting of the National Counter-Terrorism Committee was held. All Australian States and Territories agreed to refer constitutional powers relating to terrorism to the Commonwealth, and it was agreed that the Commonwealth would take charge of the strategic coordination of Commonwealth, State and Territory resources in the event of a terrorist incident.

In 2006 Assistant Commissioner Nick Kaldas gave evidence before the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission in its inquiry into scrutiny of police counter-terrorism powers. He advised:

> *The current terrorism environment involved NSW Police working hand in glove with the Australian Federal Police, ASIO and other Commonwealth intelligence agencies. I cannot envisage that NSW Police would ever conduct a major terrorism investigation without the involvement and partnership of those Commonwealth agencies.*[738]

In March 2008 *The Street Review : A review of Interoperability between the Australian Federal Police and its national security partners* was released.[739] The review noted the case of Mr Ul-Haque (discussed at section 3.11.3 above) highlighted the need for greater interoperability and information sharing between police and intelligence agencies. The review made a number of recommendations regarding joint agency counter terrorism operations. It recommended State and Territory police should regularly exchange information with the AFP and ASIO on threat levels and terrorism investigations, co-location and participation of ASIO officers in joint counter terrorism teams in the States, and joint training for all police and intelligence officers involved in national security operations.

There are a number of areas where New South Wales and Commonwealth agencies are or may work together in counter-terrorism. For example:

- The NSW Police Force Counter Terrorism and Special Tactics Command is creating a new unit, the Joint Counter Terrorism Team, comprising AFP and NSW Police Force officers.
- The AFP and NSW Police Force are currently negotiating a Memorandum of Understanding on preventative detention, to clarify how the Commonwealth and New South Wales preventative detention regimes would operate in practice.
- Covert searches carried out by NSW police officers may involve officers from Commonwealth agencies, although this has not occurred to date. The NSW Police Force Standard Operating Procedures for covert search warrants instruct police applicants to consult with 'external partner agencies', such as ASIO or the AFP, before applying for a covert search warrant, and state that ASIO or AFP staff may be involved in the execution of covert searches as specialist assistants.[740]

In its submission to our review, the Police Integrity Commission observed that because the prevention and investigation of terrorism offences occurs within a cross-jurisdictional framework, it may be difficult for agencies such as the Commission to provide effective oversight of the use of counter terrorism powers. The Commission gave the example of counter-terrorism operations where NSW police officers may be assisted by NSW Crime Commission staff, ASIO and the AFP. The Commission also noted that 'the problems related to oversight are amplified by limitations on the exchange of information between state and Commonwealth agencies.'[741]

Similar concerns regarding limited jurisdiction in this area were raised by the Commonwealth Inspector General of Intelligence and Security (IGIS) in his most recent annual report. The Inspector General's report states:

> *Indeed, the span of agencies which can be involved in issues such as counter-terrorism can be considerable and this has caused me to reflect on whether there should be some capacity to extend an inquiry under the IGIS Act to include intelligence and security activities of other agencies in special circumstances. This should*

not be the norm lest there be a diminution of focus by my office on the AIC [Australian Intelligence Community], but there are occasions when an intelligence or security issue can only be satisfactorily examined by going outside the AIC.[742]

As we have previously noted, the IGIS and the Commonwealth Ombudsman have entered into a memorandum of understanding which facilitates the exchange of information in the review, or investigation of matters, where agencies under their jurisdictions work cooperatively.[743] The IGIS has jurisdiction over six intelligence agencies including ASIO, and the Commonwealth Ombudsman has jurisdiction over multiple Australian Government departments and agencies, including the AFP. The MOU specifies a number of areas where agencies work cooperatively including joint ASIO/AFP execution of entry and search warrants, questioning and detention warrants and preventative detention orders and control orders. The MOU is intended to ensure complainants have their concerns dealt with effectively and efficiently by the most appropriate agency and the activities of the two offices are not duplicated unnecessarily and are complementary.

We also note that the Standing Committee of Attorneys General, a national ministerial council, which takes action on issues requiring joint action from Commonwealth, State and Territory Governments, is currently developing a model for inter-jurisdictional oversight of DNA sampling. This is particularly important given the operation of a national DNA database.

Given that State and Commonwealth agencies work together in counter terrorism investigations, there would be considerable merit in developing a cooperative, inter-jurisdictional oversight scheme, which would enable oversight bodies in each jurisdiction to refer complaints to each other as appropriate, and share information for the purpose of any investigation. We raise this for the consideration of the Attorney General and recommend a copy of this report be provided to the Standing Committee of Attorneys General. The Independent Reviewer of Terrorism Laws Bill (see section 5.1.3 above) might also be considered by the Attorneys General, as was submitted to us by the Ministry for Police.[744]

Recommendations

35. The Police Commissioner ensure annual reports are prepared retrospectively to the Attorney General and Police Minister pertaining to the exercise of the covert search warrant powers in compliance with the Act.
36. The Attorney General provide a copy of this report to the Standing Committee of Attorneys General for consideration of any additional arrangements or review to facilitate or further examine cross-jurisdictional oversight in relation to counter-terrorism powers.

5.9. Conclusion — Scrutiny

During the review period we found no evidence of misuse of the counter terrorism powers subject of this review. Preventative detention powers were not used. Covert search warrant powers were used infrequently, only in the investigation of serious offences, and the courts were satisfied of the need for the powers to be exercised. On balance the needs of law enforcement and of protecting people's right to privacy were met. However, we consider there is an overwhelming case for ongoing external oversight of both preventative detention and covert search warrant powers while they remain in force.

It is of considerable concern that with the end of the Ombudsman's statutory review period for covert search warrants, there will be no external mechanism to review and report upon whether:

- police or Crime Commission staff provide a report to the eligible judge, following the execution of a covert search warrant in a timely manner
- occupiers (including those in adjoining premises) are duly notified that their house was entered and/or searched
- any postponement of service of an occupier's notice is duly authorised by the eligible judge, and
- records made in the execution of a covert search warrant are destroyed where required by section 27W of the Act.

We note here that although only five covert search warrants were obtained during the review period, and only three of these were executed, we identified a number of occasions (even in these few instances) where it was not clear that those exercising the powers complied with their legislative obligations. These included:

- failure to provide the Attorney General and the Police Minister with annual reports on the exercise of covert search warrant powers
- obtaining authorisation to enter adjoining premises where this was not actually required

- failure to provide report to eligible judge within required time frame, and
- failure to serve occupier's notice on the right person.

We were also able to check compliance on issues relating to warrants, such as whether they had been executed before expiry; that reports were made to the eligible judge; and that occupier's notices were served on time or alternatively, that postponements were obtained within the statutory timeframe. Proper systemic review provides an opportunity to identify and act on issues relating to warrants, which goes beyond judicial scrutiny of individual matters. It also provides an opportunity, across all uses of the powers to assess their effectiveness in meeting legislative obligations and balancing competing interests.

Further, once the review period ends for the preventative detention laws, police will no longer be required to notify the Ombudsman that a preventative detention order has been made, or a person has been taken into preventative detention. The Ombudsman would only become involved if a detainee were to make a complaint under the ordinary provisions of the complaint handling legislation (the *Ombudsman Act 1974* and the *Police Act 1990*). In the absence of a complaint, the Ombudsman may not be able to monitor the treatment of detainees or the conditions of detention. In addition, compliance with the destruction of identity material requirements would not be independently monitored.

If there is to be ongoing scrutiny of the exercise of preventative detention and covert search powers, timely notification of any use of the powers is necessary for the scrutiny to be effective.

For example, in Western Australia, the *Terrorism (Preventative Detention) Act 2006* (WA) provides that police must give the Inspector of Custodial Services a copy of the preventative detention order, and advice as to the place of detention, as soon as practicable after the person is taken into custody.[745] This is an ongoing requirement, which ensures the Inspector is notified as soon as practicable whenever the powers are used. In New South Wales, by contrast, police are required to ensure the Ombudsman, during the statutory review period, is 'duly notified' when a preventative detention order or prohibited contact order is made or revoked, or when a person is taken into custody under an order. We are concerned these provisions may not be sufficient, and will monitor this issue during the remaining review period.

There are several reasons why ongoing external and independent scrutiny of the exercise of covert search and preventative detention powers is desirable. First, the extraordinary nature of the powers means they have been used rarely (in the case of covert search powers) or not at all (in the case of preventative detention powers) during the Ombudsman's initial review period. For this reason the Ombudsman's capacity to comment on the actual exercise of the powers is limited. Second, traditional accountability mechanisms such as the police complaints system may not be appropriate or available where the powers are exercised covertly. Third, ongoing scrutiny would ensure the NSW Police Force and Crime Commission comply with the legislative obligations which flow from the exercise of the powers, obligations which may extend for quite some time after search or detention powers are actually exercised.

External oversight serves a number of other important functions:

- experience has demonstrated that it can improve agency processes, for the benefit of agencies and the community
- the community is provided with regular information about the use of controversial law enforcement powers, and an assessment of agency compliance with legal requirements
- there is an independent process to provide information and analysis about the effectiveness of the powers to assist in detecting or preventing serious crime — including terrorism offences, and
- properly constructed, it balances agency efficiency with external accountability.

Our review provides clear evidence of the need for ongoing external scrutiny of the exercise of police functions conferred under Part 3 of the Act — covert search warrants. This is consistent with other external reviews, the consideration of Parliament as reflected in safeguards provided in various legislation, and with many of the submissions made in response to our issues paper.

In our view, there would be merit in an independent body such as the Ombudsman performing an auditing role in relation to covert search powers, or an ongoing monitoring role similar to that under 27ZC while the legislation is in force.

Our view is that such an ongoing scrutiny role is also necessary for the exercise of preventative detention functions, including direct monitoring of detainee's conditions of detention. However, given our review role for this is not complete until 2010, at this time we express no final view.

Recommendation

37. Should Parliament determine to continue Part 3 of the Act in its present or some amended form, consideration be given to appropriate ongoing accountability including amending the Act to provide for ongoing external scrutiny of the exercise of covert search powers. In particular, Parliament may wish to consider the following arrangements:

    - Extending the Ombudsman's monitoring functions under section 27ZC for the period the legislation remains in force, or
    - Conferring an auditing role on the Ombudsman to ensure the NSW Police Force and Crime Commission exercising the powers comply with their legislative obligations.

Endnotes

[672] Law Council of Australia submission, on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, provided with the submission of 18 June 2007.
[673] The Law Society of NSW submission, 12 June 2007.
[674] University of NSW, Gilbert + Tobin Centre for Public Law submission, 13 June 2007.
[675] Police Integrity Commission submission, 15 June 2007.
[676] Public Interest Advocacy Centre submission, 3 July 2007.
[677] NSW Council for Civil Liberties submission, 22 June 2007.
[678] Ministry for Police submission, 14 August 2007.
[679] Law Council of Australia submission, 18 June 2007.
[680] *Terrorism (Police Powers) Act 2002* s.27U.
[681] *Terrorism (Police Powers) Act 2002* s.27W(3).
[682] *Terrorism (Police Powers) Act 2002* s.26ZM(4).
[683] Community Relations Commission submission, 30 May 2007; Public Interest Advocacy Centre submission, 3 July 2007; Privacy NSW submission, 22 May 2007; Submission H, 15 June 2007.
[684] *Terrorism (Police Powers) Act 2002* s.27ZC(2).
[685] Such as material obtained through telecommunications intercepts.
[686] For example, the review of Criminal Infringement Notices under section 172(2) of the *Crime Legislation Amendment (Penalty Notice Offences) Act 2002*, the Sex Offenders Register under section 25 of the *Child Protection (Offenders Registration) Act 2000*, Drug Premises under section 21 of the Police *Powers (Drug Premises) Act 2001* and Non-Association Orders under section 5 of the Justice *Legislation Amendment (Non-Association and Place Restriction) Act 2001*.
[687] *Terrorism (Police Powers) Act 2002* s.26ZO.
[688] The *Police Powers Legislation Amendment Act 2006* assented to in December 2006, amended the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* to allow the Ombudsman to require information from 'any public authority'.
[689] http://news.theage.com.au/national/antiterror-laws-need-overseer-liberals-20080624-2vtc.html, accessed 30 July 2008.
[690] Report of the Security Legislation Review Committee, June 2006, p6.
[691] Review of Security and Counter Terrorism Legislation, Parliamentary Joint Committee on Intelligence and Security, December 2006 and Inquiry in to the proscription of 'terrorist organisations' under the Australian Criminal Code, Parliamentary Joint Committee on Intelligence and Security, September 2007, p 52.
[692] Recommendation 7, Inquiry in to the proscription of 'terrorist organisations' under the Australian Criminal Code, Parliamentary Joint Committee on Intelligence and Security, September 2007.
[693] University of NSW, Gilbert + Tobin Centre of Public Law submission, 13 June 2007.
[694] *Terrorism Act 2000* (UK) s.126 and *Prevention of Terrorism Act 2005* (UK) s.14.
[695] Mr Petro Georgiou MP, Commonwealth House of Representatives parliamentary hansard, 17 March 2008.
[696] The Independent Reviewer of Terrorism Laws Bill 2008 s.3.
[697] The Independent Reviewer of Terrorism Laws Bill 2008 ss.10(3) and (5).
[698] Independent Reviewer of Terrorism Laws Bill 2008 s.11.
[699] Ministry for Police submission, 4 July 2008.
[700] NSW Council for Civil Liberties submission, 22 June 2007; Privacy NSW submission, 22 May 2007; Submission C, 1 May 2007; Submission D, 9 May 2007; Submission H, 15 June 2007 and Submission J, 15 June 2007.
[701] Privacy NSW submission, 22 May 2007.
[702] Senate Standing Committee on Legal and Constitutional Affairs, Report on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, paragraph 2.46 and 2.47.
[703] Senate Standing Committee on Legal and Constitutional Affairs, Report on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, Recommendation 8.
[704] NSW Council for Civil Liberties submission, 22 June 2007.
[705] Police Integrity Commission submission, 15 June 2007.
[706] NSW Council for Civil Liberties, submission to the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of the NSW Police Force counter-terrorism and other powers, June 2006.

[707] Law Society of NSW, submission to the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of the NSW Police Force counter-terrorism and other powers, 14 June 2006.
[708] Submission H, 15 June 2007 and Public Interest Advocacy Centre submission, 3 July 2007. In its submission the NSW Council for Civil Liberties reiterated its position that covert searches should be observed by an independent person, and this person should be from the Ombudsman: submission, 22 June 2007.
[709] Ministry for Police submission, 14 August 2007.
[710] Public Interest Advocacy Centre submission, 3 July 2007.
[711] Police Integrity Commission submission, 15 June 2007.
[712] *Police Powers and Responsibilities Act 2000* (Qld) ss.740 to 745.
[713] Premier Peter Beattie, Queensland Parliamentary Hansard, 22 November 2005.
[714] *Terrorism (Preventative Detention) Act 2005* (Qld) s.14. See also section 73.
[715] *Police Powers and Responsibilities Act 2000* (Qld) ss.742(2)(g)(i) and 742(4)(d).
[716] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss.14, 56 and 62.
[717] Mr Colin Forrest, Queensland Public Interest Monitor, evidence given before the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 24 August 2006.
[718] NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers, November 2006.
[719] NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers, November 2006 at paragraph 7.24.4.
[720] NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers, November 2006, Recommendation 7.
[721] NSW Law Reform Commission, *Surveillance: an interim report*, Report 98, 2001, at paragraph 6.47.
[722] Ministry for Police submission, 14 August 2007.
[723] *Ombudsman Act 1974* s.12(1).
[724] *Ombudsman Act 1974* s.12(3).
[725] Section 26F of the *Terrorism (Police Powers) Act 2002* provides that a person being detained is entitled to contact the Ombudsman and Police Integrity Commission. Police must inform the person of the person's right to complain to the Ombudsman. A person being detained is entitled to make a complaint about the conduct of a correctional officer under the ordinary provisions of the *Ombudsman Act 1974*.
[726] Complaints notified to the Ombudsman during the period from 1 September 2005 to 1 August 2007.
[727] Recommendation 5, Review of Security and Counter Terrorism Legislation, Parliamentary Joint Committee on Intelligence and Security, December 2006.
[728] *Police Act 1990* s.160.
[729] *Terrorism (Police Powers) Act 2002* s.27ZB.
[730] *Terrorism (Police Powers) Act 2002* s.27ZB(4) and (5).
[731] Correspondence from the Office of the Commissioner dated 25 February 2008.
[732] *Terrorism (Police Powers) Act 2002* s.26ZN.
[733] Ministry for Police submission, 4 July 2008.
[734] *Terrorism (Police Powers) Act 2002* s.36.
[735] NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002*, August 2006.
[736] University of NSW, Gilbert + Tobin Centre of Public Law submission, 13 June 2007 and NSW Council for Civil Liberties submission, 22 June 2007.
[737] University of NSW, Gilbert + Tobin Centre of Public Law submission, 13 June 2007.
[738] NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers, November 2006 at paragraph 6.4.
[739] Sir Lawrence Street, *The Street Review: A review of Interoperability between the Australian Federal Police and its national security partners, March 2008*.
[740] NSW Police Force, Standard Operating Procedures, Covert Search Warrants, 22 May 2006. We note that from the information provided by the NSW Police Force, it appears that none of the assistants used in the covert searches conducted to date under Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW) were from Commonwealth agencies.
[741] Police Integrity Commission submission, 15 June 2007.
[742] Inspector General Intelligence and Security Annual Report 2006–2007, p12
[743] Memorandum of Understanding between the Commonwealth Ombudsman and the Inspector General of Intelligence and Security, 14 December 2005.
[744] Ministry for Police submission, 4 July 2008.
[745] *Terrorism (Preventative Detention) Act 2006* (WA) s.34.

Summary of recommendations

		Page
1.	The NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority.	**18**
2.	The NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice finalise Standard Operating Procedures on preventative detention as a matter of priority.	**18**
3.	The Attorney General, in conducting his review of the policy objectives of the Act, take into account the various submissions and views set out in this report in relation to the maximum detention period.	**34**
4.	Parliament consider amending the Act so that the nominated senior officer must inform persons who are detained at correctional centres of their right to contact the Ombudsman to make a complaint about the conduct of any correctional officer.	**35**
5.	Parliament consider amending sections 26Y and 26Z of the Act so as to include a reference to the right of persons detained to complain to the Police Integrity Commission about the conduct of any police officers.	**35**
6.	Until any legislative amendment is made, the NSW Police Force SOPs specifically provide that detainees must be informed they may contact the Police Integrity Commission to complain about the conduct of any police officer.	**36**
7.	The NSW Police Force SOPs include a statement of the information which has to be provided to detainees.	**37**
8.	The NSW Police Force SOPs provide guidance as to the meaning of 'as soon as practicable'.	**37**
9.	The NSW Police Force SOPs provide that where information is not provided because it is not practicable, detailed reasons for the information not being provided should be recorded.	**37**
10.	Police consider informing detainees of the existence of prohibited contact orders, in particular where the detainee wishes to contact a person they would otherwise be entitled to contact, but are prevented from doing so because a prohibited contact order has been imposed.	**38**
11.	Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains.	**40**
12.	Parliament further consider the arrangements for monitoring of detainee-lawyer communication, having regard to the matters set out in this report.	**44**
13.	Parliament consider amending the Act: • to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, where the court is satisfied this is in the interests of justice. • to require police to refer a person in preventative detention to Legal Aid where such an order is in place, or where the person is otherwise unable to contact a lawyer.	**45**
14.	The NSW Police Force SOPs provide that police are to assist a person in preventative detention to contact Legal Aid if the person is otherwise unable to secure legal advice or representation.	**45**
15.	In developing the Memorandum of Understanding on preventative detention, the NSW Police Force, Department of Corrective Services and Department of Juvenile Justice consider requiring a security assessment of young people to be held in preventative detention, with a view to the detention being the least restrictive reasonably practicable.	**54**
16.	Parliament consider amending the Act so, in relation to detainees who are under 18: • Police, as far as practicable, are required to assist the detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests. • Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of the detainee, that they are required to provide to the detainee.	**55**

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17.	The NSW Police Force SOPs provide for the following: • Police are required, as far as practicable, to assist a young person in preventative detention to exercise their contact rights with a parent, guardian or other person who is able to represent the detainee's interests. • Where police are required to provide information to a young person in preventative detention, this information should be provided to the young person's parent or guardian as well as the young person. • Police should consider any request by a young person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular, police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours. • Clear guidance on what would constitute 'exceptional circumstances' such that a senior police officer might approve 16 or 17 year old detainees being detained with persons 18 years and over. • Guidance on what would constitute an 'appropriate person' to release an under 16 year old.	55
18.	The NSW Police Force SOPs provide that police should consider the welfare of any known dependents of a person who is taken into custody under a preventative detention order, and make appropriate arrangements in consultation with the Department of Community Services.	55
19.	Parliament consider amending the Act so: • The definition and meaning of incapable person is consistent throughout the Act. • The meaning of incapable person include a person who is unable to understand the information provided, make decisions under the Act, or rely on rights available under the Act. • Police are required, as far as practicable, to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests. • Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of an incapable detainee, that they are required to provide to the detainee.	58
20.	The NSW Police Force SOPs provide for the following: • Guidelines on identifying and communicating with incapable people. These guidelines should be established in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing whether a detainee is incapable for the purposes of the Terrorism (Police Powers) Act. • Police are required to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests. • Where police are required to provide information to an incapable person in preventative detention, this information should be provided to the detainee's parent, guardian or other person who is able to represent the interests of the detainee. • Police should consider any request by an incapable person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular, police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours.	59
21.	The NSW Police Force SOPs require the nominated senior police officer and detaining officers to consider at regular intervals, and at least every 24 hours, whether the grounds on which the order was made continue to exist, and to document such considerations.	62
22.	The NSW Police Force SOPs include information to be provided to detainees (and, for children and incapable persons, their parent, guardians or other nominated person) upon release, including whether or not the person can be taken into preventative detention again under the same order.	62

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23.	The NSW Police Force SOPs include arrangements for the release of children and incapable persons into the care of a parent or guardian.	**62**
24.	Parliament consider amending the Act to require the nominated senior police officer to immediately release a person from preventative detention where the grounds for detention no longer exist.	**62**
25.	Parliament consider the concerns raised about a detainees' exposure to unwanted media attention, and whether it is appropriate to provide the detainee with greater protection in the form of disclosure offences.	**62**
26.	Parliament consider amending the Act to include a code of conduct applicable to law enforcement officers and assistants executing covert search warrants requiring that they be properly briefed, abide by the terms of the warrant and maintain confidentiality.	**76**
27.	The Attorney General's Department, in developing any new regulatory framework governing the covert collection of DNA samples, consider the submissions made to the Ombudsman's review of covert search warrant powers.	**79**
28.	The legislation be amended to require covert searches to be recorded in their entirety on video, unless there are compelling circumstances which make this impracticable.	**81**
29.	The report to the judge on the outcome of the search include advice as to whether the covert search was recorded on video (including a copy of the video if recorded) and if not, the reasons why it was not practicable to record the search.	**81**
30.	Police SOPs should require covert searches to be recorded in their entirety unless there are compelling circumstances which make this impracticable. The SOPs should also include advice as to what circumstances might be 'compelling'.	**81**
31.	The Attorney General consider developing forms to be used by applicants and judges in the administration of the Act. Should forms be developed, the application form and warrant form should clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.	**83**
32.	The NSW Police Force amend the standard covert search warrant document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.	**83**
33.	The NSW Police Force standard operating procedures include the standard application form used by police and the standard covert search warrant document.	**83**
34.	The Act be amended so covert search records are retained rather than destroyed, to enable proper oversight of covert search functions.	**86**
35.	The Police Commissioner ensure annual reports are prepared retrospectively to the Attorney General and Police Minister pertaining to the exercise of the covert search warrant powers in compliance with the Act.	**108**
36.	The Attorney General provide a copy of this report to the Standing Committee of Attorneys General for consideration of any additional arrangements or review to facilitate or further examine cross-jurisdictional oversight in relation to counter-terrorism powers.	**108**
37.	Should Parliament determine to continue Part 3 of the Act in its present or some amended form, consideration be given to appropriate ongoing accountability including amending the Act to provide for ongoing external scrutiny of the exercise of covert search powers. In particular, Parliament may wish to consider the following arrangements: • Extending the Ombudsman's monitoring functions under section 27ZC for the period the legislation remains in force, or • Conferring an auditing role on the Ombudsman to ensure the NSW Police Force and Crime Commission exercising the powers comply with their legislative obligations.	**110**

Annexure 1: Proscribed terrorist organisations

Section 310J of the *Crimes Act 1900* (NSW) provides that it is an offence to be a member of a terrorist organisation. 'Terrorist organisation' has the meaning given by section 102.1(1) of the Commonwealth Criminal Code, which defines a terrorist organisation as 'an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or an organisation that is specified by the regulations. The following organisations are currently specified: [746]

Al Qa'ida

Jemaah Islamiyah

Abu Sayyaf Group (ASG)

Jamiat ul-Ansar (JuA)

Armed Islamic Group (GIA)

Al-Qa'ida in the Lands of the Islamic Maghreb (AQIM)

Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (TQJBR)

Ansar al-Sunna

Asbat al Ansar (AAA)

Islamic Movement of Uzbekistan (IMU)

Jaish-e-Mohammad (JeM)

Lashkar-e Jhangvi (LeJ)

Egyptian Islamic Jihad (EIJ)

Islamic Army of Aden (IAA)

Hizballah's External Security Organisation (ESO)

Palestinian Islamic Jihad (PIJ)

Hamas' Izz al-Din al-Qassam Brigades

Lashkar-e-Tayyiba (LeT or LT)

Kurdistan Workers Party (PKK)

Endnote

[746] Criminal Code Regulations 2002, prepared on 9 August 2008.

Annexure 2: Submissions received by the Ombudsman's review[747]

Submission number	Date received	Individual submission reference	Organisation	Representative of organisation/individual
1	29 Jun 06		Uniting Care	Justin Whelan — Social Policy Officer
2	21 Apr 07	Submission A		Carol Pender
3	24 Apr 07	Submission B		Sean Robert Meaney
4	30 Apr 07		WA Inspector of Custodial Services	Richard W Harding
5	1 May 07	Submission C		Carol O'Donnell
6	9 May 07	Submission D		Mr L M Cunliffe
7	23 May 07	Submission E		Kathy Bagot — Solicitor
8	25 May 07	Submission F		James Dekroney
9	30 May 07		NSW Privacy	John Dickie — Acting Privacy Commissioner
10	28 May 07		Commonwealth AGD	Geoff McDonald
11	31 May 07		Qld Corrective Services	F P Rockett — Director-General
12	4 Jun 07		Community Relations	Stepan Kerkyasharian AM — Chairperson
13	13 Jun 07		G+T Centre of Public Law	Dr Andrew Lynch
14	15 Jun 07		Minister for Ports	Joe Tripodi
15	14 Jun 07	Submission G		Christie Elemam
16	15 Jun 07		PIC	Allan Kearney
17	15 Jun 07	Submission H		Brian Rowe
18	15 Jun 07		The Law Society of NSW	Geoff Dunlevy — President
19	15 Jun 07	Submission I		John Flanagan
20	15 Jun 07	Submission J		Robert Pauling
21	15 Jun 07		Australian Arabic Council	Roland Jabbour — Chairman
22	18 Jun 07		DOCS	Kevin Greene MP — Minister for CS
23	18 Jun 07		Law Council of Australia	Peter Webb — Secretary-General
24	22 Jun 07		Council for Civil Liberties	Martin Bibby — Convenor
25	18 Jun 07		Victoria Police	Neil Paterson — Inspector

Submission number	Date received	Individual submission reference	Organisation	Representative of organisation/individual
26	13 Jun 07		Minister for Housing & Tourism	Matthew Brown MP
27	3 Jul 07		PIAC	Natasha Case
28	3 Jul 07		DJJ	J Mason
29	12 Jul 07		Guardianship Tribunal	Diane Robinson
30	20 Jul 07		DCS	Ron Woodham
31	9 Aug 07		Legal Aid	Aideen McGarrigle
32	14 Aug 07		Police Ministry	Les Tree
33	26 Sep 07		The New South Wales Bar Association	PA Selth
34	20 Dec 07		Counter Terrorism and Special Tactics Command	Commander Peter Dein

Endnote

[747] Submissions received in response to the Issues Paper, Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, NSW Ombudsman, April 2007.

Acknowledgements

This report was researched and written by Katrina Sanders and David Snell with the assistance of the following Ombudsman staff: Simon Cohen, Greg Andrews, Jennifer Agius, Justine Simpkins, Jeremie Quiohilag, Brendan Delahunty, Tom Millett, Ayishah Ansari, Tim Lowe, Aimee Tan and Shelagh Doyle.

We would like to thank the NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice for providing information and assistance.

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