NSW Ombudsman

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

Review period 2008 - 2010

August 2011

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NSW Ombudsman

Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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

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The Honourable Greg Smith MP
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Dear Attorney-General

Under sections 26ZO and 27ZC of the *Terrorism (Police Powers) Act 2002* I am 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.

This report is my second under the Act, and combines the reports in relation to each of those Parts, as provided for in section 27ZC(8). I will report again after a further three years, as provided for in sections 26ZO(4) and 27ZC(3).

I am pleased to provide you with this report. A copy has also been provided to the Minister for Police.

I draw your attention to sections 26ZO(5) and section 26ZC(4) which requires the Attorney-General to lay a copy of the report before both Houses of Parliament as soon as practicable after receiving it.

Yours sincerely

Bruce Barbour
Ombudsman

August 2011

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The Honourable Michael Gallacher MLC
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Governor Macquarie Tower
Level 33, 1 Farrer Place,
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I am pleased to provide you with this report. A copy has also been provided to the Attorney-General.

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Bruce Barbour
Ombudsman

Foreword

The *Terrorism (Police Powers) Act 2002* gives police and other agencies special powers to deal with suspected terrorist acts. These include powers to apply for court orders to detain people without charge for up to two weeks to prevent a suspected 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.

This is my second report under the Act. Since I last reported, the powers regarding covert search warrants have not been used. The powers regarding preventative detention have not been used to date in NSW – and nor the have similar powers for preventative detention existing in other states and territories.

While the powers under the Act have been used rarely, they empower police and other agencies to take extraordinary measures, which depart from long established legal principles about the detention of individuals and searching of private property. Independent scrutiny of the way such powers are used is an important safeguard for both those who may be subject of the powers and the officers who exercise them. The importance of such external scrutiny has been recognised by Parliament in recent amendments which require me to perform ongoing scrutiny of the exercise of powers conferred on police and other officers under the Act. I am now required to report to the Attorney General and Minister for Police every three years.

In addition to extending the Ombudsman's review role, Parliament introduced a range of amendments to the Act in late 2010 to clarify the responsibilities of officers holding people in preventative detention, including assisting detainees to gain access to Legal Aid if the Supreme Court deems such access is in the interests of justice and assisting young people and persons with impaired intellectual functioning to exercise their right to contact their parent or guardian while in detention. These amendments supported nine of the 13 of the recommendations I had made in my first report with regard to the provisions of the Act.

The NSW Police Force and other agencies with powers and responsibilities under the Act also responded positively to the recommendations of my first report, with all of the recommendations I made about procedural and operational matters being accepted in whole or in part. Despite this, progress in actively implementing some of those recommendations has been slow. In particular there have been significant delays in the development of agreements between the NSW Police Force, Corrective Services NSW and Juvenile Justice, with regard to the accommodation and management of persons that may be held in preventative detention. There have also been delays in implementing changes to NSW Police Force procedures - preventative detention procedures were only finalised in January 2011.

The preventative detention and covert search warrant powers have been in place for some time. While the legislation sets out the requirements for use, appropriate procedural guidance is of particular importance given the circumstances necessitating use of the powers would be likely to be serious and urgent.

In order to fulfil the role that Parliament has assigned to the Ombudsman and keep under scrutiny the exercise of the preventative detention and covert search warrant powers, I have found it necessary to examine issues concerning the non-use of the powers in this recent review period. Accordingly, this report considers whether the limited use of the powers and the delays in implementing changes to the policy and procedures of agencies tasked with exercising the powers may reflect upon the utility and necessity of the powers. This is considered in light of the function of the powers as part of a cross-jurisdictional response to terrorism within Australia. A number of my recommendations aim to elicit important information to facilitate Parliament's consideration of the operational utility of the powers, which in the case of preventative detention are due to expire in 2015.

I have also felt it necessary to make recommendations to clarify the scope of my capacity to require information under the Act. I am disappointed to report that my office has experienced ongoing problems regarding our entitlement to access information relevant to our scrutiny role, particularly with regard to the NSW Police Force's consideration of using covert search warrant powers in this review period. In my view, to properly fulfil the role Parliament has asked of me - to keep under scrutiny the exercise of powers conferred on police - I must consider the reasons for very limited use of the powers or failure to use the powers. To limit my office to reporting only when powers have been actioned would significantly reduce the utility of this review. It would mean that Parliament may not be provided with important information about whether the powers are effective, the level of preparedness or readiness to use the powers should the need arise, or whether there are difficulties with the way the powers have been constructed or construed that has limited or prevented their use by police.

In my view, the Act enables me to require such information. However my office has had to divert appropriate resources from the legitimate task to hand to spend time chasing the information we require to perform this task. Parliament has given the Ombudsman the responsibility to keep the exercise of powers under scrutiny - it is incongruous that relevant information about the exercise of those powers should be withheld.

While it is essential that matters pertaining to terrorism be handled with sensitivity to the national security issues underlying them, this must be balanced with appropriate transparency regarding the way those powers are used and an exploration of the reasons informing their lack of use.

I trust this report will be of assistance to those agencies with powers and responsibilities under the Act and will 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.

This chapter sets out our role and the purpose of this report. It also provides a brief history of the Terrorism (Police Powers) Act, and traces recent developments in counter-terrorism laws in Australia.

Since we last reported there has been no use of the powers set out under the Terrorism (Police Powers) Act. This means that to date, preventative detention powers have not been used at all in NSW. We understand they have not been used in any other Australian jurisdiction either. To date, police have applied for five covert search warrants, and of these, three were executed. These were considered in detail in our previous report under the Act.

1.1 The role of the Ombudsman and the purpose of this report

1.1.1 The terms of our review

The Ombudsman is required to keep under scrutiny the exercise of powers conferred on police officers and correctional officers under Part 2A of the Act – powers with regard to preventative detention.

The Ombudsman is also required to keep under scrutiny the exercise of powers conferred on members of the NSW Police Force, the Crime Commissioner and members of staff of the NSW Crime Commission under Part 3 – powers with regard to covert search warrants.

We are now required to report on the exercise of powers under both of these parts every three years. We must furnish a copy of our report to the Attorney General and the Minister for Police. The Attorney General is required to table our report in Parliament as soon as practicable after it is received by him.

1.1.2 Our previous report under the Act

In September 2008 we finalised our first report as required under the Act ('the September 2008 report').[1] It consisted of an interim report in relation to Part 2A (preventative detention powers) and our final report in relation to Part 3 (covert search warrant powers) under the Act.

At that time, the period in which we were required to review the exercise of covert search warrant powers under Part 3 was two years (from September 2005 to September 2007) and the period in which we were required to review the exercise of preventative detention powers under Part 2A was five years (from December 2005 to December 2010).

In that period, there were five applications for covert search warrant, three of which were executed. No preventative detention orders were sought or granted during the review period.

In the September 2008 report we found that in the few instances that covert search warrant powers had been used, it was not clear that those exercising the powers had complied with their legislative obligations.[2]

In light of this, and given the extraordinary nature of the powers, we recommended that Parliament consider amending the Act to provide for ongoing scrutiny of the covert search warrant powers. A review of the Act completed by the Department of Attorney General and Justice supported that recommendation, and the *Terrorism (Police Powers) Amendment Act 2010* passed through Parliament in late 2010. That Act gives the Ombudsman a responsibility for ongoing scrutiny of the exercise of powers conferred on police and Crime Commission officers in relation to covert search warrants, as well as the exercise of powers conferred on police and correctional officers in relation to preventative detention orders.[3] These provisions of the Act commenced on 16 December 2010.

1 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008.
2 See NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Chapter 4 and Part 5.9.
3 *Terrorism (Police Powers) Amendment Act 2010* Schedule 1, clauses [17],[18], [19], [22], [23], [24] and [25].

1.1.3 Our ongoing review role

This ongoing review role will enable the Ombudsman to continue to independently observe the exercise of the powers conferred under Parts 2A and 3 of the Act, including analysis of any information and documentation relating to the uses of those powers, and direct observation of the use of preventative detention powers. We are required to continue this review role as long as those powers are in force.

Following commencement of the provisions regarding our ongoing review role, we have entered arrangements to extend the information sharing agreements we had in place to allow us to directly observe the use of preventative detention powers. We have extended our agreements with the NSW Police Force, Juvenile Justice NSW, NSW Crime Commission and Corrective Services NSW.

Since we last reported we also sought information from the NSW Police Force, the NSW Crime Commission, Corrective Services NSW, Juvenile Justice NSW, the Department of Attorney General and Justice and the Department of Premier and Cabinet in relation to their activities in exercising the powers since our September 2008 report and in implementing the recommendations of that report. We have analysed information and documents held by relevant agencies, tracked media coverage of relevant events and considered the potential impact of changes to national security legislation and policy on the use of the powers in New South Wales. We have also closely considered the range of amendments that have been made to the Act following the review completed by the Department of Attorney General and Justice in June 2010.

Given the powers under review have not been used at all since we last reported, we have not published a further issues paper seeking submissions from stakeholders and the broader community.

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 powers are complying with their obligations. As we did in our September 2008 report, we have considered whether the relevant agencies have implemented procedures which would maximise the fair treatment of persons who are detained or searched under the Act. 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.

1.1.4 Other review mechanisms

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.[4]

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.[5] When the legislation was enacted, the Attorney General was required to review the Act every 12 months. In 2006, this was changed to a review every two years.[6] In 2010 the requirement was changed again, so that a review is required every three years, as soon as possible after the Ombudsman's report under the Act is tabled in Parliament.[7] Given the limited use of the powers to date this extension of the policy review period appears appropriate.

The Attorney General's reviews of the Act were conducted in 2005-06, 2007 and the most recent concluded in 2010. The Attorney General's 2010 review covers the period from 2007 to 2009 and considered our September 2008 report, as well as submissions from a variety of government agencies. It concluded that there was an ongoing need to retain legislation like the Terrorism (Police Powers) Act 'to provide the appropriate law enforcement powers required to deal with extraordinary times of crisis'.[8] The Attorney General's review recommended the provisions in the Act be extended, noting:

> *It is fortunate that law enforcement agencies have not had frequent cause to resort to these powers, but that does not diminish the need to have those powers available should such cause arise.*[9]

4 *Terrorism (Police Powers) Act 2002* ss. 26ZN and 27ZB.
5 *Terrorism (Police Powers) Act 2002* s. 36.
6 *Police Powers Legislation Amendment Act 2006.*
7 *Terrorism (Police Powers) Amendment Act 2010* Schedule 1, clause [26].
8 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p. 43.
9 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p. 43.

The review outlined the policy objectives of the Act as follows, and concluded these objectives remain valid:

> *The objectives of the Act are to provide police with special powers to assist in preventing the occurrence of terrorist acts or assist in the apprehension of the perpetrators of a terrorist act following its occurrence.*[10]

The review stated that the majority of the submissions to the review 'did not challenge the need for provisions such as those contained in the Act'.[11] It stated that the threat of terrorism remains real in NSW and Australia, referring to the 2009 Annual Report of the Australian Security Intelligence Organisation (ASIO) which stated that 'terrorism remains a serious and immediate threat to Australia and is expected to be a destabilising force for the foreseeable future.'[12] The ASIO report referred to recent convictions and arrests for terror-related activity, commenting:

> *All of these issues underscore the need for NSW to remain vigilant in ensuring that the laws of the State are adequate to manage and contain any eventuality, which may result from a terrorist act or the threat of one.*[13]

1.1.5 Recent amendments to NSW counter terrorism legislation

Since we last reported, there have been a number of amendments to NSW legislation regarding terrorism. In September 2010 the NSW Parliament passed legislation amending section 310L of the *Crimes Act 1900* so as to extend the operation of the sunset clause for the offence of being a member of a terrorist organisation for a further three years. This is discussed further at Part 1.2.2 of this report. A range of amendments have been made to the Terrorism (Police Powers) Act following the review completed by the Department of Attorney General and Justice. These are discussed in detail in the ensuing parts of the report. The amendments include the creation of an ongoing monitoring role for the Ombudsman with regard to the use of both preventative detention and covert search warrant powers, and a requirement to report to Parliament every three years about the use of those powers.

Discussion in Parliament about the amendment of section 310L of the Crimes Act and the Terrorism (Police Powers) Act illustrates that counter-terrorism continues to be an important issue for the Government, Opposition Members and the NSW Police Force. While no terrorist attack has taken place in Australia in the years since the 11 September 2001 attacks in the United States, Members of Parliament continue to reflect upon those events in their discussion of NSW terrorism legislation. Members also reflected upon the Bali nightclub bombings of 2002, and the bombings in London, Jakarta, Mumbai and Madrid,[14] to illustrate their views that the terrorist threat remains a real one in NSW. One Member emphasised that NSW 'cannot run the risk of being without these powers to properly investigate terrorist organisations'.[15]

1.2 Background

The *Terrorism (Police Powers) Act 2002 (NSW)* (the Act) was enacted in December 2002. It was enacted as part of a new national framework to combat terrorism.

This new framework came out of discussions between Commonwealth, State and Territory leaders in April 2002. 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.[16] 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.[17] States and Territories also agreed to refer constitutional powers relating to terrorism to the Commonwealth.[18]

The Terrorism (Police Powers) Act in NSW gave police officers significant powers to prevent imminent terrorist acts and to investigate terrorist acts after they have occurred, including special powers to search, detain persons, seize items and cordon areas. Then Premier Bob Carr stated that the new powers were 'confined to limited circumstances' and were 'not intended for general use'.[19]

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10 alDepartment of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p43.
11 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p43.
12 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p5.
13 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p5.
14 The Hon. Geoff Corrigan MP, Legislative Assembly Hansard, 1 September 2010.
15 The Hon. Barry Collier MP, Legislative Assembly Hansard, 1 September 2010.
16 '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.
17 'Counter terrorism review', media release by Prime Minister John Howard, 24 October 2002.
18 'Reference of terrorism power', media release by former federal Attorney General Daryl Williams, 8 November 2002.
19 The Hon. Bob Carr, Legislative Assembly Hansard, 19 November 2002.

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.'[20] The powers were intended to be an interim measure, pending the enactment of a federal covert search warrant scheme.[21]

In September 2005, the Council of Australian Governments (COAG) met to consider the adequacy of Australia's counter-terrorism arrangements. At the meeting, the COAG agreed that it was necessary to strengthen Australian counter-terrorism laws. It said the laws should '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'.[22]

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.[23] Provisions for making preventative detention orders and prohibited contact orders were inserted into the Terrorism (Police Powers) Act in NSW in December 2005. 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 been enacted in all Australian States and Territories, to complement the federal scheme.

1.2.1 Commonwealth review of national security and counter terrorism legislation

Given the NSW legislation forms part of a national framework for counter terrorism, it is important to trace the variations in Commonwealth national security and counter terrorism legislation. Since we last reported under the Terrorism (Police Powers) Act,[24] counter-terrorism has remained a significant issue for the Commonwealth Government and has been the subject of a number of policy statements and legislative reform packages. The continued emphasis on counter terrorism at the Commonwealth level is an important backdrop to the powers provided for in NSW.

Over the past few years, there have been a number of independent and bipartisan committee reviews of Australia's counter-terrorism laws. These include and the July 2006 *Review of Sedition Laws in Australia* by the Australian Law Reform Commission; the December 2006 review by the Parliamentary Joint Committee on Intelligence and Security ('PJIS') of Security and Counter-Terrorism Legislation; the September 2007 Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the PJIS and the November 2008 Clarke Inquiry into the case of Dr Mohamed Haneef.

In response to these, the Commonwealth Government undertook its own review of national security and counter terrorism legislation, releasing a discussion paper in July 2009 to pose legislative amendments for public consultation. This was followed by the Commonwealth Government's Counter Terrorism White Paper released in February 2010. The White Paper described terrorism as a 'persistent and permanent feature of Australia's national security environment'.[25] It posited an increase in the terrorist threat from people born or raised in Australia, a comment which was highlighted in media coverage of the White Paper.[26]

The White Paper announced the creation of a National Counter Terrorism Control Centre which was later opened in October 2010, to enhance analysis of terrorism related intelligence, and facilitate information sharing between law enforcement agencies. The White Paper emphasised the importance of collaboration and coordination between the Commonwealth and other jurisdictions in responding to terrorist activity.

On 24 November 2010, the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) and *National Security Legislation Amendment Act 2010* (Cth) were assented.

The Parliamentary Joint Committee on Law Enforcement Act established a new Commonwealth Parliamentary Joint Committee to replace the Parliamentary Joint Committee on the Australian Crime Commission. The new Committee will have 'broad oversight of the Australian Federal Police and the Australian Crime Commission … examine trends and changes in criminal activities, and inquire into any question in connection with its functions that it referred … by either House of Parliament'.[27]

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20 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
21 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
22 Council of Australian Governments *Communique,* Special Meeting on Counter-Terrorism, 27 September 2005.
23 Council of Australian Governments *Communique*, Special Meeting on Counter-Terrorism, 27 September 2005.
24 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008.
25 Department of Prime Minister and Cabinet, *National Counter Terrorism White paper – Securing Australia – Protecting Our Community*, February 2010, p ii.
26 See for example, Coorey, Phillip, 'Increased Terrorist Risk from Within', *Sydney Morning Herald*, www.smh.com.au, 23 February 2010, accessed 8 November 2010; Packam, Ben and Hudson, Phillip, 'New National Security blueprint says threat of home grown terrorism has grown in past six years', *Herald Sun*, www.herald sun.com.au, 23 February 2010, accessed 8 November 2010.
27 *Explanatory Memorandum*, Parliamentary Joint Committee on Law Enforcement Bill 2010.

The National Security Legislation Amendment Act ('the NSL Amendment Act') introduces a range of amendments to the counter-terrorism legislation that was introduced under the Howard Government. These include:

- Amendments to treason and sedition offences in the Criminal Code, changing the name of sedition offences to offences of 'urging violence' against groups and members of groups.[28]
- Amendment to the offence of advocating terrorism, to refer to directly praising 'the doing of a terrorist act in circumstances where there is a *substantial* risk that such praise might have the effect of leading a person to engage in a terrorist act'.[29] The inclusion of the term 'substantial' is new.
- Extending the duration of a regulation proscribing a terrorist organisation from two to three years.[30] This has the effect of deferring review of the continued proscription of a terrorism organisation by an additional year.
- Changes to the AFP's powers to detain a person for the purposes of questioning them in relation to a terrorist offence.
- The introduction of new powers for the AFP to enter premises without a warrant in emergency circumstances relating to terrorism offences[31] and powers extending the time available for police to re-enter premises under a search warrant by 12 hours, or longer in exceptional circumstances.[32]

The AFP's detention and questioning powers as amended by the NSL Amendment Act are separate and additional to powers to place a person in preventative detention under Commonwealth or State and Territory laws. The powers to detain a person to question them in relation to a terrorist offence were utilised by the AFP when detaining and questioning Dr Mohamed Haneef in 2007 in relation to allegations that he had supported a terrorist organisation. Dr Haneef was held for 12 days without charge while police conducted their investigation. The NSL Amendment Act now sets the maximum investigation time for terrorism offences at 24 hours.[33] It also sets a seven day maximum limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence.[34] This is known colloquially as 'dead time' and is discussed further at Part 2.1.1 below. In addition to setting this cap, the NSL Amendment Act is intended to clarify how dead time can be calculated.

The new emergency warrantless search powers allow the AFP to enter to search premises and seize anything to prevent it from being used in connection with a terrorism offence. The NSL Amendment Act requires the police officer to suspect on reasonable grounds that such entry is necessary to prevent the thing being used in connection with a terrorism offence, and that entry is necessary without a warrant due to the serious and imminent threat to a person's life, health or safety.[35] The provisions also allow police to secure the premises in order to obtain a warrant if an officer finds any item which is suspected to be relevant to an indictable offence, or seize any item if the officer reasonably suspects it is necessary for the protection of a person's life, safety or health.

The provisions for emergency warrantless searches differ from covert searches, as entry is authorised without a warrant and police are required to notify the occupier of the search within 24 hours, or by leaving written notice of the entry at the premises. The new powers have been criticised as 'extreme'.[36] Professor George Williams of the Gilbert and Tobin Centre of Public Law at the University of New South Wales has commented that the new warrantless search powers 'remove one of the most fundamental checks and balances in the law', being judicial or independent review of the searches.[37] Professor Williams, along with other legal commentators such as Nicola McGarrity (also from the Gilbert and Tobin Centre of Public Law) and Susan Harris-Rimmer of Australian Lawyers for Human Rights have commented that the government had not demonstrated a need for the new powers.[38]

While a national covert search warrant scheme has been anticipated since the introduction of covert search warrant powers in NSW[39] the recent changes to federal national security and counter terrorism legislation do not touch upon covert search warrant powers. Nor do the changes alter the preventative detention powers currently available at the Commonwealth level.

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28 *National Security Legislation Amendment Act 2010* Schedule 1, Part 2.
29 *Explanatory Memorandum*, National Security Legislation Amendment Bill 2010, p15.
30 National Security Legislation Amendment Bill 2010, Schedule 2 Item 3.
31 National Security Legislation Amendment Bill 2010, Schedule 4 Item 4.
32 National Security Legislation Amendment Bill 2010 Schedule 5.
33 National Security Legislation Amendment Bill 2010 Schedule 3 Item 16.
34 National Security Legislation Amendment Bill 2010 Schedule 3 Item 16.
35 National Security Legislation Amendment Bill 2010, Schedule 4 Item 4.
36 Cameron Murphy, Council for Civil Liberties, quoted in Renee Viellaris, 'New Federal Police Powers trouble civil libertarians', *Courier Mail*, www.couriermail.com.au, 20 November 2010, accessed 29 November 2010.
37 Neighbour, Sally, 'Haunted by Haneef', *The Australian*, www.theaustralian.com.au, 16 November 2009, accessed 29 November 2010.
38 Neighbour, Sally, 'Haunted by Haneef', *The Australian*, www.theaustralian.com.au, 16 November 2009, accessed 29 November 2010; McGarrity, Nicola, "Freedoms are losing out to fear", *The Age,* www.theage.com.au, 14 August 2009, accessed 27 October 2010.
39 The Hon. Bob Debus, Second Reading Speech, Legislative Assembly Hansard, Terrorism Legislation Amendment (Warrants) Bill 2005, 9 June 2005.

Nicola McGarrity has commented that the new counter-terrorism laws were 'disappointing' as they 'can, at best, be regarded as tinkering around the edges of Australia's anti-terrorism laws'.[40] In particular, she noted the NSL Amendment Act did not amend the provisions for pre-charge detention in light of the submissions made by organisations and individuals in the public consultation on the legislation. McGarrity points out that none of the 42 submissions available on the website of the Department of Attorney General supported the seven day cap on pre-charge detention that is provided in the NSL Amendment Act, and 16 of the submissions suggested the cap should be set at one or two days.[41]

Another element of the Commonwealth counter-terrorism reform package, is the *Independent National Security Monitor Act 2010*, which was assented on 12 April 2010. It creates a new statutory office to review Australia's counter-terrorism laws on an ongoing basis. The creation of the Monitor was a key element of the Counter Terrorism White Paper. Their role is to 'regularly review the operation, effectiveness and implications of our national security legislation and to consider if the laws remain necessary and contain appropriate safeguards to protect the rights of individuals'.[42]

Mr Brett Walker SC was appointed as the Independent National Security Monitor on 21 April 2011.[43]

1.2.2 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.[44] Terrorism offences carry substantial maximum penalties, ranging between three 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).[45] Unlike the NSW 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').[46]

Because the NSW 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.[47] 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.[48] Also, other acts which may be terrorism related may constitute offences under the ordinary criminal law.

In September 2010 the *Crimes Amendment (Terrorism) Act 2010* was passed. It extended the operation of a sunset clause contained in section 310L of the Crimes Act for the offence[49] of being a member of a terrorist organisation. The offence was initially introduced as a temporary measure only, pending the introduction by the Commonwealth of a national covert search warrant regime. A national scheme has not yet been created. The NSW offence was due to lapse on 13 September 2010. However, Parliament extended the covert search warrant powers under Part 3 of the Act for a further three years.

The Terrorism (Police Powers) Act adopts substantially the same definition of a 'terrorist act' as the Commonwealth Criminal Code.[50] Under the Terrorism (Police Powers) Act, 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 act must be done with the intention of advancing a political, religious or ideological cause, and must be done with the intention to coerce or influence by intimidation a government, or 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.'

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40 McGarrity, Nicola, Gilbert and Tobin Centre of Public Law Newsletter, July 2010, p16.
41 McGarrity, Nicola, Gilbert and Tobin Centre of Public Law Newsletter, July 2010, p16.
42 Department of Prime Minister and Cabinet, *National Counter Terrorism White paper – Securing Australia – Protecting Our Community,* February 2010, p 57.
43 The Hon. Wayne Swan MP, *Appointment of the Independent National Security Legislation Monitor – Press Release*, 21 April 2011.
44 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
45 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
46 *Criminal Code Act 1995* (Cth) ss100.1 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.
47 See *Terrorism (Commonwealth Powers) Act 2002* (NSW).
48 This provision is to be repealed on 13 September 2013.
49 The offence is contained in s. 310J of the *Crimes Act 1900.*,
50 See Terrorism (Police Powers) Act s. 3 and *Criminal Code Act 1995* (Cth) s. 100.1.

1.3 What are the powers we are required to monitor?

1.3.1 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.[51] Like all the other States and Territories, NSW introduced laws to provide for detention of up to 14 days for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act that has occurred.[52]

Under Division 105 of the Commonwealth Criminal Code, preventative detention is provided for up to 48 hours. This period could not be extended due to constitutional constraints. The provisions enacted by the states and territories were intended to strengthen Australia's counter terrorism laws by allowing longer preventative detention.

Part 2A of the Terrorism (Police Powers) Act permits police to apply to the Supreme Court for an order for the detention of a person aged 16 or above to prevent an imminent terrorist act, or to preserve evidence of 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 was 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.

1.3.2 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.[53]

51 Council of Australian Governments *Communique*, Special Meeting on Counter-Terrorism, 27 September 2005.
52 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* (NT) and *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).
53 *Terrorism (Police Powers) Act 2002* s. 27C.

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 which prohibits intentional membership of a terrorist organisation.54 In the case of an application relating to an offence under section 310J, the offence must be being committed and the execution of a covert warrant would provide evidence relating to the commission of that offence.

54 The definition of terrorist organisation under this section has the meaning given under the Commonwealth Criminal Code at s.102.1.

Chapter 2. Preventative detention and covert searches in other jurisdictions since 2008

In our September 2008 report, we outlined the legislative provisions existing in other jurisdictions that gave police powers to place persons in preventative detention and to use covert search warrants in relation to terrorism offences. This chapter highlights the developments in relation to those provisions since 2008.

2.1 Preventative detention in other jurisdictions

2.1.1 Commonwealth

Division 105 of the Commonwealth Criminal Code provides for preventative detention orders. As outlined in our September 2008 report, the Commonwealth scheme differs from the NSW 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.
- 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. Nor have there been any changes to the preventative detention provisions under the Criminal Code since we last reported.

However, there has been a range of recent amendments to Commonwealth pre-charge detention provisions which are set out at Part 1C of the *Crimes Act 1914* (Cth).[55] The Part 1C provisions differ to preventative detention, in that they allow police to detain an individual, after arrest, for questioning in relation to terrorism offences and other Commonwealth offences. Under the Commonwealth Criminal Code, it is an offence to question a person held in preventative detention, other than to confirm the person is the person specified in a preventative detention order, to ensure the person's health and wellbeing, or to comply with other requirements under the preventative detention provisions.[56]

Amendments to the pre-charge detention provisions were introduced under the NSL Amendment Act. The Commonwealth Government has described the amendments as a response to issues raised by the Hon. John Clarke in his inquiry into the case of Dr Mohammed Haneef.

Dr Haneef was arrested in Brisbane by the AFP and Queensland Police following terrorist incidents in London and Glasgow in 2007. The AFP alleged that Dr Haneef provided resources to a terrorist organisation by giving his second cousin a SIM card before he left the United Kingdom in 2006.[57] Dr Haneef was detained for 12 days before he was charged with intentionally providing resources to a terrorist organisation and being reckless as to whether the organisation was a terrorist organisation. The charge was withdrawn 25 days later due to lack of evidence.[58] The Clarke Inquiry found there had been no evidence to link Dr Haneef to the terrorist incidents in London and Glasgow.

55 See the *National Security Legislation Amendment Act 2010.*
56 *Criminal Code* (Cth) s.105.42.
57 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007) Spender J.
58 Walker, Jamie., "Mohamed Haneef sues former immigration minister for lost earnings", The Australian, www.theaustralian.com.au, 2 July 2010, accessed 2 July 2010.

The 12 day detention period included significant 'dead time' or time that can be disregarded from the investigation period when a person has been arrested for a terrorism offence. The investigation period is the time before the person must be charged and brought before a magistrate.[59]

The NSL Amendment Act capped the time that can be disregarded from the investigation period to a maximum of seven days. The amendments also aim to clarify how this time is to be calculated, and the procedures for extending the investigation period or applying for disregarded time from a magistrate.[60] They also provide that if a person is arrested under a terrorism related offence, police may also investigate a non-terrorism Commonwealth offence that the investigating officer reasonably suspects the person has committed.

The seven day cap on 'dead time' effectively provides for a maximum detention of up to eight days (24 hours questioning plus up to seven days of 'dead time'). The Gilbert and Tobin Centre of Public Law made a submission in response to the National Security Legislation Discussion Paper suggesting the Commonwealth Government should not set a cap on dead time until after completing a review of the pre-charge detention provisions, as recommended by the Clarke Inquiry. Their submission recommended that a cap in the vicinity of 48 hours may be more appropriate, and that any increase in the pre-charge detention period over that allowed for non-terrorism offences should be 'fully justified'.[61]

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 court by a senior 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 if the member 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.

No Australian is subject to any control order at present.

While no control orders have been made since 2008, legislation has been introduced in South Australia, New South Wales[62], Queensland and the Northern Territory which allows police to apply for control orders on members of certain declared criminal organisations.[63] The criminal organisation laws have been noted as bearing similarities to the Commonwealth terrorism legislation, in that they seek to place restrictions on freedom of association based, in part, on membership of particular organisations.[64]

At the time of writing, no control orders have been confirmed under criminal organisation legislation in Australia. Two control orders were issued in South Australia in 2009, however these were not executed following a legal challenge to the validity of the legislative provisions under which the control orders were issued.[65]

2.1.2 Other Australian States and Territories

While all Australian States and Territories have enacted preventative detention regimes to complement the federal scheme,[66] we are not aware of any preventative detention orders having been made in any Australian States or Territories.

Other than amendments to the NSW scheme under the *Terrorism (Police Powers) Amendment Act 2010*, there have been no significant amendments to any of the Australian State or Territory preventative detention regimes since we last reported.

59 *Crimes Act 1914* (Cth), s. 23B.
60 Explanatory memorandum, National Security Legislation Amendment Bill 2010, p. 22.
61 Gilbert and Tobin Centre of Public Law, *Submission in response to the National Security Legislation Discussion Paper (Discussion Paper)*, 24 September 2009, p.15.
62 *Crimes (Criminal Organisations Control) Act 2009 (NSW).* On 23 June 2011 the High Court determined that NSW criminal organisation legislation was invalid, see *Wainohu v New South Wales* [2011] HCA 24.
63 See *South Australian Serious and Organised Crime (Control) Act 2008* (SA); *Serious Crime Control Act 2009* (NT); *Criminal Organisations Act 2009* (Qld).
64 See Loughnan, Arlie, 'The legislation we had to have? The Crimes (Criminal Organisations Control) Act 2009 (NSW)', *Current Issues in Criminal Justice*, Vol 20 No. 3, March 2009, p 45ff.
65 See Totani & Anor v The State of South Australia, [2009] SASC 301; South Australia v Totani [2010] HCA 39.
66 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* (NT) and *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

It is worth noting that the sunset provisions of the State and Territory terrorism preventative detention laws will activate over the coming years. The ACT terrorism legislation (which includes powers of preventative detention) is due to expire in November 2011.[67] Preventative detention laws in the Northern Territory are due to expire in 2013,[68] and the provisions in Queensland and South Australia in December 2015.[69] The sunset provisions for the remainder of the States are due to activate in 2016.[70]

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.[71] 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'.[72]

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 must 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.

Under the *Terrorism Act 2006* (UK), the 28 day period of detention must be renewed by order if it is to remain in place.[73] On 24 June 2010, the Government of the United Kingdom announced it would renew the order which sets the maximum period of pre-charge detention at 28 days. At the same time, the Secretary of State for the Home Department, the Rt. Hon. Theresa May said that the Government would review counter-terrorism legislation including the pre-charge detention scheme. That review was completed in January 2011. It recommended, among other things, the reduction of the maximum period of detention to 14 days.

By contrast, in an independent review of the operation of terrorism legislation in 2009, completed by Lord Carlile in July 2010, Lord Carlile commented that he did not favour a reduction in the maximum period of pre-charge detention to 14 days, although he supported the idea of strengthening judicial scrutiny of post arrest detention.[74] Lord Carlile's report noted that of the 106 people arrested in 2009 under the Terrorism Act 2000, 21 were released after eight days and none were detained for more than 14 days.[75] In 43% of the cases, the detention was less than 48 hours.

Control orders were introduced under the *Prevention of Terrorism Act 2005* (UK) as emergency legislation. Under that Act, control orders can be imposed upon individuals including terms such as home curfews of up to 16 hours a day, a ban on travelling abroad, the approval of all visitors by the Home Office, monitoring of all phone calls, and bans on using the internet and mobile phones. In 2009, three men who were subject to control orders challenged the validity of those control orders, saying that reliance on secret evidence denied them a fair trial. On 10 June 2009, the House of Lords determined that reliance upon closed material in terror suspect hearings in support of control orders denied those subject of the control orders a fair trial under the *Human Rights Act 1998* (UK).[76] The House of Lords ordered that the control orders pertaining to the three men be reheard. In January 2010, control orders made against two of the men were quashed in the United Kingdom High Court, bringing the number of people on control orders in the United Kingdom to a total of six.[77]

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67 Section 101, *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT). At the time of writing, a the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011 was before the ACT Parliament. That bill proposes to continue the Terrorism (Extraordinary Temporary Powers) Act for a further five years to 2016.

68 *Terrorism (Emergency Powers) Act* (NT), s. 21ZV.

69 See *Terrorism (Preventative Detention) Act 2005* (Qld), s. 83 and *Terrorism (Preventative Detention) Act 2005* (SA) s. 52.

70 See *Terrorism (Community Protection) (Amendment) Act 2006* (Vic), s41; *Terrorism (Preventative Detention) Act 2006* (WA), s60 and *Terrorism (Preventative Detention) Act 2005* (Tas), s. 54.

71 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.

72 *Terrorism Act 2000* (UK) s. 40.

73 Rt. Hon. Theresa May, Secretary of State for the Home Department United Kingdom, *Written Ministerial Statement on pre charge detention* 24 June 2010, www.homeoffice.gov.uk/publications, accessed 1 November 2010.

74 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006,* p33, www.homeoffice.gov.uk/publications, accessed 3 November 2010.

75 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006,* p30, www.homeoffice.gov.uk/publications, accessed 3 November 2010.

76 Alan Travis, 'Terror control orders breach human rights, law lords rule', *The Guard*ian, www.theguardian.co.uk, accessed 3 November 2010.

77 See Office of Security and Counter terrorism, *Review of Counter terrorism and Security Powers*, January 2011, p. 36.

In response to the decisions in the High Court and House of Lords, the United Kingdom Government's review of Counter-Terrorism and Security Powers recommended that control order provisions be repealed and replaced with a 'less intrusive' alternative system. The new system, called Terrorism Prevention and Investigation Measures[78], will require the permission of the Home Secretary and be reviewed by the High Court. The measures will require overnight residence of 8-10 hours, verified by an electronic tag. The system lifts some of the restrictions on communication such as use of the internet, and will require regular reporting to police. In his independent report on the Government's review, Lord MacDonald considered 'the reduction in pre-charge detention to 14 days … and the removal of those aspects of control orders that most resemble house arrest … as reforms of real significance'. However, Lord MacDonald considered the use of curfews and electronic tags as 'disproportionate, unnecessary and objectionable', and the limits on telephone and internet use, as well as association bans as 'hostile to evidence gathering'.[79]

2.1.4 Canada

In 2001 the *Anti-Terrorism Act 2001* amended the Canadian Criminal Code to expand the definition of terrorism and create several new offences relating to the financing and facilitation of terrorism. The *Anti-Terrorism Act* also contained provisions for preventative arrests and investigative hearings[80].

Under the *Anti-Terrorism Act*, a person could be detained under the preventative detention measures in the following circumstances:

- If a peace officer believed on reasonable grounds that a terrorist activity would be carried out, and suspected on reasonable grounds that arrest, or the imposition of a recognizance with conditions on the person, was necessary to prevent the carrying out of the terrorist activity, then the peace officer could, with the consent of the Attorney General, lay this information before a Provincial Court judge. The judge could then issue a summons for the person to appear before the judge, or, if it was considered necessary in the public interest, issue a warrant for the arrest of the person.
- A person could be detained in preventative detention without a prior judicial warrant only in 'exigent circumstances', where it was impractical for the information to be laid before a Provincial Court judge. If a person was to be detained without a prior judicial warrant, the peace officer was required to reasonably believe that a terrorist activity would be carried out, and reasonably suspect that arrest, or the imposition of a recognizance with conditions on the person, was necessary to prevent the carrying out of the terrorist activity.

Under the provisions, a person in preventative detention 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 was then to order the release of the person, unless it was shown that the detention was necessary to ensure the person's appearance before a judge, to ensure public safety, to maintain confidence in the administration of justice, or for "any other just cause". 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 then 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. A person who refused to enter into a recognizance could be jailed for up to 12 months, and a person who breached a recognizance was punishable by up to two years imprisonment. 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).

The provisions relating to preventative detention set out in the *Anti-Terrorism Act* expired on 1 March 2007 under a sunset clause. No uses of the provisions had been reported.

In April 2010, a new bill was introduced into the Canadian House of Commons proposing essentially the same provisions relating to preventative detention as set out in the 2001 Anti-Terrorism Act. At the time of writing, the bill, entitled the Combating Terrorism Bill, passed its second reading in the House of Commons in September 2010, and had been considered by the Public Safety and National Security Committee.[81]

The Combating Terrorism Bill proposes to re-enact the preventative detention provisions set out in the 2001 Anti-Terrorism Act, with only slight changes to the wording and effect of the provisions.

78 BBC News UK, 26 January 2011, http://www.bbc.co.uk/news/uk-12287074 (accessed 7 February 2011).
79 Macdonald, K, *Review of Counter-terrorism and Security powers – A report by Lord Macdonald of River Glaven QC* January 2011, p. 13-16.
80 *Anti-Terrorism Act 2001* (Can) s. 83.3.
81 Bill C-17, the Combating Terrorism Bill Canada. First reading on 23 April 2010, second reading 22 September 2010.

One change relates to the circumstances in which a judge must order the release of a detained person. Under the *Anti-Terrorism Act*, the judge was required to order the release of a detained person unless it was shown that the detention was necessary to ensure the person's appearance before a judge, to ensure public safety, to maintain confidence in the administration of justice, or for 'any other just cause'. Under the Combating Terrorism Bill, the provisions relating to 'any other just cause' have been removed. This accords with recommendations made by a 2007 Senate subcommittee report which found the previous detention provisions too broad.

Like the *Anti-Terrorism Act*, the Combating Terrorism Bill proposes a sunset clause - of two years[82] - on the preventative detention provisions. In addition it proposes that a comprehensive review of the preventative detention provisions be undertaken by a parliamentary subcommittee, including a recommendation as to whether the provisions should be extended. Under the *Anti-Terrorism Act*, the Attorney General was responsible for publishing the number of requests to place people in preventative detention made, as well as the number of consents to place someone in preventative detention that were granted. In addition to this, the Combating Terrorism Bill would require the Attorney General to give an opinion on whether the operation of the preventative detention measures should be extended.

2.2 Covert searches in other jurisdictions

2.2.1 Commonwealth

Since the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007* lapsed after the 2007 federal election, no further plans to introduce delayed notice search warrants have been made public by the Commonwealth Government. However, as noted above at Part 1.2.1, the federal police have been issued with new powers to conduct warrantless searches in emergency situations relating to a terrorism incident.

2.2.2 Other Australian States and Territories

As indicated in our September 2008 report, Victoria, Queensland, Northern Territory and Western Australia have similar covert search warrant powers to New South Wales.

We are not aware of any substantial changes to covert search warrant powers in any other State or Territory since we last reported.

Victoria Police applied for and were issued four covert search warrants in 2008-09, however no premises were covertly entered. No other applications were sought or issued in Victoria since we last reported.[83]

Queensland's Public Interest Monitor reports annually on the use of covert surveillance and covert search warrants, and these reports are tabled in Parliament by the Minister for Police. Covert search warrants are available in relation to organised crime and certain other serious offences, as well as terrorism offences. Both the Queensland Police Service (QPS) and the Crime and Misconduct Commission (CMC) may apply to a Supreme Court Judge for a covert search warrant.

Since we last reported, Queensland's Public Interest Monitor reported that in 2007-08 the QPS made five applications for a covert search warrant and the CMC made two applications,[84] in 2008-09 the QPS and the CMC each made one application for a covert search warrant,[85] and in 2009-10, QPS made two applications for covert search warrants and the CMC made three applications.[86] The Public Interest Monitor's reports do not indicate that any of these covert search warrants were used in terrorism investigations.

In July 2008, Legal and Legislative Services of the Western Australia Police conducted a review of the *Terrorism (Extraordinary Powers) Act 2005*.[87] At that time, the Western Australian covert search powers had not been utilised. We are not aware of any subsequent use of the covert search powers set out in that Act. The Western Australian Minister for Police is required to review the operation and effectiveness of the Terrorism (Extraordinary Powers) Act every three years, and table a report in Parliament about the review.[88]

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82 On 2 March 2011, the House of Commons Standing Committee on Public Safety and National Security adopted three amendments to Bill C-17. The five-year sunset clause was shortened to two years.

83 Victoria Police *Annual Report 2007-08 under the Terrorism (Community Protection) Act 2003*, Victoria Police *Annual Report 2008-09 under the Terrorism (Community Protection) Act 2003,* Victoria Police *Annual Report 2009-10 under the Terrorism (Community Protection) Act 2003.*

84 Forrest, Colin*, Eleventh Annual Report of the Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act 2000 and the Crime and Misconduct Act 2001*, 30 October 2008, p. 10-11.

85 Forrest, Colin, *Twelfth Annual Report of the Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act 2000 and the Crime and Misconduct Act 2001*, 30 October 2009, p. 10-11.

86 Forrest, Colin, *Thirteenth Annual Report of the Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act 2000 and the Crime and Misconduct Act 2001*, 30 October 2010, p. 8-9.

87 Western Australia Police, *Terrorism (Extraordinary Powers) Act 2005 Review of the Act*, July 2008.

88 *Terrorism (Extraordinary Powers) Act 2005* (WA), s. 34.

Chapter 3. Preventative detention

The nature of preventative detention powers in NSW are described above at Part 1.3.1.

At the time of writing, no preventative detention orders had been sought in New South Wales. It also appears that preventative detention powers have not been used in any Australian jurisdiction.

The NSW Police Force advised us that since the powers were introduced, there have been no instances where use of the preventative detention powers has been seriously considered.[89]

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 NSW agencies.

Our September 2008 report set out in detail the nature of the powers relating to preventative detention. We raised issues about a range of matters relevant to the potential impact of the preventative detention powers, making recommendations in relation to some issues and noting other issues for ongoing monitoring. As the preventative detention powers have not been used, it is not possible to make further comment on many of the issues canvassed in our September 2008 report, and we will not address each matter in detail here. In our ongoing review role,[90] we will continue to monitor the impact of any preventative detention orders that are sought or executed in the future.

In this chapter, we focus on the changes to those provisions and any developments that have been made in relation to the implementation of the legislation, particularly in response to the recommendations of our September 2008 report.

3.1 Implementation of our previous recommendations

In our September 2008 report, we made 25 recommendations in relation to the preventative detention provisions and operational issues pertaining to preventative detention. Of those, 21 have been implemented or partly implemented. Two recommendations are awaiting implementation, and two of our recommendations regarding preventative detention were not implemented.

A table outlining the implementation status of each of the recommendations we made in our September 2008 report can be found at Annexure 1.

3.1.1 Agency procedures and interagency agreements

When we last reported on the NSW preventative detention provisions in 2008, the key agencies were still putting in place systems for exercising the preventative detention powers, even though those powers had been in existence since late 2005. In its submission to our review, the Police Integrity Commission (PIC) outlined its concerns that the NSW Police Force had yet to finalise their draft policy on their use of preventative detention powers. We agreed that it was concerning that the policy was not finalised and implemented. We recommended that the NSW Police Force, Department of Corrective Services (now Corrective Services NSW) and Department of Juvenile Justice (now Juvenile Justice NSW) finalise their Memoranda of Understanding (MoU) and Standard Operating Procedures (SOPs) as a matter of priority.[91]

At the time of writing, the MoUs had been generally agreed upon, but were yet to be signed and finalised.

One of the effects of the delay in finalising the MoUs between NSW Police Force, Juvenile Justice NSW and Corrective Services NSW is that internal policies have not been drafted within Juvenile Justice NSW and Corrective Services NSW. Both agencies have indicated they are waiting for the finalisation of the MoU before drafting internal policy, to ensure consistency. Juvenile Justice NSW indicated that they were reliant on the NSW Police Force establishing its position in the management of detainees, as that would shape the way Juvenile Justice NSW managed detainees.

In our September 2008 report, we made a number of further recommendations in relation to the NSW Police Force SOPS, to address issues relating to the responsibilities of police officers detaining persons under the Act. The SOPS were finalised in January 2011. The SOPs implement or partially implement most of the recommendations we made in our September 2008 report.

89 Correspondence from the Deputy Commissioner Specialist Operations, undated, received by NSW Ombudsman's Office on 21 December 2010.
90 *Terrorism (Police Powers) Act 2002* s. 26ZO(1).
91 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendations 1, 2 and 15.

We welcome the finalisation of the NSW Police Force SOPs. While preventative detention powers are yet to be used, given the complexity of the legislative provisions, guidance in the form of SOPs will be an important tool for any police officer exercising responsibilities under the Act. Clarity regarding the role of police and officers from any correctional or juvenile detention centre will also be important, should a person be taken into preventative detention.

We noted in our September 2008 Report that finalisation of the SOPs should be a priority, and have been concerned that they have taken so long to complete. The NSW Police Force advised us that the delay in finalising the SOPs before January 2011 was due to 'recent legislative arrangements potentially impacting the SOPs'.[92]

We acknowledge that the amendments made to the *Terrorism (Police Powers) Act* in late 2010 resulted in some further changes to the responsibilities of officers, which had to be reflected in the SOPs. However, the recent amendments do not explain the delay in finalising and implementing the SOPs and the MoU before that time.

It appears that one of the primary reasons for delay in finalising the MoUs and SOPs has been the concerns that the NSW Police Force have about the workability of the preventative detention powers. As discussed below at Part 3.3, police have indicated it is unlikely that they will use the preventative detention powers as they are currently drafted. Notwithstanding these concerns, we consider it advisable that the procedures and interagency arrangements be finalised to provide officers operating under the Act with whatever guidance is possible should the powers be required. At the same time, it appears that further work may be needed within NSW and at a federal level to clarify some of the uncertainties in the preventative detention regime. This is further discussed at Parts 3.2 and 3.3.

Recommendations

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

On 1 July 2011, the Commissioner of Police advised that an MoU relating to preventative detention has been negotiated between the NSW Police Force, Corrective Services NSW and Juvenile Justice NSW and is being circulated among agencies for signature. He noted that the agreement was not a precondition for use of the preventative detention powers but has been negotiated to assist when used.

3.1.2 Providing information to detainees

The NSW Police Force have included an information sheet in their SOPs that is to be provided to detainees when they are taken into custody under an interim preventative detention order, and when a preventative detention order is made. This implements recommendations 7 and 9 of our September 2008 report. The recommendations were that the NSW Police Force SOPs include a statement of the information which has to be provided to detainees, and that the SOPs provide that where information is not provided because it is not practicable, detailed reasons for the information not being provided should be recorded.

The information sheet addresses the information requirements at sections 26Y and 26Z of the Act. Where information is not provided to the detainee in accordance with those sections, police are required to record their reasons. It also includes additional information for detainees that are under the age of 18 years or who have impaired intellectual functioning, which sets out additional entitlements for contacting parents, guardians or other persons who can represent their interests.

In response to recommendation 10 of our September 2008 report, the SOPs provide that police should consider informing detainees about the existence of a prohibited contact order. Where a decision is made not to advise a detainee of a prohibited contact order, the officer must record the reasons for their decision. The NSW Police Force have indicated that 'there may be circumstances where it may be inappropriate to notify the detainee of the existence of a prohibited contact order, such as where police do not wish to notify the detainee that an associate is also of interest to any police investigation being undertaken'.[93]

The SOPs also include a form setting out the responsibilities of police overseeing a preventative detention order, which instructs police to record the details of any information provided to detainees, or reasons why any information was not provided. We consider this may be an effective tool for keeping track of the way a detainee has been managed while

92 Correspondence from the Deputy Commissioner Specialist Operations, undated, received by NSW Ombudsman's Office on 21 December 2010.
93 Correspondence from the Office of the Commissioner dated 23 December 2009.

in custody, and for reviewing the decisions of officers tasked with overseeing the preventative detention order. We also consider the SOPs provide sufficient safeguards that detainees will be provided with the information they are entitled to and that decisions made by police not to provide information will be adequately recorded.

3.1.3 Impact on young people

Persons under 16 years of age cannot be detained under a preventative detention order or made the subject of an application.[94] Young people who are 16 or 17 years old cannot be detained with adults unless the nominated police officer considers there are exceptional circumstances.[95] If a person is being detained and police become aware that the person is under 16 years of age, police must release the young person into the care of a parent or other appropriate person.

As we indicated in our September 2008 report, submissions to our review expressed concern about a number of aspects of the preventative detention of young people, including their detention with adults and their detention in correctional facilities, restrictions on visiting, and whether relevant information should be provided to the parent or guardian of a young person in detention.

3.1.3.1 Contact with parents, guardians and others

In response to our recommendations, changes have been made to the Act to require a police officer detaining a person under the age of 18 under a preventative detention order, to assist them, as far as is reasonably practicable, to exercise their contact entitlements.[96] This includes contact with the detainee's parent, guardian or any other person who is able to represent the detainee's interests, as well as contact with the NSW Ombudsman, the PIC and the detainee's legal representative.

The police SOPs indicate that police must provide this assistance in exercising their contact entitlements to any young person in preventative detention. Additionally, the NSW Police Force has agreed to consider any request a young person in preventative detention makes when determining the length and frequency of contact with a parent, guardian or other person. Under the Act, a person under the age of 18 in preventative detention is entitled to two hours contact per day with their parent, guardian or other person who is able to represent their interests, or any longer period specified by the Supreme Court in making the order. In response to our recommendations, the SOPs now require that police give consideration to extending the period of contact beyond the minimum two hour period.

3.1.3.2 Releasing detainees under the age of 16

As persons under the age of 16 are not permitted to be the subject of a preventative detention application or order, if police learn that a detainee is under the age of 16, the officer must release the detainee into the care of an appropriate person. In response to our recommendations, the NSW Police Force has committed to providing guidance about who would fall in that category of 'an appropriate person'.

The SOPS address release of detainees who are under the age of 18 without making special reference to release of persons who are under the age of 16 and who have been wrongfully detained. The SOPS do note that police cannot obtain a preventative detention order for persons under the age of 16 years.

The SOPS indicate that persons under the age of 18 should be released to a parent, guardian or other person who is able to represent the detainee's interests, but who is not a police officer or ASIO officer. We consider that it would be appropriate to release a person under the age of 16 to such a person.

It would be appropriate for the SOPS to provide some guidance to police regarding what to do if police become reasonably satisfied that a detained person is under the age of 16 years.

Recommendation

3. The NSW Police Force SOPs provide guidance to police regarding what to do if police become reasonably satisfied that a detained person is under the age of 16 years.

On 1 July 2011, the Commissioner of Police advised that the NSW Police Force will implement this recommended change to the SOPs.

94 *Terrorism (Police Powers) Act 2002* s. 26E.
95 *Terrorism (Police Powers) Act 2002* s. 26X(6).
96 *Terrorism (Police Powers) Act 2002* s. 26ZH(7).

3.1.3.3 Security assessments of young people

Another recommendation made in our September 2008 report in relation to the impact of the preventative detention scheme on young people was that in developing the MoU on preventative detention, the NSW Police Force, Department of Corrective Services and Department of Juvenile Justice NSW 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.[97]

The Government indicated that any such security assessment would be undertaken prior to a decision being made about whether or not to transfer a detainee from police custody to either a juvenile detention centre or a juvenile correctional centre. As such, the Government considers the security assessment to be the responsibility of police and should form part of the SOPs.[98]

The NSW Police Force has indicated that the initial security assessment would be undertaken by police. As far as possible, where Corrective Services NSW or Juvenile Justice NSW are to hold a person on behalf of the NSW Police Force under Part 2A of the Act, any risk assessment information used by police will be provided to those agencies, insofar as the provision of that information would not reveal information subject to national security classification.[99]

The NSW Police Force SOPS provide that the risk assessment is to include any relevant matters that may affect the detention of the detainee, the health safety and wellbeing of the detainee, and the health safety and wellbeing of staff engaged in detaining the detainee. This would include consideration of matters such as background information, information held by the NSW Police Force including criminal history or relevant intelligence, information concerning specific risk factors such as propensity for violence, and information provided by external agencies.

Juvenile Justice NSW proposes to conduct its own risk assessment of any individual to be held in preventative detention in a juvenile detention centre following any initial security assessments conducted by the NSW Police Force. This would involve the same risk assessment that is used to classify any young person entering custody. Juvenile Justice NSW has indicated it would classify any young person held in preventative detention under the highest security classification available - a Mandatory A1(o).[100] As Juvenile Justice NSW does not have a detention centre designated A1 security for male detainees over the age of 16 years of age, it has indicated that any young person who is a male who is the subject of a preventative detention order would be subject to an order under section 28 of the *Children's (Detention Centres) Act 1987* and, on approval from Corrective Services NSW, would be transferred to Kariong Juvenile Correctional Centre.[101]

Corrective Services NSW advised that it would undertake its own security assessment subsequent to any assessment undertaken by the NSW Police Force.[102] That security assessment would be coordinated by the Assistant Commissioner, Security and Investigations. If the detainee has previously been held in custody with Corrective Services NSW, the security assessment will consider any information held in the Offender Information Management System. Corrective Services NSW would also consider any available information provided by the NSW Police Force and external resources such as advice from external intelligence agencies and any specific threats identified by a Security Assessment Evaluation Team. Corrective Services NSW indicated that the security assessment would take place within 48 hours, and a security rating and placement recommendation would most likely be made within seven days of the detainee's being received into detention, for consideration by the Commissioner of Corrective Services.

Until the detainee is classified by the Commissioner, Corrective Services NSW propose to manage the detainee using the protocols and procedures developed for AA classified inmates and Category 5 classified female inmates – these being the security classifications available under clauses 22 and 23 of the Crimes (Administration of Sentences) Regulation 2008 for inmates who, in the opinion of the Commissioner, represent a special risk to national security.[103]

While the NSW Police Force has an expectation that male preventative detainees under the age of 18 would be held in Kariong Juvenile Correctional Centre, Corrective Services NSW advised us that it may not be possible to detain any young person who is classified as requiring maximum security detention at Kariong Juvenile Correctional Centre:

> *Where a detained person is a young person under the age of 18, it may not be feasible to manage that person at Kariong Juvenile Correctional Centre. If that is the case, the detained person will be managed at an adult correctional centre with due regard to safety issues appropriate to his/her age balanced alongside the behaviour which has led to their being preventatively detained.*[104]*.*

97 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Recommendation 15.
98 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, June 2010, p 34.
99 Correspondence from the Deputy Commissioner Specialist Operations, undated, received by NSW Ombudsman's Office on 21 December 2010.
100 Correspondence from Juvenile Justice dated 8 November 2010.
101 Correspondence from Juvenile Justice dated 8 November 2010.
102 Correspondence from Corrective Services NSW dated 15 November 2011.
103 Correspondence from Corrective Services NSW dated 15 November 2011.
104 Correspondence from Corrective Services NSW dated 15 November 2011.

On 26 July 2011 the Commissioner for Corrective Services advised that it is not possible to predict the circumstances under which it may not be feasible to manage preventative detainees aged 16 to 17 at Kariong Juvenile Correctional Centre, however relevant issues include the availability of bed space and 'the limited scope to ensure separation of inmates at Kariong due to the physical configuration of the centre'.

It appears that under the security classification scheme outlined by Corrective Services NSW, any young person that is to be detained at a correctional centre under a preventative detention order would be detained in an adult correctional centre by default, for at least the initial seven days it would take for the young person to be classified.

A detainee in this situation may be able to be managed without coming into contact with adult prisoners, and it appears that the detainee could be managed so that they have appropriate access to visits, telephones and fresh air and exercise.

However, we note that the legislation provides that the nominated senior police officer responsible for overseeing the preventative detention order can only authorise detention of a person under the age of 18 with adults in 'exceptional circumstances'.

It is unclear if accommodation within an adult correctional centre that is managed so that the detainee does not come into contact with adult prisoners would be considered 'detention with persons who are 18 years or older' as set out in s. 26X(6).

In December 2010 the NSW Police Force advised us that the SOPs, at that time still in draft form, would provide 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.[105] However, while the SOPs note that detainees under the age of 18 can only be detained with adults in exceptional circumstances, there is no guidance as to what may constitute exceptional circumstances.

We asked police within the Counter Terrorism and Special Tactics Command about the comments made by Corrective Services, and the potential impact on accommodation for any male juvenile detainees. Police indicated this would be a matter for Corrective Services NSW. Police also said that given it was highly unlikely that the preventative detention powers would ever be used, any comment on these arrangements would be speculation.

We note the reluctance of the NSW Police Force to use the preventative detention powers, which is based on the view that the powers are unworkable. This is discussed further at Part 3.3.

Recommendations

4. That the NSW Police Force and Corrective Services NSW seek legal advice as to whether detaining persons under the age of 18 within an adult correctional centre where such detainees are managed so that the detainee does not come into contact with adult prisoners is be considered 'detention with persons who are 18 years or older' as set out in s. 26X(6).
5. That the NSW Police Force and Corrective Services NSW clarify and resolve the circumstances in which any juvenile in preventative detention would be accommodated in an adult correctional facility, and that this is addressed in the Memorandum of Understanding between NSW Police Force and Corrective Services NSW.
6. That the NSW Police Force SOPs for preventative detention provide 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.

On 1 July 2011, the Commissioner of Police advised that he would consider getting legal advice as outlined in recommendation 4. He also advised that discussions are being held between the NSW Police Force and Corrective Services NSW to clarify the issue of accommodating juveniles in adult correctional facilities. The Commissioner indicated the NSW Police Force SOPs would be amended as necessary after clarification is obtained, rather than amending the MoU with Corrective Services:

> *As the MoU has already been circulated for signature, any amendments at this time will further delay the process.*

The Commissioner also indicated that he would amend the SOPs would be amended to provide clear guidance on what would constitute 'exceptional circumstances' as outlined in recommendation 6.

105 Correspondence from the Deputy Commissioner Specialist Operations, undated, received by NSW Ombudsman's Office on 21 December 2010.

On 26 July 2011, the Commissioner for Corrective Services indicated that Corrective Services NSW would 'consider and address these recommendations in due course'.

We will monitor the implementation of these recommendations.

3.1.3.4 Providing information to young people and their parents or guardians

The Act requires a police officer who is detaining a person under an interim preventative detention order to give the detained person the following information as soon as practicable after they are taken into custody:

- the fact that an interim preventative detention order has been made authorising the person's detention pending the hearing and determination of the application for the person's continued preventative detention,
- the date and time fixed by the Supreme Court for the hearing and determination of that application,
- that that the person can seek for the order to be revoked or may seek another remedy in relation to the order or their treatment in detention,
- the detained persn's' contact rights with regard to the Ombudsman, the PIC and a lawyer,
- that the person may complain to the Ombudsman about the application for or making of the order or their treatment by police,
- the name and work telephone number of the senior police officer who has been nominated to oversee the exercise of functions under the order.[106]

It is an offence for the police officer to fail to provide this information as soon as practicable after the person is detained under an interim preventative detention order.[107]

If a person is detained under a preventative detention order, the police officer detaining the person must give the detained person the following information as soon as practicable after they are taken into custody:

- the fact that the order has been made in relation to the person,
- the period during which the person may be detained under the order,
- the detained person's contact rights with regard to the Ombudsman, the PIC and a lawyer,
- that the person may complain to the Ombudsman about the application for the order or their treatment by police,
- the fact that the person may ask the Supreme Court to revoke the order or seek from a court any other remedy relating to the order, their treatment in detention
- the name and work telephone number of the senior police officer who has been nominated to oversee the exercise of functions under the order.[108]

It is an offence for the police officer to fail to provide this information as soon as practicable after the person is detained under a preventative detention order.[109]

These information requirements apply to all detained people, including young people and other vulnerable persons who are detained.

While the Act provides this information must be given to the detained person, in our September 2008 report we recommended that 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.[110] Similarly, we recommended that the Act should be amended to require police 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.[111]

These recommendations have not been accepted by the Government, and no changes to the requirement regarding provision of information were made to the legislation.

106 *Terrorism (Police Powers) Act 2002* s. 26Y.
107 *Terrorism (Police Powers) Act 2002* s. 26Y(1).
108 *Terrorism (Police Powers) Act 2002* s. 26Z.
109 *Terrorism (Police Powers) Act 2002* s. 26Z(1).
110 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 17.
111 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 16.

The Government response indicated that the existing controls on information in the Act were appropriate, and provision of information to the parent or guardian of a young person who is in preventative detention would 'undermine the Act's tight controls on the nature of information permitted to be disclosed by detainees and third parties'.[112] The Government response also indicated that the current information controls in the Act are 'consistent with those provided by the Commonwealth preventative detention scheme'.[113] The Government's view was that as long as a young person was appropriately assisted in contacting their support person and a lawyer, then the appropriate balance would be struck between the detained person's rights and 'the policy intent in providing for a robust system of preventative detention at times of extreme risk of terrorist activity.'[114]

Notwithstanding these views, the NSW Police Force have now included an instruction in the SOPs that where practicable, when a detainee is under 18 years old, police should provide the same information that has been provided to the detainee to the parent and or guardian of the detainee. The SOPS require that police record any reasons if it is determined that it is not practicable to provide this information to the parent/guardian.

While it is not a legislative requirement, we welcome this instruction. The requirement that reasons be recorded if information is not provided to the young person's parent or guardian may assist police in monitoring the way the decisions are made with regard to providing information, and should prompt officers to consider the reasonableness of their decision at the time.

A senior police officer from the Counter Terrorism and Special Tactics Command advised us that the offence provisions relating to providing information to detainees is a key concern for police when considering the workability of the preventative detention powers. We were advised that police are concerned the offence provisions make senior officers vicariously liable for the conduct of the police officer who has contact with the detainee in carrying out the preventative detention order. The concerns of NSW Police Force in relation to the offence provisions are further discussed at Part 3.3.1 below.

Section 26C of the Act provides that where a number of police officers are involved in the detention of a person under the Act at a particular time, any function imposed upon an officer is imposed at that time on the most senior of those police officers.

The offence provisions indicate that the police officer who is detaining a person under an order may commit an offence if information is not provided to the detainee as set out in the Act. It would appear that this offence provision would catch the most senior officer involved in the detention of the person, but it is unclear if this means only the most senior officer at the place of detention or whether it extends to the nominated senior police officer with responsibility for overseeing the exercise of functions in relation to the order, whether or not that officer is at the place of detention.[115] It may be appropriate for the offence to be clarified so that the most senior officer at the place of detention is liable if information is not provided to the detainee as set out in section 26Y and 26Z.

As no preventative detention orders have been sought or granted, it is not possible to evaluate the effectiveness of the provisions relating to giving information to young people. We will continue to monitor this issue.

Recommendation

7. That the Act be amended to clarify which officer would be guilty of an offence if information is not provided to the detainee as set out in sections 26Y and 26Z.

We were advised on 27 June 2011 that the preliminary view of the Department of Attorney General and Justice was that no legislative amendment is required regarding the offence provisions at section 26Y and 26Z, as it was sufficiently clear that the obligations apply to the police officer detaining the person, which by virtue of s. 26C will be the most senior officer involved if there is more than one officer.

On 1 July 2011, the Commissioner of Police advised that 'the NSW Police Force has previously stated its objection, on a number of grounds, to the offence provisions for officers. If the offence provisions are to remain in the Act then this issue should be clarified'.

112 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 34.
113 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 34.
114 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 34.
115 *Terrorism (Police Powers) Act 2002*, s. 26R.

3.1.4 The meaning of 'as soon as practicable'

In our September 2008 Report, we recommended that police provide guidance as to the meaning of 'as soon as practicable' where it appears in the provisions outlining police responsibilities to provide detainees with information. We considered this important for both detainees and for police, as officers may commit an offence, punishable by imprisonment of up to two years, if they fail to provide the detainee with the information set out in the Act as soon as practicable after a person is taken into custody under an interim preventative detention order, or as soon as practicable after a preventative detention order is made.[116]

The NSW Government response of June 2010 indicated that the recommendation was supported, and that the NSW Police Force would provide general, non-prescriptive guidance that 'as soon as practicable' means 'as soon as possible, unless some critical imperative impedes it'.[117]

The NSW Police Force SOPS now provide a definition of the words 'as soon as practicable' as they appear in section 26Y, 26Z and 26ZB. It states that the words do not mean 'as soon as possible' but mean 'as soon as reasonably practicable depending on the circumstances of each case'. This definition, which comes from case law,[118] indicates that police are required to consider and weigh the circumstances in the case. It remains to be seen if this definition will provide clear practical guidance for officers to decide how soon they are required to provide information.

3.1.5 Dependents of the detained person

Our September 2008 report highlighted concerns raised by the Community Relations Commission and the then Department of Community Services about the impact of preventative detention on the dependents of any detained person. In particular, concerns were raised about the welfare of any children whose parents are taken into preventative detention. We recommended that the NSW Police Force SOPs require police to consider the welfare of any such dependents, and make appropriate arrangements in consultation with Community Services NSW to ensure the dependents receive appropriate care. The NSW Government indicated that the NSW Police Force would address this issue through forming an MoU with Community Services NSW.

At the time of writing, police had not initiated contact with Community Services NSW in relation to entering an MoU. However, the SOPs now indicate that police should engage with Community Services NSW at the earliest opportunity where police become aware that the dependents of a detainee may require assistance.

3.1.6 Impact on people with intellectual impairment

3.1.6.1 Definitional consistency

In our September 2008 Report we raised concerns about inconsistencies in the definition of 'incapable persons' under the Act. The Act made reference to a person who is 'incapable of managing his or her own affairs'. Submissions from the Guardianship Tribunal advised that that term had a specific legal meaning - 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.[119]

Other submissions also raised concerns 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.[120] We stated that in determining whether a person was 'incapable' for the purposes of Part 2A of the 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 2000* and *Law Enforcement (Powers and Responsibilities) Act 2002*.

In response to our recommendations, the Act has been amended to replace references to 'a person incapable of managing his or her affairs' with the term 'a person with impaired intellectual functioning'. This makes the definition of such vulnerable persons consistent with the definitions used in other legislation. The definition now inserted in the Act is the same as that contained in the Law Enforcement (Powers and Responsibilities) Act. Greater consistency should assist officers in appropriately identifying vulnerable persons, and we welcome this change.

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116 *Terrorism (Police Powers) Act 2002*, ss. 26Y(1), 26Z(1).
117 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002*, 2010, p. 30.
118 *Ex parte Wills* [1987] 2 Qd R 284.
119 Guardianship Tribunal submission 11 July 2007.
120 Public Interest Advocacy Centre submission, 3 July 2007; The Council of Civil Liberties submission, 22 June 2007 and Submission J, 15 June 2007.

3.1.6.2 Contact with parents, guardians and others

Along with the amendments to the Act in relation to assisting detainees under the age of 18 to contact their parents, guardians and others, the Act has been amended to extend that same requirement to police detaining a person with impaired intellectual functioning.

Police have amended the SOPs to provide guidance on identifying persons with impaired intellectual functioning, and guidance on communicating with such persons. The following indicators are listed 'which may assist police in determining if a person has impaired intellectual functioning':

- Person has difficulty understanding questions and instructions
- Responds inappropriately or inconsistently to questions
- Has a short attention span
- Receives a disability support pension
- Resides at a group home or institution, or is employed at a sheltered workshop
- Is undertaking education, or has been educated at a special school or in special education classes at a mainstream school
- Has an inability to understand the caution
- Person identifies themselves as someone with impaired intellectual functioning
- Where a third party, such as a carer, family member or friend tells you that the person is, or may be someone with impaired intellectual functioning
- Exhibits inappropriate social distance, such as being overfriendly and anxious to please
- Acting in a way that is appropriate to a much younger age group than the person's age group
- The person has dressed inappropriately for the season or occasion
- Has difficulty reading or writing
- Has difficulty identifying money values or calculating change
- Has difficulty in finding their telephone number in a directory
- Where the person displays problems with memory or concentration.

The SOPs provide that if a responsible officer suspects that a detainee has impaired intellectual functioning, the officer should treat the person accordingly.

While we recommended that the NSW Police Force consult with the Guardianship Tribunal and disability advocates in order to develop guidelines for officers in identifying and communicating with vulnerable persons, at the time of writing this consultation had not yet occurred. The NSW Police Force advised that consultation with the Guardianship Tribunal would occur if the Counter Terrorism and Special Tactics Command considered existing NSW Police Force policy for communicating with vulnerable persons to be unsuitable in the preventative detention context.

3.1.6.3 Provision of information to detained persons with intellectual impairment

In the same vein as the recommendation we made with regard to providing information to the parents, guardians or other relevant person of any young person detained in preventative detention, we recommended that where police are required to provide information to a person with impaired intellectual functioning who is held in preventative detention, this information should be provided to the detainee's parent or guardian as well as the detainee.[121] Similarly, we recommended that the Act should be amended to require police 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.[122]

121 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Recommendation 20.
122 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 16.

We noted the particular concerns raised by the Guardianship Tribunal about the potential for section 26ZA(1) to be used inappropriately when dealing with people incapable of managing their own affairs. The concern raised was that police may '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'.[123]

The NSW Government response echoed their response to our recommendation that the parents and guardians of young people be provided the same information as is given to the detainee – the recommendations were not supported.

The NSW Police Force has included an instruction in the SOPs that where practicable, when a detainee has impaired intellectual functioning, police should provide the same information that has been provided to the detainee to the parent and or guardian of the detainee. The SOPS require police to record their reasons if it is determined that it is not practicable to provide this information to the parent/guardian.

While it is not a legislative requirement, we welcome this instruction. The requirement that reasons be recorded if information is not provided to the young person's parent or guardian may assist police in monitoring the way the decisions are made with regard to providing information, and should prompt officers to consider the reasonableness of their decision at the time.

We also acknowledge that the Act now requires police to provide additional assistance to vulnerable people with regard to exercising their contact rights parents, guardians, complaint handling bodies and legal representatives. These new provisions should better ensure that any vulnerable people who are detained will be better able to receive the support to which they are entitled.

We consider the changes made to the SOPS about providing information to the parent or guardian of a vulnerable person in detention should improve the capacity for such persons to receive appropriate support while in preventative detention. In our view, the contact person will be in a better position to represent the detainee's interests if provided with the information the detainee is entitled to. This might address the concerns previously raised by the Guardianship Tribunal 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.[124]

As no preventative detention orders have been sought or granted, it is not possible to evaluate the effectiveness of the provisions relating to giving information to vulnerable people. We will continue to monitor this issue.

3.1.7 Contact with a chaplain

One of the changes to the Act made under the Terrorism (Police Powers) Amendment Act was the insertion of provisions entitling a detainee to receive visits from an authorised chaplain while in detention in a correctional centre or juvenile detention centre.

In our 2008 report, we recommended that Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains.[125] We considered access to religious guidance from an accredited chaplain to be a detainee's right, and provision of such access to be consistent with the duty to provide humane treatment to the person detained.

We welcome this amendment to the Act, noting it is consistent with the duty to provide humane treatment to a person being detained.[126]

3.1.8 Access to legal advice

In our September 2008 report, we considered the arrangements under the Act for monitoring detainee-lawyer communication. [127] We considered the following issues:

- monitoring of detainee-lawyer communication by police,
- security vetting of lawyers, and
- the capacity of Corrective Services NSW to ban lawyers from correctional centres.

123 Guardianship Tribunal submission, 11 July 2007.
124 Law Enforcement (Powers and Responsibilities) Regulation 2005, clause 32.
125 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Recommendation 11.
126 *Terrorism (Police Powers) Act 2002* s. 26ZC.
127 See NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 3.9.

We commented that monitoring of detainee-lawyer communication was likely to hinder that contact, and considered alternative approaches, such as that in Victoria where the court is left to determine the appropriate monitoring arrangement, the limitation of monitoring to communication with lawyers who do not have a security clearance, and the application of a threshold test as is used in the United Kingdom, where consultation between a lawyer and detainee will occur within the sight and hearing of a police officer if a senior police officer has reasonable grounds to believe that the consultation may lead to interference with the investigation.

We also commented on the offence provision at section 26ZI. It is an offence for a monitor (being a police officer monitoring communication between a detainee and their lawyer, or an interpreter assisting in that monitoring) to disclose to any other person information communicated between the detainee and lawyer, if the information relates to one of the permitted purposes of detainee-lawyer communication under the Act (such as obtaining advice about the detainee's legal rights in relation to the preventative detention, instructing the lawyers in relation to court proceedings about the preventative detention order, or arranging for the lawyer to make a complaint to the PIC or the Ombudsman on behalf of the detainee). This offence provision is a form of protection against the improper disclosure of permitted communication between the detainee and his or her lawyer. The protection is important given the capacity for police to monitor these conversations is a significant departure from the ordinarily confidential and privileged nature of client-lawyer communications.

We suggested that to assist police to execute their functions properly, police ought to be able to consult a lawyer about whether any disclosure would breach section 26ZI.

Amendments have now been made to section 26ZI to allow the person monitoring detainee-lawyer communication under section 26ZI to consult a lawyer in order to seek advice about whether any information monitored properly falls within one of the permitted purposes, and to seek advice about the monitor's obligations in relation to that information.

This amendment should assist police to appropriately execute their monitoring function. However, the communication between the monitor and the lawyer under section 26ZI(7) does not appear to be protected. This appears to create a risk of improper disclosure that the original offence provision was designed to avoid. In light of this, further consideration of whether the provision creates this risk may be warranted.

We recommended Parliament further consider the arrangements for monitoring detainee-lawyer communication having regard to the issues in our September 2008 report. That recommendation was supported in submissions made to the Department of Attorney General and Justice's 2010 review of the Act.[128]

The Government has agreed to consult with the Supreme Court and other stakeholders regarding the possibility of inserting provisions in the Act allowing the Court the discretion to determine whether contact with a lawyer should be monitored or not. We were advised in January 2011 that this consultation had recently commenced.[129]

Our September 2008 report also considered the issue of detained persons' eligibility for legal aid.[130] We recommended that Parliament consider amending the Act to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, and that police be required to refer a person in preventative detention to Legal Aid where such an order is in place, or if the detainee is otherwise unable to contact a lawyer.

The inclusion of section 26PA in the Act has made it a requirement that an officer detaining a person assist the detainee to contact the Legal Aid Commission if the Supreme Court has ordered that Legal Aid is to be provided to the person. The SOPs reflect the requirement for police to assist a person in preventative detention to contact Legal Aid if the person is otherwise unable to contact a lawyer.

Recommendations

8. Parliament consider amending the Act to ensure the information disclosed in any consultation between a monitor and a lawyer under s. 26ZI is protected from further disclosure.

We were advised on 27 June 2011 that the preliminary view of the Department of Attorney General and Justice was that there is no need to further amend the Act to protect information disclosed to a lawyer following monitoring under s. 26ZI, although the Department did not object to the recommendation.

On 1 July 2011, the Commissioner of Police advised that the NSW Police Force does not object to this recommendation.

128 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 31.
129 Correspondence from the Department of Attorney General and Justice, dated 31 January 2011.
130 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 3.9.6.

3.1.9 Complaints about correctional officers

In our September 2008 report we considered the information that a detained person is entitled to be provided upon entering preventative detention. We noted that detainees must be informed of their right to make a complaint to the Ombudsman about their treatment by police, but that the Act does not require that the detainee be informed of their right to make a complaint about a correctional officer.[131] We noted that Corrective Services NSW proposed its draft policy on preventative detention would state that detainees would be advised of their right to contact the Ombudsman at any point during their detention to complain about a police officer or a correctional officer.

While we support the inclusion of such instructions in departmental policy, we recommended the creation of a legislative requirement to inform detainees of their right to contact the Ombudsman to complain about the conduct of a correctional officer.[132] This would ensure there is 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.[133] There is a similar need to inform any detainee held in a juvenile detention centre of their right to complain about a juvenile justice officer.

The right to make such complaints about the conduct of correctional officers or juvenile justice officers is significant, because such officers are responsible for the general administration of the detainee while housed in either a correctional or juvenile detention centre. This includes provision of meals, clothing, access to exercise and all aspects of the physical housing within the centre.

The Government indicated its support for this recommendation, and noted that the draft policies within Corrective Services NSW and NSW Police Force stated that detainees should be informed of their right to contact the Ombudsman. The Act has been amended so that it is now a requirement that a detainee be informed of their right to contact both the Ombudsman and PIC when they are informed of their contact rights in relation to family members and a lawyer.[134]

We welcome the statutory requirement that detainees be informed of their right to contact the Ombudsman and the PIC. However the legislative amendment does not go as far as the recommendation made in our September 2008 report. There is no explicit reference to the right to complain about a correctional officer. The police officer detaining the person is only required to tell the detainee that they may complain to the Ombudsman or PIC about the application for or making of the order, or their treatment by police in connection with the order.

Currently the NSW Police Force SOPs make no reference to a detainee's entitlement to complain about the conduct of police and correctional or juvenile justice officers in connection with their detention. We consider it would be appropriate for the SOPs to instruct police to provide this information to detainees. We remain of the view that making the provision of this information a clear statutory requirement is an important safeguard to ensure the detainee is aware of their rights while in detention.

Recommendations

9. The NSW Police Force SOPs instruct police to inform detainees they can complain about the conduct of correctional officers or juvenile justice officers in connection with their detention.

10. Parliament consider amending the Act so that the nominated senior police officer must inform persons who are detained at correctional centres or juvenile detention centres of their right to contact the Ombudsman to make a complaint about the conduct of any correctional officer or juvenile justice officer.

We were advised on 27 June 2011 that the Department of Attorney General and Justice considered the inclusion of a reference to section 26ZF (the detainee's general right to contact the Ombudsman and PIC) in sections 26Y and 26Z adequately addressed the issue of provision of information regarding complaints to the Ombudsman about correctional officers.

On 1 July 2011, the Commissioner of Police advised that the NSW Police Force would amend the SOPs to reflect the recommendation 9. However, he advised that recommendation 10 was not supported 'as the NSW Police Force has agreed to amend the SOPs to address this issue, as per recommendation 9'.

For the purpose of clarity, it is our view that the inclusion of an explicit reference to the detainee's right to complain about a correctional officer would be preferable. We hope that the amendment to the SOPs will assist in making this clear.

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131 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 3.7.
132 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 4.
133 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, p. 35.
134 *Terrorism (Police Powers) Amendment Act 21*,, Schedule 1 [7].

3.1.10 Protection from unwanted media exposure

In our September 2008 report, we considered concerns raised during the Parliamentary debates and in submissions to our review that detainees may not be protected from unwelcome publicity on their release. Unlike preventative detention schemes in other Australian jurisdictions, such as Victoria and the Commonwealth, it is not an offence under the Terrorism (Police Powers) Act to disclose the fact that a person is in preventative detention.

To protect the reputation, career and families of people released from preventative detention in NSW from media exposure, we recommended that Parliament consider whether it was appropriate to include disclosure offences in the Act.[135]

The NSW Government response supported this recommendation in principle, but considered additional disclosure offences unnecessary in light of the experience of Corrective Services NSW in dealing with the release of high-profile inmates, and because the police SOPs indicated that disclosure of the details of preventative detention orders should not be made to unauthorised persons or bodies. However, we note the finalised version of the police SOPs do not contain this instruction, and recommend their amendment.

On 1 July 2011, the Commissioner of Police advised that the NSW Police Force would amend the SOPs to provide guidance on protecting detainees from unwanted publicity on their release, in accordance with current media policy, including providing means for detainees to cover their face if they wish. However he noted the advice to be included in the SOPs 'will not extend beyond the privacy measures normally afforded to any other person taken into police custody for any lawful reason'.

In light of the Government's response to our September 2008 report, it is our view the police SOPs should also be amended to indicate that disclosure of the details of preventative detention orders should not be made to unauthorised persons or bodies.

As no preventative detention orders have been sought or granted, it is not possible to evaluate the effectiveness of the provisions relating to protection from unwanted media exposure. We will continue to monitor this issue.

Recommendation

11. The NSW Police Force SOPs provide guidance to police about protecting detainees from unwanted publicity on their release.

3.1.11 Reviewing preventative detention orders

In our September 2008 report we recommended that the SOPs require police overseeing the preventative detention order to consider, at regular intervals, and at least every 24 hours, whether the grounds on which the order was made continue to exist.[136]

We welcome the instruction in the SOPs that a review to consider whether the grounds for an order remain valid is to be conducted at least once in every 12 hours. The SOPs also indicate that if fresh information comes in which would warrant review of the grounds for detention, the review should not be deferred to the next 12 hourly time period, but should take place as soon as practicable. All reviews are to be recorded on the police database for preventative detention orders.

We also note that the Act has now been amended to require police to release a detainee as soon as is practicable where the grounds for detention no longer exist. This was a change that we recommended in our September 2008 report.[137] The SOPs address this new requirement by instructing police to release the detainee as soon as practicable, after consultation with the nominated senior police officer with responsibility for overseeing the order.

3.2 Interaction between the NSW and Commonwealth preventative detention schemes

At the time of our September 2008 Report, NSW Police Force and the AFP were in the process of developing arrangements for the transfer of people detained under federal preventative detention laws into the custody of

135 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Recommendation 25.
136 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 21.
137 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 24.

NSW police. Since that time, while discussions with the AFP have been ongoing, no progress has been made on implementing any such arrangements.

The NSW Police Force advised:

> *The detention of a person under Commonwealth preventative detention arrangements falls within the administrative and operational responsibility of the AFP. In 2007 the AFP initiated dialogue with various states and territories, including NSW, regarding preventative detention issues, including the detention of persons detained under Commonwealth preventative detention orders.*
>
> *Whilst there have been various discussions held to date, the AFP have advised that they have not formally progressed this issue with the NSW Police Force or any other State or Territory agency.*[138]

We acknowledge that this is not a matter that the NSW Police Force can progress unilaterally.

An officer from the Counter-Terrorism and Special Tactics Command told us that the AFP were observing the progress of the negotiations between the NSW Police Force and Corrective Services NSW and Juvenile Justice NSW before progressing the MoU between NSW Police Force and AFP. However, as discussed in Part 3.1.1, the progress of those MoUs with Corrective Services NSW and Juvenile Justice NSW has been frustrated by NSW Police Force concerns about the workability of the preventative detention regime, which may in part be informed by a lack of clarity about how the Commonwealth and State regimes would work together.

As we consider later in Part 5.2, cross-jurisdictional efforts are required to work through these difficulties.

The Federal Commissioner of Police advised us on 6 May 2011 that negotiations regarding an MoU between the AFP and the NSW Police Force to clarify how Commonwealth and NSW preventative detention regimes would operate in practice has now been overridden by the development of:

> *an overarching MoU between [the AFP and the NSW Police Force], which guides overall management of counter terrorism investigations. …*
>
> *Any decision regarding how the NSW and Commonwealth preventative detention regime operates in practice will be made by governance committees described in the overarching MoU. These are the Counter Terrorism Operations Oversight Committee, the Joint Management Committee and Operations Coordination Group.*[139]

The Federal Police Commissioner indicated that he expected the overarching MoU to be finalised in the near future, as it was forwarded to the NSW Police Force for approval and signature in late March 2011.

It remains to be seen if these arrangements will provide sufficient clarity to allow the MoUs between the NSW Police Force and Corrective Services NSW and Juvenile Justice NSW to be finalised.

We will continue to monitor this issue in the course of our ongoing review.

3.3 Utility and necessity of the powers

In our September 2008 report, we commented that counter-terrorism police officers had expressed doubts about the utility of the preventative detention powers, particularly as arrest under criminal law would be a preferred option for dealing with prevention of terrorism. We also noted that officers had expressed reluctance to use the preventative detention powers because of the risk of exposure to criminal liability for breaching obligations imposed upon them by the Act. Discussion of these issues can be found at Part 3.3.1 of our September 2008 report.

These observations, when coupled with the fact that no preventative detention orders have been sought by the NSW Police Force since the powers became available, nor have there been any instances when the NSW Police Force considered use of the powers, raises a question about the utility of the provisions. It also raises a question about whether such powers are indeed necessary in light of other options available to police to respond to acts of terrorism. Additionally the significant delays in finalising the SOPs and the MoUs with Corrective Services NSW and Juvenile Justice NSW appear to demonstrate that the impetus to use the preventative powers is weak.

We asked the NSW Police Force about their current views on the operational utility of the preventative detention powers. The Deputy Commissioner, Specialist Operations, Nick Kaldas commented that as the powers have never been exercised, it was difficult for the NSW Police Force to comment on their operational utility. However, in 2011, senior police from the Counter Terrorism and Special Tactics Command said that it was highly unlikely the preventative detention powers would be used, and they have not been used to date because police consider them

138 Correspondence from the Deputy Commissioner, Specialist Operations, undated, received by the Ombudsman's Office on 21 December 2010.
139 Correspondence from the Federal Police Commissioner, Commissioner Tony Negus, dated 6 May 2011.

to be difficult and unworkable. A senior police officer told us that police would consider any other available measure before considering using a preventative detention order, such as Commonwealth powers to investigate and detain.

3.3.1 Criminal sanctions against police officers

One of the primary concerns held by the Counter Terrorism and Special Tactics Command which influences their view as to the utility of the preventative detention provisions is that criminal sanctions that may be brought against police officers for failure to provide detainees with relevant information once they have been taken into preventative detention make police reluctant to use the powers.[140] In correspondence dated 28 April 2011, the Counter Terrorism and Special Tactics Command advised that the NSW Police Force were 'opposed to the imposition of criminal sanctions upon police officers who would only be performing their duty', and indicated that the sanctions were 'overly proscriptive and unnecessary'.[141] The reasons cited by the Counter Terrorism and Special Tactics Command were that:

- The legislation is complex and operationally difficult to implement – a view which 'is common across all Australian jurisdictions'
- The preventative detention provisions 'are a considerable departure from normal NSWPF custody management procedures (ie. those found in LEPRA). Practice and procedure requirements under the Preventative detention order ('PDO') regime are unique, not being found anywhere else at law. This unfamiliarity increases the likelihood that police may perform or fail to perform an action that results in police being liable for a criminal offence under the Act'.
- The fact that the powers have never been used in any jurisdiction and that use of the powers, while possible was 'not considered probable' makes it difficult for police to ensure 'relevant staff are or remain familiar with all provisions of the PDO scheme'.
- The NSW Police Force considers the legislation contains sufficient safeguards without the criminal sanctions against police officers (such as oversight by the Ombudsman and the judicial scrutiny given to all applications for a preventative detention order).

We acknowledge that there may be difficulties in keeping officer training current in relation to powers that are seldom used. Clear and detailed SOPs may address some of these difficulties, as would appropriate oversight by a senior officer. We recommended in our September 2008 report that the SOPs be finalised as a matter of priority, and note that they were only finalised in January 2011. As noted at 3.1.4 above, we have previously recommended that the police SOPs provide a clear definition of obligations on officers, including guidance about the meaning of the term 'as soon as practicable' as it appears in sections 26Y and 26Z of the Terrorism (Police Powers) Act.

We also note that the Terrorism (Police Powers) Act stipulates that a senior police officer will perform an internal oversight role, ensuring compliance with the obligations on police officers in relation to the person detained.[142] This role is to be filled by an officer of the rank of superintendent or above. Providing an officer in this position is kept well trained and can refer to clear and detailed SOPs, there may be less likelihood that other officers performing functions under the preventative detention warrant will inadvertently commit an offence under the Act.

Preventative detention legislation in all Australian jurisdictions contains offence provisions where police officers contravene the safeguards for persons in detention.[143] These laws uniformly create offences for contravention of provisions regarding humane treatment of the detainee, questioning the detainee about matters other than their identity and the conditions of detention, and taking and using identification material such as fingerprints or DNA other than to ascertain of the detained person is the person named in the order. Only the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), while requiring officers to explain the effect of the preventative detention order and any extension of the order to the detainee, does not make it an offence if an officer fails to perform this function. Some jurisdictions also make it an offence for a person under the age of 18 to be preventatively detained with adults,[144] and in Victoria, it is an offence where contact between a detainee and their lawyer is monitored in some circumstances.[145]

140 See section 26Y, 26Z, 26ZC, 26ZK, 26ZL and 26ZM of the *Terrorism (Police Powers) Act 2002*.
141 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.
142 Section 26R, *Terrorism (Police Powers) Act 2002*.
143 See for example: *Terrorism (Preventative Detention) Act 2005* (Qld), s. 54; *Terrorism (Community Protection) Act 2003* (Vic), s. 13ZN; *Terrorism (Preventative Detention) Act 2006* (WA), s. 50; *Terrorism (Preventative Detention) Act 2005* (SA), s. 45; *Terrorism (Preventative Detention) Act 2005* (Tas), s. 42; *Terrorism (Emergency Powers) Act* (NT), ss. 21ZD, 21 ZG, 21ZP, 21ZQ, 21ZR; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT). Ss. 48 and 58 and Criminal Code (Cth) Division 105.45.
144 See *Criminal Code (Cth)* Division 105.45 (b)(iva); *Terrorism (Community protection) Act 2003* (Vic) s. 13ZN (v); *Terrorism (Preventative Detention) Act 2005* (SA) s. 45(b)(iiia).
145 *Terrorism (Community protection) Act 2003* (Vic) s. 13ZN (vii).

In contrast with the Australian approach, the United Kingdom's detention after arrest scheme includes a code of practice for detention after arrest without warrant under section 41 of the *Terrorism Act 2000* (UK). While it details the obligations of police officers in detaining a person under that Act, it does not contain offence provisions for contravention of these obligations and requirements.[146]

3.3.2 Broader concerns about the preventative detention regime

In addition to the specific concerns about criminal sanctions, the Counter Terrorism and Special Tactics Command the Counter Terrorism and Special Tactics Command advised us that concerns about the operational utility of preventative detention powers are shared across a number of jurisdictions. The Deputy Commissioner, Specialist Operations advised:

> *In 2010, the Investigations Support Capability Coordination Sub-Committee of the National Counter Terrorism Committee (NCTC) held a discussion exercise, involving all Commonwealth, State and Territory jurisdictions, to assess the operational viability of preventative detention legislation. … the NSW Police Force is aware that there was broad concern regarding the actual implementation of the powers, should they ever be required.*[147]

The NCTC advised us that the discussion exercise involved senior investigating officers from various law enforcement agencies discussing a hypothetical scenario in order to compare legislation across jurisdictions, and consider matters such as interoperability, protocols and procedures, evidentiary issues and the effectiveness of preventative detention provisions.[148] Some of the key issues arising from the discussion exercise included:

- Counter terrorism law enforcement officers considered the preventative detention legislation is difficult and operationally impractical.
- Questions regarding the interoperability of preventative detention provisions, including:
  - whether it was lawful to bring preventative detainees held in different jurisdictions to the one jurisdiction
  - questions about when to use Commonwealth or State and Territory preventative detention powers, and how to transition between these two schemes
  - whether a preventative detention order issued in one jurisdiction would allow the subject of the order to be detained in another jurisdiction.
- Consideration about the limitations on interviewing persons detained under a preventative detention order in relation to the terrorist act for which the preventative detention order applies.
- Consideration be given to enabling applications for preventative detention orders to be made electronically, by phone, fax or email.
- Amendments be sought to Commonwealth and State legislation to give police authority to direct persons not to disclose specific information.

Following the discussion exercise, a report was prepared for the Investigation Support Capability Coordination Subcommittee (ISCCSC) of the NCTC detailing the key issues from the exercise and outlining suggested areas for legislative amendment. We understand it indicated that the current preventative detention legislation is 'difficult and impractical to use operationally' and is 'considered unworkable by investigative practitioners'.[149]

The Assistant Commissioner, Counter Terrorism and Special Tactics, indicated that the NSW Police Force shares the views coming out of the NCTC discussion exercise, and correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011 further outlined the NSW Police Force views in relation to the key issues arising from the ISCCSC discussion exercise.

In relation to the view that preventative detention legislation in its current form is difficult and operationally impractical, the Counter Terrorism and Special Tactics Command commented:

> *PDO legislation is considered overly complex and would be difficult to implement operationally. NSWPF endorse this view. PDO legislation is a substantial departure from normal policing custody management. This complexity, coupled with the small probability that the legislation would be used, renders use of the legislation operationally difficult.*

146 *Police and Criminal Evidence Act 1984 (UK),* 'Code H: Code of Practice in connection with the detention, treatment and questioning by police officers of persons detained under section 41 of, and schedule 8 to the Terrorism Act 2000'.
147 Correspondence from the Deputy Commissioner, Specialist Operations, undated, received by the Ombudsman's Office on 21 December 2010.
148 Correspondence from the National Counter Terrorism Committee Secretariat, dated 25 November 2010.
149 Correspondence from the National Counter Terrorism Committee Secretariat, dated 25 November 2010.

Additional complexity is found in that no two pieces of PDO legislation, whether Commonwealth, State or Territory, are the same. Given that counter terrorism investigations have proven to be transnational in nature, the variance between legislation renders them operationally impractical to use.[150]

The discussion exercise also considered the role of the Nominated Senior Police Officer who is appointed to oversight the detention of a person held in preventative detention. The Counter Terrorism and Special Tactics Command advised that the participants considered that a national standard or protocol should be developed regarding the role and function of a nominated senior police officer.

In our view, it would be appropriate for these concerns, particularly those regarding the differences between preventative detention legislation across jurisdictions, to be brought to the attention of the newly appointed National Security Legislation Monitor. Additionally, it may assist in resolving some of the concerns shared by operational police across all jurisdictions if these matters were considered by Ministers of Police through the Ministerial Council for Police and Emergency Management – Police, and by the Attorney General through the Council of Attorneys General. This is discussed further, below, at Parts 5.2 and 5.3.

The Counter Terrorism and Special Tactics Command indicated a range of areas where clarification at the Commonwealth level would be useful to police, including use of the Commonwealth preventative detention legislation in conjunction with State legislation, transitioning from Commonwealth to State or Territory preventative detention schemes and transferring detainees between jurisdictions. The Counter Terrorism and Special Tactics Command also indicated that legal advice was to be sought as a result of the discussion exercise about the issues around transferring detainees between the Commonwealth and State or Territory schemes, or whether preventative detention orders in one jurisdiction have effect in other jurisdictions. We understand that this will be progressed through Commonwealth agencies.

With regard to the issue of the impending expiration of some preventative detention legislation, the Counter Terrorism and Special Tactics Command said that preventative detention legislation could only be effective if 'implemented consistently on a national basis.' The Counter Terrorism and Special Tactics Command was concerned that if one or more jurisdictions did not renew their legislation after the expiration date it would 'adversely impact any design for a nationally consistent PDO scheme (not that there is one at present in any event due to the inconsistency of the various PDO regimes).'[151]

The Counter Terrorism and Special Tactics Command indicated that it supported proposals arising from the discussion exercise to amend Commonwealth, State and Territory legislation to give police the authority to direct persons not to disclose specific information, and prescribe an offence and penalty prohibiting the disclosure of that information. It commented:

The NSW PDO legislation contains an obvious omission, in that a person who is detained under a PDO, or those who are aware that a person is detained under a PDO, are not restricted in any way from disclosing that information to any other person, including possible suspects. This has adverse implications for operational security and may result in destruction of evidence.

This is common to other jurisdictions. Accordingly, amendment is recommended to prevent disclosure of certain details relating to a person detained under a PDO, and for an offence creating provision to be inserted for those persons who do disclose such information.[152]

It does not appear that the NSW Police Force raised this issue in the context of the Attorney General's statutory reviews of the terrorism (Police Powers) Act.

One of the key issues arising from the discussion exercise was that the legislation does not allow police to question the detainee, except in relation to the administration of the preventative detention order itself, or under special legislative conditions such as an ASIO warrant. The Counter Terrorism and Special Tactics Command commented that participants considered that in a preventative investigation phase there would be a need to interview the detainee, and this need may be urgent and critical. The Counter Terrorism and Special Tactics Command further commented:

NSWPF see this prohibition on questioning as one of the operational obstacles in the PDO legislation, together with inability to take/use identification material (eg fingerprints) except for limited circumstances.

150 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.
151 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.
152 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.

> *It is noted that police could temporarily remove a detainee from detention under a PDO to interview them or conduct forensic procedures, but [this] would likely be operationally complex and inefficient in an ongoing terrorism investigation.*[153]

A senior police officer from the Counter Terrorism and Special Tactics command indicated that releasing the detainee from preventative detention and entering that detainee into another form of police custody, such as that under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* or under Commonwealth legislation, may be logistically complex. Police would have to ensure that there are sufficient grounds to place the detainee into another form of custody that would enable questioning, and movement between the regimes may be confusing. We were advised that there may also be a need to physically remove the detainee from the preventative detention location in order to conduct questioning. It may be possible for detainees to be interviewed in a regular interview room (such as those used by welfare officers and case officers), a legal interview room (in which there would be a partition between the detainee and the interviewing officer), and some centres have dedicated police interview rooms. If none of these arrangements were available or suitable, police may need to remove the detainee to a police station to conduct interviews. Some of these matters could potentially be addressed in any MoU between the NSW Police Force and Corrective Services NSW.

In order to remove a detainee from preventative detention to allow questioning under another regime, police would need to be familiar with the requirements of each regime. We acknowledge that the process may have a number of steps, particularly if the detainee is re-entered into preventative detention after questioning is complete. In our view, while this may be a complex process, these arrangements could be appropriately explained in SOPs. However, we acknowledge that officers involved with the legislation feel sufficiently concerned about these potential complexities to regard them as a reason against using the preventative detention scheme. We also acknowledge that in the circumstances that a preventative detention order is being sought, there may be significant time pressures involved - for instance police would need to reasonably suspect that a terrorist act will occur in the next 14 days, or has occurred in the past 28 days.[154] This would support the argument that confidence and familiarity with the scope of the powers and the processes associated with their use would be important.

Further to the police criticism of the limitation on questioning detainees, the discussion exercise raised the possible utility of giving consideration to the United Kingdom model of extended detention after arrest in relation to suspected terrorist offences. The Counter Terrorism and Special Tactics Command said:

> *…the NSWPF sees obvious benefit in replacing the existing PDO legislation with an expanded detention after arrest scheme for terrorism offences, including appropriate judicial and independent oversight safeguards.*[155]

Officers from the Counter Terrorism and Special Tactics command have indicated that a scheme based on arrest and questioning similar to that used in the United Kingdom may be easier to implement than the preventative detention order scheme, as it would be based on commonly utilised procedures, and police would be more likely to be familiar with the nature of the powers than they are with preventative detention powers.

The United Kingdom provisions for arresting a person without charge in order to investigate a suspected terrorism offence (also known as pre-charge detention)[156] are certainly used more than preventative detention provisions in Australia.[157] For example, 106 persons were arrested under these provisions in 2009. A further 101 persons were arrested under other powers but on suspicion of terrorism offences. Of that total of 207, 23 were charged with terrorism or terrorism related offences, and a further 33 were charged with other offences. Ninety-five were released without charge, and others were the subject of alternative action such as transfer to immigration authorities or summonses to be dealt with under mental health legislation.[158] Lord Carlile of Berriew's *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* found only 11% of terrorism arrests resulted in a terrorism or related charge in 2009.[159] Of those charged in 2009, 11 have been prosecuted, and of these eight convicted, although only two were convicted under terrorism legislation, the others under other criminal legislation. One of those charged was found not guilty and 11 are still awaiting court proceedings.[160]

In terms of the length of detention, of the 106 persons arrested in 2009 under s. 41 of the *Terrorism Act 2006*, 21 were released after eight days had passed. Seventeen were held for six to seven days, and 34 held for under one day. Since 11 September 2001, a total of 6 people have been held in pre-charge detention for 27-28 days, and five other people were held for more than 14 days.[161]

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153 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.
154 *Terrorism (Police Powers) Act 2002*, s. 26D.
155 Correspondence from the Counter Terrorism and Special Tactics Command dated 28 April 2011.
156 *Terrorism Act 2000* (UK) s. 41.
157 See above at Part 2.1.3 for further detail about the pre-charge arrest provisions under *Terrorism Act 2000* (UK) s. 41.
158 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2010, p. 28.
159 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2010, p. 28.
160 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2010, p. 77.
161 Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006,* July 2010, p. 76.

While the pre-charge detention provisions are utilised by police in the United Kingdom, it is worth noting that there is a substantial difference in the nature of the United Kingdom pre-charge detention scheme and the scheme in NSW (and other jurisdictions in Australia). The United Kingdom scheme is designed for the purpose of investigation and questioning where a person has been arrested without charge on suspicion of engaging in terrorist acts. Under the United Kingdom scheme, detention is not allowed solely for the purpose of preventing a terrorist act from being committed.

By contrast, in NSW preventative detention is for the purpose of either preventing an imminent terrorist act, or preserving evidence of a terrorist act which has already been committed.[162] The fact that police are limited in their capacity to question a person held in preventative detention appears to be because the nature of the detention is *preventative* rather than *investigative* – it is limited to removing a person's capacity to participate in a suspected terrorist act or removing their capacity to destroy evidence of a terrorist act that has been committed.

Notwithstanding this, questioning may occur within NSW and other Australian jurisdictions under other investigative schemes. As we noted in our September 2008 report, 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.[163]

While we agree that preventative detention is of limited utility from an investigative perspective, in our view, the availability of questioning powers under alternative detention regimes does appear to enable investigations to be pursued. We note that the NSW Police Force has indicated that transfer between the preventative detention scheme to another scheme which allows questioning may be complex, especially if officers are unfamiliar with the processes under preventative detention. In our view, it also remains unclear whether a pre-charge detention scheme would avoid the complexities involved in making sufficient arrangements for the accommodation of detainees in correctional or juvenile justice centres.

However, one of the key concerns that the NSW police officers appear to have with the preventative detention scheme is the requirement that police must reasonably suspect that a terrorist act is 'imminent'[164] – that it is expected to occur within the next 14 days.[165] The NSW scheme is designed to *prevent* an act or the destruction of evidence, and as such some temporal nexus to an act or a suspected act is necessary as a limit to arbitrary detention. The United Kingdom approach, which is not preventative but investigative can do away with this temporal nexus, but would not necessarily serve the purpose of preventing a suspected terrorist act from occurring.

The Counter Terrorism and Special Tactics command has also conveyed to us that the threshold for arrest and pre-charge detention under s. 41 of the *Terrorism Act 2000* (UK) is the same as that in the NSW preventative detention legislation – officers must have 'reasonable suspicion' that the person to be detained is involved in an act of terrorism.[166] It appears that the Counter Terrorism and Special Tactics command are suggesting that if the threshold for arresting without charge to investigate a terrorism offence were the same as that for applying for a preventative detention order, there would be no significant alteration of the grounds upon which police can exercise the powers. In our view, as the United Kingdom pre-charge detention scheme does not specify any temporal nexus to a suspected or actual terrorist act, there is a marked difference in the circumstances under which police are authorised to exercise pre-charge detention as opposed to preventative detention powers. Ostensibly, it may be easier to satisfy the requirements for using pre-charge detention than preventative detention, as police would not need to suspect the terrorist act was likely to occur in 14 days or had already occurred. This regular use of pre-charge detention powers in the United Kingdom, compared with the non-use of preventative detention powers in Australia may be illustrative of the fact that the threshold for pre-charge detention is easier to cross than that for preventative detention.

We have noted that law enforcement officers who participated in the NCTC discussion exercise considered the preventative detention powers 'unworkable'. However this does not appear to have posed any significant impediment to the capacity for police to engage in terrorism related investigations. While preventative detention powers have not been used or seriously considered by police, the NSW Police Force continues to be involved in counter-terrorism investigations.

162 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Part 3.11.
163 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 3.11.
164 Correspondence from the Counter Terrorism and Special Tactics Command, dated 28 April 2011.
165 *Terrorism (Police Powers) Act 2002*, s. 26D.
166 Correspondence from the Counter Terrorism and Special Tactics Command, dated 28 April 2011.

Commenting on whether the existing provisions under Commonwealth criminal legislation were sufficient for the purposes of preventing and investigating imminent terrorist acts or preserving evidence of recent terrorist acts, the Deputy Commissioner Specialist Operations said:

> *The range of powers available to the NSW Police Force under Commonwealth and State legislation have proved sufficient in relation to counter terrorism criminal investigations undertaken in this jurisdiction.*[167]

The Deputy Commissioner Specialist Operations advised us that the Part 2A powers 'were enacted by the NSW Parliament and are available for use by the NSW Police Force as and when necessary'.[168] However, to date no instances have arisen under which it has been considered necessary to use the powers.

While the preventative detention scheme does not appear to be operationally useful in its current form, it remains unclear as to whether there is any real need for an alternative scheme in order for police to continue the work they are doing to protect the community and respond to a terrorist threat. The case for an alternative scheme would need to be clearly made out, and wide consultation about the likely impact of pre-charge detention would be important. While we have outlined some of the views of the NSW Police Force in relation to this matter, a more thorough exploration of the merits and need for an alternative to preventative detention is beyond the scope of this report.

3.3.3 Comment

In our view, the preceding discussion suggests that the preventative detention powers may not be needed by police in order to respond to the threat of terrorism in NSW. As we have seen, the preventative detention powers have not been used, agreements with other agencies involved in preventative detention are yet to be finalised and there has been significant delay in finalising NSW Police Force SOPs and MoUs. To date, the NSW Police Force has not made out a strong case for the retention of the powers.

Police have recently provided us with detail around their concerns with the preventative detention scheme. However, it is not clear what other work has been undertaken by the NSW Police Force to have these concerns addressed, and remedy any problems in the legislation such as the concerns about whether the Act may make some officers vicariously liable for the actions of others, discussed above at 3.1.3.4. While some issues, insofar as they are shared across jurisdictions, have been discussed within the National Counter Terrorism Committee, it does not appear that police concerns specific to the NSW legislation have been advanced by the NSW Police Force beyond the recent provision of advice to this office. For instance, the difficulties police have in using the powers, and the concerns that were described to us, were not canvassed in the Department of Attorney General and Justice's June 2010 *Review of the Terrorism (Police Powers) Act*.

A further indication that the preventative detention powers within NSW may not be necessary is that to date, the other powers available under State and Commonwealth legislation appear to have been sufficient to enable police to carry out the work needed to respond to any terrorist threat. While it is important that police have appropriate tools to ensure the safety of the community and to respond to and investigate terrorism, it appears that the preventative detention powers may not be essential to this task. Senior officers within the Counter Terrorism and Special Tactics Command have repeatedly indicated that 'whilst it is possible that the PDO powers may be utilised, it is not considered probable that they would be used.'[169] If the preventative detention powers were an essential tool for responding to the threat of terrorism, we would have expected police to have taken further action to resolve the concerns about the difficulty and unworkability of the legislation in the five years that have passed since those powers were created. If those powers were seriously unworkable and yet essential to the law enforcement response to terrorism, this could place the community at an unacceptable risk of vulnerability to a terrorist threat – however this argument has not been made by the NSW Police Force.

In light of the above observations, we suggest that further consideration be given to whether there is indeed a need for the NSW Police Force to retain powers to place persons under preventative detention. Unless the NSW Police Force make out a clear case as to why the powers are needed, and have taken action to resolve its outstanding concerns about the difficulty and workability of the legislative provisions, it may be concluded that the preventative detention powers are not needed. There may be a case that resources spent on the ongoing management of issues related to implementing the preventative detention powers would be better spent refining alternative powers which are considered workable and effective by police.

We will continue to keep under scrutiny the exercise of the powers and report on this matter again in a further three years. However, at this stage, we suggest there would be a strong case to allow the powers to lapse in 2015 if the powers remain unused and if the issues which make police reluctant to use the powers remain unresolved.

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167 Correspondence from the Deputy Commissioner, Specialist Operations, undated, received by the Ombudsman's Office on 21 December 2010.
168 Correspondence from the Deputy Commissioner, Specialist Operations, undated, received by the Ombudsman's Office on 21 December 2010.
169 Correspondence from the Counter Terrorism and Special Tactics Command, dated 28 April 2011.

In making this suggestion, we acknowledge that the preventative detention powers were implemented in NSW in order to complement Commonwealth preventative detention powers, which also have not been used to date. We also acknowledge that at the Council of Australian Governments meeting in September 2005, State and Territory leaders agreed to enact legislation including preventative detention of up to 14 days.

If the case can be made that preventative detention powers are indeed a necessary counter terrorism tool, further consideration should be given to the potential difficulties in using the powers, while at the same time ensuring that any amendments to the powers are in line with Australia's human rights obligations and contain appropriate safeguards for protecting the rights of individuals.

Reviews by the Attorney General are required to be undertaken every three years, as soon as possible after the Ombudsman's report under the Act is tabled in Parliament.[170] It would appear that the next review by the Attorney General is due to be conducted as soon as possible after this report is tabled in Parliament. We suggest that the question of whether the preventative detention powers are needed should be considered in the next statutory review, taking into account the range of other powers available to police to respond to and investigate terrorism. As Part 2A is due to expire in December 2015, we suggest that this issue should be considered in detail prior to that expiry or any decision to extend the powers beyond that date.

Recommendations

12. The NSW Police Force lists the concerns it has with the preventative detention powers in their current form, along with suggestions for resolution, and provides this document to the Attorney General for consideration. The NSW Police Force should also provide a copy to the Ombudsman.

13. The next statutory review of the Act consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the non-use of those powers in the five years following their creation and the other powers available to police to respond to and investigate terrorism.

On 1 July 2011 the Commissioner of Police agreed to convey any concerns and suggested solutions identified by the NSW Police Force to the Attorney General for consideration, noting that this does not suggest the powers under the Act could not be used if required. The Commissioner commented that 'the circumstances necessitating the use of powers have simply not arisen during the review period' and that any review of the Act 'will need to recognise the significant deterrent effect of these powers and the associated terrorism legislation as an important factor when considering the ongoing need for powers of this variety'. The NSW Police Force did not include any detail regarding the deterrent effect of the powers. Any such information outlining the deterrent effect of the powers would be of relevance to a statutory review of the powers, and it is suggested such information be provided in the course of the next statutory review.

170 *Terrorism (Police Powers) Act 2002,* s. 36(2).

Chapter 4. Covert search warrants

The nature of covert search warrant powers in NSW are outlined above at Part 1.3.2.

At the time of writing, no covert search warrants have been sought or executed in NSW since we last reported on these powers. Nor have any police officers sought authorisation from the Commissioner of Police to apply for a covert search warrant. Notwithstanding this, in Parliamentary debate on the Crimes Amendment (Terrorism) Bill 2010, Members of Parliament commented that the covert search powers remained an essential part of the New South Wales counter-terrorism strategy.[171]

Some of the information obtained under the covert search warrants previously executed has been used in the prosecution of individuals for terrorism related offences. In 2009 five men were convicted of a range of terrorist offences, following the Joint Counter Terrorist Team's Operation Hammerli/Pendennis Eden. The Operation took place between 2004-2006, and involved a range of surveillance activities, including the execution of two covert search warrants in 2005. The information collected from those covert search warrants formed a part of the large brief of evidence which consisted of 150 lever arch folders and large volumes of electronic surveillance.[172]

The trial, which commenced in 2008, lasted 181 days, and followed 110 days of pre-trial arguments.[173] The prosecution did not suggest there was any firm evidence of a particular terrorist act having been planned, but outlined a chronology of events comprising circumstantial evidence which the Crown Prosecutor said made up a 'mosaic or large jigsaw puzzle' showing the accused were guilty.[174] In early 2010 the five men each received sentences of between 23 and 28 years.

Five other men who were also arrested in 2005 in relation to the planned terrorist act pleaded guilty to various terrorism related charges, including possessing a thing connected with preparation for a terrorist act.

However, not all information collected under the covert search warrants we have previously reported on has been used in court proceedings. Swabs taken to find evidence of explosive material during the execution of a third covert search warrant in 2006 were not admitted in evidence when the relevant matter was brought to trial. In that matter, the accused were charged with conspiring to plant a bomb in Kings Cross, but were acquitted after trial in the Supreme Court in 2008.

While covert search warrants have not been used in NSW in relation to investigating terrorism offences, they have been widely used in the investigation of other serious crime after the introduction of covert search warrant provisions into the Law Enforcement (Powers and Responsibilities) Act in May 2009. This will be explored further at Part 4.4 below.

4.1 National covert search warrant scheme

In September 2010 the *Crimes Amendment (Terrorism) Act 2010* was passed. It extended the operation of a sunset clause for the offence of being a member of a terrorist organisation contained in section 310L of the *Crimes Act 1900 (NSW)*. The offence was created in 2005 to ensure the constitutional validity of the covert search warrants in NSW. The offence was initially introduced as a temporary measure only, pending the introduction by the Commonwealth of a national covert search warrant regime. A national scheme has not yet been created.

The NSW offence of being a member of a terrorist organisation was due to lapse on 13 September 2010. The offence provisions form the legal basis for covert search warrant powers. Had the offence provisions lapsed, police would have been unable to apply for covert search warrants, which can only be authorised in relation to detecting or preventing terrorist acts, as defined in the Crimes Act. The extension of the offence provisions under the Crimes Act had the effect of extending the covert search warrant powers under Part 3 of the Terrorism (Police Powers) Act for a further three years.

The introduction of covert search warrant powers for federal police in the form of delayed notification search warrants was considered under the Crimes Legislation (National Investigative Powers and Witness protection) Bill 2006. That Bill lapsed with the 2007 federal election, and at the time of writing no alternative federal scheme has been proposed.

171 See Hansard, 7 and 8 September 2010.
172 *Police Weekly*, Volume 22 No 8, 15 March 2010 p. 7.
173 NSW Police Force Media Release, 'Operation Hammerli Pendennis Eden', www.secure.nsw.gov, 16 October 2009, accessed 2 February 2011.
174 Madden, James, 'Five Men guilty on terrorism charges', The Australian, www.theaustralian.com.au, 16 October 2009, accessed 2 February 2011.

While there are currently no public proposals for a national covert search warrant scheme, the Commonwealth Government has passed changes to national security legislation which grant the Australian Federal Police additional powers to search premises without a warrant in emergency circumstances, where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises and there is a risk to the health or safety of the public.[175] The legislation allows police to take immediate action to enter premises to render them safe, and allows police to seize dangerous objects that they reasonably suspect are being used in connection with terrorist activity and that pose an immediate threat to public safety.

4.2 Implementation of our previous recommendations

In our September 2008 report, we made 12 recommendations in relation to the covert search warrant provisions and operational issues pertaining to the use of covert search warrants. Of those, seven have been implemented or partly implemented. Three are awaiting implementation - the relevant agency has indicated support for the recommendation or has commenced steps to implement it, but the recommendation has not been fully implemented. Two of our recommendations regarding covert search warrants were not accepted.

A table outlining the implementation status of each of the recommendations we made in our September 2008 report can be found at Annexure 1.

4.2.1 Assistants to covert searches

In the three covert search warrants that were executed in 2005-2006, a number of special assistants were used to support the officers with responsibilities of executing the search. All of the assistants were officers from the NSW Police Force, however there is provision for specialist assistants to be persons from outside the NSW Police Force, such as chemists, translators and locksmiths.

In our September 2008 report, we recommended that Parliament consider inserting a code of conduct applicable to law enforcement officers and assistants executing covert search warrants. We recommended the code of conduct should require all officers and assistants to be properly briefed, abide by the terms of the warrant, and maintain confidentiality.

This recommendation was not supported by the Government who considered it unnecessary given that there had been no misuse of the provision allowing specialist assistants to date.

We will continue to monitor the activities of any assistants to the execution of covert search warrants as part of our ongoing review role.

4.2.2 Covert collection of DNA samples

In our 2008 report we considered the potential for DNA samples to be collected under a covert search warrant (other than directly from a person).[176] While the Act does not explicitly authorise the collection of DNA samples during a covert search, a covert search warrant may authorise the 'testing of a kind of thing.'[177] To date, no covert search warrants have authorised the collection of DNA.

In late 2008 the Department of Attorney General and Justice was considering the development of a regulatory framework regarding the covert collection of DNA samples for law enforcement purposes.

We recommended the Department of Attorney General and Justice consider the submissions to our report in developing any such regulatory framework.[178]

The Government supported this recommendation, indicating that the review of the *Crimes (Forensic Procedures) Act 2000* was taking place, and would consider the submissions regarding covert sampling of DNA. At the time of writing, the Department of Attorney General and Justice was yet to finalise that review.

We will continue to monitor the issues surrounding the collection of DNA under covert search warrants.

175 National Security Legislation Amendment Bill 2010, Schedule 4.
176 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 4.4.5.
177 *Terrorism (Police Powers) Act 2002* s. 27O(1)(l).
178 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 27.

4.2.3 Video recording of searches

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

In our September 2008 report, we considered whether there should be a legislative requirement that searches be recorded, in the interests of accountability.[179] We also considered the practices of the NSW Police Force in recording the three covert searches that were executed in 2005.[180]

We recommended legislative amendment to require covert searches to be recorded unless there are compelling reasons which would make recording the search impractical. In addition, we recommended that the covert search warrant SOPS should require officers to record searches in their entirety unless there are compelling reasons that would make it impracticable to do so. We also recommended that the report to the judge subsequent to the execution of a covert search warrant advise whether the search had been recorded (including a copy of the video if it has) and, if not, outlining the reasons why it was not practicable to record the search.

While the Government did support the recommendations in principle, the recommendations for changes to the legislation and the SOPs to require officers to record the covert search warrants have not been implemented. The Government did not consider a legislative requirement for video recording covert search warrants was appropriate due to operational issues. By comparison, there is a requirement under Queensland's *Police Powers and Responsibilities Act 2000* that covert searches (which may be granted to investigate a range of serious offences and organised crime as well as terrorism offences) be videotaped, if practicable.[181]

The NSW Police Force SOPs reinforce the desirability of recording the execution of covert search warrants, but do not explicitly set out advice as to what might be 'compelling' circumstances which would make recording searches impracticable, 'as this may result in a disproportionate focus on a limited set of circumstances'.[182] Where police are not in a position to record covert searches, the SOPs require them to explain why this is the case. The NSW Police Force advised that they were 'acutely aware, particularly with covert search warrants, of the advantages that are gained by video - taping the execution of a search warrant.'[183]

Police have amended the covert search warrant SOPS to include that the report to the judge should include information about whether the search was video recorded, and if not, a statement as to why.

As there have been no further uses of the covert search warrant powers, we have not had the opportunity to observe the way the amended SOPs have addressed the issue of accountability in the conduct of covert searches. We will continue to monitor the way covert search warrants are recorded in our ongoing review role.

4.2.4 Adjoining premises

An eligible officer may enter adjoining premises 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. 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. If the warrant authorises entry, the adjoining premises may be entered using whatever force is reasonably necessary for the purposes of entering.

The application form that police use for covert search warrants includes entry to adjoining premises. In our September 2008 report, we noted the form had the potential to create confusion as to whether entry to adjoining premises was required. In four of the five warrants sought in 2005-2006, authority to enter adjoining premises was provided. However, no adjoining premises were actually entered. The NSW Police Force advised that the applicants for three of those warrants had not intended to apply for entry to adjoining premises, but did so by default because entry to adjoining premises was included in the police application form and warrant documents. In relation to one of the warrants, the NSW Police Force advised the request to enter adjoining premises was made in error.

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. The forms that have been in use to date have not been approved by the Attorney General, but have been created by the NSW Police Force.

179 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Part 4.4.7.
180 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Part 4.4.8.
181 *Police Powers and Responsibilities Act 2000* (Qld), s216(e).
182 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 40.
183 Correspondence from the Office of the Commissioner dated 23 December 2009.

To avoid inadvertent application for or authorisation of entry to adjoining premises, we recommended that the pro forma application document be amended so that applicants and judges are prompted to consider whether entry to adjoining premises is required.[184] We also recommended that any forms developed by the Attorney General should clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.[185]

We suggested that until any form is approved by the Attorney General the NSW Police Force should take steps to amend the forms currently in use. We recommended the forms or pro forma document should be included in the covert search warrant SOPs.

These recommendations were all supported. However, at the time of writing, all were yet to be implemented.

The Government indicated that forms similar to the covert search warrant forms that have been developed under the Law Enforcement (Powers and Responsibilities) Regulation would be developed – however did not specify which agency would develop the forms.

Form 1A under that regulation includes application for authorisation to enter adjoining premises as an additional item that must be deleted if not required. If required, the address of the adjoining premises, the grounds for seeking entry to the adjoining premises and the grounds for dispensing with serving notice on the occupier of the adjoining premises must all be filled out by the applying officer. Form 9A, the covert search warrant form under the Law Enforcement (Powers and Responsibilities) Regulation, includes authorisation of access to adjoining premises as an additional item that must be deleted if not required. The instructions on these forms clearly indicate that the items regarding access to adjoining premises must be deleted if inapplicable. Use of similar instructions in forms regarding covert search warrants under the Terrorism (Police Powers) Act would assist in avoiding the inadvertent application for or authorisation of entry to adjoining premises.

At the time of writing, no forms had been approved by the Attorney General under the Terrorism (Police Powers) Act, although a form existed under the Law Enforcement (Powers and Responsibilities) Regulation in relation to serious crime covert search warrants.[186] The NSW Police Force had not taken steps to amend their pro forma documents. We have been advised by a senior counter terrorism police officer that this is because the NSW Police Force was awaiting the development of forms by the Department of Attorney General and Justice.

While no covert search warrants have been sought since we last reported on this issue, given the confusion created by the existing forms, we consider it important that the relevant documents and forms be amended as a matter of priority, to avoid any similar errors occurring should there be further applications for covert search warrants.

Recommendations

14. As a matter of priority, the NSW Police Force amend the standard covert search warrant pro forma application document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.

15. The Attorney General finalise the development of forms to be used by applicants and judges in the administration of the Act, and that the form clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.

On 1 July 2011, the Commissioner of Police advised that the NSW Police Force would review the covert search warrant documents and implement any necessary amendments. He also advised that the issue of forms for use by applicants and judges has been raised with the Ministry of Police and Emergency Services. The Commissioner said while recommendation 15 is a matter for the Attorney General, he had no objection to it.

The Department of Attorney General and Justice advised us that the forms are under development jointly by that Department and the NSW Police Force.[187]

4.2.5 Annual reporting

Section 27ZB requires the NSW Police Force to provide the Attorney General and the Minister for Police with an annual report on the use of covert search warrants. Those reports are required to be tabled in each house of parliament as soon as practicable after they are received by the Attorney General.

184 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002,* September 2008, Recommendation 30.
185 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, Recommendation 31.
186 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 1A.
187 Email correspondence from the Department of Attorney General and Justice dated 27 June 2011.

In our September 2008 report, we noted that the Annual Report for 2005-06 had not been completed, and recommended that this report be finalised and issued as required under the section. The NSW Police Force advises this was due to an oversight. The report for 2005-06 was issued in June 2010 and was tabled in Parliament on 31 August 2010. That report outlined the applications for five covert search warrants in that period. Three of those covert search warrants were executed. We considered those applications and the execution of those warrants in Chapter 4 of our September 2008 report.

The 2008-09 annual report under section 27ZB by the NSW Police Force was tabled on 11 November 2009. The annual report by the NSW Crime Commission was tabled on 10 September 2009. The reports indicate that neither the NSW Police Force nor the NSW Crime Commission sought or executed any covert search warrant in the period from 1 July 2008 to 30 June 2009.

Reports for 2009-10 were required to be issued by 31 October 2010.[188] On 31 January 2010, the Director General of Department of Attorney General and Justice advised that reports from the NSW Police Force for the year 2009-10 had 'only recently' been received, and the Attorney General's Office was in the process of making arrangements to have them tabled out of session in the Legislative Council.[189] We were advised by the NSW Crime Commission that due to an omission, no report had been prepared for the 2009-10 year. A report was prepared and issued to the Attorney General in March 2011. It indicates that no applications for covert search warrants under the Act were made in 2009-10.[190]

4.2.6 Search records

The requirement to destroy covert search records 12 months after the execution of the search warrant has now been removed from the Act.[191] This was a change recommended in our September 2008 report, and we note that Department of Attorney General and Justice also received a submission from Legal Aid on that matter.

The records relating to the covert search warrants sought in 2005 had not been destroyed by the NSW Police Force. This is due to ongoing court proceedings about matters relating to the records. Now that the Act has been amended, there is no requirement that these records be destroyed.

The removal of the requirement to destroy covert search warrant records will enable regular inspection of covert search warrant records to ensure accountability of the law enforcement agencies exercising the powers. Should any further covert searches be sought, we will consider whether appropriate confidentiality provisions are in place.

4.3 Consideration of use of covert search warrants

4.3.1 Requiring information about consideration of the powers

As there had been no applications for covert search warrants made by police since 2006, and no applications made by the NSW Crime Commission at all, we asked whether the NSW Police Force or the Crime Commission had cause to seriously consider using covert search warrant powers in relation to investigating, preventing or responding to an act of terrorism since we last had a role in monitoring their use (September 2007). We sought details about how such decisions were made and, if the covert search warrant provisions had been seriously considered but not used, the reasons why it was ultimately decided not to use the provisions.

The NSW Crime Commission indicated that since September 2007 there have been no instances where the covert search warrant powers were seriously considered by the Commission. While the Crime Commission has been involved in terrorism related investigations it has not found any need to apply for a covert search warrant to date.

The NSW Police Force confirmed that no applications were sought, nor has the initial stage of seeking a covert search warrant – where a police officer applies to the Commissioner of Police for authorisation to use the covert search warrant powers – occurred since our last review. However, the NSW Police Force has refused to provide this office with information about whether covert search warrants were seriously considered but not used since our last report.

188 *Terrorism (Police Powers) Act 2002*, s. 27ZB.
189 Correspondence the Department of Attorney General and Justice dated 31 January 2011.
190 Correspondence from the NSW Crime Commission, dated 7 March 2011.
191 *Terrorism (Police Powers) Amendment Act 2010*, Schedule 1 clause [21].

Without confirming whether the use of covert search warrants was considered in any matter, the NSW Police Force advised that 'relevant operations where use of the powers were considered but not used is inherently sensitive in nature and may be ongoing'.[192] The Commissioner of Police said that the request for information about considered use of the covert search warrant powers was outside the scope of our Information Agreement. A senior police officer within the Counter Terrorism and Special Tactics command further advised us that such information pertains to matters of national security, and can only be exchanged with organisations that will use it to mitigate the threat of terrorism.

We acknowledge the sensitivity of information relating to terrorism investigations. In seeking information about considered uses of the covert search warrant powers, we advised the NSW Police Force that we did not seek for information that would put operations at risk and would consider receiving the requested information in a form that did not disclose any particulars that may put ongoing operations at risk.

The Terrorism (Police Powers) Act envisages that in order to report to Parliament about the way police use the powers conferred on them under the Act, the Ombudsman will be privy to sensitive information, including matters that are the subject of ongoing investigation such as the taking of people into preventative detention and applications for covert search warrants.

We have experience in managing such information sensitively and maintaining appropriate levels of security around such information. Prior to completing our first report under the Act, we received information about covert search warrants sought by NSW Police Force. We managed that information sensitively and in accordance with security standards for such information. In the course of fulfilling our other functions the Ombudsman has access to a wide range of sensitive information, such as information about surveillance devices, witness protection and covert operations, and criminal intelligence information relevant to proceeding under the *Crimes (Criminal Organisations) Control Act 2009*.

We do not accept the assertion that information about whether the NSW Police Force has considered using covert search warrant powers cannot be provided to us either on grounds of information security or the extent of our review responsibilities.

The Terrorism (Police Powers) Act gives the Ombudsman the power to require the Commissioner of Police, the Crime Commissioner or the Director General of the Department of Attorney General and Justice to provide us with information about the exercise of the covert search warrant powers.[193] We consider the provisions that empower the Ombudsman to require information about the exercise of the powers includes the capacity to require information directly related to the exercise of the powers and matters that are reasonably incidental to the exercise of the powers.

To limit our review to only reporting on when powers have been actioned would significantly reduce the utility of our review. It would mean that Parliament may not be provided with important information about whether the powers are effective, the level of preparedness or readiness to use the powers should the need arise, or whether there are difficulties with the way the powers have been constructed or construed that has limited or prevented their use by police. These are matters that have been the subject of past legislative reviews by this office, and have provided Parliament with important information relevant to decisions as to whether the repeal, reform or enhancement of police powers is warranted.

For example, during our review of the *Police Powers (Internally Concealed Drugs) Act 2001*, the powers under review were used only once. Our consideration of the reasons why the powers were used so infrequently revealed a range of issues, including industrial concerns around retrieval of evidence that had been internally concealed, concerns about the capacity of medical imaging to identify internally concealed drugs, and doubts about whether drugs which have been ingested can be recovered intact if allowed to pass naturally through the body. We also considered the significant expense to police and health services, including the cost of the scan and detention at a hospital, in an attempt to obtain evidence of what may be a relatively minor offence. The principal recommendation of the report was that Parliament consider whether the Act should remain in force. The Act was repealed in 2005.

In our view, to properly fulfil the role Parliament has asked of the Ombudsman - to keep under scrutiny the exercise of powers conferred on police - we must consider the reasons for very limited use of the powers or failure to use the powers. Such issues may illustrate the way police officers exercise their discretion as to whether or not to use the powers available to them. This may highlight whether the powers are useful in an operational sense, whether thresholds for using the powers have been appropriately set, or whether there are other issues which may impact on the frequency of use of the powers.

192 Correspondence from the Office of the Commissioner, 2 February 2011
193 Section 27C(2) *Terrorism (Police Powers) Act 2002*.

On the issue of information security, while there is good reason to limit the circulation of information about counter terrorism investigations, in our view the provisions in the Act which enable us to require the provision of information about the exercise of the powers mean that police may be required to provide us with sensitive information about investigations so that we can fulfil our monitoring role. Limiting the sharing of information with other departments and law enforcement agencies to circumstances where the information will be used to mitigate terrorist threats makes good sense in terms of information security, as it will limit the risks associated with unnecessary circulation of sensitive information. However, section 27ZC of the Terrorism (Police Powers) Act creates a legal requirement for the information to be provided to the Ombudsman outside of such circumstances. This is necessary for us to independently monitor the way these police powers are exercised.

The Commissioner's decision to withhold information surrounding considered use of the powers is contrary to his agreement to provide us with similar information about other police powers. The NSW Police Force provided us with details about whether police considered the use of preventative detention orders, as outlined above at Part 3.3. In our other monitoring roles, the NSW Police Force provides us with information about considered use of police powers. For example, police bi-annually provide us with information about the considered use of powers to prevent or control public disorder, under Part 6A of the Law Enforcement (Powers and responsibilities) Act. This kind of information is particularly useful for assessing the way police make decisions about when it is appropriate to use extraordinary powers that are not commonly exercised.

We also note that the NSW Crime Commission responded to our request for information about considered uses of the covert search warrant powers.

While we consider that our capacity to require information under the Act includes the capacity to require information about whether use of the powers is necessary, an amendment to the Act may make this capacity abundantly clear. Accordingly, we recommend that Parliament consider amending the Act to make it clear that the Ombudsman's review role extends to consideration of the use of the powers.

Recommendation

16. That Parliament amend sections 26ZO(2) and 27ZC(2) of the Act to indicate that the Ombudsman may require information about the considered use of the powers.

On 1 July 2011, the Commissioner of Police advised that he did not support recommendation 16, commenting that the 'significant expansion of powers, to the extent where information may be sought about when police are merely considering using the powers does not enhance accountability'.

In our view, the suggested amendment at recommendation 16 does not expand the powers of the Ombudsman to require information, but merely clarifies them to avoid confusion and the difficulties of gaining access that we have experienced in requesting for information relevant to this current report.

The Commissioner further commented that 'it is possible to foresee situations where the NSW Police Force could be compelled to provide information to the Ombudsman which would, in certain circumstances, be counter-productive to investigations'. He stated that 'ongoing investigations or matters involving security intelligence partners would be deleteriously effected by this requirement and that it is not necessary for the Ombudsman's scrutiny to extend this far into operational policing.'

In our view, the purpose of the Ombudsman's role under the Act is to keep operational policing under scrutiny. The Act enables the Ombudsman to require information about the exercise of powers and does not exclude information relating to ongoing investigations from this ambit. To do so would significantly restrict the capacity of the Ombudsman to provide Parliament with meaningful information about the exercise of powers, including issues relating to the limited use of powers, or failure to use powers.

The Commissioner did not provide detail as to how ongoing investigations may be deleteriously affected in circumstances where this office is provided information that the use of covert search warrants had been considered. Nor did he otherwise expand on the 'situations' he thought it possible to foresee. In the past, the NSW Police Force has appropriately provided this office with information pertaining covert search warrants executed but where notification to the owner of the premises has been postponed. These were essentially ongoing investigations, and we have not been advised of any adverse impact the provision of that information had on ongoing investigations. It is difficult to see how provision of information about circumstances where the powers were seriously considered but ultimately not used would impact on ongoing investigations any differently. As such, the grounds of the Commissioner's objection remain unclear.

On 27 July 2011 the Chief Executive Officer of the Ministry for Police and Emergency Services indicated he shared the concerns of the NSW Police Force regarding recommendation 16. In addition to the concerns raised by the NSW Police Force he suggested the Attorney General's policy review could consider issues relating to imperfect construction of the powers. He also commented that public interest in inquiring into the non-use of a power is slight. The Chief Executive Officer also suggested that documentary records relating to decisions not to use a power might be fragmentary and the decision not to use the powers may arise from a complex set of factors including 'operational need, risk and resourcing and differing officers' legitimate disagreement over the rating of such complex issues is one that does not require external oversight, especially where no member of the public has been affected'.

We note the Department of Attorney General and Justice did not raise any concerns with this recommendation.

With regard to the nature of records kept about incidents in which serious consideration has been given to the use of a power ultimately not used, it is reasonable to expect the NSW Police Force would have generated sufficient records of that decision making process.

We also acknowledge that in any matter where there is serious consideration of the powers, whether or not they are ultimately used, there may be complex factors influencing the final decision. We would consider those factors with the same sensitivity whether the powers are used or not.

Our review of incidents where the covert search warrant powers have been seriously considered does not require the generation of additional operational records and it creates no additional operational risks. However, our request for this information, which is both important and relevant to our review role, has been met with resistance. In light of the difficulty we have experienced in gaining access to this information, we remain of the view that our capacity to require such information needs to be clarified so that we can properly fulfil the role Parliament has asked of us.

4.3.2 Ongoing utility of the powers

Since we last reported, the NSW Police Force continued to be actively involved in counter-terrorism activities, including involvement in the prevention of a threatened attack on the Holsworthy Army base in Sydney.[194] This involvement, coupled with the non-use of the powers, raises a question about whether the covert search warrant powers remain useful or necessary for the purpose of detecting, preventing or investigating terrorist acts.

The NSW Crime Commission commented that it had 'no current concerns about the operational utility of covert search powers under the Act'.[195]

While not commenting on whether the use of the powers has been considered since our last review, the NSW Police Force advised it has no concerns regarding the operational utility of the covert search warrant powers, and that despite not being used since 2006, the powers have operational utility 'as evidenced by use of the powers in previous counter terrorism investigations'.[196] Unlike the preventative detention powers, it does not appear that police hold any concern about the workability of the covert search warrant powers.

In March 2011, Assistant Commissioner Peter Dein told *The Australian* that the Counter Terrorism and Special Tactics Command were involved in 12 investigations, however none were at the stage where there was any imminent threat to the community.[197]

The fact that the NSW Police Force has no concerns with the operational utility of the covert search warrant powers and that no covert search warrants have been sought may suggest that police have not found evidence of any planned terrorist act that meets the thresholds for utilising a covert search warrant. It may also suggest that the other investigative tools available to police have been sufficient to address the terrorist threat in NSW since we last reported.

When the covert search warrant powers were created, Parliament intended that they be used only in extraordinary circumstances.[198] In light of this, we would not expect there to be frequent use of the covert search warrant powers.

194 NSW police officers were also involved in the joint counter-terrorism investigation which spoiled an alleged planned attack on the Holsworthy Army base. The investigation was code named Operation Neath and involved officers from the Australian Federal Police, Victoria Police and NSW Police Force. Five men were charged as a result of the investigation under the *Criminal Code Act 1995* (Cth) with preparing or planning a terrorist act. The trial was held in 2010, with three of the men being convicted of conspiring to prepare for or plan a terrorist act and two acquitted. The powers conferred on police officers under the Terrorism (Police Powers) Act were not utilised by police in Operation Neath.
195 Correspondence from the NSW Crime Commission, dated 28 January 2011.
196 Correspondence from the Office of the Commissioner, 2 February 2011.
197 Maley, Paul, 'Top cop tells of shift in terror threat', *The Australian,* www.theaustralian.com.au, 9 March 2011, accessed 9 March 2011.
198 See the Hon. Bob Debus, Second Reading Speech, Terrorism Legislation Amendment (Warrants) Bill 2005, Legislative Assembly Hansard, 9 June 2005.

4.4 Expansion of covert search powers

While the covert search warrant provisions under the Terrorism (Police Powers) Act have had limited use, new covert search warrant powers were granted to police in 2009 to assist in the investigation of serious offences under the Law Enforcement (Powers and Responsibilities) Act.

4.4.1 Overview of covert search warrant powers under the *Law Enforcement (Powers and Responsibilities) Act 2002*

A serious offence is defined at s. 46A(2) of that Act. It includes indictable offences punishable by imprisonment by a period of seven or more years involving crimes such as supply, manufacture or cultivation of drugs or prohibited plants, possession, manufacture or sale of firearms, money laundering, car re-birthing, organised theft crimes, violence causing grievous bodily harm or wounding, corruption, destruction of property, homicide or kidnapping. It also includes child pornography offences, sexual assault offences that are punishable by seven or more years imprisonment and serious computer offences, as well as an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting any of the offences listed in that section.

Police officers (with authorisation from an officer above the rank of Superintendent), certain officers of the Police Integrity Commission, and certain officers of the NSW Crime Commission may apply for the covert search warrants available under the Law Enforcement (Powers and Responsibilities) Act ('serious offence covert search warrants').[199]

Such officers may apply for serious offence covert search warrants if the officer suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected with a relevant serious offence in relation to the warrant, and the officer considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.[200]

Serious offence covert search warrants may only be authorised by an eligible judge.[201]

In many regards, the serious offence covert search warrants mirror the covert search warrants available under the Terrorism (Police Powers) Act. They authorise entry and search of the subject premises without the knowledge of any occupier of the subject premises.[202] Entry through adjoining premises, without the knowledge of the occupier, may be authorised if it is necessary to do so to access the premises subject of the covert search warrant.[203] The serious offence covert search warrants also authorise the executing officer to impersonate another person if necessary to execute the warrant[204] and do anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier.[205]

The serious offence covert search warrants authorise entry and search of a premises using such force as is necessary,[206] and can authorise searching officers to seize and detain any thing found in the execution of the warrant that is mentioned in the warrant or is connected with any offence.[207] This power includes substituting the thing that has been seized with a similar thing.[208] If specified in the warrant, the executing officer may be authorised to re-enter the premises for the purpose of returning any thing seized, and this must occur within seven days of the first entry under the warrant.[209]

The occupier of premises searched under a serious offence covert search warrant must be notified of the search warrant as soon as practicable after it is executed.[210] However, the eligible judge that authorised the warrant may authorise postponement of such notification for a period of up to six months if the judge is satisfied there are reasonable grounds to postpone notification.[211] Postponement of notice may be extended by further six month period, up to a total of three years.[212] However, postponement beyond 18 months must only be authorised if the eligible judge considers there are exceptional grounds.[213]

199 *Law Enforcement (Powers and Responsibilities) Act 2002* s. 46C.
200 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47(3).
201 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 46(1).
202 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47A(2)(a).
203 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47A(2)(b).
204 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 47A(2)(c).
205 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47A(2)(d).
206 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 70(1).
207 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 49(1).
208 *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 49(2)(c).
209 Law Enforcement (Powers and Responsibilities) Act 2002, s. 49A.
210 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 67(8).
211 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 67A(1).
212 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 67A(2).
213 *Law Enforcement (Powers and Responsibilities) Act 2002,* s. 67A(3).

4.4.2 Differences in threshold

When covert search warrants were first introduced as a formal police power in 2005, the then Attorney General, the Hon. Bob Debus commented:

> *General criminal activity had never aimed to perpetrate the mass taking of life, the widespread destruction of property or the wholesale disruption of society in the way that terrorism does. The powers set out in this bill are not designed or intended to be used for general policing. Their use is to be restricted to the NSW Police Counter Terrorism Coordination Command and to the units of the NSW Crime Commission assigned the task of investigating and responding to terrorism.*[214]

The expansion of covert search warrant powers to non-terrorism related investigations has been subject to criticism by some Members of Parliament, academics, legal bodies and the media.[215] It has been dubbed by some a 'gradual normalisation of extraordinary powers'[216] and a 'dangerous precedent'.[217]

We note that the threshold for authorising covert search warrant powers under the Terrorism (Police Powers) Act appears higher than that for covert search warrants under the Law Enforcement (Powers and Responsibilities) Act - a difference which has been remarked upon by some commentators. Under the Terrorism (Police Powers) Act, there is a requirement that the covert entry and search of the premises will 'substantially assist' in responding to or preventing a terrorist act. This safeguard is not required in the context of covert searches under the Law Enforcement (Powers and Responsibilities) Act, which is a subject of concern for some commentators.[218]

While serious offence covert search powers have been utilised more than covert search warrant powers under the terrorism legislation, it does not appear that this is because the threshold is too high under the terrorism legislation. We do not consider there is any need to alter the threshold enabling an application for a covert search warrant under the Terrorism (Police Powers) Act. The Assistant Commissioner, Counter Terrorism and Special Tactics suggested that the reason covert search warrants under the Terrorism (Police Powers) Act have been used so rarely, while covert search warrants under the Law Enforcement (Powers and Responsibilities) Act have been used more frequently, is due to the volume of matters under investigation. He indicated that the NSW Police Force holds no operational concerns regarding the covert search warrant powers under the Terrorism (Police Powers) Act. Additionally, in light of the limited use of the terrorism covert search warrants, there is little evidence to support any relaxing of the thresholds for granting terrorism related covert search warrants.

For this reason, we do not consider there is any evidence to support amendment to the application threshold set out under the Terrorism (Police Powers) Act to conform to that of the serious offence covert search warrants.

4.4.3 The Ombudsman's role in monitoring serious offence covert search warrants

The Ombudsman is required to inspect the records of law enforcement agencies every two years in relation to the use of serious offence covert search warrants under section 242 of the Law Enforcement (Powers and Responsibilities) Act, for the purpose of ascertaining whether the legislative requirements regarding those warrants are being complied with. The Ombudsman is required to report to the Attorney General and the Minister for Police following each review.[219] We issued our first report under this provision in July 2010, and it is available on our website at www.ombo.nsw.gov.au.

The Ombudsman's role in reviewing serious offence covert search warrants differs from the role in keeping under scrutiny the exercise of covert search warrants relating to terrorism. Under the Law Enforcement (Powers and Responsibilities) Act, the Ombudsman may inspect records, and hence require access to relevant records. We inspect each individual covert search warrant file held by the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission. The purpose of our inspection is to review compliance with the provisions of the legislation. We also examine the records relating to the exercise of the covert search warrants and the records relating to entry and seizure to ascertain the accuracy of the reports to the issuing judge.

214 The Hon. Bob Debus, Second Reading Speech, Terrorism Legislation Amendment (Warrants) Bill 2005, Legislative Assembly Hansard, 9 June 2005.
215 See McGarrity, Nicola. "The Thin Grey Line", *Inside story,* 25 March 2009, http://inside.org.au/the-thin-grey-line/, accessed 27 October 2010; Branson, Catherine, correspondence to the Hon John Hatzistergos and The Hon Greg Smith, 18 March 2009, http://www.hreoc.gov.au/legal/submissions/2009/20090318_covert_search.html, accessed 8 October 2010; Legislation Review Committee, *Legislation Review Digest No. 2 of 2009* p. 41.
216 Australian Lawyers for Human Rights, Combined Community Legal Centres group et al, *Open Letter to the NSW Government*, 20 March 2009, www.piac.asn.au, accessed 27 October 2010.
217 The Hon. Gordon Moyes, Legislative Council Hansard, 26 March 2009.
218 McGarrity, Nicola. "The Thin Grey Line", *Inside story,* 25 March 2009, http://inside.org.au/the-thin-grey-line/, accessed 27 October 2010.
219 *Law Enforcement (Powers and Responsibilities) Act 2002* s. 242(3C).

Under the Terrorism (Police Powers) Act, the Ombudsman must keep under scrutiny the exercise of powers conferred on police officers, and we are not limited to a review of compliance, but may report more broadly on what we have observed in relation to the exercise of the powers. The difference in the way our review and monitoring role is constructed under section 242 of the Law Enforcement (Powers and Responsibilities) Act and sections 26ZO and 27ZC of the Terrorism (Police Powers) Act further supports our view that our role under the latter is not limited to consideration of instances where covert search warrants have been applied for, but would also encompass other relevant and related matters such as those discussed above at Part 4.3.1.

From 29 May 2009 to 28 May 2010, the NSW Crime Commission made two applications for serious offence covert search warrants, and both were granted. Further details relating to these warrants are available in our report under section 242(3) of the Law Enforcement (Powers and Responsibilities) Act. The Commission advised us it did not consider the introduction of serious crime covert search warrants had any impact on the decision to use or not use covert search warrants under the Terrorism (Police Powers) Act.[220]

From 29 May 2009 to 28 May 2010, the NSW Police Force prepared 46 applications for serious offence covert search warrants. Ten of these were not proceeded with, and of the 36 applications that were made, all were granted. Further details relating to these warrants are available in our report under section 242(3) of the Law Enforcement (Powers and Responsibilities) Act. The NSW Police Force has indicated that there has been no impact on the use of the use of covert search warrants under the Terrorism (Police Powers) Act as a result of the covert search warrant provisions under the Law Enforcement (Powers and Responsibilities) Act.

We will finalise our next report about the use of covert search warrants under the Law Enforcement (Powers and Responsibilities) Act as soon as practicable after May 2011.

220 Correspondence from the NSW Crime Commission dated 28 January 2011

Chapter 5. Scrutiny of counter terrorism powers and reconciliation of legislative mechanisms

5.1 Ongoing monitoring by the Ombudsman

The recent amendments to the Terrorism (Police Powers) Act gave the Ombudsman an ongoing role to keep under scrutiny the powers conferred on police and other officers under Parts 2A and 3 of that Act while it remains in force.

This addressed recommendation 37 of our 2008 report. The review conducted by the Department of Attorney General and Justice indicated that a number of submissions supported that recommendation.

Given the powers under Parts 2A and 3 are not routinely used, ongoing monitoring of the way they are used while the legislation is in force will enable us to continue to observe the way police use the powers and relevant related issues.

5.2 Cross-jurisdictional oversight

As we reported in 2008, there are a number of areas in which the NSW and Commonwealth agencies work together in counter terrorism.[221] The Joint Counter Terrorism Team comprises AFP and NSW Police Force officers. The joint response to the planned attack on Sydney's Holsworthy Army Base involved police from NSW, Victoria and the AFP. Covert searches carried out by NSW police officers may involve officers from Commonwealth agencies, although this has not occurred to date.

The importance of coordinating State, Territory and Commonwealth counter-terrorism capabilities has been emphasised in the Commonwealth Government's White Paper on Counter Terrorism.[222] The new Australian Counter-Terrorism Command Centre, opened in August 2010, illustrates the way that cross agency partnerships are now underpinning the counter-terrorism response. The Centre is 'designed to smooth the flow of intelligence between agencies and police forces and set fortnightly counter terrorism priorities'.[223]

Our September 2008 report noted 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 recommended that the Attorney General provide a copy of our September 2008 report to the Standing Committee of Attorneys General for consideration of any additional arrangements or review to facilitate or further examine cross-jurisdictional oversight to counter-terrorism powers.

The Government supported that recommendation in principle, noting that the 'most appropriate forum for considering the issues raised by the Ombudsman's report and the Government response would be the Legal Issues Sub-Committee of the National Counter Terrorism Committee'.[224] The Department of Attorney General and Justice undertook to bring the report and response to the Sub-Committee's attention. The Attorney General also undertook to discuss with the Commonwealth whether the report and the Government's response should be submitted to the National Security Legislation Monitor when appointed. The Monitor was appointed in April 2011.

Given the collaborative arrangements between the Commonwealth and the States and Territories for preventing, preparing for and responding to terrorist incidents within Australia, agreed upon as part of the September 2005 meeting of the Council of Australian Governments, we recognise that changes to NSW police powers to respond to terrorism must be considered in conjunction with police powers available in other jurisdictions and the cross jurisdictional response to terrorism.

In light of this, we consider that it would be beneficial for the concerns held by NSW Police officers about the workability of terrorism powers, in particular those regarding preventative detention, to be brought to relevant cross jurisdictional forums, such as the National Counter Terrorism Committee and the Minister for Police consider these

221 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, part 5.8.
222 Australian Government, *Counter-terrorism White Paper – Securing Australia – Protecting our Community*, 2010, p. 4.
223 Welch, D, 'New terrorism centre watching home-grown jihadis', *The Australian*, www.theaustralian.com.au, 22 October 2010, accessed 22 October 2010.
224 Department of Attorney General and Justice, Review of the *Terrorism (Police Powers) Act 2002,* 2010, p. 41.

matters through the Ministerial Council for Police and Emergency Management – Police.[225] The Council meets twice annually to promote a co-ordinated national response to law enforcement issues and to maximise the efficient use of police resources.[226] As noted at 2.1.2 above, legislation regarding counter terrorism powers in some jurisdictions is reaching its expiration. As such, this may be an opportune time for further consideration of the necessity and utility of existing provisions.

The *Independent National Security Monitor Act 2010* was assented on 13 April 2010. It creates a new statutory office to review Australia's counter-terrorism laws on an ongoing basis. The role of the Monitor will be undertaken by one person, independent from the current administration of the counter-terrorism legislation. The Monitor may initiate his or her own investigations, or receive referrals from the Prime Minister. The Monitor is to assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:

> *(a) is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and*
>
> *(b) is effective in responding to terrorism and terrorism-related activity; and*
>
> *(c) is consistent with Australia's international obligations, including:*
>
> *(i) human rights obligations; and*
>
> *(ii) counter-terrorism obligations; and*
>
> *(iii) international security obligations; and*
>
> *(d) contains appropriate safeguards for protecting the rights of individuals.*[227]

Mr Brett Walker SC was appointed as the Independent National Security Monitor on 21 April 2011.[228] In our view, it would be useful for the Monitor to consider both the September 2008 report and this report, particularly insofar as these reports highlight difficulties in utilising preventative detention schemes and the difficulties of monitoring the use of powers that are jointly exercised by State and Commonwealth officers.

When we wrote our 2008 report, the NSW Police Force and AFP were negotiating a Memorandum of Understanding (MoU) on preventative detention to clarify how Commonwealth and NSW preventative detention regimes would operate in practice. While some discussions have occurred since we last reported, no MoU has been entered between these agencies. An officer from the Counter-Terrorism and Special Tactics Command told us that the AFP were observing the progress of the negotiations between the NSW Police Force and Corrective Services NSW and Juvenile Justice NSW before progressing the MoU between NSW Police Force and AFP. However, as discussed in Part 3.1.1, the progress of those MoUs with Corrective Services NSW and Juvenile Justice NSW has been stymied by NSW Police Force concerns about the workability of the preventative detention regime, which may in part be informed by a lack of clarity about how the Commonwealth and State regimes would work together.

We are limited in our capacity to review the arrangements between the NSW Police Force and the AFP. Clearly cross-jurisdictional efforts are required to work through these difficulties.

Recommendation

17. That the Attorney General bring the concerns highlighted by the NSW Police Force in response to recommendation 12 and as outlined in this Report to the Legal Issues Sub-Committee of the National Counter Terrorism Committee with a view to considering whether there is ongoing utility for preventative detention powers.
18. That the Minister for Police bring the concerns highlighted by the NSW Police Force in response to recommendation 12 and as outlined in this Report to the Ministerial Council for Police and Emergency Management – Police with a view to considering whether there is ongoing utility for preventative detention powers.
19. That the Attorney General provide a copy of the Ombudsman's reports under the Terrorism (Police Powers) Act to the National Security Legislation Monitor.

On 1 July 2011 the Commissioner of Police advised he had no objections to Recommendations 17-19.

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225 The next meeting of the Ministerial Council for Police and Emergency Management – Police will be held in July 2011.
226 http://www.ema.gov.au/www/agd/agd.nsf/Page/RWP286BA8F5F45D18D6CA2571D50003D6FB (accessed 25 May 2011).
227 *Independent National Security Legislation Monitor Act 2010* (Cth), s. 3.
228 The Hon. Wayne Swan MP, *Appointment of the Independent National Security Legislation Monitor – Press Release*, 21 April 2011.

5.3 Counter-terrorism legislation in Australia

Our examination of the reasons why preventative detention powers have not been used suggests that confusion about how the NSW scheme interacts with Commonwealth detention and investigation schemes is one of the key reasons for the lack of use. The exercise held by the National Counter Terrorism Committee in 2010 regarding preventative detention raised this confusion as a 'key issue'. Concerns are shared across jurisdictions over the way that state and territory preventative detention schemes work with the Commonwealth detention and investigation powers.

A senior police officer within the Counter Terrorism and Special Tactics Command told us that any legislative amendment in relation to preventative detention would be coordinated at the Commonwealth level to ensure consistency across jurisdictions. Accordingly, the NSW Police Force is not currently pursuing any legislative amendment to preventative detention powers.

We acknowledge that consistency across jurisdictions would be useful, particularly where counter terrorism investigations are conducted on the basis of inter-jurisdictional cooperation. The NSW Police Force has indicated it is unlikely to use preventative detention orders under the current scheme given their concerns about the workability of the scheme. However, unless the practical issues about how preventative detention orders would work are resolved, there may be an unacceptable risk of confusion or error if there was cause to place a person in preventative detention.

It has now been five years since the preventative detention powers were introduced in NSW, and a similar length of time in other states and territories. Given the general consensus that the powers are not workable, we consider that action to resolve any lack of clarity in the way preventative detention schemes interrelate should be expedited.

There are existing forums where these issues can be considered so that State, Territory and Commonwealth Parliaments can make appropriate amendments to the legislation. For example, the National Counter Terrorism Committee, 'comprises senior officials from all Australian governments, provides the mechanism to agree on common standards, share information on best practice models and contest policy development to ensure that our police and operational responses are robust and effective.'[229]

In 2006, COAG agreed that a review of counter-terrorism legislation should be conducted in 2010. The review would be conducted by a committee comprising a balance between Commonwealth, State and Territory members. COAG agreed the committee should be chaired by an independent person with knowledge and experience in the administration of criminal justice, and remaining members would consist of persons from the following areas of expertise:

- *two accountability members (for example, drawn from the Inspector-General of Intelligence and Security, an ombudsman, human rights commissioner, privacy commissioner or someone with expertise in law reform),*
- *two law enforcement members (one from the Australian federal Police and one from a state or territory police force) and*
- *a prosecutorial member.*[230]

COAG agreed the committee should review and evaluate the operation, effectiveness and implications of amendments made to Commonwealth, State and Territory legislation in relation to terrorism. COAG specified that:

> *In conducting the review, the committee should take into account the agreement of COAG at the Special Meeting on counter terrorism on 27 September 2005, 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.*[231]

COAG said the Committee should consider the reviews or monitoring activities conducted under individual state and territory legislation and should provide for public submissions and hearings. The review was to take place in December 2010 and the committee is expected to provide a written report to COAG within six months of commencing the review. However, at the time of writing, membership of the committee was yet to be finalised, and the review had not yet commenced.

229 Australian Government, *Counter-Terrorism White Paper – Securing Australia – Protecting our Community*, 2010, p. 42.
230 Council of Australian Governments Meeting *Comminique,* Attachment G, 10 February 2006.
231 Council of Australian Governments Meeting *Comminique,* Attachment G, 10 February 2006.

Annexure 1. Implementation of previous recommendations

Recommendation	Implementation status	What steps have been taken?
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.	Awaiting implementation	An MoU between NSW Police Force, Corrective Services NSW and Juvenile Justice is in draft form. The draft MoU was agreed by the three agencies in December 2009, however the MoU has not yet been finalised and signed.
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.	Partially implemented	NSWPF has finalised its preventative detention SOPs. At the time of writing, Corrective services NSW and Juvenile Justice had not finalised their internal procedures, pending finalisation of the MoU.
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.	Implemented	The NSW Government completed its statutory review of the Terrorism (Police Powers) Act in June 2010. The review did take into account the submissions and views set out in the September 2008 report.
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.	Not implemented	The legislation has not been amended to make specific reference to a detained person's entitlements to complain about a correctional or juvenile justice officer. However, amendments have been made to sections 26Y and 26Z to make it clear that as soon as practicable after a person is first taken into custody under a preventative detention order, the police officer detaining the person must inform the person that they are entitled to contact the Ombudsman to complain about the preventative detention order or the treatment of the person by a police officer in connection with the person's detention under the order.
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.	Implemented	Amendments have been made to section 26Y and 26Z to specifically refer to the Police Integrity Commission.
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.	Implemented	This recommendation has now been superseded by the implementation of recommendation 5. The SOPs provide that the detainee must be informed they may contact the Police Integrity Commission.
7. The NSW Police Force SOPs include a statement of the information which has to be provided to detainees.	Implemented	The SOPS include a statement of information as an annexure.

Recommendation	Implementation status	What steps have been taken?
8. The NSW Police Force SOPs provide guidance as to the meaning of 'as soon as practicable'. Implemented	Implemented	The NSW Government response of June 2010 indicated that the recommendation was supported, and that the NSW Police Force would provide general, non-prescriptive guidance that 'as soon as practicable' means 'as soon as possible, unless some critical imperative impedes it'. The SOPS indicate that the words 'as soon as practicable' as they appear in section 26Y,26Z and 26ZB do not mean 'as soon as possible' but mean 'as soon as reasonably practicable depending on the circumstances of each case'.
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.	Implemented	The SOPs include an Annexure listing police responsibilities in taking a person into preventative detention. It requires the nominated senior officer to provide details whether or not information is provided to the detainee. The NSW Police Force has also amended the Custody Management System of COPS to allow a secure, permanent record to be created including providing detailed reasons as outlined in the 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.	Implemented	The SOPS indicate that where a decision is made not to advise a detainee of the existence of a PCO, then a record of this is to be made together with the reason for the decision. This record will be made in the enhanced Custody Management System COPS.
11. Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains.	Implemented	Section 26ZGA has been inserted into the *Terrorism (Police Powers) Act 2002* indicating a detained person's entitlement to contact a chaplain.
12. Parliament further consider the arrangements for monitoring of detainee-lawyer communication, having regard to the matters set out in this report.	Implemented	The Government has agreed to consult with the Supreme Court and other stakeholders regarding the possibility of inserting a provision in the Act allowing the court the discretion to determine whether contact with a lawyer should be monitored or not. An amendment has been made to section 26ZI of the Terrorism (Police Powers) Act to make it clear that a monitor does not commit an offence in relation to disclosure of information to a lawyer for the purpose of obtaining advice as to whether the information communicated between a detainee and the detainee's lawyer was permitted under section 26ZG, or to obtain advice as to the monitor's obligations in relation to that information.

Recommendation	Implementation status	What steps have been taken?
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.	Implemented	Section 26PA has been added to the Terrorism (Police Powers) Act allowing the Supreme Court to order the Legal Aid Commission to provide legal aid to persons in relation to preventative detention proceedings if the court is satisfied it is in the interests of justice to do so. The provision also requires the police officer detaining the person to assist them to contact the Legal Aid Commission if such an order is made.
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.	Implemented	The SOPs include an Annexure listing police responsibilities in taking a person into preventative detention. It requires the nominated senior officer to inform the detained person of their entitlements to contact a lawyer. Where a detainee is prevented from contacting a particular lawyer due to a prohibited contact order or because the lawyer is unable to be contacted, police must give the detainee reasonable assistance to contact another lawyer. The Annexure also states that where a detainee is unable to engage their own lawyer, police should contact NSW Legal Aid.
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.	Awaiting implementation	The NSW Police Force advised that a risk assessment will be conducted, initially by police, on all detainees, and Corrective Services NSW and Juvenile Justice would undertake their own risk assessments prior to their acceptance of housing a detainee on behalf of police in accordance with section 26X. Corrective Services NSW have indicated that the draft MoU does not include a requirement for a security assessment of young people held in preventative detention, and has indicated that a security assessment prior to the person being transferred to a juvenile correctional facility would render a security assessment by Corrective Services NSW superfluous. However Juvenile Justice indicated that this issue would be canvassed in an MoU with NSW Police Force.

Recommendation	Implementation status	What steps have been taken?
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.	Partially implemented	Section 26ZH(7) provides that a police officer detaining a person under the age of 18 under a preventative detention order is required, as far as is reasonably practicable, to assist the person to exercise their contact entitlements. However, the NSW Government did not agree with the second part of recommendation 16, indicating it would "undermine the Act's tight controls on the nature of information permitted to be disclosed by detainees to third parties." The Government considered these controls were consistent with those provided under the Commonwealth preventative detention scheme.
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.	Partially implemented	In relation to this recommendation the NSWPF SOPs provide the following: • where practicable, if a detainee is under 18 years of age or has impaired intellectual functioning, the same information that is provided to the detainee should be provided to the detainee's parent or guardian. Where this is not practicable, reasons are to be recorded. • Police should consider extending contact beyond 2 hours for detainees who are under 18 years of age. • Police should take all reasonable steps to facilitate contact with the parent/guardian/ representative of the detainee The SOPs do not contain 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, nor do they contain guidance on what would constitute an 'appropriate person' to release an under 16 year old.

Recommendation	Implementation status	What steps have been taken?
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.	Implemented	The SOPs provide that where police become aware that dependents of a detainee may require assistance, police should engage with NSW Community Services at the earliest opportunity. At the time of writing, police had not made any formal arrangements with NSW Community Services in this regard.
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.	Partially implemented	Amendments have been made to the Terrorism (Police Powers) Act to insert a definition of "impaired intellectual functioning" which is the same as the definition of that term in the *Law Enforcement (Powers and Responsibilities) Act 2002*, and replacing references to incapable person with references to a person with impaired intellectual functioning. Section 26ZH(7) provides that a police officer detaining a person with impaired intellectual functioning under a preventative detention order is required, as far as is reasonably practicable, to assist the person to exercise their contact entitlements. However, the NSW Government considered that the existing controls with regard to provision of information were appropriate. As such, the Act has not been amended to require police to provide the parent or guardian of a person with impaired intellectual functioning with the same information required to be provided to the detained person.

Recommendation	Implementation status	What steps have been taken?
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.	Partially implemented	In relation to this recommendation the SOPs provide the following: • a list of indicators to assist police in determining if a detainee has impaired intellectual functioning. They also provide that police should consider early engagement with support services such as the Criminal Justice Support Network for people with Intellectual Disabilities. • if police suspect a detainee suffers from impaired intellectual functioning, they should treat the person accordingly • Police should consider extending contact beyond 2 hours for detainees who have impaired intellectual functioning. • Police should take all reasonable steps to facilitate contact with the parent/guardian/representative of the detainee At this time, the NSW Police Force had not consulted with either the Guardianship Tribunal or disability advocates.
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.	Implemented	The SOPs provide the default interval for review by the police officer detaining the person is every 12 hours, however more frequent review may be conducted.
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.	Implemented	Police have created an information sheet to be provided to the detainee, and where practicable to the detainee's parent/guardian/representative where the detainee is under the age of 18 years or has impaired intellectual functioning.

Recommendation	Implementation status	What steps have been taken?
23. The NSW Police Force SOPs include arrangements for the release of children and incapable persons into the care of a parent or guardian.	Implemented	The SOPs provide that police must release a detainee under the age of 18 years or considered to be "incapable persons" into the care of a parent and/or guardian or other person who is capable of representing their interests (but who is not a police officer or ASIO officer).
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.	Implemented	Section 26W of the Terrorism (Police Powers) Act provides that a police officer who is detaining a person under preventative detention must release the person from detention as soon as practicable after the police officer is satisfied that the grounds upon which the order was made cease to 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.	Not implemented	The DAGJ review supported this recommendation in principle, but considered legislative provisions in relation to this, such as additional disclosure offences, to be unnecessary.
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.	Not implemented	The DAGJ review did not support this 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.	Awaiting implementation	The DAGJ review indicated the Government supported this recommendation, and that the review of the *Crimes (Forensic procedures) Act 2000* was taking place, and would take into account the submissions surrounding covert sampling of DNA.
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.	Not implemented	The DAGJ review indicated the Government supported this recommendation in principle. The review stated that NSW Police Force SOPs would emphasise the desirability of video recording covert searches.
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.	Implemented	The Covert Search Warrant SOPs have been amended to include that police, in their report to the issuing Judge, should include whether or not the warrant was video recorded and, if not, a brief statement as to why.
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'.	Partially implemented	The Covert Search Warrant SOPs reinforce the desirability of having the execution of a covert search warrant video recorded, and indicate that if it is not practicable to record the search, detailed notes should be created. However, the NSW Police advised that is impossible to compile a definitive list of what might constitute "compelling" circumstances.

Recommendation	Implementation status	What steps have been taken?
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.	Awaiting implementation	The DAGJ review indicated the Government supported this recommendation, and that forms will be developed similar to the LEPRA covert search warrant forms, which prompt for further information in relation to the exercise of the power to enter adjoining premises.
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.	Awaiting implementation	NSW Police Force have not yet amended the covert search warrant document, but have agreed to implement this recommendation.
33. The NSW Police Force standard operating procedures include the standard application form used by police and the standard covert search warrant document.	Implemented	The current forms in use by the Terrorism Investigation Squad have been appended to the Covert Search Warrant SOPs.
34. The Act be amended so covert search records are retained rather than destroyed, to enable proper oversight of covert search functions.	Implemented	Section 27W has been removed from the Act.
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.	Implemented	The report for 2005-06 was issued retrospectively in June 2010.
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.	Implemented	The DAGJ review indicated the Government supported this recommendation in principle, however considered the legal issues Sub-committee of the National Counter terrorism Committee to be a more appropriate forum for considering the issues raised by the September 2008 report, and agreed to bring the report to that sub-committee's attention. The Attorney General committed to discussing with the Commonwealth whether the Report and response should be submitted to the National Security Legislation Monitor, when one is appointed.

Recommendation	Implementation status	What steps have been taken?
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.	Implemented	Section 26ZO and section 26ZC have been amended, giving the Ombudsman an ongoing role monitoring with regard to both preventative detention and covert search warrant powers.

Annexure 2. 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: [232]

Al-Qa'ida

Jemaah Islamiyah (JI)

Abu Sayyaf Group (ASG)

Jamiat ul-Ansar (JuA)

Al-Qa'ida in the Islamic Maghreb (AQIM)

Al-Qa'ida in Iraq (AQI)

Ansar al-Islam

Asbat al-Ansar (AAA)

Islamic Movement of Uzbekistan

Jaish-e-Mohammad (JeM)

Lashkar-e Jhangvi (LeJ)

Islamic Army of Aden (IAA)

Hizballah's External Security Organisation

Palestinian Islamic Jihad

Hamas' Izz al-Din al-Qassam Brigades

Lashkar-e-Tayyiba

Kurdistan Workers Party

Al-Shabaab

232 Criminal Code Regulations 2002, prepared on 15 March 2011.

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