NSW Ombudsman

Issues Paper

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

Preventative Detention and Covert Search Warrants

April 2007

Issues Paper

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

Preventative Detention and Covert Search Warrants

April 2007

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone (02) 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: (02) 9283 2911
Telephone typewriter: (02) 9264 8050
Website: www.ombo.nsw.gov.au
Email nswombo@ombo.nsw.gov.au

ISBN 978-1-921131-55-4

Contents

SUBMISSIONS DUE FRIDAY 15 JUNE 2007

Chapter 1. Introduction

1.1. Background

Recent developments in counter-terrorism in New South Wales reflect a general trend around the globe, where new terrorism offences have been created and the powers of law enforcement agencies have been expanded in response to the threat of terrorism.

The development of counter-terrorism laws in New South Wales has largely been driven by the Commonwealth government. In April 2002, Commonwealth, State and Territory leaders decided on a new national framework to combat terrorism, and agreed to form the National Counter-Terrorism Committee. They agreed that the Commonwealth would take charge of the strategic coordination of Commonwealth, State and Territory resources in the event of a terrorist incident. Each jurisdiction agreed to review its legislation and counter-terrorism arrangements, to ensure they were sufficiently strong.[1] The *Inter-Governmental Agreement on Australia's National Counter-Terrorism Arrangements* was signed in October 2002 and the first meeting of the National Counter-Terrorism Committee was held in November 2002.[2] States and Territories also agreed to refer constitutional powers relating to terrorism to the Commonwealth.[3]

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

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

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

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

State and Territory leaders agreed to enact legislation which, because of constitutional constraints, the Commonwealth could not enact, including legislation providing for preventative detention for up to 14 days.[8] Following this, provisions for making preventative detention orders and prohibited contact orders were inserted into the *Terrorism (Police Powers) Act* in New South Wales. As with the other powers contained in the Act, these were designed for use only in extraordinary circumstances, in order to prevent a terrorist attack or preserve evidence following a terrorist attack. Preventative detention regimes have now been enacted in all Australian States and Territories, to complement the federal scheme.

In the past five years, the Commonwealth Parliament has enacted legislation to create new terrorism offences, such as preparing for a terrorist act and financing terrorism. Old offences, such as sedition, have been modernised to target activity which promotes terrorism. The Australian Security Intelligence Organisation (ASIO) has been given new detention and questioning powers, and control orders and preventative detention have been introduced for dealing with people who are not charged with an offence but are suspected of terrorist activity. Telephone intercept legislation has been changed to allow access to stored communications such as emails and text messages, and to enable law enforcement agencies to obtain interception warrants for 'B parties' (that is, people who are not suspects).

Developments in counter-terrorism in New South Wales have been designed to complement the changing federal regime of counter-terrorism legislation, so it is important to take this into account when examining police counter-terrorism powers in New South Wales.

Over the last five years, the New South Wales government has spent $460 million on counter-terrorism initiatives.[9]

1.1.1. Concerns about the new legislation

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

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

It is against this background that we are scrutinising the exercise of preventative detention and covert search warrant powers.

1.2. Terrorism legislation — key provisions

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

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

The *Terrorism (Police Powers) Act* gives special powers to police to deal with terrorism acts and protect people. It contains three sets of discrete powers: special powers (Part 2), preventative detention orders (Part 2A) and covert search warrants (Part 3). The Act adopts substantially the same definition of a 'terrorist act' as the Commonwealth Criminal Code.[14] A terrorist act includes action which causes serious physical harm to a person or serious damage to property; causes a person's death; endangers a person's life (other than the person committing the act); or creates serious public health or safety risks. It also includes action which seriously interferes with information, telecommunications, transport, essential service delivery, financial or other public utility systems.

In addition, to be a terrorist act, the action must be done with the intention of advancing a political, religious or ideological cause, and must be done with the intention to coerce or influence by intimidation a government, or intimidate the public or a section of the public.[15]

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.'[16]

1.2.1. Special powers (Part 2)

The *Terrorism (Police Powers) Act* created new powers for police officers to prevent and investigate terrorist acts. It enables police to request a person disclose their identity, stop and search (including strip search) particular people, vehicles and premises, and seize and detain things where there are reasonable grounds to believe there is an imminent threat of a terrorist act, and the use of the powers would reasonably assist in preventing it. Police may also exercise these powers where they would assist in apprehending perpetrators immediately after a terrorist act.[17] The new powers were not intended for general use, but for use only in particular circumstances, where there is a credible terrorist threat and use of the powers would reasonably assist police.[18] Any use of the powers has to be authorised

by the Commissioner or a Deputy Commissioner of Police with the concurrence of the Police Minister (provided the Minister can be contacted). Where an authorisation is sought as a matter of urgency, a Superintendent may give it.[19]

Part 2 powers were authorised for the first time in November 2005. However, the powers were not exercised.[20]

1.2.2. 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.[21] Part 2A permits police to apply to the Supreme Court for orders enabling the detention of a person aged 16 or above in order 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 and the person notified of the time and date of the hearing. The person is entitled to give evidence and have legal representation at the hearing. A person can be detained under a confirmed order for up to 14 days (which includes the 48 hour period of the interim order). If the date on which the terrorist act is expected to occur changes, a further order can be made, to take effect on the expiry of the existing order. Police must apply to have a preventative detention order revoked if the grounds on which the order were made cease to exist.

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

Police can arrange for a person in preventative detention to be detained at a correctional facility. A person in preventative detention must be treated with humanity, 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 have to be detained separately from adults.

Part 2A also provides police with powers to enter premises, search persons and seize property in relation to the execution of preventative detention orders.[22] Police can request disclosure of identity, and penalties apply to non-compliance.[23]

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

Relationship to the Commonwealth legislation

Following the September 2005 COAG agreement, the Commonwealth Criminal Code was amended to provide for control orders and preventative detention in order to protect the public from suspected terrorist acts. The governments agreed to amendments to the federal Code to provide for preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community.[24] State and Territory governments agreed to enact legislation providing for preventative detention for up to 14 days, which could not be enacted by the Commonwealth because of constitutional constraints.[25]

1.2.3. 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.[26]

A covert search warrant authorises the nominated officers to enter the subject premises, or premises adjoining the subject premises, 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 ten 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, or such further period as is

permitted by the court. 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.

For the purposes of Part 3, a terrorist act includes an offence under section 310J of the *Crimes Act 1900* which prohibits intentional membership of a terrorist organisation.[27] In the case of an application relating to an offence under section 31OJ, the offence must be being committed and the execution of a covert warrant would provide evidence relating to the commission of that offence.[28]

1.3. Our role and the purpose of this paper

The *Terrorism (Police Powers) Act* requires the Ombudsman to keep under scrutiny the exercise of the powers conferred on police and Crime Commission officers under the covert search warrant provisions for two years; and the powers conferred on police and correctional officers under the preventative detention order provisions for five years, with an interim report after two years.[29] The Attorney General must table these reports in Parliament as soon as practicable after receiving them. There is no requirement that the Ombudsman keep under scrutiny the special powers set out in Part 2 of the Act.

We are using a range of research strategies in our review of Parts 2A and 3, to ensure our report is balanced and comprehensive. These include:

- analysing information and documents held by relevant agencies, including NSW Police, the Crime Commission, the Department of Corrective Services, the Department of Juvenile Justice and the Attorney General's Department
- consulting with correctional officers and police officers of different ranks about the way the powers are used in practice, including any problems they have identified
- observing the exercise of some powers directly
- inspecting the facilities where people subject to preventative detention orders may be detained
- monitoring any relevant court proceedings
- tracking media coverage of relevant events
- analysing complaints about police conduct which relate to counter-terrorism powers
- analysing any relevant statistics and looking at trends according to police data
- conducting interviews and focus groups with interested parties, and
- comparing the New South Wales experience with developments in other jurisdictions.

We are also seeking community input. This paper provides a basis for consulting interested parties on the operation of the Act. It provides some background to the legislation, identifies issues for discussion, and invites submissions from interested members of the community.

1.3.1. Our approach

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

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

1.3.2. Other review mechanisms

We note that in addition to our role in scrutinising the exercise of these powers, the Commissioner of Police must report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants and preventative detention. The Commissioner is also required to report as soon as practicable to these Ministers after the cessation of an authorisation to exercise 'special powers' under Part 2 of the Act. The Crime Commissioner is required to report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants.[30]

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.[31] The Attorney General is required to review the Act annually. The first report under this section was finalised in August 2006. It concluded that the policy and objectives of the Act remain valid.[32]

Endnotes

1 'National move to combat terror', media release on the Leaders Summit on Terrorism and Multi-jurisdictional Crime by former federal Attorney General Daryl Williams, 7 April 2002.
2 'Counter terrorism review', media release by Prime Minister John Howard, 24 October 2002.
3 'Reference of terrorism power', media release by former federal Attorney General Daryl Williams, 8 November 2002.
4 The Hon. Bob Carr, then Premier, Legislative Assembly Hansard, 19 November 2002.
5 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
6 The Hon. Bob Debus, Legislative Assembly Hansard, 9 June 2005.
7 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
8 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
9 NSW Government, 'A new direction for NSW: State Plan', consultation draft, August 2006.
10 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
11 *Criminal Code Act 1995* (Cth), Divisions 101 to 103.
12 *Criminal Code Act 1995* (Cth) ss. 100.1 and 100.4. A note in the *Terrorism (Police Powers) Act 2002* explains that in the context in which the expression 'terrorist act' is used, it is not necessary to include threats of terrorist acts.
13 See *Terrorism (Commonwealth Powers) Act 2002* (NSW).
14 See *Terrorism (Police Powers) Act* s. 3 and *Criminal Code Act 1995* (Cth) s. 100.1.
15 *Terrorism (Police Powers) Act 2002* s. 3.
16 *Terrorism (Police Powers) Act 2002* s. 3.
17 *Terrorism (Police Powers) Act 2002*, Part 2.
18 The Hon. Bob Carr, then Premier, Legislative Assembly Hansard, 19 November 2002.
19 *Terrorism (Police Powers) Act 2002* ss. 8 and 9.
20 NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002*, August 2006.
21 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
22 *Terrorism (Police Powers) Act 2002* ss. 26U and 26V.
23 *Terrorism (Police Powers) Act 2002* s. 26T.
24 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
25 Council of Australian Governments Communique, Special Meeting on Counter-Terrorism, 27 September 2005.
26 *Terrorism (Police Powers) Act 2002* s. 27C.
27 The definition of terrorist organisation under this section has the meaning given under the Commonwealth Criminal Code at s. 102.1.
28 *Terrorism (Police Powers) Act 2002* s. 27A (2).
29 *Terrorism (Police Powers) Act 2002* ss. 27ZC and 26ZO.
30 *Terrorism (Police Powers) Act 2002* ss. 26ZN and 27ZB.
31 *Terrorism (Police Powers) Act 2002* s. 36.
32 NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002*, August 2006.

Chapter 2. Preventative detention: issues for consideration

At the time of writing, no preventative detention orders had been sought. However, we have identified a number of issues concerning preventative detention, and invite you to respond to the following questions. Your comments on any other aspects of the legislation and its implementation are also welcome.

2.1. Implementation of the legislation

The key agencies are still in the process of putting in place systems for exercising preventative detention powers. From the information available, we understand that a person who is detained under an interim order will be taken to a nearby police station and entered into custody. If the order is confirmed, NSW Police can transport the detainee to a correctional centre.

NSW Police and the Department of Corrective Services are still drafting their policies on preventative detention. They are also negotiating a Memorandum of Understanding to deal with the management of people detained under preventative detention orders.[33] It is also possible that a person will be taken into preventative detention by federal police, and then transferred into NSW Police custody. As discussed above, the most significant difference between federal and state schemes is that the maximum period of detention under a Commonwealth order is 48 hours, but is 14 days under a New South Wales order. NSW Police is currently holding discussions with the Australian Federal Police about arrangements for transferring people detained under federal preventative detention laws into the custody of NSW Police.[34]

The Department of Juvenile Justice has indicated it will not be responsible for detaining any young people subject to preventative detention orders. If a person aged 16 or 17 is to be detained in a correctional facility, it will be in a juvenile correctional facility, under the control of the Department of Corrective Services.

2.1.1. Police powers

Police have the following powers when executing preventative detention orders:

- Police may request any person to disclose his or her identify if they reasonably believe that the person may be able to assist in executing a preventative detention order. It is an offence not to comply with such a request, or to give a false information.[35]
- Police may enter and search premises for the purpose of taking a person who is subject to a preventative detention order into custody. Police can use such force as is reasonably necessary to enter the premises. They can only enter premises at night when it would not be practicable to do so during the day, or entry at night is necessary to prevent a terrorist act or preserve evidence relating to a terrorist act.[36]
- When taking a person into custody pursuant to a preventative detention order, police can search the person and anything in possession of the person, and seize any evidence relating to a terrorist act, and anything which would present a danger to the person, could assist the person to escape, or could be used to contact another person.[37]

The NSW Police Counter Terrorism Coordination Command has started drafting Standard Operating Procedures for use of the preventative detention powers. We have not been provided with a draft yet. However, we have observed meetings of a NSW Police working group on preventative detention.

2.1.2. Correctional powers

Section 26X of the *Terrorism (Police Powers) Act* provides that police can arrange, with the Commissioner of Corrective Services, for a person in preventative detention to be detained at a correctional centre, and states that 'the preventative detention order is taken to authorise the person in charge of the correctional centre to detain the subject at the correctional centre while the order is in force in relation to the subject.'[38] However, it does not otherwise confer powers on correctional officers for dealing with detainees.

The Department of Corrective Services has raised concerns that correctional officers are not sufficiently authorised to deal with people held in preventative detention in a correctional facility. Most of the powers conferred on correctional officers are contained in the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2001*. These include powers to use reasonable force, for example to search an inmate, or to

prevent an inmate from escaping, and powers to give directions to inmates for the purpose of maintaining good order and discipline in the correctional centre.[39] They also provide for the security classification of inmates, directions for holding an inmate in segregated custody, and permit compulsory medical treatment of inmates.[40]

The Department of Corrective Services recently sought advice from the Crown Solicitor's Office to clarify whether the *Crimes (Administration of Sentences) Act* applies to people held in preventative detention. The Department explained:[41]

> *If it is the case that the CASA [Crimes (Administration of Sentences) Act] does not apply, the Department is placed in a difficult situation with regards management of such detainees. For example:*
>
> 1. *If the provisions of CASA do not apply, what authority do correctional officers have to search; conduct drug tests; impose segregation directions or use force if required, upon detainees (ie exercise the powers generally available to them for the care, control and management of persons in custody);*
> 2. *If only the provisions of the Terrorism Act... apply, what authority do correctional officers have to exercise specific powers under that legislation. For example, section 26ZI... authorise[s] a police officer to monitor telephone and personal visits but the legislation is silent as to whether those powers are conferred on any correctional officer with whom the police officer makes a detention arrangement;*
> 3. *If only the provisions of the Terrorism Act apply... what authority do correctional officers have to prevent a detainee escaping? Given that a correctional officer is expressly authorised to discharge a firearm at an inmate to prevent an escape (clause 269(1)(b)(i) Crimes (Administration of Sentences) Regulation 2001), the consequences of this could be severe.*

The Crown Solicitor's Office advised that the *Crimes (Administration of Sentences) Act* does not apply to people held in preventative detention. It applies to inmates, and a person detained under a preventative detention order is not, for the purposes of that Act, an 'inmate'. While there are specific provisions for other types of detainees, including people in periodic or home detention, there is no specific reference to people held in preventative detention. The Crown Solicitor's Office concluded that correctional officers do not have the authority to exercise the functions available to them under the *Crimes (Administration of Sentences) Act* in relation to people held in preventative detention. Nor do they have the authority to exercise the functions set out in the *Terrorism (Police Powers) Act* which are conferred specifically on police officers.[42]

The *Terrorism (Police Powers) Act* clearly intends that people subject to preventative detention orders can be detained in prisons. Section 26X states that police 'may arrange, with the Commissioner of Corrective Services, for the subject to be detained under the order at a correctional centre' and that 'the preventative detention order is taken to authorise the person in charge of the correctional centre to detain the subject at the correctional centre while the order is in force in relation to the subject.' It is of concern that despite this clear intention, correctional officers do not appear to be authorised to deal with detainees in any way other than to detain them. The lack of clarity around this issue has created a significant impediment to the successful implementation of the Act.

1. **Are police powers to deal with detainees sufficient and appropriate?**
2. **Do correctional officers' powers to deal with detainees require clarification? Should the powers conferred on correctional officers under the *Crimes (Administration of Sentences) Act* apply to people held in preventative detention? If not, what powers and functions should be conferred on correctional officers to enable them to deal with preventative detainees?**

2.2. When can preventative detention orders be made?

A preventative detention order can be made against a person:

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

To detain a person in order to prevent a terrorist attack, there must be reasonable grounds to suspect a person will engage in a terrorist act, possesses a thing connected to the preparation of a terrorist act or has done an act in preparation for or planning a terrorist act. The order can only be made if doing so would substantially assist in preventing a terrorist act occurring and detaining the person is reasonably necessary for that purpose. The suspected terrorist act must be imminent and, in any event, be expected to occur at some time within 14 days.[43]

To detain a person in order to preserve evidence of a terrorist act that has occurred, an order can be made if the terrorist act has occurred in the last 28 days, it is necessary to detain the person to preserve evidence relating to the

act, and the period of detention is reasonably necessary for that purpose.[44] The location of the terrorist act could be in New South Wales or elsewhere.

2.2.1. Applying for preventative detention orders

A police officer can apply for a preventative detention order where he or she is satisfied there are sufficient grounds. Approval to make the application must be obtained from either the Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner responsible for counter-terrorism operations.[45]

Applications for detention orders must be in writing and sworn, and contain the facts and other grounds of the application, the period of detention sought by the applicant, and information relating to the age of the subject person. Applications must also contain any information relating to previous applications made against the person and information about whether any detention or control order has been made against the person under the Commonwealth Criminal Code or corresponding law of another State or Territory. The applicant must fully disclose all relevant matters of which they are aware, whether favourable or adverse to the making of the order.[46]

2.2.2. Interim and confirmed preventative detention orders

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

Interim orders can be made where the court is satisfied with the grounds of the application but cannot proceed immediately to the hearing and determination of the final order.[47] An interim order can be made in the absence of the subject person and without their notice, but the court must fix a time and date for hearing the application for a confirmed order, and must give directions for notice of the date and time for a resumed hearing to be given to the person subject to the detention order. The interim order cannot remain in force for more than 48 hours after the person has been taken into custody.[48] An application and interim order can be made via telephone or other electronic device where it is required urgently, but a written record of the application and order must be made as soon as practicable afterwards or at the direction of the court.[49]

Confirmed orders can be made after a hearing, where the court is satisfied with the grounds of the application. The subject person is entitled to give evidence and be legally represented at the hearing.[50] However, the court may determine an application in the absence of the person, if the court is satisfied the person was properly notified of the proceedings.[51]

We note that in the United Kingdom, police can detain persons in certain circumstances without a warrant for 48 hours. Until recently, Canada had similar laws, providing for detention without a warrant for up to 24 hours. These arrangements are discussed in more detail below, at 2.16.3 and 2.16.4.

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

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

> *The Supreme Court may take into account any evidence or information that the Court considers credible or trustworthy in the circumstances and, in that regard, is not bound by principles or rules governing the admission of evidence.*[52]

The Act requires that applications for detention orders set out the facts and other grounds on which police consider the order should be made.[53] However, there is no requirement that the person subject to the order be given access to the application in its entirety. Further, a person who is the subject of a preventative detention application may not be given access to all the evidence or other information on which the application is based. This would impact on the person's opportunity to contest the making of the order.

A person in preventative detention may not have access to the information on which an order is based even after it is made. The Act provides that a preventative detention order must set out a summary of the grounds on which the order is made, rather than the grounds in full. Further, information need not be included in the summary if its disclosure 'is likely to prejudice national security.'[54]

'National security' is defined in the *National Security Information (Criminal And Civil Proceedings) Act 2004* (Cth) and means Australia's defence, security, international relations or law enforcement interests. 'Security' means protection from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference, whether committed within Australia or not. 'International relations' means political, military and economic relations with foreign governments and international organisations. 'Law enforcement interests' includes interests in avoiding disruption to national and international efforts relating

to law enforcement, criminal investigation and intelligence; protecting informants and other methods of collecting intelligence; and ensuring intelligence and law enforcement agencies are not discouraged from giving information to another nation's government.[55] The *National Security Information (Criminal And Civil Proceedings) Act 2004* (Cth) also provides that 'a disclosure of national security information is 'likely to prejudice national security' if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.'[56]

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

Concerns about a detainee's access to the evidence or other information on which orders are based were raised during the Parliamentary debates.[57] The Law Society of NSW, the NSW Bar Association and the Public Interest Advocacy Centre (PIAC) also expressed concern about these provisions.[58]

While a number of these matters do not relate to police or correctional functions under the Act, the application procedures are direct police functions. Submissions are sought on these matters.

3. **What are your views as to the present application process for preventative detention orders?**
4. **What is the practical or operational impact of having to obtain a court order before being able to detain a person?**

2.3. Where is a person detained?

The Act does not specify where a person in preventative detention is to be detained. However, it does provide that police can arrange for a person to be detained at a correctional centre, or in the case of children aged 16 or 17, a juvenile detention or juvenile correctional centre.[59] The police officer who made the arrangement is considered to be the person detaining the subject, and police officers can enter the centre at any time to visit the detainee for the purpose of exercising functions under the detention order.[60]

NSW Police and the Department of Corrective Services have indicated that a person detained under Part 2A would be held in high security, either in police custody or at a correctional facility. It does not appear that a person would be detained in any other place.

2.3.1. Detention by police

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

People detained in police custody will have their own specialist custody managers, rather than be managed by ordinary police custody managers. The NSW Police Counter Terrorism Coordination Command is training a small cohort of officers who will be able to act as custody managers for detainees.

2.3.2. Detention in a correctional centre

In July 2006, the Department of Corrective Services provided us with its draft policy on preventative detention, which set out the proposed management regime for people held in preventative detention. The draft policy covered matters including security, searches, visits, clothes and property, meals, activities, and whether detainees would be segregated. In February 2007, the Commissioner of Corrective Services advised that in light of the Crown Solicitor's recent advice, the draft policy 'cannot legally be applied' and is redundant.[61]

We will continue to monitor the development of the Department of Corrective Services policy on preventative detention and will include further information about the conditions and treatment of a person's detention under Part 2A in our interim and final reports.

2.3.3. Access to health care

Justice Health is responsible for providing health services to offenders and other persons in custody, and to monitor the provision of health services in correctional centres.[62]

Justice Health does not have any specific policies or procedures for preventative detention. Indeed, it seems that a person in preventative detention is not a 'person in custody' for the purposes of section 236A of the *Crimes (Administration of Sentences) Act 1999*, which sets out the functions of Justice Health. However, Justice Health has advised it will apply its existing policies to people held in preventative detention, as if they were inmates.[63]

For example, the Justice Health Policy on Segregated Custody will apply to any detainee who is held in segregation. The policy states that detainees should be seen at least daily by nursing staff and at least weekly in the clinic. If a nurse has any concerns, the detainee should be seen by a medical officer within 24 hours. Detainees should also be offered an appointment with a medical officer once a week. Daily examinations should include a discussion with the detainee to assess his or her physical and mental state, and any potential risks. Physical examinations are not usually necessary. The policy also reminds staff that 'prolonged segregation may adversely affect a patient's physical and mental health.'[64]

2.3.4. Concerns about detention in a correctional centre

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

> *I want to be clear that the legislation states expressly that those detained will not be shackled against a wall and fed bread and water. They are simply detained.*[65]

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

> *Here we see the emergence of Orwellian language: they are detainees, as if what they are called materially alters the reality of what they experience. They are still behind razor wire. But language is important… the word 'detention' aims to mask the fact that the person is imprisoned.* [66]

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

> *These are people who have not been charged with any offence. There may well be good reasons — and I certainly hope there are good reasons — for a person to be taken into preventative detention, but the type of prison is not specified. In the event that one of us were charged with an offence we would be taken to a remand centre. We would not be thrown into a prison with murderers and dangerous criminals, and we would not be carted off to the other side of Australia to be detained. It is regrettable that the type of prison in which a person will be detained is not spelled out in the legislation.*[67]

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

> *Article 9(2)(a) of the International Covenant on the Civil and Political Rights (ICCPR) provides that 'accused persons shall, save in exceptional circumstances, be segregated from convicted person and shall be subject to separate treatment appropriate to their status as unconvicted persons'. This principle of segregation should be taken further where the person being detained is not even an accused in the criminal justice system. The Bill ought properly establish an appropriate mechanism for detention that ensures individuals detained are not detained with accused persons or convicted prisoners.*[68]

5. Are the existing arrangements for preventative detention appropriate? If not, how could detention arrangements better reflect the preventative rationale for detention?

2.4. How long can a person be detained?

Under an interim order a person can be detained for up to 48 hours, during which time an application for a confirmed order must be heard.[69]

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

Maximum period of detention and multiple preventative detention orders

(1) In this section:

related order, in relation to a person, means an interim preventative detention order, another preventative detention order or an order under a corresponding law that is made against the person.

(2) The maximum period for which a person may be detained under a preventative detention order (other than an interim order) is 14 days. That maximum period is reduced by any period of actual detention under a related order against the person in relation to the same terrorist act.

Note. Under section 26L an interim order expires 48 hours after the person is first taken into custody under the order if the application for the order has not been heard and finally determined by that time.

(3) Despite subsection (2), the maximum period for which a person may be detained under a preventative detention order made on the basis of preserving evidence of, or relating to, a terrorist act that has occurred is not to be reduced by any period for which the person is detained under a preventative detention order or related order made on the basis of preventing a terrorist act.

(4) Subject to subsection (5), more than one preventative detention order may be made in relation to the same terrorist act (whether or not against the same person).

(5) Not more than one interim preventative detention order may be made against the same person in relation to the same terrorist act. This subsection does not prevent:

(a) an extension of an interim order under section 26H (5), or

(b) the making of another interim order following a further application for an order.

(6) A preventative detention order can be made against a person to take effect on the expiration of detention under a related order against the person.

Note. This Division does not authorise the extension of the period of an order. However, if the initial order does not authorise detention for the maximum period of detention in respect of the same terrorist act that is authorised by this section, further orders may be applied for and made (so long as that maximum period is not exceeded in respect of the total period of those orders).

(7) For the purposes of this section:

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

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

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

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

This means a preventative detention order can be made against a person to take effect on expiry of detention under a 'related order.'[70] A related order means an interim order, another preventative detention order or an order under a corresponding law made against the person.[71] More than one preventative detention order may be made in relation to the same terrorist act, whether or not against the same person.[72] The maximum period for which a person can be detained is still 14 days though, which includes any actual period of detention already served under a related order.[73]

While orders relating to the same terrorist act by the same person have a maximum detention period, the same person could be subject to a separate detention order in relation to a separate terrorist act. Section 26K(7) defines when a terrorist act remains the same act and when it becomes a separate act. A terrorist act ceases to be the same act where the date on which it is expected to occur changes. An act is not deemed to be a separate act merely because of a change in the persons expected to carry it out, or a change in how or where the act is expected to be carried out, if it is expected to occur at a particular time.[74] This means that further preventative detention orders could be made against the same person where the date on which a terrorist act is to occur changes.

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

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

for the act is changed. However… the change of date provision allows for potentially open-ended rolling preventative detention orders.[75]

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

Multiple and consecutive preventative orders may be issued in relation to a particular terrorist act, provided that the maximum period of detention is not exceeded. However, if the relevant act does not take place within the anticipated 14 day period and the date of the suspected terrorist act is revised, s 26K(7) provides an opportunity for people to be subject to further orders and thus they may effectively be detained for very lengthy periods.[76]

The Law Society also made the point that separate preventative detention orders can be made detaining the same person in relation to preventing terrorist acts occurring and preserving evidence of terrorist acts that have occurred. Orders made in this manner could see a person detained for up to 28 days.

PIAC recommended a cap be placed on the number of subsequent preventative detention orders that can apply to a single person, and that there be a minimum period that must elapse before any further preventative detention order can be sought.

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

A number of submissions have raised the possibility of cumulative or rolling warrants. I make it clear to the House that the aim of this preventative detention scheme is not to provide the ability for law enforcement agencies to keep a person in a constant state of preventative detention. Proposed section 26K is designed to prevent rolling warrants. However, it is difficult to justify on policy grounds the complete prohibition of a second or subsequent order in relation to a particular person where the rest of the test, which is set out in proposed section 26D, is met, remembering that the test requires the reasonable suspicion that the detention of the person will prevent an imminent terrorist attack.

A number of strong safeguards will count against the use of rolling warrants. Those safeguards are that these orders will be overseen by the Supreme Court, the requirement that each application must contain details of previous applications and orders, allowing the Supreme Court to detect improper use, and, most important, the fact that a person who appears to be intimately involved in an imminent terrorist attack will be charged with a substantive offence rather than preventatively detained. Those concerns that have been expressed about rolling warrants, although understandable, have been sufficiently answered by those observations.[77]

As currently drafted, the Act permits additional preventative detention orders being made against a person, where the date on which a terrorist act is expected to occur changes. Concerns have been raised that this permits open ended rolling detention orders. Concerns have also been raised that detention for reasons of preventing a terrorist act and preserving evidence relating to an act could be used back to back. It has been suggested the number of detention orders applicable to an individual be capped and a minimum period elapse before further orders can be made against them.

We note that in the United Kingdom, the period of detention has increased from 7, to 14 and now 28 days. A recent review suggested this timeframe may not be sufficient. This is discussed in more detail below, at 2.16.3.

The question of what is permitted in terms of ongoing preventative detention orders is clearly relevant to how police may choose to exercise functions under Part 2A, including in making decisions to apply for or seek revocation of orders. For this reason, it is an important issue in this review.

6. What are your views as to the present 'maximum period of detention' provisions in section 26K of the Act? Are these provisions:

- **a. Sufficiently clear as to maximum periods of detention?**
- **b. Appropriate as regards the use of, and safeguards for, multiple orders made in relation to the same person?**
- **c. Sufficiently flexible to deal with changing operational or other factors?**
- **d. Adequate in length to achieve the purpose of preventative detention? If not, what additional period should be permitted?**

2.5. What information is a detained person entitled to?

Police must provide the detained person with a copy of an interim order as soon as practicable after being taken into custody, and a copy of a confirmed order as soon as practicable after it is made. There is no requirement that police produce a copy of an interim or confirmed preventative detention order when taking a person into custody.[78]

In addition to providing a detainee with a copy of the preventative detention order, police are required to explain the effect of the order as soon as practicable after the person is taken into detention. It is an offence for police not to do so.[79] However, this does not apply if the actions of the detainee make it impracticable for police to comply.[80]

Police must explain the fact that an interim or confirmed order has been made authorising the person's detention. In relation to interim orders, police must inform the person of the date and time of the court hearing for the confirmed order.[81] In relation to confirmed orders, police must inform the person of the period for which their detention is authorised.

Police must also inform the person of a range of prescribed matters such as their right to contact certain people and the restrictions that apply to that contact. They must inform the person of their right to contact a lawyer, make a complaint to the Ombudsman concerning the application for the order or their treatment by police in detention, and their entitlements in relation to applying for revocation of the order.[82] The information need not be precise or technical, but must cover the substance of the matters required. Police must arrange for an interpreter to assist the person where the person's knowledge of English is not sufficient to communicate reasonably fluently.[83]

We note that while detainees must be informed of their right to make a complaint to the Ombudsman about their treatment by police, there is no requirement to inform them of their right to make a complaint about their treatment by a correctional officer, although detainees have such a right under the ordinary provisions of the *Ombudsman Act 1974*. We raised this issue with the Department of Corrective Services, and they advised they would consider including in their policy that detainees be informed of their right to make a complaint to the Ombudsman about their treatment by police or correctional officers. However, the legislation as currently drafted does not require this.

It is likely the NSW Police standard operating procedures (SOPs), when drafted, will set out the information which will be provided to detainees. We will review this information when it is available.

2.5.1. Concerns about the information provided

PIAC recommended that penalties should apply, where police fail to give the person a copy of the detention order or summary of the grounds:

> *PIAC urges that, as with other provisions that provide the detained person with a right to information, there be a penalty for failing to provide the copy of the order and the summary of the grounds.*[84]

The Law Society recommended removing section 26ZA(1), which provides that it is not necessary for police to give the requisite information if it is impracticable for police to comply.[85]

2.5.2. The requirement that information be provided 'as soon as practicable'

Some members of Parliament expressed concern about the requirement that information be provided to detainees 'as soon as practicable'. For example:

> *It is bad enough that citizens might be detained merely on suspicion without having committed any crime, but now the bill, with its poorly worded, hopelessly vague 'as soon as practicable' standard, raises the possibility of detainees not even being informed of the reason for their detention until considerable time has passed. What exactly does 'as soon as practicable' mean? It is quite subjective. Does it mean when the police officer gets a chance? If he or she is busy, that could mean many hours. The provision is wide open to abuse because an officer could easily manufacture reasons for delay.*[86]

Ms Rhiannon MLC moved an amendment which proposed that the information must be conveyed as soon as practicable 'but in any event not later than two hours after a detention order is made or a detainee is taken into custody'. The Government opposed the amendment on the basis some flexibility of timeframes was required.[87] The Hon. Tony Kelly also suggested the two hour limit might invite police to use all of the available time before acting.[88]

PIAC has similarly recommended that police be required to provide the relevant information within a specified time period, in particular to ensure that a person has adequate time to instruct a solicitor before a hearing for a confirmed order.[89]

2.5.3. Information about prohibited contact orders

The Act does not require police to inform a person detained whether a prohibited contact order has been made relating to their detention, or the name of a person specified in such an order.[90]

During Parliamentary debates, concerns were raised about this aspect of the legislation:

Why should a detainee not be entitled to know that there is an order in place by the Supreme Court prohibiting that person from having contact with another person or persons? Simply knowing of the prohibition will in no way weaken or subvert that prohibition, but it would provide for greater procedural fairness and would also be more practical. After all, it is difficult to comply with, let alone challenge, a prohibited contact order if one does not know of its existence.[91]

Ms Rhiannon MLC moved that those sections be omitted from the Bill, which provided that police were not required to inform the detainee of prohibited contact orders. The Government opposed these amendments on the basis 'they would make the Bill inconsistent with similar Commonwealth provisions'.[92]

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

There is an absence of a rationale for a person not to be informed of the existence of a prohibited contact order and in relation to whom such an order applies. The Bill clearly provides that other than the entitlements under proposed sections 26E, F, G and H there is no entitlement to contact any other person. As these are entitlements and can only be overridden where there is a prohibited contact order, the absence of an obligation to inform the person of this prohibition is without basis. It will become clear to a detained person when they ask to contact a particular person whether or not that person may be subject to a prohibited contact order.[93]

Providing information to detainees is clearly an issue for police in the exercise of Part 2A powers. It is a criminal offence not to provide certain information. In addition, the provision or withholding of information may directly impact on the attitude and management of a detainee.

7. What are your views on the provision of information to people in preventative detention? In particular:

- **a. Is the information provided to detainees appropriate?**
- **b. Should detainees have to be informed of their right to make a complaint about their treatment by correctional officers, in the same way they have to be informed of their right to make a complaint about their treatment by police officers?**
- **c. Is the requirement that information be provided 'as soon as practicable' appropriate?**
- **d. Is it appropriate that police may be charged for an offence for failing to provide information? Is the exception of impracticability necessary? Should police also face a penalty for failing to provide a copy of the order?**
- **e. Should a detainee be entitled to know of the existence of a prohibited contact order?**

2.6. Who can a detainee contact?

Subject to any prohibited contact order, a person in preventative detention is entitled to contact a family member or person they live with, employer (or, if relevant, an employee or business partner) or another person with the agreement of police, but only to let them know he or she is safe and is being detained. The person is entitled to disclose the fact a preventative detention order has been made, and the period for which they are being detained.[94] The detainee can also contact a lawyer, the Ombudsman and the Police Integrity Commission (these provisions are further discussed below, at 2.7 and 2.8).[95] The detainee is not otherwise entitled to contact another person and may be prevented from contacting another person.[96]

Police can apply to the court for prohibited contact orders which deny the detainee contact with specified persons while they are being detained. Police must provide grounds on which the order should be made and the court must be satisfied that making such an order is reasonably necessary for achieving the purposes of the preventative detention order.[97] As previously discussed, the detainee is not entitled to know whether or not a prohibited contact order exists although police can, of course, disclose this fact.

Police can monitor all contact made by the detainee with his or her family member, employer or other prescribed person. Communication in a language other than English can only take place if it can be monitored with the assistance of an interpreter.[98]

2.6.1. No entitlement to personal contact

Contact with family members and others may be by phone, fax or email. The Act does not entitle a detainee to contact in person, other than for detainees who are under 18 or are incapable of managing their affairs.[99]

PIAC raised concerns about there being no right to personal visits, arguing it was inappropriate that the New South Wales legislation mirror the Commonwealth legislation in this regard:

> *Given the length of the detention there should be a right to a person who is detained having personal visits from any person within sub-sections [26ZE] 1(a) or (b) [family members and persons the detainee lives with] or a person nominated by a detained person. In this regard, mirroring the limits imposed on the type of contact set out in the Federal Bill is inappropriate as the detention orders permissible under the Federal Bill are limited to 48 hours duration.*[100]

2.6.2. Contact while in custody of the Department of Corrective Services

We note that while a detainee has no entitlement to contact people other than those prescribed in the Act, in the absence of a prohibited contact order or being prevented from doing so, there is no explicit prohibition on contacting other people.

It is not clear at this stage whether detainees would have contact with any other people, such as official visitors, chaplains, or other inmates or detainees. We will continue to monitor this issue.[101]

8. What are your views about the implementation of the contact provisions in Part 2A? In particular:

a. Should the Act provide for personal contact for detainees 18 years old and over with family and other permitted persons? If so, what arrangements would be appropriate? For example, should personal visits be permitted, unless there are particular reasons why they should not be allowed?

b. Should detainees have access to chaplains and/or official visitors?

2.7. Contacting the Ombudsman or Police Integrity Commission

A person in detention is entitled to contact the Ombudsman and the Police Integrity Commission. Police are not entitled to monitor this contact.[102]

2.8. Access to legal advice

A person in preventative detention is entitled to contact a lawyer, provided the individual lawyer is not subject to a prohibited contact order. If the detainee can't (because of a prohibited contact order or because their attempt to contact the lawyer is unsuccessful), police must provide reasonable assistance to help the person choose another lawyer. The purpose of this contact is limited to obtaining advice or making arrangements relating to the person's detention. Contact includes being visited by the lawyer, and communication by phone, fax or email.[103]

2.8.1. Limitation of communication to certain matters

The Act limits the purposes for which a detainee can communicate with a legal practitioner. These purposes (the permitted purposes) are:[104]

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

2.8.2. Police monitoring of communication with lawyer

Police can monitor a detainee's communication with a lawyer. Provided the communication is for a permitted purpose, it is inadmissible in evidence against the detainee.[105] It is an offence for the police officer or interpreter monitoring the contact ('the monitor') to disclose to another person any information relating to contact made for a permitted purpose.[106] The offence appears to be committed simply through disclosure, and the maximum penalty is five years imprisonment.

Concerns about police monitoring a detainee's contact with a lawyer have been raised in a number of submissions and during Parliamentary debate. Mr Paul Lynch MP described this monitoring as 'wrong in principle and bad in practice'.[107] Mr Barry Collier MP also raised concerns that a lawyer could not receive proper instructions from a client where their conversation was being monitored, and argued this effectively denied a detainee access to the legal system.[108] The Bar Association raised concerns that protections against communications being used in evidence against the detainee would not apply where topics discussed fell outside the permitted purposes.[109] The Law Society described the monitoring of client lawyer communications as an 'unacceptable obstruction to lawyers performing their duty to their client' which undermined the rationale for 'legal professional privilege of full and frank disclosure by the client to the lawyer'. The Law Society recommended removing the provision, or failing that, including a threshold test along the lines of that in the United States and United Kingdom:

> *In the United States the Attorney General must certify that 'reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further facilitate acts of violence or terrorism' [and] In the United Kingdom the* Terrorism Act 2000 *allows for consultation between lawyer and detainee to be held in sight and hearing of a police officer, if a senior police officer has 'reasonable grounds to believe that such consultation would lead to interference with the investigation'.*[110]

2.8.3. Security vetting of lawyers

The Act provides:

> *In recommending lawyers to the person being detained… the police officer who is detaining the person may give priority to lawyers who have been given a security clearance at an appropriate level by the Attorney-General's Department of the Commonwealth… but subject to any prohibited contact order, the person being detained is entitled under this section to contact a lawyer who does not have a security clearance.*[111]

2.8.4. Eligibility for legal aid

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

> *When people are detained and not charged they will no longer qualify for legal aid. People qualify for legal aid only if they have been charged.*[112]
>
> *This bill makes no explicit recognition of the right of a detained person to legal aid. This will be a case where people with the means to do so can contest a preventative detention order. If they do not qualify for legal aid, then they contest the order at their own expense or as a self-represented litigant.*[113]

In Victoria, the court may order Victoria Legal Aid to provide representation for the subject of a preventative detention order application, 'if satisfied that it is in the interests of justice to do so having regard to the financial circumstances of that person or any other circumstances.' Legal Aid must comply with such an order, regardless of anything in the *Legal Aid Act 1978* (Vic).[114] PIAC has recommended that similar provisions be included in the New South Wales legislation.[115]

In the Australian Capital Territory, a preventative detention order application must be provided to the Legal Aid Commission.[116] The Commission must appoint a public interest monitor from the public interest monitor panel, who is entitled to attend the application hearing. In addition, the person subject to the application is entitled to contact the Commission and the Commission is required to assist the person in finding a legal representative.[117]

2.8.5. Issues for consideration

The question of whether communications with lawyers should be monitored is not an issue directly relevant to this review, as it is not linked to the question of how the Act is being implemented by police or correctional officers. However, certain issues such as how communication with a lawyer is facilitated, and which lawyer is engaged, are directly relevant to the exercise of police and correctional functions under the Act. The issues below focus on these matters.

9. **What are your views about the present provisions on the monitoring of lawyer/client communication by police? In particular:**
   a. **Should there be some threshold, similar to that provided for in the United States and United Kingdom, prior to police being able to monitor the communications? If so, what are appropriate considerations, and who should determine this?**
   b. **Is it appropriate that the non-disclosure and non-admissibility provisions apply only to communications made for a permitted purpose?**
   c. **Is it appropriate that disclosure of communications by a monitor is a criminal offence? Should the elements of the offence include any additional requirements?**
10. **Are the arrangements for security clearance of lawyers provided for in the Act appropriate?**
11. **Would legal aid entitlements assist in police officers facilitating legal representation for detainees? If so, what arrangements would be appropriate? What other arrangement may assist police in facilitating legal assistance to detainees?**

2.9. Access to interpreters

The Act provides that police must arrange for the assistance of an interpreter to explain the effect of the preventative detention order, 'if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language'. A telephone interpreter may be used. Failure to provide an interpreter does not, however, affect the lawfulness of a person's detention.[118]

12. **What are your views as to the adequacy of required arrangements for interpreters for detainees?**

2.10. Questioning and other investigative procedures

2.10.1. General prohibition on questioning

Police cannot question a person in preventative detention other than for the purposes of determining whether the person is the person specified in the order, ensuring the person's safety and well being, or complying with other Part 2A legislative requirements. It is an offence for police to question a person in relation to any other matters.[119]

Some members of Parliament questioned the basis for the general prohibition on questioning:

> *It seems unusual that they should not be questioned, particularly as, if they were willing to co-operate, further information could be gained from them while they are being detained.*[120]

The Law Society argued that questioning should not be permitted at all:

> *A person is only protected from other than limited questioning while the person is actually detained. This is not appropriate. The section should be amended to provide that a person subject to a preventative detention order must not be questioned at any time.*[121]

In the United Kingdom, suspected terrorists can be detained for up to 28 days without charge. The legislation clearly anticipates that detainees will be questioned during this time, as one of the grounds for continued detention of a person is to enable police 'to obtain relevant evidence whether by questioning him or otherwise'.[122] The United Kingdom regime is discussed in more detail at 2.16.3.

2.10.2. Detention after arrest

The general prohibition on questioning does not apply where a person is released from detention under the order, even though the order may still be in force. Police can release a person from detention under the order at any time and take the person immediately into custody on some other basis, for example so that the person can be arrested and charged with an offence.[123]

Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* provides for a period of time that a person who is under arrest can be detained by police, to enable police to investigate the person's involvement in the commission of an offence. The investigation period begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but it must not exceed the maximum investigation period. The maximum investigation period is four hours but can be extended by a detention warrant.[124] A magistrate or other authorised officer may issue a detention warrant that extends the investigation period by up to eight hours on the basis of a range of considerations including the nature of the offence, the evidence against the person, the cooperation shown by the detainee and provided continued detention is reasonably necessary to complete the investigation.[125] The maximum investigation period cannot be extended more than once.[126] If a person is arrested more than once within any 48 hour period, the investigation period for the subsequent arrest is reduced by the amount of time the person spent in detention following the first arrest, unless the subsequent arrest relates to an offence the person is suspected of having committed in the meantime.[127]

A person who is detained after arrest, under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act*, must be cautioned as soon as practicable and provided with a summary of the provisions relating to the investigation period. The person has a right to refuse to participate in questioning, and is entitled to a legal practitioner. The person is also entitled to communicate with a friend, relative or guardian (unless the custody manager has reasonable grounds to believe this is likely to result in certain things, such as injury or loss of evidence).[128]

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

> *I understand that under the present legislation, police already have those powers, and that they would be able to take a person into custody, interrogate them, and ascertain particular aspects of police intelligence in relation to a future, forthcoming, or past terrorist act. However, the irony is that when a person is taken into custody under this legislation, police will not be able to talk to the person; he or she will simply be detained. It will prevent people from being able to talk to other people who police suspect have untoward aims.*[129]

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

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

Release from detention under an order does not extend the period for which the order remains in force.[130] A person may be taken back into custody under the same preventative detention order, after being released from it, but the order continues to run while the person is released.

2.10.3. Questioning by ASIO

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

> *As the Australian Security Intelligence Organisation powers override this legislation, persons may be detained under those powers; under the warrant they may be subject to seven days or 168 hours of questioning. The passage of 168 hours will start when the person is first brought before a prescribed authority under the warrant. The legislation then provides a series of time periods in which questioning can occur. The Australian Security Intelligence Organisation Act does not detail the extent of the questioning, but obviously it is much more invasive and detailed than the sort of questions a New South Wales authority may ask… While the Government is doing everything in this bill to protect the rights of individuals, those rights will be subject to the powers of the Australian Security Intelligence Organisation Act. Therefore I am concerned that this legislation may simply be a post box in terms of the operation of the Act.*[131]

The federal preventative detention scheme anticipates that preventative detention orders operate in conjunction with ASIO's questioning and detention powers.[132] Our understanding is that ASIO's questioning and detention powers operate outside of the New South Wales preventative detention powers. That is, a person could be released

from preventative detention for the purpose of being questioned by ASIO, and could then be put back in detention afterwards, provided the preventative detention order has not lapsed (the order continues to run during the person's release from detention. This is discussed further at 2.13.2). We note that anything said by the person subject to questioning by a prescribed authority under the *Australian Security Intelligence Organisation Act 1979* is not admissible in evidence against that person.[133]

2.10.4. Conducting other investigative procedures

Police can take identification material from a detainee where they have that person's consent in writing or they believe on reasonable grounds that it is necessary for the purpose of confirming the person's identity as the person specified in the preventative detention order.[134] Police can use such force as is necessary and reasonable to do so. Identification material includes such things as finger and other prints, photographs, voice recordings and handwriting.[135] The officer taking the material, or causing it to be taken, must be of the rank of sergeant or above.

Police can take finger and other prints from persons under 18 years or who are incapable of managing their own affairs, but require court orders to take other forms of identification material. A parent, guardian or other appropriate person (not a police officer) must be present when the material is taken.[136] A court order is not required by police where they have the consent in writing of a juvenile who is capable of managing his or her own affairs and their parent, guardian or other appropriate person.[137]

The identification material can only be used for the purpose of determining whether the person is the person specified in the order.[138] It is an offence to use the material for any other purpose.[139] The Commissioner of Police has the responsibility to ensure that all identification materials are destroyed as soon as practicable after 12 months has elapsed from taking the material, provided any proceedings relating to the order or the detainee's treatment under the order have not been brought, or have been brought and discontinued or completed within that 12 month period.[140]

PIAC recommended the destruction of identification materials should be subject to a certification process and the 'certification of destruction be one of the matters upon which the Attorney General should be required to report under section 26ZN'.[141] The Government amended the Bill to include provisions that a statement confirming the destruction of identification material be included in the annual report by police on the exercise of preventative detention powers to the Attorney General.[142]

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

> *Proposed section 26ZM deals with the use and destruction of material taken for identification purposes. That is fine, if material and evidence is retained in New South Wales and is destroyed after 12 months, as in the case with fingerprints taken after the commission of a misdemeanour. However, I know, and all honourable members know, that under this legislation that person's identification information will not be retained within Australia. It will be sent to police forces overseas to be checked. I do not disagree with that course. What I disagree with is the implication in the section that such material will be destroyed. Everyone knows that once that material is sent overseas, neither the New South Wales police nor the Federal police will have control of it. It will not be destroyed, despite the fact that there are treaties in place. I see that as a mere sop to civil libertarians, something they would expect but something that will never happen.*[143]

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

2.10.5. Establishing a person's identity

Police can question a person, or take identification material, 'for the purpose of determining whether the person is the person specified in the order'.[144]

NSW Police has expressed concern that determining whether a person is the person specified in the order is different from establishing a person's identity. If a person has different identities, the Act would not permit police to question the person about this, or to take identification material for establishing the person's true identity.

2.10.6. Taking DNA samples

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

13. **Are the powers of police to question persons the subject of preventative detention and obtain identification material sufficient and appropriate? In particular:**
    a. **Is it appropriate that police be restricted to asking questions only relating to determining whether the person detained is the person specified in the order, or for health and welfare purposes? Or, should police be able to generally question a person detained — similar to the powers of police in the United Kingdom? Does the interaction between Part 2A of the *Terrorism (Police Powers) Act* and *Part 9 of the Law Enforcement (Powers and Responsibilities) Act* provide sufficient flexibility for police in questioning detained persons?**
    b. **Should police be permitted to ask questions to establish the identity of a person detained in addition to any questions to establish they are the person named in the order?**
    c. **Should police be permitted to take a DNA sample from a person in preventative detention under the *Terrorism (Police Powers) Act*? If so, under what circumstances?**

2.11. Impact on young people

Children under 16 years of age cannot be detained under a preventative detention order or made the subject of an application. If a person is being detained and police become aware that person is under 16, police must release the person as soon as is practicable.[145]

There are special provisions for child detainees aged 16 or 17. They cannot be detained with adults unless there are exceptional circumstances.[146] They are entitled to have contact with a parent or guardian, or another person who is acceptable to the person and able represent their interests.[147] This contact is to be for a minimum period of two hours each day or for longer periods where the court has specified in the order.[148]

In the Australian Capital Territory, preventative detention orders can only be made in relation to adults (that is, people 18 or above).[149]

2.11.1. The difference between juvenile detention and juvenile correctional centres

The Act provides that a detainee who is under 18 may be detained at a juvenile detention centre or juvenile correctional centre.[150]

Juvenile detention centres are managed by the Department of Juvenile Justice. There are eight in New South Wales, one of which has facilities for young women. Juvenile detention centres provide educational, recreational and vocational programs, as well as specialised counselling and assistance in personal development.[151] Juvenile detention centres are governed by the *Children (Detention Centres) Act 1987*, which provides that the welfare and interests of detainees must be given paramount consideration, and punishment imposed by a court is the only punishment for the offence.[152]

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

> *Some older detainees are better suited to the environment of the Department of Corrective Services, either due to the seriousness of their offence or because of their behaviour... The detainees located at Kariong are the worst behaved in the juvenile justice system. They are there either due to the severity of their offending, or due to a history of disruption or violence in the juvenile justice system.*[153]

Although the Act provides that 16 and 17 year old detainees can be detained in a juvenile detention centre or juvenile correctional centre, the Department of Juvenile Justice has advised that 16 and 17 year old detainees will not be detained in juvenile detention centres.

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

During Parliamentary debate there were concerns raised about the provisions relating to child detainees in that there was no provision for 'information provided to a person who is under 18 years of age or otherwise incapable of managing his or her own affairs to also be communicated to a parent or guardian, or an independent third person'.[154]

2.11.3. Visiting rights

The Act provides that 16 and 17 year old detainees are entitled to have contact with a parent or guardian, or another person who is acceptable to the person and able to represent their interests (not a police officer), for at least two hours each day, or longer if specified in the order or permitted by the detaining police officer.[155]

PIAC submitted that the legislative presumption of a two hour limit for contact with another person for a juvenile was inappropriately short. Its position was that a juvenile 'should be permitted to be accompanied by an independent observer at all times'.[156]

More generally, concerns were raised during Parliamentary debate that the Act breached the *Convention on the Rights of the Child*, in particular Article 37 (which sets out the right not to be deprived of liberty unlawfully or arbitrarily) and Article 40 (which sets out the right to be presumed innocent until proven guilty).[157]

14. Are the arrangements for the detention of young people appropriate? In particular:

- **a. Are the visiting arrangements appropriate? What considerations should a police officer take into account in determining whether to allow a child detainee to have contact beyond two hours with a parent or guardian?**
- **b. What information should parents and guardians of child detainees be entitled to?**

2.12. Impact on people incapable of managing their affairs

The Act also has special provisions for people who are incapable of managing their affairs. They are entitled to have contact with a parent or guardian, or another person who is acceptable to the person and able to represent their interests (not a police officer).[158] They are entitled to have contact for a minimum period of two hours each day or for longer periods where the court has specified in the order or permitted by the detaining police officer.[159]

Like its submission in relation to child detainees, PIAC submitted that the legislative presumption of a two hour limit for contact with another person was inappropriately short for persons incapable of managing their own affairs. They also recommended the term 'people who are incapable of managing their affairs' be amended:

> *PIAC strongly recommends throughout the Bill the substitution of the term 'incapable of managing their own affairs', with the term, 'person under special disadvantage'. This is proposed in order to reflect the need to ensure that persons who have intellectual or psychiatric disabilities, for example, but who do manage their own affairs, are afforded appropriate protections while subject to a preventative detention order… A person under special disadvantage should be permitted to be accompanied by an independent observer at all times.*[160]

15. Are the arrangements for the detention of people who are incapable of managing their affairs appropriate? In particular:

- **a. On what basis would people be considered 'incapable of managing their affairs', and who would make that decision?**
- **b. Are the visiting arrangements appropriate? What considerations should a police officer take into account in determining whether to allow an incapable person to have contact beyond two hours with a parent or guardian?**
- **c. What information should parents and guardians of incapable adult detainees be entitled to?**

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

2.13.1. Revocation of a preventative detention order

A confirmed preventative detention order can be revoked by the court on application by the subject person or on application by a police officer.[161] Police must apply to have a preventative detention order revoked if they are satisfied the grounds on which the order was made have ceased to exist.[162] An application for revocation must set out any relevant information that was not provided to the court at the time the order was made.

Concerns were raised by PIAC that police were not required to inform themselves of any changes to the grounds or make a timely application for revocation. It noted:

> *[The Act] provides, appropriately, for the police officer to seek a revocation of the order where the grounds for the order have ceased to exist. However, there is no obligation on the police officer to make enquiries or be informed of any change in circumstances that affects the existence of the grounds. Further, there is no maximum time allowed before the police officer, having determined that the grounds no longer exist, to make the revocation application… Given the seriousness of the removal of liberty, it is PIAC's view that the maximum time permissible ought properly be two hours.*[163]

2.13.2. Release from detention

The police officer detaining a person under an order can release the detainee at any time provided the detainee is given a written statement, signed by the officer, stating that the person is being released from that detention.[164] A detainee may be released from detention under the order but taken into custody on some other basis immediately after being informed of their release, such as for the purposes of being arrested and charged with an offence.[165]

A person may be taken back into detention under the order, after being released, provided the order remains in force in relation to that person.[166] Release from detention under an order does not extend the period for which the order remains in force, in other words the time for which the person may be detained under the order continues to run while the person is released.[167]

During the Parliamentary debates concerns were expressed that detainees would not be protected from unwelcome publicity on their release.[168] PIAC raised these concerns:

> *This provision places no obligation on the police officer to provide the person released from detention with protection from unwelcome media exposure or the means to return to their residence or place of arrest. Nor does it provide any protection against the police officer releasing information about the pending release of a person detained [under an order] without that person's consent… Given the level of media interest and community tension in relation to people suspected of involvement in terrorist acts, it is vital that they are protected from potential retribution on release and are provided with the means to return to their preferred location.*[169]

The Law Society raised concerns the release from detention and return to custody could be otherwise misused:

> *People released can be returned to detention at any time while the order remains in force. This section could be used to provide an opportunity for people to be harassed and families disrupted, by people being released from detention during the day only for police to enter their premises and return them to custody each night during the life of the order.*[170]

We note that, in the Australian Capital Territory, a preventative detention order lapses if a person is released, and the person cannot be taken back into custody under the same order.[171] Application can be made to reinstate the order where the order lapsed due to the detention of the person under the *Crimes Act 1900* (ACT) or the *Australian Security Intelligence Organisation Act 1979* (Cth). The reinstated order ceases to have effect at the end of the period stated in the original order.[172]

We also note that, in the United Kingdom, a judge is required, every 7 days, to assess the continued detention of a person.

16. **Should there be some additional requirement on police and/or the court to assess, at regular intervals, whether the continued detention of a person is necessary? If so, who should consider this matter and at what intervals?**
17. **In circumstances where a court has found there are sufficient grounds to detain a person for a specific period, is it appropriate that police have the power to release that person without consultation with the court?**
18. **If police release a person from preventative detention prior to the preventative detention order expiring, should they be required to consider having the order revoked, or should the order be considered to have lapsed — similar to the Australian Capital Territory regime?**

2.13.3. Provision of information upon release

PIAC further submitted that, to ensure detainees understand what is happening to them, police should be required to explain the effects of release to persons upon their release. This should include whether the order has lapsed, whether the person may be taken into detention again (for example because the order has not lapsed), whether the

person is going to be taken into custody under another regime (such as questioning by ASIO or being charged under the criminal law) as well as information about what rights of appeal and complaint mechanisms apply.[173]

19. Should a person being released from detention be entitled to more information about their rights and status upon release? Should NSW Police or the Department of Corrective Services develop procedures to return persons to an appropriate location on their release from preventative detention, including to protect the person from retribution or unwanted media exposure?

2.14. Safeguards for detainees

The Act contains a number of safeguards already covered, including a detainee's entitlement to be legally represented at a hearing, be provided with a summary of the grounds for their detention and make an application to have the detention order revoked. Other safeguards are discussed below.

2.14.1. Protection of dignity

The Act requires that persons in detention be treated with humanity and respect for human dignity, and makes it an offence to subject detainees to cruel, inhuman or degrading treatment.[174]

PIAC noted the provisions ensuring detainees be treated with respect for human dignity, but submitted the standards of treatment in detention should expressly include access to appropriate medical care and the right to exercise religious and other personal beliefs such as dietary restrictions. In addition PIAC submitted the maximum penalty of two years imprisonment for cruel, inhuman or degrading treatment was inadequate. They submitted the penalty should reflect the seriousness of a breach of international conventions against torture of which Australia is a state party. The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* provides that 'each state party shall make these offences punishable by appropriate penalties which take into account their grave nature'.[175] PIAC submitted two years imprisonment does not appropriately reflect the gravity of such an offence.[176]

2.14.2. Appointment of a senior officer to oversee the order

A senior police officer must be appointed to oversee the functions of the preventative detention order by the Commissioner, Deputy Commissioner or Assistant Commissioner responsible for counter-terrorism operations. The nominated officer must be of or above the rank of superintendent, and must not have been involved in the application for the order.[177]

This officer must ensure compliance with all obligations under the scheme, including application by police for revocation of the preventative detention order, or contact orders, where the grounds cease to exist. The officer must also consider any representations made by the detained person, their lawyer or their contact persons, in relation to the person's treatment under the order or their application for revocation of the order.

The NSW Police Counter Terrorism Coordination Command is training about eight superintendents in preventative detention, so there will be a pool to draw from.

PIAC made the following submission in relation to oversight of the orders:

> *The oversight of the order by a serving senior police officer fails to provide sufficient independence of the oversight function. A special independent office should be created to serve this function given the seriousness of the removal of liberty without proof of or conviction for a criminal offence. Alternatively, the Police Integrity Commission could perform this function.*[178]

2.14.3. Annual reporting by the Attorney General

Annual reports on the exercise of preventative detention powers are required to be given to the Attorney General and Minister for Police by the Commissioner of Police within four months after each 30 June.[179] The report must include matters such as; the number of orders applied for, and issued or not issued by the courts; the number of applications relating to adults and juveniles; the duration of orders made; whether the orders were made to prevent a terrorist act or preserve evidence; whether the subject of the order was detained and the period of detention; the number of prohibited contact orders applied for and issued or not issued; the number of revocation applications made and granted; particulars of any complaints made relating to detention under an order and the outcome of those complaints.[180] The Attorney General must table the reports in each House of Parliament as soon as practicable after receiving them.

PIAC made a number of submissions relating to the content of the annual report to be tabled by the Attorney General. Some of these matters were adopted in the Act. Other matters which PIAC submitted should be reported on, but which do not appear in the Act include:

- whether any proceedings were brought seeking remedy in relation to a detention order the treatment of a person detained, the basis of such proceedings and their outcome
- the amount of money paid by the State by way of compensation to any person as a result of proceedings seeking remedy, and
- an analysis of the effectiveness of the preventative detention regime, including what if any terrorist events the Attorney General reasonably believes were prevented as a result of the use of the orders and on what basis.[181]

PIAC submitted that a report to Parliament should be required, at minimum, every three months and a maximum time allowed for compliance with this requirement so that reports are tabled within one month of the end of each reporting quarter.[182] The Law Society also submitted the reporting mechanism was inadequate and should be quarterly, or half yearly, and that the reports should be published and made available to the public.[183]

2.14.4. Public interest monitoring

Preventative detention regimes in some other jurisdictions provide for public interest monitoring. For example:

- The Queensland Public Interest Monitor (PIM) is appointed under the *Police Powers and Responsibilities Act 2000* (Qld). The PIM monitors applications for surveillance and covert search warrants, federal control orders and preventative detention orders.[184] The PIM has oversight functions under the Commonwealth Criminal Code in relation to control orders and under the *Terrorism (Preventative Detention) Act 2005* (Qld) in relation to preventative detention. The Queensland Premier, Mr Peter Beattie has compared the oversight role of the PIM with oversight regimes in other States:

  > *Other jurisdictions use reactive mechanisms that only apply after the event, such as complaints, inspections and reports. There is no doubt a role for these back end accountability measures, but they are immeasurably enhanced by proactive safeguards like the Public Interest Monitor at the front end… the Public Interest Monitor will be notified of initial and final PDO [preventative detention order] applications and will be entitled to make representations to the senior police officer or the serving retired judge.*[185]

  Police must notify the PIM when applying for preventative detention orders. The PIM is entitled to be present when an application is heard for a preventative detention order, and can ask questions and make representations to the issuing authority.[186] It is not the role of the PIM to legally represent the person subject to a preventative detention order application (the person is entitled to be legally represented) rather to represent the 'public interest'. The current PIM has defined the public interest as balancing the public interest in preventing, detecting and prosecuting serious and major crime, including terrorist offences, with the public interest in guarding and securing the privacy and rights of individuals.[187] The PIM can also gather statistical information about the use and effectiveness of control and preventative detention orders. Whenever considered appropriate the PIM can give the police commissioner a report on non-compliance by police officers with the covert search warrant or preventative detention laws.[188]
- In the Australian Capital Territory, the Minister must appoint people to a public interest monitor panel. Each person appointed must be a lawyer, with appropriate security clearance, with the qualities and experience suitable to being a public interest monitor. For each application for a preventative detention order, the Legal Aid Commission must appoint a person from the panel to be the public interest monitor for the application. The monitor is entitled to be present at the hearing of the application, to ask questions of anyone giving evidence to the court and to make any submissions to the court. Police must also consult with the public interest monitor before directing that contact between a detainee and his or her lawyer be monitored by police.[189]

There is no public interest monitoring in New South Wales.

2.14.5. Role of the Ombudsman and Police Integrity Commission

The Ombudsman is to keep under scrutiny the exercise of preventative detention powers by police and correctional services officers for a five year period.[190] The Ombudsman may require police or any public authority to provide information about the exercise of the powers, and police are to ensure the Ombudsman is duly notified of the making of an order, if a person is taken into custody and any revocations of an order.[191] As previously stated, the Ombudsman must prepare reports on the exercise of the powers two years and five years after their commencement.[192]

In addition, a detainee is entitled to contact the Ombudsman or the Police Integrity Commission and has a right to complain to the Ombudsman in relation to the application for an order, or their treatment in detention.[193]

The NSW Council for Civil Liberties has submitted that extraordinary powers should be subject to extraordinary safeguards, supervision and oversight.[194] The Council made a number of recommendations relating to an expanded oversight role of the Ombudsman. In particular it recommended the Ombudsman:

- be required to be present at every application for a preventative detention order, with the right to make representations in the public interest (similar to the Public Interest Monitor in Queensland)
- be given the power and obligation to investigate all actions taken in accordance with each preventative detention order including monitoring the treatment of detainees and reporting to Parliament on issues such as the justification for use of the powers, and the effectiveness of their use
- be given authority to investigate and report to Parliament on any concerns with the use of powers under Part 2A, despite anything contained in Part 8A of the *Police Act 1990* (which deals with complaints made against police), and
- where prohibited contact orders are made, report on the reasons that were given for restriction and the impact of the restriction on the detainee.

The Law Society has endorsed the recommendations made by the Council for Civil Liberties. In relation to which agency should undertake an expanded oversight role the Law Society noted, 'in most instances the Ombudsman should be preferred to ensure actual and apparent arms-length oversight'. 195 The Law Society considered the Queensland Public Interest Monitor would be a good model for the oversight of preventative detention in New South Wales.

2.14.6. Sunset provision

The Act provides that any preventative detention or prohibited contact order in force at the end of 10 years after the commencement of Part 2A (that is, 16 December 2015) ceases to be in force, and no application can be made for orders after that date.

20. Are the safeguards for detainees, as they apply to the exercise of powers conferred on police and correctional officers, appropriate? In particular:

a. What are your views as to the legislative arrangements to ensure humane treatment of detainees?

b. Are the arrangements by NSW Police to provide for specially trained superintendents to oversee detention sufficient and appropriate?

c. Should police be required to report to the Attorney General and Police Minister on additional matters, or more frequently, about the exercise of Part 2A functions?

d. Are the external oversight arrangements in place sufficient? If not, what other arrangements are required to ensure appropriate use of Part 2A functions by police and correctional officers?

2.15. Complexity of current arrangements

In discussions with police officers and correctional officers about the implementation of Part 2A, views have been expressed that the procedural and other requirements included in Part 2A mean that its use is unlikely in many circumstances. Issues include the requirements for police officers to supervise detention, the lack of powers to question a person in detention and the possible criminal consequences for police for breaching some legislative requirements. Issues for correctional officers include whether they are authorised to deal with detainees at all, other than simply to detain them. While many of these matters have been canvassed above, it is appropriate to seek overall comment as to this issue.

21. What are your views as to the overall arrangements for preventative detention? Should the requirements of Part 2A be revised to increase the utility of preventative detention in preventing and investigating terrorist acts, and if so in what respects?

2.16. Preventative detention in other jurisdictions

This section provides a brief overview of preventative detention regimes in other jurisdictions.

2.16.1. Commonwealth

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

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

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

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. In August 2006, a control order was imposed on Joseph Thomas, after his conviction for funding a terrorist organisation was overturned on appeal.[196] The grounds for the order cited Thomas' training with Al Qa'ida, his 'vulnerability' to extremist views and beliefs and his potential as an available resource to 'aspirant extremists'. The order placed a curfew on Thomas, required him to report regularly to Victorian police, and prohibited him from using certain devices and associating with prescribed individuals and organisations.[197] These controls were to 'protect the public and substantially assist in preventing a terrorist act'.

2.16.2. Other Australian States and Territories

Preventative detention regimes have now been enacted in all Australian States and Territories to complement the federal scheme.[198]

State and Territory laws all provide for a detention period of up to 14 days for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act that has occurred. Each regime provides for an initial or interim order for a period of 24 hours detention, after which application must be made to a prescribed issuing authority at a hearing in which the person is entitled to legal representation. The regimes also provide for prohibited contact orders while a person is detained. In each of the States and Territories, the detainee is entitled to contact a relevant oversight or complaint handling agency.

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

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

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

- The court can only make a preventative detention order where detaining the person is the least restrictive way of preventing the specified terrorist act from occurring.[199]
- Police can release the person from the order, however the order then lapses and the person cannot be taken back into custody under the order.[200] Application can be made to reinstate the order where the order lapsed due to the detention of the person under the *Crimes Act 1900* (ACT) or the *Australian Security Intelligence*

Organisation Act 1979 (Cth). The reinstated order ceases to have effect at the end of the period stated in the original order.[201]

- Children under 18 years of age cannot be detained. All reasonable enquiries must be made to determine a person's age and where there is reasonable belief the person is under 18 they must be immediately released — failure to comply is an offence carrying a penalty of up to 2 years imprisonment.[202]
- The applicant must provide the legal aid commission with a copy of a preventative detention order application and the commission must appoint a person from the public interest monitor panel.[203] The legal aid commission must provide assistance to the person subject to the application by arranging for a suitable lawyer to represent them.[204]
- Where the application relates to person with impaired decision-making ability, the applicant must notify the public advocate, who is entitled to attend the hearing.[205]
- The facts and other grounds relied on in the application must not have been obtained, directly or indirectly, through torture.[206]

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

2.16.3. United Kingdom

Section 41 of the *Terrorism Act 2000* (UK) provides for the detention of suspected terrorists, without charge, for up to 28 days. 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.'[207]

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

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

When it came into force, the *Terrorism Act 2000* (UK) provided for a maximum detention period of 7 days. In 2003, this was increased to 14 days.[208] In 2005, the government introduced a Bill into Parliament proposing a maximum detention period of 90 days. The government based its proposal on advice from police that 14 days was not long enough to undertake investigative activities such as making inquiries in other countries, examining and decrypting computer data, analysing forensic evidence, establishing the identity of suspects, and obtaining data from mobile phones.

The proposed maximum detention period of 90 days was widely criticised, and ultimately, was not enacted. However, Parliament did accept the case for extending the maximum detention period beyond 14 days, and increased the maximum period to 28 days. The law as it currently stands provides for detention without charge for up to 28 days, although the person's continued detention has to be assessed at least every 7 days by a judge.[209]

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

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

> *The change in the nature of the terrorist threat has led to an increasing number of cases in which the arrest has come earlier than would be otherwise the case, because these arrests are primarily intended to protect the public by disrupting terrorist conspiracies.*[210]

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

> *One of the key conclusions of our inquiry is that the preventative element of some arrests under the* Terrorism Acts *should be given clearer and more explicit recognition... Preventative detention is a significant new development, and one that was not made explicit during the passage of the Bill, during which extended detention was primarily justified on the grounds of the time needed to collect and analyse evidence.*[211]

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

> *The idea that arrest and detention of some terrorist suspects is carried out solely as a 'preventative' measure, is misleading. While an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, the legislation does not allow continued detention on this basis. Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence, or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings.*
>
> *There is an important distinction between the need for extended periods of pre-charge detention and the need for a separate power of arrest.*[212]

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

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

To date, no person has been detained under the New South Wales preventative detention provisions. However, police in the United Kingdom have used their detention without charge powers on a number of occasions. Between January 2004 and September 2005, 36 people spent more than a week in detention under the *Terrorism Act 2000* (UK). Of these, 10 were released without charge at the end of the detention period.[213] The powers were also used in August 2006, when 25 suspects were taken into detention on suspicion of committing a terrorist act involving a number of aircraft. A district judge ruled that 23 of the 25 could be held without charge while police continued their investigations.[214] Eight detainees were charged with offences including conspiracy to murder and preparing acts of terrorism, and another three were charged with other offences under the *Terrorism Act 2000*.[215]

The United Kingdom has introduced other legislative measures which aim to prevent terrorist activity. The *Anti-Terrorism, Crime and Security Act 2001* (UK) provided, among other things, for the indefinite detention of foreign nationals suspected of terrorism. In 2004, the House of Lords held this was incompatible with the European Convention on Human Rights. The court found the law discriminated against foreign nationals and was disproportionate to the threat of terrorism.[216]

Following this ruling, Parliament enacted the *Prevention of Terrorism Act 2005* (UK), which allows control orders to be imposed on people suspected of being involved in terrorist activity. Control orders impose conditions upon individuals ranging from prohibitions on access to specific items or services, such as the internet, and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews. The Act provides for two types of control orders, those which derogate from the European Convention on Human Rights, and those which do not. Non-derogating orders can be made by the Secretary of State with the permission of the courts, and derogating orders can be made by the courts on application by the Secretary of State. To make a non-derogating order, or to apply for a derogating order, the Secretary of State must have reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, and must consider that it is necessary, for the protection of members of the public, to make a control order imposing obligations on that individual. To make a derogating order, the court must be satisfied the individual has been involved in terrorism, it is necessary to impose conditions on him to protect the public, and the risk is associated with a public emergency in which there is a designated derogation under article 5 of the European Convention on Human Rights.[217] Control orders may be imposed for a period of up to 12 months, but can be renewed. Breach of a control order is a criminal offence.

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

- *Secretary of State for the Home Department v JJ and others* involved six men who were subject to control orders. The men were only allowed out of their small flats between 10am and 4pm each day, and were only allowed within a permitted area. They were electronically tagged, and had to report to the monitoring company when they left and returned to their homes. They could not meet any person outside the house, or receive any visitors, without the approval of the Home Office. Police could enter the controlled person's flat at any time, to search the place, remove any items, install equipment or take the controlled person's photograph. The men were not allowed to use mobile phones or the internet, or have more than one bank account, and had to provide monthly bank statements to the Secretary of State. The High Court held that the obligations imposed by the control orders were so severe they amounted to deprivation of liberty, contrary to Article 5 of the European Convention on Human Rights. The Court quashed the orders on the basis that the Secretary of State had no power to make them.[218] The Secretary of State appealed against the decision. The Court of Appeal dismissed the appeal, agreeing that the orders amounted to a deprivation of liberty contrary to Article 5. The court noted, however, that the Secretary of State could impose new control orders on the men, provided the new package of obligations did not amount to a deprivation of liberty.[219]
- In *Secretary of State for the Home Department v MB*, the High Court found the procedure for making control orders, as set out in the *Prevention of Terrorism Act 2005* (UK), was incompatible with the right to a fair hearing required by Article 6 of the European Convention on Human Rights, on the basis that the court performed only the limited function of considering whether the Secretary of State's decision was flawed; it could not review the merits of the case; it was required to apply a particularly low standard of proof; and reached its decision on the basis of closed evidence, of which the controlled person was not aware and was therefore not able to contest. The court described this procedure as 'conspicuously unfair', and concluded that the controlled person's rights 'were being determined not by an independent court… but by executive decision-making, untrammelled by any prospect of effective judicial supervision.'[220] The Secretary of State appealed against the decision. The appeal was allowed, on the basis that the provisions for judicial review of non-derogating control orders were compatible with Article 6.[221]

2.16.4. Canada

In 2001, the Criminal Code of Canada was amended to provide for warrantless arrests by 'peace officers' for up to 24 hours and a maximum detention period of 72 hours. This was designed as a preliminary step towards the imposition of a 'recognizance with conditions'.[222] A person could be taken into custody in two circumstances:

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

The person taken into custody had to be brought before a provincial judge within 24 hours, or if no judge was available within 24 hours, as soon as possible. The judge would order the release of the person, unless the peace officer could show that detention was necessary; either to ensure the person appeared at their next hearing, to protect the safety of the public or witnesses, or for 'any other just case' including maintaining confidence in the administration of justice. This is the same general formula that is used for bail in the Canadian system. If the person continued to be detained, then the hearing to determine whether recognizance conditions should be imposed had to occur within 48 hours, bringing the maximum time in detention to 72 hours. A recognizance could be made by the judge that the person keep the peace and be of good behaviour, and comply with any other reasonable conditions prescribed in the recognizance, for a period of up to 12 months. Annual reports by the Attorney General with respect to the use of the preventative arrest powers had to be submitted to the Canadian Parliament (along with reports by the responsible Minister concerning the number of arrests without warrant).[223]

The provisions were due to expire in 2007, unless extended by Parliament.[224] A 2006 interim report by the Standing Committee on Public Safety and National Security recommended that the provisions remain in force for another five years, and be subject to further review.[225] However, Parliament decided not to extend the measures, so they are no longer in force.[226]

22. Should any of the features of preventative detention legislation in other jurisdictions be incorporated into the New South Wales regime, and if so, why?

Endnotes

[33] Department of Corrective Services advice, 18 January 2007.
[34] NSW Police advice, 7 July 2006.
[35] *Terrorism (Police Powers) Act 2002* s. 26T.
[36] *Terrorism (Police Powers) Act 2002* s. 26U.
[37] *Terrorism (Police Powers) Act 2002* s. 26V.
[38] *Terrorism (Police Powers) Act 2002* s. 26X(2)(b).
[39] See *Crimes (Administration of Sentences) Act 1999* s. 79 and the *Crimes (Administration of Sentences) Regulation 2001* cl 120 and 121.
[40] See *Crimes (Administration of Sentences) Regulation 2001* cl 22 and 23 and *Crimes (Administration of Sentences) Act 1999* ss. 10 and 73.
[41] Department of Corrective Services letter of instruction, 3 January 2007.
[42] Crown Solicitor's Office, Advice on application of *Crimes (Administration of Sentences) Act* to preventative detention orders, 17 January 2007.
[43] *Terrorism (Police Powers) Act 2002* s. 26D(1).
[44] *Terrorism (Police Powers) Act 2002* s. 26D(2).
[45] *Terrorism (Police Powers) Act 2002* s. 26F.
[46] *Terrorism (Police Powers) Act 2002* s. 26G(1).
[47] *Terrorism (Police Powers) Act 2002* s. 26H.
[48] *Terrorism (Police Powers) Act 2002* s. 26L.
[49] *Terrorism (Police Powers) Act 2002* s. 26G(2).
[50] *Terrorism (Police Powers) Act 2002* s. 26I(3).
[51] *Terrorism (Police Powers) Act 2002* s. 26I(5).
[52] *Terrorism (Police Powers) Act 2002* s. 26O.
[53] *Terrorism (Police Powers) Act 2002* s. 26G(1)(a).
[54] *Terrorism (Police Powers) Act 2002* s. 26J.
[55] *Terrorism (Police Powers) Act 2002* s. 26J(2), *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) Part 2 and *Australian Security Intelligence Organisation Act 1979* (Cth) s. 4.
[56] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s. 17.
[57] See the Hon. Dr. Arthur Chesterfield-Evans, Legislative Council Hansard, 30 November 2005.
[58] Law Society of NSW, submission to NSW Parliament, 28 November 2005; NSW Bar Association, summary points of the submissions made to the Crossbench members of the Legislative Council, 29 November 2005 and Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[59] *Terrorism (Police Powers) Act 2002* s. 26X(1).
[60] *Terrorism (Police Powers) Act 2002* s. 26X(2)(e).
[61] Letter from the Commissioner of Corrective Services, 8 February 2007.
[62] *Crimes (Administration of Sentences) Act 1999* s. 236A.
[63] Advice from Justice Health, 9 August 2006.
[64] Justice Health, "Policy Segregated Custody", April 2006.
[65] The Hon. Eric Roozendaal, Legislative Council Hansard, 30 November 2005.
[66] Ms Sylvia Hale MLC, Legislative Council Hansard, 30 November 2005.
[67] Mr Neville Newell MP, Legislative Assembly Hansard, 17 November 2005.
[68] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[69] *Terrorism (Police Powers) Act 2002* s. 26L(1).
[70] *Terrorism (Police Powers) Act 2002* s. 26K(6).
[71] *Terrorism (Police Powers) Act 2002* s. 26K(1).
[72] *Terrorism (Police Powers) Act 2002* s. 26K(4).
[73] *Terrorism (Police Powers) Act 2002* s. 26K(2).
[74] *Terrorism (Police Powers) Act 2002* s. 26K(7)(b).
[75] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[76] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[77] The Hon. Bob Debus, Legislative Assembly Hansard, 17 November 2005.
[78] *Terrorism (Police Powers) Act 2002* s. 26ZB(2).
[79] *Terrorism (Police Powers) Act 2002* ss. 26Y and 26Z(1).
[80] *Terrorism (Police Powers) Act 2002* s. 26ZA(1).
[81] *Terrorism (Police Powers) Act 2002* s. 26(2)(b).
[82] *Terrorism (Police Powers) Act 2002* s. 26Z(2).
[83] *Terrorism (Police Powers) Act 2002* s. 26ZA.
[84] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[85] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[86] Ms Lee Rhiannon MLC, Legislative Council Hansard, 30 November 2005.
[87] The Hon. Tony Kelly, Legislative Council Hansard, 30 November 2005.
[88] The Hon. Tony Kelly, Legislative Council Hansard, 30 November 2005.

[89] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[90] *Terrorism (Police Powers) Act 2002* s. 26Z(3).
[91] Ms Lee Rhiannon MLC, Legislative Council Hansard, 30 November 2005.
[92] The Hon. Tony Kelly, Legislative Council Hansard, 30 November 2005.
[93] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[94] *Terrorism (Police Powers) Act 2002* s. 26ZE.
[95] *Terrorism (Police Powers) Act 2002* ss. 26Zf and 26ZG.
[96] *Terrorism (Police Powers) Act 2002* s. 26ZD.
[97] *Terrorism (Police Powers) Act 2002* s. 26N.
[98] *Terrorism (Police Powers) Act 2002* ss. 26ZI.
[99] *Terrorism (Police Powers) Act 2002* ss. 26ZE and 26ZH.
[100] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[101] Inmates usually have access to Official Visitors, under section 228 of the *Crimes (Administration of Sentences) Act 1999*. Official Visitors are appointed by the Minister, to interview inmates and receive complaints and inquiries.
[102] *Terrorism (Police Powers) Act 2002* ss. 26ZF and 26ZI.
[103] *Terrorism (Police Powers) Act 2002* s. 26ZG.
[104] *Terrorism (Police Powers) Act 2002* s. 26ZG(1).
[105] *Terrorism (Police Powers) Act 2002* s. 26ZI(5).
[106] *Terrorism (Police Powers) Act 2002* s. 26ZI(6).
[107] Mr Paul Lynch, Legislative Assembly Hansard, 17 November 2005.
[108] Mr Barry Collier, Legislative Assembly Hansard, 17 November 2005.
[109] NSW Bar Association, summary points of the submissions made to the Crossbench members of the Legislative Council on 29 November 2005.
[110] Law Society of NSW, submission to NSW Parliament, 28 November 2005. References omitted.
[111] *Terrorism (Police Powers) Act 2002* s. 26ZG(5) and (6).
[112] Ms Lee Rhiannon MLC, Legislative Council Hansard, 30 November 2005.
[113] The Hon. Peter Breen, Legislative Council Hansard, 30 November 2005.
[114] *Terrorism (Community Protection) Act 2003* (Vic) s. 3E(9) and (10).
[115] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[116] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 14.
[117] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 44.
[118] *Terrorism (Police Powers) Act 2002* s. 26ZA.
[119] *Terrorism (Police Powers) Act 2002* s. 26ZK.
[120] The Rev. Fred Nile, Legislative Council Hansard, 30 November 2005.
[121] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[122] *Terrorism Act 2000* (UK) Schedule 8, paragraph 23(1)(a).
[123] *Terrorism (Police Powers) Act 2002* s. 26W.
[124] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 115.
[125] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 120.
[126] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 118(3) and (4).
[127] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 114(7) and (7).
[128] *Law Enforcement (Powers and Responsibilities) Act 2002* ss. 122, 123 and 126.
[129] Mr Neville Newell MP, Legislative Assembly Hansard, 30 November 2005.
[130] *Terrorism (Police Powers) Act 2002* s. 26W(5)(a).
[131] Mr Bryce Gaudrey MP, Legislative Assembly Hansard, 30 November 2005.
[132] *Criminal Code Act 1995* (Cth) Schedule 4, Part 1, s. 105.25.
[133] *Australian Security Intelligence Organisation Act 1979* (Cth) Part III, Division 3, s. 34G(9)(a).
[134] *Terrorism (Police Powers) Act 2002* s. 26ZL(3).
[135] *Terrorism (Police Powers) Act 2002* s. 26ZL(1).
[136] *Terrorism (Police Powers) Act 2002* s. 26ZL(5) and (6).
[137] *Terrorism (Police Powers) Act 2002* s. 26ZL(7), (8), (9) and (10).
[138] *Terrorism (Police Powers) Act 2002* s. 26ZM(2).
[139] *Terrorism (Police Powers) Act 2002* s. 26ZM(3).
[140] *Terrorism (Police Powers) Act 2002* s. 26ZM(4).
[141] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[142] *Terrorism (Police Powers) Act 2002* s. 26ZN(2)(j).
[143] Mr Neville Newell MP, Legislative Assembly Hansard, 30 November 2005.
[144] *Terrorism (Police Powers) Act 2002* ss. 26ZK(a) and 26ZM(2).
[145] *Terrorism (Police Powers) Act 2002* s. 26E.
[146] *Terrorism (Police Powers) Act 2002* s. 26X(6).
[147] *Terrorism (Police Powers) Act 2002* s. 26ZH(2).
[148] *Terrorism (Police Powers) Act 2002* s. 26ZH(5).
[149] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 11.

[150] *Terrorism (Police Powers) Act 2002* s. 26X.
[151] Department of Juvenile Justice website, www.djj.nsw.gov.au accessed 7 August 2006.
[152] *Children (Detention Centres) Act 1987* s. 4.
[153] The Hon. Tony Kelly, Legislative Council Hansard, 9 December 2004.
[154] The Hon. Peter Breen, Legislative Council Hansard, 30 November 2005.
[155] *Terrorism (Police Powers) Act 2002* s. 26ZH.
[156] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[157] See the Hon. Dr. Arthur Chesterfield-Evans, Legislative Council Hansard, 30 November 2005 and the Hon. Penny Sharpe, Legislative Council Hansard, 30 November 2005.
[158] *Terrorism (Police Powers) Act 2002* s. 26ZH(2).
[159] *Terrorism (Police Powers) Act 2002* s. 26ZH(5).
[160] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[161] *Terrorism (Police Powers) Act 2002* s. 26M(1).
[162] *Terrorism (Police Powers) Act 2002* s. 26M(2).
[163] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[164] *Terrorism (Police Powers) Act 2002* s. 26W(1) and (2).
[165] *Terrorism (Police Powers) Act 2002* s. 26W(3)(b).
[166] *Terrorism (Police Powers) Act 2002* s. 26W(5)(b).
[167] *Terrorism (Police Powers) Act 2002* s. 26W(5).
[168] Mr Neville Newell MP, Legislative Assembly Hansard, 30 November 2005.
[169] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[170] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[171] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 42.
[172] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss. 27, 28, 29.
[173] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[174] *Terrorism (Police Powers) Act 2002* s. 26ZC.
[175] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 4.
[176] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[177] *Terrorism (Police Powers) Act 2002* s. 26R.
[178] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[179] *Terrorism (Police Powers) Act 2002* s. 26ZN(1).
[180] *Terrorism (Police Powers) Act 2002* s. 26ZN.
[181] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[182] Public Interest Advocacy Centre, submission to NSW Parliamentarians on the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005*, 25 November 2005.
[183] Law Society of NSW, submission to NSW Parliament, 28 November 2005.
[184] *Police Powers and Responsibilities Act 2000* (Qld) ss. 740 to 745.
[185] Premier Peter Beattie, Queensland Parliamentary Hansard, 22 November 2005.
[186] *Terrorism (Preventative Detention) Act 2005* (Qld) s. 14. See also section 73.
[187] Mr Colin Forrest, Queensland Public Interest Monitor, evidence given before the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 24 August 2006.
[188] *Police Powers and Responsibilities Act 2000* (Qld) ss. 742(2)(g)(i) and 742(4)(d).
[189] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss. 14, 56 and 62.
[190] *Terrorism (Police Powers) Act 2002* s. 26ZO(1).
[191] *Terrorism (Police Powers) Act 2002* s. 26ZO(2) and (3).
[192] *Terrorism (Police Powers) Act 2002* s. 26ZO(4).
[193] *Terrorism (Police Powers) Act 2002* s. 26Z(2)(d).
[194] NSW Council for Civil Liberties, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, June 2006.
[195] Law Society of NSW, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 14 June 2006.
[196] *R v Thomas* [2006] VSCA 165.
[197] Order, Federal Magistrate Mowbray, Federal Magistrates Court of Australia in Canberra, 27 August 2006.
[198] 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).
[199] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 18(4)(c).
[200] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 42.
[201] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss. 27, 28 and 29.

[202] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 11.
[203] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 14.
[204] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 52(4).
[205] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 15.
[206] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s. 17(1)(f).
[207] *Terrorism Act 2000* (UK) s. 40.
[208] *Criminal Justice Act 2003* (UK) s. 306.
[209] *Terrorism Act 2006* (UK) s. 23.
[210] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 93.
[211] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 94.
[212] United Kingdom, Government Reply to Home Affairs Committee Report, *Terrorism Detention Powers*, September 2006, at p10.
[213] United Kingdom, Report of the House of Commons Home Affairs Committee, *Terrorism Detention Powers*, July 2006 at paragraph 133.
[214] "Airlines may sue over terror losses", *The Australian*, 18 August 2006.
[215] "Terror in skies plot: eight charged", *Sydney Morning Herald*, 22 August 2006.
[216] See *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[217] *Prevention of Terrorism Act 2005* (UK).
[218] *Secretary of State for the Home Department v JJ; KK; GG; HH; NN and LL* [2006] EWHC 1623 (Admin).
[219] *Secretary of State for the Home Department v JJ; KK; GG; HH; NN and LL* [2006] EWCA Civ 1141.
[220] *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin).
[221] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.
[222] Criminal Code of Canada s. 83.3. A "peace officer" refers to a range of prescribed persons including police, correctional service officers, customs officers, immigration officers, fisheries officers, a mayor, a pilot in command of an aircraft, a sheriff's officer or a justice of the peace.
[223] Criminal Code of Canada s. 83.31. See Public Safety and Emergency Preparedness Canada, *Annual Report Concerning Recognizance with Conditions: Arrests without Warrant*, December 2004 to December 2005. Available at www.psepc.gc.ca, accessed 17 October 2006.
[224] Criminal Code of Canada s. 83.32.
[225] Canada, Standing Committee on Public Safety and National Security, *Review of the Anti-Terrorism Act Investigative Hearings and Recognizance with Conditions Program*, October 2006. Available at www.parl.gc.ca, accessed 21 November 2006.
[226] Ian Austen, "Canadian Parliament Decides to Let 2 Measures Passed after 9/11 Expire", www.nytimes.com, accessed 1 March 2007.

Chapter 3. Covert search warrants: issues for consideration

We have identified a number of issues concerning covert search warrants, and invite you to respond to the following questions. Your comments on any other aspects of the legislation and its implementation are also welcome.

3.1. Implementation of the legislation

Only certain police officers and staff members of the Crime Commission are eligible to apply for covert search warrants. An 'eligible police officer' means a police officer employed within a group designated by the Commissioner of Police as the terrorism investigation group. In NSW Police, this is the Counter Terrorism Coordination Command. An 'eligible staff member of the Crime Commission' means a person employed within a group of staff of the NSW Crime Commission that is designated by the Crime Commissioner as the terrorism investigation group. Applications must be authorised by the Commissioner of Police, Crime Commissioner or certain delegates.[227]

NSW Police and the Crime Commission have indicated that, when exercising covert search warrant powers, they will act as a single unit. NSW Police will make all applications and it is unlikely the Crime Commission would apply for a covert warrant itself.

The NSW Police Counter Terrorism Coordination Command drafted Standard Operating Procedures (SOPs) for covert search warrants in September 2005 and they were revised in May 2006. The SOPs indicate that the Crime Commission may be a 'partner agency' in the execution of a covert search warrant, and that Crime Commission staff may assist in the execution of a covert warrant. ASIO and the Australian Federal Police (AFP) may also be 'partner agencies'.[228] The Crime Commission has not drafted any SOPs for use of covert search warrant powers.

3.1.1. Warrants obtained so far

At the time of writing, NSW Police has applied for five covert search warrants and all five were issued. The applications were all made in person to an eligible judge. Judges who issued the warrants have commented to staff from this office that warrant applications have been to a high standard, providing a similar level of detail to affidavits in applications for listening device warrants.

Two of the five warrants were not executed. One warrant was not executed because there was no opportunity to execute it covertly. Another warrant was not executed because the address on the application was incorrect.

While no arrests were made as a direct result of the three covert search warrants executed, persons were arrested and charged with terrorist related offences as part of ongoing related investigations. Service of the occupier's notices for two of the executed warrants has been postponed for a further six months. The occupier's notice for the other executed warrant has been served.

3.2. Applying for a covert search warrant

An eligible police officer or staff member of the Crime Commission applying for a covert search warrant must be properly authorised by the Police Commissioner or Crime Commissioner, or a senior officer delegated to give such authorisation.[229] Authority to apply for a warrant may be given if the person giving the authorisation suspects or believes on reasonable grounds that a terrorist act has been, is being or is likely to be committed, the entry and search of premises will substantially assist in responding to or preventing the terrorist act, and it is necessary to conduct the entry and service without the knowledge of any occupier of the premises.[230] The definition of terrorist act includes intentionally being a member of a terrorist organisation.[231] An eligible judge is a Supreme Court judge who has consented to the role, and has been declared by the Attorney General as eligible.[232]

Applications are dealt with in the absence of the public, and may be made in person or by telephone.[233] The application in person must be in writing and given before an eligible judge on oath, affirmation or affidavit.[234] The judge may administer an oath, affirmation or take an affidavit for the purposes of the application. This does not apply to a telephone warrant.[235]

Telephone warrants can be issued where the judge is satisfied the warrant is required urgently and it is not practicable to be made in person.[236] The application must be made by facsimile where such facilities are readily available. If it is not practicable to make an application by telephone directly to an eligible judge, it may be transmitted to the judge by another person. If the judge issues the warrant but cannot provide it to the applicant, the applicant can complete a

form of warrant in the terms indicated by the judge, sign it, naming the judge and the date, and provide it to the judge within two business days of issue.

The application for a warrant must include certain details including the grounds on which the application is based, the address or description of the subject premises, the names of persons believed to be knowingly concerned in the commission of the terrorist act, and if no such person is the occupier of the premises, the names (if known) of the occupier of the subject premises.[237]

The application must state the powers that are proposed to be exercised on entry to the premises, and a description of the kinds of things to be searched for, seized, substituted, copied, operated or tested.[238] The application must also contain information relating to any previous applications for covert search warrants on the subject premises, either issued or refused.[239] Where a warrant has been refused no further application can be made to any judge unless there is additional information that justifies making the application.[240]

In determining whether there are reasonable grounds to issue the warrant, the eligible judge must consider a range of matters including the reliability of the information, the connection between the terrorist act and the thing proposed to be searched for, the nature and gravity of the terrorist act, and the extent to which execution of the warrant would assist in the prevention of or response to the act.[241] The judge is also to consider whether there may be alternative means of obtaining the information sought and the extent to which executing the warrant would affect the privacy of any person who is not believed to be knowingly involved in the commission of the terrorist act.[242]

The judge must record the grounds upon which he or she has relied to justify the issue of the warrant or his or her refusal to issue the warrant.[243] The judge can issue the warrant and impose conditions in relation to its execution.[244] Any such conditions must be set out in the contents of the warrant.[245]

3.2.1. Concerns about covert search warrants

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

- *the threshold for invoking the powers is suspicion on reasonable grounds (which will inevitably lead to the covert entry and search of premises of innocent people);*
- *it is not necessary that all or any occupiers of the premises be suspected of any criminal acts, although the Judge is to consider the extent to which the privacy of the person who is believed to be knowingly concerned in the commission of the terrorist act is likely to be affected;*
- *the Bill allows use of covert search powers on the basis of actions which may have very little connection with any act which might harm a person, such as taking steps to join an organisation that has been proscribed by Commonwealth regulation, although the Judge must consider the nature and gravity of the 'terrorist act';*
- *there is no requirement of imminent threat before a warrant may be issued.*[246]

The Committee noted the Bill appeared to enable 'persons not concerned with a terrorist act who occupy the same premises as a person suspected of committing a terrorist act, or are visited by such a person, to be subject to the full force of a covert search warrant'.[247]

The Committee raised concerns with the breadth of the offence of 'being a member of a terrorist organisation', which may be the basis for using extensive covert entry, search and seizure powers. The Committee noted the meaning of terrorist organisation included any organisation specified in regulations made by the Governor-General on the advice of the Commonwealth Attorney General. The Committee suggested this had the 'potential to trespass on personal rights by criminalising association with that organisation on the basis of political assessment of that organisation, rather than an impartial assessment of the actions or objectives of that organisation'.[248]

The Commonwealth Security Legislation Review Committee, in its recent report into the Commonwealth security scheme, was critical of the process of proscribing terrorist organisations. It noted that proscription was 'an executive act' with 'no sufficient process in place that would enable persons affected by such proscription to be informed in advance that the Governor-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation'.[249] The Committee believed a 'fairer and more transparent' proscription process should be devised and recommended the process be amended to meet the requirements of administrative law.

The New South Wales Legislation Review Committee noted that while it is an offence to knowingly give false or misleading information to a judge when making an application, 'there is no prohibition on being reckless or negligent regarding the truthfulness or accuracy of such information'. It stated:

> *The Bill appears to enable… applications for a covert search warrant to be made without sufficient care being taken, given the gravity of the powers sought, to test the grounds of suspicion of the terrorist act.*[250]

While a number of these matters do not relate to police or Crime Commission functions under the Act, the application procedures are directly relevant. Submissions are sought on these matters.

23. What are your views about the present application process for covert search warrants?

24. What are your views about the making of applications by telephone or facsimile without evidence being sworn by oath or affidavit?

25. Is the present threshold test for applications — suspicion or belief on reasonable grounds that a terrorist act is being or likely to be committed — appropriate? If not, in what respects should it be amended?

3.3. Conducting covert searches

3.3.1. Who can conduct a covert search?

Eligible police officers or staff of the Crime Commission may execute a covert search warrant, with the aid of assistants as is considered necessary.[251]

NSW Police SOPs clearly outline the roles and responsibilities of officers involved in the application and execution of covert search warrants. Roles to be assigned include an authorising officer, operation commander, case officer, applicant (warrant holder), searching officer, exhibit officer, independent officer (where practicable), video operator (where practicable) and specialist assistants. It is anticipated all roles would be performed by NSW Police with the exception of specialist assistants, who may be persons from outside NSW Police such as Crime Commission staff, chemists, translators and analysts.

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

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

During Parliamentary debates, concerns were raised about the use of assistants:

> *The bill also allows the person who is granted a secret search warrant to use assistants to carry out the terms of the warrant. There is no obligation to accredit, train or vet that assistant who will then be tramping through innocent people's homes and bugging or searching others.*[252]

We note that under New South Wales controlled operations legislation a person must not be authorised to participate in a controlled operation unless the chief executive officer of the relevant agency is satisfied that the person has the appropriate skills to participate in the operation.[253]

3.3.2. What can officers do when conducting a covert search?

A covert search warrant authorises eligible persons to enter the subject premises without the occupier's knowledge and search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print from or test any thing which is either described in the warrant or is a relevant thing.[254] A relevant thing is a reference to a thing that the eligible person has reasonable grounds to suspect or believe will substantially assist in responding to or preventing a terrorist act.[255] Eligible persons can use reasonable force to enter the premises and impersonate another person for the purposes of executing the warrant.[256] Officers can also break open any receptacle in or on the premises for the purposes of the search.[257]

The warrant may authorise the return of a seized thing or the retrieval of a thing placed in the subject premises. Under these circumstances the officer may re-enter the premises within seven days of the first entry or within the period provided for by the judge, but only for the purposes of returning or retrieving the thing.[258]

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

- In one warrant officers executing the warrant searched premises and copied the hard drive of a computer and video taped documents. They also located and recorded plans of buildings and premises. Nothing was seized.
- In another warrant officers executing the warrant searched premises. Nothing was seized or otherwise copied, recorded or tested.
- In the third warrant officers executing the warrant searched a vehicle and took swabs for forensic analysis. No items were seized. The search was video recorded.

Warrants are required to describe the kinds of things that may be searched for, seized, substituted, copied, photographed, operated, printed or tested.[259] The warrants issued to date contain a standard list of 29 things. The list includes such things as financial records, mobile phones, passports, photographs, personal correspondence, computers, publications, travel documents, diaries, telephone records, address books, correspondence, publications, maps, diagrams, chemicals, weapons, and extremist propaganda. It also includes any storage device which contains any of these things, and any manual, instruction or password needed to gain access to or decode any of the things.

Each warrant granted also sets out a standard list of powers the applicant and assistants may exercise (as those powers are set out in the Act). As the warrant is a proforma document, it appears these powers are granted, unless the judge crosses any of them out.

3.3.3. Seizing evidence of other offences

The Act provides that covert search warrants authorise an eligible person to seize and detain any thing that the person finds in the course of executing the warrant that is connected with a serious indictable offence — that is, an offence punishable by five or more years imprisonment.[260] There must be reasonable grounds for suspecting the thing has been or will be used in the commission of the offence.[261]

The Legislation Review Committee raised the issue of covert warrants being 'used to gather evidence for a serious indictable offence unconnected with a terrorist act, using powers that could not otherwise be used for an investigation of that offence.'[262] It noted:

> *Once a warrant has been issued, the Bill allows the covert search powers to be used to seize 'any other thing… that is connected with a serious indictable offence', without the need for any evidence of connection between that thing and a terrorist act.*[263]

The Law Society raised the following issues with evidence obtained:

> *We are concerned by covert warrants. They're open to abuse…They could be used as fishing expeditions — using covert warrants to look for evidence of other crimes on the pretext that there's a terrorism suspicion. Any evidence of a serious crime found during a covert search may be admissible in Court.*[264]

We note that during the execution of an ordinary search warrant, police may seize any thing the police officer believes on reasonable grounds is connected with any offence.[265]

3.3.4. Collection of DNA

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

The Attorney General Mr Bob Debus considered the issue of DNA collection when executing covert search warrants:

> *An important issue that arose during drafting of the bill was the possible collection of DNA samples during covert searches. Given the desirability of regulating the covert collection of DNA samples for law enforcement generally — for example, in executing a search warrant, or by collecting discarded samples from used cups or cigarettes — it has been decided that the possible collection of DNA under a covert search warrant will be regulated as part of a general regulatory framework to be developed by my department. I have asked my department to consult with NSW Police in developing this policy.*[266]

We dealt with covert DNA sampling in our report, *Review of the Crimes (Forensic Procedures) Act 2000* (2006). We observed that collection of DNA other than directly from a person is essentially unregulated, although a court may find

such evidence inadmissible, if it has been obtained improperly. We recommended that Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.[267]

We will continue to monitor this issue, in light of the Attorney General's advice that collection of DNA during the execution of a covert search warrant is to be regulated under the proposed new framework.

3.3.5. Installation of cameras, listening devices etc

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

- To plant a listening device, or 'bug', officers have to comply with the provisions of the *Listening Devices Act 1984*. Listening devices can generally only be planted in accordance with a warrant granted by a judicial officer.
- To intercept phone calls and other telecommunications, officers have to comply with the provisions of the *Telecommunications (Interception) (New South Wales) Act 1987*. Again, telephone intercepts must be authorised by a warrant granted by a judicial officer or member of the Commonwealth Administrative Appeals Tribunal.

The use of cameras to record images is largely unregulated. This means that once officers have access to a house, whether the subject premises or adjoining premises, no further authorisation is required to install cameras.

26. What are your views as to the powers provided to police and Crime Commission officers on executing a covert search warrant? In particular:

a. Are the powers to use assistants sufficient and appropriate?

b. Are the provisions setting out the various acts permitted under a warrant sufficient and appropriate?

c. Are police powers to collect DNA or other forensic evidence sufficient and appropriate?

d. Should there be any additional requirements where those executing the warrant seize things which are not related to a terrorist act, but to some other serious indictable offence?

3.4. Adjoining premises

An eligible officer may apply to enter premises adjoining or providing access to the subject premises. The application must set out the address or other description of the adjoining premises and the grounds on which entry to those premises is required.[268] 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.[269] If the warrant authorises entry the adjoining premises may be entered using whatever force is reasonably necessary for the purposes of entering.[270]

In its review of the Bill, the Legislation Review Committee expressed concern that the legislation 'specifically provides for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises'. The Committee noted this further significantly trespassed on 'the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act.'[271] Concerns were also raised during Parliamentary debates:

> *I remind members that in voting for this bill they will support a regime that will allow homes in New South Wales to be secretly entered by police for no reason other than the proximity of their property to a suspect's property. It is quite extraordinary that anyone would sign off on that.*[272]

No adjoining premises have been entered during the execution of the five covert warrants issued to date. However, entry to adjoining premises has been authorised in four warrants out of five:

- In three warrants authority to enter adjoining premises was provided. NSW Police subsequently advised that the applicants did not intend to apply for entry to adjoining premises, but did so by default because entry to adjoining premises was included in the proforma warrant document. In each case the judge signed the warrant without crossing out the reference to entry to adjoining premises.

- In one warrant no request to enter adjoining premises was made. The judge crossed out the reference to entry to adjoining premises and so the power was not authorised.
- In one warrant authority to enter adjoining premises was provided. NSW Police subsequently advised that the application did not in fact provide any grounds upon which entry was required or provide the address or other description of the adjoining premises, and that 'the request in the affidavit to exercise this particular power was erroneous.'

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

27. Are the current provisions governing entry to adjoining premises appropriate?

3.5. Outcomes

A person who executes a covert search warrant must provide the judge with a written report within 10 days. The report must include information such as when the warrant was executed, what actions were taken and who took those actions.[273] The report is to provide descriptions of any things seized, copied, photographed, recorded, operated or tested. Where things were found in the course of the search which were not expressly authorised to be seized or copied etc, the report must state the grounds on which the thing was considered to be relevant or connected with a serious indictable offence.[274]

The report must state whether or not execution of the warrant assisted in the prevention or response to the specified terrorist act, or any serious indictable offence, and how it assisted.[275]

The report must include the names of persons who executed the warrant including any police officers, Crime Commission staff or other intelligence gathering officers assisting.[276] This may include police from the AFP or other States or Territories, or people employed by ASIO or any other intelligence agencies.[277]

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

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

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

We note that in all other Australian jurisdictions permitting covert search warrants, a report must be provided within seven days. In Victoria and Western Australia it is an offence not to provide the report.

28. What are your views as to the current report requirements for police and Crime Commission officers following execution of a covert search warrant? In particular:

a. Is the information required necessary? Is it appropriate?

b. Is the 10 day reporting period appropriate?

c. Are there any additional matters upon which a report should be made?

d. Should there be a penalty for failing to provide the report?

3.6. Notifying people their premises were searched

3.6.1. Occupiers of the subject premises

The Act requires an occupier's notice to be served following the execution of a covert search warrant. The notice must set out a range of details including who applied for the warrant, who issued it, when it was executed and the number of persons who entered the premises.[278] It must contain a summary of the nature of the warrant, including the grounds upon which a covert search warrant may be issued, and the powers conferred and exercised by the warrant.[279] It must describe any things seized, substituted, returned or retrieved.[280]

Where the occupier was not believed to be knowingly concerned in the commission of the suspected terrorist act relating to the executed warrant, the notice must state this.[281]

The notice must be provided to the issuing judge for approval before it is served on the occupier. Police generally have six months to provide the notice to the judge. The notice must be given to the person who was believed to be concerned with the commission of a terrorist act and who occupied the premises at the time of the search, provided they are over 18 years. It must be given as soon as practicable after the judge approves the notice.[282]

The judge may postpone service of the occupier's notice where he or she is satisfied there are reasonable grounds for such postponement.[283] The judge can postpone service on more than one occasion, in maximum six month periods, but the total period of postponement must not exceed 18 months unless the judge is satisfied there are exceptional circumstances.[284]

Should the whereabouts of the person subject of the warrant or the occupiers of the searched premises be unknown to the executing officer, they are to report back to the judge who issued the warrant and the judge may give directions as he or she thinks fit.[285]

In the second reading speech, the Attorney General Bob Debus stated that notifying the occupier was a fundamental tenet of the covert warrant scheme:

> *The giving of an occupier's notice must not be postponed for a total of more than 18 months unless the eligible judge is satisfied that there are exceptional circumstances justifying the postponement. This formulation makes it clear that a fundamental tenet of the scheme is that an occupier's notice will be served at some time and that there is no provision for a court to approve a notice never being served.*[286]

What this means is that a judge cannot order that an occupier's notice never be served. However, it is possible for a judge to postpone service for six months, and where there are exceptional circumstances, do this indefinitely, with a six monthly review.

At the time of writing:

- For two of the warrants which have been executed, police provided the judge with the occupier's notices exactly six months after the warrant was executed. In both cases, the judge was satisfied there were reasonable grounds for postponing service of the notice for a further six months.
- For the other executed warrant, police provided the judge with the occupier's notice six months and four days after the warrant was executed, and served it by mail on the occupier's legal representative that day. Police advised that the occupier and the occupier's legal representative were already aware that a covert search warrant had been executed as the occupier had been charged with an offence, and a copy of the warrant was included in the brief of evidence.[287]

The Act does not provide for any oversight mechanism to ensure that occupier's notices are served. The Ombudsman's oversight of the exercise of the powers finishes in September 2007.

As noted below, at 3.9, other States with similar covert search powers, specifically Victoria, Queensland and Western Australia do not provide for occupiers to be notified they have been searched.

29. What are your views as to the current provisions relating to the service of occupier's notices? In particular, does the requirement that an occupier's notice be served risk compromising police or Crime Commission investigations?

3.6.2. Occupiers of adjoining premises

Notices to occupiers of adjoining premises are to be prepared, approved and given at the same time as notices relating to the subject of the warrant and occupants of the subject premises.[288] Such notices are only required to specify who applied and issued the warrant, when it was issued and executed and the address or description of the subject premises.[289] No summary of the nature of the warrant is required.

None of the warrants executed involved entry into adjoining premises and so no occupier's notices have been required for occupants of adjoining premises.

30. Occupiers of adjoining premises are provided with less information relating to the grounds and the activities undertaken, than the occupiers of the subject premises. Is there any other information neighbours should be entitled to?

31. Is there a possibility notifying the occupiers of adjoining premises could have detrimental effects on neighbourly relations and/or heighten the risk of compromising ongoing investigations?

3.7. Covert versus overt search warrants

3.7.1. When ordinary search warrants are executed covertly

Part 5 of the *Law Enforcement (Powers and Responsibilities) Act* sets out the general powers police have to search and seize pursuant to a warrant. Police can apply for a search warrant on the reasonable belief that a thing connected with a particular offence is on the premises. When executing a search warrant, police can use force to enter the premises, and may seize and detain any thing mentioned in the warrant or any other thing reasonably believed to be connected with any offence.[290]

When executing an ordinary search warrant, police must on entry or as soon as practicable after entry, serve an occupier's notice. If no adult occupier is present, police must serve the notice as soon as practicable after executing the warrant. However, service of the notice can be postponed by the authorised officer who issued the warrant, if satisfied there are reasonable grounds for postponing service. Service may be postponed more than once, provided it is not postponed for more than six months at a time.[291] These requirements also apply to search warrants executed by Crime Commission staff.[292]

In effect, being able to postpone service means that searches of private premises can be conducted covertly, under the ordinary search warrant provisions contained in the *Law Enforcement (Powers and Responsibilities) Act*, provided there is nobody present when the search is conducted, and the issuing officer is satisfied there are reasonable grounds for postponing notification. Indeed, in evidence to the Joint Parliamentary Committee on the Ombudsman and Police Integrity Commission, the Crime Commissioner, Phillip Bradley recently described a 'regime of covert searching' which has been 'going on for several years' under the general search warrant provisions:

> *Obviously the difficulty with covert search warrants is that police and others are authorised to go into private premises of people and go through their belongings without telling them that they have done it. That is one of the things that has been fairly fundamental to search warrants for a very long time, that people need to be served with an occupier's notice and know that people have been in there and know the reason that they have been in there. There are provisions in the Search Warrants Act [which are now in the Law Enforcement (Powers and Responsibilities) Act] for deferral of occupier's notices in some cases and there has been a regime of covert searching going on for several years.*
>
> *A typical example is going into a drug laboratory when it is unattended and examining the status of the process. With amphetamines laboratories, obviously they take the precursors and they cook them and turn them into speed or MDMA or Ice or something. It is a significant advantage to the police to know what stage the process is at and when people are likely to be there and things like that. There have been instances of searches being conducted in those circumstances and the occupier's notice being deferred until the people are arrested, usually. So it [covert searching] has a place.*[293]

3.7.2. When covert searches become overt

NSW Police SOPs provide for the contingency that officers executing the covert search warrant may be required to move from a covert to overt phase during the warrant's execution. The SOPs cite a variety of reasons for this

transition including possible detection in the covert stage, and the locating of weapons or chemicals that cannot be preserved covertly. The case officer is to prepare a risk assessment to be included in operational orders and provided to senior police within the Counter Terrorism Coordination Command. The case officer is also to brief all relevant staff engaged in the operation, covering the roles of staff and any factors impacting upon their safety and security.

The SOPs also cite a range of considerations, which should be taken into account when planning the execution of a covert search warrant, such as the safety and security of members of the public and staff, methods of entry and departure, perimeters (covert and overt), assembly points and the conditions under which the warrant will move to overt phase.

Police have advised that for two of the warrants executed no risk assessment was completed 'due to the immediacy and nature of the investigation'. Risk factors were taken into consideration, however, during the planning application and execution phases. Such matters included profile and criminal history of the suspects, location and access to the subject premises and likelihood of operational compromise.

The Legislation Review Committee identified some risks associated with these operations, particularly with the power to enter premises when the occupants are present. The Committee noted that the Bill authorised eligible officers to impersonate another person for the purpose of executing the warrant without any 'required prior exploration of whether impersonation is appropriate, either in the application for the warrant…or in the determination of whether it should be granted'.[294] The Committee stated:

> *There are clearly risks in this situation that an innocent occupier will react violently to an ineffective impersonation in purported exercise of a power of self defence. While it would appear that in these circumstances the occupier would have available to them a complete defence of self defence under s 418 of the Crimes Act, the exposure to the risk of prosecution in these circumstances can be viewed as trespassing on personal liberties, particularly where the possible provocation and resultant risk is created by law enforcement agencies… The Bill provides no protection in relation to reasonable responses by occupiers discovering covert intruders who are executing a warrant.*[295]

Alternatively, the Act does not specifically deal with the directions police might give in these circumstances, and the necessity of persons to follow those directions. Such matters are considered in general search warrant powers — see section 50 (search of persons) and section 52 (obstruction or hindrance prohibited) of the *Law Enforcement (Powers and Responsibilities) Act*. We note the West Australian covert search warrant scheme allows for the searching of persons.[296]

32. Given Parliament has enacted a stand-alone covert search warrant regime for the investigation of terrorism offences, should there be any requirement that police and Crime Commission officers use these powers, rather than general search warrant powers, when conducting covert searches as part of investigations into terrorism offences?

33. What additional arrangements may be necessary to manage circumstances when covert warrants become overt?

34. Should Part 3 specifically deal with rights of persons and powers of police or Crime Commission officers where the execution of a covert search warrant is interrupted?

3.8. Safeguards for people whose property is searched

The Act contains a number of safeguards to protect the rights and interests of people whose property is searched.

3.8.1. Offence for providing false information

Part 3 makes it an offence to knowingly provide an eligible judge with false or misleading information in connection with covert search warrant applications, reports or notices, whether or not that information is verified on oath, affirmation or affidavit.[297] This applies to telephone warrant applications as well as applications made in person.

3.8.2. Publication of information

Part 3 also makes it an offence to intentionally or recklessly publish a covert search warrant application, report or notice, or any information derived from those documents, unless the occupier's notice has been given or the judge has made directions where the occupier's whereabouts are not known.[298] It is not an offence to publish such

information if the publication is for the purposes of exercising functions under Part 3 or the internal management of police, staff of the Crime Commission, the Supreme Court or the Attorney General's Department.[299]

3.8.3. Destruction of records

Part 3 requires the destruction of any records made in the execution of the search warrant as soon as practicable after determining that its retention is no longer reasonably required for an investigation or proceedings.[300] The Police and Crime Commissioners are to determine whether such records are reasonably required within 12 months of the execution of the search warrant, and within each subsequent 12 months for so long as the record remains in existence.[301]

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

> *The bill... gives the Commissioner of Police or the New South Wales Crime Commissioner the power to destroy documents relating to the search of premises. When an aggrieved person uses those documents to challenge the lawfulness of a secret search, the Government effectively promotes the shredding of that important evidence.*[302]

We note that the Act does not provide for any oversight mechanism to ensure that records made in the execution of a search warrant are destroyed. The Ombudsman's oversight of the exercise of the powers finishes in September 2007.

3.8.4. Annual reporting

The Commissioner of Police and the Crime Commissioner are required to report annually to the Police Minister and Attorney General on the exercise of Part 3 powers by police and Crime Commission staff.[303] The reports must specify the number of warrant applications made by each agency, the number of warrants executed and the number of things seized, substituted, copied, operated and tested. The reports must also specify the number of arrests made in connection with executed covert search warrants and the number of charges laid. The reports must also specify the number of complaints made relating to the execution of covert search warrants and the number of complaints which have been subject to investigation. The reports are to be tabled in both Houses of Parliament as soon as practicable after receipt by the Attorney General.[304]

It is noted that in Victoria, such reports must be tabled within 12 sitting days and in Western Australia, within 30 days of receipt by the relevant Minister.[305]

3.8.5. Inspection of records

The *Terrorism (Police Powers) Regulation 2005* commenced in September 2005 and prescribes the documents to be kept relating to the issue of covert search warrants, and the manner in which those documents may be inspected. The regulation provides that the documents may be inspected by the occupier of the premises to which the covert search warrant relates or by any other person who is given an occupier's notice relating to the warrant under the Act.

It also provides for the prevention of certain documents from being made available for inspection if their disclosure is likely to identify a person and therefore jeopardise that or any other person's safety.

In relation to at least two of the covert search warrants executed, NSW Police successfully sought a judge's certificate precluding inspection of warrant records pursuant to the Regulation. This was made on the basis disclosure could jeopardise the safety of a person, or persons, and may have seriously compromised the investigation of any matter.

3.8.6. Safeguards in police procedures

In addition to the safeguards provided for in Part 3, NSW Police SOPs relating to the execution of covert search warrants contain a number of safeguards. Such safeguards include the presence of an independent officer and video recording of the execution of the warrant, but only where practicable.

In Queensland, the covert search warrant laws require a search to be videotaped, if practicable.[306]

3.8.7. Sufficiency of oversight

Arrangements for the role of the Public Interest Monitor in Queensland are discussed below, at 3.9. This includes the monitor's right to be advised of the application and make submissions to the judge which must be taken into account in determining whether to authorise the warrant.

In a submission to the current Parliamentary inquiry into scrutiny of NSW Police counter-terrorism and other powers, the NSW Council of Civil Liberties argued that covert search warrant powers call for special scrutiny of police actions. It recommended that either the Ombudsman or the Police Integrity Commission:

> *be required to observe each covert search, and that it be a condition of the legality of the searches and of the subsequent use of what is discovered in evidence in legal proceedings, that they do so observe. The Ombudsman's Office or the PIC should prepare a report on each search, to be given to the owner/occupier of the premises searched at the same time that the occupier's notice is given.*[307]

The Council for Civil Liberties further recommended the Ombudsman keep records of covert searches and report each three months on the number of covert searches, outcomes in relation to the saving of life and on the use of evidence in laying charges for terrorist offences and other offences.

The Law Society also recommended that all covert search warrants be overseen by either an officer of the Police Integrity Commission or the Ombudsman's office, and a report of each search should be prepared by that officer. It also recommended these agencies monitor and report regularly on all searches and outcomes including any charges laid, whether terrorist related or otherwise.[308]

35. What are your views as to the current safeguards applying to covert search warrants? In particular:

- **a. Are the statutory provisions which apply to false information, publication of information and destruction of records appropriate?**
- **b. Are the public reporting requirements sufficient? Are they appropriate?**
- **c. Are the rights to inspect records relating to covert search warrants appropriate, particularly considering the potential for disclosure of investigative methodologies and compromise of ongoing investigations?**
- **d. Should the Act require police to videotape covert search warrants, where practicable?**
- **e. Are the arrangements for external oversight sufficient? Are they appropriate?**

3.9. Covert search warrants in other Australian jurisdictions

This section looks at covert search warrant regimes in other Australian jurisdictions.

3.9.1. Commonwealth

The *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (Cth) proposes to allow police officers to enter and search premises covertly, to prevent or investigate terrorism or other serious Commonwealth offences, 'without giving notice to the occupier of the premises until operational sensitivities allow.'[309]

The proposed scheme is similar to that in New South Wales. The main differences include that warrants are referred to as 'delayed notification search warrants' rather than covert search warrants, and that they can be issued in relation to a number of Commonwealth offences, and state offences with a federal aspect, in addition to terrorism offences. The Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Bill, and recommended that the offences in relation to which warrants can be issued be limited to organised crime, terrorism and offences involving death or serious injury with a maximum penalty of life imprisonment.[310]

3.9.2. Other Australian States and Territories

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

- Unlike New South Wales, the other jurisdictions do not include membership of a terrorist organisation as grounds for issuing a covert search warrant.
- In Queensland, covert search warrants are available in relation to organised crime and certain other serious offences, as well terrorism offences.[311]
- In Victoria, Queensland, Northern Territory and Western Australia, there do not appear to be any provisions requiring occupants of searched premises to be notified of the search. In New South Wales, occupants must be notified of the search within six months, or longer where the issuing judge is satisfied there are reasonable grounds for postponement.[312]

In Victoria, police can apply to the Supreme Court for a covert search warrant under the *Terrorism (Community Protection) Act 2003* (Vic). The grounds for application are similar to New South Wales although the suspicion or belief need not relate to a specific terrorist act.[313] The covert search warrant authorises entry into the premises, 'or any other specified premises adjoining or providing access to the premises'. The court can direct that anything seized during the execution of the warrant be returned to the owner, if it can be returned consistently with the interests of justice.[314] Except where provided, the rules of the *Magistrates Court Act 1989* (Vic) are to be observed and applied to warrants under this Act.[315] The person to whom the warrant is issued must make a report to the court no later than seven days after the warrant expires. It is an offence not to provide the court with this report, carrying a penalty of one year imprisonment. The Chief Commissioner must submit an annual report relating to covert search warrants to the relevant Minister who must table the report in Parliament within 12 sitting days.

In Queensland, Chapter 9 of the *Police Powers and Responsibilities Act 2000* (Qld) provides for covert search warrant powers.[316] A police officer of at least the rank of inspector can apply to a Supreme Court judge for a covert search warrant. The applicant must advise the Public Interest Monitor of the application under arrangements decided by the monitor. The judge must hear the application in the absence of the person who is the subject of the application or anyone likely to inform that person. The factors the judge must take into consideration are similar to those in New South Wales. In addition, the judge must take into account any submissions by the Public Interest Monitor. In issuing a warrant, the judge may impose any conditions which are necessary in the public interest. The requirements for the contents of the warrant are similar to New South Wales but also state, that 'if practicable, the search must be videotaped'.[317] The powers are similar to those in New South Wales, except they do not include a power of entry to adjoining properties, except to 'pass over, through, along or under another place to enter the relevant place'.[318] A report must be presented to the court which issued the warrant, or the Public Interest Monitor, as stated on the warrant, within seven days of the warrant being executed.[319]

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

In Western Australia, Part 3 of the *Terrorism (Extraordinary Powers) Act 2005* (WA) provides for covert search warrant powers. Police can apply to a judge for a covert search warrant on similar grounds to New South Wales. The judge must not issue a covert search warrant that confers a power to enter an adjoining place, unless satisfied that it is reasonably necessary to facilitate entry into the target place, to prevent the search from being frustrated or jeopardised, or for any other good reason.[320] A covert search warrant allows an officer to conduct a basic search or strip search of any person who is in the target place when the warrant is being executed for any thing or class of thing described in the warrant.[321] A report must be presented to the issuing judge within seven days of either serving the warrant or its expiry date. It is an offence not to provide the report with a penalty of one year imprisonment. The Commissioner must present an annual report containing information relating to covert search warrants to the Minister. The report can form part of the *Financial Administration and Audit Act 1985* (WA). If it is presented separately, it must be tabled in Parliament within 30 days.

Endnotes

[227] *Terrorism (Police Powers) Act 2002* ss. 27D, 27E and 27F.
[228] NSW Police, Standard Operating Procedures, Covert Search Warrants, 2 September 2005.
[229] *Terrorism (Police Powers) Act 2002* ss. 27D, 27E and 27F.
[230] *Terrorism (Police Powers) Act 2002* s. 27C(a),(b) and (c).
[231] *Terrorism (Police Powers) Act 2002* s. 27A(2) and *Crimes Act 1900* s. 310J.
[232] *Terrorism (Police Powers) Act 2002* s. 27B.
[233] *Terrorism (Police Powers) Act 2002* ss. 27Y, 27H and 27I.
[234] *Terrorism (Police Powers) Act 2002* s. 27H.
[235] *Terrorism (Police Powers) Act 2002* s. 27H(4).
[236] *Terrorism (Police Powers) Act 2002* s. 27I.
[237] *Terrorism (Police Powers) Act 2002* s. 27J(b) (c) and (d).
[238] *Terrorism (Police Powers) Act 2002* s. 27J(f) and (g).
[239] *Terrorism (Police Powers) Act 2002* s. 27J(h).
[240] *Terrorism (Police Powers) Act 2002* s. 27M.
[241] *Terrorism (Police Powers) Act 2002* s. 27K.
[242] *Terrorism (Police Powers) Act 2002* s. 27K(2)(f).
[243] *Terrorism (Police Powers) Act 2002* s. 27L.
[244] *Terrorism (Police Powers) Act 2002* s. 27K(h).
[245] *Terrorism (Police Powers) Act 2002* s. 27N.
[246] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.

[247] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[248] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[249] Commonwealth of Australia, Report of the Security Legislation Review Committee, June 2006, p4.
[250] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[251] *Terrorism (Police Powers) Act 2002* s. 27P.
[252] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.
[253] *Law Enforcement (Controlled Operations) Act 1997* s. 7(2).
[254] *Terrorism (Police Powers) Act 2002* s. 27O.
[255] *Terrorism (Police Powers) Act 2002* s. 27O(3).
[256] *Terrorism (Police Powers) Act 2002* s. 27O(1)(b) and (c).
[257] *Terrorism (Police Powers) Act 2002* s. 27O(1)(f).
[258] *Terrorism (Police Powers) Act 2002* s. 27R.
[259] *Terrorism (Police Powers) Act 2002* s. 27N(d).
[260] In New South Wales, many hundreds of offences are punishable by five years imprisonment or more. Some examples include murder, sexual assault, robbery, possession of explosives with intent to injure, money laundering, prejudicing the safe operation of an aircraft, making a false instrument, sabotage, causing a bushfire, and supply of prohibited drugs.
[261] *Terrorism (Police Powers) Act 2002* s. 27O(1)(h).
[262] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[263] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[264] Law Society of NSW, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 14 June 2006.
[265] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 49(1)(b).
[266] The Attorney General Mr Bob Debus, Legislative Assembly Hansard, 9 June 2005.
[267] NSW Ombudsman, *DNA Sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000*, October 2006 at 9.2.
[268] *Terrorism (Police Powers) Act 2002* s. 27J(1)(e).
[269] *Terrorism (Police Powers) Act 2002* s. 27K (g).
[270] *Terrorism (Police Powers) Act 2002* s. 27O(d).
[271] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[272] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.
[273] *Terrorism (Police Powers) Act 2002* s. 27S(1)(c).
[274] *Terrorism (Police Powers) Act 2002* s. 27S(1)(c)(vii).
[275] *Terrorism (Police Powers) Act 2002* s. 27U.
[276] *Terrorism (Police Powers) Act 2002* s. 27S(1)(c)(iii).
[277] *Terrorism (Police Powers) Act 2002* s. 27S(6).
[278] *Terrorism (Police Powers) Act 2002* s. 27U(1).
[279] *Terrorism (Police Powers) Act 2002* s. 27U(2)(g).
[280] *Terrorism (Police Powers) Act 2002* s. 27U(2)(h) and (i).
[281] *Terrorism (Police Powers) Act 2002* s. 27U(2)(k).
[282] *Terrorism (Police Powers) Act 2002* s. 27U(3)(4) and (5).
[283] *Terrorism (Police Powers) Act 2002* s. 27U(7).
[284] *Terrorism (Police Powers) Act 2002* s. 27U(9)(b).
[285] *Terrorism (Police Powers) Act 2002* s. 27U(6).
[286] The Attorney General Mr Bob Debus, Legislative Assembly Hansard, 9 June 2005.
[287] Advice from NSW Police, 11 October 2006.
[288] *Terrorism (Police Powers) Act 2002* s. 27V(3) and (4).
[289] *Terrorism (Police Powers) Act 2002* s. 27U(2)(a) to (e).
[290] *Law Enforcement (Powers and Responsibilities) Act 2002* Part 5, Division 2. Note that search warrant powers were formerly contained in the *Search Warrants Act 1985*.
[291] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 67(3).
[292] *Law Enforcement (Powers and Responsibilities) Act 2002* s. 59(1)(b) and *NSW Crime Commission Act 1985* s. 11.
[293] Mr Phillip Bradley, NSW Crime Commissioner, evidence given before the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 20 September 2006.
[294] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[295] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.
[296] *Terrorism (Extraordinary Powers) Act* (WA) s. 27(7)(f).
[297] *Terrorism (Police Powers) Act 2002* s. 27Z.
[298] *Terrorism (Police Powers) Act 2002* s. 27ZA(1).
[299] *Terrorism (Police Powers) Act 2002* s. 27ZA(2).
[300] *Terrorism (Police Powers) Act 2002* s. 27W(3).
[301] *Terrorism (Police Powers) Act 2002* s. 27W(2) and (3).
[302] Ms Lee Rhiannon MLC, Legislative Council Hansard, 22 June 2005.
[303] *Terrorism (Police Powers) Act 2002* s. 27ZB(1).
[304] *Terrorism (Police Powers) Act 2002* s. 27ZB(5).
[305] *Terrorism (Community Protection) Act 2003* (Vic) s. 13(3) and *Terrorism (Extraordinary Powers) Act* (WA) s. 30(3).
[306] *Police Powers and Responsibilities Act 2000* (Qld) s. 216(e).

[307] NSW Council for Civil Liberties, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, June 2006.
[308] Law Society of NSW, submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission Inquiry into scrutiny of NSW Police counter-terrorism and other powers, 14 June 2006.
[309] Commonwealth Parliament, *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 Explanatory Memoranda*, 29 October 2006, p2.
[310] Commonwealth of Australia, Standing Committee on Legal and Constitutional Affairs, Report on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, 7 February 2007, Recommendation 6.
[311] *Police Powers and Responsibilities Act 2000* (Qld) s. 212.
[312] *Terrorism (Police Powers) Act 2002* s. 27U.
[313] *Terrorism (Community Protection) Act 2003* (Vic) s. 6(1A).
[314] *Terrorism (Community Protection) Act 2003* (Vic) s. 9(2).
[315] *Terrorism (Community Protection) Act 2003* (Vic) s. 9(3).
[316] See *Police Powers and Responsibilities Act 2000* (Qld) ss. 211 to 220.
[317] *Police Powers and Responsibilities Act 2000* (Qld) s. 216(e).
[318] *Police Powers and Responsibilities Act 2000* (Qld) s. 219(1)(b).
[319] *Police Powers and Responsibilities Act 2000* (Qld) s. 220.
[320] *Terrorism (Extraordinary Powers) Act 2005* (WA) s. 26(2).
[321] *Terrorism (Extraordinary Powers) Act 2005* (WA) s. 27(f).

Chapter 4. Scrutiny of counter-terrorism powers

The Ombudsman's role in keeping special counter-terrorism powers under scrutiny is limited to an initial period of the legislation being in force. The Ombudsman is required to monitor the covert search warrant provisions for two years, and the preventative detention order provisions for five years, with an interim report after two years. There is no provision for ongoing monitoring by the Ombudsman beyond each of the review periods.

Other reviews we have conducted required us to examine police powers which are used frequently, such as powers to conduct forensic procedures or use of drug detection dogs. At the end of a review period, we are usually able to gauge whether the new powers are being used effectively and fairly, for both police and the wider community, based on detailed research into the way police officers are using their powers.

The preventative detention and covert search warrant powers differ, however, in that they are not used routinely by police. It may well be that they are not used very often during the review period. Where the powers are used, the obligations of those exercising the powers may extend for some time beyond the end of the review period. For example:

- Police are required to ensure any identification material taken from a person in preventative detention is destroyed 12 months after the completion of any proceedings relating to the order or the detainee's treatment under the order.[322]
- Police are required to serve an occupiers notice within six months of executing a covert search warrant. This may be postponed for six monthly periods, where there are reasonable grounds for postponement. In exceptional circumstances it may be postponed for more than 18 months.[323]
- Police are required to destroy any records made in the execution of a search warrant as soon as practicable after determining that retention is no longer reasonably required for an investigation or proceedings.[324]

Without ongoing oversight, there would be no way of ensuring these obligations are met.

In this context, a longer period of scrutiny may be warranted for the exercise of special counter-terrorism powers than for other, more frequently used police powers. Further, given the extraordinary nature of the powers, scrutiny on an ongoing basis may be warranted.

36. Should special counter terrorism powers be subject to ongoing scrutiny? If so, what form should that scrutiny take?

Endnotes

[322] *Terrorism (Police Powers) Act 2002* s. 26ZM(4).
[323] *Terrorism (Police Powers) Act 2002* s. 27U.
[324] *Terrorism (Police Powers) Act 2002* s. 27W(3).

Consolidated list of questions

	Question	Page
1	**Are police powers to deal with detainees sufficient and appropriate?**	8
2	**Do correctional officers' powers to deal with detainees require clarification? Should the powers conferred on correctional officers under the Crimes (Administration of Sentences) Act apply to people held in preventative detention? If not, what powers and functions should be conferred on correctional officers to enable them to deal with preventative detainees?**	8
3	**What are your views as to the present application process for preventative detention orders?**	10
4	**What is the practical or operational impact of having to obtain a court order before being able to detain a person?**	10
5	**Are the existing arrangements for preventative detention appropriate? If not, how could detention arrangements better reflect the preventative rationale for detention?**	11
6	**What are your views as to the present 'maximum period of detention' provisions in section 26K of the Act? Are these provisions:** a. Sufficiently clear as to maximum periods of detention? b. Appropriate as regards the use of, and safeguards for, multiple orders made in relation to the same person? c. Sufficiently flexible to deal with changing operational or other factors? d. Adequate in length to achieve the purpose of preventative detention? If not, what additional period should be permitted?	13
7	**What are your views on the provision of information to people in preventative detention? In particular:** a. Is the information provided to detainees appropriate? b. Should detainees have to be informed of their right to make a complaint about their treatment by correctional officers, in the same way they have to be informed of their right to make a complaint about their treatment by police officers? c. Is the requirement that information be provided 'as soon as practicable' appropriate? d. Is it appropriate that police may be charged for an offence for failing to provide information? Is the exception of impracticability necessary? Should police also face a penalty for failing to provide a copy of the order? e. Should a detainee be entitled to know of the existence of a prohibited contact order?	15
8	**What are your views about the implementation of the contact provisions in Part 2A? In particular:** a. Should the Act provide for personal contact for detainees 18 years old and over with family and other permitted persons? If so, what arrangements would be appropriate? For example, should personal visits be permitted, unless there are particular reasons why they should not be allowed? b. Should detainees have access to chaplains and/or official visitors?	16

	Question	Page
9	**What are your views about the present provisions on the monitoring of lawyer/client communication by police? In particular:** a. Should there be some threshold, similar to that provided for in the United States and United Kingdom, prior to police being able to monitor the communications? If so, what are appropriate considerations, and who should determine this? b. Is it appropriate that the non-disclosure and non-admissibility provisions apply only to communications made for a permitted purpose? c. Is it appropriate that disclosure of communications by a monitor is a criminal offence? Should the elements of the offence include any additional requirements?	18
10	**Are the arrangements for security clearance of lawyers provided for in the Act appropriate?**	18
11	**Would legal aid entitlements assist in police officers facilitating legal representation for detainees? If so, what arrangements would be appropriate? What other arrangement may assist police in facilitating legal assistance to detainees?**	18
12	**What are your views as to the adequacy of required arrangements for interpreters for detainees?**	18
13	**Are the powers of police to question persons the subject of preventative detention and obtain identification material sufficient and appropriate? In particular:** a. Is it appropriate that police be restricted to asking questions only relating to determining whether the person detained is the person specified in the order, or for health and welfare purposes? Or, should police be able to generally question a person detained — similar to the powers of police in the United Kingdom? Does the interaction between Part 2A of the *Terrorism (Police Powers) Act* and Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* provide sufficient flexibility for police in questioning detained persons? b. Should police be permitted to ask questions to establish the identity of a person detained in addition to any questions to establish they are the person named in the order? c. Should police be permitted to take a DNA sample from a person in preventative detention under the *Terrorism (Police Powers) Act?* If so, under what circumstances?	21
14	**Are the arrangements for the detention of young people appropriate? In particular:** a. Are the visiting arrangements appropriate? What considerations should a police officer take into account in determining whether to allow a child detainee to have contact beyond two hours with a parent or guardian? b. What information should parents and guardians of child detainees be entitled to?	22
15	**Are the arrangements for the detention of people who are incapable of managing their affairs appropriate? In particular:** a. On what basis would people be considered 'incapable of managing their affairs', and who would make that decision? b. Are the visiting arrangements appropriate? What considerations should a police officer take into account in determining whether to allow an incapable person to have contact beyond two hours with a parent or guardian?	22

	Question	Page
15 (cont'd)	c. What information should parents and guardians of incapable adult detainees be entitled to?	22
16	**Should there be some additional requirement on police and/or the court to assess, at regular intervals, whether the continued detention of a person is necessary? If so, who should consider this matter and at what intervals?**	23
17	**In circumstances where a court has found there are sufficient grounds to detain a person for a specific period, is it appropriate that police have the power to release that person without consultation with the court?**	23
18	**If police release a person from preventative detention prior to the preventative detention order expiring, should they be required to consider having the order revoked, or should the order be considered to have lapsed — similar to the Australian Capital Territory regime?**	23
19	**Should a person being released from detention be entitled to more information about their rights and status upon release? Should NSW Police or the Department of Corrective Services develop procedures to return persons to an appropriate location on their release from preventative detention, including to protect the person from retribution or unwanted media exposure?**	24
20	**Are the safeguards for detainees, as they apply to the exercise of powers conferred on police and correctional officers, appropriate? In particular:** a. What are your views as to the legislative arrangements to ensure humane treatment of detainees? b. Are the arrangements by NSW Police to provide for specially trained superintendents to oversee detention sufficient and appropriate? c. Should police be required to report to the Attorney General and Police Minister on additional matters, or more frequently, about the exercise of Part 2A functions? d. Are the external oversight arrangements in place sufficient? If not, what other arrangements are required to ensure appropriate use of Part 2A functions by police and correctional officers?	26
21	**What are your views as to the overall arrangements for preventative detention? Should the requirements of Part 2A be revised to increase the utility of preventative detention in preventing and investigating terrorist acts, and if so in what respects?**	26
22	**Should any of the features of preventative detention legislation in other jurisdictions be incorporated into the New South Wales regime, and if so, why?**	30
23	**What are your views about the present application process for covert search warrants?**	37
24	**What are your views about the making of applications by telephone or facsimile without evidence being sworn by oath or affidavit?**	37
25	**Is the present threshold test for applications — suspicion or belief on reasonable grounds that a terrorist act is being or likely to be committed — appropriate? If not, in what respects should it be amended?**	37

	Question	Page
26	**What are your views as to the powers provided to police and Crime Commission officers on executing a covert search warrant? In particular:** a. Are the powers to use assistants sufficient and appropriate? b. Are the provisions setting out the various acts permitted under a warrant sufficient and appropriate? c. Are police powers to collect DNA or other forensic evidence sufficient and appropriate? d. Should there be any additional requirements where those executing the warrant seize things which are not related to a terrorist act, but to some other serious indictable offence?	39
27	**Are the current provisions governing entry to adjoining premises appropriate?**	40
28	**What are your views as to the current report requirements for police and Crime Commission officers following execution of a covert search warrant? In particular:** a. Is the information required necessary? Is it appropriate? b. Is the 10 day reporting period appropriate? c. Are there any additional matters upon which a report should be made? d. Should there be a penalty for failing to provide the report?	40
29	**What are your views as to the current provisions relating to the service of occupier's notices? In particular, does the requirement that an occupier's notice be served risk compromising police or Crime Commission investigations?**	41
30	**Occupiers of adjoining premises are provided with less information relating to the grounds and the activities undertaken, than the occupiers of the subject premises. Is there any other information neighbours should be entitled to?**	42
31	**Is there a possibility notifying the occupiers of adjoining premises could have detrimental effects on neighbourly relations and/or heighten the risk of compromising ongoing investigations?**	42
32	**Given Parliament has enacted a stand-alone covert search warrant regime for the investigation of terrorism offences, should there be any requirement that police and Crime Commission officers use these powers, rather than general search warrant powers, when conducting covert searches as part of investigations into terrorism offences?**	43
33	**What additional arrangements may be necessary to manage circumstances when covert warrants become overt?**	43
34	**Should Part 3 specifically deal with rights of persons and powers of police or Crime Commission officers where the execution of a covert search warrant is interrupted?**	43
35	**What are your views as to the current safeguards applying to covert search warrants? In particular:** a. Are the statutory provisions which apply to false information, publication of information and destruction of records appropriate? b. Are the public reporting requirements sufficient? Are they appropriate?	45

	Question	Page
35 (cont'd)	c. Are the rights to inspect records relating to covert search warrants appropriate, particularly considering the potential for disclosure of investigative methodologies and compromise of ongoing investigations? d. Should the Act require police to videotape covert search warrants, where practicable? e. Are the arrangements for external oversight sufficient? Are they appropriate?	45
36	**Should special counter terrorism powers be subject to ongoing scrutiny? If so, what form should that scrutiny take?**	49

SUBMISSIONS DUE FRIDAY 15 JUNE 2007

NSW Ombudsman
Level 24 580 George St
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro area): 1800 451 524
Facsimile: 02 9283 2911
Telephone typewriter: (02) 9264 8050
Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au