

**Preventative detention
and covert search
warrants:**

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

Review period 2011 - 2013

September 2014

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

Review period 2011 - 2013

September 2014

**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 978-1-925061-41-3

© Crown Copyright, NSW Ombudsman, September 2014

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

Foreword

In 2005 the *Terrorism (Police Powers) Act 2002* was amended to give police and the NSW Crime Commission special powers to deal with suspected terrorist acts. Under Part 2A, police may apply to the Supreme Court for a preventative detention order to detain a person without charge for up to two weeks, in order to prevent a suspected imminent terrorist act or to preserve evidence of a terrorist act which has occurred. In addition, under Part 3, police and officers of the NSW Crime Commission may apply for a covert search warrant that enables them to search premises without notifying the owner at the time.

I am required to report to the Attorney General and Minister for Police every three years in relation to the exercise of the powers under Parts 2A and 3 of the Act. This is my third report, and it covers the exercise of the powers in the 2011, 2012 and 2013 calendar years. Since I last reported, none of the powers have been used. Indeed, the preventative detention powers have never been used in NSW nor have they been used by law enforcement agencies in other states and territories or at a federal level.

This report provides an update about the progress of implementation of our past recommendations. In this context, I have focused on whether the NSW agencies that administer the preventative detention scheme are operationally ready to do so and whether concerns previously raised by police about the operational effectiveness of the powers have been resolved.

At the time of writing, the NSW Police Force and Juvenile Justice NSW have developed procedures to support the use of preventative detention powers by police. Corrective Services NSW has advised it is in the final stages of developing similar procedures. There is still work to be done. To ensure that the agencies have consistent practices I have recommended that this issue be urgently brought to a conclusion.

I have also recommended that the Attorney General consider the suggestion I received from the Crime Commissioner that it is not necessary for the covert search powers to be vested in the Crime Commission. Instead, this type of covert search power should only be exercised by police.

In my 2011 report, I noted serious concerns expressed by some police in NSW about the operational effectiveness of these powers. Similar concerns are included in the 2013 *Council of Australian Governments Review of Counter-Terrorism Legislation* and the 2012 *Declassified Annual Report* of the Independent National Security Legislation Monitor, both of which recommended the repeal of these types of powers.

As the preventative detention powers have not been used, I am not in a position to scrutinise and report on whether concerns about their operational utility have been realised. As the NSW preventative detention powers will expire in December 2015 this report considers the views put forward in the two reports above, and those of the Commissioner of Police and other NSW agencies, regarding the viability of these powers, for the Attorney General and Parliament to consider when determining whether the powers should expire.

These powers were designed to complement federal powers to combat terrorism. At the time of writing, there is heightened debate about the adequacy of federal counter-terrorism laws. New measures proposed by the federal government include an extension of the federal preventative detention powers, which are due to expire in 2015.

I trust this report will be of assistance to those agencies with powers and responsibilities under the Act and will assist Parliament in assessing the ongoing utility of the legislation.



Bruce Barbour
Ombudsman

Acknowledgements

We would like to thank the NSW Police Force, Corrective Services NSW, Juvenile Justice NSW and the NSW Crime Commission for providing information and assistance for this review.

Principal researchers: Sally Haydon and Natalie De Campo.

Contents

Foreword	iii
Acknowledgements	iv
Acronyms and Glossary	vii
Terms used in this report	vii
Executive Summary	1
Summary of Recommendations	2
Chapter 1. Introduction	3
1.1 The role of the Ombudsman and the purpose of this report	3
1.1.1. The terms of our review	3
1.1.2. The process we used to prepare this report	3
1.1.3. Other review mechanisms	4
1.2 Background	4
1.2.1. The framework for policing terrorism in Australia	4
1.2.2. NSW counter-terrorism laws	5
1.2.3. Terrorism offences	5
1.3 Developments during the reporting period	6
1.3.1. Counter-terrorism in context	6
1.3.2. Changes to NSW counter-terrorism legislation	7
1.4 The powers we are required to scrutinise	8
1.4.1. Preventative detention orders (Part 2A)	8
1.4.2. Covert search warrants (Part 3)	9
Chapter 2. Preventative detention and covert search warrants in other jurisdictions	10
2.1 Preventative detention in other jurisdictions	10
2.1.1. Commonwealth	10
2.1.2. Other Australian states and territories	10
2.1.3. Canada	11
2.1.4. United Kingdom	12
2.2 Covert searches in other jurisdictions	12
2.2.1. Commonwealth	12
2.2.2. Other Australian states and territories	12
Chapter 3. Preventative detention	14
3.1 Background	14
3.2 Current framework for the exercise of preventative detention powers	14
3.3 Our previous recommendations	15
3.4 Recommendations that have been implemented since our last report	16
3.4.1. Releasing detainees who are under 16 years of age	16
3.4.2. Places where a person aged 16 or 17 years may be detained	16
3.4.3. Senior officer's liability	18
3.4.4. Dependants of a detained person	18
3.4.5. Access to legal advice	19
3.4.6. Complaints about correctional officers	20
3.4.7. Protection from unwanted media exposure	20
3.5 Provision of police concerns to the Attorney General	21

3.6	Recommendations that have not been implemented	22
3.6.1.	Interagency agreements and agency procedures	22
3.6.2.	Interaction between NSW and federal preventative detention schemes	24
3.7	Expiry of preventative detention powers in December 2015	25
3.7.1.	Our previous comments about expiry of the powers	25
3.7.2.	View of the Attorney General	27
3.7.3.	Current view of the NSW Police Force	27
3.7.4.	View of the Minister for Police and Emergency Services.....	28
3.7.5.	Determining whether Part 2A should be extended or allowed to expire	28
3.8	Operational readiness	31
	Recommendations	32
3.9	Monitoring of any new preventative detention powers	32
Chapter 4. Covert search warrants		33
4.1	Use of covert search powers during reporting period.....	33
4.2	Background	33
4.3	Other NSW covert search powers	33
4.4	Current framework for exercise of the powers	34
4.5	Implementation of our previous recommendations.....	34
4.6	Ongoing utility and effectiveness of Part 3	35
4.6.1.	Police powers	36
4.6.2.	NSW Crime Commission powers	36
	Recommendation	37
4.7	Federal covert search warrant scheme	37
Chapter 5. NSW counter-terrorism powers in a national context		38
5.1	Framework for counter-terrorism in Australia	38
5.2	Oversight of counter-terrorism laws in Australia.....	39
Annexure A: Implementation of recommendations from our 2011 report.....		40

Acronyms and Glossary

AFP	Australian Federal Police
ANZCTC	Australia-New Zealand Counter-Terrorism Committee
ASIO	Australian Security Intelligence Organisation
COAG	Council of Australian Governments
Corrective Services or CSNSW	Corrective Services NSW
Juvenile Justice or JJ	Juvenile Justice NSW
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
LOPs	local operating procedures
MoU	Memorandum of Understanding
PDO	preventative detention order
SOPs	standard operating procedures

Terms used in this report

reporting period	1 January 2011 to 31 December 2013
preventative detention order	An order made by the Supreme Court under section 26l of the <i>Terrorism (Police Powers) Act 2002</i> , authorising detention of a person for a specified period
terrorist act	An act as defined in section 3 of the <i>Terrorism (Police Powers) Act 2002</i> , including, for example, an act that causes serious harm to a person, serious damage to property or a person's death and which is done with the intention of advancing a political, religious or ideological cause, and coercing, or influencing by intimidation, the government of the Commonwealth or a state, or intimidating the public or a section of the public
young person	A person aged 16 or 17
section 310J offence	offence under section 310J of the <i>Crimes Act 1900</i> regarding membership of a terrorist organisation
Security Legislation Monitor	Independent National Security Legislation Monitor
2013 statutory review	<i>Review of the Terrorism (Police Powers) Act 2002</i> , conducted on behalf of the Attorney General by the Department of Attorney General and Justice, and tabled in Parliament by the Attorney General in 2013
our 2008 report	The Ombudsman's first report for his review of Parts 2A and 3 of the <i>Terrorism (Police Powers) Act 2002</i> , provided to the Attorney General in September 2008
our 2011 report	The Ombudsman's second report for his review of Parts 2A and 3 of the <i>Terrorism (Police Powers) Act 2002</i> , provided to the Attorney General in August 2011
the 2013 COAG report	Australian Government, <i>Council of Australian Governments Review of Counter-Terrorism Legislation</i> , Canberra, 2013. This report was prepared by a committee appointed by COAG and contains recommendations from that committee to COAG
the COAG review	Review by COAG of counter-terrorism legislation in Australia, incorporating consideration of recommendations from the 2013 COAG report

page intentionally blank

Executive Summary

The *Terrorism (Police Powers) Act 2002* gives special powers to police and the NSW Crime Commission to deal with terrorist acts. These include powers to apply for court orders to detain people without charge for up to 14 days to prevent a suspected imminent terrorist act or preserve evidence of terrorist acts which have occurred. The Act also provides powers to apply for covert search warrants, enabling NSW Police Force and Crime Commission officers to search premises, but postpone notifying the owner until a later time.

The NSW Ombudsman has an ongoing responsibility to scrutinise the exercise of the preventative detention powers by police and correctional officers, and the use of the covert search powers by the NSW Police Force and the NSW Crime Commission. We have previously published two reports on these powers which were tabled in 2008 and 2011. This third report covers the period from 1 January 2011 to 31 December 2013. The powers under review have not been used during that period.

The national terrorism public alert level remained at Medium during the reporting period but was raised to High on 12 September 2014, due to 'the increased likelihood of a terrorist attack in Australia.'¹ The development of the conflicts in Syria and Iraq, and the involvement of a number of Australians with extremist groups in those regions, has increased concerns of terrorist activity within Australia. The Australian Security Intelligence Organisation has expressed a concern that such people could return to Australia with strengthened links to terrorist networks, and experience and skills in facilitating attacks. In this context, there may be an increased need for use of the powers under review in the future.

The Federal Government has also recently announced a range of new counter-terrorism measures. These include amendments to telecommunication interception legislation, the suspension of Australian passports on request by ASIO, and the introduction of new terrorism offences. The Prime Minister has also foreshadowed an extension of federal preventative detention powers and a review of Australia's 'counter-terrorism coordinating machinery'.² While these measures have not yet been finalised, we anticipate that they will impact upon counter-terrorism laws at the state level.

The preventative detention powers are due to expire on 16 December 2015. In our 2011 report, we discussed the issue of the ongoing utility of these powers, and considered a number of concerns raised by the NSW Police Force regarding the complexity of the preventative detention scheme and difficulties in its implementation. At that time, we recommended that the next statutory review of the Act by the Attorney General consider whether there was an ongoing need for these powers. Following that statutory review in 2013, the Attorney General deferred consideration of this issue until preventative detention laws had been discussed at a national level.

The NSW Commissioner of Police supports retaining the preventative detention powers. The Commissioner has argued that repealing these powers would result in a gap in law enforcement capability to prevent a suspected terrorist attack. In this report, we consider the Commissioner's arguments, and conclude that the expiry of these powers would appear to leave a gap in law enforcement powers. However, it remains to be considered whether this gap is of such a magnitude and significance that it justifies the continuation of these extraordinary powers, and whether this gap could be appropriately addressed through other existing provisions.

It is beyond the scope of this report to make a definitive assessment of these issues. Additionally, it would be premature to make a recommendation on whether the preventative detention powers should be allowed to lapse until more is known about a possible national approach. We await the Attorney General's final response to our 2011 recommendation regarding this issue.

In this report, we have also focussed on the implementation of our past recommendations regarding the preventative detention powers, particularly the operational readiness of the NSW Police Force, Corrective Services and Juvenile Justice. Under the relevant provisions, a police officer may arrange for a detained person to be held at a correctional centre or, if the person is 16 or 17 years old, at a juvenile detention centre or juvenile correctional centre. Where this occurs, the police retain responsibility for the person's detention even while that person is in the physical custody of Corrective Services or Juvenile Justice.

1 The Hon. Tony Abbott (Prime Minister), *National Terrorism Public Alert Level Raised to High*, Canberra, 12 September 2014.

2 The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

In 2011, these agencies developed a Memorandum of Understanding which facilitates and governs, at a broad level, the management of people subject to a preventative detention order. However, this instrument does not provide detailed operational guidance to staff. This guidance would ordinarily be set out in standard operating procedures within each agency. In our 2008 and 2011 reports, we recommended that such procedures be developed as a matter of priority.

The NSW Police Force completed its procedures for preventative detention orders in 2011. Juvenile Justice and Corrective Services had not finalised their procedures before the end of the present reporting period. Juvenile Justice has since finalised its policy and procedures, and provided us with a copy in July 2014. Corrective Services has advised us that its procedures have been drafted, and it expects to be operationally ready to use the powers by September 2014.

In our view, a consistent and finalised set of procedures is necessary to ensure that the requirements for detaining a person subject to a preventative detention order are met and the purpose of that order is not compromised. Accordingly, we recommend that Corrective Services finalise its procedures by September 2014, and that the Commissioner of Police review the procedures of all three agencies by November 2014 to ensure that they are consistent, comprehensive and integrated.

The covert search powers were not used during the reporting period, and we received no new information regarding the use of those powers. In 2013, the Attorney General's statutory review found that the policy objectives of the Act remain valid, and that the limited use of the covert search powers was not a sufficient reason for their repeal. In 2014, the Commissioner of Police and the Minister for Police and Emergency Services each advised us that, in their view, these powers remain a significant part of the state's counter-terrorism capability. Accordingly, we make no recommendation for any changes to the police powers in respect of covert searches.

In January 2014, the Crime Commissioner expressed the view that, while there is a continued need for the covert search powers, it is unnecessary for those powers to be available to the Crime Commission. The Commissioner advised us that the use of those powers would ordinarily be deferred to the NSW Police Force, and that the Commission lacks the appropriately trained staff and equipment necessary to conduct covert searches. In light of the Commissioner's view, we recommend that in the next statutory review the Attorney General consider whether the Act should be amended to remove the powers conferred on the Crime Commissioner and the staff of the Commission.

Summary of Recommendations

- 1. Corrective Services finalise its procedures for managing a person subject to a preventative detention order, by September 2014.**
- 2. The Commissioner of Police, by November 2014, review the police SOPs and Corrective Services and Juvenile Justice procedures to ensure they are consistent, comprehensive and integrated.**
- 3. The Attorney General, in the next statutory review, consider the view of the NSW Crime Commissioner that Part 3 of the *Terrorism (Police Powers) Act 2002* should be amended to remove the powers conferred on the Crime Commissioner and staff of the NSW Crime Commission.**

Chapter 1. Introduction

This report is required under the *Terrorism (Police Powers) Act 2002* (the Act) and relates to preventative detention and covert search powers. Since 2005, the Ombudsman has been required to keep under scrutiny how the NSW Police Force and the NSW Crime Commission use these powers. Our previous reports regarding this review were tabled in 2008³ and 2011.⁴

This report covers the period 1 January 2011 to 31 December 2013 (the reporting period). As some significant developments occurred in the period January 2014 to August 2014 while we prepared this report and sought comment from relevant agencies, we also provide some information regarding events in this period.

This chapter sets out our role and the purpose of this report. It also provides a brief history of the Act and discusses recent developments in counter-terrorism law in Australia. While we provide some background regarding issues that are ongoing in this review, detailed information regarding many issues considered and resolved earlier in the life of this review is available in our 2008 and 2011 reports.

The powers under review were not used in the period 2011-2013. The preventative detention powers have never been used and the covert search powers have only been used on five occasions, all in 2005.

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

1.1.1. The terms of our review

The Ombudsman is required to keep under scrutiny the exercise of preventative detention powers conferred on police officers and correctional officers under Part 2A of the Act.⁵ The Ombudsman is also required to keep under scrutiny the exercise of covert search powers conferred on members of the NSW Police Force, the NSW Crime Commissioner and staff members of the NSW Crime Commission under Part 3 of the Act.⁶ Other special powers that may be exercised by police under Part 2 of the Act are not the subject of the Ombudsman's review.

The Ombudsman must report on the exercise of the powers under Parts 2A and 3 every three years and furnish a copy of the report to the Attorney General and the Minister for Police. The Attorney General is then required to table the report in Parliament as soon as practicable after it is received.⁷ This is our third report in relation to the powers under Parts 2A and 3 of the Act. Our first report was finalised in September 2008 and our second report was finalised in August 2011.

1.1.2. The process we used to prepare this report

In preparing this report we sought information from the NSW Police Force, the NSW Crime Commission, Corrective Services NSW (Corrective Services), Juvenile Justice NSW (Juvenile Justice) and the Department of Justice⁸ in relation to their activities in exercising the powers and their implementation of the recommendations of our 2011 report. We also received information from the Minister for Police, the Attorney General and the Minister for Family and Community Services regarding some aspects of the powers under review.

We reviewed relevant legislation from other Australian jurisdictions, and from Canada and the United Kingdom. At the time of writing, the Federal Government had discussed the introduction of a range of new counter-terrorism laws,⁹ including the extension of the federal preventative detention order scheme, however no new laws concerning preventative detention or covert search warrants had yet been introduced.

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

⁴ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011.

⁵ *Terrorism (Police Powers) Act 2002*, s. 26ZO.

⁶ *Terrorism (Police Powers) Act 2002*, s. 27ZC.

⁷ *Terrorism (Police Powers) Act 2002*, ss. 26ZO and 27ZC.

⁸ Please note that this department has had other titles during the reporting period, including the Department of Police and Justice (see Administrative Arrangements (Administrative Changes—Miscellaneous Agencies) Order 2014) and the Department of Attorney General and Justice (see Administrative Arrangements (Administrative Changes—Ministers and Public Service Agencies) Order 2014).

⁹ The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

Given that the powers have not been used during the reporting period, one focus of our scrutiny has been the question of whether there is an ongoing need for the powers. In addition, we have reviewed the progress of implementation of our previous recommendations to assess whether the relevant agencies have adequate policies and procedures to support the effective use of the powers.

Copies of a consultation draft of this report were provided to the Commissioner of Police, the NSW Crime Commissioner, the Commissioner of Corrective Services and the Chief Executive of Juvenile Justice on 11 July 2014. We requested that they provide feedback on the material presented and our recommendations, if they wished. We also requested that they comment on the accuracy of the descriptions of police and other agency processes and practices and on whether the consultation draft of the report contained any information that in their view should not be made public. We received responses from all of these parties in July and August 2014, and information from these responses is included, where appropriate, in this report.

1.1.3. Other review mechanisms

In addition to our role in scrutinising the exercise of the powers under Parts 2A and 3 of the Act, the Commissioner of Police must report annually to the Minister for Police and the Attorney General in relation to the exercise of these powers.¹⁰ The Crime Commissioner is also required to report annually to the Minister for Police and the Attorney General in relation to the exercise of covert search powers under Part 3 of the Act.¹¹ The Attorney General is required to table all of these reports in Parliament.

The Attorney General is also required to periodically review the entirety of the Act to determine whether its policy objectives remain valid and whether the terms of the Act are appropriate for securing those objectives.¹² This review must be undertaken every three years, as soon as possible after the Ombudsman's report has been tabled in each House of Parliament.¹³

The Attorney General tabled reviews of the Act in 2006, 2007, 2010 and most recently in 2013. The 2013 review conducted by the Attorney General (the 2013 statutory review) covers the period from 2010 to early 2013 and considers the recommendations made in our 2011 report, in addition to submissions from a range of agencies.¹⁴ The 2013 statutory review concluded that the policy objectives of the Act remain valid. Further details of the 2013 statutory review are discussed later in this report.

1.2 Background

1.2.1. The framework for policing terrorism in Australia

In 2002, following the 11 September 2001 terrorist attacks in the United States, it was decided by the Council of Australian Governments (COAG) that counter-terrorism resources within Australia needed to be better integrated and coordinated.¹⁵ In April 2002, the Federal, state and territory governments developed a national framework to combat terrorism and agreed to form the National Counter-Terrorism Committee.¹⁶ It was agreed that the Federal Government would take charge of the strategic coordination of federal, state and territory resources in the event of a terrorist incident in Australia.

To strengthen the constitutional basis for terrorism-related federal laws, the state and territory governments agreed to refer constitutional powers in relation to terrorism to the Federal Government.¹⁷ In NSW, this was achieved through the *Terrorism (Commonwealth Powers) Act 2002*. The Federal Government then amended the Criminal Code (Cth) to include a range of terrorist offences. In effect, these legislative measures mean that most counter-terrorism offences are set out in federal legislation, but that NSW and other states and territories are still able to enact their own laws in relation

10 *Terrorism (Police Powers) Act 2002*, ss. 26ZN and 27ZB.

11 *Terrorism (Police Powers) Act 2002*, s. 27ZB.

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

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

14 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 6.

15 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 1.

16 The Hon. Daryl Williams (Commonwealth Attorney General), *Reference of terrorism power*, media release, Canberra, 8 November 2002.

17 *Ibid.*

to terrorism where this is considered necessary.¹⁸ Sometimes this occurs where a gap is identified in federal counter-terrorism laws but the Federal Parliament cannot enact the desired legislation due to constitutional constraints.

As noted above, at the time of writing, the Federal Government had announced a range of new counter-terrorism powers to augment the existing framework of state and federal laws.¹⁹

1.2.2. NSW counter-terrorism laws

Most NSW police powers that relate specifically to terrorism are contained in the Act. When first enacted in December 2002, the Act gave police powers that were designed to prevent imminent terrorist acts and to investigate terrorist acts after they have occurred, including special powers to search, detain people, seize items and cordon around target areas. The then Premier, Bob Carr, stated that the new powers were 'confined to limited circumstances' and were 'not intended for general use'.²⁰ These powers are contained in Part 2 of the Act.

In 2005, the Act was amended to include covert search powers. At the time, the government explained that these powers would allow investigations to take place from the earliest stages of suspected terrorist activity.²¹ Again, it was made clear that the powers were 'extraordinary' and were 'not designed or intended to be used for general policing'.²²

In September 2005, following the 7 July terrorist attacks in London, COAG met to consider the adequacy of Australia's counter-terrorism arrangements.²³ At this meeting, COAG agreed that it was necessary to further strengthen Australia's counter-terrorism laws and that the laws should 'contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate'.²⁴

Federal, state and territory governments agreed to enact counter-terrorism legislation that would give police powers to detain a person in order to prevent a terrorist attack. The Federal Government held concerns in relation to the constitutionality of enacting preventative detention legislation for any extended period.²⁵ For this reason, the Federal Government enacted legislation providing for preventative detention for up to two days (48 hours), while all states and territories enacted complementary legislation providing for preventative detention for up to 14 days.²⁶ NSW added Part 2A to the Act, which empowers police to apply to the Supreme Court for a preventative detention order and to hold a person in detention for up to 14 days.

As well as using laws designed specifically for counter-terrorism purposes, NSW police are able to use their other criminal law enforcement powers, where suspected terrorist activities might constitute these other types of crime.

1.2.3. Terrorism offences

In keeping with the decision that, where possible, counter-terrorism laws would sit within the federal framework, most terrorism offences in Australia are contained in the Criminal Code (Cth). 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.²⁷

A terrorist act includes actions such as those that cause serious physical harm to a person, or a person's death, and which are carried out with the intention of advancing a political, religious or ideological cause and coercing the government or intimidating the public.²⁸

18 Criminal Code (Cth), s. 100.6.

19 The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

20 The Hon. Bob Carr MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 19 November 2002, p. 6978.

21 The Hon. Bob Debus MP, NSWPD, (Hansard), Legislative Assembly, 9 June 2005, p. 16940.

22 Ibid.

23 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 1.

24 Council of Australian Governments, *Council of Australian Governments Communiqué: Special Meeting on Counter-Terrorism*, Canberra, 27 September 2005.

25 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 66.

26 Council of Australian Governments, *Council of Australian Governments Communiqué: Special Meeting on Counter-Terrorism*, Canberra, 27 September 2005.

27 Criminal Code (Cth), Divisions 101 - 103.

28 *Terrorism (Police Powers) Act 2002*, s. 3.

Terrorism offences carry maximum penalties ranging from three years (for associating with a terrorist) to life imprisonment (for engaging in a terrorist act, preparing or planning a terrorist act or financing terrorism).²⁹ The only terrorism-specific offence under NSW law is in section 310J of the *Crimes Act 1900*, which contains the offence of membership of a terrorist organisation. This offence mirrors section 102.3 of the Criminal Code (Cth). The list of terrorist organisations in NSW also mirrors that set out in federal legislation. The section 310J offence was introduced at the same time as the Part 3 covert search powers. A sunset clause means that this offence expires in 2016. This issue is discussed further in Chapter 4.

No person has been charged with the section 310J offence in NSW, although charges have been laid in Australia in relation to the equivalent federal offence. Other criminal offences, such as conspiracy, murder and sabotage, may also be applied to terrorist activities.

NSW police are able to use the police powers contained in the Act in investigating both state and federal offences.

1.3 Developments during the reporting period

1.3.1. Counter-terrorism in context

The national terrorism public alert level for Australia remained at Medium between 2003 and August 2014.³⁰ Australian Security Intelligence Organisation (ASIO) Director-General, David Irvine, has explained that this means that 'a terrorist attack is assessed as feasible and could well occur'.³¹ The alert level was raised to High on 12 September 2014, due to concerns about the number of Australians 'working with, connected to, or inspired by terrorist groups'.³² This means that a terrorist attack in Australia is considered 'likely'.³³

While the Part 2A and Part 3 powers were not used in the reporting period, police counter-terrorism operations continued during this time. In its submission to the COAG Review of Counter-Terrorism Legislation, ASIO stated that more than 200 counter-terrorism investigations were being conducted and described the threat of terrorism as 'ongoing, pervasive and persistent'.³⁴

A key issue for police has been the development of conflicts in Syria and Iraq and the participation of some Australian citizens in these conflicts.³⁵ In correspondence to us, the former Minister for Police and Emergency Services cited the Syrian civil war as a key international event that may create a need for the use of police powers under the Act in future.³⁶ Information obtained from senior police indicates that the threat of terrorist activity within Australia is currently being aggravated by these events.³⁷ Prime Minister Tony Abbott also recently commented that while the threat level has not changed, there is 'heightened concern' about the possibility of a terrorist attack in Australia.³⁸

It is estimated that at least 150 Australians have 'become involved with Islamist extremists in Syria and Iraq, either by travelling to the region, attempting to travel or supporting groups there from Australia'.³⁹ NSW Police Force Assistant Commissioner (Counter Terrorism and Special Tactics) Peter Dein reportedly expressed concern about increased numbers of young men being recruited from Sydney to fight with rebels in Syria.⁴⁰ Foreign Minister Julie Bishop and

29 Criminal Code (Cth), Divisions 101 - 103.

30 Australian Government, *National Terrorism Public Alert System*, viewed 11 September 2014, www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/NationalTerrorismPublicAlertSystem.aspx.

31 David Irvine AO, Legal and Constitutional Affairs Committee, Senate Estimates, Canberra, 30 May 2013, p. 91.

32 The Hon. Tony Abbott (Prime Minister), *National Terrorism Public Alert Level Raised to High*, Canberra, 12 September 2014.

33 Australian Government, *National Terrorism Public Alert System*, viewed 11 September 2014, www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/NationalTerrorismPublicAlertSystem.aspx.

34 Australian Security Intelligence Organisation, Submission to the Committee conducting the Council of Australian Governments' Review of Counter-Terrorism Legislation, undated, p. 1.

35 Anthony Bubalo, Lowy Institute for International Policy, *Next-gen jihad in the Middle East*, March 2014, p. 10; also see Australian Security Intelligence Organisation, *ASIO Report to Parliament 2012-2013*, Canberra, 2013, p. 3.

36 Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

37 Meeting between officers from NSW Police Force Counter Terrorism and Special Tactics Command and Ombudsman officers, 20 March 2014.

38 Latika Bourke and James Massola, 'Tony Abbott boosts funding by \$630m to fight home-grown terrorism', *Sydney Morning Herald* (online), 6 August 2014, viewed 6 August 2014.

39 David Irvine (Director-General, ASIO), *Evolution of terrorism — and what it means for Australia*, address to the Australian Institute of International Affairs, Sydney, 12 August 2014.

40 Geoff Chambers and Ben McClellan, 'South-west Sydney 'a recruitment hotspot of Islamic fundamentalists'', *The Daily Telegraph* (online), 20 March 2014, viewed 20 March 2014.

ASIO have expressed concern that those people involved in the conflicts could return to Australia with experience and skills in facilitating terrorist attacks and with stronger links to terrorist networks.⁴¹ ASIO expects 'these challenges to play out over several years and have a medium to long-term influence on the extremist environment in Australia, beyond any immediate resolution' to the Iraq and Syrian conflicts.⁴²

It has been reported that ASIO, in an attempt to prevent participation in foreign conflicts, has cancelled the passports of more than 50 people, stopping them from leaving Australia.⁴³ Two men were also arrested in December 2013 in Sydney following a four-month joint operation between the Australian Federal Police (AFP) and the NSW Police Force.⁴⁴ The men were charged with several offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) in relation to their involvement in hostile activity in Syria.⁴⁵

In July 2014, the AFP also issued arrest warrants for two Australians, Mohamed Elomar and Khaled Sharrouf, following their involvement with a listed terrorist organisation in Syria and Iraq. The men have posted a series of graphic, violent and threatening photographs and messages online relating to this involvement. In the event that they return to Australia, the warrants authorise their immediate arrest.⁴⁶

In mid 2014, the Federal Government responded to the evolving threat of terrorism by announcing a range of new counter-terrorism measures,⁴⁷ including proposed amendments to telecommunication interception legislation, enabling ASIO to request the suspension of an Australian passport and the introduction of new terrorism offences.⁴⁸ The Prime Minister has indicated that federal preventative detention laws would be extended in a forthcoming bill and that Australia's 'counter-terrorism coordinating machinery' would be reviewed. He also emphasised the importance of a nationally consistent approach to the threat of terrorism.⁴⁹

1.3.2. Changes to NSW counter-terrorism legislation

No substantive changes have been made to the Act since we last reported. However, changes have been made to associated counter-terrorism laws. In 2013, the sunset provision in section 310L of the *Crimes Act 1900* was extended; in effect, this means that the NSW offence of being a member of a terrorist organisation now expires in 2016. We discuss in Chapter 4 how this change may impact on Part 3 of the Act.

Regulations under the Act relate to administrative matters including the delegation of functions by the Commissioner of Police, the keeping and inspection of documents relating to covert search warrants and the approval of forms by the Attorney General.⁵⁰ The Terrorism (Police Powers) Regulation 2005 was repealed by section 10(2) of the *Subordinate Legislation Act 1989*, effective 1 September 2011. This regulation was replaced, with minor amendments, by the Terrorism (Police Powers) Regulation 2011.

41 Latika Bourke, 'Number of Australians fighting with militants in Iraq and Syria "extraordinary", Julie Bishop says', ABC News (online), 19 June 2014, viewed 20 June 2014.

42 As discussed in Australian Security Intelligence Organisation, *ASIO Report to Parliament 2012-2013*, Canberra, 2013, p. 3.

43 Tom Allard, 'Government plans new measures to enhance powers to suspend and cancel passports', *Sydney Morning Herald* (online), 5 August 2014, viewed 13 August 2014.

44 Martin Cuddihy, 'Arrested: Kingpin sending Australians to fight in Syria', *ABC Radio National* (transcript), 3 December 2013, viewed 4 December 2013; Paul Maley, 'Cancelled passports triple as ninth Aussie dies in Syria', *The Australian* (online), 11 February 2014, viewed 2 April 2014; Natalie O'Brien, 'ASIO cancels passports of western Sydney men for "jihadi mentality"', *Sydney Morning Herald* (online), 8 December 2013, viewed 6 February 2014.

45 The Hon. George Brandis QC (Commonwealth Attorney General), *Arrests highlight threats to Australia's national security*, media release, 3 December 2013.

46 Rachel Olding, 'AFP issues warrants for Australian ISIL fighters Khaled Sharrouf and Mohamed Elomar', *Sydney Morning Herald* (online), 30 July 2014, viewed 14 August 2014; Louise Cheer, "'I will slaughter you': Convicted terrorist Khaled Sharrouf taunts Australian police on Twitter from Iraq-Syria battlefield', *Daily Mail* (online), 17 July 2014, viewed 17 July 2014.

47 The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

48 Ibid.

49 Ibid.

50 Terrorism (Police Powers) Regulation 2011, Explanatory note.

1.4 The powers we are required to scrutinise

1.4.1. Preventative detention orders (Part 2A)

Part 2A of the Act came into force in December 2005. NSW, like all other states and territories, introduced laws to provide for the detention of a person for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act, for up to 14 days.⁵¹

The Act adopts substantially the same definition of a 'terrorist act' as the Criminal Code (Cth).⁵² Under section 3 of the Act, a terrorist act includes an action which causes serious physical harm to a person or serious damage to property; causes a person's death; endangers a person's life, other than the life of the person taking the action; or creates a serious public health risk. It also includes an action which seriously interferes with information, telecommunications, transport, essential service delivery, financial or other public utility systems.

To qualify as a 'terrorist act', an act must be done with the intention of advancing a political, religious or ideological cause and must be done with the intention to coerce or influence by intimidation a government, or to intimidate the public or a section of the public.⁵³ The definition of terrorist act specifically excludes advocacy, protest, dissent or industrial action which is not intended to cause serious harm or death, endanger life, or create serious public health or safety risks.⁵⁴

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

The Supreme Court may make an interim preventative detention order for up to 48 hours. This can occur in the absence of the person subject to the order.⁵⁵ The court must fix a date to hear the substantive application at the time the interim order is made.⁵⁶ After hearing the substantive application, the Supreme Court will either grant the application and make a preventative detention order or refuse the application.⁵⁷ The detained person is entitled to give evidence and have legal representation at this hearing.⁵⁸ A person subject to a preventative detention order can be detained under a confirmed order for up to 14 days (which includes the 48-hour period of the interim order).⁵⁹ 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.⁶⁰ Police must apply to have a preventative detention order revoked if the grounds on which the order was made cease to exist.⁶¹

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.⁶² Subject to any prohibited contact order, a person in preventative detention is entitled to contact a family member, a person they live with and their employer, but only to let them know that they are safe and are being detained.⁶³ They may also contact a lawyer, the Ombudsman and the Police Integrity Commission.⁶⁴ Police can monitor all contact made by the detainee, except contact with the Ombudsman or Police Integrity Commission.

51 *Terrorism (Police Powers) Act 2002*, s. 27C.

52 *Terrorism (Police Powers) Act 2002*, s. 3 and Criminal Code (Cth), s. 101.1.

53 *Terrorism (Police Powers) Act 2002*, s. 3.

54 *Terrorism (Police Powers) Act 2002*, s. 3(3).

55 *Terrorism (Police Powers) Act 2002*, s. 26H.

56 *Terrorism (Police Powers) Act 2002*, s. 26H(4).

57 *Terrorism (Police Powers) Act 2002*, s. 26I(1).

58 *Terrorism (Police Powers) Act 2002*, s. 26I(3).

59 *Terrorism (Police Powers) Act 2002*, s. 26K.

60 *Terrorism (Police Powers) Act 2002*, s. 26K(7)(a).

61 *Terrorism (Police Powers) Act 2002*, s. 26M(2).

62 *Terrorism (Police Powers) Act 2002*, s. 26N.

63 *Terrorism (Police Powers) Act 2002*, s. 26ZE.

64 *Terrorism (Police Powers) Act 2002*, ss. 26ZG and 26ZF.

Police can arrange for a person in preventative detention to be detained at a correctional centre.⁶⁵ A person in preventative detention must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.⁶⁶ Police cannot question a person in preventative detention other than for the purposes of identification, the person's welfare or complying with other legislative requirements.⁶⁷ Young people – that is, people aged 16 and 17 years – may be subject to a preventative detention order,⁶⁸ but generally must be detained separately from adults.⁶⁹ A young person or a person with impaired intellectual functioning who is subject to a preventative detention order has 'special contact rules' that entitle them to, for example, visits from certain people, including parents or guardians.⁷⁰

Part 2A also provides police with powers to enter premises to execute a preventative detention order, search detained persons and seize items.⁷¹ Police can request disclosure of identity to assist in executing the order, and penalties apply to non-compliance.⁷²

Part 2A expires after 10 years, that is, on 16 December 2015.⁷³

1.4.2. Covert search warrants (Part 3)

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

- a terrorist act has been, is being or is likely to be committed
- searching the premises will substantially assist in responding to or preventing the terrorist act, and
- it is necessary that the search be conducted without the occupier's knowledge.⁷⁴

A covert search warrant authorises a nominated officer to enter and search premises (and, where authorised, premises adjoining the subject premises) without the occupier's knowledge, and search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test any thing described in the warrant.⁷⁵ Any force that is reasonably necessary to enter the premises may be used.⁷⁶ After the covert search warrant has been executed, the officer who executed the warrant must report back to the judge within 10 days stating what action was taken, who took those actions, and whether or not execution of the warrant assisted in the prevention of, or response to, the specified terrorist act.⁷⁷ Within six months of executing the search warrant, the officer who executed the warrant must provide the issuing judge with a notice to occupiers, for the judge's approval.⁷⁸ Once approved, the occupiers notice must be given to the occupier of the premises searched. A judge may postpone the giving of an occupier's notice, for a maximum of 18 months, if satisfied that there are reasonable grounds for that postponement.⁷⁹

For the purposes of Part 3, a terrorist act includes an offence under section 310J of the Crimes Act, which prohibits intentional membership of a terrorist organisation.⁸⁰

65 *Terrorism (Police Powers) Act 2002*, s. 26X(1).

66 *Terrorism (Police Powers) Act 2002*, s. 26ZC.

67 *Terrorism (Police Powers) Act 2002*, s. 26ZK.

68 *Terrorism (Police Powers) Act 2002*, s. 26E.

69 *Terrorism (Police Powers) Act 2002*, s. 26X(6).

70 *Terrorism (Police Powers) Act 2002*, s. 26ZH(4).

71 *Terrorism (Police Powers) Act 2002*, ss. 26U and 26V.

72 *Terrorism (Police Powers) Act 2002*, s. 26T.

73 *Terrorism (Police Powers) Act 2002*, s. 26ZS.

74 *Terrorism (Police Powers) Act 2002*, s. 27C.

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

76 *Terrorism (Police Powers) Act 2002*, s. 27O(1)(c).

77 *Terrorism (Police Powers) Act 2002*, s. 27S.

78 *Terrorism (Police Powers) Act 2002*, s. 27U(3).

79 *Terrorism (Police Powers) Act 2002*, ss. 27U(7) and 27U(9).

80 Terrorist organisation is defined in the Criminal Code (Cth), s. 102.1.

Chapter 2. Preventative detention and covert search warrants in other jurisdictions

2.1 Preventative detention in other jurisdictions

2.1.1. Commonwealth

Division 105 of the Criminal Code (Cth) provides for a federal preventative detention regime. Division 105 differs from the NSW preventative detention regime in several ways, including the following:

- The maximum period of detention under the federal regime is 48 hours, compared to 14 days in NSW.⁸¹
- NSW orders are made by the Supreme Court, while federal orders may be made by a senior AFP officer on an initial basis and otherwise by certain persons appointed by the Minister acting in a personal capacity.⁸²
- Federal preventative detention orders do not provide for the detained person to be present or to give evidence at a hearing, while a person detained under the NSW regime is entitled to give evidence and make submissions at a hearing.⁸³
- A person detained under the NSW regime may apply to the Supreme Court to have the order revoked, whereas a person detained under the federal regime may make representations to the nominated officer in relation to revoking the order.⁸⁴

No preventative detention orders have been made under Division 105 of the Criminal Code (Cth).⁸⁵

Since we last reported, amendments have been made to Division 105 to remove references to 'Federal Magistrate' and to replace references to the Federal Magistrates Court with the Federal Circuit Court.⁸⁶ These amendments do not have any significant practical implications.

The federal preventative detention regime is subject to a sunset clause outlined in section 105.53 of the Criminal Code (Cth). In accordance with this section, the federal preventative detention powers are due to expire in December 2015. The Federal Government has recently indicated that federal preventative detention powers will be continued beyond December 2015.⁸⁷ At the time of writing, this legislation had not yet been introduced in Parliament.

2.1.2. Other Australian states and territories

All Australian states and territories have enacted preventative detention regimes to complement the federal regime.

State and territory laws all provide for a maximum detention period of 14 days for the purpose of preventing a terrorist act or preserving evidence relating to a terrorist act that has occurred.⁸⁸ Each state and territory also has reporting requirements or oversight mechanisms attached to the preventative detention order provisions.⁸⁹

81 *Terrorism (Police Powers) Act 2002*, s. 26K and Criminal Code (Cth), s. 105.12

82 Criminal Code (Cth), ss. 105.8 and 105.2.

83 *Terrorism (Police Powers) Act 2002*, s. 26I.

84 *Terrorism (Police Powers) Act 2002*, s. 26M and Criminal Code (Cth), s. 105.17.

85 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 68.

86 Criminal Code (Cth), ss. 105.2, 105.11, 105.12, 105.18 and 105.46.

87 The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

88 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s. 26(2); *Terrorism (Emergency Powers) Act 2006* (NT), s. 21K; *Terrorism (Preventative Detention) Act 2006* (WA), s. 13; *Terrorism (Community Protection) Act 2003* (Vic), s. 13G; *Terrorism (Preventative Detention) Act 2005* (Qld), s. 12(2); *Terrorism (Preventative Detention) Act 2005* (SA), s. 10(5); *Terrorism (Preventative Detention) Act 2005* (Tas), s. 9(2).

89 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s. 100; *Terrorism (Emergency Powers) Act 2006* (NT), s. 21ZS; *Terrorism (Preventative Detention) Act 2006* (WA), s. 54; *Terrorism (Community Protection) Act 2003* (Vic), ss. 13DA, 13ZR and 38; *Terrorism (Preventative Detention) Act 2005* (Qld), s. 14; *Terrorism (Preventative Detention) Act 2005* (SA), s. 48; *Terrorism (Preventative Detention) Act 2005* (Tas), s. 51.

Some differences exist between the various preventative detention regimes. For example, in some jurisdictions, including Tasmania, South Australia and Queensland, interim orders for up to 24 hours may be issued by senior police⁹⁰ officers. Other jurisdictions, including NSW, Victoria and the Australian Capital Territory (ACT), require all preventative detention orders to be made by the Supreme Court.⁹¹

Several amendments have been made to the state and territory preventative detention regimes since we last reported. Most significantly, the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) has been amended to extend the sunset period that applies to the ACT's preventative detention provisions from five years to 10 years. In effect, this means that the powers in the ACT have been extended from November 2011 to November 2016.⁹²

As with that of NSW, the other state and territory preventative detention regimes are subject to sunset provisions which will activate over the coming years. The Queensland and South Australia provisions are due to expire in 2015, while the relevant provisions in the remaining states and territory are due to expire in 2016 or 2017.⁹³

The preventative detention regimes have never been used in any Australian jurisdiction.

2.1.3. Canada

In 2001, the *Anti-Terrorism Act 2001* amended the Canadian Criminal Code to provide for warrantless arrests by peace officers⁹⁴ with a maximum detention period of 72 hours. A person could be detained under these provisions in circumstances where a peace officer believed on reasonable grounds that a terrorist activity would be carried out and suspected on reasonable grounds that the arrest and imposition of recognizance with conditions (similar to release on bail) was necessary to prevent the terrorist activity being carried out. The preventative detention provisions in the *Anti-Terrorism Act 2001* expired under a sunset clause in 2007. The details of the 2001 preventative detention regime were explained in our 2008 and 2011 reports.

In our 2011 report, we discussed the 2010 introduction of the Combating Terrorism Bill, which would essentially reintroduce preventative detention in Canada, with only minor changes to the working and effect of the former provisions. The *Combating Terrorism Act 2013* was passed in April 2013.

Section 10 of the *Combating Terrorism Act 2013* amends section 83.3 of the *Criminal Code 1985* to allow for the arrest and detainment in custody of a person without a warrant in order to bring the person before a provincial court judge in circumstances where a peace officer believes on reasonable grounds that a terrorist activity will be carried out, and:

- suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity,⁹⁵ or
- suspects on reasonable grounds that detention of the person is necessary to prevent a terrorist activity.⁹⁶

Following their arrest, the person must be taken before a provincial court judge within 24 hours, or as soon as possible if no judge is available within 24 hours. A judge may order that the person be released unless the relevant peace officer can demonstrate that the person's detention is justified. If the judge is satisfied that the peace officer has reasonable grounds for suspicion, an order will be made that the person enter into a recognizance 'to keep the peace and be of good behaviour' and to comply with any other reasonable conditions that the judge considers necessary for preventing the carrying out of a terrorist activity. In the event that the detained person refuses to enter into the recognizance, the judge may impose a prison term of up to 12 months.⁹⁷

The current Canadian preventative detention regime is subject to a five-year sunset clause, expiring in 2018.⁹⁸

90 *Terrorism (Preventative Detention) Act 2005* (Tas), s. 9(1); *Terrorism (Preventative Detention) Act 2005* (SA), s. 10(5); *Terrorism (Preventative Detention) Act 2005* (Qld), ss. 7(1) and 12(1).

91 *Terrorism (Community Protection) Act 2003* (Vic), s. 13E; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s. 18.

92 *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011* (ACT), s. 101.

93 *Terrorism (Emergency Powers) Act 2006* (NT), s. 21ZV; *Terrorism (Preventative Detention) Act 2006* (WA), s. 60; *Terrorism (Community Protection) Act 2003* (Vic), s. 41; *Terrorism (Preventative Detention) Act 2005* (Qld), s. 83; *Terrorism (Preventative Detention) Act 2005* (SA), s. 52; *Terrorism (Preventative Detention) Act 2005* (Tas), s. 54; Proclamation under the *Terrorism (Preventative Detention) Act 2005* (Tas).

94 A peace officer is a law enforcement officer as defined in the *Criminal Code 1985* (Can), s. 2.

95 *Criminal Code 1985* (Can), s. 83.3(4)(a).

96 *Criminal Code 1985* (Can), s. 83.3(4)(b).

97 *Criminal Code 1985* (Can), s. 83.3(8).

98 *Criminal Code 1985* (Can), s. 83.32.

2.1.4. United Kingdom

Section 41 of the *Terrorism Act 2000* (UK) provides for the detention of suspected terrorists, without charge, for up to 14 days.⁹⁹ While the powers are not intended to be used for preventive purposes, they may have the effect of preventing a terrorist act.¹⁰⁰ In contrast to the NSW preventative detention powers, a person held under section 41 may be questioned by police. The maximum period of pre-charge detention under the Terrorism Act stood at seven days until 2004, then 14 days until July 2006, and then 28 days until 25 January 2011, when it was once again amended to 14 days.¹⁰¹

While there have been no substantive reviews of the pre-charge detention powers during the reporting period, the Independent Reviewer of Terrorism Legislation reports annually on the use of the powers.¹⁰²

In 2011, 54 people were arrested under section 41 of the Terrorism Act in Great Britain. During that period, 51 people were detained for less than a week and three people were detained for between 10 and 12 days.¹⁰³ In 2012, 49 people were arrested under section 41 of the Terrorism Act in Great Britain. Of those, 45 people were held for less than a week, one person was held for 11 to 12 days and three were held for 13 to 14 days.¹⁰⁴ In 2013, 50 people were arrested under section 41 of the Terrorism Act in Great Britain. Of those, 39 people were held for less than a week and all were held for less than 8 days.¹⁰⁵ These powers are discussed in more detail in our 2011 report.

2.2 Covert searches in other jurisdictions

2.2.1. Commonwealth

No federal covert search powers currently exist. In its submission to the COAG Review of Counter-Terrorism Legislation, the AFP expressed concern about the lack of covert search powers at the federal level as this 'represents an impediment to terrorism investigations' and 'such powers are an integral part of the toolkit available to law enforcement'.¹⁰⁶ AFP officers have powers to enter premises to conduct warrantless searches where necessary in emergency situations relating to a terrorist incident.¹⁰⁷ These warrants differ from covert search warrants in a number of ways, including the notification requirements.

As we explain in Chapter 4, the covert search powers contained within NSW legislation were intended to be an interim measure pending the enactment of a federal covert search warrant scheme. The NSW Government has indicated an intention to raise with the Federal Government the issue of implementing a federal covert search warrant regime and aims to have this issue resolved before September 2016.¹⁰⁸

2.2.2. Other Australian states and territories

As discussed in our 2008 and 2011 reports, Victoria, the Northern Territory and Western Australia have similar terrorism-related covert search powers to NSW.¹⁰⁹ Queensland has covert search powers available in relation to organised crime, certain serious offences and terrorism offences under the *Police Powers and Responsibilities Act 2000* (Qld).¹¹⁰

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

99 Also see *Terrorism Act 2000* (UK), part 36 of schedule 8.

100 Bret Walker QC, Independent National Security Legislation Monitor, *Declassified Annual Report*, Canberra, December 2012, p. 61.

101 David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000* and Part 1 of the *Terrorism Act 2006*, London, p. 68.

102 *Terrorism Act 2000* (UK), s. 36. See also <https://terrorismlegislationreviewer.independent.gov.uk>.

103 David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000* and Part 1 of the *Terrorism Act 2006*, London, p. 71.

104 David Anderson QC, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000* and Part 1 of the *Terrorism Act 2006*, London, p. 79.

105 David Anderson QC, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000* and Part 1 of the *Terrorism Act 2006*, London, p. 58.

106 Australian Federal Police, *AFP submission to the COAG review of counter-terrorism legislation*, October 2012, para 81.

107 *Crimes Act 1914* (Cth), s. 3UEA.

108 See the Hon. David Clarke MLC on behalf of the Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 11 September 2013, p. 23220.

109 *Terrorism (Community Protection) Act 2003* (Vic), s. 6; *Terrorism (Emergency Powers) Act 2003* (NT), Part 3A; *Terrorism (Extraordinary Powers) Act 2005* (WA), Part 3.

110 *Police Powers and Responsibilities Act 2000* (Qld), ss. 211-220.

Each state and territory with terrorism-related covert search powers is subject to reporting requirements.¹¹¹ Victoria Police, Western Australia Police and Northern Territory Police have not reported any use of the covert search powers in their annual reports during the relevant period.¹¹²

Queensland's Public Interest Monitor is required to report annually on the use of covert search warrants and these reports are to be tabled in Parliament by the Minister for Police. From 1 July 2011 to 30 June 2012, the Queensland Police Service made three applications to the Supreme Court for covert search warrants.¹¹³ In the same period, the Queensland Crime and Misconduct Commission made no applications for covert search warrants. From 1 July 2012 to 30 June 2013, the Queensland Police Service made one application for a covert search warrant, while the Crime and Misconduct Commission made three covert search warrant applications.¹¹⁴ The Public Interest Monitor's report does not indicate whether any of the covert search warrants were used in terrorism investigations. We are not aware of any other use of the power in Queensland during the reporting period.

111 *Terrorism (Emergency Powers) Act 2003* (NT), s. 27Z; *Police Powers and Responsibilities Act 2000* (Qld), s. 743; *Terrorism (Extraordinary Powers) Act 2005* (WA), s. 30; *Terrorism (Community Protection) Act 2003* (Vic), s. 13.

112 Victoria Police, *Annual Report 2010-2011*; Victoria Police, *Annual Report 2011-2012*; Victoria Police, *Annual Report 2012-2013*; Western Australia Police, *Annual Report 2010-2011*, Western Australia Police, *Annual Report 2011-2012*; Western Australia Police, *Annual Report 2012-2013*; Northern Territory Police, *Annual Report 2010-2011*; Northern Territory Police, *Annual Report 2011-2012*; Northern Territory Police, *Annual Report 2012-2013*.

113 Karen Carmody, *Fourteenth Annual Report of the Queensland Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act 2000*, Brisbane, 31 October 2012, p. 2.

114 Karen Carmody, *Fifteenth Annual Report of the Queensland Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act 2000* (Qld), the *Crime and Misconduct Act 2001* (Qld), *Terrorism (Preventative Detention) Act 2005* (Qld), *Criminal Code of the Commonwealth*, Brisbane, 31 October 2013, pp. 3-4.

Chapter 3. Preventative detention

The NSW preventative detention powers, as set out in Part 2A of the Act, were introduced in 2005. The powers have not been used during the reporting period (1 January 2011 to 31 December 2013) or since their introduction.

In our previous reports we made recommendations regarding the development of procedures by agencies and the suitability of these procedures. This chapter provides information regarding progress on implementing these recommendations during and following the reporting period.

In summary, while broad arrangements between the NSW Police Force, Corrective Services and Juvenile Justice have been in place since November 2011 regarding preventative detention, we have been concerned that during the three year reporting period Juvenile Justice and Corrective Services failed to finalise any procedures to guide their staff in managing a person held in preventative detention. After receiving the consultation draft of this report, Juvenile Justice finalised its procedures. Corrective Services has still not finalised its procedures at the time of writing. In our view, the lack of a consistent and finalised set of procedures increases the risk that the requirements of a preventative detention order would not be met and its purpose would be compromised.

Given that the powers will expire in December 2015 (if left unaltered), the other key issue for this reporting period is the ongoing utility and viability of the preventative detention powers.

3.1 Background

As noted in section 1.2.2, preventative detention powers were introduced after a 2005 COAG meeting that considered how Australia's counter-terrorism response could be strengthened. At the time, COAG agreed that the new counter-terrorism laws would be subject to a sunset clause of 10 years and that COAG would review them after five years.¹¹⁵

After the 2005 COAG meeting, all states and territories enacted preventative detention laws, as agreed. None of these laws, or the corresponding federal scheme for preventative detention, have been exercised¹¹⁶ and all are now approaching expiry due to their various sunset clauses.

In 2013, COAG released the report *Council of Australian Governments Review of Counter-Terrorism Legislation* (the 2013 COAG report), as part of its ongoing review of the counter-terrorism laws introduced after its 2005 meeting. At the time of writing, the review of counter-terrorism laws had not been finalised and the Australia-New Zealand Counter-Terrorism Committee and, ultimately, COAG were to consider responses from NSW and other jurisdictions to the 2013 report. The Federal Government's August 2014 announcement that it intends to ensure that the AFP can continue to use the federal preventative detention powers beyond December 2015¹¹⁷ indicates that this issue may be resolved through new legislation. The commencement of any such new legislation and the outcome of the COAG review regarding this issue will have a bearing on the future of the Part 2A powers in NSW.

3.2 Current framework for the exercise of preventative detention powers

In our 2008 and 2011 reports, we emphasised the importance of clear guidance for police and other relevant agency staff in the use of the preventative detention powers. While one key recommendation in this regard is yet to be implemented (please see section 3.6.1 below), the procedures and agreements currently in place are as follows:

- A Memorandum of Understanding (MoU) between the NSW Police Force, Corrective Services and Juvenile Justice has been in effect since 9 November 2011 and facilitates and governs arrangements, at a broad level, for the management of a person subject to a preventative detention order. The MoU does not provide detailed guidance to staff regarding these arrangements, as this would be accomplished through procedures within each agency.

¹¹⁵ Council of Australian Governments, *Council of Australian Governments Communiqué: Special Meeting on Counter-Terrorism*, 27 September 2005, p. 3.

¹¹⁶ Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 68.

¹¹⁷ The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

- NSW Police Force standard operating procedures (SOPs)¹¹⁸ were finalised in January 2011 and then amended in 2012 and 2013 in response to our recommendations. After police discussions with Juvenile Justice and Corrective Services in July 2014 regarding the development of those agencies' procedures, a further revised version of the SOPs is being prepared.¹¹⁹ The SOPs include guidance for officers in relation to making an application for a preventative detention order, taking a person into custody, detention and release of a person subject to a preventative detention order, responsibilities of the nominated senior police officer and the investigator, provision of information to a person subject to a preventative detention order and transferral of physical custody of such a person between police and Corrective Services.
- Juvenile Justice NSW *Policy and procedures for managing young people detained on a preventative detention order*, finalised in July 2014.
- The Commissioner of Police is required to duly notify the Ombudsman if any preventative detention order or prohibited contact order is made, if a person is taken into custody under a preventative detention order and if such an order is revoked.¹²⁰ An Information Agreement between the Ombudsman and the NSW Police Force assists the Ombudsman to monitor police uses of the Part 2A powers and to respond to any contact or complaint from a detainee.¹²¹ The Information Agreement provides that police will notify the Ombudsman as soon as possible after a preventative detention or prohibited contact order has been made. It also sets out arrangements for the provision of other information, and for the monitoring of police management of a person subject to a preventative detention order. The Ombudsman has also entered into Observation Agreements with the NSW Police Force and Corrective Services and with Juvenile Justice to facilitate any direct observation of how officers from these agencies exercise the Part 2A powers.

3.3 Our previous recommendations

In our 2008 and 2011 reports, we discussed in detail issues and concerns about the implementation of the preventative detention provisions. As the powers have not been used since our last report, the focus of this report is on providing information regarding progress that agencies have made in implementing recommendations that we made in our 2008 and 2011 reports.

In our September 2008 report, we made 25 recommendations in relation to the preventative detention provisions and operational issues. Four were carried over in a very similar form to our 2011 report, as they had not been implemented by that time.

Of the original 25 recommendations that we made in 2008, 22 have now been implemented or partially implemented. Two recommendations were not implemented, as they were not supported in the 2013 statutory review by the Attorney General. One recommendation, regarding the development of standard operating procedures by Corrective Services and Juvenile Justice, was accepted by both agencies, however, Corrective Services has still not fully implemented this recommendation (see section 3.6.1 below).

In this chapter we consider the progress of police and other agencies in implementing recommendations 1 to 13 from our 2011 report. We begin with considering the recommendations that have either been implemented or do not require any further action and then discuss those issues or recommendations which, in our view, still require further action. Annexure A contains a table listing all of our 2011 recommendations and any action that has been taken in response.

In summary, of the total 17 recommendations regarding preventative detention that we made in our 2011 report, six have been implemented and three have been partially implemented. One recommendation was supported and its implementation is almost complete. Two recommendations were supported but their implementation has been delayed. Four recommendations were not supported and have not been implemented. In addition, there was a recommendation which concerned both the Part 2A and Part 3 powers. It was not supported in the 2013 statutory review and has not been implemented.

¹¹⁸ NSW Police Force, *Standard Operating Procedures Preventive Detention Orders (NSW)*, June 2013.

¹¹⁹ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, dated 13 August 2014.

¹²⁰ *Terrorism (Police Powers) Act 2002*, s. 26ZO(3).

¹²¹ Please note that a person who is subject to a preventative detention order is entitled to contact the Ombudsman under s. 26ZF of the *Terrorism (Police Powers) Act 2002*.

3.4 Recommendations that have been implemented since our last report

3.4.1. Releasing detainees who are under 16 years of age

A preventative detention order cannot be applied for or made in relation to a person who is under 16 years of age.¹²² If a police officer in charge of detaining a person becomes reasonably satisfied that the person is in fact under 16 years of age, the officer 'must release the person as soon as practicable from detention under the order' 'into the care of a parent or other appropriate person'.¹²³

We reported in 2011 that the NSW Police Force had 'committed to providing guidance about who would fall in the category of "an appropriate person"'.¹²⁴ We noted that the police SOPs provided guidance in relation to the release of detainees who are under the age of 18 but did not make special reference to the release of people who are under the age of 16 and who have therefore been wrongfully detained. In our 2011 report, we made the following recommendation:

The NSW Police Force SOPs provide guidance to police regarding what to do if police become reasonably satisfied that a detained person is under the age of 16 years.¹²⁵

Following the release of our 2011 report, the Minister for Family and Community Services wrote to the Ombudsman and expressed support for our 2011 recommendation and a continuing preference for the Act to provide for a child to be 'released immediately' into the care of a parent or guardian once it has been established that the detained person is under 16 years.¹²⁶ The Minister for Family and Community Services reinforced this view in correspondence to us in April 2014.¹²⁷

The NSW Police Force advised us in early 2013 that its SOPs had been amended to implement our recommendation.¹²⁸ The police SOPs now provide in relation to a person who is under the age of 16 years that the police officer detaining the person is to ensure that the detainee is released as soon as practicable into the custody of a parent, guardian or other person who is able to represent the detainee's interests. The police SOPs also specify that such a person cannot be a police officer or an ASIO officer. We are of the view that the police SOPs, as amended, are sufficient.

3.4.2. Places where a person aged 16 or 17 years may be detained

In this section we discuss three recommendations that we made in 2011 that have now been resolved, regarding places where a young person may be detained. The key outcome regarding the issues raised in these recommendations is that Corrective Services and the NSW Police Force are now of the view that, under the Act, young people cannot be detained in an adult correctional centre.

Taking this outcome into account, a young person who is aged 16 or 17 years and is the subject of a preventative detention order may be detained under section 26X of the Act in one or more of the following places during the period of detention:

- Facilities managed by police, such as the Sydney Police Centre, or another location arranged by police, which could include, for example, a motel room.
- A juvenile detention centre¹²⁹ (or juvenile justice centre¹³⁰) managed by Juvenile Justice.
- A juvenile correctional centre. This type of centre holds young people who have been charged with more serious offences.¹³¹ The only juvenile correctional centre in NSW is Kariong Juvenile Correctional Centre, which is a male-only facility and is managed by Corrective Services.

¹²² *Terrorism (Police Powers) Act 2002*, s. 26E.

¹²³ *Terrorism (Police Powers) Act 2002*, s. 26E.

¹²⁴ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 16.

¹²⁵ Recommendation 3, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p.16.

¹²⁶ Correspondence from the Hon. Pru Goward MP, Minister for Family and Community Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 19 October 2011.

¹²⁷ Correspondence from the Hon. Pru Goward MP, Minister for Family and Community Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), received 11 April 2014.

¹²⁸ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, dated 28 February 2013.

¹²⁹ There are seven facilities established as juvenile detention centres under the *Children (Detention Centre) Act 1987*, s. 5.

¹³⁰ Juvenile detention centres are called 'juvenile justice centres' by Juvenile Justice NSW.

¹³¹ *Children (Detention Centre) Act*, s. 28. This section allows for the transfer of certain detainees aged 16 years or over to a centre designated as a Juvenile Correctional Centre under the *Crimes (Administration of Sentences) Act 1999*.

There are several outstanding issues regarding places where a young person may be detained and the procedures which may be applied when this occurs. We discuss these in section 3.6.1 below.

3.4.2.1. A young person cannot be detained in an adult correctional centre

In our 2011 report, we made two recommendations regarding the issue of whether a young person can be detained in an adult correctional centre. One was:

That the NSW Police Force and Corrective Services NSW clarify and resolve the circumstances in which any juvenile in preventative detention would be accommodated in an adult correctional facility, and that this is addressed in the Memorandum of Understanding between NSW Police Force and Corrective Services NSW.¹³²

In response to this recommendation, Corrective Services indicated that a detainee under the age of 18 would not be held in an adult correctional facility, because such an arrangement is not authorised under the Act.¹³³ Corrective Services noted that section 26X of the 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. Where an arrangement is made under this section in relation to a detainee under the age of 18, section 26X(5) clarifies that a reference to 'correctional centre' is to be construed only to refer to a 'juvenile detention centre or juvenile correctional centre'. The Act therefore does not envisage any circumstance where a young person is held in an adult correctional centre.

The NSW Police Force initially advised that a juvenile may be detained in an adult correctional facility in 'exceptional circumstances', but later aligned their position with that of Corrective Services and updated their SOPs accordingly.¹³⁴ The SOPs now provide clear guidance on the process of detaining persons aged between 16 and 18 years and state that where Juvenile Justice has no available or suitable facilities, the police officer detaining a person under 18 years of age must make appropriate alternative arrangements. The SOPs further specify that people under 18 years of age are not to be detained at an adult correctional centre.

Our other recommendation on this issue (recommendation 4) was:

That the NSW Police Force and Corrective Services NSW seek legal advice as to whether detaining persons under the age of 18 within an adult correctional centre where such detainees are managed so that the detainee does not come into contact with adult prisoners is to be considered 'detention with persons who are 18 years or older' as set out in s. 26X(6).¹³⁵

Corrective Services noted in response to this recommendation that section 26X(6) refers only to circumstances where a person under 18 years of age is not detained under a section 26X arrangement, which could only be when they were detained by police.¹³⁶ As discussed above, Corrective Services had also formed the view that the Act does not authorise detention of a young person at an adult correctional centre.

Recommendation 4 in our 2011 report was also not supported in the 2013 statutory review, but for a different reason. In that review, the Attorney General concluded that detaining a person under the age of 18 within an adult correctional centre where such detainees were managed so as not to come into contact with adult prisoners could not be considered 'detention with persons who are 18 years or older'. The statutory review therefore concluded that legal advice was not required.¹³⁷

In any case, we are now of the view, as put forward by Corrective Services and supported by the NSW Police Force, that the Act does not authorise detention of a young person in an adult correctional centre. There is therefore no need for further action regarding recommendations 4 or 5 from our 2011 report.

3.4.2.2. Detaining a young person with adults in other locations

The only time a young person may be detained with adults under a preventative detention order would be in circumstances where they were held by police, for example, at a police station. Section 26X(6) of the Act provides that this should only occur under exceptional circumstances. In our 2011 report, we made the following recommendation:

That the NSW Police Force SOPs for preventative detention provide clear guidance on what would constitute 'exceptional circumstances' such that a senior police officer might approve 16 or 17 year old detainees being detained with persons 18 years and over.¹³⁸

¹³² Recommendation 5, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 18.

¹³³ Correspondence from Peter Severin, Commissioner of Corrective Services NSW, to Bruce Barbour, Ombudsman, dated 5 March 2013.

¹³⁴ Correspondence from Catherine Burn APM, Deputy Commissioner Specialist Operations, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 21 June 2013.

¹³⁵ Recommendation 4, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 18.

¹³⁶ Correspondence from Peter Severin, Commissioner of Corrective Services NSW, to Bruce Barbour, Ombudsman, dated 5 March 2013.

¹³⁷ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 24

¹³⁸ Recommendation 6, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 18.

This recommendation was supported in the 2013 statutory review.¹³⁹ We received confirmation from the NSW Police Force in early 2013 that the SOPs had been amended in accordance with our recommendation. The SOPs now set out considerations that may be relevant in determining whether 'exceptional circumstances' exist such that a senior police officer would approve a 16 or 17 year old detainee being detained with adults. These considerations include the wellbeing of the juvenile detainee, the location of suitable facilities and the adequacy of security.

3.4.3. Senior officer's liability

Under section 26C of the Act, where a number of police officers are involved in the detention of a person under the Act, any function imposed upon any of those officers is taken to be imposed upon the most senior of the officers involved. Most preventative detention schemes in other states and territories have similar provisions.¹⁴⁰ In our past reports we considered whether section 26C means that the most senior officer involved may be liable for an offence if a lower-ranked officer fails to provide initial information to a detainee as required under the Act.

Where an interim preventative detention order is made, section 26Y of the Act requires the police officer who is detaining the person to inform the person of matters including the fact that an interim preventative detention order has been made, the date and time fixed by the Supreme Court for the hearing and determining of that application and the detained person's right to contact the Ombudsman, the Police Integrity Commission and a lawyer.¹⁴¹ Similarly, where a preventative detention order is made, section 26Z of the Act requires the police officer who is detaining the person to inform the person of matters including the fact that the order has been made, the period during which the person may be detained under the order, that the person is entitled to contact certain people and the fact that the person may ask the Supreme Court to revoke the order.¹⁴²

Under sections 26Y and 26Z, the police officer who is detaining a person under an order may commit an offence if information is not provided to the detainee as required by those sections. In our 2011 report, we made the following recommendation:

That the Act be amended to clarify which officer would be guilty of an offence if information is not provided to the detainee as set out in sections 26Y and 26Z.¹⁴³

We commented that it appears that the offence provision would catch the most senior officer involved in the detention of the person, but that it is not clear if this extends to the 'nominated senior police officer'¹⁴⁴ with responsibility for overseeing the exercise of functions in relation to the order.

In our 2011 report, we noted that the then Department of Attorney General and Justice¹⁴⁵ had indicated their view on a preliminary basis that it was 'sufficiently clear that the obligations apply to the police officer detaining the person, which by virtue of section 26C will be the most senior officer involved if there is more than one officer'.¹⁴⁶ The 2013 statutory review confirmed the Attorney General's view that the provision is made sufficiently clear by section 26C and that where multiple officers are involved the person liable will be the most senior officer.¹⁴⁷ We do not consider that any further action is necessary regarding this recommendation.

3.4.4. Dependants of a detained person

In our 2011 report, we noted that the NSW Government was planning to address the issue of how police should respond where a person detained has dependants, through the development of an MoU between the NSW Police Force and Community Services NSW.¹⁴⁸ We have now been advised that this MoU has never been progressed. However, we consider that the SOPs, which state that police officers are to engage with NSW Community Services at the earliest opportunity and provide specific contact details so that this may occur, provide adequate guidance for officers in this situation and satisfy the intention of our recommendation.

¹³⁹ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 24.

¹⁴⁰ *Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)*, s.10; *Terrorism (Community Protection) Act 2003 (Vic)*, s. 13ZQ; *Terrorism (Preventative Detention Act 2005 (Tas)*, s. 46; *Terrorism (Preventative Detention) Act 2006 (WA)*, s. 8; *Terrorism*

¹⁴¹ *Terrorism (Police Powers) Act 2002*, s. 26Y(2).

¹⁴² *Terrorism (Police Powers) Act 2002*, s. 26Z(2).

¹⁴³ Recommendation 7, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 20.

¹⁴⁴ *Terrorism (Police Powers) Act 2002*, s. 26R.

¹⁴⁵ Now the Department of Justice.

¹⁴⁶ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 20.

¹⁴⁷ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 25.

¹⁴⁸ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 21.

3.4.5. Access to legal advice

A person in preventative detention is entitled to contact a lawyer, provided the lawyer is not subject to a prohibited contact order.¹⁴⁹ They may only contact a lawyer for a purpose permitted under the Act, for example, to obtain advice about their legal rights in relation to the preventative detention order.¹⁵⁰ Police can monitor this contact.¹⁵¹ If the contact is made for a purpose that is permitted under the Act, the police officer undertaking the monitoring (the police monitor) may not disclose to another person any information relating to the contact. If the police monitor were to make such a disclosure, they may be liable for an offence with a maximum penalty of five years imprisonment.¹⁵²

Communication between the detainee and their lawyer is not admissible in evidence against the detainee, provided it is for a purpose permitted under the Act.¹⁵³

In our 2008 report, we made a recommendation that:

Parliament further consider the arrangements for monitoring of detainee-lawyer communication, having regard to the matters set out in this report.¹⁵⁴

Three outcomes have flowed from the implementation of this recommendation. First, in 2010, Parliament amended section 26ZL of the Act to allow the police monitor to disclose information to a lawyer for the purposes of seeking advice about whether any information that they have monitored properly falls within one of the permitted purposes. This means that the police monitor can seek advice from their own lawyer on this issue, without being liable for an offence under the Act.

Second, we commented in our 2011 report that this new amendment to section 26ZL appeared to create a risk of improper disclosure that the original offence provision was designed to avoid. Consequently, in our 2011 report we made a recommendation that:

Parliament consider amending the Act to ensure the information disclosed in any consultation between a [police] monitor and a lawyer under s. 26ZL is protected from further disclosure.¹⁵⁵

The 2013 statutory review supported our recommendation and made the following recommendation:

...that s. 26ZL of the Act be amended to clarify that the obligation not to disclose information extends to lawyers from whom advice is sought by a person who monitored contact between a detained person and their lawyer, in order to determine the status of the monitored information.¹⁵⁶

The Attorney General has since advised us that this reform will be progressed in the 2014 budget session of Parliament.¹⁵⁷

The third outcome from our 2008 recommendation has been the government's consideration of the option of the Supreme Court determining whether contact between a detainee and their lawyer should be monitored. We considered this issue in our 2008 report, noting that the Victorian and Queensland schemes for preventative detention included provisions for 'monitoring orders' by a court.

In our 2011 report, we reported that the government had started consulting with the Supreme Court and other stakeholders regarding the possibility of inserting provisions into the Act that would provide the court with the discretion to determine whether contact with a lawyer should be monitored.

The 2013 statutory review noted that:

This issue was considered in the third Review, which agreed to consult the Supreme Court on its views on such an amendment. This consultation was undertaken, however the Supreme Court did not support a proposal to give it the discretion to make 'monitoring orders'.¹⁵⁸

In light of this development, it appears that there will be no further changes to the arrangements for monitoring detainee – lawyer communication as a result of our 2008 recommendation. We will closely consider any issues that arise regarding monitoring of this communication by police should the Part 2A powers be used in the future.

¹⁴⁹ *Terrorism (Police Powers) Act 2002*, s. 26ZG.

¹⁵⁰ *Terrorism (Police Powers) Act 2002*, s. 26ZG(1)(a).

¹⁵¹ *Terrorism (Police Powers) Act 2002*, s. 26ZL(1).

¹⁵² *Terrorism (Police Powers) Act 2002*, s. 26ZL(6).

¹⁵³ *Terrorism (Police Powers) Act 2002*, s. 26ZL(5).

¹⁵⁴ Recommendation 12, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 44.

¹⁵⁵ Recommendation 8, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 24.

¹⁵⁶ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 25.

¹⁵⁷ Correspondence from the Hon. Greg Smith SC MP, Attorney General, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 4 March 2014.

¹⁵⁸ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 22.

3.4.6. Complaints about correctional officers

A person detained under a preventative detention order may complain to the Ombudsman about the conduct of police officers and, where applicable, correctional services officers and juvenile justice officers who are involved in their detention.¹⁵⁹ The Act requires that detainees be informed of their right to complain to the Ombudsman about a police officer¹⁶⁰ but does not require that they be informed of their right to complain about correctional services officers or juvenile justice officers.

In our view, it is important that detainees receive this additional information as correctional services officers or juvenile justice officers will be responsible for significant aspects of the management of a detainee, such as provision of their meals and clothing, and access to exercise. To address this issue, in both our past reports we recommended that the Act be amended to require that detainees be informed that they can complain to the Ombudsman about correctional services and juvenile justice officers.¹⁶¹ However, the Department of Attorney General and Justice confirmed in its 2013 statutory review that it did not support such an amendment and that the inclusion of a reference to section 26ZF (the detainee's general right to contact the Ombudsman and Police Integrity Commission) in sections 26Y and 26Z of the Act was sufficient to address this issue. We remain of the view that a further amendment is necessary to make clear to detainees that they have the right to complain about correctional services officers.

In our 2011 report, we made an associated recommendation that:

The NSW Police Force SOPs instruct police to inform detainees they can complain about the conduct of correctional officers or juvenile justice officers in connection with their detention.¹⁶²

We reported at the time that the Commissioner of Police had indicated that he supported this recommendation. We also clarified that 'it is our view that the inclusion of an explicit reference to the detainee's right to complain about a correctional officer would be preferable. We hope that the amendment to the SOPs will assist in making this clear.'¹⁶³

We have since received a copy of the updated police SOPs, which the Commissioner of Police advised had been 'amended accordingly'.¹⁶⁴ The 2013 statutory review also reported that this recommendation had been implemented.¹⁶⁵ The updated police SOPs clearly provide that police must advise a detainee that he or she has the right to complain to the Ombudsman about how they are treated while in preventative detention. However, the police SOPs still do not specifically state that this includes how a detainee is treated by correctional services officers or juvenile justice officers, consistent with our recommendation.

We reported in 2011 that Corrective Services had proposed that its draft policy on preventative detention would ensure that detainees would be advised of their right to contact the Ombudsman to complain about a police officer or a correctional officer.¹⁶⁶ Corrective Services further advised in July 2014 that its draft local operating procedures (LOPs) 'clearly sets out the right of a detainee in a NSW correctional centre to contact and/or complain to the NSW Ombudsman'.¹⁶⁷ Once we receive a copy of Corrective Services' finalised LOPs we will confirm the inclusion of this information (please see section 3.6.1 for further discussion regarding these procedures).

3.4.7. Protection from unwanted media exposure

In our 2008 report, we considered issues relating to protecting detainees from unwelcome publicity upon their release. We recommended that Parliament consider whether it was appropriate to include disclosure offences in the Act.¹⁶⁸ That recommendation was supported by the NSW Government in principle, but an offence provision was considered unnecessary.

¹⁵⁹ Detainees may complain about correctional services officers and juvenile justice officers under the ordinary provisions of the *Ombudsman Act 1974*.

¹⁶⁰ *Terrorism (Police Powers) Act 2002*, s. 26Y(2)(d).

¹⁶¹ Recommendation 4, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 35, and recommendation 10, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 25.

¹⁶² Recommendation 9, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 25.

¹⁶³ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 25.

¹⁶⁴ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 28 February 2013.

¹⁶⁵ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 25.

¹⁶⁶ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 25.

¹⁶⁷ Correspondence from Peter Severin, Commissioner of Corrective Services, to Bruce Barbour, Ombudsman, 29 July 2014.

¹⁶⁸ Recommendation 25, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 62.

In our 2011 report, we reported that the Commissioner of Police had advised that the NSW Police Force would amend the SOPs to provide guidance on protecting detainees from unwanted publicity upon release in accordance with the media policy but that this would not extend beyond normal privacy measures.¹⁶⁹ We remained of the view that SOPs should also indicate that disclosure of the details of preventative detention orders should not be made to unauthorised people or bodies and recommended that:

The NSW Police Force SOPs provide guidance to police about protecting detainees from unwanted publicity on their release.¹⁷⁰

In early 2013, we received correspondence from the NSW Police Force advising that the SOPs had been amended in accordance with our recommendation.¹⁷¹ The SOPs now provide that police engaged in the detention of a person must ensure that details surrounding the matter are given only to those persons and/or agencies that have a reason or need to know. Police are not to make any comment to the media and should take care to ensure the identity of a detainee is not disclosed. The SOPs also provide that media inquiries in relation to a detained person are to be referred immediately to the senior investigating officer, who will liaise with the Public Affairs Branch. We consider that our recommendation has been implemented. In response to our consultation draft, the NSW Police Force noted that the SOPs also include other provisions that contribute to the implementation of this recommendation, including the protection of information regarding the identity of a person subject to a preventative detention order.¹⁷²

3.5 Provision of police concerns to the Attorney General

In our 2011 report, we noted that it did not appear that police had advanced any of their concerns about the Act beyond their provision of advice to us for that report. We commented that 'for instance, the difficulties police have in using the powers, and the concerns that were described to us, were not canvassed in the Department of Attorney General and Justice's June 2010 Review of the Terrorism (Police Powers) Act'.¹⁷³

To ensure the Attorney General was aware of police concerns regarding the preventative detention powers to inform the 2013 statutory review, we recommended that:

The NSW Police Force lists the concerns it has with the preventative detention powers in their current form, along with suggestions for resolution, and provides this document to the Attorney General for consideration. The NSW Police Force should also provide a copy to the Ombudsman.¹⁷⁴

Deputy Commissioner of Police Catherine Burn advised us on 21 June 2013 that while the Commissioner of Police had initially agreed to implement this recommendation, he now considered that the COAG review process was the most appropriate forum to raise these issues, rather than progressing them separately through the Attorney General and the statutory review process.

Deputy Commissioner Burn advised that issues identified by police would be raised through the NSW COAG Review of Counter-Terrorism Legislation Working Group, which includes representatives from the NSW Police Force and the Department of Attorney General and Justice, as it was then known. She further advised that the working group 'would review and provide advice on the COAG review for the purposes of developing a NSW position for Cabinet to consider' and that 'it would not be appropriate to provide your office with a NSW Police Force submission in advance of the Working Party process and the deliberations of Cabinet'.¹⁷⁵

We support the NSW Police Force's decision to communicate its issues and concerns to the COAG working party, and consider that our recommendation has been implemented in principle.

169 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 26.

170 Recommendation 11, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 26.

171 Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, dated 28 February 2013.

172 Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, dated 13 August 2014.

173 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 33.

174 Recommendation 12, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 34.

175 Correspondence from Catherine Burn, Deputy Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 21 June 2013.

3.6 Recommendations that have not been implemented

3.6.1. Interagency agreements and agency procedures

3.6.1.1. Interagency agreements

In our 2011 report, we recommended that 'the NSW Police Force, Corrective Services and Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority'.¹⁷⁶ This recommendation was implemented in November 2011 when the NSW Police Force, Corrective Services and Juvenile Justice signed a Memorandum of Understanding to 'define, facilitate and govern the arrangements for the detention and management of persons who are subject to a preventative detention order'.¹⁷⁷

The main text of this MoU is very broad and is not designed to provide detailed guidance to staff regarding how a person subject to a preventative detention order would be managed. This detailed guidance would normally be provided through procedures developed by each agency, and we also made recommendations in our 2008 and 2011 reports that the NSW Police Force, Corrective Services and Juvenile Justice each finalise these procedures.¹⁷⁸

A key practical consideration is that while a detainee may be in the physical custody of Corrective Services or Juvenile Justice, police maintain overall responsibility for their detention under the Act. Appendix 1 of the MoU explicitly states that:

...although the Commissioner of Corrective Services NSW/Chief Executive of Juvenile Justice has physical custody of the detainee, I (or the police officer hereunder) is taken, for the purposes of section 26X(2)(d) of the Act to be detaining the Subject.¹⁷⁹

This arrangement is unique and unlike others that operate between these agencies. It is therefore critical that the procedures developed by each agency are consistent and reflect a common understanding of how the custody of a person subject to a preventative detention order will be managed.

3.6.1.2. Current status of agency procedures

As mentioned above, in our 2008 and 2011 reports we also recommended that Corrective Services and Juvenile Justice finalise standard operating procedures as a matter of priority.¹⁸⁰ At the time of writing, Juvenile Justice had recently finalised its procedures and Corrective Services had not finalised its procedures. Police were also revising some aspects of their SOPs, which were initially completed in 2011.

In our view, the continuing lack of comprehensive and integrated procedures increases the risk that transferring a detainee into a correctional or juvenile justice facility may compromise aspects of the detention order. For example, section 26ZD of the Act requires that, with certain exceptions, a person subject to a preventative detention order 'is not entitled to contact another person' and 'may be prevented from contacting another person'. Appropriate procedures would help staff manage the risk that a person detained under a preventative detention order in a correctional or juvenile justice facility comes into contact with other inmates.

In March 2013, Corrective Services advised us that the relevant SOPs were being drafted and it was anticipated that they would be completed by the end of 2013.¹⁸¹ Juvenile Justice advised us in February 2013 that Corrective Services had 'established a draft SOP incorporating JJ NSW'.¹⁸² Juvenile Justice expected to provide comment on a further draft SOP from Corrective Services in late 2013.¹⁸³

176 Recommendation 1, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 15.

177 *Memorandum of Understanding* between the Commissioner of Police, the Commissioner of Corrective Services and the Chief Executive of Juvenile Justice, 9 November 2011.

178 Recommendation 2, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 18 and recommendation 2, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 15.

179 *Memorandum of Understanding* between the Commissioner of Police, the Commissioner of Corrective Services and the Chief Executive of Juvenile Justice, 9 November 2011, Appendix 1 (NSW Police Force form 'Transfer of physical custody pursuant to a preventative detention order (PDO)'), p. 1.

180 Recommendation 2, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p.18 and recommendation 2, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 15.

181 Correspondence from Peter Severin, Commissioner of Corrective Services, to the Ombudsman, 5 March 2013.

182 Correspondence from Valda Ruis, Acting Chief Executive, Juvenile Justice NSW, to Bruce Barbour, Ombudsman, 15 February 2013.

183 Ibid.

The Attorney General, in the 2013 statutory review, then stated:

The Review has been advised that CSNSW and JJ will not be preparing their own SOPs, as under the Act and Memorandum of Understanding, the custody of a preventative detainee will never pass to either of those agencies. At all times the person remains in police custody, with CSNSW or JJ merely providing support in the form of suitable facilities.¹⁸⁴

Given this information, we asked for clarification regarding whether both agencies were still intending to develop procedures. Corrective Services and Juvenile Justice confirmed that they still intended to develop procedures. However, in March 2014 Corrective Services also advised that it proposed to develop local operating procedures, instead of agency-wide standard operating procedures, for the Metropolitan Remand and Reception Centre and Silverwater Women's Correctional Centre, where detainees are most likely to be held.¹⁸⁵

Four months later, in his response to the consultation draft of this report, the Commissioner of Corrective Services provided the following advice:

Corrective Services NSW (CSNSW) acknowledges it has taken an inordinate amount of time to develop the Local Operating Procedures (LOP) for the management of persons detained under the Act in NSW Correctional Centres. However these procedures have been drafted and Corrective Services NSW representatives are meeting with representatives of the NSW Police Force and Juvenile Justice NSW on 30 July 2014 to resolve any outstanding matters before the LOP is submitted to the relevant Assistant Commissioners within CSNSW for approval.¹⁸⁶

The Commissioner also advised that he expects Corrective Services to be operationally ready to use the powers, with completed procedures that are consistent with those of other agencies, by September 2014.¹⁸⁷

Juvenile Justice had not completed its procedures by the end of the reporting period. However, in response to our consultation draft of this report, on 28 July 2014, Juvenile Justice provided us with its newly completed *Policy and procedure for managing young people detained on a preventative detention order*. In reviewing this policy, we have formed the view that some final discussion may be necessary between Juvenile Justice and the NSW Police Force regarding any minor changes that may be needed to ensure clarity and consistency with police expectations and the Act. In particular, where standard Juvenile Justice procedures regarding aspects of detention such as mail and property are applied to a young person subject to a preventative detention order, a further check may be needed to ensure that these do not conflict with the requirements of that order, including the protection of information about the location and identity of the detainee.

The NSW Police Force completed its SOPs for preventative detention orders in 2011, in accordance with a recommendation from our 2008 report.¹⁸⁸ In his response to the consultation draft of this report, the Commissioner of Police further advised:

On 8 and 30 July 2014, representatives from the NSW Police Force Terrorism Investigation Squad (TIS), Corrective Services and Juvenile Justice met and compared Standard Operating Procedures (SOPs) and Local Operating Procedures (LOPs) to ensure compliance and consistency across agencies. The NSW Police Force SOPs are currently being revised. Once the final version is approved by the Executive a copy will be provided to your Office.¹⁸⁹

We await receipt of a copy of these revised police SOPs, when completed.

Once we have received the new or revised procedures from all agencies we will be in a position to examine whether, as a whole, they provide consistent guidance to relevant staff about how to manage the detention and physical custody of a person subject to a preventative detention order in any of the locations where they might be held.

3.6.1.3. Procedures for Kariong Juvenile Correctional Centre

As noted in section 3.4.2 above, one of the places a young person may be detained under the Act is a juvenile correctional centre.¹⁹⁰ The only juvenile correctional centre in NSW is Kariong Juvenile Correctional Centre. The centre is managed by Corrective Services, rather than Juvenile Justice.

184 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 23.

185 Correspondence from Peter Severin, Commissioner of Corrective Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), 26 March 2014.

186 Correspondence from Peter Severin, Commissioner of Corrective Services, to Bruce Barbour, Ombudsman, 29 July 2014.

187 Ibid.

188 Recommendation 2, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 18.

189 Correspondence from Andrew Scipione, Commissioner of Police, to Bruce Barbour, Ombudsman, 13 August 2014.

190 *Terrorism (Police Powers) Act 2002*, s. 26X(5).

When a young person enters the custody of Juvenile Justice, they are assessed 'to determine the level of risk they pose to themselves and others'.¹⁹¹ This classification determines the level of supervision and intervention they require. Juvenile Justice has advised that a young person subject to a preventative detention order will be initially classified as A1.¹⁹² A detainee will be assigned this classification if they have been charged or convicted of a serious children's indictable offence, or if their behaviour requires 'a very intensive level of supervision [and] a very high level of secure containment'.¹⁹³

Under Juvenile Justice policy, Kariong Juvenile Correctional Centre is the only centre in NSW where males aged 16 and 17 years who are classified A1 may be held in custody.¹⁹⁴ It is therefore our understanding that it is most likely that a young male person who is subject to a preventative detention order would be held at Kariong Juvenile Correctional Centre, rather than a juvenile detention centre.¹⁹⁵ However, at present it appears that Corrective Services is not developing LOPs for preventative detention of a young person at Kariong Juvenile Correctional Centre.

We also note that the Department of Justice is currently reviewing the operations of Kariong Juvenile Correctional Centre.¹⁹⁶ The outcome of this review may affect whether a young person subject to a preventative detention order would be held at that centre in the future.

In our 2011 report, we noted that the Minister for Family and Community Services had expressed a strong preference that 'young people be detained in a juvenile detention centre or alternative facility, not a juvenile or adult correctional facility'.¹⁹⁷ The Minister has reiterated this view in more recent correspondence.¹⁹⁸

If Kariong Juvenile Correctional Centre is retained as the facility that holds males aged 16 and 17 years who have an A1 classification, we believe it would be appropriate for a young person who is subject to a preventative detention order and who holds that classification to be held in custody there. However LOPs for managing a young person who is subject to a preventative detention order must be developed for that centre by Corrective Services, if it retains responsibility for the management of Kariong. If another facility, managed by Juvenile Justice, becomes the centre that holds males of this age and classification, it is our understanding that the new Juvenile Justice *Policy and procedures for managing young people detained on a preventative detention order*, finalised in July 2014, would then apply for that centre.

3.6.2. Interaction between NSW and federal preventative detention schemes

In our 2011 report, we noted that some police officers had raised a concern about how the NSW and federal preventative detention powers would interact in practice.¹⁹⁹ For example, a person initially detained for 48 hours under the federal preventative detention powers might then become subject to a longer preventative detention order under the NSW scheme. While their physical location may not change, the legal authority and requirements for their detention would be different.

In our 2011 report, we reported that we had been advised that the AFP and the NSW Police Force were finalising an 'overarching MoU which guides overall management of counter terrorism investigations' and was expected to address some of these issues.²⁰⁰ The AFP advised at the time that one of the committees to be designated in this MoU would be the most appropriate forum for discussion of how the NSW and federal preventative detention schemes would operate in conjunction.

NSW police have advised us that this MoU with the AFP has not been finalised since our 2011 report. A broader MoU between the AFP and NSW Police Force is in force, but there is currently no MoU that is specific to counter-terrorism or preventative detention powers.²⁰¹

191 Juvenile Justice NSW, *Objective Detainee Classification Policy*, October 2011, p. 3.

192 Correspondence from Juvenile Justice NSW to the Deputy Ombudsman, 8 November 2010. Levels of classification are designated in the Children (Detention Centres) Regulation 2010 and Juvenile Justice NSW, *Objective Detainee Classification Policy*, October 2011.

193 Juvenile Justice NSW, *Objective Detainee Classification Policy*, October 2011, p. 6.

194 *Ibid*, p. 5.

195 Please note that a young female person aged 16 or 17 who is the subject of a preventative detention order would be held at Juniperina Juvenile Justice Centre, which is the only juvenile detention centre for young females in NSW.

196 The Hon. Greg Smith SC MP (NSW Attorney General), *Reviewing Kariong Juvenile Correctional Centre*, media release, Sydney, 9 April 2014.

197 Correspondence from the Hon. Pru Goward MP, Minister for Family and Community Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 19 October 2011.

198 Correspondence from the Hon. Pru Goward MP, Minister for Family and Community Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), received 11 April 2014.

199 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 29.

200 Correspondence from Tony Negus, Commissioner, Australian Federal Police, to Bruce Barbour, Ombudsman, dated 6 May 2011.

201 Meeting between Ombudsman officers and police officers from the Counter Terrorism and Special Tactics Command, NSW Police Force, 20 March 2014.

While it can be argued that counter-terrorism police operate in an environment where they must regularly decide whether state or federal powers are best applied in particular circumstances, given the concerns of officers as discussed in our 2011 report, the apparent lack of guidance through an MoU or some other more detailed interagency procedures is concerning. We note that the NSW Police Force finalised their internal SOPs in 2011, but the continuing lack of guidance for officers regarding how to resolve any interoperability issues that arise with the federal powers further demonstrates that some of the detailed arrangements regarding the exercise of Part 2A powers by NSW agencies have not been entirely finalised.

3.7 Expiry of preventative detention powers in December 2015

Under the section 26ZS 'sunset provision', the Part 2A powers cannot be used 10 years after the day they commenced. This means that the powers, and any existing preventative detention orders, will expire on 16 December 2015.

This sunset provision is consistent with the decision of COAG at its 2005 meeting that all of the new counter-terrorism laws introduced as a result of that meeting would expire after 10 years. The other state and territory preventative detention laws introduced at that time also reflect this decision and will expire in 2015 or 2016. The Prime Minister has given a preliminary indication that the federal preventative detention laws, which also expire in 2015, may be extended, but no detail is yet available regarding the legislation that will give effect to this.²⁰²

3.7.1. Our previous comments about expiry of the powers

We have extensively discussed the issue of the ongoing utility of the preventative detention powers in our previous reports. Since that time, there has been no new information arising from any exercise of these powers in NSW or elsewhere in Australia.

In our 2011 report, we noted that the NSW Police Force – in particular, the Counter Terrorism and Special Tactics Command – had raised a range of concerns regarding the preventative detention scheme. For example, in correspondence to our office, the Command had commented that:

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

Additional complexity is found in that no two pieces of PDO legislation, whether Commonwealth, State or Territory, are the same. Given that counter terrorism investigations have proven to be transnational in nature, the variance between legislation renders them operationally impractical to use.²⁰³

The Counter Terrorism and Special Tactics Command also advised that it had shared its views at a discussion organised by the Investigations Support Capability Coordination Sub-Committee of the then National Counter-Terrorism Committee.²⁰⁴ In our 2011 report, we noted that the issues raised included the following:

- Counter terrorism law enforcement officers considered the preventative detention legislation is difficult and operationally impractical.
- Questions regarding the interoperability of preventative detention provisions including:
 - whether it was lawful to bring preventative detainees held in different jurisdictions to the one jurisdiction
 - questions about when to use Commonwealth or State and Territory preventative detention powers, and how to transition between these two schemes
 - whether a preventative detention order issued in one jurisdiction would allow the subject of the order to be detained in another jurisdiction.
- Consideration about the limitations on interviewing persons detained under a preventative detention order in relation to the terrorist act for which the preventative detention order applies.
- Consideration be given to enabling applications for preventative detention orders to be made electronically, by phone, fax or email.
- Amendments be sought to Commonwealth and State legislation to give police authority to direct persons not to disclose specific information.²⁰⁵

²⁰² The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

²⁰³ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 29.

²⁰⁴ Between 2002 and 2010 this body was known as the National Counter-Terrorism Committee. In 2012, when New Zealand was invited to become a member, its title changed to the Australia-New Zealand Counter-Terrorism Committee.

²⁰⁵ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 29.

A further concern expressed by police was the potential imposition of criminal sanctions on officers if they failed to provide the required information to a person newly detained.

In our 2011 report, we suggested that there would be a strong case for the powers to expire in 2015 if they remained unused and the issues which had made police reluctant to use them had not been resolved. We also noted that:

If the case can be made that preventative detention powers are indeed a necessary counter terrorism tool, further consideration should be given to the potential difficulties in using the powers, while at the same time ensuring that any amendments to the powers are in line with Australia's human rights obligations and contain appropriate safeguards for protecting the rights of individuals.²⁰⁶

We then made the following recommendation:

The next statutory review of the Act consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the non-use of those powers in the five years following their creation and the other powers available to police to respond to and investigate terrorism.²⁰⁷

3.7.1.1. *Developments since our 2011 report*

As part of its ongoing review of counter-terrorism laws, COAG appointed a committee to review the operation, effectiveness and implications of the new counter-terrorism laws introduced in all Australian jurisdictions after the London terrorist incidents in 2005. The committee, in the 2013 COAG report, recommended 'by majority':

that the Commonwealth, State and Territory 'preventative detention' legislation be repealed. If any form of preventive detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which, in the view of the majority of the Committee, may further reduce its operational effectiveness.²⁰⁸

The committee noted 'a genuine concern at Police and Government level that a terrorist attack may be launched in Australia'²⁰⁹ and that 'the prevention of an imminent and serious terrorist attack by means of executive detention, though an extreme measure, can, at least in an emergency, be seen as a genuinely valuable protective measure'.²¹⁰ It further noted that it did 'not place much store in the argument that the detention laws have not been used and are therefore unnecessary'.²¹¹

Despite these points, the majority of the committee was 'persuaded by a singular and compelling feature revealed in the submissions' it received regarding whether or not the provisions could be used in practice. In particular, three police submissions (from Victoria, South Australia and Western Australia), while not asking for repeal of the preventative detention legislation, 'unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime'.²¹²

Reasons provided to the committee in these submissions included the complexities of the provisions, the impracticality of the thresholds that must be met to obtain an order, the inability to question a detained suspect and the likelihood that 'if there were sufficient material to found a detention order, there would be, more likely than not, sufficient material to warrant conventional arrest and charge'.²¹³

The committee did not believe that these issues could be satisfactorily overcome by a restructure of the federal/state scheme, as the additional safeguards that would be needed would further diminish the scheme's operational effectiveness and 'lead to an even greater level of reluctance and a determination on the part of police not to use the legislation, even in an emergency situation'.²¹⁴

The Security Legislation Monitor also examined federal preventative detention laws in his 2012 annual report and recommended that the relevant Division 105 of Part 5.3 of the Criminal Code (Cth) be repealed, noting that:

There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.²¹⁵

206 Ibid, p. 34.

207 Recommendation 13, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 34.

208 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 68.

209 Ibid, p. 68.

210 Ibid, p. 69.

211 Ibid.

212 Ibid, p.70.

213 Ibid.

214 Ibid.

215 Independent National Security Legislation Monitor, *Declassified Annual Report*, Canberra, December 2012, p. 67.

The Security Legislation Monitor argued that the range of other powers already available provided an effective alternative to preventative detention.²¹⁶

3.7.2. View of the Attorney General

The NSW Attorney General's 2013 statutory review of the Act noted the 2013 COAG review and the Security Legislation Monitor's 2012 annual report and provided the following response to our recommendation:

[AG's statutory] Review Recommendation 2: That, in order to maintain a nationally consistent approach, a decision on the repeal or retention of the preventative detention powers be deferred until national discussion has occurred on the recommendations of the two Commonwealth reviews.²¹⁷

The Attorney General has since advised that this national discussion is ongoing and that the Federal Government has asked the Australia-New Zealand Counter-Terrorism Committee to undertake work on developing a national response to the recommendations from the 2013 COAG report.²¹⁸

3.7.3. Current view of the NSW Police Force

We wrote to the Commissioner of Police in December 2013 noting the conclusions of the 2013 COAG report and the Security Legislation Monitor's 2012 annual report and requested his advice regarding the view of the NSW Police Force on the ongoing utility of the Part 2A powers. The Commissioner responded on 6 February 2014, noting that:

The NSW Police Force supports the continuation of preventative detention order powers in Part 2A beyond December 2015.

That the provisions have not been used should not be a critical factor in evaluating the ongoing need for the provisions. Rather, that the provisions have not been used is a natural consequence of the extraordinary nature of a terrorist threat or event, and indeed illustrates that the NSW Police Force has in no way abused these powers.

The NSW Police Force does not accept the statement that *conventional powers of arrest and charge would ultimately prove more operationally effective than a preventative detention order*. This comment does not take into account the extraordinary circumstances of a terrorist threat or attack, nor does it acknowledge the context in which the legislation was introduced and continues to operate.

Given the dynamic nature of terrorist threats, the more recent terrorist events post 9/11 including Madrid 2004, London 2005, Mumbai 2008, Norway 2011 and France 2012, and the number of thwarted terrorist attacks here and abroad, it is essential that law enforcement be able to take preventative action to protect the public. To do this, there must be the capability to detain a person who presents an immediate risk to the public, even though there might not be sufficient evidence to arrest for criminal offences at that time.

Preventative detention orders are an important component of the counter terrorism legislation. Their availability ensures that law enforcement agencies have a legal basis to take action to prevent a terrorist threat from eventuating where a prosecution is not open, but a person presents a credible risk to public safety in relation to an imminent terrorist act, or in the immediate aftermath of a completed terrorist act.

Removing preventative detention powers would create a gap in law enforcement capability to prevent a suspected terrorist attack. This may occur, for example, because the arrest of an individual involved in or associated with a suspected, imminent terrorist plot may ultimately warn others involved. However temporarily detaining one person involved in the plot may prevent the act from being carried out. A further possibility is that arrest, charge and prosecution is not feasible due to extraordinary sensitivities in the evidence necessary to sustain such action. However, temporarily detaining a person who is implicated in a suspected, imminent terrorist act may be considered necessary to prevent that act from being carried out. In the absence of preventative detention powers, law enforcement agencies would not have a clear legal basis on which to take preventative action in these circumstances.

While it appears there is scope to improve the utility of these provisions, which we would expect would be advanced following consultation with other jurisdictions, it would be imprudent to repeal this legislation.²¹⁹

²¹⁶ Ibid.

²¹⁷ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 27.

²¹⁸ Correspondence from the Hon. Greg Smith SC MP, Attorney General, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 7 March 2014.

²¹⁹ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 6 February 2014.

3.7.4. View of the Minister for Police and Emergency Services

We also sought the view of the Minister for Police and Emergency Services. He advised that the COAG review process is still underway 'as COAG awaits a consolidated reply from the State and Territory Governments through the Australia-New Zealand Counter-Terrorism Committee', and that the NSW Government is carefully considering the 2013 COAG report's recommendation for repeal of the preventative detention powers. The Minister further noted that 'although these powers have not been used to date there are emerging international events, such as the Syrian civil war, that may create a need for use of such provisions'.²²⁰

3.7.5. Determining whether Part 2A should be extended or allowed to expire

Although the issues previously raised by police about the operational effectiveness of the preventative detention powers are yet to be resolved, it would be premature to make a recommendation about whether NSW's provisions should be allowed to lapse or should be extended until more is known about whether a nationally consistent approach is likely to be adopted before December 2015. In preparing this report to the Attorney General and the Minister for Police and Emergency Services we can, however, provide some comments and observations to assist in the Attorney General's next statutory review of the legislation and to assist the NSW Parliament in determining whether Part 2A should be extended.

It appears that the misgivings of police about using the preventative detention powers mentioned in our previous reports were echoed in several of the submissions by police from other jurisdictions to the committee that prepared the 2013 COAG Report. However, as outlined above, the Commissioner of Police has made clear his support for the continuation of Part 2A.

There appear to be three limbs to the argument made by the Commissioner to retain Part 2A beyond December 2015:

- the powers may allow police to prevent an imminent terrorist attack in circumstances where police do not have sufficient evidence to arrest a suspect
- the use of conventional arrest powers, instead of the Part 2A powers, may result in associates of terrorists being warned, thereby thwarting police attempts to prevent an attack, and
- the Part 2A powers provide a legal basis to detain a person in order to prevent an imminent terrorist attack where arrest, charge and prosecution is not feasible due to extraordinary sensitivities in the evidence.

Each of these is discussed in more detail below.

3.7.5.1. Whether Part 2A enables police to act where there is insufficient evidence to support a charge

The Commissioner of Police suggested that Part 2A should be retained as there may be circumstances where police have sufficient evidence to successfully apply for a preventative detention order, but the same evidence would not be sufficient to arrest and detain that person using conventional powers:

...it is essential that law enforcement be able to take preventative action to protect the public. To do this, there must be the capability to detain a person who presents an immediate risk to the public, even though there might not be sufficient evidence to arrest for criminal offences at that time.²²¹

Police can arrest a person without a warrant using the Commonwealth power of arrest under section 3W of the *Crimes Act 1914* (Cth) or the corresponding NSW power under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). In many circumstances, if police have sufficient evidence to seek a preventative detention order, they would also have sufficient evidence to arrest and detain a person using conventional powers.

Section 99(1) of LEPRA provides that a police officer may arrest a person without a warrant where they 'suspect on reasonable grounds that the person is committing or has committed an offence'. Terrorism-related offences for which a person may be arrested using this power include, for example, an offence under section 101.6(1) of the Criminal Code (Cth), which states that 'a person commits an offence if the person does any act in preparation for, or planning, a terrorist act'. A police officer therefore has the authority to arrest a person where they suspect on reasonable grounds that the person has done an act in preparation for, or to plan, a terrorist act.

²²⁰ Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

²²¹ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 6 February 2014.

In comparison, police may apply for a preventative detention order where there are reasonable grounds to suspect a person 'has done an act in preparation for, or planning, a terrorist act'.²²² When preventative detention powers are compared with conventional powers in these terms, it is unsurprising that the COAG committee was persuaded by submissions that:

...at a practical level, if there were sufficient material to found a detention order, there would be, more likely than not, sufficient material to warrant conventional arrest and charge.²²³

Importantly, however, police may also apply for a preventative detention order where there are reasonable grounds to suspect that a person 'will engage in a terrorist act'²²⁴ or that a person possesses something connected with the preparation or engagement of a terrorist act.²²⁵ Accordingly, a person does not need to have committed an offence to be subject to a preventative detention order.

It is also important to note that the rules of evidence do not apply in relation to proceedings under Part 2A. Section 26O(2) of the Act allows the Supreme Court to 'take into account any evidence or information that the Court considers credible or trustworthy in the circumstances' in any proceedings connected to preventative detention or prohibited contact orders. Therefore, to support an application for a preventative detention order, police may present to the court evidence that might not be allowed in proceedings for a prosecution.

In our discussions with police,²²⁶ officers put forward an example where police might have credible and significant evidence contained within classified material which, if disclosed, could adversely affect national security. This evidence might be able to be summarised in a form that does not compromise national security. Although the summarised form of evidence might be inadmissible in criminal proceedings, it could be used in support of a preventative detention order application where the court is not bound by the rules of evidence.

Further, police might encounter difficulty in attempting to present evidence in admissible form where the evidence was gathered in a foreign country. The Security Legislation Monitor's 2014 annual report noted the AFP's submission that it had 'encountered cases where prosecutions have not been pursued due to concerns over admissibility of evidence gathered overseas'.²²⁷ The AFP further submitted that, in some cases, terrorism investigations may not be pursued because the evidence required to support a charge is from an overseas source and, accordingly, a successful prosecution is unlikely.²²⁸ After considering the AFP submission, the Security Legislation Monitor recommended that the Federal Government consider amending the rules of evidence²²⁹ to allow such evidence in certain circumstances.²³⁰ At present, however, this type of evidence could be admitted in support of a preventative detention order.

We recognise that it is possible the circumstances described by the Commissioner of Police – where police have sufficient evidence to successfully apply for a preventative detention order but not to use conventional powers of arrest and charge – could occur. While the criteria to be satisfied for both courses of action appear similar, there are factors, such as the differing types of evidence that may be admitted for each type of proceeding, that may also affect police decision-making about whether arrest is a viable option.

3.7.5.2. Whether the use of conventional arrest powers increases the risk of alerting terrorist associates

The Commissioner of Police also suggested that there might be circumstances where preventative detention would be preferable to arresting a person suspected of being involved in planning a terrorist act:

Removing preventative detention powers would create a gap in law enforcement capability to prevent a suspected terrorist attack. This may occur, for example, because the arrest of an individual involved in or associated with a suspected, imminent terrorist plot may ultimately warn others involved.²³¹

The provisions available under Part 2A that may prevent such a warning include the option for police to apply for a prohibited contact order which, if made by the court, could prohibit the person subject to a preventative detention order

²²² *Terrorism (Police Powers) Act 2002*, s. 26D(1)(a)(iii).

²²³ Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, p. 70.

²²⁴ *Terrorism (Police Powers) Act 2002*, s. 26D(1)(a)(i).

²²⁵ *Terrorism (Police Powers) Act 2002*, s. 26D(1)(b)(ii).

²²⁶ Meeting between officers from NSW Police Force Counter Terrorism and Special Tactics Command and Ombudsman officers, 20 March 2014.

²²⁷ Bret Walker QC, Independent National Security Legislation Monitor, *Annual Report*, Canberra, March 2014, p. 34.

²²⁸ *Ibid.*

²²⁹ These are contained within the *Evidence Act 1995* (Cth) and the *Foreign Evidence Act 1994* (Cth).

²³⁰ Bret Walker QC, Independent National Security Legislation Monitor, *Annual Report*, Canberra, March 2014, p. 36.

²³¹ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 6 February 2014.

from contacting certain people. Additionally, police have the authority to monitor all contact that a person subject to a preventative detention order has with any other person, including their lawyer (the exceptions to this are contact with the Ombudsman or Police Integrity Commission).²³²

By comparison, if police were to arrest the person for a terrorism-related offence under LEPR and hold them in custody at a police station, the person would be entitled under section 123 of LEPR to contact a range of people, before participating in any investigative procedure. They would also be entitled to inform those people of their whereabouts²³³ and to communicate with them 'in circumstances in which, so far as practicable, the communication will not be overheard'.²³⁴ The rights available to a person held in custody under section 23G of the *Crimes Act 1914* (Cth) are similar to those contained within LEPR. Neither LEPR nor the Crimes Act provide police with the authority to monitor all communications between the person arrested and others, including communication with their lawyer.

However, there are certain exceptions to the requirements to allow contact, set out in section 125 of LEPR, including where a custody manager believes on reasonable grounds that contact would hinder the recovery of a person or property relating to an investigation²³⁵ or would result in injury being caused to another person.²³⁶ This means a custody manager can limit contact between a person arrested and their associates in a terrorism-related matter if it met these criteria. This may assist in reducing the risk of the person warning their associates.

Another issue to consider would be the transfer of the person to a correctional centre, juvenile correctional centre or juvenile justice centre. In the case of an adult who is on remand for a terrorism offence, the Commissioner of Corrective Services could potentially limit the detainee's contact with other inmates in a correctional centre under section 10 of the *Crimes (Administration of Sentences) Act 1999*. This section allows the Commissioner or their delegate to detain any inmate 'in isolation from all other inmates' if necessary to ensure the safety of others or the security and good order of the correctional centre.²³⁷

Under section 26 of the Crimes (Administration of Sentences) Regulation 2008, the Commissioner of Corrective Services is also able to make a broad range of determinations regarding the management of inmates with higher security classifications, including 'extreme high security' and 'extreme high risk' restricted inmates. If a person on remand for a terrorism offence was managed in custody under one of these classifications, these provisions could be used to prevent contact with other inmates or visitors or written or telephone contact with others, if police and the Commissioner of Corrective Services were of the view that this contact may result in a warning to associates. It is important to note the lack of finalised procedures to guide staff in correctional centres when managing a person subject to a preventative detention order, particularly around issues such as contact with other inmates or detainees. This is discussed in more detail in section 3.8.

Although there are ways to prevent a person subject to conventional arrest powers from contacting terrorist associates, the Part 2A provisions provide more immediate and comprehensive protection against a warning occurring. Part 2A includes extraordinary powers to prevent most contact between a detainee and others and to monitor any contact²³⁸ that does occur. It will be for the Attorney General to decide whether these extraordinary powers are necessary on the basis of the type of circumstances outlined by the Commissioner of Police.

3.7.5.3. Whether Part 2A increases police ability to limit the disclosure of sensitive material

The third situation put forward by the Commissioner of Police to support retaining Part 2A was where 'arrest, charge and prosecution is not feasible due to extraordinary sensitivities in the evidence necessary to sustain such action'.²³⁹ As noted above, applications by police for a preventative detention order under Part 2A are heard in a closed court and the court may order suppression of publication of the proceedings. The court is also not bound by rules relating to admission of evidence. These provisions would help to protect highly sensitive information. There are, however, various other provisions that may be used to protect this type of information as part of conventional proceedings related to a terrorism offence.²⁴⁰ The Commissioner seems to be suggesting that these provisions are not sufficient in some circumstances.

²³² Section 26ZI of the *Terrorism (Police Powers) Act 2002* does not authorise police to monitor communication that occurs under s. 26ZF, that is, between a detainee and the Ombudsman or Police Integrity Commission.

²³³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 123(1)(a)(i).

²³⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 123(2)(b).

²³⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 125(1)(c).

²³⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 125(1)(d).

²³⁷ *Crimes (Administration of Sentences) Act 1999*, s. 12(1)(a).

²³⁸ With the exception of contact with the Ombudsman and the Police Integrity Commission.

²³⁹ Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 6 February 2014.

²⁴⁰ *Courts Suppression and Non-Publication Orders Act 2010* and *National Security Information (Criminal and Civil) Act 2004* (Cth).

3.7.5.4. Retaining Part 2A powers

It appears that some of the circumstances outlined by the Commissioner of Police above indicate that Part 2A of the Act provides police with a legal basis to detain a person to prevent an imminent terrorist act, and to prevent the person from warning their associates, where this might not be as achievable through arrest, charge, remand and prosecution. Our observation is that the expiry of Part 2A would therefore leave a gap in law enforcement powers. In our view the key issue then becomes whether this gap is of such a magnitude and significance that it justifies the continuation of these extraordinary powers. A related issue is whether this gap, as identified in the circumstances put forward by the Commissioner, could be appropriately addressed through existing provisions, or through the strengthening of some of those provisions in relation to terrorism offences.

For example, in relation to the risk of warning associates, if the option of arrest, custody, bail and remand were pursued, some existing provisions of LEPPRA may be used at each stage of that process to attempt to prevent such a warning occurring. This would require police to do more at each of these stages, whereas the provisions of Part 2A make this aspect of the process simpler to administer. Yet the simplicity that Part 2A might offer in this respect should be viewed alongside the comments made by officers in our 2011 report that Part 2A is, overall, 'complex and operationally difficult to implement'.²⁴¹

Between now and December 2015, the Attorney General must consider, and Parliament determine, whether the Part 2A powers shall expire or should be extended. It is beyond the scope of this report to make a definitive assessment on these issues. They are issues that the Attorney General will need to consider when deciding whether Part 2A of the Act should expire. We suggest that the Attorney General take into account our discussion of these and other matters in this report and our 2008 and 2011 reports.

As noted in section 3.7.1, in our 2011 report we recommended that the Attorney General's next statutory review consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the powers not having been used and the other powers available to police to respond to and investigate terrorism.²⁴² The Attorney General has since deferred consideration of this recommendation until a decision is made through the COAG review process. We will await further advice from the Attorney General regarding the implementation of this recommendation once this has occurred. We expect that the next consideration of this recommendation will include a review of the issues raised in this report and our 2011 report.

3.8 Operational readiness

While some NSW agencies have expressed strong support for retention of the powers, after nine years not all relevant agencies are operationally ready to use them. The NSW Police Force completed its SOPs in 2011, and police, Juvenile Justice and Corrective Services have also recently taken action to ensure that consistent procedures across all agencies are finalised. However, their work to achieve this outcome is not yet complete.

The Commissioner of Police has indicated support for our view regarding 'the need for all agencies to be operationally ready and ensure all procedures are consistent'.²⁴³ In the consultation draft of this report, we included the recommendation that these actions should be completed by September 2014. However, the Commissioner advised that 'to ensure this capability we consider a longer timeframe is required'.²⁴⁴

The NSW Police Force does not have an agreement or procedures with the AFP that are specific to preventative detention orders and guide officers in any transition between the federal and state schemes. The NSW Police Force's ability to address this issue is obviously dependent on the participation of the AFP. While it is possible that a new preventative detention scheme may address some of the issues of interoperability, if the NSW Police Force were to exercise the powers in 2014 it seems they would be transferring a person between federal and state schemes without detailed guidance. This increases the risk that a requirement of either scheme may be inadvertently omitted in transition.

More concerning is that Corrective Services and Juvenile Justice both signed a broad MoU with the NSW Police Force that they would accept physical custody of a person subject to a preventative detention order but did not finalise in detail during the reporting period how this process would work. The completion of procedures by Juvenile Justice in

241 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 28.

242 Recommendation 13, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 34.

243 Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, 13 August 2014.

244 Ibid.

July 2014 is a welcome, albeit belated, development. However, under current arrangements Juvenile Justice would only be likely to provide facilities for the custody of a female detainee aged 16 or 17 years. Adult detainees or young male detainees aged 16 or 17 would be held in facilities managed by Corrective Services.

It is vital that Corrective Services finalises its procedures. There are crucial differences between the requirements of the Act and the requirements relevant to other inmates and it is important that these differences are clearly set out for staff involved in this process.

As police retain overall responsibility for the detention of a person under Part 2A of the Act, we are of the view that the Commissioner of Police should assess whether procedures across all agencies are consistent, comprehensive and integrated. This will facilitate operational readiness and allow the NSW Police Force to be satisfied it can detain a person subject to a preventative detention order in any location in accordance with the requirements of the Act.

Recommendations

1. **Corrective Services finalise its procedures for managing a person subject to a preventative detention order, by September 2014.**
2. **The Commissioner of Police, by November 2014, review the police SOPs and Corrective Services and Juvenile Justice procedures to ensure they are consistent, comprehensive and integrated.**

3.9 Monitoring of any new preventative detention powers

If any new preventative detention powers are envisaged in NSW beyond the expiration of the current powers, it is our view that the Ombudsman should retain a role in keeping any use of these powers under scrutiny, identical to the oversight scheme currently set out in section 26ZO of the Act.

Any new preventative detention powers are highly likely, by their very nature, to remain 'extraordinary' in the sense that they depart from long-established principles regarding the detention of individuals. Where legislation includes such powers, Parliament originally considered it necessary to establish a robust scrutiny function for the Ombudsman. While any new preventative detention powers may also be rarely used, it will remain important that any use is subject to close, independent examination. The Federal Government, in introducing new counter-terrorism laws, has also noted the continuing importance of proper oversight of counter-terrorism powers.²⁴⁵

245 The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

Chapter 4. Covert search warrants

As described in Chapter 1, certain police officers and staff of the Crime Commission may apply to an eligible judge for a covert search warrant under Part 3 of the Act. This type of search warrant allows a nominated officer to enter and search premises without the occupier's knowledge, and to search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test anything described in the warrant.²⁴⁶

No covert search warrants were sought or executed using these powers during the reporting period. Since the powers' introduction, the NSW Police Force has applied for five covert search warrants under Part 3 of the Act, three of which were executed. This occurred in 2005 as part of the Operation Hammerli/Pendennis Eden.²⁴⁷ In 2009, as a result of this operation, five men were convicted of a range of terrorist offences and each received a sentence of between 23 and 28 years.²⁴⁸

In this chapter we discuss the establishment of the covert search warrants scheme in NSW, responses to our past recommendations and the ongoing effectiveness and utility of NSW Police Force and NSW Crime Commission powers under Part 3 of the Act.

4.1 Use of covert search powers during reporting period

Covert search powers under Part 3 of the Act have not been exercised in NSW by the NSW Police Force or the NSW Crime Commission during the reporting period.

4.2 Background

The NSW covert search warrant scheme came into operation under Part 3 of the Act in September 2005. It allows for covert search warrants to be issued where there are reasonable grounds to suspect or believe that a 'terrorist act' has been, is being, or is likely to be committed. A definition of terrorist act,²⁴⁹ which covers all parts of the Act, is included in Part 1 of the Act.

At the same time as Part 3 commenced, a new offence of membership of a terrorist organisation also commenced, under section 310J of the *Crimes Act 1900*. Section 27A(2) of Part 3 states that 'in this Part, terrorist act includes an offence against section 310J of the *Crimes Act 1900* (membership of a terrorist organisation)'. Part 3 is the only part of the Act that extends the definition of terrorist act in this way, by including a reference to this offence.

The powers under Part 3 of the Act are ongoing and have no sunset clause.

4.3 Other NSW covert search powers

The covert search powers under Part 3 of the Act are not the only covert search powers available to police in NSW. Police may also apply for covert search warrants to assist in the investigation of serious offences under LEPRA, including homicide, kidnapping, money laundering, corruption and violence causing grievous bodily harm or wounding (searchable offences).²⁵⁰

In many regards, LEPRA covert search warrants mirror the covert search warrants available under Part 3 of the Act. They authorise entry and search of a premises without the knowledge of the occupier.²⁵¹ Entry through adjoining premises may be authorised if it is necessary to access the subject premises.²⁵² The LEPRA covert search warrants authorise entry and search of a premises using force as necessary,²⁵³ and can authorise searching officers to seize and detain anything found in the execution of the warrant that is mentioned in the warrant or is connected with a searchable offence.²⁵⁴

²⁴⁶ *Terrorism (Police Powers) Act 2002*, s. 27O.

²⁴⁷ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 11.

²⁴⁸ *R v Elomar & Ors* (2010) 264 ALR 759.

²⁴⁹ *Terrorism (Police Powers) Act 2002*, s. 3.

²⁵⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 46A.

²⁵¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47A(2)(a).

²⁵² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 47A(2)(b).

²⁵³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 70(1).

²⁵⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 49(1).

However, there are also several important differences. We noted in our 2011 report that the threshold for authorising covert search warrants under the Act appears to be higher than that for covert search warrants under LEPRA. There is a requirement under the Act that the covert search will 'substantially assist' in responding to or preventing a terrorist act.²⁵⁵ There is no equivalent requirement under LEPRA.

It is possible that LEPRA covert search powers could be used in the investigation of terrorist activities where these activities include searchable offences. The Ombudsman is required to inspect police records regarding any covert search warrants issued under LEPRA at least every 12 months and to report annually to the Attorney General regarding these inspections. Our reports about this separate review function are tabled in Parliament and are publicly available on our website.

4.4 Current framework for exercise of the powers

While the powers have not been exercised since 2005, amendments to the Act since 2005 and the establishment of a procedural framework for their application should assist police in the effective and fair use of the powers, if this occurs.

The NSW Police Force has established SOPs in relation to covert search warrants to guide officers in their application for, and execution of, covert search warrants. The SOPs now indicate that the execution of a warrant should be video recorded. If recording is not possible, officers must take detailed notes. Further, in the report to the issuing judge, police must include information as to whether or not the execution of the warrant was video recorded and, if not, a brief statement explaining the reason.

More detailed information regarding all changes that have occurred in relation to the covert search powers since their introduction, and the issues that we have previously raised regarding these powers, is available in our 2008 and 2011 reports.

4.5 Implementation of our previous recommendations

In our 2011 report, we made three recommendations in relation to the covert search powers under Part 3 of the Act. Two related to the authority to enter adjoining premises during a covert search. The third recommendation concerned our access to information regarding any considered use of the Part 2A and Part 3 powers.

As explained in our previous reports, under the covert search powers, an eligible officer may enter adjoining premises providing access to the subject premises.²⁵⁶ In our 2008 report, we noted that the application form used by police for covert search warrants potentially created confusion as to whether entry to adjoining premises was required. We recommended that:

The Attorney General consider developing forms to be used by applicants and judges in the administration of the Act. Should forms be developed, the application form and warrant form should clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.²⁵⁷

The NSW Police Force amend the standard covert search warrant document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.²⁵⁸

The NSW Police Force standard operating procedures include the standard application form used by police and the standard covert search warrant document.²⁵⁹

We reported in 2011 that these recommendations had not been implemented or had been only partially implemented. We then recommended that:

As a matter of priority, the NSW Police Force amend the standard covert search warrant pro forma application document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.²⁶⁰

The Attorney General finalise the development of forms to be used by applicants and judges in the administration of the Act, and that the form clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.²⁶¹

²⁵⁵ *Terrorism (Police Powers) Act 2002*, s. 27C(b).

²⁵⁶ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, pp. 81-83; NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, pp. 37-38.

²⁵⁷ Recommendations 31, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 83.

²⁵⁸ Recommendation 32, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 83.

²⁵⁹ Recommendation 33, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008, p. 83.

²⁶⁰ Recommendation 14, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 38.

²⁶¹ Recommendation 15, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 38.

Police have advised that the standard covert search warrant application template document has now been amended to state whether authority is sought to enter adjoining premises.²⁶² The 2013 statutory review confirmed that the Attorney General has finalised the form of the covert search warrant to include a requirement that an address or description of adjoining premises be provided where the authority has been granted.²⁶³

The third recommendation in our 2011 report that related to covert search powers under Part 3 also concerned the Part 2A powers. We recommended:

That Parliament amend sections 26ZO(2) and 27ZC(2) of the Act to indicate that the Ombudsman may require information about the considered use of the powers.²⁶⁴

Our position in this regard was subsequently supported by the Australian Human Rights Commission and Legal Aid NSW.²⁶⁵ As noted in our 2011 report, the Commissioner of Police did not support this recommendation, commenting that the 'significant expansion of [Ombudsman] powers, to the extent where information may be sought about when police are merely considering using the powers does not enhance accountability'.²⁶⁶

While we acknowledged the sensitivity of information relating to terrorism investigations, we did not seek information that would put operations at risk and we would accept information in a form that did not disclose any such particulars. Given our experience in managing sensitive information and maintaining appropriate security around such information, we did not accept the assertion that information about considered use of covert search powers could not be provided on the grounds of information security.²⁶⁷

The Attorney General's 2013 statutory review supported the views of the Commissioner of Police, stating that 'the Review does not consider it necessary to legislate for such information sharing, thereby overriding police concerns when they have concluded that it is not appropriate to share certain sensitive information with the Ombudsman'.²⁶⁸ The 2103 statutory review further concluded that the lack of clarity around what 'considered use' might mean would 'introduce unwelcome uncertainty into the legislation'.²⁶⁹

We remain of the view that access to information regarding any considered uses of the powers under review would significantly contribute to our ability to appropriately scrutinise police decision-making. Additionally, as indicated in our 2011 report, we have not sought information that would put operations at risk and would consider receiving the information in a form that did not disclose any operational particulars.

There have been no developments during the reporting period regarding other issues that we raised regarding the Part 3 powers in our previous reports, including covert collection of DNA samples and the use of special assistants to help police officers executing the search. We will continue to monitor these issues, as necessary.

4.6 Ongoing utility and effectiveness of Part 3

In our 2011 report, we considered the operational utility of the Part 3 powers and noted that 'unlike the preventative detention powers, it does not appear that police hold any concern about the workability of the covert search powers'.²⁷⁰ Similarly, the NSW Crime Commission reported to us at that time that it had no concerns regarding the operational utility of the powers.²⁷¹

During Parliamentary debate in 2013 regarding the latest extension of the sunset clause for offence contained in section 310J of the Crimes Act, Members of Parliament commented that the Part 3 covert search powers remain a necessary part of the response to the threat of terrorism.²⁷²

In December 2013, we asked the NSW Police Force and the NSW Crime Commission for their current views regarding this issue.

²⁶² Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Bruce Barbour, Ombudsman, dated 5 March 2013.

²⁶³ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 27.

²⁶⁴ Recommendation 16, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 41.

²⁶⁵ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, pp. 6 and 20.

²⁶⁶ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 41.

²⁶⁷ Ibid.

²⁶⁸ Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 28.

²⁶⁹ Ibid.

²⁷⁰ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 42.

²⁷¹ Ibid.

²⁷² Mark Speakman MP, NSWPD, (Hansard), Legislative Assembly, 10 September 2013, p. 23194.

4.6.1. Police powers

There is no new information available since we last reported that would substantially support any recommendations for changes to Part 3 to improve either its functioning in an operational sense or its safeguards.

The Attorney General's 2013 statutory review concluded that the policy objectives of the Act remain valid and made no recommendations specific to Part 3. In response to various submissions, the 2013 statutory review argued that the limited use of the powers contained in Part 3 is not sufficient reason for repeal. The powers are intended to be used in response to circumstances of emergency, and accordingly should rarely be necessary.²⁷³ The statutory review also noted the 'strong, robust safeguards in relation to the granting and use of covert search warrants'²⁷⁴ contained within the Act.

In 2014, the Commissioner of Police advised us that he supported the retention of the powers set out in Part 3 of the Act in their current form.²⁷⁵ In his view, these powers are necessary despite the availability of other covert search powers under LEPRA, because of important differences in the two schemes. While certain terrorist offences may fall within those listed as 'searchable offences' in section 46A of LEPRA, not all terrorist acts would be covered by this provision. Consequently, any absence of Part 3 from the Act would 'pose a very significant impediment to counter-terrorism investigations'.²⁷⁶

The Commissioner expressed his view that covert search warrants under the Act offer 'greater operational flexibility'.²⁷⁷ An example of this is the difference in length of time the warrant is valid – a LEPRA covert search warrant will expire 10 days after it is issued, while a covert search warrant under the Act expires 30 days after it is issued.

The Commissioner was also concerned that 'softening' the Act may convey the message that terrorism is no longer a threat to the community and 'this message would be entirely inconsistent with the ongoing preventative and investigative work of the NSW Police Force'.²⁷⁸

In 2014, the Minister for Police and Emergency Services advised that, in his view, covert search warrants continue to form an important part of NSW's counter-terrorism capability.²⁷⁹

Given these views, which are consistent with those communicated to us for our 2011 report, and the lack of any new information arising from an application of the powers during the reporting period, we make no recommendations in this report regarding any changes to the police powers contained in Part 3 of the Act.

4.6.2. NSW Crime Commission powers

In a letter to the Deputy Ombudsman in January 2014, the Crime Commissioner advised that while there is a continued need for the covert search powers under the Act,

...there is no need for the Commission to be able to utilise such covert search warrant powers. If the Commission became aware of a situation in which the use of such powers were warranted, such information and action would ordinarily be deferred to the New South Wales Police. Consequently the Commission considers that relevant amendments should be made to Part 3 of the Act to remove those powers presently conferred on the Commission, leaving such powers to solely be utilised at the discretion of the Commissioner of Police.²⁸⁰

In response to the consultation draft of this report, the Crime Commissioner reaffirmed this position and further noted that the NSW Crime Commission 'does not have the staff trained, nor the equipment needed to conduct covert search warrants'.²⁸¹

We note that the NSW Crime Commission has not used the powers since they were introduced. The Crime Commissioner's view that the Commission does not need the powers is significant. However, any decision regarding their removal would need to be made only after consideration of the reason Parliament initially conferred these powers on the Commission. Parliamentary debate from that time does not provide guidance on this issue.

273 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 18.

274 *Ibid.*, p. 19.

275 Correspondence from Andrew Scipione APM, Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 6 February 2014.

276 *Ibid.*

277 *Ibid.*

278 *Ibid.*

279 Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

280 Correspondence from Peter Hastings QC, Commissioner of the NSW Crime Commission, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 24 January 2014.

281 Correspondence from Peter Hastings QC, Commissioner of the NSW Crime Commission, to Bruce Barbour, Ombudsman, dated 22 July 2014.

The views of the NSW Police Force regarding such a change would also need to be considered, as it would become the sole NSW agency able to use the powers. While it was given the opportunity to do so, the NSW Police Force made no comment in relation to this issue in response to the consultation draft of this report. We therefore make the following recommendation.

Recommendation

3. **The Attorney General, in the next statutory review, consider the view of the NSW Crime Commissioner that Part 3 of the *Terrorism (Police Powers) Act 2002* should be amended to remove the powers conferred on the Crime Commissioner and staff of the NSW Crime Commission.**

4.7 Federal covert search warrant scheme

The section 310J offence was introduced at the same time as Part 3 of the Act. During Parliamentary debate, then Attorney General Bob Debus linked these two legislative changes, noting that the section 310J offence provision:

...is necessary as a temporary measure because membership of a terrorist organisation [was] not an offence known to New South Wales law, and New South Wales is constitutionally prevented from enacting a covert search warrant scheme for the investigation of Commonwealth terrorism offences.²⁸²

A sunset clause, contained in section 310L, applies to the section 310J offence provision, as it was then envisaged that a federal search warrant scheme would soon be enacted, which was regarded as preferable to any NSW scheme. Once this had occurred, Part 3 of the Act, and the associated section 310J offence, would no longer be needed. In 2005 when discussing the introduction of Part 3, the Attorney General commented that:

This would be the more appropriate arrangement, given the 2002 reference of power that New South Wales and other states made to the Commonwealth in relation to terrorism; and if that should occur, New South Wales would consider repealing this scheme in order to avoid constitutional and operational inconsistencies.²⁸³

A federal covert search warrant scheme has never been introduced. Accordingly, the sunset clause for section 310J has now been extended three times (in 2008, 2010 and 2013²⁸⁴), each time in anticipation of a federal scheme. For example, in 2008, then Attorney General John Hatzistergos commented:

The sunset clause was designed to allow the Commonwealth government enough time to develop a national covert search warrant scheme pursuant to the Commonwealth Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007. That scheme was to replace the State scheme. The change in government federally late last year meant that the bill was never debated. The new Commonwealth Government needs time to enact its own delayed notification search warrant scheme. The introduction of such a scheme will ensure consistency between all jurisdictions as to who should investigate terrorism offences and who should prosecute them. It will also provide for the economical use of resources. Schedule 6 to the Bill will extend the sunset clause for another two years from 13 September 2008 and will provide ample time for the Commonwealth to pass the necessary legislation.²⁸⁵

The parliamentary debate regarding the further extension of the sunset clause in 2013 suggested that the NSW Government intends to resolve this issue with the Federal Government before the expiration of the next sunset period (now in September 2016).²⁸⁶ This may occur through the COAG review process. We note that while the AFP advocated a federal covert search warrant scheme in its submission to the COAG committee that prepared the 2013 COAG report, as this would ensure 'national consistency of police powers across jurisdictions',²⁸⁷ the committee did not address this issue in its report.

The Security Legislation Monitor has since recommended the introduction of a federal covert search warrant or 'delayed notification search warrant' scheme in his 2014 annual report,²⁸⁸ which was tabled in the Federal Parliament on 18 June 2014. He referred to the AFP view that the lack of covert search warrant powers at a federal level represents an impediment to counter-terrorism investigations.²⁸⁹ The report concluded that a delayed notification search warrant scheme would 'increase the capability of the AFP to investigate and prosecute terrorism offences and would improve the effectiveness of Australia's counter-terrorism laws'.²⁹⁰

282 The Hon. Bob Debus MP, NSWPD, (Hansard), Legislative Assembly, 9 June 2005, p. 16940.

283 Ibid, p. 16941.

284 *Courts and Crimes Legislation Amendment Act 2008, Crimes Amendment (Terrorism) Act 2010, Crimes Amendment (Terrorism) Act 2013.*

285 The Hon. John Hatzistergos MP, NSWPD, (Hansard), Legislative Assembly, 12 August 2008, p. 9013.

286 Mr Bruce Notley-Smith MP, NSWPD, (Hansard), Legislative Assembly, 10 September 2013, p. 23196.

287 Australian Federal Police, *AFP submission to the COAG review of counter-terrorism legislation*, October 2012, para. 87.

288 Bret Walker QC, Independent National Security Legislation Monitor, *Annual Report*, Canberra, March 2014, p. 62.

289 Ibid, p. 61.

290 Ibid.

Chapter 5. NSW counter-terrorism powers in a national context

5.1 Framework for counter-terrorism in Australia

Several national bodies have a role in the national coordination of Australia's counter-terrorism response and legislation, as described in the National Counter-Terrorism Plan.²⁹¹ These bodies include COAG and the Australia-New Zealand Counter-Terrorism Committee (ANZCTC), formerly the National Counter-Terrorism Committee.

The ANZCTC, which reports annually to COAG, coordinates 'an effective nation-wide counter terrorism capability', provides expert strategic advice and maintains 'effective arrangements for the sharing of relevant intelligence and information' between agencies and jurisdictions.²⁹² The Chief Executive Officer of the NSW Ministry for Police and Emergency Services and the NSW Police Force Deputy Commissioner, Specialist Operations, are members of the ANZCTC.²⁹³

The ANZCTC is currently developing a consolidated response to the 2013 COAG report that will incorporate the views of different jurisdictions and will be submitted to COAG for consideration²⁹⁴ as part of COAG's overall review of counter-terrorism legislation.

In our 2011 report, we noted that while some issues that were shared across jurisdictions regarding preventative detention had been raised with the National Counter-Terrorism Committee, it did not appear that police concerns specific to NSW legislation had been advanced beyond the information provided to us. We therefore made two recommendations aimed at ensuring these concerns were brought to the attention of relevant cross-jurisdictional bodies, as the concerns were pertinent to any consideration of other preventative detention legislation in Australia. These recommendations were:

That the Attorney General bring the concerns highlighted by the NSW Police Force in response to [our 2011] recommendation 12 and as outlined in this Report to the Legal Issues Sub-Committee of the National Counter-Terrorism Committee with a view to considering whether there is ongoing utility for preventative detention powers.²⁹⁵

That the Minister for Police bring the concerns highlighted by the NSW Police Force in response to recommendation 12 and as outlined in this Report to the Ministerial Council for Police and Emergency Management—Police with a view to considering whether there is ongoing utility for preventative detention powers.²⁹⁶

The Attorney General²⁹⁷ and the Minister for Police and Emergency Services²⁹⁸ have since indicated that they now regard the COAG review process, of which the ANZCTC forms a part, as the most appropriate forum for concerns and issues to be raised regarding the viability of the preventative detention powers. Consequently, the Attorney General, in the 2013 statutory review, concluded that 'these Recommendations should not be progressed until those discussions have been finalised'.²⁹⁹

We agree that the COAG review process appears at this time to be the most appropriate forum for discussion of these issues. We also note that the 2013 COAG report raised very similar issues regarding preventative detention to those we reported had been communicated to us by police in our 2011 report.

291 National Counter-Terrorism Committee, *National Counter-Terrorism Plan*, Canberra, 2012, p. 5.

292 Australian Government, *Australian National Security*, viewed 16 April 2014, <http://www.nationalsecurity.gov.au/WhatAustraliaIsDoing/Pages/Australia-New-Zealand-Counter-Terrorism-Committee.aspx>.

293 NSW Government and NSW Police Force, *Counter terrorism arrangements in NSW*, viewed 16 April 2014, <http://www.secure.nsw.gov.au/Counter-terrorism-arrangements/Counter-terrorism-arrangements-in-NSW.aspx>.

294 Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

295 Recommendation 17, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 47.

296 Recommendation 18, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 47.

297 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 28.

298 Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

299 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 28.

5.2 Oversight of counter-terrorism laws in Australia

The National Counter-Terrorism Plan notes that in order to:

... ensure there is a balance between national security requirements, the rights of suspects and the public interest, governments have enacted a range of legislative provisions which provide effective counter-terrorism specific measures ... A variety of oversight measures, including the requirement for judicial authorisation of some powers and regular legislative reviews are in place.³⁰⁰

Our legislative review function is one of these oversight measures. Another is the Security Legislation Monitor which, as discussed in Chapter 3, is responsible for reviewing Australia's counter-terrorism laws on an ongoing basis, ensuring that they are effective in preventing terrorism, responding to terrorism and are consistent with Australia's international human rights and international security obligations.³⁰¹

As the Security Legislation Monitor's role has included reviewing the federal preventative detention provisions, in our 2011 report we made the following recommendation:

That the Attorney General provide a copy of the Ombudsman's reports under the Terrorism (Police Powers) Act to the National Security Legislation Monitor.³⁰²

The 2013 statutory review supported this recommendation and indicated that it has been carried out.³⁰³

In March 2014, the Independent National Security Legislation Monitor Repeal Bill 2014 was introduced into Federal Parliament. If passed, this bill would have effectively abolished the Office of the Security Legislation Monitor. It was noted in the Second Reading Speech that 'multiple independent oversight mechanisms already exist' and that the expiration of several counter-terrorism provisions in 2015 and 2016 would provide an opportunity for these provisions to be reviewed.³⁰⁴ On 27 March 2014, the Senate referred the Independent National Security Legislation Monitor Repeal Bill 2014 to the Senate Legal and Constitutional Affairs Committee for inquiry.³⁰⁵ However, on 17 July 2014, prior to the Senate reporting, the bill was discharged from Parliament. The Attorney General, George Brandis, explained that the newly introduced counter-terrorism legislation warranted retention of the Security Legislation Monitor position.³⁰⁶ This means that the Security Legislation Monitor will continue the role of reviewing federal counter-terrorism and national security legislation.

300 National Counter-Terrorism Committee, *National Counter-Terrorism Plan*, Canberra, 2012, p. 4.

301 Department of Prime Minister and Cabinet, *Independent National Security Legislation Monitor*, 18 June 2014, viewed 16 July 2014, <http://www.dpmc.gov.au/INSLM/index.cfm>.

302 Recommendation 19, NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, p. 47.

303 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 29.

304 The Hon. Josh Frydenberg MP, Commonwealth Parliamentary Debates, (Hansard), House of Representatives, 19 March 2014, p. 25.

305 Parliament of Australia, Independent National Security Legislation Monitor Repeal Bill 2014, viewed 28 May 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/National_Security_Monitor.

306 The Hon. George Brandis QC (Commonwealth Attorney General), National Security Legislation Amendment Bill (No. 1) 2014, media release, Canberra, 16 July 2014.

Annexure A: Implementation of recommendations from our 2011 report³⁰⁷

	Recommendation	Implementation status	What steps have been taken?
1.	The NSW Police Force, Corrective Services and Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority.	Implemented	A Memorandum of Understanding between NSW Police Force, Corrective Services and Juvenile Justice in relation to the use of preventative detention powers was finalised and signed in November 2011.
2.	Corrective Services NSW and Juvenile Justice NSW finalise the Standard Operating Procedures on preventative detention as a matter of priority.	Implementation in progress	Juvenile Justice finalised its procedures in July 2014. Corrective Services had not finalised its procedures at the time of writing. It advised it plans to develop Local Operating Procedures for the Metropolitan Remand and Reception Centre and the Silverwater Women's Correctional Centre, rather than SOPs, and that it expects to finalise these procedures by September 2014. ³⁰⁸ Recommendations one and two of this report relate to this issue.
3.	The NSW Police Force SOPs provide guidance to police regarding what to do if police become reasonably satisfied that a detained person is under the age of 16 years.	Implemented	The Act does not permit the detention of persons under the age of 16. In the event that a person under 16 years of age is detained, the Act requires police to release the detainee as soon as practicable into the care of a parent or other appropriate person. The SOPs now provide guidance to police officers in relation to any person that may be considered an 'appropriate person' in these circumstances.
4.	That the NSW Police Force and Corrective Services seek legal advice as to whether detaining persons under the age of 18 within an adult correctional centre where such detainees are managed so that the detainee does not come into contact with adult prisoners is to be considered 'detention with persons who are 18 years or older' as set out in s. 26X(6).	Not implemented	The NSW Police Force advised that it was unnecessary to seek legal advice in relation to section 26X(6) as the provision only applies in circumstances where a detainee is not held in a Corrective Services or Juvenile Justice facility. The recommendation was not supported in the 2013 statutory review. The review determined that circumstances where detainees under the age of 18 were held at an adult correctional facility but did not come into contact with adult prisoners could not be considered 'detention with persons who are 18 years or older'. We are of the view that no further action is required in relation to this recommendation, noting also the outcome of recommendation 5 – that young people will not be held in an adult correctional facility.

307 NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011.

308 Correspondence from Peter Severin, Commissioner of Corrective Services, to Bruce Barbour, Ombudsman, 29 July 2014.

	Recommendation	Implementation status	What steps have been taken?
5.	That the NSW Police Force and Corrective Services clarify and resolve the circumstances in which any juvenile in preventative detention would be accommodated in an adult correctional facility, and that this is addressed in the Memorandum of Understanding between NSW Police Force and Corrective Services.	Implemented	Both Corrective Services and the NSW Police Force have clarified that they are now of the view the Act does not authorise the detention of a juvenile in preventative detention at an adult correctional facility. Police SOPs have been updated to clarify that juvenile detainees cannot be held in an adult correctional facility. We are of the view this issue does not need to also be addressed in the Memorandum of Understanding between NSW Police Force and Corrective Services.
6.	That the NSW Police Force SOPs for preventative detention provide clear guidance on what would constitute 'exceptional circumstances' such that a senior police officer might approve 16 or 17 year old detainees being detained with persons 18 years and over.	Implemented	The SOPs set out a range of considerations that may be relevant in determining whether there are exceptional circumstances in a particular case. Such considerations include the wellbeing of a child, security and location.
7.	That the Act be amended to clarify which officer would be guilty of an offence if information is not provided to the detainee as set out in sections 26Y and 26Z.	Not implemented	This recommendation was not supported in the 2013 statutory review. The review concluded it is clear that the senior officer would be liable in these circumstances. We accept the views expressed in the 2013 statutory review and therefore no further action is required in relation to this recommendation.
8.	Parliament consider amending the Act to ensure the information disclosed in any consultation between a monitor and a lawyer under s. 26ZI is protected from further disclosure.	Implementation in progress	The Attorney General has confirmed that this reform will be progressed through Parliament in the 2014 Budget Session of Parliament.
9.	The NSW Police Force SOPs instruct police to inform detainees they can complain about the conduct of correctional officers or juvenile justice officers in connection with their detention.	Partial implementation	The Commissioner of Police advised the Deputy Ombudsman on 28 February 2014 that police SOPs had been amended in accordance with this recommendation. The updated SOPs clearly provide that police must advise a detainee that they have the right to complain to the Ombudsman about how they are treated while in preventative detention. However, they do not specifically state that this includes treatment by a correctional services officer or juvenile justice officer, as we had indicated was our preference.

	Recommendation	Implementation status	What steps have been taken?
10.	Parliament consider amending the Act so that the nominated senior police officer must inform persons who are detained at correctional centres or juvenile detention centres of their right to contact the Ombudsman to make a complaint about the conduct of any correctional officer or juvenile justice officer.	Not implemented	This recommendation was not supported in the 2013 statutory review. We do not believe there is any utility in taking any further action in relation to this recommendation.
11.	The NSW Police Force SOPs provide guidance to police about protecting detainees from unwanted publicity on their release.	Implemented	The SOPs state that police who are engaged in the detention of a person are to ensure that the details surrounding the matter are only provided to those persons and/or agencies that need to know. Police must not make comment to the media and should take care not to identify the detainee.
12.	The NSW Police Force list the concerns it has with the preventative detention powers in their current form, along with suggestions for resolution, and provide this document to the Attorney General for consideration. The NSW Police Force should also provide a copy to the Ombudsman.	Not implemented	Deputy Commissioner Catherine Burn advised us that the Commissioner now considers police concerns are best raised through the broader COAG review process, rather than separately with the Attorney General. Police intended to raise issues through the NSW COAG Review of Counter Terrorism Legislation Working Group, which includes representatives from the NSW Police Force and the Department of Attorney General and Justice. Deputy Commissioner Burn advised the Working Group 'would review and provide advice on the COAG review for the purposes of developing a NSW position for Cabinet to consider' and it was not considered 'appropriate to provide your office with a NSW Police Force submission in advance of the Working Party process and the deliberations of Cabinet.' ³⁰⁹ Given this advice, we are of the view no further action is needed regarding this recommendation.
13.	The next statutory review of the Act consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the non-use of those powers in the five years following their creation and other powers available to police to respond to and investigate terrorism.	Partially implemented Further advice to be provided by the Attorney General	The 2013 statutory review recommended that consideration of any retention of preventative detention powers be deferred until a national response has been developed. ³¹⁰ The Attorney General further advised that they 'will be in a position to provide further advice regarding this recommendation when a formal national response to the COAG review has been published'. ³¹¹ We await this further advice from the Attorney General.

309 Correspondence from Catherine Burn, Deputy Commissioner, NSW Police Force, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 21 June 2013.

310 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 26.

311 Correspondence from the Hon. Greg Smith SC MP, former Attorney General, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 4 March 2014.

	Recommendation	Implementation status	What steps have been taken?
14.	As a matter of priority, the NSW Police Force amend the standard covert search warrant pro forma application document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.	Implemented	The standard covert search warrant application document now includes details about whether entry to adjoining premises is required.
15.	The Attorney General finalise the development of forms to be used by applicants and judges in the administration of the Act, and that the form clearly require articulation of whether entry to adjoining premises is sought and authorised respectively.	Implemented	The 2013 statutory review supported this recommendation and confirmed that these forms have been developed as recommended.
16.	That Parliament amend sections 26ZO(2) and 27ZC(2) of the Act to indicate that the Ombudsman may require information about the considered use of the powers.	Not implemented	The 2013 statutory review did not support this recommendation. We acknowledge the views expressed in the 2013 statutory review and do not believe there is any utility in taking any further action in relation to this recommendation.
17.	That the Attorney General bring the concerns highlighted by the NSW Police Force in response to recommendation 12 and as outlined in this Report to the Legal Issues Sub-Committee of the National Counter Terrorism Committee with a view to considering whether there is ongoing utility for preventative detention powers.	Partially implemented	The 2013 statutory review supported this recommendation in part. It noted that the COAG review and the Independent National Security Legislation Monitor report had resulted in 'discussions to develop a nationally consistent response' on the issue of retention or repeal of preventative detention powers and that, consequently, this recommendation 'should not be progressed until those discussions have been finalised'. ³¹² The Attorney General has also advised that the 'Federal Government has asked the Australia-New Zealand Counter Terrorism Committee to undertake work on developing a national response to the recommendations' ³¹³ from the COAG review.

312 Department of Attorney General and Justice, Review of the Terrorism (Police Powers) Act 2002, Sydney, 2013, p. 28.


313 Correspondence from the Hon. Greg Smith SC MP, Attorney General, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 4 March 2014.

	Recommendation	Implementation status	What steps have been taken?
18.	That the Minister for Police bring the concerns highlighted by the NSW Police Force in response to recommendation 12 and as outlined in this Report to the Ministerial Council for Police and Emergency Management – Police with a view to considering whether there is ongoing utility for preventative detention powers.	Not implemented	<p>The Attorney General³¹⁴ and Police Minister³¹⁵ have indicated that they now regard the COAG review process, of which the ANZCTC forms a part, as the most appropriate forum for concerns and issues to be raised regarding the viability of the preventative detention powers. Consequently, the Attorney General, in his 2013 statutory review, concluded that this recommendation 'should not be progressed until those discussions have been finalised'.³¹⁶</p> <p>We agree that the COAG review process, through the ANZCTC, appears at this point in time, to be the most appropriate forum for discussion of these issues.</p>
19.	That the Attorney General provide a copy of the Ombudsman's reports under the Terrorism (Police Powers) Act to the National Security Legislation Monitor.	Implemented	The 2013 statutory review indicated that this recommendation had been implemented.

314 Correspondence from the Hon. Greg Smith SC MP, Attorney General, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 4 March 2014.

315 Correspondence from the Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, to Linda Waugh, Deputy Ombudsman (Police and Compliance), dated 3 March 2014.

316 Department of Attorney General and Justice, *Review of the Terrorism (Police Powers) Act 2002*, Sydney, 2013, p. 28.



NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

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

www.ombo.nsw.gov.au