



Justice

**Statutory Review of the
*Terrorism (Police Powers) Act 2002***

OCTOBER 2015

Justice Strategy and Policy
Department of Justice
Email: www.lawlink.nsw.gov.au
Phone: 02 8346 1281
Fax: 02 8061 9370
Level 3, Henry Deane Building, 20 Lee St, SYDNEY 2000
GPO Box 31 SYDNEY 2001

Translating and interpreter service

If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.
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Email: diversityservices@agd.nsw.gov.au
Phone: 02 8688 7507
Fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

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1. EXECUTIVE SUMMARY

This Review is a report to the NSW Government following the statutory review of the *Terrorism (Police Powers) Act 2002* (**the NSW Act**). The Act was assented to on 5 December 2002 and confers special powers on police officers to deal with imminent threats of terrorist activity and to respond to terrorist attacks.

This Review has been conducted by the NSW Department of Justice (**DoJ**), Justice Strategy and Policy, in accordance with section 36 of the NSW Act. That section requires the Attorney General to conduct a statutory review every three years, as soon as possible after the reports of the Ombudsman under sections 26ZO and 27ZC of the NSW Act have been tabled in each House of Parliament.¹ As the NSW Ombudsman's 2014 Review was tabled in the NSW Parliament on 11 November 2014, the statutory review of the NSW Act is due to be tabled before 11 November 2015.

The policy objectives of the NSW Act are to give police officers special powers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after one has occurred; to enable police to use preventative detention orders (**PDO**) to detain suspected people for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act; and to enable the covert entry and search of premises by specially authorised police officers.

In accordance with a recommendation of the Ombudsman's 2011 Report (**the Ombudsman's 2011 Review**)² and the 2013 Statutory Review of the NSW Act³, the present Review has considered whether the preventative detention scheme in the NSW Act should be retained. The Review notes the Commonwealth Government extended the sunset period for its PDO scheme, noting that in the current heightened threat environment, it is crucial for law enforcement agencies to retain effective

¹ Section 36(2) *Terrorism (Police Powers) Act 2002*.

² Available at:

[http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/062281a7012b5820ca257020000a3058/f9cab23d24ef429cca257bd5002365a8/\\$FILE/Review%20of%20Terrorism%20\(Police%20Powers\)%20Act%202002.pdf](http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/062281a7012b5820ca257020000a3058/f9cab23d24ef429cca257bd5002365a8/$FILE/Review%20of%20Terrorism%20(Police%20Powers)%20Act%202002.pdf).

³ NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, August 2011, < <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/review-of-parts-2a-and-3-of-the-terrorism-police-powers-act-2002>>.

mechanisms to respond to and manage emerging threats.⁴ The Review agrees with the need to maintain national consistency in counter terrorism legislation as far as possible, acknowledging that jurisdictions agreed to enact these extraordinary powers as part of a complementary scheme. The foundation of this cross-jurisdictional approach was a reference of powers to the Commonwealth to allow for the creation of comprehensive and consistent terrorism offences for Australia. As such, the Review concludes that the PDO powers remain a necessary tool for police in combating terrorism and should be retained.

It is the conclusion of the Review that the policy objectives of the NSW Act remain valid. The Review recommends two amendments to the NSW Act, to extend the operation of the PDO powers until 16 December 2018, and to remove the NSW Crime Commission's powers to apply for covert search warrants. The Review makes a further two recommendations that do not require legislative change at this time: (1) note that the operational issues relating to PDOs raised by the NSW Police Force (**NSWPF**) are currently being progressed at the national level; and (2) the NSWPF work with the NSW Ombudsman and DoJ to develop reasonable guidelines and timeframes for complying with the reporting requirements under the NSW Act. Finally, the Review provides a response to the NSW Ombudsman's 2014 Review (**the Ombudsman's 2014 Review**) of Parts 2A and 3 of the NSW Act.⁵

⁴ Senator the Hon George Brandis QC, Attorney-General, Senate Hansard, 24 September 2014, p. 65.

⁵ NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2014, < <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/parts-2a-and-3-of-the-terrorism-police-powers-act-2002-review-period-2011-2013>>.

2. RECOMMENDATIONS

Recommendation 1

Amend the NSW Act to extend the sunset of the preventative detention order powers (due to sunset on 16 December 2015) until 16 December 2018.

Recommendation 2

Note that the operational issues relating to PDOs raised by the NSWPF are currently being progressed at the national level.

Recommendation 3

The NSWPF should continue to work with the office of the NSW Ombudsman and DoJ to determine reasonable guidelines and timeframes for complying with the NSW Act's reporting requirements, and to consider whether further reforms are required to ensure that any Commonwealth secrecy provisions are appropriately maintained.

Recommendation 4

Amend Part 3 of the NSW Act to remove the powers conferred on the NSW Crime Commissioner and staff of the NSW Crime Commission in that Part.

3. INTRODUCTION

The Commonwealth Government's recent *Review of Australia's Counter Terrorism Machinery 2015 (the Commonwealth Review)* notes that the threat of terrorism in Australia is rising and becoming harder to combat, particularly as there are an increasing number of Australians joining extremist groups overseas, as well as an increasing number of potential terrorists, supporters and sympathisers in our community.⁶ The Australian Security Intelligence Organisation's (ASIO) Annual Report to Parliament for 2011-2012 stated that terrorism continued to present the most immediate threat to the security of Australians and Australian interests. However, that report noted that while the risk of large scale terrorist acts such as those which occurred on 11 September 2001 remained, the promotion of smaller scale attacks by individuals or small groups had increased. The Commonwealth Review has reinforced the ongoing concern of this threat, acknowledging the current trend towards low-tech 'lone actor' attacks, which are exponentially harder to disrupt as there may be no visibility of planning and no time delay between intent and action.⁷

The national terrorism public alert level for Australia remained at Medium between 2003 and August 2014, which means that 'a terrorist attack is assessed as feasible and could well occur'.⁸ However, the alert level was raised to High on 12 September 2014, which means that a terrorist attack in Australia is considered 'likely'.⁹ The decision to raise the threat level related to a range of factors indicating an escalation in the threat environment – in particular, increasing numbers of Australians connected with, or inspired by, terrorist groups such as the Islamic State of Iraq and the Levant, Jabhat al-Nusra, and al-Qa'ida which have a desire to attack Western countries, including Australia.¹⁰

⁶ Australian Government, *Review of Australia's Counter Terrorism Machinery*, January 2015, piv.

⁷ Ibid.

⁸ David Irvine AO, Legal and Constitutional Affairs Committee, Senate Estimates, Canberra, 30 May 2013, p. 91.

⁹ Australian Government, National Terrorism Public Alert System, viewed 11 September 2014, www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/NationalTerrorismPublicAlertSystem.aspx.

¹⁰ Commonwealth of Australia 2015, *Martin Place Siege – Joint NSW Commonwealth Review Report*, January 2015,

https://www.dpmc.gov.au/sites/default/files/publications/170215_Martin_Place_Siege_Review_1.pdf, p. iv.

More recently, the NSW Ombudsman has noted that a key issue for police has been the development of conflicts in Syria and Iraq, and the participation of some Australia citizens in those conflicts.¹¹

The Commonwealth Government responded to these evolving threats in mid-2014 by announcing a range of new counter terrorism reforms, including proposed amendments to telecommunications interception legislation, enabling ASIO to request the suspension of an Australian passport and the introduction of new terrorism offences.¹² In this announcement, the former Prime Minister, the Hon. Tony Abbott MP, emphasised the importance of a nationally consistent approach to the threat of terrorism.

Against this background, the Review recognises the need to ensure that Commonwealth, State and Territory counter terrorism frameworks remain robust, and that law enforcement and security agencies have the tools they need to operate effectively. Recent events including the disruption of planned terrorist attacks within Australia have reinforced the importance of collaboration between State, Territory and Commonwealth jurisdictions in managing these threats, as well as the need to ensure that NSW legislation remains effective in preventing and combating terrorism.

3.1 Conduct of the Review

The Review was conducted on the Attorney General's behalf by Justice Strategy and Policy, NSW DoJ. This is the fifth Review of the NSW Act. While all four prior Reviews concluded that the policy objectives of the NSW Act remained valid, legislative amendments were made to the NSW Act to clarify the original policy intent of certain provisions.

The first review, tabled in 2006, was concerned only with the operation of the special powers, as, at the time of consultation, the provisions relating to the preventative detention scheme and covert search warrants had not yet commenced. The second

¹¹ NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2014, < <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/parts-2a-and-3-of-the-terrorism-police-powers-act-2002-review-period-2011-2013>>.

¹² The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

review in 2007 considered the authorisation of special police powers for use in raids carried out in Sydney in November 2005 as part of Operation Pendennis, the operation of the covert search warrant scheme and the use of PDOs.

The third review in 2010 made recommendations to clarify the operation of the PDO and covert search warrant provisions, culminating in the *Terrorism (Police Powers) Amendment Act 2010*. The Amended Act granted powers in the Supreme Court to, if satisfied it is in the interests of justice to do so, order the Legal Aid Commission to provide legal aid in proceedings against a person in relation to whom a PDO is being sought, or a person who is the subject of such an order. It also provided that a police officer who is detaining a person under such an order must release the person as soon as is practicable after the police officer is satisfied that the grounds on which the order was made have ceased to exist.

The fourth review examined the recommendations made by the NSW Ombudsman's 2011 Review, and also made recommendations regarding the disclosure of information by lawyers under the NSW Act. The fourth Review also considered whether the preventative detention powers should be retained and recommended that a decision on their repeal or retention should be deferred until national discussion has occurred on the recommendations of the two Commonwealth reviews.

The present Review covers the period 2013 to 2015 and examines the operation of the NSW Act with respect to its policy objectives, as well as reviewing the recommendations by the NSW Ombudsman's 2014 Review, tabled in Parliament on 11 November 2014.

Key stakeholders were invited to make a submission to the Review. An advertisement was placed on the DoJ website seeking public submissions, and advertisements appeared in major newspapers. A schedule of persons and organisations that made submissions is at **Annexure A**.

4. BACKGROUND TO THE INTRODUCTION OF THE ACT

4.1 Background to the NSW Act

The Commonwealth Government's Review of Australia's Counter-Terrorism Machinery notes that the terrorist attacks in the United States on 11 September 2001 were a major turning point in Western understanding of the threat from Islamist terrorism. Governments across the world responded by significantly boosting their counter terrorism capabilities.¹³

On 5 April 2002, in the wake of the September 11 terrorist attacks, all States and Territories in Australia agreed at the Leaders' Summit on Terrorism and Cross Jurisdictional Crime that they would refer powers to the Commonwealth in relation to terrorism.

On 4 December 2002 the Parliament of NSW passed the *Terrorism (Commonwealth Powers) Act 2002* referring power to the Commonwealth to make laws with respect to terrorist acts. On the same day, the *Terrorism (Police Powers) Act 2002* was passed in NSW. The intention of the NSW Act was to confer special powers on NSWPF officers to deal with imminent threats of terrorist acts and to respond to terrorist acts. The powers contained within the NSW Act were similar to reforms introduced in Britain under the *Terrorism Act 2000*.

As a result of a decision of COAG on 27 September 2005, the *Terrorism Legislation Amendment (Warrants) Act 2005* and the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* were passed by the NSW Parliament, amending the NSW Act. The amendments allowed for covert search warrants to be issued and executed and PDOs to be made, in addition to the original special police powers.

4.2 Objectives of the NSW Act

The objects of this Act, as derived from the second reading speeches and detailed in the explanatory notes, are to:

- confer special powers on police officers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after one has occurred

¹³ Australian Government, *Review of Australia's Counter Terrorism Machinery*, January 2015, p3.

- to detain suspected people for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act
- to enable the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the NSW Crime Commission for the purposes of responding to or preventing terrorist acts (including obtaining evidence of the NSW offence of membership of a terrorist organisation)¹⁴

When exercised before the occurrence of a terrorist act, the object of the scheme is to provide police with extraordinary powers that will assist in preventing the occurrence of the terrorist act. When exercised after the occurrence of a terrorist act, the object of the scheme is to assist in the apprehension of the perpetrators of the terrorist act and to prevent further terrorist acts occurring.

¹⁴ Section 310J *Crimes Act 1900*.

5. STATUTORY REVIEW

5.1 Summary of submissions received

In relation to the submissions received for the 2015 Review, many stakeholders reiterated submissions made to the 2007, 2010 and 2013 reviews. Accordingly, this Review only discusses those issues not previously addressed, as it considers the matters raised in previous reviews have been sufficiently addressed. As there were a number of submissions that raised similar concerns, these are addressed below, grouped according to the relevant provisions in the NSW Act.

5.2 Review of Part 2 Special Powers

Part 2 of the NSW Act provides that the Commissioner of Police may, with the concurrence or confirmation of the Police Minister, give an authorisation for the exercise of special powers to find a target person or vehicle, or to prevent or respond to a terrorist act in a particular area. The use of the powers may be authorised if there is threat of a terrorist act occurring in the near future or when a terrorist act has been committed. The authorisation of special powers enables a police officer to request proof of identity, search a person, vehicle or premises without a warrant, place a cordon around the target area, and seize and detain anything that the officer suspects on reasonable grounds may be used or may have been used to commit a terrorist act or may provide evidence of the commission of a serious indictable offence

The special powers under Part 2 of the NSW Act were authorised for the first time in raids carried out in Sydney in November 2005 as part of *Operation Pendennis*. The authorisation named 13 target people under s7(1)(a) of the NSW Act for the purpose of finding such people. The authorisation was in effect from 7 November 2005 to 13 November 2005. No powers were exercised under the authorisation, as the police searches and arrests occurred under other law enforcement powers. The use of the powers has not been sought or authorised since.

The NSWPF submitted that it strongly supports the continuation of special powers under Part 2 of the NSW Act. The NSWPF submitted that powers under Part 2 of the

NSW Act have become a vital tool in preventing acts of terrorism, noting that they have been used recently in numerous counter terrorism operations.

The Law Society of NSW and Legal Aid NSW reiterated concerns made to previous reviews regarding the broad application of the special powers, in that they may be triggered by a person or vehicle merely being present in the 'target area'. The Public Defenders submitted that they were unaware of any authorisation of special powers under Part 2 of the NSW Act and as such, suggested that consideration be given to the repeal of these powers. Alternatively, Public Defenders supported the submission made by the Law Society of NSW. As the above issues have been addressed in the 2013 review of the NSW Act, the discussion will not be repeated.

The Law Society of NSW, Legal Aid NSW and the Chief Judge of the District Court also criticised the lack of judicial review of authorisations under section 13 of the NSW Act, and that the Part 2 powers should also be the subject of the Ombudsman's oversight functions. Similarly, the Privacy Commissioner noted submissions by former NSW Privacy Commissioners, which expressed their strong view about the need for proper safeguards, supervision and oversight for the overall operation of the NSW Act. The current submission of the Privacy Commissioner noted that extending external oversight to other parts of the NSW Act achieves consistency in the external oversight arrangements set out in the NSW Act.

This recommendation has been addressed in the 2007 and 2013 reviews, which noted that Ombudsman's monitoring role under Parts 2A and 3 of the NSW Act reflects the extraordinary nature of the powers contained in those parts. The Ombudsman rightly retains its general oversight and complaints handling roles in relation to Part 2, and the Police Integrity Commission (**PIC**) also retains its standard review functions over the exercise of these powers. As such, the Review considers that no legislative change is required to the current oversight functions of the NSW Ombudsman.

5.3 Part 2A Preventative Detention Orders

Recommendation 1:

Amend the NSW Act to extend the sunset of the preventative detention order powers (due to sunset on 16 December 2015) until 16 December 2018.

Part 2A of the NSW Act creates a preventative detention scheme. The NSW preventative detention scheme commenced on 16 December 2005 and is due to sunset on 16 December 2015. It is part of uniform model laws as agreed to at the COAG meeting on 27 September 2005.

Police can apply to the Supreme Court for a PDO if there is a reasonable suspicion that the person will engage in a terrorist act, or has done an act in preparation for, or planning, a terrorist act, and the PDO would assist in preventing a terrorist act occurring. PDOs can also be made where a terrorist act has occurred in the past 28 days and the order is reasonably necessary to preserve evidence. The maximum period for a PDO under the scheme is 14 days.

At the time of the Ombudsman's 2014 Review, no PDO powers had been used since the commencement of the NSW Act. However, PDOs were used to detain persons following a joint counter terrorism operation on 18 September 2014 (Operation Appleby). This is the first time that PDOs were used in NSW.

The Law Society of NSW, Legal Aid NSW and the Public Defenders all reiterated their opposition to the PDO provisions, noting that persons who are not charged with, or found guilty of, a criminal offence should not be imprisoned by the State without trial. Stakeholders further noted that the mere use of the powers does not, of itself, demonstrate the laws are necessary.

The National Security Law and Policy Division, Commonwealth Attorney General's Department (**Commonwealth AGD**) submitted that in relation to the operation of the PDO scheme, it is important that national consistency be maintained to the greatest extent possible, noting that legislative policy is based on each jurisdiction's particular situation. In the case of terrorism, the Commonwealth AGD acknowledges that the

risk is not necessarily consistent across all jurisdictions. The Commonwealth AGD submitted that given the demonstrated need for the PDO scheme following its use in Operation Appleby, the Commonwealth AGD supports NSW extending the NSW PDO scheme beyond the sunset date of 16 December 2015. Similarly, the Australian Federal Police (**AFP**) submitted that PDO powers remain critical in the range of legislative tools available to the AFP and the NSWPF in enabling the successful disruption of terrorist activity and ensuring public safety.

The Ombudsman's 2011 Report noted serious concerns expressed by some police in NSW about the operational effectiveness of the PDO powers. As noted earlier, similar concerns were included in the 2013 COAG Review of Counter-Terrorism Legislation and the 2012 Annual Report of the Independent National Security Legislation Monitor, both of which recommended the repeal of these types of powers. At the time of the Ombudsman's 2014 Review the PDO powers had not been used and the Ombudsman was not in a position to scrutinise and report on whether concerns about their operational utility have been realised. However, as noted above, these powers were first used in NSW in September 2014 in Operation Appleby.

The Ombudsman's 2014 Report noted that these powers were designed to complement Commonwealth powers to combat terrorism. The Ombudsman's 2014 Report noted that the time of writing, there was heightened debate about the adequacy of Commonwealth counter-terrorism laws, including proposed new measures announced by the Commonwealth Government, which included an extension of the Commonwealth PDO powers that were due to expire in 2015.¹⁵ At the time of the 2014 Report, the NSW Commissioner of Police supported retaining the preventative detention powers, arguing that repealing these powers would result in a gap in law enforcement capability to prevent a suspected terrorist attack.¹⁶ The Ombudsman's 2014 Report considered the Commissioner's arguments, and concluded that the expiry of these powers would appear to leave a gap in law enforcement powers. However, the Ombudsman noted that it remained to be considered whether this gap is of such a magnitude and significance that it justifies

¹⁵ NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2014, < <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/parts-2a-and-3-of-the-terrorism-police-powers-act-2002-review-period-2011-2013>>. pi,

¹⁶ *Ibid*, p1.

the continuation of these extraordinary powers, and whether this gap could be appropriately addressed through other existing provisions.

The present Review notes that the Commonwealth Government extended its PDO powers for a further three years in December 2014 (sunset on 7 September 2018) and agrees that the NSW powers set out in the NSW Act were designed to complement Commonwealth powers to combat terrorism. The AFP and the NSWPF consider that the PDO powers remain crucial in their 'toolkit' of law enforcement powers, including the general police powers in the *Law Enforcement (Powers and Responsibilities) Act 2002*, as well as the extraordinary powers in the NSW Act. Similarly, the Second Reading Speech for the Commonwealth Bill acknowledged that "*in the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage emerging threats*".¹⁷ While the Review notes the concerns raised by stakeholders regarding the retention of the powers, the Review considers that there are adequate safeguards in place to guard against the abuse of such extraordinary powers. Therefore, the Review concludes that the PDO provisions should be retained, and the sunset should be extended for a further three years, until 16 December 2018.

5.3.1 Duration of PDOs and their application to children

In the alternative, the Law Society of NSW and Legal Aid NSW suggested the need for additional safeguards for the PDO regime, including that a PDO should only last for a maximum period of 48 hours; that it should not apply to persons aged under 18 years (currently PDOs cannot apply to persons aged under 16 years); and that the NSW Act should specify a maximum period of detention to avoid the possibility of multiple orders being made.

As these proposals have been considered and not adopted in previous reviews, the discussion will not be repeated in this Review.

5.3.2 Rules of evidence

Stakeholders reiterated submissions from past reviews, noting concern that the Part 2A powers did not require any evidence to be provided in support of an application

¹⁷ Senator the Hon George Brandis QC, Attorney-General, Senate Hansard, 24 September 2014, p. 65.

under section 26G of the NSW Act and considered that the normal rules of evidence should apply, including that the person's lawyer be entitled to review the evidence against their client.

As these proposals have been considered and not adopted in previous Reviews, the discussion will not be repeated in this Review.

5.3.3 Monitoring communications between a person and their lawyer

Submissions from the Chief Judge of the District Court, the Law Society of NSW and Legal Aid NSW all reiterated their concern in relation to section 26ZI of the NSW Act, noting that monitoring communications between a person and their lawyer does not allow for full and frank disclosure by the client, and should be removed.

As these proposals have been considered and not adopted in previous Reviews, the discussion will not be repeated in this Review.

5.3.4 Release of a person from preventative detention

The Law Society of NSW noted the power in section 26W of the NSW Act that allows a person to be released from detention during the period of a PDO may result in the person being harassed and families disrupted, by people being released multiple times and then brought back to detention. The submission sought the removal of this provision.

The Review notes that section 26W is an important provision, as it recognises that at some stage in a law enforcement investigation a person who is being detained under a PDO may need to be arrested for a criminal offence and questioned under the Commonwealth investigation scheme.¹⁸ As such, section 26W(1) of the NSW Act provides that the police officer who is detaining a person under a PDO may release the person from detention under the order. The section goes on to note that a person may be released, for example, so that the person may be arrested and charged with an offence and otherwise dealt with in connection with the charge.

¹⁸ Part IC *Crimes Act 1914* (Cth).

The safeguards in section 26W are designed to preserve the policy intent of each of both of the legislative schemes, including pre-charge detention under the Commonwealth *Crimes Act 1914* as well as the NSW PDO provisions. It ensures that if a person is moved into the investigation scheme, it would not act as a “time out” for either scheme, meaning that a PDO would continue to run, even if a person was arrested and questioned. Further, if a person was arrested, they would be clearly informed of their release from preventative detention and the fact that they were now under arrest and subject to possible police questioning. The Review considers that this is an important section to allow police the flexibility to take people out of detention for specified purposes and it should be retained.

5.3.5 Prohibited contact orders

The Law Society of NSW submitted that while section 26N allows the Supreme Court to make a prohibited contact order to prevent a detained person contacting specified persons, section 26Y(3) provides that a police officer is not required to inform the detained person that such an order has been made, nor the name of a person specified in the order. The Law Society of NSW considers that section 26Y(3) should be removed as it defeats the purpose of section 26N.

Regarding section 26Y(3), which provides that a police officer is not required to inform the detained person that such an order has been made, nor the name of a person specified in the order, the Review notes that this has previously been raised by the Law Society of NSW in its submission to the 2007 review. This provision has also been derived from the Commonwealth scheme, in maintaining consistency of the overall provisions. The prohibited contact orders are designed to prevent suspected co-conspirators from conferring or “tipping each other off”. The secrecy of the order is intended to prevent the detained person from discerning the extent of police knowledge of the alleged planning and conspiracy to commit a terrorist act.

The Review acknowledges that in some circumstances, the detained person will be able to determine that a prohibited contact order has been made against a particular person, for example, if they are a family member of employee who they are otherwise entitled to contact under section 26ZE for example. If this were to happen, section

26N(6) allows the person subject to the PDO to make an application for the revocation of the prohibited contact order.

5.3.6 Requirement to provide information to the detained person

The Law Society of NSW's submission noted the inconsistency between sections 26Y(1) and 26Z(1), which require certain information to be provided to persons as soon as practicable after they are detained or when a PDO is made, and section 26ZA(1), which provides that the provision of requisite information is not necessary if it is impracticable to do so. Accordingly, the Law Society of NSW considers that section 26ZA(1) should be removed.

The Review notes that section 26ZA(1) of the NSW Act has been adopted from the Commonwealth Act and it is uniform in terrorism legislation across Australian jurisdictions. The provision is restricted in that compliance is only not required if it is the actions of the person being detained under the PDO that make it impracticable to do so. The provision does not allow for police to simply disregard the requirement to provide information under sections 26Y(1) and 26Z(1) of the NSW Act. The Review does not consider that there is an inconsistency between sections 26Y(1), 26Z(1) and 26ZA(1) of the NSW Act and accordingly, recommends that no legislative change is required.

5.3.7 Duration of the interim period of PDOs

The NSWPF submission raised a number of concerns with the existing PDO scheme, noting that in their current state they are not workable and are of limited value.

The NSWPF submitted that the operational experience in Operation Appleby demonstrated that the interim PDO period of 48 hours is not sufficient time for police to either gather sufficient evidence for an arrest, or develop material to justify an extended detention period to 14 days. The NSWPF notes that initially the objects of the NSW Act have been to either quickly arrest persons based on already known information or detain them for short periods of time to prevent evidence being destroyed. However, the NSWPF submits these persons are now likely to be the key suspects against whom there is insufficient evidence for a charge. Therefore, NSWPF suggests the interim detention period is now also necessary for the

investigation and exploitation of search warrant material. The AFP raised similar issues regarding the utility of the interim detention time period to gather evidence in the current threat environment.

Accordingly, the NSWPF submitted that extending the interim PDO period from two to four days would enable law enforcement agencies to have adequate time to investigate seized material and complete an application for a final PDO, apply for a control order, or charge the person with commission of an offence.

While under the Commonwealth legislation a PDO can only last for 48 hours, each State and Territory's PDO legislation enables the further detention of individuals under a PDO for up to a total of 14 days. This extended detention time is provided by jurisdictions, and not in the Commonwealth provisions, due to concerns that the longer period of executive-based detention would be inconsistent with the separation of judicial power under the Constitution that applies at the Federal level. For those jurisdictions that provide for an interim PDO period, the length of detention varies, however no jurisdiction provides for an interim PDO period of longer than 48 hours.¹⁹ Further, the Commonwealth Government is currently considering further amendments to its counter-terrorism legislation, which may address some of the concerns raised by the NSWPF regarding the operation of PDOs. Discussions between jurisdictions and the Commonwealth are ongoing, in the development of these proposed reforms. Accordingly, the Review considers that it is preferable to await the outcome of those amendments, to determine whether further changes are required in NSW.

5.3.8 Protection of sensitive evidence in PDO applications

Second, the NSWPF were concerned that, while the interim PDO application is *ex parte*²⁰, the NSW Act does not allow the court to rely on protected information when making a further PDO. This means that any evidence relied on at the further hearing would need to be disclosed to the person and their legal representative. The NSWPF are concerned that such applications are likely to contain highly sensitive material

¹⁹ Northern Territory and Western Australia do not provide for interim PDO periods, rather, after a person is first taken into custody under a PDO, they must be brought before a court for a review of the PDO as soon as practicable.

²⁰ An *ex parte* hearing is one where one of the parties is not present or represented.

which, if released, risks compromising ongoing investigations. The AFP identified the same issues raised by the NSWPF regarding the absence of an effective mechanism to protect sensitive material in PDO applications.

As noted above, the Commonwealth Government is currently considering further amendments to its counter-terrorism legislation, which may address some of the concerns raised by the NSWPF regarding the imminence test for PDOs. Given that discussions between jurisdictions and the Commonwealth are ongoing in the development of further proposed counter terrorism reforms, the Review considers that it is preferable to await the outcome of those amendments, to determine whether changes are required in NSW.

5.3.9 Requirement to prove that a terrorist attack must be imminent

Third, the NSWPF submitted the PDO provisions currently require police to prove that a terrorist attack must be imminent and expected to occur at some time in the next 14 days (s26D). NSWPF note that the term ‘must be imminent’ implies the need for certainty and there would never be certainty in relation to applications of this kind.

As noted above, the Review considers that it is preferable to await the outcome of proposed Commonwealth amendments to its counter terrorism legislation, to determine whether changes are required to the NSW Act.

5.3.10 Prohibition on questioning a person subject to a PDO

Recommendation 2:

Note that the operational issues relating to PDOs raised by the NSWPF are currently being progressed at the national level.

The NSWPF submission noted that the current prohibition on questioning a person detained under a PDO in section 26ZK of the NSW Act has the potential to raise difficulties. Specifically, the NSWPF notes that there may be situations where a person may volunteer information that may assist in the investigation of an offence, however under the current scheme police would be prevented from questioning the person. Accordingly, the NSWPF suggest an amendment to section 26ZK of the

NSW Act to permit police to question a person if they volunteer to make a statement, and permit police to ask the person if they wish to make a statement.

The Review notes that the prohibition on investigative questioning is appropriate to ensure the purely preventive purpose of PDOs. The purpose of PDOs is to take a person into custody in order to prevent an imminent terrorist act occurring or to preserve evidence relating to a recent terrorist act. This position has been confirmed by the Commonwealth AGD in its submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry on the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which reiterated that the original purpose of the PDO scheme was preventing a terrorist act or preventing the destruction of evidence relating to terrorist act. The Commonwealth AGD also stated that the changing threat level has not resulted in the existing scheme for questioning in Part IC of the Commonwealth Crimes Act, and the safeguards within, being inappropriate. In the same Inquiry, the AFP confirmed they had not requested the Commonwealth legislation be changed to enable questioning, given the purpose of a PDO is to prevent rather than investigate.²¹

The Review notes the need for consistency in counter terrorism legislation, as far as possible, which has been acknowledged by the Commonwealth Government in the context of PDO powers. Proposed amendments to the NSW PDO scheme risk being constitutionally invalid to the extent that they are inconsistent with the Commonwealth scheme. However, the Review also recognises that situations in jurisdictions may differ, where for example differing threat levels may require different legislative responses. As such, the Review considers that the prohibition on questioning should be pursued at the Commonwealth level in the first instance.

5.4 Covert Search Warrants

Part 3 of the NSW Act relates to covert search warrants. These provisions commenced on 16 December 2005 and enable specially authorised police officers or staff of the NSW Crime Commission to covertly enter and search premises, under the authority of a special covert search warrant, for the purposes of responding to or

²¹ Australian Federal Police, Submission 36 to the Parliamentary Joint Committee on Intelligence and Security Inquiry on the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p. 5.

preventing terrorist acts. Only eligible Supreme Court judges can issue such warrants.

The NSWPF submitted that it strongly supports the continuation of the covert search warrant powers under Part 3. Further, the NSWPF submitted that while the use of covert search warrant powers has been limited, their effectiveness has been previously demonstrated in previous terrorism investigations. The NSWPF considers the covert search warrant powers are another vital tool in the suite of police powers under the NSW Act and should be retained.

Public Defenders submitted that, given the conclusions in the Ombudsman's 2014 Review, continuation of Part 3 of the NSW Act is not opposed. However, Public Defenders also note that the NSW Crime Commission has asked that its powers under this Part be removed, and support this removal. This recommendation was also supported by Legal Aid NSW.

The NSW Privacy Commissioner noted the view of the NSW Crime Commission, that its powers under Part 3 of the NSW Act should be removed, acknowledging that powers conferred by the NSW Act should be strictly limited to agencies that would directly use them. The Ombudsman's 2014 Report recommended consideration of this issue, which is addressed in Chapter 6.

The Law Society of NSW reiterated its opposition to the covert search warrant powers, noting that the requirement for notice of an intended search is an important safeguard and its absence risks abuse of the powers. The Law Society of NSW submitted that the covert search warrant scheme seriously undermines the balance between the state's right to investigate and prosecute crime and the rights of individuals to carry out their proper business and lives without fear of intrusion by the State.

As these concerns have previously been raised and addressed in detail in the fourth review of the NSW Act (tabled on 28 August 2013), they will not be discussed again in this Review.

5.4.1 Changes to the covert search warrant template

The Privacy Commissioner's submission to this Review acknowledged the amendments made by the NSWPF to the standard covert search warrant application template, to state whether authority is sought to enter premises adjoining the subject premises and a requirement that an address or description of adjoining premises be provided where the authority has been granted. The Privacy Commissioner noted submissions by former Privacy Commissioners to require a separate search warrant to enter adjoining premises, and suggested the NSWPF standard operating procedures for covert search warrants should include similar considerations by a warrant application of whether entry to adjoining premises is needed and for what reasons.

As noted in the 2007 and 2013 reviews, the covert search warrant powers under s.27O of the NSW Act only allow police to enter adjoining premises for the purposes of entering the subject premises, and a notice must be given to the adjoining occupier after execution of the warrant. Further, s.27J and 27K of the NSW Act require that any proposal to enter adjoining premises be included in the application for the search warrant for the subject premises, so that the court may take it into consideration when determining the application. On this basis, the Review considers that no further changes are required.

5.5 Ombudsman's oversight of Parts 2A and 3 of the NSW Act

Recommendation 3:

The NSWPF should continue to work with the office of the NSW Ombudsman and DoJ to determine reasonable guidelines and timeframes for complying with the NSW Act's reporting requirements, and to consider whether further reforms are required to ensure that any Commonwealth secrecy provisions are appropriately maintained.

The Privacy Commissioner noted the NSW Act's deliberate departure from long-standing principles of criminal justice and that the nature of the powers conferred by it are such that proper oversight of the decision-making and use of these powers is critically important. On this basis, the Privacy Commissioner submitted her strong support for the NSW Ombudsman's ongoing role in scrutinising the exercise of preventative detention powers and covert search warrants.

The Privacy Commissioner's submission also noted the NSW Ombudsman's 2014 Report, which recommended the retention of the Ombudsman's oversight functions of Parts 2A and 3 of the NSW Act, and the Privacy Commissioner supports this position.

The NSWPF submitted that the exercise of the Ombudsman's powers under section 26ZO of the NSW Act following the first use of the interim PDOs in September 2014 brought to attention significant practical issues that require further attention. The NSWPF advised that the Ombudsman issued to 'requirements to produce information' following the use of the powers, and that responding to the Ombudsman's requests required extensive police resources (including obtaining legal advice regarding the highly sensitive nature of the information being requested).

The NSWPF submission also noted that they are often not the single source of information, given that the NSWPF works with the AFP, NSW Crime Commission and ASIO as part of the Joint Counter Terrorism Team (**JCCT**), and that this gives rise to a question as to whether information sought is subject to Commonwealth legislative secrecy provisions that trigger criminal sanctions if breached. The NSWPF also expressed concern that the information sought by the Ombudsman may involve confidential human sources and an ongoing investigation. The submission notes that its partner agencies have also raised concerns regarding the documents and information being disclosed to the NSW Ombudsman, which would affect the NSWPF's relationship with its JCCT partners.

The Review considers that the Ombudsman's oversight of Parts 2A and 3 of the NSW Act are crucial, as these powers are extraordinary in that they depart from long-established principles regarding the detention of individuals. In enacting these special powers, the NSW Parliament considered that it was necessary to establish a robust scrutiny function for the NSW Ombudsman.²² These safeguards have been reiterated by the Commonwealth Government, which also noted the continuing importance of

²² NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2014, < <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/parts-2a-and-3-of-the-terrorism-police-powers-act-2002-review-period-2011-2013>>, p32.

proper oversight of counter terrorism powers.²³ The Ombudsman's 2014 Report notes that each State and Territory also has reporting requirements or oversight mechanisms attached to the PDO provisions, to ensure ongoing scrutiny of these powers. As such, the Review considers that it is appropriate for the Ombudsman to retain this oversight function, but that work should continue between the NSWPF, the office of the Ombudsman and the DoJ to address the issues identified in the NSWPF submission.

5.6 Additional issues raised by stakeholders

In addition to the issues raised regarding the PDO scheme, the AFP also identified a separate inconsistency between powers under the *Criminal Code Act 1995* (Cth) (**the Criminal Code**), and *Crimes Act 1914* (Cth) (**the Cth Crimes Act**) and the NSW Act. Specifically, the AFP notes that having seized a device pursuant to the Cth Crimes Act, pursuant to section 3LA of the Cth Crimes Act a police officer may apply to a magistrate for an order requiring the specified person to assist officers in accessing this data. The AFP notes that no such provision exists under the NSW Act, to allow a police officer to compel the owner to assist with retrieving data from it. The AFP submits that consideration should be given to including a similar power in the NSW Act.

Section 3LA was inserted into the Cth Crimes Act in 2001. The Review considers that it is an abrogation of the right against self-incrimination, that is, that a person should not be forced to answer questions if those answers may incriminate them. Further, the Review is unaware of any review of the Commonwealth power, which demonstrates that it has been effective as a law enforcement investigation tool.

The Review notes that criticism has been levelled at section 3LA for setting up a situation where a person who is suspected of a serious offence, such as terrorism, who knows that evidence exists on an encrypted device, is likely to choose to defy an order and face a maximum two year penalty, rather than providing the encryption code and risk higher penalties for serious criminal offences.

²³ The Hon. Tony Abbott (Prime Minister), *New Counter-Terrorism Measures for a Safer Australia*, Canberra, 5 August 2014.

The Review agrees with the AFP submission that over the longer term the NSW Government should explore whether such a provision should be included in the NSW Act. However, the Review considers this should only occur after it has been established that section 3LA is an effective law enforcement tool.

Given that encrypted devices may come into the possession of the NSWF and AFP in ways other than seizure under section 3E of the Cth Crimes Act, consideration may also be given to requesting the Commonwealth to amend the Cth Crimes Act to allow for orders under section 3LA to be sought in relation to devices that have been seized or that are otherwise in the lawful possession of Police.

6. OMBUDSMAN'S REVIEW OF PARTS 2A AND 3 OF THE ACT

Recommendation 4:

Amend Part 3 of the NSW Act to remove the powers conferred on the NSW Crime Commissioner and staff of the NSW Crime Commission in that Part.

The Ombudsman made three recommendations in his 2014 Review of Parts 2A and 3, which impact upon the operations of the NSWPF and the DoJ, including Corrective Services NSW (**CSNSW**) and Juvenile Justice NSW (**JJ**). The Ombudsman's recommendations, all of which are supported by this Review, are as follows:

1. CSNSW finalise its procedures for managing a person subject to a PDO, by September 2014.
2. The Commissioner of Police, by November 2014, review the police Standard Operating Procedures (**SOP**) and CSNSW and JJ procedures to ensure they are consistent, comprehensive and integrated.
3. The NSW Attorney General, in the next statutory review, consider the view of the NSW Crime Commissioner that Part 3 of the NSW Act should be amended to remove the powers conferred on the Crime Commissioner and staff of the NSW Crime Commission.

Ombudsman's Recommendation 1: CSNSW finalise its procedures for managing a person subject to a PDO, by September 2014.

Discussion

This recommendation is completed. CSNSW Local Operating Procedures (**LOP**) have been finalised in the event CSNSW is requested by the NSWPF to house any person detained under a PDO. The LOPs ensure the safe and secure custody of these detainees and provide detailed operational guidance to staff.

Ombudsman's Recommendation 2: The Commissioner of Police, by November 2014, review the police SOPs and CSNSW and JJ procedures to ensure they are consistent, comprehensive and integrated.

Discussion

This recommendation is underway. The NSWPF SOPs in relation to PDOs are presently being reviewed to ensure they align with CSNSW and JJ procedures. The CSNSW LOPs have been drafted in consultation with key internal and external stakeholders, including the Anti-Terrorism and Security Group of the NSWPF, JJ and the NSW Ombudsman.

Ombudsman's Recommendation 3: The Attorney General, in the next statutory review, consider the view of the NSW Crime Commissioner that Part 3 of the NSW Act should be amended to remove the powers conferred on the Crime Commissioner and staff of the NSW Crime Commission.

Discussion

The Ombudsman's 2014 Report notes that 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 NSW Crime Commission. The NSW Crime Commissioner advised that the use of those powers would ordinarily be deferred to the NSWPF, and that the NSW Crime Commission lacks the appropriately trained staff and equipment necessary to conduct covert searches.

The Review supports this recommendation, agreeing with the submission of the NSW Privacy Commissioner, that the extraordinary powers conferred by the NSW Act should be strictly limited to agencies that would directly use them. The NSWPF supports this recommendation.

7. CONCLUSION

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

Most submissions to this Review re-iterated issues and concerns that were discussed and resolved in previous reviews, noting that while some of the powers had now been used for the first time, their use alone did not necessarily justify the retention of the powers.

This Review has been informed by and has considered the Ombudsman's 2014 Review. All of the Ombudsman's recommendations are supported and two have either already been implemented or are close to finalisation.

The Review agrees that national consistency in counter terrorism legislation is of great importance, given that the extraordinary powers were enacted as part of a complementary scheme. Consistent with the Commonwealth Government's recent extension of its PDO powers for a further three years, the Review agrees that in the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage such emerging threats. Furthermore, the Review acknowledges submissions made by the AFP and the NSWPF, which consider that the continued access to PDOs is a valuable operational response of last resort, to ensure that law enforcement agencies can undertake action to quickly disrupt imminent threats.

As such, the Review considers that the NSW PDO powers should be retained, and their operation extended for a further three years, consistent with the Commonwealth legislation. The NSW Ombudsman will maintain the oversight functions of Part 2A and 3 of the NSW Act, to scrutinise the exercise of these powers by law enforcement officers.

ANNEXURE A – LIST OF SUBMISSIONS TO THE REVIEW

Submissions to the Review were received from the following individuals and organisations:

- The Chief Judge of the District Court
- National Security Law and Policy Division, Commonwealth Attorney-General's Department
- Australian Federal Police
- The Public Defenders
- Law Society of NSW
- NSW Police Force
- Office of the Privacy Commissioner
- Legal Aid NSW