Review of the
Terrorism (Police Powers) Act 2002

NSW Attorney General's Department

August 2006

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ISBN: 0 7347 2899 9
Published by the NSW Attorney General's Department.
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Executive Summary

The *Terrorism (Police Powers) Act 2002* (the Act) was assented to on 5 December 2002. The Act confers special powers on police officers to deal with imminent threats of terrorist activity and to respond to terrorist attacks.

At the time of consultation for this Review, the powers had not yet been exercised, and as such most submissions were concerned with the policy of the scheme and the adequacy of the safeguards. There were approximately thirty proposals to reform the Act made by four parties.

It is the conclusion of the Review that the policy and objectives of the Act still remain valid. There are five recommendations that aim to clarify the original policy intention of certain provisions.

These recommendations were made in consultation with the Counter Terrorism Laws Taskforce.

Recommendations

Recommendation 1: That s14(2) be amended to reflect that police officers need not be aware of the full terms of the authorisation.

Recommendation 2: That s17(3) and s18(2) should be amended so as to be consistent with s204 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Recommendation 3: That s23 be amended so as to be consistent with the *Law Enforcement (Powers and Responsibilities) Act 2002* by imposing a duty on a plain-clothed police officer to provide the person subject to the exercise of the power with evidence that they are a police officer.

Recommendation 4: That s23 be amended to insert a notice provision, similar to s201 of the LEPAR Act in relation to offences contained in the Act.

Recommendation 5: Require that the authorisations be reasonably proportional to the terrorist threat as assessed by the Commissioner for Police.

1. Introduction

1.1 Terms of reference for the review

Section 36 of the Act provides as follows:

36 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 12 months from the date of assent to this Act and every 12 months thereafter.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of each period referred to in subsection (2).

The Act was assented to on 5 December 2002 and commenced operation on 15 December 2002.

1.2 Conduct of the Review

The Review was conducted on the Attorney General's behalf by the Criminal Law Review Division of the Attorney General's Department.

The Review process involved a detailed consideration of the reforms introduced by the Act, and the objectives of those reforms.

Consultation was conducted in relation to the operation of the Act. Key identified stakeholders were invited to make submissions in relation to the Review, however, the Review accepted submissions from any interested group or individual. Any member of the public was free to make a submission to the Review. A schedule of persons and organisations that made submissions is at **Appendix 1**.

The Criminal Law Review Division prepared this report, which is the result of the review process and takes into account the responses received.

2. Background to the Introduction of the Act

2.1 Background to the Act

The Act confers special powers on police officers to deal with imminent threats of terrorist acts and to respond to terrorist acts.

In his second reading speech to Parliament in relation to the Act (NSW Legislative Assembly Hansard, 19 November 2002, page 6978) the then Premier, the Hon. Bob Carr MP stated:

> The new powers are not intended for general use. In ordinary circumstances we rely on standard police investigations and the co-operation of Australian and international law enforcement and intelligence agencies. However, when an attack is imminent, all resources must be able to be mobilised with maximum efficiency. Similarly, when an attack has just occurred, there is an increased chance of catching the terrorists, and this chance must be seized.

2.2 Objectives of the Act

The object of this Act, as derived from the second reading speech and detailed in the explanatory note, is 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.

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.

2.3 Summary of the provisions of the Act

The Act provides that the Commissioner of Police (or another senior police officer) may, with the concurrence or confirmation of the Police Minister, give an authorisation for the exercise of special powers:

(a) for the purpose of finding a particular person named or described in the authorisation (the *target person*), or
(b) for the purpose of finding a particular vehicle, or a vehicle of a particular kind, described in the authorisation (the *target vehicle*), or
(c) for the purpose of preventing or responding to a terrorist act in a particular area described in the authorisation (the *target area*).

Section 5 contains the test for the authorisation of the use of the powers.

Section 6 permits the exercise of special powers to be authorised when the police officer giving the authorisation is satisfied that there are reasonable grounds for believing that a terrorist act has been committed and that the exercise of the powers will substantially assist in apprehending the persons responsible for committing the terrorist act.

The authorisation enables a police officer to demand that a person give his or her name and address (and to request proof of identity) if the officer reasonably suspects that the person is the target person (or in his or her company), is in the target vehicle or is in the target area (including entering or having just left the target area). Such a person is also liable to be searched without warrant, as is any vehicle that the officer reasonably suspects contains the target person, or is the target vehicle or that is in the target area. An authorisation also permits a police officer to enter and search, without warrant, any premises that he or she reasonably suspects contains a target person or target vehicle or that are in the target area.

In relation to any search, a police officer is authorised to 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.

2.4 The utilisation of the provisions of the Act

The powers under the 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 persons under s7(1)(a) of the Act for the purpose of finding such persons.

The authorisation was in effect from 7 November 2005 to 13 November 2005. No powers were exercised under the authorisation.

The police searches and arrests which took place as part of Operation Pendennis occurred under other law enforcement powers.

As consultation for this Review took place before the authorisation in November 2005, commentary on the use of the powers will be sought in the next review of the Act.

2.5 Amendments to the Act prior to consultation

Miscellaneous Amendments - *Crimes Legislation Amendment (Terrorism) Act 2004*

The Act was amended by the *Crimes Legislation Amendment (Terrorism) Act 2004,* the relevant sections of which commenced on 6 July 2004.

Section 5 was amended to clarify the circumstances in which the special powers conferred by the Act may be authorised. Originally the special powers were only exercisable if the Commissioner or a Deputy Commissioner of Police (or other available senior police officer) was satisfied that there were reasonable grounds for believing that there was an imminent threat of a terrorist act. The test was amended to require the Commissioner etc to be satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future.

Section 14A was inserted into the Act to authorise the Commissioner of Police or a Deputy Commissioner (or other available senior police officer) to give directions to government agencies (and their members and officers) to facilitate the exercise of the special powers conferred on police officers under the Act when an authority to exercise those powers is given.

Section 19A was inserted into the Act to confer specific powers on police officers to place a roadblock or other cordon in or around a target area where police officers are authorised to exercise special powers under the Act to search persons, vehicles or premises.

These amendments were made to the Act due to specific issues that were raised during counter-terrorism exercises conducted by the NSW Police Force and other emergency services.

The NSW Police Force submitted that as a result of recent amendments (as of February 2005) the Act provides a better scheme than when first enacted.

2.6 Amendments to the Act made after consultation

There were also a number of amendments that took place after consultation which will be the subject of the next Review of the Act:

(a) **Covert Search Warrants** – *Terrorism Legislation Amendment (Warrant) Act 2005;* and
(b) **Preventive Detention** - *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*.

3. Discussion of Submissions

3.1 Submissions Received

The NSW Attorney General's Department sent out consultation letters to key stakeholders. Written submissions to the review were invited, particularly with respect to any comments on the provisions of the Act.

The following persons and bodies advised that they had no submissions to make in relation to the Statutory Review:

- The Director of Pubic Prosecutions;
- The Department of Corrective Services;
- Commonwealth Attorney-General's Department; and
- The Australian Federal Police.

The following persons and agencies stated that the objects and the terms of the Act remained valid:

- Solicitor General;
- The Ministry for Police; and
- NSW Police.

The following four submissions made substantive recommendations for the amendment of the Act:

- The Law Society of NSW;
- The Human Rights and Equal Opportunity Commission;
- The Public Interest Advocacy Centre; and
- Mr Dale Mills.

3.2 The Law Society of NSW

The submission of the Law Society noted that the Act conferred wide-ranging powers on police including the power to:

(a) require disclosure of identity (s16);
(b) stop and search a person without a warrant (s17);
(c) stop and search a vehicle in a target area without a warrant (s18); and
(d) enter and search premises without a warrant (s19).

3.2.1 Exercising powers without a copy of the authorisation (s14)

The Law Society was concerned, in light of these extraordinary powers, that a police officer may exercise these powers whether or not the officer has been provided with or notified of the terms of the authorisation (s14). The Law Society submitted that a police officer could not act under the authorisation, or form a suspicion based on reasonable grounds, if he or she does not know the terms of the authorisation.

Submission 1: The Law Society submitted that s14 should be deleted.

Discussion

It was not the intention of the Parliament to allow police officers to exercise powers under the Act without being informed in some way that they have been authorised to do so. Section 14 was designed to cover the situation where a police officer is not provided with a written form of the authorisation, or is ordered to carry out part of the authorisation rather than the whole.

Section 14(2) provides:

> (2) a police officer may exercise those powers whether or not the police officer has been provided with or notified of the terms of the authorisation.

The words "*provided with*" covers the scenario which is allowed for in s10(2), that is, that the authorisation is given orally.

Corresponding legislation in other Australian jurisdictions was enacted to secure similar objectives to the Act by including provisions similar to s14.

For example in Victoria, the *Terrorism (Community Protection) (Amendment) Act 2005* provides in s21K (Exercise of special powers by members of the force) that a member of the force may exercise special powers conferred by this Part whether or not he or she has been provided with a copy of the authorisation.

In South Australia, the *Terrorism (Police Powers) Bill 2005* provides in s7(2) (Exercise of powers under authorisation) that a police officer may exercise a power conferred by this Division without being in possession of a copy of the special powers authorisation and without any other warrant.

In Western Australia, the *Terrorism (Extraordinary Powers) Act 2005 (WA)* provides in s10 (Exercising powers, general matters) that the special powers conferred by Division 3 of Part 2 can be exercised by any police officer without warrant, whether or not the officer has a copy of the Commissioner's warrant.

It is acknowledged, however, that it is possible to interpret the section as allowing a police officer to exercise powers even though that officer has not been informed of an authorisation, although this is not a common sense interpretation of the provision.

If a police officer had no notification at all of any of the terms of the authorisation, then presumably he or she would not be in a position to exercise any special powers nor form a suspicion based on reasonable grounds.

It is recommended that the section be clarified to confirm the original policy behind the provision namely, that a police officer may exercise powers under the authorisation even though they do not possess a copy of the authorisation or be aware of the full terms of the authorisation.

Recommendation 1: That s14(2) be amended to reflect the police that that police officers need not possess a copy of the authorisation or be aware of the full terms of the authorisation.

3.2.2 Reasonable suspicion

The Law Society further noted that the powers under Division 3 of Part 2 can be triggered by a person or vehicle merely being present in a "target area", or being about to enter or leave a "target area". Police are not required to have a reasonable suspicion that the person or vehicle was or will be involved in a "terrorist act". Police are also authorised to use "such force as is reasonably necessary" in exercising their special powers (s21).

The Law Society submitted that the application of powers in the Act, as they relate to persons or vehicles that are not the target of an authorisation, should be predicated on the police forming a reasonable suspicion that the powers must be exercised in order to prevent a terrorist attack or apprehend a person who has committed a terrorist attack.

Submission 2: The Law Society submitted that s16(1)(c), s17(1)(c) and 18(1)(c), should be amended accordingly.

Discussion

In examining the second reading speech, it is clear that it was the intention of Parliament that police officers should have immediate access to a full range of powers in the event of a terrorist threat or attack when operating in a declared target area. The Premier stated that the purpose of these powers was to mobilise resources with maximum efficiency and to seize the opportunity to apprehend terrorists after an attack. Section 14 and the target area provisions are part of a scheme to implement this intention.

It is important to note that the target area provisions were formulated to prevent a terrorist act in a particular area, and to empower police in places where a terrorist act has occurred or will potentially occur.

It was the deliberate policy implemented by Parliament that reasonable suspicion would not be a prerequisite to the exercise of the powers *within a target area*.

In relation to s16(1)(c), s17(1)(c) and s18(1)(c), other Australian jurisdictions appear to have provisions drafted in similar terms.

In Western Australia, s11 (power in respect of target areas) enables police officers to direct people to remain in, leave, or refrain from entering a target area. It also enables police to direct that vehicles remain in, be removed from, or refrain from entering a target area. In Victoria, s21G(1)(c) (Persons, vehicles or areas targeted by authorization) provides for the authorisation of the exercise of the special powers conferred by the Part in relation to a particular area described in the authorisation. In South Australia, s12 extends special police powers to target areas.

3.2.3 Lack of Judicial Oversight

Section 13 of the Act provides:

13 Authorisation not open to challenge

(1) An authorisation (and any decision of the Police Minister under this Division with respect to the authorisation) may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus.

(2) For the purposes of subsection (1), *legal proceedings* includes an investigation into police or other conduct under any Act (other than the *Police Integrity Commission Act 1996*).

The effect of s13 is that an authorisation to exercise powers under the Act is not subject to any form of judicial review. The Law Society submitted that this limitation is further exacerbated by s29 which provides that if proceedings are brought against a police officer for acts done pursuant to an authorisation, the officer cannot be convicted or held liable "merely" because "the person who gave the authorisation lacked the jurisdiction to do so". The Law Society interpreted this provision so that the authorisation cannot be contested (except by the Police Integrity Commission) and, if the authorisation was given by someone who had no power to do so, an officer acting on it cannot be held liable.

Submission 3: The Law Society submitted that s13 should be repealed.

Discussion

Section 13 was enacted for two main reasons:

(a) in order to protect the highly sensitive information that authorisations will be based on. As stated by Premier Carr in the Second Reading Speech, "the information on which authorisations are made is likely to be highly sensitive intelligence material, quite possibly provided by co-operating Australian or foreign agencies. This information must be protected to ensure the continuing supply of this intelligence."; and

(b) to prevent legal challenges to the exercise of the powers during an actual counter terrorism operation where time may be of the essence.

Section 13 does not prevent judicial review of how the special powers are exercised. It only precludes judicial review of authorisations itself. Appropriate safeguards are in place to monitor the authorisation process; s13 preserves the ability of the Police Integrity Commission to review the decisions of senior police and the Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the Act is not affected.

Additionally, s14B provides that as soon as practicable after an authorisation given under this Act ceases to have effect, the Commissioner of Police is to furnish a report, in writing, to the Attorney General and the Police Minister setting out the terms of the authorisation and the period during which it had effect, identifying as far as reasonably practicable the matters that were relied on for giving the authorisation, describing generally the powers exercised pursuant to the authorisation and the manner in which they were exercised, and specifying the result of the exercise of those powers.

3.2.4 Provisions relating to personal searches

Schedule 1 of the Act (Conduct of personal searches) is consistent with Part 4, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPAR Act). The Law Society has previously submitted that this part of the LEPAR Act should be amended in the following way:

(a) repeal cl.6(2) (presence of parent/guardian/personal representative if practicable); and

(b) repeal cl.6(3) (obligations of presence of parent/guardian/personal representative if strip search of a child between 10-18 years old, person with impaired intellectual functioning).
(c) Insert those provisions into clause 5 (Preservation of privacy and dignity during search), so that the provision will apply to all searches, not just to strip searches.

Submission 4: The Law Society submitted that these amendments should be made to Schedule 1 of the Act.

Discussion

The Law Society suggested that the provision for a parent or guardian to be present during the conduct of strip search should also be extended to frisk and ordinary searches. This is not practicable or consistent with search powers in similar situations under s30 of the LEPAR Act. Extending this provision to all searches would seriously impede the ability of police to quickly ascertain whether a person was carrying dangerous articles. Given the context of a recent or imminent terrorist attack in a public place, a requirement that a police officer must locate the parent of a minor before conducting an ordinary or frisk search will be difficult if not impossible to satisfy and is unnecessary given the statutory requirements to preserve privacy and dignity during searches.

Submission 5: The Law Society submitted that clause 5(5) which mandates that police must conduct the least invasive type of search practicable in the circumstances should be isolated into a separate section of its own right and made more prominent in the Schedule.

Discussion

This appears to be a mainly cosmetic amendment, since relocation of the clause will not strengthen or widen the operation of the provision of the safeguard. Ensuring that police comply with this provision is more reliant on proper education of those so empowered with the responsibilities that correspond with increased police powers.

3.2.5 Inconsistencies with the *Law Enforcement (Powers and Responsibilities) Act 2002*

There are a number of areas where provisions of the Act are inconsistent with similar provisions in the LEPAR Act.

Sections 17(3) and 18(2) deal with the power to stop and search persons and vehicles. Section 204 of the LEPAR Act provides that a police officer that detains a person or vehicle for a search must not detain the person or vehicle any longer than is reasonably necessary for the purpose.

Section 23 of the Act relates to police officers supplying their details “if requested to do so”. The Law Society submitted that these words should be deleted so as to be consistent with s201 of the LEPAR Act.

Submission 6: The Law Society submitted that Sections 17(3) and 18(2) should be amended to provide that a police officer who detains a person or a vehicle that has been detained pursuant to the Act must not detain the person or vehicle any longer

than is reasonably necessary for the purpose; and “if requested to do so” should be deleted from s23.

Discussion

Section 204 of the LEPAR Act is in the following terms:

> A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose.

Section 17(3) of the Act is in the following terms:

> A police officer may detain a person for so long as is reasonably necessary to conduct a search under this section.

Section 18 (2) of the Act is in the following terms:

> A police officer may detain a vehicle for so long as is reasonably necessary to conduct a search under this section

In order to ensure consistency across legislative schemes and minimise the impact of the Act on persons subject to the exercise of the powers conferred, it is recommended that this submission be adopted.

Recommendation 2: s17(3) and s18(2) should be amended so as to be consistent with s204 of the LEPAR Act.

Section 23 of the Act concerns police providing a target with evidence that he or she is a police officer (unless the police officer is in uniform) but only if *requested* to do so. Section 201(1) of the LEPAR Act states that a police officer *must* provide the person subject to the exercise of the power with evidence that the police officer is a police officer (unless the police officer is in uniform). In order to be consistent with the LEPAR Act, s23 should be amended so that a plain clothed police officer is required to provide evidence that they are a police officer regardless of whether they are requested to do so.

Recommendation 3: Amend s23 to impose a duty on a plain-clothed police officer to provide the person subject to the exercise of the power with evidence that they are a police officer.

3.2.6 Later amendments to the Act

The Law Society also noted that the *Crimes Legislation Amendment (Terrorism) Act 2004* made amendments to the trigger under s5 of the Act. The Law Society noted their concern that the amendments had significantly lowered the test for the authorisation of the use of special police powers and widened the circumstances in which these powers can be exercised.

3.3 The Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunities Commission (HREOC) made a submission on two substantive points:

(a) judicial oversight; and
(b) the exercise of the powers under the Act.

HREOC submitted that the Act has wide applications and is subject to limited oversight. The special powers under the Act, if misused, have the potential to contravene human rights as provided for in international instruments to which Australia is a signatory.

3.3.1 Special Powers

HREOC noted that the Act provided for the following special powers in relation to persons who are reasonably suspected of being the target of an authorisation, vehicles that are reasonably suspected to be the subject of an authorisation, or persons or vehicles who are in target areas:

(a) power to demand name, address and proof of identity;
(b) power to stop and search;
(c) power to conduct ordinary searches, frisk searches and strip searches (if the person is suspected of being the target of an authorisation), including searches of children aged 10-18 years;
(d) power to enter and search premises, without a warrant, if there is a reasonable suspicion that a target person or target vehicle is in or on the premises, or if the premises are in a target area.

HREOC further noted that pursuant to s14 these powers could be exercised whether or not the officer has been provided or notified of the terms of the authorisation and that it is lawful for police to use such force as is necessary. This is the same issue raised by the Law Society and the subject of Recommendation 1.

3.3.2 Lack of judicial oversight of the scheme

HREOC submitted that as the Act provides for wide ranging powers, for example:

(a) stop and search;
(b) the strip search of a child, subject to certain rules;
(c) authorisation, in some circumstances, by a police officer above the rank of superintendent, even without the concurrence of the Police Minister; and
(d) the power to exercise powers, even if not notified of the terms of the authorisation;
(e) the authorisation not being open to challenge or review;
(f) the report to the Attorney General and the Police Minister need describe only generally the exercise of the powers.

HREOC expressed concern that there was an absence of independent monitoring of the issue of an authorisation, the exercise of powers and/or judicial oversight.

HREOC submitted that the need for judicial oversight of counter terrorism measures has been recognised by expert bodies.

The Berlin Declaration of the International Commission of Jurists entitled *The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (adopted 28 August 2004) states:

> 2. Independent judiciary: In the development and implementation of counter terrorism measures, states have an obligation to guarantee the independence of the judiciary and its role for reviewing state conduct.
> …
> 9. Remedy and reparation: States must ensure that any person adversely affected by counter terrorism measures of a state, or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter terrorism measures.

The Declaration notes in relation to the judiciary that:

> Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards, including through judicial consideration of constitutionality and legality of such norms and acts.

The Advisory Council of Jurists has noted that:

> While there may be justification for restricting the right to privacy in light of the threat to national security posed by terrorism and a willingness by citizens to accept restrictions in such circumstances, any information gathering powers must be clearly defined and be subject to judicial oversight. They must also be necessary and proportional to the threat to national security.

And:

> It is important that all searches, including those conducted pursuant to interception warrants, be subject to judicial oversight and review.

HREOC in it's submission acknowledged that the Act is structured to allow for the rapid use of exceptional powers in urgent circumstances that might not permit traditional judicial oversight and authorisation in advance of the exercise of the powers. HREOC submitted, however, that where time does permit and where the urgency of the situation does not dictate to the contrary, the Act should provide that the powers be authorised in advance by a judicial officer.

Submission 7: In cases where the urgency of the situation does not dictate to the contrary, the Act should provide that the authorisation for the exercise of a special power should be approved in advance by a judicial officer.

Discussion

Section 8 of the Act currently reads:

8 Who may give an authorisation

(1) An authorisation may be given by the Commissioner of Police or by a Deputy Commissioner of Police.

(2) If the Commissioner of Police or a Deputy Commissioner of Police is not able to be contacted when an authorisation is sought as a matter of urgency, a police officer

> above the rank of superintendent who is able to be contacted may give an authorisation in accordance with this Division.

The scheme does not provide for judicial review of an authorisation, before or after it is granted. As recognised by HREOC it is unlikely that, in the event of a terrorist threat or attack, there will be sufficient time for judicial oversight of the use of powers provided by the Act. The legislation as a scheme was formulated in response to anticipated emergency situations involving serious threats to public safety. A provision that requires authorisation by judicial officers runs counter to the intention of Parliament that police officers should be empowered as quickly as possible to deal with these situations, and is an unnecessary check on the Act, given other safeguards and avenues of scrutiny.

3.3.3 Judicial review after use of the powers and remedial orders

In cases where urgency does not allow for judicial authorisation of the powers, judicial review should be provided for after the event on the application of a person affected by the powers. Where authorisations have been found to not be in accordance with the Act, remedial orders should be available.

Submission 8: That the Act be amended to provide, on application of the person affected by the exercise of the special power, for judicial review after the event of an authorisation [i.e. that the prohibition on judicial review of authorisations in s13 is lifted].

Submission 9: HREOC submitted that if, on review, it is found that the exercise of the special power was not in accordance with the requirements in the Act that condition the exercise of the power, remedial orders should be available.

Discussion

Section 13 currently reads:

13 Authorisation not open to challenge

> (1) An authorisation (and any decision of the Police Minister under this Division with respect to the authorisation) may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus.
>
> (2) For the purposes of subsection (1), ***legal proceedings*** includes an investigation into police or other conduct under any Act (other than the *Police Integrity Commission Act 1996*).

It should be noted that this section *does not preclude judicial review of the exercise of powers granted under an authorisation.* The Act does not remove the rights of a person who is subject to powers authorised by the Act to ensure that the exercise of those powers was lawful. The reason why authorisations, as opposed to the exercise of powers, are not reviewable under s13 is because, as stated by Premier Carr, they are based on highly sensitive intelligence. In order to ensure that the NSW Police will continue to have access to information regarding potential terrorist activity, it is necessary to protect those sources.

Nothing in the Act precludes access to remedial orders if a finding is made that exercise of the special power was not in accordance with the requirements in the

Act. For example, if excessive force were used, or if there were no reasonable basis to form a suspicion that the person was a target of an authorisation.

Police misconduct can be reviewed and dealt with in a number of ways, including referral to the Police Integrity Commission, the NSW Ombudsman, the NSW Independent Commission Against Corruption and the NSW Police Service's Internal Complaints Division.

3.3.4 Use of the defence of "reasonable excuse" and return of property

HREOC submitted that, at the very least, the Act should provide for a court to find that the powers were not exercised in accordance with the Act, and that such a declaration would found a defence of "reasonable excuse" under the offences provided for in the Act, and establish an entitlement to the return of improperly seized property.

HREOC submitted that judicial review after the fact would be a more effective check on the powers, guarding against improper or excessive use, and would also fulfil Australia's obligations under the ICCPR (Art 3).

Submission 10: The Act should provide for a court to find that the powers were not exercised in accordance with the Act, and that such a declaration would found a defence of "reasonable excuse" under the offences provided for in the Act, and establish an entitlement to the return of improperly seized property.

Discussion

The legislation expressly provides for the defence of reasonable excuse for offences in the Act, such as non-compliance with requests to disclose identity or obstruction of police officers in the exercise of a power. Nothing in the Act precludes a Court from finding that the unlawful exercise of special powers by police constitutes a 'reasonable excuse' for committing an offence.

Section 27 of the Act provides that a police officer exercising a power conferred by the Act must return property to the owner if the officer is satisfied that its retention is not required, and that it is lawful for the person to have possession of the thing. Section 28 provides that a court may, on application by any person, make an order that property seized by a police officer exercising a power conferred by or under this Act be delivered to the person who appears to be lawfully entitled to the property.

3.4 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) welcomed the Attorney's involvement in the Review and was supportive that such a Review was open to the public.

3.4.1 Policy objectives of the Act

As a general comment PIAC submitted that even if the Government remained convinced that the Act was necessary as a "just in case" set of powers, the Act is not properly drafted to serve the stated purpose. Specifically, PIAC submitted:

(a) the departures from normal policing powers are not justified;
(b) the statutory language is loose and ill defined;
(c) the Act grants broad and unreviewable discretionary powers;

(d) use of force and seizure of property without compensation or due process is permitted at an individual junior police officer level;
(e) it is otiose legislation;
(f) it has not been used and is not likely to be used;
(g) it was enacted in a time of great community trauma (after the Bali Bombing);
(h) its operation is secretive; and
(i) the Act lacks review mechanisms.

On these grounds PIAC submitted that the Act has no place in contemporary NSW statute books and therefore the Act should be repealed.

Submission 10: PIAC submitted that the Act be repealed and policing of all actual suspected criminal activity, including terrorism be, appropriately, governed by existing criminal and police powers legislation.

Discussion

In his second reading speech, the former Premier outlined the particular policy imperatives relating to counter terrorism powers which underline the need for extraordinary powers in emergency situations. In summary terrorist organisations operate in extremely clandestine ways and, unlike other forms of organised crime, their aim is not profit but mass civilian casualties and damage to vital infrastructure.

The Act was formulated so as to provide police with extraordinary powers in extreme situations. The Act was never designed to replace existing criminal and police powers legislation and this was made clear by the Parliament when the scheme was enacted.

3.4.2 Redrafting of the Act

Submission 11: If the Act remains in force, PIAC submitted that a reference group be convened in order to bring drafting discipline to the Act and ensure a better balance between:
(a) the protection of the community; and
(b) the protection of civil and human rights.

Discussion

The Act was drafted by Parliamentary Counsel's Office who have the greatest expertise in properly implementing the will of the Parliament in legislative language.

The policy at the heart of the scheme is the protection of the community.

The issue of protecting civil and human rights was extensively considered by the Parliament during the second reading debate. Whilst it was acknowledged that the scheme provided police with extremely strong powers, it was believed that these powers were appropriate in the extreme situations envisaged.

3.4.2 Definition of "terrorist act"

The Act adopts the definition of "terrorist act" contained in Commonwealth law. PIAC has raised concerns about the definition of this term.

The definition excludes advocacy, protest, dissent or industrial action that is not intended to cause physical harm, endanger life or create a serious health or safety risk. Terms such as “advocacy”, “dissent”, “protest” and “industrial action” are undefined. PIAC is concerned that because of this, there is a possibility for incursion on legitimate forms of political communication.

Submission 12: PIAC submitted that the definition of terrorism be amended to clarify the meaning of “advocacy”, “protest”, “dissent” and “industrial action”. These terms must be defined expansively. If not, legitimate individual and collective political participation and protest risk being policed as a threat to society.

Discussion

As noted by PIAC the definition of “terrorist act” is taken directly from the Commonwealth Act. This definition has also been adopted by all other Australian jurisdictions and was the subject of a Constitutional reference of power from the States to the Commonwealth. On that basis there would be a significant problem with unilaterally amending the definition for NSW purposes.

Despite not being defined exhaustively in the legislation, it is clear from the second reading speech that the new powers given to police are confined to limited circumstances. The new powers are not intended for general use and s3(3) clearly excludes advocacy, protest, dissent and industrial action, where such action does not intend to cause serious harm or public safety risks and as such the provisions of the Act could not reasonably be extended to cover non-violent political action. As was stated by the Premier when introducing the Bill to the House, “legitimate, non-violent protest cannot trigger the proposed powers”.

3.4.3 Target areas and a definition of “suspicion on reasonable grounds”

The Act allows for *target persons*, *target individuals* and *target areas*. PIAC submitted that “target areas” are inappropriate as it allows any person in the area to be subject to the exceptional powers.

If police have “reasonable grounds” to suspect that a person is a “target person” or a vehicle is a “target vehicle” they may exercise the powers under the Act. PIAC submitted that there is no guidance in the Act as to what is meant by “reasonable grounds”. PIAC raised the further concern that front-line police officers may consider commonly held prejudices in weighing up whether there are “reasonable grounds”, for instance views based on cultural, ethnic or religious grounds. Because of this there was the great potential for “dragnet” policing and racial and religious profiling.

Submission 13: PIAC submitted that the Act be amended to provide statutory criteria to regulate and standardise the meaning of “suspect on reasonable grounds” to assist front-line police officers in the exercise of the powers under the Act and to prevent policing practices based on prejudiced or stereotypical perceptions of particular ethnic, religious or cultural groups.

Discussion

The concept of “suspect on reasonable ground” is extremely well established in the criminal law of NSW. This test is the trigger for many other police powers that are used every single day. The test appears regularly in the LEPAR Act. Police are

thoroughly trained in the application of this test and both the police and the courts have the benefit of High Court case law to assist them in its understanding.

In relation to the issue of prejudice and stereotypical perceptions influencing police, the nature of the operational response will depend on the type of information and intelligence received in relation to the perceived terrorist threat.

NSW is an extremely multicultural environment and police are trained to respect cultural differences and to avoid racial stereotyping. Initiatives include new recruits undertaking intensive educational programmes regarding diversity and tolerance, on going training and education, NSW Police Ethnic Community Liaison Officers being attached to many local area commands and the active recruitment of police officers from diverse backgrounds to reflect the cultural and linguistic diversity of the community.

3.4.5 Extent of Powers Under the Act

PIAC raised concerns about two discretions under the Act, namely:

(a) the discretion of the Police Commissioner to authorise the use of the powers; and

(b) the discretion to use the powers by front-line police officers.

PIAC submitted that the authorisation powers of the Commissioner are Ministerial level powers vested in an unelected public servant.

In relation to the type of discretion exercised by a junior officer, PIAC gave as an example s27(1)(a) and (b) where a police officer is required to return a seized thing to the owner if the officer is satisfied that it is lawful for that person to have possession of the thing. PIAC submitted that this amounts to an exercise of judicial powers because it calls for an adjudication of property rights.

Submission 14: PIAC submitted that if the Attorney is satisfied that the Act should not be repealed, the exercise of discretion by both senior and junior ranking police officers should be more strictly prescribed by the addition of exhaustive legislative criteria by which the exercise of discretion to grant an authorisation and to exercise the powers under the Act are limited.

Discussion

In relation to the issue of the authorisation by the Commissioner or another senior police officer, even though the NSW Police Force is a part of the executive government, there has always been a distinction between policy and operational matters. It is entirely appropriate that the Commissioner be responsible for authorisations under the Act. The Commissioner is in the best position to make operational decisions based on the entirety of his or her knowledge and experience. The traditional separation between the Minister and operational matters actually works as a safeguard to prevent the perception that police operations are dictated by political motives. Even though the Act provides for the concurrence by the Minister for Police, in reality there may not be time for this to be obtained due to the urgency of the situations. As such the Act also allows for subsequent confirmation.

In relation to the use of the powers by front line police and in particular s27(1)(a) and (b) such a requirement is not unusual under the law, it is in fact modelled on s218 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

The formulation is not in any way an exercise of judicial powers and does not prevent a court adjudicating on a matter if there is a dispute as to ownership or lawfulness of possession.

What the provision does do is create a duty on police to return private property to a person without the need for that person to launch time consuming or expensive legal action and, where there is a dispute as to ownership or as to lawfulness of possession, the Act creates a legal right that a court can adjudicate on as specifically provided for under s28 for the Act.

3.4.4 Involvement by the Police Minister

The Act provides the Minister of Police with the following powers to:

(a) confirm the exercise of the powers;
(b) confirm the exercise of the powers after their activation; and
(c) revocation of the authorisation to use the powers.

Submission 15: PIAC submitted that the Minister's approval be made conditional upon the satisfaction of statutory criteria, including the receipt of copies of the information and/or intelligence upon which the relevant police officer has based the decision to grant an authorisation, and an assessment of that need for the extension of special powers.

Discussion

The legislation currently outlines conditions for the approval of authorisiations. In determining whether to concur with the authorisation the Minister for Police will receive the same material that the Commissioner received in making the authorisation. It is not necessary for the Act to prescribe further requirements. In concurring with the authorisation, the Minister for Police must be satisfied that the legislative triggers have been met.

Section 5 currently provides that an authorisation for the exercise of the special powers can only be made if the police officer giving the authorisation is:

> (a) satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future, and
>
> (b) satisfied that the exercise of those powers will substantially assist in preventing the terrorist act.

Section 6 similarly imposes a requirement that special powers to investigate a terrorist act in the immediate period after its occurrence, require that the police officer giving the authorisation is:

> (a) satisfied that there are reasonable grounds for believing that a terrorist act has been committed, and
>
> (b) satisfied that the exercise of those powers will substantially assist in apprehending the persons responsible for committing the terrorist act.

3.4.7 Failure to approve the authorisation

PIAC pointed out that there is no power under the Act to nullify any action taken under the Act, if the Minister for Police chooses not to authorise the use of the powers.

Submission 16: PIAC submitted that where the Minister fails to confirm that authorisation under the Act within the prescribed period, the exercise of the special powers under the act be nullified *ex post facto*.

Discussion

Section 9 of the Act clearly states that if an authorisation is given *without* the concurrence of the Police Minister, the authorisation ceases to have effect if there is no confirmation by the Minister within 48 hours. Any exercise of powers after this time would be unlawful.

It is a general principle that law enforcement powers exercised in good faith should not give rise to personal liabilities for front-line police officers. If this were not the case police officers may be hesitant to use these powers in the event of a terrorist attack. There is also nothing preventing people making applications to the NSW Police Force for reparation for any damage caused during the exercise of the powers.

Again there is nothing preventing people from reporting matters to appropriate oversight bodies in relation to any alleged abuse of the powers when exercised.

3.4.8 Secrecy and lack of accountability

PIAC raised a concern in relation to the combination of wide police discretion and lack of judicial review. PIAC submitted that in these circumstances it would be extremely difficult for a complainant to succeed.

PIAC raised three further concerns relating to secrecy:

(a) written reports relating to the operation of the powers pursuant to s26 are not tabled in Parliament;
(b) Section 36 (Review of Act) does not require any public participation; and
(c) Section 36 requires the Attorney to table the Review within 12 months and this is an unacceptable timeframe given the exceptional nature of the policing powers.

Submission 17: PIAC submitted that the Act be amended to include an obligation for reports both on the grant of an authorisation and any associated exercise of the special powers, and on the statutory reviews of the Act to be tabled in Parliament and subject to Parliamentary scrutiny within the same Parliamentary sitting.

Discussion

The Act currently provides under s36(3) that a report on the outcome of the annual review of the Act is to be tabled in each House of Parliament and as such will be subject to the full extent of democratic scrutiny. The Act also provides for a report to be given to the Attorney General and the Police Minister as soon as practicable after an authorisation given under this Act ceases to have effect by the Commissioner of Police.

Section 14(B) requires the report to:

(a) set out the terms of the authorisation and the period during which it had effect, and
(b) identify as far as reasonably practicable the matters that were relied on for giving the authorisation, and
(c) describe generally the powers exercised pursuant to the authorisation and the manner in which they were exercised, and
(d) specify the result of the exercise of those powers.

Section 14B reports are not tabled in Parliament. This is because the information on which authorisations are granted is often highly sensitive and the publication of intelligence sources is likely to endanger future flows of information to police necessary to prevent terrorist attacks and possibly endanger ongoing police investigations or police investigation methods.

3.4.9 Permissive rather than restrictive powers

PIAC submitted that the Act is replete with permissive grants of power that are open ended and loosely defined, lack definitional discipline and explicit limitations on the proper exercise of power.

PIAC gives the example of s14(2) which provides that a police officer may exercise the special powers under the Act whether or not the officer has been provided with or notified of the terms of the authorisation.

Submission 18: PIAC submitted that s14(2) be repealed

See discussion of Law Society submission at paragraph 3.2.1.

3.4.10 Detention for reasonable time to allow exercise of the power

PIAC submitted that the Act, whilst providing the power to stop and search persons and vehicles, does not require that this detention be no longer than is reasonably necessary to conduct the search. Such provisions are to be found in the LEPAR Act. PIAC further submitted that the powers are too widely drafted.

An example of where statutory criteria are enumerated in s356E of the *Crimes Act 1900*.

Submission 19: PIAC submitted that the Act be amended to stipulate a maximum time period for the detention of persons and vehicles/vessels consistent with regular police standards. If the concept of “reasonable time” is used to limit the time a person or a vehicle/vessel is detained, legislative criteria for determining what is “reasonable” ought to be enacted.

Discussion

It is not practicable to legislate a definition of what is a ‘reasonable time’ to detain a person or vehicle under the Act given that the particular operational circumstances may vary substantially. The flexible formulation is a safeguard against misuse of the powers as, if a person is detained any longer that is reasonably necessary (in light of the particular circumstances), a person may sue police for unlawful detention.

The statutory criteria listed in former s356E of the *Crimes Act 1900* (now s116 of *LEPAR*) deals with a scheme where a person is being detained at a police station for questioning, not where police are exercising powers in the field.

In relation to consistency with LEPAR provisions please see **Recommendation 2** under paragraph 3.2.5.

3.4.11 Damage to property

Section 19(1) provides that a police officer may enter and search premises without a warrant if the officer suspects, on reasonable grounds, that a person or vehicle who is the target of an authorisation may be in or on the premises or where the premises are in a target area. Section 19(2) requires that police officers must do as little damage as possible.

Submission 20: PIAC submitted that the Act be amended to include a positive obligation not to damage property, except as reasonably necessary in the proper exercise of the powers under the Act.

Discussion

Section 19 of the Act (power to enter and search premises) does not in any way authorise police to do more damage to private property than is reasonably necessary. The proposed amendment is therefore unnecessary.

3.4.12 Use of Force

PIAC noted that s21 permits the use of "such force as is reasonably necessary to exercise the power" and does not contain any limiting language such as "only such force as is reasonably necessary". The section also permits persons assisting the police officer to exercise such reasonable force.

Submission 21: PIAC submitted that the Act should be strictly limited in its operation to identifiable police officers or other duly authorised law enforcement officers whose actions will remain accountable and whose conduct can, at the very least, be referred to the Police Integrity Commission (PIC).

Submission 22: PIAC submitted that the Act should be amended to remove permission to use force. Instead the Act should contain an explicit prohibition against the use of force except where reasonably necessary.

Discussion

Section 21 currently reads:

21 Use of force generally by police officers

> It is lawful for a police officer exercising a power under this Division in relation to a person or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the power.

The sudden and chaotic nature of a terrorist act means that police may require the assistance of other people to deal with the situation, for example other members of emergency services.

This is the general formulation in other general policing schemes, see for example s231 of the LEPAR Act which provides:

> A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

It is already the case that if more force is used than is reasonably necessary in the circumstances, a police officer will be liable for prosecution under the criminal law.

3.4.13 Maximum use of Force

Submission 23: PIAC submitted that the Act should specify a maximum threshold of use of force beyond which an office would be acting unlawfully, regardless of the necessity of the use of some force.

Discussion

The exercise of powers under this Act have been left to the general law as with all other pieces of legislation dealing with police powers. If a police officer were to use force that was in excess of that reasonably required for the particular situation, that officer would be subject to the usual criminal law relating to property damage, assault and homicide.

The law of self-defence has been codified in the *Crimes Act 1900* (ss418-423). This law applies equally to all citizens in NSW and it is clear that a person can use up to and including lethal force where their life, or the life of another person is threatened. Lethal force is not permissible however in relation to the defence of property.

3.4.14 Strip search of children aged 10-18

The Act permits the practice of strip-searching children who are at least 10, but not yet 18 years of age (Schedule 1, clause 6(3)).

PIAC noted that ALP members of the Commonwealth Parliament opposed the questioning or detention of children under ASIO legislation.

Submission 24: PIAC submitted that the Act be amended to remove the possibility of strip-searching children between the ages of 10 and 18.

Discussion

The provisions relating to searches directly replicate the search powers provided for under the LEAP Act that deals with general policing powers.

It would not be desirable to create powers that were more limited or inconsistent with general law enforcement powers.

3.4.15 Review and complaint mechanisms

PIAC submitted that there is a lack of review mechanisms under the Act and that the authorisation and the exercise of the powers under the Act should be subject to independent judicial review. PIAC submitted that s13 is improperly wide, that it abrogates the principle that decisions of public officials should be reviewable.

PIAC noted that the Act intends to preserve the power of PIC to investigate in appropriate cases, but submitted that this is an ineffective check on power.

PIAC submitted that an appropriate review and complaints mechanism under the Act would:

(a) subject decision making under the Act, including the granting of the authorisations, to judicial scrutiny;
(b) create a right to compensation for any loss or damage suffered by reason of the exercise of the special powers under the Act; and
(c) clearly enable disciplinary proceedings under the *Police Act 1990*, Part 9 to operate in relation to policing that take place under the Act.

PIAC noted that s28 does offer a judicial mechanism to review seized property, however the Act interferes with fundamental rights that pertain to the person, such as freedom from arbitrary interference and detention, right to privacy, presumption of innocence and access to the courts.

PIAC also submitted that s29 provides a partial shield from suit for police officers who exercise powers under the Act. Section 29 provides:

29 Protection of police acting in execution of Part 2 authorisation

If any proceedings (whether criminal or not) are brought against any police officer for anything done or purportedly done by the police officer in pursuance of an authorisation under Part 2, the police officer is not to be convicted or held liable merely because:

(a) there was an irregularity or defect in the giving of the authorisation, or

(b) the person who gave the authorisation lacked the jurisdiction to do so.

Submission 25: PIAC submitted that section 13 be repealed and replaced with a comprehensive review and complaints mechanism that provides for independent remedies, be instituted.

See discussion of Law Society Submission at paragraph 3.2.3.

3.4.16 Criminal consequences for exceeding authorisation

Submission 26: PIAC submitted that s29 be repealed and a new section inserted to provide clear criminal and disciplinary offences for police officers that exceed the scope of an authorisation under the Act. This will require consequential amendment to s14(2) such that police officers must have notice of the terms of the authorisation before purporting to exercise powers under it.

Discussion

Nothing in the Act precludes disciplinary proceedings against a police officer found to have exceeded the scope of an authorisation under the Act. Section 29 does not preclude liability of police officers, but merely provides that an officer cannot be convicted solely on the basis of an irregularity or defect in the giving of an authorisation.

As discussed above, if it is found that a police officer has used more than reasonable force, he or she will be open to prosecution under the general criminal law and in addition face potential disciplinary proceedings under the *Police Act*.

In relation to the issue of s14(2) please see **Recommendation 1**.

3.4.17 Warnings of possible consequences of non-compliance

PIAC submitted that there is no requirement for police to warn persons of the consequences of non-compliance ("notice requirement"), and that non-compliance is a serious offence under the Act.

Submission 27: PIAC submitted that a notice provision be inserted into s.23 of the Act

Discussion

Section 201 of the LEAPR Act establishes a new general policing practice where people are warned that failure to comply with a lawful direction may be an offence. It is reasonable that a similar requirement be implemented under the Act.

Recommendation 4: That a notice provision, similar to s201 of the LEPAR Act, be inserted into s23 of the Act in relation to offences contained in the Act.

3.4.18 Level of penalty

PIAC submitted that the penalties under the Act are punitive and disproportionate to the conduct in question.

Submission 28: PIAC submitted that penalties for offences under the Act be reduced to the level of comparable offences under the *Crimes Act 1900*.

Discussion

It appears to be the intent of Parliament that the penalties incurred by non-compliance with police directions should be an incentive for persons detained during the aftermath or lead-up to a suspected terrorist attack to cooperate with police fully and quickly so as to maximise the ability of police to apprehend a potential terrorist. Accordingly, the disparity in penalties between comparable instances reflects the consequences of non-compliance in those situations.

3.4.19 Reversal of onus of proof under s33

Section 33 of the Act places the onus of proof on the defendant where he or she has raised a defence of reasonable excuse.

Submission 29: PIAC submitted that the reversal of the onus of proof under s33 be repealed.

Discussion

This proposal is not consistent with the operation of defences in criminal law. It is always for the defendant in any matter to raise evidence of a defence to a certain

evidentiary level. It is then left to the prosecution to negative the defence beyond reasonable doubt.

3.4.20 Adverse impact on the vulnerable

PIAC also raised concerns about the possibility that the exercise of these powers and the possible offence might impact adversely on particular persons.

One of PIAC's partners, the Redfern Legal Centre, made submissions that there were often good reasons unconnected with terrorist or criminal intent, for persons to hesitate to comply with police requests, for example fear, distrust or mental illness. The onus to prove reasonable excuse is also unfair to this category of person.

The following comment from Redfern Legal Centre was included in the PIAC submission:

> "Many of our clients who suffer from mental illness often have difficulties in their interactions with authorities. For example, they are likely to become upset if approached by authority figures, such as police officers, and lack the skills and capacity to control their responses. Some of the common responses by clients with mental illness when stopped, questioned or confronted by authority figures are the use of offensive language or even exaggerated or delusional comments that may be misinterpreted as threats. RLC is concerned that people with mental illness be characterised as such, rather than policed as terrorist threats.
>
> Such clients may also suffer, as a result of their illness, exaggerated fear of authorities and the exercise of the powers under the Act in relation to them could cause an intensification of fear and stress among people who have not and are not likely to be engaged in any form of "terrorist" behaviour."

Discussion

The interaction of the criminal law and vulnerable or mentally ill people is not an issue restricted to the operation of this Act. Police are already trained in recognising categories of vulnerable people.

In relation to people with a mental illness, the law also allows summary matters to be dealt with under s33 of the *Mental Health (Criminal Procedure) Act*.

3.5 Mr Dale Mills

3.5.1 Repeal of the Act.

Mr Mills made the following general points in his submission:

(a) that other Australian jurisdictions had not seen the need to introduce powers like those under the Act;
(b) powers introduced in other Australian jurisdictions have been narrower; and
(c) the powers under the Act have never been used.

On this basis Mr Mills submitted that the Act should be entirely repealed.

Submission 30: Mr Mills submitted that the Act be repealed.

Discussion

See discussion of PIAC Submission at paragraph 3.4.1.

3.5.2 Breadth of s13 prohibition on judicial review.

Mr Mills noted that s13 prohibited judicial review of an authorisation to use powers under the Act, and further submitted that it was not clear whether this protection extended to the actions of police officers exercising powers under the Act. Mr Mills suggested that, as the Act is silent on this matter, such actions can be reviewed in the normal way. As this point is unclear, however, he submitted that the Act should be amended to make this point apparent.

Submission 31: Mr Mills submitted that the Act be amended to make clear that the actions of an individual police officer exercising powers under an authorisation are reviewable in the normal way and not protected from review under s13 of the Act.

Discussion

It is clear that s13 applies only to authorisations granted under the Act. The prohibition on judicial review does not extend to the exercise of powers under the Act. There is nothing in the Act to preclude review of the actions of police officers empowered by the Act.

3.5.3 Definition of "terrorist act"

Mr Mill's noted that the definition of "terrorist act" only excluded advocacy, protest, dissent or industrial action where it is not intended to:

(i) cause serious harm that is physical harm to a person, or
(ii) to cause a person's death, or
(iii) to endanger the life of a person, other than the person taking the action, or
(iv) to create a serious risk to the health or safety of the public or a section of the public.

Mr Mill's submitted that this exclusion might cover the following scenarios:

(a) industrial action leading to physical harm to a person (such as could have been case during the 'run-through' by the CFMEU leader Craig Johnston in Melbourne in 2004 (for which he received 9 months imprisonment);
(b) Creating a serious risk to health (such as 'wild-cat' strike by aged care workers in a nursing home);
(c) Creating a serious risk to health or safety (such as interruptions to a sewerage outlet by Greenpeace activists).

Discussion

Please see discussion under paragraph 3.4.2

3.5.4 Extension of ministerial power into operational policing

Section 9 of the Act requires that the Minister for Police give concurrence with an authorisation to use the powers.

Mr Mills submitted that such an intervention is unjustified and that it is not clear what the provision is designed to achieve. Mr Mills provided the following quote from Dr Tim Anderson:

> "The extension of ministerial power into operational policing in the NSW legislation is further reason for concern, as this appears to breach the Westminster convention on the separation of powers. It involves direct ministerial involvement in operational policing and a form of arbitrary, and probably discriminatory policing at that. Ministerial targeting of embarrassing demonstrations seems likely".

Submission 32: Mr Mills submitted that s9 be repealed

Discussion

It is clear from the second reading speech that s9 was inserted into the legislation to act as a safeguard. The Premier asserted that expanded police powers required civilian control at all times during a trigger period. Given that these powers were conferred in the specific context of a terrorist attack in Bali and there are repeated assurances that the Act can not be extended for general use, it would appear unlikely that the Police Minister would use these powers to target legitimate political action and this has certainly not occurred to date.

3.5.5 Limitations on authorisations

Mr Mills noted that there are no statutory limitations on an authorisation and suggested that a plain reading of the Act would allow an authorisation of a 'strip search of every Muslim in Sydney'; and as a consequence, such an authorisation would also be unchallengeable in a court of law.

Submission 33: Mr Mills submitted that the Act should provide appropriate guidelines or restrictions on the type of authorisations that can be made under the Act.

The type of authorisations and the action that Police take in any given situation will depend entirely on the nature of the terrorist threat and the amount of information that is available to inform the police operation.

The NSW Police response to a terrorist threat will firstly be dictated by resourcing issues and it is extremely unlikely that undirected and operationally ineffective authorisations such as the one suggested in Mr Mill's submission would be made.

On that basis there is no issue with amending the Act to provide that an authorisation should be reasonably proportional to the terrorist threat as assessed by the Commissioner for Police. Such an amended would assure that overly wide authorisations, such as declaring the entire State of NSW as a target area, does not occur.

Recommendation 5: require that authorisations be reasonably proportional to the terrorist threat as assessed by the Commissioner for Police.

3.5.6 Possible violations of international treaties

Mr Mills submitted that the possible breadth of an authorisation would breach international law in relation to arbitrary searches and arbitrary interference with

privacy, both under the ICCPR and the Convention of the Rights of the Child (CROC). If the powers were used to target political protests, this also may be a violation of the right to peaceful assembly under Art 21 ICCPR.

Discussion

It is clear that the Act was drafted to be used only in the very specific context of terrorist attacks. Recommendation 5 will also address the concern that authorisations may be too wide or out of proportion with the threat.

In relation to Art 21 of the ICCPR, the definition of "terrorist act" which specifically excludes peaceful advocacy, protest, dissent or industrial action will ensure that these powers are no used in relation to peaceful assemblies.

4. Conclusion and Recommendations

4.1 Conclusion

The Review finds that the policy objectives of the Act remain valid.

The threat of a terrorist act in NSW is still present as demonstrated by terrorist prosecutions such as Faheem Khalid Lodhi, who was sentenced to 20 years imprisonment in August 2006 for planning terrorist attacks against critical infrastructure.

Terrorist activity is distinct in several ways from other criminal activity in that it is highly organised, is difficult to detect and has as its aim the destruction of property and mass civilian casualties.

On this basis the Act strikes a good balance between extraordinary law enforcement powers that will be effective in preventing an imminent terrorist act, and the necessary tests and safeguards to ensure that these powers are only used in urgent and appropriate circumstances.

The laws implemented by NSW in the Act have become the model for counter terrorist powers in most other Australian jurisdictions.

4.2 Summary of Recommendations

	Recommendation
1	That section 14(2) be amended to reflect that police officers need not be aware of the full terms of the authorisation
2	Section17(3) and s18(2) should be amended so as to be consistent with s204 of the LEPAR Act
3	That s23 be amended so as to be consistent with the LEPAR Act by imposing a duty on a plain-clothed police officer to provide the person subject to the exercise of the power with evidence that they are a police officer.
4	That a notice provision, similar to s201 of the LEPAR Act, be inserted into s23 of the Act in relation to offences contained in the Act.
5	Require that the authorisations be reasonably proportional to the terrorist threat as assessed by the Commissioner for Police.

Appendix 1

List of Submissions

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

1. The Law Society of NSW
2. The Ministry for Police
3. NSW Police
4. The Department of Corrective Services
5. The Australian Federal Police
6. Commonwealth Attorney-General's Department
7. The Human Rights and Equal Opportunity Commission
8. Solicitor General, New South Wales
9. The Director of Pubic Prosecutions, New South Wales
10. The Public Interest Advocacy Centre
11. Mr Dale Mills

Appendix 2

TERRORISM (POLICE POWERS) BILL

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Bill introduced and read a first time.

Second Reading

Mr CARR (Maroubra—Premier, Minister for the Arts, and Minister for Citizenship) [3.41 p.m.]: I move:

That this bill be now read a second time.

The events in the past 14 months have caused us to change our view about our safety as a nation. The terrorist attacks in New York and Bali show a new preparedness among terrorist organisations to strike at civilians with the aim of causing casualties. This morning, at a briefing with an FBI representative, I blanched at the use of the terminology "catastrophic attack, spectacular casualties", but this is the terminology now deployed. But it is also real to us, having experienced the funerals and the grief associated with Bali. The Bali bombing has brought terrorism to our doorstep. There have been revelations about the operation of terrorist organisations in our nearest neighbour, Indonesia. There have been special references to Australians as a target. There have been reports that intelligence analysts believe came from Osama bin Laden himself. All this would suggest that we have no alternative but to respond to the reality of a possible terrorist attack in New South Wales.

We have created a new 70-member Counter-Terrorism Command in the police force, under the command of Superintendent Norm Hazard, and we have increased funding to New South Wales police counter-terrorism. We have reviewed Commonwealth anti-terrorism legislation. We have looked at the legislation in the United States and the United Kingdom. We have committed ourselves to a partnership with the national Government, with Canberra, because our agencies must work closely together on these fronts. We have balanced two competing imperatives in drafting this legislation. Yes, we do need to be able to react effectively at short notice to the threat of a terrorist strike, or in the immediate aftermath of an attack. But, second, we need to remain calm in the face of terrorism and not surrender unnecessarily civil liberties that are part of the fabric of our working democracy. I would rather that these laws were not necessary. Sadly, they are.

The new powers given to police are confined to limited circumstances. As I have said repeatedly, it is not my instinct to fling at police and security agencies crudely increased powers. In any democracy there must be a healthy suspicion of law enforcement powers. We must carefully monitor their use. We have time-limited the increased powers and created a special trigger before they can be invoked. That is an alternative model to just saying that police shall have these extra powers to search, and to do so in all these circumstances.

We are not doing that. We are saying that where there is a credible terrorist threat, or where there has been an actual incident, for a period of seven days and two days respectively police will enjoy these increased powers. Then the powers automatically lift unless they are specifically renewed. That is a time limit on these powers. It is a

check. It is a balance. Moreover, we are making sure that in these areas—as in all areas—the police and their behaviour are subjected to the oversight of the Police Integrity Commission and the Ombudsman. So there will be that review capacity, as there ought to be. We want accountability to apply even where police are responding to terrorism.

This is how it would work: The new powers will be triggered, first, where the Commissioner of Police or a deputy commissioner is satisfied that there are reasonable grounds for believing there is an imminent threat of a terrorist attack, and the use of the new powers would substantially assist in preventing that act—which is not unreasonable—or immediately after a terrorist attack; or, second, where the commissioner or a deputy believe that the powers would assist in apprehending those responsible. Those are reasonable circumstances.

The new powers are not intended for general use. In ordinary circumstances we rely on standard police investigations and the co-operation of Australian and international law enforcement and intelligence agencies. However, when an attack is imminent, all resources must be able to be mobilised with maximum efficiency. Similarly, when an attack has just occurred, there is an increased chance of catching the terrorists, and this chance must be seized.

Clause 3 defines a terrorist act—and we have adopted the Commonwealth definition. This is essential to permit the maximum possible co-operation between the New South Wales Police and Commonwealth law enforcement agencies and ASIO. Everyone must be operating under the one definition. As defined, "terrorism" means "those acts intended to intimidate the Government or the public involving serious injury or danger to people, serious damage to property, or serious interference with an electronic system". Legitimate, non-violent protest cannot trigger the proposed powers.

Clauses 5 and 6 provide the limited circumstances in which the new powers that I outlined earlier may be invoked. Clause 8 gives the Commissioner of Police and two deputy commissioners the capacity to authorise the use of the new powers. Where none of these officers are available, an officer above the rank of superintendent, being a police senior executive position, may authorise their use. This succession planning will guard against the situation where a terrorist attack claims the most senior ranks of New South Wales Police.

Clause 9 provides a key safeguard. An authorisation must be approved or ratified by the Minister for Police. We inserted this in the legislation because we are insisting on civilian control at all times during this trigger period. If the Minister were not available at the time, ratification must occur within 48 hours, or else authorisation is terminated. The Minister may also revoke the authorisation at any time. Clause 11 sets out the duration of the authorisation. An authorisation to prevent a future terrorist act lasts for a maximum of seven days, extendable, with ministerial agreement, by another seven days. An authorisation under an attack lasts for a maximum of 24 hours, extendable, with ministerial agreement, by another 24 hours.

Clause 13 makes it clear that the decisions of senior police are reviewable by the Police Integrity Commission. The Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the bill is not affected. The information on which authorisations are made is likely to be highly sensitive intelligence material, quite possibly provided by co-operating Australian or foreign

agencies. This information must be protected to ensure the continuing supply of this intelligence.

I turn to the new powers granted to police. Clause 7 sets out what the powers are for. They are to permit police to find a particular person, a target person; to find a particular vehicle, or a vehicle of a particular kind, a target vehicle; and to prevent a terrorist act in a particular area, a target area. They may also be used to target specific premises when a person or place authorisation permits. These different purposes recognise the range of possible scenarios.

Police might receive a warning that a particular type of vehicle will be involved in a terrorist attack. Or the information may be that a particular area is the target without telling us who it is, or how it will be attacked. The authorisation provisions are sufficiently flexible to allow persons to be described. A photo or a drawing may be used for this purpose. The target area provisions extend to persons or vehicles about to enter the target area, or persons and vehicles that have recently left the area. Part 3 of the bill sets out the new powers. Clause 16 permits a police officer to direct someone to identify themselves if they suspect, on reasonable grounds, that the person is a target person or a vehicle is a target vehicle, or if the person is in a target area. It will be an offence not to comply without reasonable excuse, or to provide false answers. The maximum penalty is 50 penalty units or 12 months imprisonment, or both.

Clause 17 gives officers the power to stop and search a person if the officer suspects, on reasonable grounds, that the person is a target person, the person is in a target vehicle or is in a target area. Search powers may also be used in connection with a person found in suspicious circumstances in the company of a target person. The search may be a frisk search, running the hands over the outside of a person's clothing; an ordinary search—jackets, hats, gloves, shoes may be removed and examined; or it may be a strip search in very limited circumstances. Frisk searches and ordinary searches generally will be enough to determine if the person is carrying a gun or a bomb, for example.

Clause 18 permits a police officer to stop and search a vehicle and anything in the vehicle if the officer suspects, on reasonable grounds, that the vehicle is the target of the authorisation, a person in the vehicle is a target, or the vehicle is in a target area. Clause 19 permits an officer to enter and search premises if the officer suspects, on reasonable grounds, that a target person or a target vehicle is in the premises or if the premises are in a target area. Clause 20 permits an officer to seize and detain any item the officer suspects could be used or could have been used to commit a terrorist act.

An officer may also find things that are evidence of general offences, such as drugs. An officer may seize these things if he or she reasonably suspects that there may be evidence of a serious indictable offence. This threshold has been chosen in recognition of the intrusive nature of the new powers. Clause 22 makes it an offence without reasonable excuse to hinder an officer exercising these powers. Clause 23 requires officers to identify themselves and give reasons why they are exercising one of these powers as soon as practicable. If a person, a vehicle or premises have been searched, the person may also apply to the Commissioner of Police for a written statement that the powers were exercised under an authorisation. That has been adopted from the legislation in the United Kingdom.

Part 4 of the bill permits members of law enforcement agencies of other Australian

jurisdictions to be authorised to use the powers. This recognises that in an emergency we may want to maximise our capacity to respond to an incident, especially in specialist search units. Part 5 of the bill contains important additional safeguards. Clause 26 requires a report to be provided to the Minister for Police and the Attorney General by the commissioner as soon as practicable after the expiry of an authorisation. Clauses 27 and 28 provide for the return or disposal of property seized under the powers.

Clause 36 provides for annual reviews of the Act. Schedule 2 to the bill contains amendments to the State Emergency and Rescue Management Act 1989. These new powers are not exercised as part of the authorisation system I have already described. They are separate powers. These new powers deal with the reality of chemical, biological and radiological weapons. Persons exposed to these agents may unintentionally expose others. Tokyo in 1995 is an example. Many casualties occurred, not through direct exposure to the gas but through persons touching the skin or clothing of others who had already been exposed.

The bill creates a power for a senior police officer that is satisfied there are reasonable grounds to authorise a person who may have been contaminated to be kept in a particular area, quarantined and decontaminated. Schedule 2 also permits police officers to remove a vehicle or object from the danger area and to direct persons not to interfere with such an object. These powers have been designed to complement existing Commonwealth powers, and are necessary to maximise the ability of New South Wales Police to protect our people.

At least eight people from my electorate died in Bali. I do not want—none of us wants—to see more casualties, more suffering and more bereavement in our homes because of a terrorist strike. These powers are designed to increase our capacity to prevent such a strike, as well as to increase our capacity to respond effectively to a strike if that tragedy should befall us. The bill has been properly crafted. We have created the balance that people would expect. It will be followed by other States around Australia. I look forward to the day when terrorism has been so comprehensively defeated, blocked, and eliminated that we can remove this legislation from the statute books of New South Wales.

Hansard, 19 September 2002

Terrorism (Police Powers) Act 2002 No 115

Assent date
5 December 2002

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An Act to give special powers to police officers to deal with terrorist acts; to amend the *State Emergency and Rescue Management Act 1989* to give police officers additional powers to protect people in emergencies; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Terrorism (Police Powers) Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definition of "terrorist act"

(1) **General**
In this Act, ***terrorist act*** means an action where:

(a) the action falls within subsection (2) and does not fall within subsection (3), and

(b) the action is done with the intention of advancing a political, religious or ideological cause, and

(c) the action is done with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or

(ii) intimidating the public or a section of the public.

(2) **Action included**
Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person, or

(b) causes serious damage to property, or

(c) causes a person's death, or

(d) endangers a person's life, other than the life of the person taking the action, or

(e) creates a serious risk to the health or safety of the public or a section of the public, or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system, or

(ii) a telecommunications system, or

(iii) a financial system, or

(iv) a system used for the delivery of essential government services, or

(v) a system used for, or by, an essential public utility, or

(vi) a system used for, or by, a transport system.

(3) **Action excluded**
Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action, and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person, or

(ii) to cause a person's death, or

(iii) to endanger the life of a person, other than the person taking the action, or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) **Application**
In this section:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside the State (including within or outside Australia), and

(b) a reference to the public includes a reference to the public of another State or Territory or of a country other than Australia.

Note. The above definition is in the same terms as those used in Part 5.3 of the Commonwealth Criminal Code (as inserted by the *Security Legislation Amendment (Terrorism) Act 2002* of the Commonwealth), except that threats of terrorist acts are excluded since it is not necessary to refer to threats in the context in which the expression is used in this Act.

4 Other definitions

(1) In this Act:

authorisation means an authorisation under this Act given in accordance with Part 2.

Police Minister means the Minister administering the *Police Act 1990*.

premises includes a building, structure or place, whether built on or not.

recognised law enforcement officer means a person appointed under Part 4.

serious indictable offence means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

target of an authorisation—see section 7 (2).

vehicle includes a vessel or an aircraft.

(2) For the purposes of this Act:

(a) a person in an area that is the target of an authorisation includes a person who is about to enter the area or who has recently left the area, and

(b) a vehicle in an area that is the target of an authorisation includes a vehicle that is about to enter the area or that has recently left the area.

(3) Notes included in this Act do not form part of this Act.

Part 2 Authorisation to exercise special powers

5 Authorisation of special powers to prevent terrorist acts

An authorisation for the exercise of the special powers conferred by this Act may be given in accordance with this Part if the police officer giving the authorisation:

(a) is satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future, and

(b) is satisfied that the exercise of those powers will substantially assist in preventing the terrorist act.

6 Authorisation of special powers to investigate terrorist act in the immediate period after its occurrence

An authorisation for the exercise of the special powers conferred by this Act may also be given in accordance with this Part if the police officer giving the authorisation:

(a) is satisfied that there are reasonable grounds for believing that a terrorist act has been committed, and

(b) is satisfied that the exercise of those powers will substantially assist in apprehending the persons responsible for committing the terrorist act.

7 Persons, vehicles or areas targeted by authorisation

(1) An authorisation may authorise the exercise of the special powers conferred by this Act:

(a) for the purpose of finding a particular person named or described in the authorisation, or

(b) for the purpose of finding a particular vehicle, or a vehicle of a particular kind, described in the authorisation, or

(c) for the purpose of preventing a terrorist act in a particular area described in the authorisation (or apprehending in any such area the persons responsible for committing a terrorist act),

or for any combination of those purposes.

(2) The person, vehicle or area is referred to in this Act as the ***target*** of the authorisation.

(3) Without limiting subsection (1) (a), a person may be described by the use of a photograph or drawing.

8 Who may give an authorisation

(1) An authorisation may be given by the Commissioner of Police or by a Deputy Commissioner of Police.

(2) If the Commissioner of Police or a Deputy Commissioner of Police is not able to be contacted when an authorisation is sought as a matter of urgency, a police officer above the rank of superintendent who is able to be contacted may give an authorisation in accordance with this Part.

9 Ministerial concurrence or confirmation

(1) An authorisation may only be given with the concurrence of the Police Minister, except as provided by subsection (2).

(2) An authorisation may be given without the concurrence of the Police Minister if he or she is not able to be contacted at the time it is given.

(3) If the authorisation is given without the concurrence of the Police Minister:

(a) the Police Minister is to be notified of the authorisation as soon as the Police Minister is available to be notified, and

(b) in the case of an authorisation under section 5—the authorisation ceases to have effect if the Police Minister has not confirmed the authorisation within 48 hours after the authorisation was given.

Note. The Police Minister may at any time direct that an authorisation be revoked—see section 12 (1).

10 Authorisation may be given orally or in writing

(1) An authorisation may be given orally or by instrument in writing.

(2) If the authorisation is given orally, it must be confirmed by instrument in writing as soon as it is reasonably practicable to do so.

(3) An authorisation must:

(a) state that it is given under this Act, and

(b) describe the general nature of the threatened terrorist act or suspected terrorist act to which it applies, and

(c) name or describe the person, vehicle or area targeted by the authorisation, and

(d) specify the time it ceases to have effect.

11 Duration of authorisation

(1) An authorisation given has effect, unless sooner revoked, during the period beginning at the time it is given and ending at the time specified in the authorisation.

(2) The period an authorisation has effect must not exceed:

(a) in the case of an authorisation under section 5—7 days beginning with the day on which it is given, or

(b) in the case of an authorisation under section 6—24 hours beginning with the time at which it is given.

(3) The period an authorisation has effect may be extended by the giving of a further authorisation, with the concurrence of the Police Minister, in accordance with this Part so long as the combined period does not exceed:

(a) in the case of an authorisation under section 5—14 days beginning with the day on which it was first given, or

(b) in the case of an authorisation under section 6—48 hours beginning with the time at which it was first given.

12 Revocation of authorisation

(1) The police officer that gives an authorisation, or a police officer of a more senior rank, may revoke it at any time, and must revoke it if directed to do so by the Police Minister.

(2) The cessation of an authorisation (by revocation or otherwise) does not affect anything lawfully done in reliance on the authorisation before it ceased to have effect.

13 Authorisation not open to challenge

(1) An authorisation (and any decision of the Police Minister under this Part with respect to the authorisation) may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus.

(2) For the purposes of subsection (1), ***legal proceedings*** includes an investigation into police or other conduct under any Act (other than the *Police Integrity Commission Act 1996*).

14 Exercise of special powers conferred by authorisation by police officers

(1) The special powers conferred by this Act may be exercised by any police officer.

(2) A police officer may exercise those powers whether or not the officer has been provided with or notified of the terms of the authorisation.

Note. The special powers of a police officer under this Act may also be exercised by a recognised law enforcement officer as referred to in Part 4.

14A Power to give directions to government agencies

(1) The Commissioner of Police or other police officer referred to in section 8 may, for the purposes of facilitating the exercise of the special powers conferred by this Act, give a government agency directions with respect to the exercise of the powers or functions of the agency.

(2) The government agency is authorised and required to comply with the direction.

(3) In this section:

government agency includes a government department, a public or local authority, a State owned corporation and any member or officer of any such department, authority or corporation, but does not include a parliamentary or judicial body or its members or officers.

Part 3 Special powers

15 Purposes for which special powers may be exercised

The special powers under this Part may be exercised for the purposes for which an authorisation is given under this Act.

Note. See section 7 for purposes of an authorisation.

16 Power to obtain disclosure of identity

(1) A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if:

(a) the officer suspects on reasonable grounds that the person is the target of an authorisation (or the person is found in suspicious circumstances in the company of the target of the authorisation), or

(b) the person is in or on a vehicle that the officer suspects on reasonable grounds is the target of an authorisation, or

(c) the person is in an area that is the target of an authorisation.

(2) A person who is so requested to disclose his or her identity must not, without reasonable excuse, fail or refuse to comply with the request.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

(3) A person must not, without reasonable excuse, in response to any such request:

(a) give a name that is false in a material particular, or

(b) give an address other than the person's full and correct address.

Maximum penalty: 50 penalty units or 12 months imprisonment, or both.

(4) A police officer may request a person who is requested under this section to disclose his or her identity to provide proof of his or her identity.

17 Power to search persons

(1) A police officer may, without a warrant, stop and search a person, and anything in the possession of or under the control of the person, if:

(a) the officer suspects on reasonable grounds that the person is the target of an authorisation (or the person is found in suspicious circumstances in the company of the target of the authorisation), or

(b) the person is in or on a vehicle that the officer suspects on reasonable grounds is the target of an authorisation, or

(c) the person is in an area that is the target of an authorisation.

(2) Schedule 1 applies to the search of a person conducted under this section.

Note. Schedule 1 provides for the carrying out of ordinary searches, frisk searches and strip searches. A strip search may not be carried out unless the person is suspected of being the target of an authorisation.

(3) A police officer may detain a person for so long as is reasonably necessary to conduct a search under this section.

18 Power to search vehicles

(1) A police officer may, without a warrant, stop and search a vehicle, and anything in or on the vehicle, if:

(a) the officer suspects on reasonable grounds that the vehicle is the target of an authorisation, or

(b) the officer suspects on reasonable grounds that a person in or on the vehicle is the target of an authorisation, or

(c) the vehicle is in an area that is the target of an authorisation.

(2) A police officer may detain a vehicle for so long as is reasonably necessary to conduct a search under this section.

19 Power to enter and search premises

(1) A police officer may, without a warrant, enter and search any premises, if:

(a) the officer suspects on reasonable grounds that a person who is the target of an authorisation may be in the premises, or

(b) the officer suspects on reasonable grounds that a vehicle that is the target of an authorisation may be in the premises, or

(c) the premises are in an area that is the target of an authorisation.

(2) The police officer must do as little damage as possible.

19A Cordon around target area

(1) A police officer may, for the purposes of stopping and searching under this Part persons, vehicles or premises in a target area, place a cordon around the target area or any part of it.

(2) A cordon may include any form of physical barrier, including a roadblock on any road in or in the vicinity of the target area.

20 Power to seize and detain things

(1) A police officer may, in connection with a search under this Part, seize and detain:

(a) all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may be used, or may have been used, to commit a terrorist act, or

(b) all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence (whether or not related to a terrorist act).

(2) A power conferred by this section to seize and detain a thing includes:

(a) a power to remove a thing from the place where it is found, and

(b) a power to guard the thing in or on the place where it is found.

21 Use of force generally by police officers

It is lawful for a police officer exercising a power under this Part in relation to a person or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the power.

22 Offence to obstruct or hinder search or other powers

A person must not, without reasonable excuse, obstruct or hinder a police officer in the exercise of a power under this Part to stop and search a person or vehicle, to enter and search premises or to seize and detain a thing.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

23 Supplying police officer's details and other information

(1) A police officer must, before or at the time of exercising a power under this Part, or as soon as is reasonably practicable after exercising the power, provide the person subject to the exercise of the power with the following if requested to do so:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power.

(2) The Commissioner of Police is to arrange for a written statement to be provided, on request made within 12 months of the search, to a person who was searched, or whose vehicle or premises were searched, under this Act stating that the search was conducted in pursuance of this Act.

Part 4 Recognised law enforcement officers

24 Recognition of other law enforcement officers

(1) The Commissioner of Police or a Deputy Commissioner of Police may, by instrument in writing, appoint any of the following as recognised law enforcement officers for the purposes of this Act if of the opinion it is necessary for the more effective exercise of powers under this Act with respect to terrorist acts:

(a) members of the Australian Federal Police,

(b) members of the police force of another State or a Territory.

(2) An appointment as a recognised law enforcement officer may be made subject to conditions.

(3) If an individual is appointed as a recognised law enforcement officer, the instrument of appointment must specify the term of the appointment (not exceeding 14 days).

(4) The Commissioner of Police or a Deputy Commissioner of Police may, at any time, revoke the appointment of a person or persons as recognised law enforcement officers.

(5) Recognised law enforcement officers remain under the command and control of the police force to which they belong during the term of their appointment under this Part.

25 Recognised law enforcement officers to have police powers

(1) A recognised law enforcement officer has and may exercise all the functions (including powers, immunities, liabilities and responsibilities) that a police officer of the rank of constable duly appointed under the *Police Act 1990* has and may exercise under this Act or, in any matter arising under this Act, under any law of the State (including the common law).

(2) Those functions extend to functions conferred after the commencement of this section.

(3) The conferral of functions by this section on a recognised law enforcement officer is subject to any applicable conditions of the officer's appointment as a recognised law enforcement officer.

Part 5 Miscellaneous

26 Report to be given to Attorney General and Police Minister

As soon as practicable after an authorisation given under this Act ceases to have effect, the Commissioner of Police is to furnish a report, in writing, to the Attorney General and the Police Minister:

(a) setting out the terms of the authorisation and the period during which it had effect, and

(b) identifying as far as reasonably practicable the matters that were relied on for giving the authorisation, and

(c) describing generally the powers exercised pursuant to the authorisation and the manner in which they were exercised, and

(d) specifying the result of the exercise of those powers.

27 Return of seized things

(1) A police officer who, in exercising a special power conferred by or under this Act, seizes a thing, must return the thing to the owner or person who had lawful possession of the thing before it was seized or came into custody if the officer is satisfied that:

(a) its retention as evidence is not required, and

(b) it is lawful for the person to have possession of the thing.

(2) This section is subject to any order made under section 28.

28 Disposal of property on application to court

(1) A court may, on application by any person, make an order that property seized by a police officer exercising a special power conferred by or under this Act:

(a) be delivered to the person who appears to be lawfully entitled to the property, or

(b) if that person cannot be ascertained, be dealt with as the court thinks fit.

(2) In determining an application the court may do any one or more of the following things:

(a) adjust rights to property as between people who appear to be lawfully entitled to the same property or the same or different parts of property,

(b) make a finding or order as to the ownership and delivery of property,

(c) make a finding or order as to the liability for and payment of expenses incurred in keeping property in police custody,

(d) order, if the person who is lawfully entitled to the property cannot be ascertained, that the property be forfeited to the State,

(e) make any necessary incidental or ancillary orders.

(3) Property ordered to be forfeited to the State:

(a) in the case of money, is to be paid to the Treasurer for payment into the Consolidated Fund, or

(b) in any other case, may be sold by or on behalf of the Commissioner of Police at public auction and the proceeds of sale are to be paid to the Treasurer for payment into the Consolidated Fund.

(4) If the property is not money or is not fit or suitable for sale, or fails to sell at public auction, it is to be disposed of in accordance with the directions of the Commissioner of Police.

29 Protection of police acting in execution of authorisation

If any proceedings (whether criminal or not) are brought against any police officer for anything done or purportedly done by the police officer in pursuance of an authorisation under this Act, the police officer is not to be convicted or held liable merely because:

(a) there was an irregularity or defect in the giving of the authorisation, or

(b) the person who gave the authorisation lacked the jurisdiction to do so.

30 Relationship with other Acts

(1) Nothing in any other Act limits any powers, or prevents a police officer from exercising any powers, that the police officer has under this Act.

(2) Nothing in this Act limits any powers, or prevents a police officer from exercising any powers, that the police officer has under any other Act.

31 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

32 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may create offences punishable by a penalty not exceeding 100 penalty units.

33 Onus of proof of reasonable excuse

The onus of proof of reasonable excuse in proceedings for an offence against this Act or the regulations lies on the person accused of the offence.

34 Proceedings for offences

Proceedings for an offence against this Act or the regulations are to be dealt with summarily by a Local Court.

35 (Repealed)

36 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 12 months from the date of assent to this Act and every 12 months thereafter.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of each period referred to in subsection (2).

Schedule 1 Conduct of personal searches

(Section 17)

1 Application of Schedule

This Schedule applies to any search of a person carried out, or authorised to be carried out, by a police officer under this Act, except as otherwise provided by this Act or the regulations.

2 Definitions

In this Schedule:

electronic metal detection device means an electronic device that is capable of detecting the presence of metallic objects.

frisk search means:

(a) a search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing, and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person, including an examination conducted by passing an electronic metal detection device over or in close proximity to that thing.

ordinary search means a search of a person or of things in the possession of a person that may include:

(a) requiring the person to remove only his or her overcoat, coat or jacket or similar article of clothing and any gloves, shoes and hat, and

(b) an examination of those items.

strip search means a search of a person or of things in the possession of a person that may include:

(a) requiring the person to remove all of his or her clothes, and

(b) an examination of the person's body (but not of the person's body cavities) and of those clothes.

3 Frisk searches and ordinary searches

(1) A police officer who is authorised to search a person may carry out a frisk search or an ordinary search of the person for any purpose for which the search may be conducted.

(2) In conducting a frisk search, a police officer may, if the police officer has asked the person to remove a coat or jacket, treat the person's outer clothing as being the person's outer clothing after the coat or jacket has been removed.

4 Strip searches

A police officer who is authorised to search a person may conduct a strip search of the person:

(a) if the person is suspected of being the target of an authorisation, and

(b) if the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.

5 Preservation of privacy and dignity during search

(1) A police officer who searches a person must, as far as is reasonably practicable in the circumstances, comply with this clause.

(2) The police officer must inform the person to be searched of the following matters:

(a) whether the person will be required to remove clothing during the search,

(b) why it is necessary to remove the clothing.

(3) The police officer must ask for the person's co-operation.

(4) The police officer must conduct the search:

(a) in a way that provides reasonable privacy for the person searched, and

(b) as quickly as is reasonably practicable.

(5) The police officer must conduct the least invasive kind of search practicable in the circumstances.

(6) The police officer must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.

(7) A search must be conducted by a police officer of the same sex as the person searched or by a person of the same sex under the direction of the police officer.

(8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.

(9) A person must be allowed to dress as soon as a search is finished.

(10) If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing.

(11) In this clause:

questioning of a person means questioning the person, or carrying out an investigation (in which the person participates).

transgender person means a person, whether or not the person is a recognised transgender person:

(a) who identifies as a member of the opposite sex, by living, or seeking to live, as a member of the opposite sex, or

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether or not the person is, or was, in fact a transgender person.

6 Rules for conduct of strip searches

(1) A police officer who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:

(a) the strip search must be conducted in a private area,

(b) the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched,

(c) except as provided by this clause, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

(2) A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present.

(3) A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must, unless it is not reasonably practicable in the circumstances, be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the child or person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person.

(4) A strip search must not involve a search of a person's body cavities or an examination of the body by touch.

(5) A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(6) A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(7) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

(8) This clause is in addition to the other requirements of this Act relating to searches.

(9) In this clause:

impaired intellectual functioning means:

(a) total or partial loss of a person's mental functions, or

(b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or

(c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Note. Procedures for searches of a more invasive nature are dealt with under the *Crimes (Forensic Procedures) Act 2000*.

7 No strip searches of children under 10 years

A strip search must not be conducted on a person who is under the age of 10 years.

Schedule 2 (Repealed)