NSW GOVERNMENT Justice

Statutory Review

Terrorism (Police Powers) Act 2002

June 2018

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1. Executive summary

This is a report on the statutory review (**the Review**) of the *Terrorism (Police Powers) Act 2002* (**the Act**). The Act was assented to on 5 December 2002 and confers special powers on police officers to deal with imminent threats of terrorist activity and to respond to terrorist attacks. The Act clarifies the use of force by police when responding to a terrorist act and provides for the investigative detention of terrorism suspects, the preventative detention of terrorism suspects and covert search warrants. The Act is arranged into Parts that make provision on the following topics:

- Part 2 (s.4B-23) confers 'special powers' on NSW Police including the power to stop and search persons and vehicles, to enter and search premises and to seize things
- Part 2AAA (s.24A-24B) addresses the use of force by police to address ongoing terrorist acts
- Part 2AA (s.25A-26) provides for 'investigative detention' of terrorism suspects
- Part 2A (s.26A-26ZS) provides for 'preventative detention' of terrorism suspects
- Part 3 (s.27A-s.27ZC) provides for covert search warrants.

These powers provide the New South Wales Police Force (**the NSWPF**) with the ability to intervene when the risk of terrorism begins to crystallise or to investigate a terrorist act that has occurred.

The Review was conducted on behalf of the Attorney General by the NSW Department of Justice (**the Department**), in accordance with s.36 of the Act. This section requires the statutory review to be undertaken every three years, as soon as possible after the report from the NSW Ombudsman's[1] review of Parts 2A and 3 has been tabled in Parliament (**the Ombudsman's review)**. The report from the Ombudsman's review was tabled in June 2017. We have considered the recommendations from the Ombudsman's report as well as submissions received from key stakeholders in addition to recommendations made by the Victorian Expert Panel on Terrorism and Violent Extremism and Response Powers. The Ombudsman recommended that:

1. Part 2A of the *Terrorism (Police Powers) Act 2002* should be allowed to expire on 16 December 2018.
2. The *Terrorism (Police Powers) Act 2002* should be amended so that the Law Enforcement Conduct Commission (**the LECC**) is not subject to claims of public interest immunity in requiring information from police or other relevant agencies in performing its functions under the Act.
3. The *Terrorism (Police Powers) Act 2002* should be amended so that the LECC is required to

[1] The Ombudsman's review function under Parts 2A and 3 of the Act transferred to the Law Enforcement Conduct Commission on 1 July 2017.

keep under scrutiny the exercise of powers by police under Part 2AA of the Act in identical terms to its functions under Part 2A and Part 3.

4. To ensure that the LECC is able to perform its oversight role effectively, the Attorney General should make representations to the Council of Australia Governments and the relevant Commonwealth Ministers and agencies to seek amendments to relevant legislation, as outlined in Chapter 4 of this report.

We conclude that the policy objectives of the Act remain valid. We also conclude that the terms of the Act remain appropriate for securing those objectives, although some legislative amendments are recommended.

There is no universal blueprint for meeting the challenge posed by terrorism. We have considered whether Part 2A should be retained and note that Commonwealth agencies (including the Australian Federal Police) have publicly stated that they would favour using a Preventative Detention Order (**PDO**) under state legislation than the complementary Commonwealth PDO framework.[2] We conclude that it is premature to sunset the PDO powers, particularly before the investigative detention powers (Part 2AA) are operationally tested (**Recommendation 8**).

Ensuring that the NSWPF has the powers needed to investigate, prevent and combat terrorist acts is a key element of the counter-terrorism framework. To ensure the NSWPF is accountable for any injury that may occur during custody and police are protected from potential false accusations, **Recommendation 9** recommends the NSWPF have the power to record illness or injury suffered by a person while subject to a PDO or investigative detention. To address concerns highlighted by the Ombudsman regarding access to information, **Recommendation 13** seeks to facilitate appropriate LECC oversight of powers exercised under the Act.

We recognise that powers encroaching on liberties must be limited to what is genuinely necessary, among other matters, to avoid the legislation itself becoming a source of grievance leading to an increased terrorism risk. We recommend additional safeguards in relation to investigative detention, including explicitly enabling the Supreme Court to order provision of legal aid in relation to investigative detention orders (**Recommendation 5**), and requiring those held in investigative detention to be treated with humanity and not made subject to cruel, inhuman or degrading treatment (**Recommendation 6**). We recognise that measures to address the threat posed by radicalised minors and vulnerable people must be balanced and proportionate, and crafted with due

[2] *Transcript of Proceedings*, Public Hearing before INSLM, Canberra, 19 May 2017, 20 (Michael Phelan).

regard to the particular vulnerability of these cohorts. To this end, **Recommendation 12** concludes that the Act should include additional safeguards for minors and other vulnerable people.

The Department has engaged in a thorough consultation process to obtain the views of stakeholders throughout the Review. This included a public round of consultation advertised on the Department of Justice's website in addition to two targeted rounds of consultation. A schedule of persons and organisations that made submissions is at **Annexure A.** These views have informed the Report's recommendations.

2. Introduction

Terrorism continues to present a serious and ongoing threat to the safety and security of NSW, the country and the international community. Following the attacks of 11 September 2001, evidence suggests that the terrorism threat has steadily built and will continue to grow in scale and complexity.[3] Australia's National Terrorism Threat Level remains PROBABLE. This means that '*credible intelligence, assessed by our security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.*' The number of terrorist events since the level was raised illustrates the threat. Australia has experienced a terrorist event every 6-8 weeks since September 2014, with the majority of terrorist activity occurring in NSW.[4] In its most recent unclassified annual report (2016-17), ASIO noted that '*a heightened terrorism threat environment, combined with the trend towards 'low-capability' attacks by individuals or small groups requiring limited planning' has sustained a high volume and tempo for counter-terrorism investigations and operations.*'[5] It is important in this context that NSWPF powers to address the threat continue modernising and strengthening. It is equally important to balance legislative powers with statutory protections for the individual freedoms that underpin the Australian way of life.

This is the sixth statutory review of the Act. While all previous reviews concluded that the policy objectives of the Act remained valid, legislative amendments were made to clarify the original policy intent of provisions. The present Review covers the period from the previous statutory review (2015) to 2018 and examines the operation of the Act with respect to its policy objectives, as well as reviewing the recommendations by the NSW Ombudsman's 2017 Review.

Meeting the challenge posed by terrorism requires a comprehensive and effective framework at a state and national level. Commonwealth, State and Territory Governments have recognised a shared commitment to working collaboratively to fight the threat posed by terrorism, most recently reaffirmed at the October 2017 Special Council of Australian Governments (**COAG**) meeting. On 4 December 2002, the NSW Parliament passed the *Terrorism (Commonwealth Powers) Act 2002* referring power to the Commonwealth to make laws with respect to terrorist acts. On the same day,

[3] Mr Michael L'Estrange AO and MR Stephen Merchant PSM, 2017 *Independent Intelligence Review report* (June 2017) [1.11]- [1.16].
[4] The NSWPF submission to Review. A 'terrorist event' being either a terrorist attack or overt police activity that has prevented a terrorist act, including foreign fighters.
[5] ASIO, *Annual report 2016-17*, 3.

NSW Parliament passed the Act. The Act constitutes one aspect of a suite of measures seeking to address terrorism risk. Integral to the suite are programs aimed at addressing the progression of a person further along the path of radicalisation toward violent extremism. Of equal importance are the NSWPF powers under the Act to intervene when the risk of terrorism begins to crystallise or where a terrorist act has occurred.

It is important that the counter-terrorism framework continues to adapt in response to the changing nature of the threat. Law enforcement agencies have '*to evolve their approaches to be more innovative, integrated and agile in order to identify and disrupt would-be attackers*'.[6] Consistent with this requirement, since the 2015 statutory review of the Act, the NSW Government has amended the Act as follows:

- *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* which amended the Act to implement a recommendation arising from the State Coroner's *Inquest into the deaths arising from the Lindt Café Siege*. These amendments allow the Commissioner of Police to authorise the use of force, including lethal force, that is reasonably necessary to defend any person threatened by a terrorist incident or to secure the release of hostages where planned and coordinated police action is required. Under the Act, police officers who use force in these circumstances will not incur criminal liability where they act in good faith.
- *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* which inserted Part 2AA into the Act, permitting a police officer to arrest, detain and question a person who is suspected of being involved in a recent or imminent terrorist act to assist in responding to, or preventing, the act. The amending Act also extended by three years the sunset date for the offence of membership of a terrorist organisation under the *Crimes Act 1900*.
- *Terrorism (Police Powers) Amendment Act 2015* which amended the Act to extend the operation of the PDO powers, due to expire on 16 December 2015, for a further three-year period until 16 December 2018. This amendment also saw the removal of the NSW Crime Commission's powers to apply for covert search warrants at the request of the NSW Crime Commissioner.

The above amendments seek to address and mitigate risk and are characterised by new police powers, increasing cooperation between intelligence and law enforcement agencies and a focus on targeting preparatory activities to prevent terrorist acts. The amendments recognise that the time

[6] *Transcript of Proceedings before INSLM*, Public Hearing, Canberra, 19 May 2017, 5 (Duncan Lewis).

taken between radicalisation and terrorist attacks is shortening,[7] further challenging response capabilities. As noted by the then AFP Deputy Commissioner, Mr Michael Phelan APM, '*the very short flash to bang, so to speak, time from radicalisation to violent action creates significant challenges for police ….The pace at which plots develop, coupled with the potentially catastrophic consequences of a terrorist attack, mean police need to act fast to disrupt terrorist activity*'.[8] The amendments to the Act seek to provide the NSWPF with powers to disrupt and address terrorism activity as quickly and effectively as possible.

The increasing tendency of minors to subscribe to extremist ideologies represents an emerging and troubling aspect of the threat landscape. The murder of Curtis Cheng by a 15 year old in Parramatta in 2015 and an increasing number of arrests of young people for terrorism offences illustrate this challenge. Ensuring our law enforcement agencies have adequate powers to prevent, disrupt, and respond to the changing and dynamic nature of terrorism is key. It is also important that the frameworks to respond to the terrorism threat do not undermine the principles and institutions they are supposed to protect. Powers encroaching on liberties must be limited to what is genuinely necessary, to, among other matters, avoid the legislation itself becoming a source of grievance and antipathy that foments social alienation and radicalisation, leading to an increased risk.

The recommendations in this Review seek to ensure that the legislative framework appropriately meets the Act's objectives. Submissions that stakeholders agreed could be publicly released are published on the Department's website. The Review's recommendations recognise the complex and difficult tension in implementing counter-terrorism policies. The recommendations seek to ensure that the Act provides the NSWPF the necessary powers to address terrorism risk and balance these powers with appropriate protections. The recommendations recognise that robust counter-terrorism laws can be crafted that include strict safeguards and effective oversight.

[7] Mr Michael L'Estrange AO and MR Stephen Merchant PSM, 2017 *Independent Intelligence Review report* (June 2017) [1.11] - [1.16].
[8] *Transcript of Proceedings before INSLM*, Public Hearing, Canberra, 19 May 2017, 6 (Michael Phelan).

3. Recommendations

Recommendation 1: The existing definition of *terrorist act* should be retained, noting that it is a nationally recognised definition that is currently being considered at an inter-jurisdictional level.

Recommendation 2: Warning requirements under Part 2 should align with s.203 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**).

Recommendation 3: For the purpose of gathering statistics, the Act should require annual reporting on the number of Part 2 authorisations and the powers which were exercised under those authorisations.

Recommendation 4: For the purpose of gathering statistics, the Act should require annual reporting on the number of Part 2AAA authorisations.

Recommendation 5: The Act should enable the Supreme Court to order the provision of legal aid in relation to the making or revocation of an investigative detention order.

Recommendation 6: The Act should require a person to be treated with humanity and with respect for human dignity and not be subjected to cruel, inhuman or degrading treatment by a person exercising authority under, or enforcing, the investigative detention order.

Recommendation 7: The NSWPF should be required to inform a person subject to an order under Part 2AA of matters including:

- their right to contact the LECC in relation to LECC's existing jurisdiction regarding NSWPF conduct
- their right to contact a lawyer
- a copy of the order.

Recommendation 8: Part 2A should be extended for an additional three years.

Recommendation 9: The Act should be amended to enable a NSWPF officer to record any illness or injury suffered by a person while being detained under a PDO or investigative detention.

Recommendation 10: The Act should be amended to require the NSWPF to advise detainees and their lawyer that:

- any conversation (whether by way of telephone call, Audio Visual Link (AVL) or face-to-face conversation) may only take place if it can be monitored by a police officer
- that the NSWPF intend to monitor the conversation.

Recommendation 11: The Act should be amended to align the strip search requirements with the LEPRA strip search requirements. This would enable an officer to conduct a strip search:

- at a police station or other place of detention, if he or she suspects on reasonable grounds that the search is necessary, or
- at any other place, if he or she suspects on reasonable grounds that the strip search is necessary for the purposes of a search, and that the seriousness and urgency of the circumstances make the search necessary.

Recommendation 12: Part 2A of the Act should be amended in respect of those under 18 or with impaired intellectual functioning to:

- increase the maximum limit to four hours for visits
- clarify that the custody manager is required to assist detainees to exercise their right to have contact with a person they know, trust and accept
- require the NSWPF to exercise best efforts to locate the detainee's appropriate support person
- if a contact person is deemed unacceptable by the NSWPF, the detainee should be told (provided this doesn't give rise to operational sensitivities) why this person is not acceptable and given an opportunity to nominate someone else. If no alternative is agreed upon, any contact nominated by the NSWPF should have specialist expertise.

Recommendation 13: The NSWPF should be required to provide information requested by the LECC under s.26ZO or s.27ZC on the condition that:

- LECC officers reviewing the material have appropriate security clearance
- the NSWPF can identify matters of particular sensitivity that will be seen by the LECC Commissioners only
- the NSWPF would be provided a copy of any material the LECC proposed to be included in a public report to ensure it does not unnecessarily reveal police methodology, ongoing operations or jeopardise information-sharing relationships.

The NSWPF should not be required to provide material:

- that is subject to Commonwealth statutory secrecy provisions that restrict the NSWPF providing information
- that may identify informants or officers operating covertly.

The NSWPF should specify to the LECC where redactions are made for these purposes.

This recommendation is to be reviewed after 12 months of operation.

4. Review

Overall operation of the Act

We have reviewed the Act and conclude that it remains a necessary tool in the counter-terrorism framework and that the Act's policy objectives remain valid.

Use of the extraordinary powers under the Act have been appropriately rare:

- Part 2 powers were authorised for the first time in raids carried out in Sydney in 2005 as part of *Operation Pendennis* and also authorised during the Lindt Café Siege
- Part 2AAA powers have not been used to date
- Part 2AA powers have not been used to date
- Part 2A powers have not been used since 2014
- Use of Part 3 covert search warrant powers has been limited with the NSWPF only applying for five covert search warrants since the powers were introduced, of which three were executed.

These powers, while rarely, if ever, invoked, provide the NSWPF appropriate tools to remain agile in meeting the terrorism threat. The Act provides the NSWPF necessary powers to intervene when the risk of terrorism begins to crystallise or where a terrorist act has occurred.

Part 1 Preliminary

Objects of the Act

The Act in its entirety has no objects clause, notwithstanding the objects clauses in respect of the specific parts relating to investigative detention and preventative detention.[9] This is consistent with the LEPRA and the majority of NSW legislation governing criminal offending, excluding legislation directed solely at child offending or child sentencing. Based on the second reading speeches to the Act and its amending legislation, it can be said that the policy objectives of the Act are to give police officers:

- special powers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after they have occurred.
- authority to use force, including lethal force, that is reasonably necessary to defend anyone threatened by a terrorist incident or to secure the release of hostages
- enable police to use preventative detention orders to detain suspected people to prevent terrorist acts or preserve evidence following a terrorist act
- enable the covert entry and search of premises by specially authorised police officers.

The increasing tendency of minors to subscribe to extremist ideologies represents an emerging and troubling aspect of the current threat landscape occurring domestically and internationally.[10] The murder of Curtis Cheng by a 15 year old in Parramatta in 2015 and an increasing number of arrests of young people for terrorism offences illustrate the ever-shifting challenge. There is also some evidence of the use of social media by terrorist organisations to reach, recruit and instruct minors in a form of 'grooming' for terrorism actions. Terrorism measures in relation to minors must be balanced and proportionate, and crafted with due regard to the particular vulnerabilities of this cohort. The Act recognises this through particular safeguards for minors and vulnerable people. This includes that investigative detention is not available in relation to persons under 14 years of age (s.25F) and the application of special LEPRA safeguards to young persons aged 14 to 17 years of age in relation to the exercise of Part 2AA powers.

Stakeholder views

The Office of the Advocate for Children and Young People (**ACYP**) submitted that the Act should explicitly acknowledge that children and young people require special consideration and support.

[9] See s.25A and s.26A, *Terrorism (Police Powers) Act 2002*.
[10] Christopher J. Lennings , Krestina L. Amon , Heidi Brummert & Nicholas J. Lennings (2010): *Grooming for Terror: The Internet and Young People*, Psychiatry, Psychology and Law, 17:3, 424-437.

Relevant objects and principles in relation to young people are set out in some NSW legislation, such as the *Children (Criminal Proceedings) Act 1987* (s.6), the *Children (Detention Centres) Act 1987* (s.4), the *Young Offenders Act 1997* (s.7) and the *Children and Young Persons (Care and Protection) Act 1998* (s.8 and s.9). ACYP submitted that it is important to recognise that children and young people involved in terrorism and violent extremism are often victims of deliberate child recruitment and grooming.

ACYP noted that children and young people who have been groomed should be treated in line with existing international child rights standards and relevant NSW laws. This includes obligations to consider their best interests, to use detention as a last resort, to divert young people from the criminal justice system, and to provide appropriate rehabilitation and reintegration assistance. Legal Aid NSW supported amending the Act to recognise special consideration of children and young people. The Law Society further submitted that special consideration and support should also be afforded to other vulnerable persons, including those with impaired intellectual functioning and Indigenous peoples.

The NSWPF did not support this proposal and noted that minors are afforded the same rights under the Act as they are under LEPRA (including Part 3, Division 3 of the *Law Enforcement (Powers & Responsibilities) Regulation 2016*). The NSWPF submitted that objects or principles referred to in existing NSW legislation are not applicable to the regimes in the TPPA.

Our view

It is not necessary to have an objects clause in this legislation, consistent with the LEPRA and the majority of NSW legislation governing criminal offending, excluding legislation directed solely at child offending/sentencing. Further, this Act is not the appropriate legislative vehicle to refer children to rehabilitation and reintegration assistance given the Act is directed to police powers to investigate terrorism acts. Nevertheless, safeguards for minors and other vulnerable people are included in the Act and discussed further below at Recommendation 12.

Definition of *terrorist act*

Part 1 sets out preliminary provisions including definitions used throughout the Act. This includes, at s.3, a definition of *terrorist act* which requires an act to be done with the intention of advancing a political, religious or ideological cause. This aligns with the nationally agreed definition which has

three elements – motive [3(1)(b)], intention [3(1)(c)] and action [3(1)].[11] The first requirement – the objective to advance a political, religious or ideological cause – is commonly referred to as a 'motive' requirement. This element can be distinguished from the 'intention' element where the motive requires the action to be done with the intention of coercing or influencing, by intimidation, a government or the public. All three elements must be satisfied. An act is not a 'terrorist act' unless those responsible have as their motive the advancement of a political, religious or ideological cause. COAG has previously recognised that the Australian definition '*is among the most tightly drafted and human rights respecting definitions in the domestic laws of any country*'.[12] Including motive in the definition confines the additional powers and penalties to a narrow category of actions that are linked to extreme violence or destruction motivated by a political, religious or ideological cause.

The Victorian Expert Panel on Terrorism and Violent Extremism and Response Powers have suggested that by restricting the legislative definition of a 'terrorist act' to an act motivated by a political, religious or ideological cause, the legislation exposes the community to the danger of a terrorist act motivated by something other than politics, religion or ideology. The Panel cites the case of the Las Vegas gunman, Stephen Paddock, as an example of an act that would not be captured under the existing definition. The Panel noted that a particular act might be perpetrated by a person who may have no affiliation to known terrorist groups where motivation may not be political, religious or ideological. Motivation for committing mass casualty attacks may be an unknown and perhaps unknowable mixture of personal grievances unconnected with politics, religion or ideology. The Panel's Report proposes amendments to the current legislative definition to overcome a perceived gap in police powers where the motive of the lone actor is unclear. Under the Panel's proposal, the definition of a 'terrorist act' would be amended to:

- remove motive as an essential element of the definition
- to strengthen the distinction between terrorism and other crimes to capture terrorism's unique significance and gravity. This would be done by linking the act to:
    - provoking a widespread state of terror in the community
    - coercing, or influencing, by intimidation, the government, executive or judiciary.

[11] See *Criminal Code Act 1995* (Cth) sch 1 s.101.1; *Terrorism (Community Protection) Act 2003* (Vic) s.4; *Terrorism (Police Powers) Act 2005* (SA) s.2(1); *Terrorism (Extraordinary Powers) Act 2005* (WA) s.5; *Terrorism. (Preventative Detention) Act 2005* (Tas) s.3(1); *Police powers and Responsibilities Act 2000* (Qld) s.211; *Terrorism (Emergency Powers) Act* (NT) s.5; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.6.
[12] Council of Australian Governments, *Review of Counter-Terrorism Legislation (2013)*, https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF [31].

Further to the recommendation arising from the Victorian review of counter-terrorism legislation, an inter-jurisdictional working group (which includes representation from the Commonwealth, states and territories) is currently considering whether any amendments are required to the definition of 'terrorist act'. National consistency in preventing and responding to terrorist threats underpins Australia's counter-terrorism framework in a complex and evolving threat environment.

The existing definition is consistent with definitions of terrorism in the UK[13]; New Zealand[14] and South Africa[15]. Outside of these, other countries do not use motivation as a defining characteristic. The international community has suggested that terrorism's defining characteristic is not the motive of the terrorist but the intention to terrorise. For example, the resolution signed in the aftermath of the 2004 bombing of the Australian Embassy in Jakarta condemned 'all acts of terrorism irrespective of their motivation'.[16] While this wording could be read as indicating that the international community does not include motivation as a factor in defining a *terrorist act*,[17] an equally persuasive reading is that the international community is seeking to emphasise that actions may be terrorist acts regardless of the political, religious or ideological cause that has motivated that action.

National consistency in countering terrorism is important, particularly given the coordinated and cooperative approach to inter-jurisdictional responses. The NSW definition of 'terrorist act' is substantially the same as the definition in other Australian jurisdictions[18] and has been crafted by agreement among states, territories, and the Commonwealth. To date, the existing NSW definition has not posed a problem to NSW authorities. The definition, as part of Australian legislation, has been considered by appellate courts in its current form on a number of occasions. Its meaning and application are relatively clear. Indeed, the Victorian Panel acknowledges that it is not aware of any case in which the Victorian police 'have not been able to form a reasonable belief that the motive of the offender was the advancement of religion'.[19]

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[13] *Terrorism Act 2000* (UK) s.1; Canada (Criminal Code, RSC 1985, c C-46, s.83.01(1)).
[14] *Terrorism Suppression Act 2002* (NZ) s.5.
[15] *Protecting Constitutional Democracy Against Terrorism and Related Activities Act 2004* (South Africa) s.1.
[16] See also SC Res 1566, 5053rd mtg, UN Doc S/RES/1566 (8 October 2004); International Convention for the Suppression of Terrorist Bombings, which entered into force on 23 May 2001 and The International Conviction for the Suppression of the Financing of Terrorism which entered into force on 10 April 1992.
[17] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2. https://www.vic.gov.au/safeguarding-victorians-against-terrorism/expert-panel-on-terrorism.html [3.1]
[18] See *Criminal Code Act 1995* (Cth) sch 1 s.101.1; *Terrorism (Community Protection) Act 2003* (Vic) s.4; *Terrorism (Police Powers) Act 2005* (SA) s.2(1); *Terrorism (Extraordinary Powers) Act 2005* (WA) s.5; *Terrorism (Preventative Detention) Act 2005* (Tas) s.3(1); *Police powers and Responsibilities Act 2000* (Qld) s.211; *Terrorism (Emergency Powers) Act* (NT) s.5; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.6].
[19] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2. https://www.vic.gov.au/safeguarding-victorians-against-terrorism/expert-panel-on-terrorism.html [3.2.2].

We acknowledge that there is a narrow group of individuals who undertake indiscriminate attacks where there is no underlying motive to advance a political, religious or ideological cause. Recent national and international events have highlighted the challenge of responding to threats posed by high-risk individuals with complex needs. NSW has already implemented measures to seek to address this risk. On 26 April 2017, the NSWPF announced a specialist unit to deal with obsessed individuals who threaten to carry out acts of violence.

The Fixated Persons Investigation Unit, which is separate from the Joint Counter Terrorism Team, focuses on the detection, intervention and prevention of so-called 'lone actor' and 'fixated person' threats across the state. This new framework is partly a response to evidence presented to the Coroner's *Inquiry into the Lindt Café Siege* where the threat assessment capability 'would likely have acted on the warning signs' exhibited by Man Monis'. The establishment of this unit recognises the need for a more focused approach to the identification and monitoring of individuals who are moving towards radical violence. This Unit seeks to address the fact that lone wolf actors may seek to draw on the communities of belief and ideologies as validation for their actions. The establishment of this Unit seeks to address the grey space between terrorism acts and criminal acts, particularly where the motivation of a mentally unstable person is unclear. We consider that NSW has existing frameworks in place to address risk posed by offenders committing criminal acts with no clear motive. Any change to the nationally consistent definition should be through the inter-jurisdictional working group that is currently considering this issue.

Recommendation 1: The existing definition of *terrorist act* should be retained, noting that it is a nationally recognised definition that is currently being considered at an inter-jurisdictional level.

Part 2 Special Powers

Powers under Part 2 and when they have been used

Part 2 of the Act provides that the NSWPF Commissioner, a NSWPF Deputy Commissioner, or a police officer above the rank of superintendent if the commissioners are not able to be contacted, may, with the concurrence or confirmation of the Police Minister, give an authorisation for the exercise of special powers within a particular geographic area. These powers include the power to require a person to disclose his/her identity (s.16); to stop and search persons (s.17); to stop, search and enter vehicles (s.18), to enter and search premises (s.19) and, in connection with any such search, to seize things (s.20) without a warrant. The Part's operation depends on the combined effect of Division 2 (s.5-14B) which provides for authorisation for the use of special powers, and Division 3 (s.15-23) which provides the specific powers that may be exercised when an authorisation is in force. The powers may be authorised if the authorising police officer is satisfied there are:

- reasonable grounds to believe that terrorist act could occur in the next 14 days and the exercise of the special powers will substantially assist in preventing the terrorist act (s.5)
- reasonable grounds to believe that a terrorist act has been committed and the exercise of the special powers will substantially assist in apprehending the persons responsible for committing the terrorist act (s.6).

The special powers under Part 2 were authorised for the first time in raids carried out in Sydney in November 2005 as part of *Operation Pendennis*. The authorisation named 13 target people under s.7(1)(a) of the Act to enable the relevant offenders to be found. The authorisation was in effect from 7 November 2005 to 13 November 2005. No powers were exercised under the authorisation as the police searches and arrests occurred under other law enforcement powers. Part 2 powers were also authorised by the Commissioner during the Lindt café siege

Size of an area that may be made the 'target' of an authorisation

There is no express limit under Part 2 on the size of an area that may be made the 'target' of an authorisation, nor any criterion that would necessarily limit the area. The Act includes no mechanism for ensuring that a limitation, restriction by reference to purpose, be respected. While the Act refers to a 'particular' area [s.7(1)(c)], there is currently no explicit legislative limit confining an authorisation to a small area.

As noted when the legislation was introduced, the '*new powers [were] not intended for general use. In ordinary circumstances, we rely on standard police investigations and the cooperation 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*'.[20]

The existing safeguards align with other extraordinary NSW legislation. After the Cronulla Riots in December 2005, the NSW Parliament enacted emergency legislation giving police special powers to deal with 'large-scale public disorder'. These powers are in Part 6A of the LEPRA. To use the emergency powers, the Commissioner of Police (or a Deputy or Assistant Commissioner) must issue an authorisation for a target area. LEPRA requires the police officer giving the authorisation to be satisfied that the nature and extent of the powers to be conferred by the authorisation *are appropriate* to the public disorder that is occurring or threatened [s.87D(2) of the LEPRA]. This aligns with the requirement in the TPPA.

Stakeholder views

The Bar Association recommended the Act have a mechanism for ensuring limitation on the size of an area that may be made the 'target' of an authorisation. The Bar Association noted that as a result of the current construction of the Act, Part 2 authorisations might be issued or interpreted for the prevention of a terrorist attack in a very wide area, including the whole State. The Law Society of NSW supported the Bar Association's proposal. Legal Aid NSW also supported limiting the size of an area that may be made the target of an authorisation and further suggested the proposal also limit Part 2AAA declarations regarding use of force.

The NSWPF noted that the size of the target area is determined by the unique circumstances of the terrorist threat being addressed and that they have always placed a 'size' on the target area that is determined by operational need. That is, the NSWPF have, to date, sought to ensure that a limitation – restriction by reference to purpose – *is* respected. While use of Part 2 powers has been limited, the NSWPF submit that when the powers have been sought, the authorising officers have always confined the boundary of the target area to a size deemed operationally appropriate to the threat posed.

Our view

[20] Legislative Assembly Hansard – 19 November 2002, Second reading speech, *Terrorism (Police Powers) Bill 2002* (Bob Carr).

The Act includes limits and safeguards in relation to the use of Part 2 powers. For example, the police officer giving an authorisation must be satisfied that the nature and extent of the powers to be conferred by the authorisation are appropriate to the threatened or suspected terrorist act [s.8(3)]. The existing safeguards align with other extraordinary NSW legislation and limits the size of an area that may be made the 'target' of an authorisation, while ensuring the legislation retains the flexibility to adjust to the nature and size of the relevant terrorist threat. Noting that the use of Part 2 powers has been limited, there is no evidence that the authorisations, and the special powers they confer, have been misused. Coupled with the existing Part 2 restrictions, this indicates that no limitation on the area that may be made the 'target' of an authorisation is necessary.

Power to declare an act a *terrorism act*

Part 2 of the Act enables an authorisation of special powers to either prevent terrorist acts or to investigate terrorist acts in the immediate period after their occurrence (s.5 and s.6). The power to give an authorisation rests with the Commissioner of Police or by a Deputy Commissioner of Police, or a police officer above the rank of superintendent if the commissioners are not able to be contacted (s.8). If the Commissioner or a Deputy Commissioner is not able to be contacted when an authorisation is sought as a matter of urgency, a NSWPF officer above the rank of superintendent who is able to be contacted may also give an authorisation [s.8(2)]. This is to be distinguished from the use of force authorisation at Part 2AAA.

The *Police Act 1990* (NSW) provides that the NSWPF Commissioner may delegate to another member of the NSWPF any of the functions conferred or imposed by or under any Act (s.31). This extends to delegation of the Commissioner's powers under the Act. This express power to delegate provides a statutory procedure for the devolution of the Commissioner's power, absent any contrary intention. The Commissioner's broad power to delegate could only be limited either because there is an express exception to the delegation power, or as a matter of statutory interpretation it is evident that the power was intended to be exercised personally. Neither of these exceptions applies in relation to the Commissioner's powers under Part 2.

Stakeholder views

The Law Society of NSW submitted that the Act should specify that the power to declare an act a *terrorism act* is non-delegable. Legal Aid NSW supported this proposal. The Law Society noted the significant consequences that flow from a declaration that an incident is, or is likely to be, a terrorist act. The Bar Association did not make a submission in relation to this proposal. The NSWPF considered that there was no ambiguity in the Act regarding the current delegations of the power

and noted it only allows for those above superintendent in emergency situations. The NSWPF emphasised that the proposal aligned with current practice whereby the NSWPF do not delegate this power to ranks lower than superintendent.

Our view

There is merit in limiting the power to declare an act a *terrorist act* to ensure appropriate senior oversight of the consequences that flow from an authorisation. The existing wording of Part 2 of the Act already has the effect of limiting the power to NSWPF officers above the rank of superintendent. Similar authorisation powers under Part 2AAA (use of force) only reference the Commissioner and Deputy Commissioner and do not refer to superintendents.[21] To date, the NSWPF has limited the authorisation power to senior NSWPF officers. This is evidenced by the Operation Pendennis authorisation (issued by the Commissioner) and the authorisation during the Lindt siege (also issued by the Commissioner). The second reading speech to the original bill emphasised the importance of confining the Part 2 authorisation power to officers above the rank of superintendent while also ensuring that succession planning guards against the situation where a terrorist attack claims the most senior ranks of New South Wales Police.[22] Noting that the NSWPF has emphasised that they do not propose to delegate this power to ranks lower than superintendent, and the existing restrictions in place within the Act to the rank above superintendent, we consider it is unnecessary to explicitly provide that the Commissioner's powers under Part 2 of the Act are non-delegable.

Warning requirements

When a NSWPF officer exercises Part 2 powers that involve requesting a person to comply with a request, the officer is required to provide that person with a warning that the person is required to comply with the request. If the person does not comply with the request after being given that warning, and the police officer believes that the failure to comply by the person is an offence, the officer must warn the person that their failure to comply is an offence [s.23(3)].

The NSWPF has existing warning requirements under s.203 of the LEPRA that require a NSWPF officer to give a warning to a person that they are required by law to comply with a direction, requirement or request. Prior to November 2014, if an officer exercised a power involving the issue of a direction or a request, the officer was required to inform the person that they were required by law to comply, and if the person did not comply, another warning was required that the failure to

[21] *Terrorism (Police Powers) Act 2002* s.24A(5).
[22] Second reading speech on *Terrorism (Police Powers) Bill 2002*, (Bob Carr).

comply was an offence. This warning process was streamlined in 2014 with s.203 of LEPRA. Under the new provisions, in circumstances where the exercise of power consists of a direction, requirement or request, the officer must give a warning to the person that they are required by law to comply. There is no subsequent requirement to warn them that they will be committing an offence if there is any failure to comply. Section 23(3) of the Act is inconsistent with the LEPRA and still reflects the repealed LEPRA provisions.

Stakeholder comments

The NSWPF noted that the inconsistency between the warning requirements under Part 2 of the Act and s.203 of the LEPRA could result in operational confusion as to which statutory regime is in effect in exercising powers in relation to complying with the safeguards. Legal Aid NSW did not support this proposal. Legal Aid NSW noted that Part 2 powers are extraordinary in their breadth and nature. Requiring consistency with the LEPRA is insufficient justification for weakening the existing safeguard for the NSWPF to warn those affected of the person's obligation to comply with the request and warn the person that failure to comply is an offence.

Our view

It is important to ensure that warning requirements across legislative frameworks are not overly complex, clunky or difficult to apply. It is appropriate to align the warning requirements in the Act with those in the LEPRA. This would include a requirement that, when exercising a power, police officers provide their name and place of duty, evidence that they are a police officer (unless they are in uniform) and the reason for the exercise of the power. It is appropriate to consolidate the existing warnings that the NSWPF must give when issuing a direction, requirement or request that a person is required to comply with by law.

Recommendation 2: Warning requirements under Part 2 should align with s.203 of the LEPRA.

Annual reporting

Under the existing Act, the NSWPF Commissioner must advise the Police Minister and the Attorney General:

- whenever a terrorism suspect is arrested under the investigative detention powers of Part 2AA (s.25P)
- annually on the exercise of PDO powers under Part 2A (s.26ZN)
- annually to the Police Minister and the Attorney General on the exercise of the covert search warrant powers under Part 3 (s.27ZB).

No equivalent reporting requirement exists in relation to exercise of Part 2 powers. Part 2 powers can already be scrutinised by the LECC by using its powers to oversight and monitor police investigations and investigate police misconduct or maladministration [set out in the *Law Enforcement Conduct Commission Act 2016* (**LECC Act**)].

Stakeholder views

A number of stakeholders, in particular legal stakeholders, expressed concern at the powers available to the NSWPF under the Act. Recommendation 3 of the Ombudsman's review recommended the Act be amended so that the LECC be required to keep under scrutiny the exercise of powers by the NSWPF under Part 2AA of the Act in identical terms to its functions under Part 2A and Part 3. The Bar Association supported, and built on, this recommendation in submitting that the LECC's oversight should extend to Part 2 of the Act as well. Legal Aid NSW supported this proposal. The LECC supported having an annual reporting provision regarding the exercise of Part 2 powers, similar to s.25P, s.26ZN and s.27ZB, in relation to the exercise of powers under those parts.

Our view

The NSWPF has not over-utilised powers under the Act since commencement. Part 2 powers can already be scrutinised by the LECC by using its powers to oversight and monitor police investigations and investigate police misconduct or maladministration (set out in the LECC Act). Extending the LECC oversight is difficult to justify in this context.

There are benefits in having uniform reporting requirements to ensure effective oversight on when the NSWPF exercise powers under the Act. Requiring the NSWPF to provide an additional report setting out the number of Part 2 authorisations the NSWPF has made and the powers which were exercised under those authorisations in a 12 month period will not create a significant impost on resourcing, particularly given these powers are rarely used. Rather, we anticipate that this will provide a further avenue of scrutiny and transparency regarding the very rare times Part 2 powers are used.

Recommendation 3: For the purpose of gathering statistics, the Act should require annual reporting on the number of Part 2 authorisations and the powers which were exercised under those authorisations.

Part 2AAA Police Use of force – ongoing terrorist acts

Powers under Part 2AAA and when they have been used

Last year the NSW Parliament passed the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* that inserted Part 2AAA into the Act. Part 2AAA allows the NSWPF Commissioner to authorise the use of force that is reasonably necessary to defend any person threatened by a terrorist incident or to secure the release of hostages where planned and coordinated police action is required. The provisions provide for authorising, directing or using force (including lethal force) that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty. Police officers who use force in these circumstances will not incur criminal liability where they act in good faith.

The amendments implemented in response to the NSW State Coroner's recommendation arising from the *Inquest into the deaths arising from the Lindt Café siege* noted that the existing legislative framework had the 'potential to hamper effective responses to terrorist incidents'.[23] The reforms seek to address an issue identified by the State Coroner where snipers in the Lindt siege believed they had no legal authority to use lethal force against Man Monis at an earlier point in the police operation because there was no ostensible threat of imminent physical harm to the hostages.

Part 2AAA authorisations have not been used to date. This is the first statutory review that has considered use of the powers since they commenced.

The test for exercising the use of force

To trigger the use of force powers under Part 2AAA, the NSWPF Commissioner (or a Deputy Commissioner of Police if satisfied that the Commissioner is not able to be contacted when a declaration is sought as a matter of urgency) must first declare the incident a 'terrorist act' [under s.24A(1)] once satisfied that:

[23] State Coroner of NSW, *Inquest into the deaths arising from the Lindt Café siege: Findings and recommendations* (May 2017) 324.

- an incident is likely to be a terrorist act; and
- a planned and coordinated police action is required to defend persons threatened by that act or to prevent their deprivation of liberty.

Where a declaration is made, the police action that is authorised in responding to the terrorist act is the authorisation, direction or use of force, including lethal force, that is reasonably necessary in the circumstances as the police officer perceives them, to defend persons threatened by the incident or to prevent or terminate their unlawful deprivation of liberty. Police officers taking that action will not incur criminal liability where they act for the purposes of a police action plan and in good faith.

Stakeholder views

The Law Society submitted that Part 2AAA authorisations should only be exercised once the NSWPF form a reasonable suspicion that the actions of the perpetrator present a serious risk of death to the hostages. That is, the words '*to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty*' would be replaced with 'to prevent a serious risk of death of hostages'. The Law Society submitted that under the existing provision, the NSWPF can kill a hostage taker without a reasonable suspicion that they will actually injure the hostages. Police can kill a hostage taker to prevent a threat to a hostage 'and by definition, any hostage is under threat'.

The NSWPF strongly opposed the Law Society's proposal. The NSWPF submitted that the Law Society's proposal would effectively nullify what the NSW State Coroner's recommendation sought to achieve. Evidence at the Inquest indicated a hesitation by the NSWPF to use force even where it may be legally justified. The NSWPF submitted that the Law Society proposal, by both setting a higher threshold for the use of force and adding an additional step to be considered in the decision-making process, would remove any clarity achieved by Part 2AAA.

Our view

Part 2AAA requires the NSWPF to perceive the circumstances as requiring the level of force reasonably necessary to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty. The amendments arose out of lessons learned from the Lindt Café siege. The amendments sought to provide the NSWPF clarity regarding the use of force during a terrorist attack, with the focus being to save lives of potential hostages and victims.

Part 2AAA provides for a statutory immunity in specific instances. The Law Society's proposal would narrow the existing law of self-defence in the *Crimes Act 1900* (NSW) and decrease the NSWPF's power to respond to terrorist acts as opposed to any other situation. This proposal would run counter to the lessons arising from the Lindt Siege. At this time, no further amendments regarding the use of force are proposed.

LECC scrutiny and annual reporting

The Ombudsman's review function under Parts 2A and 3 of the Act transferred to the LECC on 1 July 2017. Under the Act, the LECC is required to keep under scrutiny the exercise of Part 2A PDO powers and covert search powers under Part 3. The LECC must report on the exercise of Part 2A and Part 3 powers every three years and provide a copy of the report to the Attorney General and the Police Minister. The Attorney General is then required to table the report in Parliament as soon as practicable after it is received.[24] No equivalent scrutiny or annual reporting requirements exist in relation to the exercise of Part 2AAA authorisations.

Stakeholder views

Noting its existing and proposed functions, the LECC supported extension of its scrutiny function to all Parts of the Act, including Part 2AAA but excluding Part 2. The Bar Association supported the LECC oversight expanding more broadly. LECC scrutiny applying to Part 2AAA was not referred to specifically in the submissions of the Bar Association, the NSWPF or Legal Aid NSW (consideration was confined to LECC scrutiny applying to Part 2AA)

Our view

It is unnecessary to extend LECC scrutiny to Part 2AAA of the Act. LECC already monitors the NSWPF's investigation of *critical incidents*. A *critical incident* is an incident involving a police officer or other member of the NSWPF that results in death or serious injury to a person. Where the use of force under Part 2AAA reaches this threshold it will be managed as a critical incident. The LECC monitors the investigation of critical incidents from the time of the incident, until the completion of the investigation, to provide assurance to the public and the next of kin that investigations are conducted in a competent, thorough and objective manner. This oversight includes ensuring consideration of the lawfulness and reasonableness of officer actions involved in the critical incident. The NSWPF is required to consider and respond to concerns and recommendations raised by the

[24] *Terrorism (Police Powers) Act 2002* s.26ZO and s.27ZC.

LECC. The LECC may make the advice it has given public after the conclusion of the critical incident investigation.

There are particular pressures operating in the context of which force is authorised under Part 2AAA. As noted above, the existing Act requires the NSWPF Commissioner to advise the Police Minister and the Attorney General in relation to the exercise of powers under Part 2AA, Part 2A and Part 3. The Review has recommended equivalent reporting requirement exists in relation to exercise of Part 2 powers. Annual reporting on the exercise of Part 2AAA authorisations will provide a further avenue of scrutiny and transparency regarding use of these powers.

Recommendation 4: For the purpose of gathering statistics, the Act should require annual reporting on the number of Part 2AAA authorisations.

Non-disclosure orders

Non-publication and restricted access orders restrict the ability of the media to freely report on proceedings and seek to minimise harm that might arise if information or identities of persons are disseminated more widely. For example, during the inquest into the deaths arising from the Lindt Café Siege, the true names of all negotiators were made the subject of a non-publication order for security reasons, and pseudonyms were used in lieu of those officers' names.

In Australia, the powers to make these orders are restricted to judicial settings and enable a court to make an order in relation to closed court, suppression and non-publication. The powers governing these orders are primarily contained in the *Court Suppression and Non-publication Orders Act 2010* (**the Suppression Act**). Decisions since the commencement of the Suppression Act confirm the continuing importance of the public interest in open justice.[25]

Stakeholder views

The Police Association of NSW submitted that the Act should be amended to protect the identity of officers responding to a 'declared terrorist act'. Under the proposal, where the NSWPF Commissioner or a Deputy Commissioner has declared an incident to be a 'terrorist act' to which police are responding, then the Commissioner or a Deputy Commissioner may also make a non-

[25] *Rinehart v Welker* [2011] NSWCA 403 at [26], [32]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 293 ALR 384 at [9].

publication order in relation to the identities of officers responding to the incident. Under the proposal, the NSWPF Commissioner or a Deputy Commissioner could make a non-publication order if it was reasonably necessary to protect the safety of the police officer or if it was in the public interest to do so. The order would extend to any publication by newspaper, any public exhibit, any broadcast by electronic means and social media.

Our view

Non-publication and restricted access orders are currently restricted to court and coronial proceedings. The narrow category of circumstances in which the powers under the Suppression Act can be applied for (including by the NSWPF Commissioner) and invoked recognise that open justice is a fundamental aspect of the Australian justice system. Under the Suppression Act, the Court can consider an application for a suppression order or non-publication order made by any person considered by the court to have a sufficient interest in the making of the order. That is, it would be open to the NSWPF Commissioner to make an application in proceedings before the Court for a suppression order or non-publication order. A similar argument might be made in respect of non-publication orders outside the judicial context. Notwithstanding this, there are sound public interest reasons to protect the identity of the NSWPF officers charged with responding to terrorist acts in NSW, particularly given counter-terrorism units and roles require a measure of confidentiality. One issue with the proposal from the Police Association of NSW is that, unlike the equivalent process under the Suppression Act, there is no independent third party who can assess whether a non-publication order is appropriate in the circumstances (as would be the case in judicial proceedings). The proposal would have broader implications, including application to a wider range of police actions that are outside the scope of this review of the Act. There is a need to ensure that the protections available to the NSWPF officers responding to terrorist acts are equivalent to officers charged with responding to equally sensitive investigative action. The automatic suppression of the names of the NSWPF officers in limited investigative circumstances, that is terrorism incidents, risks creating inconsistencies in terms of the protections available to officers conducting other high-risk police work. In this context, it is premature to amend the Act to enable the NSWPF Commissioner or a Deputy Commissioner to make a non-publication to protect the identity of police officers responding to a declared terrorist act. The Government will consider this issue further.

Part 2AA – Investigative detention powers

Powers under Part 2AA and when they have been used

Part 2AA was inserted into the Act by the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016*. Part 2AA enables the NSWPF to respond to, and prevent, terrorist acts by authorising the arrest, detention and questioning of any person who is reasonably suspected of being involved in a recent or future terrorist attack. The NSWPF may arrest and detain a person if there are reasonable grounds for suspecting that the person has committed or will commit a terrorist act, possesses a thing connected with a terrorist act, or is involved in preparing for or planning a terrorist act. The terrorist act concerned must have occurred in the last 28 days or a police officer must have reasonable grounds to suspect that it could occur within the next 14 days.

In exercising these powers, a police officer must be satisfied that detaining the terrorist suspect will substantially assist in responding to, or preventing, the terrorist attack. Part 2AA provides for an initial detention period of up to four days with processes in place for a senior police officer to review the detention every 12 hours after arrest. An eligible judge may extend the detention period beyond the initial four-day period in increments of up to seven days to a maximum total period of detention of 14 days.

While detained, terrorist suspects may be questioned in connection with the terrorist act for which the person was arrested, or in connection with any other terrorist act that occurred within the last 28 days, or that could occur within the next 14 days. A detained person may also be questioned about another offence where there are reasonable grounds for suspecting the person has committed the offence and that the offence is related to the terrorist attack or that postponing the investigation may jeopardise it.

Part 2AA powers have not been used to date. This is the first statutory review that has considered use of the powers since they commenced.

Safeguards

The Act includes a number of safeguards in relation to the exercise of Part 2AA powers. Section 25O of the Act applies a range of important safeguards, contained in the LEPRA and the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (**LEPRA Regulation**) to the exercise of investigative detention powers. These safeguards include the right to contact a lawyer or friend, relative, guardian or independent person; to have a lawyer present during 'any investigative

procedure' and specific safeguards in relation to the detention of vulnerable persons in Division 3 of Part 3 of the LEPRA Regulation.[26] These safeguards apply as investigative detention is an enhanced arrest power to facilitate the investigation of a terrorist act or planned terrorist act. This is distinct from the preventative detention power in Part 2A that is a 'purely protective' power to prevent a planned terrorist act or further violence following a terrorist act.[27]

Stakeholders put forward a number of proposals for additional safeguards to Part 2AA that are addressed below. We recommend that three of these proposals proceed:

- provision of legal aid in investigative detention proceedings
- a legislative requirement to treat people under an investigative detention order with humanity
- a requirement to advise a detainee of their right to contact the LECC, their right to contact a lawyer and a copy of the order.

Further safeguard proposals put forward by stakeholders are also considered below. These proposals include requiring court ordered investigative detention for any period; enabling detention only where it is the least restrictive way of preventing the terrorist act; having special advocates in *ex parte* proceedings and additional safeguards for minors and vulnerable people.

Provision of legal aid — Stakeholder views

The Bar Association recommended transferring Part 2A safeguards to Part 2AA. This included enabling the provision of legal aid in relation to investigative detention proceedings (to align with the safeguard at s.26PA). Under s.26PA, the Supreme Court may order the provision of legal aid in relation to the making or revocation of a PDO or prohibited contact order. No equivalent provision exists in relation to the provision of legal aid where a NSWPF officer applies to the Supreme Court to have the period of investigative detention extended beyond the initial four-day period (up to a maximum total period of detention of 14 days).

The LECC supported the proposal that the safeguards in Divisions 4 and 5 of Part 2A should be replicated in Part 2AA and, in particular, supported the ability for a judge to order the provision of legal aid. The NSWPF did not oppose this proposal. Legal Aid NSW supported this proposal subject

[26] LEPRA s.123; *Terrorism (Police Powers) Act 2002* s.25N (see Note to that section) and s.25O; NSW Parliamentary Debates, Legislative Assembly, 4 May 2016, Second reading speech on *Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016*, 2 (Mike Baird).
[27] Council of Australian Governments, *Review of Counter-Terrorism Legislation (2013)*, 60 [237]. https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF [64].

to funding and a legislative requirement that the State bear the costs of the suspect's legal representation.

Our view

Given the period of detention available for the purposes of investigative detention, it is sensible to have similar safeguards in relation to provision of legal aid as exists for PDOs. To date, no investigative detention orders have been made. In the interests of consistency across the Act, it is appropriate that this provision be drafted to align with existing s.26PA.

Recommendation 5: The Act should be amended to enable the Supreme Court to order the provision of legal aid in relation to the making or revocation of an investigative detention order.

Treatment with humanity — Stakeholder views

The Bar Association recommended transferring Part 2A safeguards to Part 2AA. This included amending the Act to explicitly require a person to be 'treated with humanity', to align with the safeguard at s.26ZC. Under s.26ZC, a person detained under a PDO must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment by a person exercising authority under, or enforcing, the order. Contravention of this provision carries a sentence of imprisonment of two years. No equivalent provision exists in relation to people held in investigative detention.

The NSWPF did not oppose this proposal. Legal Aid NSW supported this proposal. The LECC supported the proposal that the safeguards in Divisions 4 and 5 of Part 2A should be replicated in Part 2AA. In particular, the LECC supported the inclusion of a requirement for a person to be treated with humanity and with respect for human dignity.

Our view

There are existing Part 2AA safeguards including that a suspect be given the opportunity to rest for a continuous period of eight hours in any 24 hours of detention and to have reasonable breaks during any period of the questioning. Similarly, s.25M permits access to a lawyer and a support person for the suspect. Notwithstanding this, in the absence of compelling reasons to the contrary, it is appropriate to apply this safeguard to Part 2AA, particularly given it relates to an equivalent period of detention to PDOs.

Recommendation 6: The Act should be amended to require a person to be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment by a person exercising authority under, or enforcing, the investigative detention order.

Requirement to advise detainee of some matters — Stakeholder views

The LECC submitted that the safeguards in Divisions 4 and 5 of Part 2A should be replicated in Part 2AA. In particular, the LECC supported the inclusion of a requirement to notify the detainee about some matters and the right of a person to receive a copy of any detention warrant.

A detainee under Part 2A is required to be informed of some matters including their right to contact the LECC (under s.26ZF), their right to contact a lawyer (under s.26ZG) and a copy of the order (under s.26ZB). Non-compliance with some of these requirements is punishable by up to two years' imprisonment.[28] No equivalent provision exists in relation to investigative detention orders under Part 2AA. The Act enables Regulations to be made that provide for additional safeguards for detainees under investigative detention. If Regulations were made to align the safeguards under Part 2AA more closely with the legislative safeguards under Part 2A, imprisonment for non-compliance would not be available. This would require legislative change.

Our view

It is appropriate to require the NSWPF to inform a person under Part 2AA of some matters, including their right to complain to LECC in relation to LECC's jurisdiction regarding the NSWPF misconduct and the requirement to provide the detainee with a copy of any detention warrant issued. This requirement would be limited to informing the detainee of their *existing* rights under the LECC Act. In general, LECC has an existing ability to investigate misconduct that constitutes serious misconduct or maladministration. Serious misconduct is conduct that could result in prosecution for a serious offence, which is an offence punishable by five years' imprisonment or more, or a serious disciplinary action, being action that could result in termination of employment or a demotion; a pattern of misconduct or maladministration carried out on more than one occasion or involving more than one officer that is indicative of systemic issues; or corrupt conduct.

Requiring the NSWPF to inform a detainee of these matters could be facilitated either through Regulations under the Act (which would not carry imprisonment for non-compliance) or via

[28] See *Terrorism (Police Powers) Act 2002* s.26Y and s.26Z.

legislative amendment (which could carry imprisonment for non-compliance). The equivalent provision under the PDO scheme carries a maximum penalty of two years for non-compliance. In the absence of any evidence, the NSWPF will not inform detainees of their right to complain to the LECC and the requirement to provide the detainee with a copy of any detention warrant issued, it is unnecessary to include maximum penalty of imprisonment for non-compliance. Noting these powers have not been used to date, this proposal can be kept under review for the next statutory review.

Recommendation 7: The NSWPF should be required to inform a person under Part 2AA of some matters including:

- their right to contact the LECC in relation to the LECC's existing jurisdiction regarding the NSWPF conduct
- their right to contact a lawyer
- a copy of the order

Court-ordered investigative detention — Stakeholder views

Legal Aid NSW submitted that any period of investigative detention should only occur after court order and also recommended regular supervision of the detention by a court. Part 2AA enables a NSWPF officer to arrest and detain a person for up to four days without a court order. Any extension of this time can only occur with court order. This proposal would require a court order for the initial investigative detention period of less than four days. The Supreme Court submitted that it is not appropriate for a court to undertake regular supervision of detention.

Our view

The dynamic nature of terrorism requires the NSWPF to have powers enabling them to respond quickly and efficiently where a terrorist act has occurred or is being planned. Evidence indicates terrorism plots are developing more quickly. Often, it is only a matter of days before an attack is enacted. The then AFP Deputy Commissioner, Mr Michael Phelan APM, has noted '*the very short flash to bang, so to speak, time from radicalisation to violent action creates significant challenges for police ….The pace at which plots develop, coupled with the potentially catastrophic consequences of a terrorist attack, mean police need to act fast to disrupt terrorist activity*'.[29] In this context, it is difficult to justify amendments creating an additional hurdle for the NSWPF by requiring any period of investigative detention subject to court order. It is also inconsistent with the nature of the power which is an arrest power. The NSWPF need powers to disrupt and address terrorism activity as

[29] *Transcript of Proceedings before INSLM*, Public Hearing, Canberra, 19 May 2017, 6 (Michael Phelan).

quickly and effectively as possible. The existing Part 2AA framework recognises that the NSWPF may be required to respond quickly to investigate a terrorist act and, where necessary, can apply to the Court for an extension of that order if detention is required over four days.

Least restrictive measure — Stakeholder views

Legal Aid NSW submitted that Part 2AA should have a similar safeguard to the ACT legislative framework that permits detention only where this is the least restrictive measure available.[30] Legal Aid NSW did not submit what less restrictive means other than arrest would be sufficient to prevent or investigate a terrorist act - the ACT legislation is also silent on this point. The NSWPF did not support this proposal and submitted that sufficient safeguards exist under Part 2AA including oversight by a NSWPF officer assigned to a separate team every 12 hours and further review by the Supreme Court.

Our view

The Court is already required to consider a number of criteria before extending the period of investigation. A court can only extend the maximum period of investigative detention where satisfied that:

- the investigation is being conducted diligently and without unnecessary delay
- there are reasonable grounds for suspecting that the person continues to be a terrorism suspect
- there are *reasonable grounds* for suspecting that *any future terrorist act concerned could occur* at some time *in the next 14 days* (or so occur if the detainee is released)
- the extension will *substantially assist* in responding to or preventing the terrorist act concerned.

The proposal put forward will not change the Court's consideration of whether or not to extend a detainee's period of detention. Further, the Act is directed to the protection of community safety in the context where a terrorist act is anticipated within 14 days. In this context, no further change to the test is warranted at this time.

Special advocates — Stakeholder views

Legal Aid NSW recommended legislating a role akin to special advocates in Commonwealth control order proceedings or a public interest monitor. Under this proposal, a special advocate would be

[30] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s.16(3).

present at *ex parte* investigative detention proceedings or criminal intelligence applications for the purpose of attesting to the content and sufficiency of the information relied on and the circumstances of an application, to ask questions of any person giving information in relation to the application and to make submissions on the appropriateness of the granting of the application.

The role of special advocates and Public Interest Monitors in other jurisdictions is to test the cogency of cases made in support of applications, for example a covert search warrant, to cross-examine applicants, for example law enforcement bodies, and to make submissions.[31] Introducing a similar role under the Act would provide a further safeguard and protective mechanism to mitigate risk in investigative detention proceedings.

The Bar Association supported this proposal. The NSWPF did not support this proposal and submitted that an operational response does not support the use of a Public Interest Monitor.

Whealy J in *R v Lodhi* raised the prospect of appointing special advocates to represent the interests of defendants and assist courts in determining national security claims.[32] Whealy J has also previously chaired the COAG review committee charged with reviewing federal counter-terrorism legislation.[33] Arising from that review, the Committee recommended amending the *Criminal Code 1995* (Cth) to provide for a national system of special advocates to participate in control order hearings.

Our view

The current scheme already incorporates a number of procedural safeguards. The State, both as a model litigant and in accordance with the normal duties of legal practitioners to the Court, has a heavy onus of frankness and candour. For example, in *ex parte* proceedings, the State must present evidence for and against the order because of the absence of the respondent where the matter is heard and determined by the Supreme Court rather than by an executive body. In the context of there being no investigative detention orders to date, it is difficult to justify the creation of a new office of special advocate or a public interest monitor, particularly where the State is already under model litigant obligations to act with complete propriety, fairly and in accordance with the highest professional standards.

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[31] *Police Powers and Responsibilities Act 2000* (QLD); *Public Interest Monitor Act 2011* (VIC).
[32] *R v Lodhi* [2006] NSWSC 586.
[33] Council of Australian Governments, *Review of Counter-Terrorism Legislation (2013)* 60 [237] https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF.

Additional safeguards for minors and vulnerable people — Stakeholder views

The ACYP recommended that Part 2AA include additional safeguards. This included:

- Enabling children and young people under 18 years to have contact with a parent/guardian or another person who is able to represent the person's interests and is, as far as practicable in the circumstances, acceptable to the person and to the police officer who is detaining the person (to align with the safeguard at s.26ZH). Section 26ZH applies special contact rules for persons under 18 or within impaired intellectual function subject to PDOs. This proposal would extend similar safeguards to persons under 18 or within impaired intellectual function subject to investigative detention.
- Clarifying that the custody manager *is required* to assist detained children and young people to exercise their right to have contact with a person they know, trust and accept.
- Having the 'best interests of the child' as a primary consideration in all Part 2AA decisions.

The Bar Association and Legal Aid NSW supported the proposals put forward by ACYP. The LECC noted the extraordinary nature of the powers in the Act, particularly Part 2AA, and urged due consideration be given to proposals for additional safeguards to these provisions. The LECC supported the proposal that the safeguards in Divisions 4 and 5 of Part 2A should be replicated in Part 2AA. The NSWPF noted that they have had an extensive and successful history of dealing with juveniles and persons with cognitive impairments. The NSWPF submitted no incidents have occurred since the introduction of Part 2AA that would provide any fresh or compelling justification to change the existing Part 2AA provisions that the Government considered appropriate less than two years ago.

The NSWPF took issue with the custody manager being *required to* assist children and young people detained under Parts 2A and 2AA to exercise their right to have contact with a person they know, trust and accept. The NSWPF submitted this placed an unrealistic additional burden on the custody manager and is practically unworkable in the terrorism space and would likely impose an additional burden on the Senior Officer tasked with the ongoing review of the detention (s.25E(6)).

Our view

We are acutely aware of the need for safeguards to provide for the adequate protection of any minor or vulnerable person who is detained. Measures must be balanced and proportionate, and crafted with due regard to the particular vulnerability of these cohorts. The Act includes particular safeguards for minors and vulnerable people. This includes, in addition to the safeguards applying across Part 2AA more broadly, that investigative detention is not available in relation to persons

under 14 years of age (s.25F). Further, the special safeguard provisions contained in Division 3 of Part 3 of the LEPRA Regulation apply to young persons aged 14 to 17 years of age and other vulnerable persons who may be detained under this Part.[34] This includes:

- the entitlement to have a support person present during any investigation
- the requirement that the custody manager assist the vulnerable person
- a requirement that the custody manager take appropriate steps to ensure that the detained person or protected suspect understands the caution.

The existing safeguards in Division 3 of Part 3 of the LEPRA Regulation go some way to addressing ACYP's concerns. Under the LEPRA Regulations, which extend to the Act, a child may choose the adult who is their support person (cl.30 LEPRA Regulations). The support person may be a parent, guardian, or other person with the child's consent. If the detainee is not a child, the support person may be a guardian or friend or a person who has expertise in dealing with vulnerable persons. Further, the custody manager is required to assist a child or vulnerable person in exercising their rights in relation to investigations and questioning (cl.29). The *existing* protections for vulnerable people and minors adequately address ACYP's concerns and strike the appropriate balance between ensuring the NSWPF have available tools to appropriately investigate a matter while ensuring protections for minors and vulnerable people. Many of ACYP's concerns more appropriately apply in the context of PDOs and are addressed at Recommendation 12.

Test for determining *criminal intelligence*

Under the Act, criminal intelligence may be relied on without disclosing it to suspects or their legal representatives.[35] Section 25K provides for the protection of *criminal intelligence* by enabling the Supreme Court to order that information that meets the definition of *criminal intelligence* is not to be provided to the suspect, or to his or her legal representative. Under s.25K(2) of the Act, the eligible judge to whom an application for a detention warrant is made may determine that particular information is *criminal intelligence*. To make such an order, the judge must be satisfied that particular information is within the definition of *criminal intelligence*. If the eligible judge declines to

[34] See s.25N - The applied provisions under section 25O include the special safeguard provisions for children under 18 years and other vulnerable persons of Division 3 of Part 3 of the Law Enforcement (Powers and Responsibilities) Regulation 2005.
[35] *Terrorism (Police Powers) Act 2002* s.25K(3).

determine that information is *criminal intelligence*, police are entitled to withdraw the information as grounds for issuing the warrant rather than risk having the information disclosed to the suspect.[36]

Criminal intelligence means any report or other information whose disclosure:

- will have a prejudicial effect on the prevention, investigation or prosecution of an offence
- will result in the existence or identity of a confidential source of information relevant for law enforcement purposes being revealed or made discoverable
- will result in confidential investigative methods or techniques used by police or security agencies being revealed or discoverable
- will endanger a person's life or physical safety.

The Act is silent on any prejudice to the detainee in finding the material to be *criminal intelligence*. In contrast, under the *Crimes (Criminal Organisations Control) Act 2012* (NSW), in exercising its discretion to declare information to be *criminal intelligence*, the Court may have regard to whether matters mentioned *outweigh any unfairness to a respondent*.[37] This aligns with the equivalent provision in the Victorian *Criminal Organisations Control Act 2012* (Vic). The *Victorian Expert Panel on Terrorism and Violent Extremism and Response Powers* (Report 1) noted that the NSW test under the Act:

- is silent as to weight, if any, the eligible judge should place on the potential prejudice or unfairness if the information is classified as criminal intelligence
- assumes that once a determination is made, the eligible judge will admit the information as evidence and may then rely on that evidence in making its determination without regard to the possible unfairness and prejudicial effect of using that evidence
- does not indicate whether the eligible judge has discretion to refuse to act in reliance upon the undisclosed material, or stay the application, for abuse of process due to the non-disclosure resulting in an unfair trial.[38]

Under the Commonwealth framework, greatest weight must be given to national security considerations in both criminal and civil proceedings.[39] To this extent, any unfairness to a respondent is ultimately trumped by national security considerations.

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[36] *Terrorism (Police Powers) Act 2002* s.25K(4).
[37] *Crimes (Criminal Organisations Control) Act 2012* s.25M(2).
[38] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1 https://www.vic.gov.au/system/user_files/Documents/CounterTerrorism/Expert%20Panel%20on%20Terrorism%20-%20report%201.pdf [7.3.2].
[39] *National Security Information (Criminal and Civil Proceedings) Act 2004* s. 31(7)(a) and s.31(8).

Whether or not material meets the definition of *criminal intelligence* is not linked to the decision of whether there is *unfairness to a respondent*. This happens at the second step, where the Court is determining whether or not to issue a detention warrant based on *reasonable grounds* for suspecting the person continues to be a terrorism suspect and *reasonable grounds* for suspecting a terrorist act is imminent. That is, a decision whether material meets the *criminal intelligence* definition, for example whether the material will endanger a person's life or physical safety, is not informed by unfairness to a respondent. It is how the Court *uses* the information that *does* meet the definition that has an impact on the respondent.

Stakeholder views

Legal Aid NSW supported a proposal which would enable the Court in exercising its discretion to declare material to be *criminal intelligence* to have regard to whether some matters *outweighed any unfairness to a respondent*.

The NSWPF submitted that the Victorian Panel's comments did not consider the unique nature of the legislation nor consider the potential impact on relationships with partner agencies and its impact on the flow of information between state, Commonwealth and international partner agencies. The NSWPF submitted that restricting the protections that can be applied to information would impact upon relationships and flow between partner agencies, thereby adversely impact upon the operational capability of the NSWPF.

Our view

The exchange of sensitive information between the NSWPF and partner domestic and international enforcement agencies hinges on the use and protection of that material. Continuing dialogue and exchange of information between the NSWPF and these agencies regarding threats and risk assessments is influenced by the information protections the NSW legislative framework affords that material. Nothing has occurred since the introduction of Part 2AA that would provide any fresh or compelling justification to change the criminal intelligence provisions in Part 2AA that the Government considered appropriate, less than two years ago, at the time of enactment in 2016. During the second reading speech for the investigative detention amendments, the then Premier, the Hon. Mike Baird, noted '*A problematic gap in the current preventative detention scheme is the inability to protect sensitive criminal intelligence relied on by police to inform detention applications.*

Clause 25K of the bill rectifies this and establishes such a mechanism….Criminal Intelligence may be relied on by the eligible judge without disclosing it to suspects or their legal representatives'.[40]

The Court, having found material to meet the definition of *criminal intelligence*, must determine what weight to place on that material given the respondent has not been afforded an opportunity to refute its contents. The Court's weighing exercise on *how* to use material that meets the definition of *criminal intelligence* occurs at the second step of the process in determining whether to make an order.[41]

LECC oversight

The Ombudsman's review function under Parts 2A and 3 of the Act transferred to the LECC on 1 July 2017. Under the Act, the LECC is required to keep under scrutiny the exercise of Part 2A PDO powers and covert search powers under Part 3. The LECC must report on the exercise of Part 2A and Part 3 powers every three years and provide a copy of the report to the Attorney General and the Minister for Police. Section 26ZO requires the LECC to keep under scrutiny the exercise of preventative detention powers conferred on police officers and correctional officers under part 2A of the Act. The LECC is also required to keep under scrutiny the exercise of covert search powers conferred under Part 3 of the Act (s.27ZC). The Attorney General is then required to table the report in Parliament as soon as practicable after it is received.[42] No equivalent scrutiny or annual reporting requirements exist in relation to the exercise of Part 2AA powers.

Recommendation 3 of the Ombudsman's report recommended consideration be given to amending the Act to provide the LECC with the same oversight functions in relation to powers exercised by the NSWPF under Part 2AA of the Act as the LECC currently performs in relation to Part 2A and Part 3.

Stakeholder views

The NSWPF note that, unlike the other powers in the Act, investigative detention is reviewed by a NSWPF officer assigned to a separate team every 12 hours and is subject to ultimate review by the Supreme Court. Further, detainees have legal representatives and the ability to report any complaints to the LECC. The NSWPF submitted that a specific review responsibility, as proposed by

[40] Legislative Assembly Hansard – 4 May 2016, Second reading speech, *Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016*, Hon Mike Baird.
[41] *Terrorism (Police Powers) Act 2002* s.25I(5).
[42] *Terrorism (Police Powers) Act 2002* s.26ZO and s.27ZC.

the Ombudsman, operationally will have no impact on addressing the immediate concerns of a detained person as it would be post-incident.

The Bar Association, Legal Aid NSW and the LECC supported LECC oversight extending to Part 2AA of the Act on the basis that there is merit in ensuring consistent oversight of police powers under all Parts of the Act.

Our view

Part 2AA powers are anticipated to be used sparingly. Further, under the existing Act, the NSWPF Commissioner must advise the Police Minister and the Attorney General whenever a terrorism suspect is arrested under the investigative detention powers of Part 2AA (s.25P). This provision also requires the NSWPF Commissioner to report annually on the exercise of powers under Part 2AA by police officers. The provisions were only recently introduced and Parliament expressly did not extend the LECC oversight in Part 2A to Part 2AA in favour of the current safeguards in Part 2AA. The fact that the powers have not been used to date, and absent any evidence regarding misuse of the powers, immediate amendments requiring additional LECC oversight to this Part are not considered necessary. Any further LECC oversight will need to be considered at the next statutory review, particularly if the Part 2AA powers are used and there is evidence that additional oversight is required.

Part 2A – Preventative Detention Orders

Powers under Part 2A and when they have been used

Part 2A of the NSW Act creates a PDO scheme that commenced on 16 December 2005 and forms part of uniform model laws as agreed to at the COAG meeting on 27 September 2005. Under Part 2A, the NSWPF can apply to the Supreme Court for a PDO if there is a reasonable suspicion that the person will engage in a terrorist act, has done an act in preparation for, or is planning, a terrorist act, and a PDO would assist in preventing a terrorist act occurring. PDOs can also be made where a terrorist act has occurred in the past 28 days and the order is reasonably necessary to preserve evidence. The maximum period for a PDO under the scheme is 14 days. There is also a concurrent Commonwealth framework for preventative detention that is set out at Division 105 of the *Criminal Code 1995* (Cth).

The NSW scheme is broader than the existing Commonwealth provisions. Both schemes provide for the detention of a person, including restrictions on communications (true of all detained persons) and the monitoring of the detained person's communications to ensure that there is no exchange of information between suspects or plans made to evade capture or destroy evidence. Under both schemes, an individual under a PDO cannot be questioned, excepted for limited purposes, such as confirming their identity.[43] In contrast to the Commonwealth scheme, the PDO scheme enables an order for a period of up to 14 days. Under the Commonwealth PDO scheme, an initial PDO can be issued by a senior AFP officer for a period of 24 hours and can only be extended for a further 24 hours if approved by an 'issuing authority'. An 'issuing authority' includes a judge of a State or Territory Supreme Court, a judge of a Federal Court or Federal Circuit court, a retired judge of a superior court, and/or is the President or Deputy President of the Administrative Appeals Tribunal, each acting in their personal capacity.[44]

PDOs were first used in 2014 when the NSWPF obtained an interim PDO and took three people into preventative detention who were held for two days and then released when the interim orders expired. These orders were sought as part of a counter-terrorism operation called Operation Appleby conducted by the NSW Joint Counter-terrorism Team (**JCTT**), which includes officers from the AFP, the NSW Crime Commission (**NSWCC**), the NSWPF and the Australian Security and

[43] Section 105.42(1) *Criminal Code*, s.105.2.
[44] Division 105 of the *Criminal Code*, s.105.2.

Intelligence Organisation (ASIO). The NSWPF have not used PDOs since 2014 as part of Operation Appleby.

Extension of Part 2A powers

Part 2A is due to sunset on 16 December 2018 (see s.26ZS). In reviewing the equivalent powers under Division 105 of the Criminal Code, COAG considered powers to prevent an imminent and serious attack by means of executive detention are 'a genuinely valuable protective measure'.[45] Most recently, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended continuing the Commonwealth powers for an additional three years.[46] The PJCIS noted that the Commonwealth provisions provide important emergency powers that complement state and territory PDO powers. Notwithstanding this, Commonwealth agencies, such as the AFP, have publicly stated that they would be more likely to arrange for an application for a PDO under complementary state legislation than the Commonwealth framework.[47] The INSLM has also noted that the Commonwealth PDO regime is 'of significantly less utility than the complementary regimes which are in force pursuant to state and territory legislation'.[48]

The NSW powers complement the Commonwealth powers. The second reading speech for the Commonwealth Bill introducing the complementary powers noted that '*in the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage emerging threats*'.[49]

Stakeholder views

The Bar Association supported the Ombudsman's recommendation that Part 2A be allowed to expire on 16 December 2018 and noted the Ombudsman's suggestion that the recent enactment of Part 2AA makes Part 2A redundant. Legal Aid NSW supported the Ombudsman's recommendation and noted that Part 2A powers have been used once and are unlikely to be used again. The

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[45] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF [265]. Notwithstanding this, a majority of the COAG Committee recommended the Commonwealth, State and Territory PDO schemes be repealed.
[46] Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (March, 2018) http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024127/toc_pdf/Reviewofpolicestop,searchandseizurepowers,thecontrolorderregimeandthepreventativedetentionorderregime.pdf;fileType%3Dapplication%2Fpdf [4.82].
[47] *Transcript of Proceedings*, Public Hearing before INSLM, Canberra, 19 May 2017, 20 (Michael Phelan)
[48] Independent National Security Legislation Monitor, *Review of Control Orders and Preventative Detention Orders*, https://www.inslm.gov.au/sites/default/files/files/control-preventative-detention-orders.pdf, paragraph 10.10.
[49] Senator the Hon George Brandis QC, Attorney-General, Senate Hansard, 24 September 2014, p.65.

Commonwealth Attorney-General's Department suggested that it would be premature to sunset the NSW PDO scheme. The NSWPF did not support Part 2A expiring and recommended extending Part 2A powers. The NSWPF noted that investigative detention powers have not been tested and caution should be exercised before removing any pre-charge or investigative detention power prior to all existing and available powers being tested by use. The AFP submitted that Part 2A plays a critical role in providing the NSW JCTT with appropriate powers to prevent terrorist attacks. Further, noting that Part 2AA is yet to be operationally tested, the AFP submitted that allowing Part 2A to expire may leave the NSW JCTT with a significant gap in preventative counter-terrorism powers.

Our view

Part 2A powers remain appropriate and necessary and a valuable disruption mechanism in the context of an imminent terrorist attack. The then AFP Deputy Commissioner has previously cited the benefit of PDOs in the context of Operation Appleby where there were multiple search warrants executed across multiple locations with a number of people police wanted to speak to and the need to keep them separate ahead of questioning.[50] Similarly, the Director-General of ASIO has noted the importance of having 'the facility and the ability to bring about what is essentially a critical disruption to a complicated and potentially several groups connected or several individuals connected' (sic).[51]

Given the need for close collaboration between NSW and the Commonwealth Government on counter-terrorism, it would be premature for this Review to recommend amendments to Part 2A, particularly given Commonwealth agencies have publicly acknowledged that they would be more likely to use state powers under the current legislative framework. These extraordinary powers are only intended to be used in times of an unfolding emergency (or in its immediate aftermath) and when the traditional investigative powers available to the NSWPF are inadequate. The fact that the powers have seldom been used by the NSWPF reflects that this purpose is understood. Noting that new Part 2AA powers are yet to be operationally tested, it is premature to allow Part 2A to sunset.

Recommendation 8: Part 2A should be extended for an additional three years.

[50] *Transcript of Proceedings*, Public Hearing, Canberra, 19 May 2017, 20 (Michael Phelan).
[51] *Transcript of Proceedings*, Public Hearing before INSLM, Canberra, 19 May 2017, 21 (Duncan Lewis).

Record of illness/injury suffered while under a PDO

Under the Act it is an offence for a NSWPF officer to take identification material from a person detained under a PDO unless:

- the person consents in writing
- the police officer believes on reasonable grounds that it is necessary to do so for the purpose of confirming the person's identity as the person specified in the order.[52]

There is a maximum penalty of a two-year imprisonment for any NSWPF officer who unlawfully takes identification material from a suspect.

Stakeholder views

The NSWPF recommend the inclusion of a provision that would enable the NSWPF to use photographs or video recordings to record any illness or injury suffered by a person while being detained under a PDO without fear of prosecution. This would align with a similar provision under the Victorian framework[53] and with a recommendation arising from the Ombudsman's Review. The Ombudsman's review noted that the NSWPF were extremely cautious about any actions that might be seen as collecting evidence from a person subject to a PDO. The Ombudsman noted that the existing legislative framework may have an unintended effect of preventing police from making proper records, including photographs of detainees, that may ordinarily be taken as part of police custody procedures.

The majority of stakeholders did not comment on this proposal. Two submissions were received in support of the proposal, the NSWPF and the LECC, and Legal Aid NSW was the sole stakeholder that did not support this proposal. Legal Aid NSW noted that the NSWPF may already take photographs with the consent of the detainee and, where consent is not forthcoming, the NSWPF may take contemporaneous notes of their observations to protect themselves from false allegations of assault or mistreatment.

Our view

There are a number of benefits for both parties in enabling the NSWPF to use photographs or video recordings to record any illness or injury suffered by a person while being detained. This would apply to a detainee under a PDO or detained under Part 2AA investigative detention. A photographic record may be necessary for the welfare of the detainee, to ensure police are accountable for any injury that may occur during custody and also serves to protect officers from

[52] *Terrorism (Police Powers) Act 2002* s.26ZL.
[53] *Terrorism (Community Protection) Act 2003* (Vic) s.13ZL(2)(c).

any potential false accusations. Enabling the NSWPF to record illness or injury suffered by a person while subject to a PDO or investigative detention provides a more reliable record than relying on the NSWPF contemporaneous notes alone.

Recommendation 9: The Act should be amended to enable a NSWPF officer to record any illness or injury suffered by a person while being detained under a PDO or investigative detention.

Notification that contact with solicitor is monitored

The Act provides that any contact between a detainee and their legal representative may take place only if it is conducted in such a way that it can be effectively monitored by police (s.26ZI). The Act does not require that the lawyer or the detainee be advised that their communication is being monitored. One of the issues identified in the Ombudsman's Report is that legal representatives of detainees are not advised in advance that their telephone conferences with detainees are monitored by the NSWPF. The Ombudsman considered that it would be in the interests of transparency that, prior to any conversation taking place between an detainee and their lawyer, both parties are informed that:

- any such conversation may only take place if it can be monitored by a police officer (s. 26ZI)
- that police intend to monitor the conversation by listening to the telephone call.

Stakeholder views

This proposal was supported by the Bar Association, Supreme Court, the LECC, and Legal Aid NSW. The Public Defenders submitted that, in addition to telephone calls, the proposal be extended to AVL conferences and face to face conferences, if they are, or may be, monitored. This broader proposal was supported by the Privacy Commissioner. The NSWPF had no objection to this proposal provided any amendment was confined to communications between a detainee and their lawyer while they were in custody under Part 2A or Part 2AA.

Our view

The Act should be amended to require the NSWPF to advise parties that any conversation while a person is detained under Part 2A or Part 2AA may only take place if it can be monitored by police and that police intend to monitor the conversation between the detainee and his or her legal representative.

Recommendation 10: The Act should be amended to require the NSWPF to advise detainees under Part 2A or Part 2AA and their lawyer that:

- any conversation (whether by way of telephone call, AVL or face-to-face conversation) may only take place if it can be monitored by a police officer
- the NSWPF intend to monitor the conversation.

Early commencement of PDO proceedings

After hearing an application for a PDO, the Court's power is confined to granting or refusing the application [s.26I(2)].

Stakeholder views

The Bar Association has noted that the requirement that the feared attack will be within 14 days, combined with the requirement that at the end of the hearing the Court must make a decision one way or the other, has the effect that applications will be made and heard in urgency which will reduce the Court's opportunity to scrutinise an application. The Bar Association has noted that given the dynamic nature of terrorism investigations, an application may be heard in circumstances of greater urgency, potentially involving less scrutiny than is necessary. Under the current construction of the Act, it is arguable that the NSWPF could not commence proceedings *ex parte* at a relatively early stage, present their evidence in circumstances that would allow the Court to scrutinise the matter critically and carefully, and then leave the application in abeyance until the threat becomes imminent.

The Bar Association has noted that an option to address this would be to clarify that the NSWPF can commence Part 2A proceedings at a relatively early stage on an *ex parte* basis. The Bar Association submitted that it could be useful if the NSWPF could present their evidence to a judge at an early stage, before a ruling is urgently needed, and keep the judge updated on material developments. If the Act explicitly enabled this, then when the matter becomes urgent, the judge would have had the opportunity to consider at least some of the case carefully. The hearing could then be completed (preferably *inter partes*, as the Act contemplates) and an order made or refused.

When this was consulted upon, the majority of stakeholders supported, or did not comment on, the proposal. Legal Aid NSW supported the proposal on the basis that the Act prescribe a maximum time outside of which *ex parte* applications may not be made. The Supreme Court did not support this proposal and noted it would not wish to be placed in an ongoing supervisory role.

Our view

This proposal might result in the Supreme Court hearing applications *ex parte* at an early stage that never eventuate into a request for a preventative detention order. This would have resourcing implications and result in wasted court time where no application/order was eventually sought. The NSWPF seek to progress applications for PDOs as expeditiously as possible when all relevant evidence and material is available. To this extent, the Supreme Court is provided with as much opportunity to scrutinise the application as the situation allows. It is significant that the Supreme Court did not support this proposal. This suggests that while the Court's opportunity to scrutinise an application may be constrained in urgent circumstances, it did not support the assertion that this would result in potentially less scrutiny of an application. In this context, we do not consider that any amendment is warranted.

Searches of the person

In 2014, amendments were introduced to the LEPRA that combined the definitions of 'ordinary search' and 'frisk search' into one consolidated search power.[54] Schedule 1 of the Act retains the previous LEPRA requirements when it comes to arrangements relating to strip searches. Prior to the 2014 amendments, LEPRA searches could be conducted if the police officer (or other person) suspected on reasonable grounds, that it is necessary to conduct a search of the person, and that the seriousness and urgency of the circumstances required the search to be carried out. The equivalent provisions in the LEPRA were amended to reduce the threshold requirements when a strip search may be carried out either at a police station or other place of detention [s.31(a)]. The new LEPRA threshold test requires that there be reasonable grounds that the search is necessary. In the case where the search is carried out in any other place (s.31(b) of LEPRA), the officer must suspect on reasonable grounds that the strip search is necessary for the purposes of the search, and that the seriousness and urgency of the circumstances make the search necessary.

Stakeholder views

The NSWPF requested the references to 'frisk' and 'ordinary search' in the Act more closely align with the 2014 LEPRA amendments. The NSWPF submitted that the interests of consistency warranted amending the Act to reduce the strip search threshold so that the NSWPF would be able to conduct a strip search where an officer is satisfied that the search is necessary (as opposed to necessary AND required due to the seriousness and urgency of the circumstances). This would

[54] *Law Enforcement (Powers And Responsibilities) Amendment Bill 2014.*

align the Act's strip search requirements with the LEPRA requirements where a search is conducted in a police station or other place of detention.

Our view

There is merit in ensuring the strip search requirements align across legislative frameworks. Notwithstanding this, unlike the LEPRA, the Act does not distinguish between searches conducted at a police station or a search conducted at another place. That is, the Act only requires the search to be conducted in a private area.[55]

If the strip search requirements are to truly align, it is appropriate that the threshold level of satisfaction should distinguish between searches conducted at police stations (and other places of detention) and searches conducted elsewhere. That is, if a strip search is conducted at a police station or other place of detention, the threshold level of satisfaction should be that the officer suspects on reasonable grounds that the search is necessary. If a strip search is conducted at any other place, the threshold level of satisfaction should be that the strip search is necessary for the purposes of a search and that the seriousness and urgency of the circumstances make the search necessary.

Recommendation 11: The Act should be amended to align the strip search requirements with the LEPRA strip search requirements. This would enable an officer to conduct a strip search:

- at a police station or other place of detention if he or she suspects on reasonable grounds that the search is necessary
- at any other place if he or she suspects on reasonable grounds that the strip search is necessary for the purposes of a search and that the seriousness and urgency of the circumstances make the search necessary.

Additional Part 2A safeguards

There are a number of existing safeguards under Part 2A. For example, s.26Y, s.26Z and s.26ZA require a police officer detaining a person under a PDO to inform the person of some matters, including the details of the order and any restrictions that apply, as well as the detainee's rights to contact certain people and a lawyer. It is an offence to fail to inform a detained person of these details which carries a maximum penalty of a two-year imprisonment.[56]

[55] *Terrorism (Police Powers) Act 2002* Schedule 1, s.6.
[56] See s.26Y and s.26Z *Terrorism (Police Powers) Act 2002.*

The Act also includes particular safeguards for persons under 18 or with impaired intellectual functioning. This includes that PDOs may not be made in relation to persons under 16 years of age (s.26E). Further, if the person is aged between the ages of 16 and 18 years or has impaired intellectual functioning, they can contact a parent/guardian or someone who is able to represent their interests. They can access a guaranteed two hours of contact a day with these persons (or longer if ordered by the Supreme Court) (s.26ZH) and there are limitations on the type of identification material that can be taken without a court order (see s.26ZL).

Stakeholder views

Legal Aid NSW considers that the existing safeguards under the Act fall far short of the protections provided by LEPRA. For example, an 'other person' must be acceptable to a police officer while contact is restricted to only two hours per day (or longer period if determined by the Supreme Court – s.26ZH). It was submitted that for a vulnerable minor, such limits on contact may be considered particularly harsh.

The Victorian Expert Panel on Terrorism and Violent Extremism Preventative and Response Powers recommended that the Court be empowered to make such other orders in respect of minors as considered necessary to achieve the relevant objective. Alternatives put forward by the Panel included an order imposing conditions, restrictions or prohibitions of a similar nature to those available in a supervision order under the Victorian *Serious Sex Offenders (Detention and Supervision) Act 2009* or under the control order regime set out in Division 104 of Part 5.3 of the *Criminal Code 1995* (Cth). This order would be adapted to address the relevant risk and could include imposing conditions in relation to residency, a minor's movements, the people with whom a minor may associate or in relation to the minor's access to the internet.

We consulted on a number of proposals to extend the existing Part 2A safeguards. These proposals were supported by the Bar Association, the Law Society, Legal Aid NSW, the Supreme Court and the LECC. The NSWPF did not support including additional safeguards at Part 2A in relation to children and other vulnerable people. The NSWPF noted that they have always dealt with juvenile offenders and their actions are reviewed by the various courts in this regard. The NSWPF suggested that enabling a vulnerable detainee to choose an appropriate support person does not take into consideration the fundamentals of the radicalisation process which would apply to persons in custody for these offences. Further, it was noted that Part 2A specifically precluded investigators from questioning the detained person, whether they are a juvenile or not. The NSWPF noted that *requiring* the custody manager to assist children and young people would place an unrealistic

burden on the custody manager in an operational environment that is likely to be fast-paced, intense and of significant risk. This is particularly difficult when obtaining a PDO requires there to be reasonable grounds to suspect either a person will engage in a terrorist act in the next 14 days (or possesses a thing that is connected with the preparation for, or engagement in, a terrorist act; or has done an act in preparation for, or planning a terrorist act) or that a terrorist act has occurred within the last 28 days and evidence needs to be preserved. The NSWPF drew attention to the operational concerns with the proposal and submitted that given PDOs would likely be used as a means of last resort to disrupt an *imminent* terrorist act, the proposals add an administrative burden at a time where all available resources will be required. Notwithstanding the operational issues raised, the NSWPF acknowledged that the proposal is supported by the majority of stakeholders.

Our view

Section 25O applies some LEPRA protections to children and young people detained under Part 2AA. One option is to progress an amendment similar to s.112 of the LEPRA that enables the Regulations to make provision for modification of the NSWPF powers to ensure equivalent protections are under Part 2A. This would apply to:

- persons under the age of 18 years
- Aboriginal persons or Torres Strait Islanders
- persons of non-English speaking background
- persons who have a disability (whether physical, intellectual or otherwise).

The Victorian Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers recently recommended additional protections for minors in relation to PDOs. This included conferring on the Supreme Court a power to make specific orders in relation to the conditions under which a minor may be held in preventative detention and a requirement for the applicant to satisfy the Court that those conditions can be met (see Recommendation 24 of the Panel's report).[57] The Victorian Panel also incorporated an additional requirement for the questioning of a minor to be recorded by audio-visual means and that the recording be required to show both the minor and the minor's parent or guardian, or independent third party, if applicable.[58] Further, the Victorian Panel required an active monitoring role by the Commission for Children and Young People. Under the NSW PDO framework, questioning of a detainee is prohibited except for the purposes of:

[57] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2. https://www.vic.gov.au/safeguarding-victorians-against-terrorism/expert-panel-on-terrorism.html, page 14.
[58] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2 https://www.vic.gov.au/safeguarding-victorians-against-terrorism/expert-panel-on-terrorism.html, page 105.

- determining whether the person is the person specified in the order
- ensuring the safety and well-being of the person being detained
- allowing the police officer to comply with a requirement of this Part in relation to the person's detention under the order.[59]

Notwithstanding the fact that Part 2A specifically precludes investigators from questioning a detained person, it is appropriate that vulnerable cohorts have appropriate protections and safeguards governing their time in detention. We are acutely aware of the vulnerabilities of children and the need, particularly in the context of a PDO, to provide for the adequate protection of any minor or vulnerable person who is detained. There is a risk that the pursuit of the specific policy will undermine the general policy. That is, that the conferral of intrusive powers are counterproductive and the legislation itself becomes a source of grievance and antipathy. Measures must be balanced and proportionate, and crafted with due regard to the particular vulnerability of these cohorts. It is with this in mind that we recommend additional protections for minors and vulnerable people including:

- increasing the maximum limit to four hours for visits for those under 18 or with impaired intellectual functioning
- clarifying that the custody manager is required to assist detainees to exercise their right to have contact with a person they know, trust and accept
- requiring the NSWPF to exercise best efforts to locate that person
- if a contact person is deemed unacceptable by the NSWPF, the detainee should be told why this person is not acceptable and given an opportunity to nominate someone else. If no alternative is agreed upon, any contact nominated by the NSWPF should have specialist expertise working with children and young people and, if appropriate in the circumstances, with culturally and linguistically diverse communities.

The requirement to advise why a person may not be acceptable is subject to any operational sensitivities. For example, where the contact nominated by the detained person is a suspect, or may be in close contact with another suspect who could be tipped off about the police investigation, the proposed requirement to provide reasons would not apply.

[59] *Terrorism (Police Powers) Act 2002* s.26ZK.

Recommendation 12: The Act should be amended in respect of those under 18 or with impaired intellectual functioning to:

- increase the maximum limit to four hours for visits for those under 18 or with impaired intellectual functioning
- clarify that the custody manager is required to assist detainees to exercise their right to have contact with a person they know, trust and accept
- require the NSWPF to exercise best efforts to locate the vulnerable detainee's support person
- if a contact person is deemed unacceptable by the NSWPF, the person should be told why this person is not acceptable (provided this doesn't give rise to operational sensitivities) and given an opportunity to nominate someone else. If no alternative is agreed upon, any contact nominated by the NSWPF should have specialist expertise working with children and young people and, if appropriate in the circumstances, with culturally and linguistically diverse communities.

LECC oversight

Part 2A powers are extraordinary and, appropriately, have been used sparingly to date. The powers have been subject to four reviews by the Ombudsman. The oversight function was transferred to the LECC in 2017. In its fourth review of Part 2A powers, the Ombudsman noted that restrictions on its ability to access information made it less effective in providing a comprehensive and independent view of PDO powers. The Ombudsman pointed to two key reasons its oversight functions were hampered during the reporting period. This was the operation of Commonwealth secrecy provisions and claims of public interest immunity by the NSWPF.

There are a number of Commonwealth laws that contain secrecy provisions that may restrict the NSWPF providing information including:

- *Australian Security and Intelligence Organisation Act 1979*
- *Telecommunications (Interception and Access) Act 1979*
- *Anti-Money Laundering and Counter-terrorism Financing Act 2006*
- *Proceeds of Crime Act 2002*
- *Surveillance Devices Act 2004.*

The Ombudsman recommended the NSW Attorney write to relevant Commonwealth Ministers seeking relevant amendments to Commonwealth Acts to authorise the NSWPF to provide the LECC with any information to facilitate its scrutiny powers.

Section 56 of the LECC Act prevents public interest immunity claims in response to a requirement to provide information to the LECC. A similar provision exists under s.21(3) and s 21A(2) of the *Ombudsman Act 1974* (**Ombudsman Act**). The Ombudsman favoured amending the Act so that it is consistent with the LECC Act and the Ombudsman Act.

The Australian approach to public interest immunity requires courts to conduct a balancing exercise.[60] Commonwealth national security legislation also provides that a balancing exercise be carried out when considering whether in criminal and civil proceedings disclosure of information is 'likely to prejudice national security'.[61] While the Commonwealth legislative framework allows for a security-cleared legal representative of an affected party to challenge arguments for non-disclosure on the basis of likely prejudice to national security, the 'greatest weight' must be given to national security considerations in both criminal and civil proceedings.

Public interest immunity has been extended beyond judicial proceedings to pre-trial proceedings, quasi-judicial proceedings and the exercise of investigative powers by the Executive.[62] One problem with making a public interest immunity claim in the context of a *scrutiny* function however, is that there is no independent third party who can look at the material and test the claims (as would be the case in judicial proceedings). This means that the Ombudsman (and now the LECC) has to accept the public interest immunity claim as made, which is a situation which the Review is not aware arises in other contexts. As was noted in the Ombudsman's report '[g]enerally, public interest immunity claims are more relevant to the exercise of adjudicative or investigative functions, than to the exercise of a general scrutiny or monitoring function of the kind exercised by the Ombudsman in the circumstances mentioned'.[63]

Similar scrutiny provisions in the *Crimes (Criminal Organisations Control) Act 2012* do not prevent public interest immunity claims being made. Notwithstanding this, the *Crimes (Criminal Organisations Control) Act 2012* does require the Ombudsman to '*maintain the confidentiality of information provided to the Ombudsman that is classified by the Commissioner as criminal intelligence*'.[64] This wording suggests that criminal intelligence *would* be provided to the Ombudsman during his or her scrutiny of powers exercised under that legislation.

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[60] *Conway v Rimmer* [1968] UKHL 2; applied in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1.
[61] *National Security Information (Criminal and Civil Proceedings) Act 2004* s.3(1).
[62] *Middendorp Electric Co Pty Ltd v Law Institute of Victoria* [1994] 2 VR 313.
[63] Ombudsman report paragraph 4.4.2 p.15.
[64] *Crimes (Criminal Organisations Control) Act 2012* s.39.

Most of the material that the Ombudsman (now the LECC) would need to see in order to perform the scrutiny function would necessarily be sensitive in nature for example, affidavits on which an application for preventative detention is made. Without access to this material, the scrutiny function is severely undermined. Nevertheless, there remains information that the NSWPF need to withhold given the highly confidential and sensitive nature of that material. The Ombudsman's review acknowledged that some information can be restricted *without* impacting effective oversight.

Stakeholder views

The Commonwealth Attorney-General's Department (**AGD**) indicated in its submission to this review that no amendment to the Commonwealth legislative framework is envisaged. AGD noted that Commonwealth secrecy and non-disclosure provisions have an important role to play in protecting sensitive information. Further, it was submitted that legislative provisions exist allowing for appropriate information sharing to assist oversight bodies in the performance of their functions. For example, under the *Telecommunications (Interception and Access) Act 1979*, the Commonwealth Ombudsman is able to exchange information with state inspecting authorities to enable that inspecting authority to perform its functions in relation to a state agency or authority of a state or territory. It is also open to states to seek Commonwealth approval to share information with other bodies performing an oversight role.

During consultation, the NSWPF noted that if it can no longer provide protection of classified material or sensitive material, partner agencies may choose not to release that information to the NSWPF which would adversely impact upon the operational capability of both the JCTT and the NSWPF. The NSWPF further noted that there were public interest immunity claims made and upheld by a number of agencies during the inquest into the deaths arising from the Lindt Café Siege and that the State Coroner did not make any recommendation to remove the ability of an agency to rely on public interest immunity.

Our view

Oversight of powers under the Act is crucial. Equally important is the need to ensure the protection of highly classified sensitive material regarding terrorist investigations and operations. The purpose of public interest immunity is to protect the nation or state from harm and the application of the doctrine calls for the balancing of various aspects of the public interest.

It is concerning that the Ombudsman was not able to form a comprehensive and informed view about the operation of the Act without access to key documents from the NSWPF. Part 2A powers

are extraordinary and depart from long-established principles on detention. NSW Parliament recognised this when the legislation was enacted by establishing a robust scrutiny function. The NSWPF and the LECC should work to address the issues identified by the Ombudsman.

The Ombudsman favoured amending the Act so that it is consistent with the LECC Act and the Ombudsman Act. While there would be benefits to this proposal, a *scrutiny* function (such as that under the Act) should be distinguished from an *investigative* function (such as those under the LECC Act and the Ombudsman Act).

The Ombudsman has acknowledged that some information can be restricted *without* impacting effective oversight. This includes information that identifies informants or officers who are operating covertly. The Ombudsman's (now the LECC's) review function would have been greatly assisted if it was provided with documents with relevant parts redacted for example, information identifying informants or officers operating covertly. In seeking to ensure that the information and evidence relied on in using powers under the Act was correctly applied, the LECC does not need information identifying informants or officers operating covertly. If the NSWPF does consider that information identifies informants or officers who are operating covertly, it can redact this information and provide the LECC with the particularised details of those parts of the documents that are redacted.

The Australian Government Information Security Management Guidelines note the importance of ensuring that information is only security classified when the results of compromise warrant the expense of increased protection. The NSWPF should be required to provide information requested by the LECC, under s.26ZO or s.27ZC, to undertake its scrutiny function except when material may identify informants or officers operating covertly or material is subject to Commonwealth secrecy provisions that restrict the NSWPF providing information. The NSWPF should indicate where redactions are made for these purposes. The NSWPF should only be required to provide information on the condition that:

- the LECC officers reviewing the material have appropriate security clearance
- the NSWPF can identify matters of particular sensitivity which will be seen only by the LECC Commissioners
- the NSWPF would be provided a copy of any material the LECC proposed to be included in a public report to ensure it does not unnecessarily reveal police methodology, ongoing operations or jeopardise information sharing relationships.

This recommendation seeks to balance the competing tension of protection of PII information and effective oversight/scrutiny of powers exercised under the Act.

Recommendation 13: The NSWPF should be required to provide information requested by the LECC under s.26ZO or s.27ZC on the condition that:

- the LECC officers reviewing the material have appropriate security clearance
- the NSWPF can identify matters of particular sensitivity which will be seen only by the LECC Commissioners
- the NSWPF would be provided a copy of any material the LECC proposed to be included in a public report to ensure it does not unnecessarily reveal police methodology, ongoing operations or jeopardise information sharing relationships.

The NSWPF should not be required to provide material:

- that is subject to Commonwealth statutory secrecy provisions that restrict the NSWPF providing information
- may identify informants or officers operating covertly.

The NSWPF should specify to the LECC where redactions are made for these purposes.

This recommendation is to be reviewed after 12 months of operation.

Part 3 – Covert search warrants

Powers under Part 3 and when they have been used

Part 3 of the Act commenced on 16 December 2005 and relates to covert search warrants. These provisions enable specially authorised police officers to covertly enter and search premises under the authority of a special covert search warrant for the purposes of responding to, or preventing, terrorist acts. Only eligible Supreme Court judges can issue such warrants.

Prior to the previous statutory review of the Act, these powers extended to the NSW Crime Commissioner and his or her staff. The Ombudsman's 2014 review noted that the Crime Commissioner had expressed the view that while there was a continuing need for Part 3 powers, it was unnecessary for those powers to be available to the Crime Commission. The previous statutory review supported this recommendation, agreeing that the extraordinary powers should be strictly limited to agencies that use them directly. Accordingly, the *Terrorism (Police Powers) Amendment Act 2015* removed the ability for the Crime Commissioner and Crime Commission staff to exercise Part 3 powers.

The use of covert search warrant powers has been limited to date. The NSWPF has applied for five covert search warrants under Part 3 since the powers were introduced. Three of the five applications were executed. This occurred in 2005 as part of the *Operation Pendennis*. In 2009, as a result of this operation, five men were convicted of a range of terrorist offences and each received a sentence of between 23 and 28 years. The NSWPF (on behalf of the JCTT) also obtained covert search warrants in a recent operation.

Continuation of Part 3 powers

The Commonwealth has a similar framework in place to the NSW Part 3 powers that may be exercised by the NSWPF. Part IAAA of the Commonwealth *Crimes Act 1914* (Cth) provides for a delayed notification search warrant scheme. Part IAAA provides for the authorising, issuing and reporting obligations with respect to delayed notification search warrants. The NSWPF are empowered to exercise the powers.

The NSW State Coroner has noted that national counter-terrorism arrangements are structured to reflect the federal system of government where the states/territories have primary responsibility for the operational response to a terrorism investigation within their jurisdictions.[65] This aligns with arrangements under the National Counter-Terrorism Plan.[66] The Commonwealth supports these arrangements as requested and as appropriate (as envisaged, in part, by s.119 of the Australian Constitution). Consistent with this, in almost every circumstance, the NSWPF will be first responders in relation to a terrorist incident occurring in NSW.

Stakeholder views

Legal Aid NSW submitted that Part 3 powers should be repealed and suggested the use of covert search warrants undermines the balance between the State's right to investigate and prosecute crime, and the rights of individuals against intrusion by the state. The Bar Association did not make a submission in relation to this proposal. The Supreme Court noted that from its perspective the limited use of covert search warrant powers had not caused any difficulties.

The NSWPF did not support Legal Aid NSW's proposal and noted that these are extraordinary powers that are only used by police in extraordinary circumstances. The NSWPF noted that nothing has occurred since the introduction of the powers that would provide any fresh or compelling justification to remove powers that the Government considered appropriate at the time of their respective enactments.

The NSWPF noted that the evidence obtained during the covert search in a recent operation was vital from an evidentiary perspective and from an officer safety perspective. The covert search enabled the NSWPF to identify information that was critical in the resolution phase to respond.

Our view

There are safeguards in relation to the exercise of Part 3 powers. For example, a covert search warrant can only be issued by an eligible judge of the Supreme Court and only where the judge is satisfied to the requisite standard that a terrorist act has been, or is likely to be, committed, and that the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act. While the Legal Aid NSW submission cites concerns from the 2005 Legislation Review Committee regarding Part 3 powers, we note that when the Legislation Review Committee later

[65] State Coroner of NSW, *Inquest into the deaths arising from the Lindt Café siege: Findings and recommendations* (May 2017).
[66] National Counter-Terrorism Committee, *National Counter-Terrorism Plan* (3rd Ed), 2012.

considered covert search warrants, the Committee '*note[d that] a judge must consider the nature and gravity of the 'terrorist act' in determining whether there are reasonable grounds to issue a covert search warrant. Hence, safeguards exist to balance national security and public safety concerns with the right to privacy. For this reason, the Committee makes no further comment.*[67]

Part 3 powers are extraordinary powers that are only used by the NSWPF in extraordinary circumstances. The fact that these powers are used with restraint and only in extraordinary circumstances would indicate that the powers are being used appropriately. We conclude that this, coupled with the fact that the NSWPF are responsible for the operational response to a terrorism investigation in NSW, indicates that the Part 3 powers should be continued.

[67] NSW Parliament Legislation Review Committee *Legislation Review Digest* No. 43/55 – 10 September 2013.

ANNEXURE A – LIST OF SUBMISSIONS TO THE REVIEW

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

- Advocate for Children and Young People
- Australian Federal Police
- Commonwealth Attorney-General's Department
- District Court
- Information and Privacy Commission NSW
- Law Enforcement Conduct Commission
- Law Society of NSW
- Legal Aid NSW
- NSW Bar Association
- NSW Director of Public Prosecutions
- NSW Ombudsman
- NSW Police Force
- Supreme Court
- The Public Defenders