

INQUIRY INTO NSW POLICE COUNTER TERROR AND OTHER POWERS
QUESTIONS FOR WITNESSES
14 JUNE 2006

1. What do you see as the main issues regarding NSW Police counter terrorism powers?

Detention Without Charge

The introduction, parallel with Federal legislation, of the power of the Sup Ct on application of Police to detain without charge or prospect of trial for periods of up to 14 days at a time if it is thought this might prevent a terrorist attack or preserve evidence (ie an innocent person may be detained). No proof is required, just reasonable grounds for suspicion.

Rolling orders can be sought, effectively enabling indefinite detention. Upon release under one order, a new order can be sought for another fortnight's detention.

Detained people, even innocent ones, can be held with convicted criminals in gaols.

Secrecy – hearings are conducted in secret and revelation of details = 5 years gaol. The Act allows the Court to keep the evidence secret from detainees and their lawyers.

Contact – detainees are only allowed to contact a strictly limited class of people (family or co-worker) to advise that they are safe but unable to be contacted for the moment. It excludes fiancés and doctors, unless the police in charge allow otherwise. People contacted commit an offence if they reveal the detention = 5 years

Court may issue a prohibited contact order preventing contact w even family or co-workers or particular lawyers.

Access to Lawyers – a detainee may have a lawyer but the detaining officer must be able to hear the conversation and understand it.

An innocent person may be detained by mistake, through carelessness or as a result of malice by an individual police officer. An innocent association with a person who turns out to be a terrorist may result in detention.

Powers could be used for political purposes and the secrecy provisions make it difficult for the wrong to be remedied.

2. Police now have access to a large body of powers to deal with terrorist incidents. Could the lack of uniformity of authorisation regimes to access these powers and various reporting requirements once these powers have been used lead to confusion or greater likelihood of

misuse or abuse by police about the appropriate way to exercise these powers?

One potential problem is that police may start to see these powers, which are extraordinary by any standards, as being "ordinary" and to be used in ordinary cases. The fact that they come from many sources may increase this risk, especially over time, when the reason for the powers' introduction (ie threat of terrorism) has been forgotten. It should be remembered that some of the new powers granted are not limited to use in terrorist cases (eg search powers) and will apply across the board.

- 3. The exercise of covert search warrants has been raised as particular issue in some of submissions to the Inquiry received by the Committee. Do you see the execution of covert search warrants as a problematic area? What kind of problems would you anticipate could arise? How could the execution of covert search warrants be more effectively oversighted?**

We are concerned by covert warrants. They're open to abuse. Evidence could be planted and it leaves the evidence open to question by defence lawyers if the person searched is ultimately charged. That does not serve the interests of justice.

They could be used as fishing expeditions – using covert warrants to look for evidence of other crimes on the pretext that there's a terrorism suspicion. Any evidence of a serious crime found during a covert search may be admissible in Court.

All covert searches should be overseen by either an officer of the PIC or the Ombudsman's office and a report of each such search should be prepared by that officer. The PIC and Ombudsman should monitor and report regularly on all searches and outcomes including charges laid and whether terrorist or other.

- 4. Are the safeguards built into the preventative detention powers adequate? For example, in Queensland the Public Interest Monitor must be present at every hearing of an application for a preventative detention order. Should there be a similar system in NSW? What other safeguards might be helpful?**

- a. We consider that the Qld Public Interest Monitor is a good model that should be considered for NSW.
- b. In relation to detention orders, the safeguards in place include curial oversight of the original application for a detention or prohibited contact order. The application is made to the Sup Ct, and the affected person and their lawyer are present. The evidence of the person seeking the order must be sworn, so it would be perjury to give false evidence. But it must be remembered that the evidential burden is light – only a reasonable suspicion is required. The

problem is that this only applies under ordinary circumstances. In urgent circumstances, these safeguards are omitted. Evidence can be given and an interim order can be made by telephone, allowing a person to be immediately arrested and detained.

- c. Detention orders last for up to 14 days but rolling orders can be made, enabling indefinite detention.
- d. Interim orders only last 48 hours but, again, rolling interim orders can be sought.
- e. A detainee is entitled to a copy of the detention order, normally with a copy of the grounds on which it was made. But this is not allowed if the information is deemed likely to prejudice national security. Therefore, a detainee may never know the grounds upon which they are being detained. This makes any challenge to the making of the order difficult if not impossible.
- f. Detainees may apply to the Ombudsman and the PIC about their treatment during detention and may apply to the Court if they have new evidence, to have the order revoked.
- g. The Police Commissioner must report annually on applications, their type and nature, whether they apply to young people and how many, number of complaints and the like and the Ombudsman is to report in 2007 and 2010 on detentions and orders made under the Act.

Because of the problems identified above, greater safeguards are required. See NSWCCCL recommendations, which we endorse.

5. Legislation amending the Controlled Operations Act to allow for retrospective approval of controlled operations was passed at the beginning of the year, but has not yet commenced. Do you see this as potentially impacting on NSW Police counter terrorism activities? What kind of difficulties could there be for the exercise of powers authorised retrospectively? What additional oversight mechanisms, if any, should be implemented for retrospective approval of controlled operations?

Retrospective laws of this nature are always problematic. To enable an operation to be lawful at a later time, which would, at the time it was carried out would otherwise have been unlawful is contrary to established principles of the rule of law. Authorities whose job it is to uphold the law should not be able to break the law themselves and have their unlawful actions subsequently sanctioned.

It is difficult to see what oversight can be recommended in relation to an operation that has already occurred, but the Ombudsman ought to oversee all applications for retrospective approval and report on each such application and their outcomes. Ongoing monitoring of outcomes of all reports should take place with an overall report being made on a regular basis, not less than annually.

6. **It seems likely that police counter terror activities will involve taskforce arrangements, where a multi-jurisdictional team (eg NSW Police, AFP and ASIO) will undertake activities. Do arrangements of this kind pose particular challenges for effective oversight?**

It is likely that joint efforts will occur. Oversight by the Ombudsman is preferred to oversight by PIC because of problems with police overseeing other police. This may present budgetary problems for the office of the Ombudsman. They should be adequately resourced. At present many complaints are referred from Omb to PIC routinely who then pass complaints to LAC, creating dissatisfaction by complainants at an apparent lack of arms' length investigation.

AFP and ASIO are not subject to Ombudsman or PIC so would have to be overseen by Federal agencies.

7. **Do you see the potential for the extraordinary powers in the anti-terrorism legislation to be used for more routine policing operations? What could be the dangers involved in this? How might misuse be prevented?**

Yes. The danger is that police may use the powers to investigate other crimes on the pretext that they are investigating potential terrorist activities. And less overtly, the fact that the powers are contained in various places may make their original purpose, ie to fight the threat of terrorism, forgotten over time. Sufficient oversight by Ombudsman would be one safeguard and collation of all laws in one place would be another.

8. **Are the current oversight mechanisms of agency reporting built into the *Terrorism (Police Powers) Act* eg annual reporting by the Attorney General to the Parliament on the operation of the Act appropriate and sufficiently clear? If not, how could they be improved or supplemented?**

We endorse the NSWCCCL recommendations and if these were implemented, it would supplement the AG's responsibilities.

9. **Is the lack of overarching review legislation for counter terrorism powers, such as the UK's *Human Rights Act* under the European Convention a particular issue for NSW? If yes, please explain how.**

The raft of counter terrorism laws introduced in NSW can properly be described as draconian, undermining many of the fundamental values of an open and democratic society. Their impact is greater than in other jurisdictions because we do not have an equivalent to the UK *Human Rights Act*. The laws themselves cannot be challenged by measuring them against overarching legislation. Only their misuse can be challenged. They can be criticised as being contrary to international conventions to which Australia is a signatory, but in the absence of a bill of rights or the like that is no bar to their legitimacy as laws in our courts.

10. Do you think the Ombudsman and the Police Integrity Commission have an adequate role in overseeing police exercising these powers? Are they the appropriate bodies for this role?

No. We endorse NSWCCCL recommendations to expand the oversight. In most instances the Ombudsman should be preferred to ensure actual and apparent arms-length oversight. Sufficient funding should be given to ensure sufficient staffing etc.

11. What other forms of oversight could be beneficial, for example to what extent should judicial review be available?

Judicial review should be available at every stage. Open and transparent curial oversight of the criminal justice system to ensure the proper operation of the rule of law is fundamental in a democracy.

12. Are there any other matters you would like to raise?

The Universal Declaration of Human Rights, article 3, says "Everyone has the right to life, liberty and security of person". These laws are extraordinary in that they enable the state to take away the liberty of a person, even an innocent person, without charge and without the prospect of trial.

"There is presently no part of the world that is immune from terrorism. The threats are real and call for a firm response from states. The response should, however, be proportional to the danger involved and carefully tailored to address it, bearing in mind that the danger includes not only the harm done by terrorism, but also the harm done to the fabric of our societies by disproportionate responses that undermine democracy itself."

Arthur Chaskalson, ICJ President, Sth Africa, ICJ Conf. Berlin 2004

There is concern that governments in Australia, including NSW, against a background of continuing widespread fear of terrorist attacks, are seeking to bypass well-established human rights and rule of law principles.

Of course, terrorism puts human rights and democracy in peril and that makes it all the more important for counter terrorism measures to uphold human rights and the rule of law, which underpin democracy.

If they are not to be repealed, at the very least, these laws must be subject to stringent oversight to ensure that they are not abused or misused.