



NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC

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Submission to the NSW Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission

**concerning the inquiry into the functions of the Police
Integrity Commission and the Ombudsman
in providing oversight over police actions under the counter-
terrorism laws of NSW
and related matters.**

The Council for Civil Liberties thanks the Parliamentary Joint Committee for the invitation to make this submission. We would be happy to comment further on any of the matters raised, or on any other matters that arise from the inquiry, should the Parliamentary Committee so desire.

Executive summary

The powers that have been given to the NSW Police by recent anti-terrorist legislation are properly described as extraordinary. They create their own dangers, to the liberty and safety of individuals and to democratic institutions. It is vitally important they continue to be viewed as extraordinary, to be used only where other, ordinary powers are inadequate to save life. Their use must never become routine.

Emergency circumstances must not be seen as providing a justification for police shrugging off supervision. Extraordinary powers require extraordinary supervision and oversight.

Preventative detention should not be used save in cases of national emergency. Arrangements for the supervision of police should be directed towards ensuring that it is not used when lesser powers are sufficient. They should also be strongly protective of the human rights of those who are detained.

The power to conduct covert searches and the targeting powers are less dangerous and less intrusive of rights than that of detaining people without trial. Nevertheless they do conflict with civil liberties, and they have their own dangers.

Recommendations:

Recommendation 1. That the Ombudsman be required to be present at every application for a preventative detention order, with the right to make representations in the public interest, and the right to report abuses.

Recommendation 2. That the Ombudsman be given the power and the obligation to investigate all actions taken in accordance with each preventative detention order.

In particular:

- a. The Ombudsman should be required to monitor closely the treatment each person is receiving during detention, whether or not the person lays a complaint.
- b. The Ombudsman should be required to present a report within a week of the end of each detention, or if the detention is renewed, within a week of the renewal, covering the following:
 - whether, in the opinion of the Ombudsman, the purposes of the detention could have been achieved by ordinary means;
 - whether any lives have been saved by the detention;
 - whether there was a national emergency justifying the use of the powers;
 - whether the purpose for which the detention was sought was for some purpose other than the saving of lives; and if it was, whether there is any threat to political processes or of victimisation of the detainee;
 - whether the treatment of the detainee was in accord with the law, and more generally, whether it was unreasonable, unjust, oppressive or improperly discriminatory.
- c. In respect of the matters on which the Ombudsman is obliged to report, the power of the Court to order suppression of evidence should be subject to a time limit of four weeks.
- e. The reports should be made to the Speaker and the President of the Legislative Council, to the Parliamentary Joint Committee on the Office of the Ombudsman and the PIC and to a committee of oversight of the Ombudsman if one is created. At the discretion of the Ombudsman, the reports should be released for publication.

Recommendation 3: That such changes be made to Part 8A of the Police Act 1990 to ensure that the Ombudsman can continue his or her investigations and make reports despite opposition from the Police Commissioner or other bodies.

Recommendation 4: Where a prohibited contact order is made, the Ombudsman should also be required to report on the reasons that were given for the restriction and impact of the restriction on the life of the detainee.

Recommendation 5: That members of the Office of the Ombudsman or of the Police Integrity Commission be required to observe each covert search, and that it be a condition of the legality of the searches and of the subsequent use of what is discovered in evidence in legal proceedings, that they do so observe. The Ombudsman's Office or the PIC should prepare a report on each search, to be given to the owner/occupier of the premises searched at the same time that the occupier's notice is given.

Recommendation 6: That the Office of the Ombudsman keep records of covert searches and report each three months on the number of such searches, on the outcomes in relation to the saving of life and on the use of evidence in laying of charges for terrorist offences and for other offences.

Recommendation 7: That after each use of police powers under sections Part 2 of the Terrorism (Police Powers) Act, one of the oversighting bodies be required to conduct an investigation and submit a report to the NSW Parliament as to whether the actions assisted in the prevention of a terrorist action or in the response to one, and if so, how. It should also list any concerns the oversighting body has about the actions taken. The investigation should not be subject to any powers of the Police Commissioner to halt or take over an inquiry by the investigating body. Despite anything contained in Part 8A of the Police Act, the Ombudsman or the PI Commissioner as the case may be should also have the untrammelled authority to release a report to the public.

Recommendation 8: That funding for the Office of the Ombudsman and for the PIC be increased to allow permit staff to be increased to meet these responsibilities.

Concerns that arise from every power.

The powers that have been given to the NSW Police by recent anti-terrorist legislation are properly described as extraordinary. They create their own dangers, to the liberty and safety of individuals and to democratic institutions. The reality of the risks can be seen in the killing of Jean Charles de Menezes in July last year, and in the subsequent attempts at cover up by members of the British police. Individuals from stigmatised minorities will be particularly vulnerable.

By diminishing the respect that is given to basic human rights and civil liberties, and by diminishing the legal enforceability of those rights and liberties, each successive law weakens the defences that we have against Australia becoming a managed democracy, and ultimately, losing its democratic institutions entirely. Each use of the powers conferred by these laws risks similarly weakening the respect for the rights of the individual and for the processes of democracy. Those rights are already under sustained attack.

Corrupt police may attempt to use the powers for revenge purposes, or in order to secure convictions that would not be obtainable otherwise.

As they are framed, the laws also might be used directly in order to subvert political processes. A series of well-timed arrests, including perhaps key political leaders, could produce an election landslide and open the way to a managed democracy, like Malaysia's, or worse.

Thus it is vitally important that the powers continue to be viewed as extraordinary, to be used only where other, ordinary powers are inadequate to save life. Their use must never become routine.

There is only so much that the Office of the Ombudsman and the Police Integrity Commission can do in order to avert these dangers. They may however be crucial in alerting the community to the routinization of what should never be routine.

Emergency circumstances must not be seen as providing a justification for police shrugging off supervision. Extraordinary powers require extraordinary supervision and oversight.

1. Preventative Detention

i. This is the most grave of all the powers granted. It is contrary to international law for it to be used other than in cases of national emergency.¹ This reflects not only a proper concern about individual rights, but also the recognition by the international community that there are even worse things that can happen to a country than a terrorist attack.

Misuse of the power might occur from ignorance of alternatives, an excess of zeal, from fear in very dangerous circumstances, or a failure to realise that it is only in an extreme national emergency that detention could be justified.

¹ International Covenant of Civil and Political Rights, Article 4 Paragraph 1.

In circumstances of terror and of haste, mistakes are likely to be made, leading to the jailing of innocent persons.² And as noted, there are more sinister possibilities.

But the rapid exposure of misuse is inhibited. The public is excluded from all proceedings in relation to preventative detention orders. The Act allows the Court to suppress publication of part or all of the proceedings. Disclosure is subject to a penalty of imprisonment for up to five years. The capacity of the Ombudsman in particular is limited both by the law and by limited resources. The powers might be systematically misused for some time before the faults were made public.

ii. Extraordinary powers should be subject to extraordinary safeguards. The existing powers of the Ombudsman and those of the PIC are in our view too limited for their oversight to be effective, especially if preventative detention starts to be used to subvert democratic processes, or is sought for revenge purposes or as a short cut to evade normal legal processes. The powers also need to be stronger to protect persons who may be innocent.

It is a reasonable question as to which body is best fitted to provide oversight of the use of this power. The CCL believes the Office of the Ombudsman should be preferred on the grounds that the focus of the PIC is on illegality and corruption of police, while it is part of the function of the Ombudsman to deal with actions that, though legal, are unreasonable, unjust, oppressive or improperly discriminatory.

It is particularly important that the police should not investigate themselves in such a matter, and that the Police Commissioner should not have the power to prevent an investigation from continuing. Extraordinary powers call for extraordinary oversight.

iii. In Queensland, under the Commonwealth's Anti-Terrorism Act No. 2 2005, the Public Interest Monitor must be present at every hearing of an application for a preventive detention order. The Monitor has the function of arguing for the public interest, including the interest in the preservation of and respect for individual rights. This is a useful precedent. Accordingly the CCL recommends:

Recommendation 1. That the Ombudsman be required to be present at every application for a preventative detention order, with the right to make representations in the public interest, and the right to report abuses.

In our view, the Ombudsman should investigate every preventative detention as though a complaint had been laid.³ The obligation should not need to be triggered by a formal complaint from a detainee. The police officer in charge of a detainee may neglect to inform the detainee of his or her right to complain to the Ombudsman. Moreover, a detainee may be made afraid to lay a complaint.

Recommendation 2. That the Ombudsman be given the power and the obligation to investigate all actions taken in accordance with each preventative detention order. In particular:

² In any case, under the detention law, it is permitted for a person known to be innocent to be detained in order to protect evidence.

³ The power to do this is already contained in the Ombudsman Act. What is appropriate in the circumstances is that there also be an explicit obligation to investigate.

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- a. The Ombudsman should be required to monitor closely the treatment each person is receiving during detention, whether or not the person lays a complaint.
- b. The Ombudsman should be required to present a report within a week of the end of each detention, or if the detention is renewed, within a week of the renewal, covering the following:
- whether, in the opinion of the Ombudsman, the purposes of the detention could have been achieved by ordinary means;
 - whether any lives have been saved by the detention;
 - whether there was a national emergency justifying the use of the powers;
 - whether the purpose for which the detention was sought was for some purpose other than the saving of lives; and if it was, whether there is any threat to political processes, or of victimisation of the detainee;
 - whether the treatment of the detainee was in accord with the law, and more generally, whether it was unreasonable, unjust, oppressive or improperly discriminatory.
- c. In respect of the matters on which the Ombudsman is obliged to report, the power of the Court to order suppression of evidence should be subject to a time limit of four weeks.
- d. The reports should be made to the Speaker and the President of the Legislative Council, to the Parliamentary Joint Committee on the Office of the Ombudsman and the PIC and to a committee of oversight of the Ombudsman if one is created. At the discretion of the Ombudsman, the reports should be released for publication.

In order to ensure that misuse of detention powers is given immediate publicity, no power should lie with ministers of the crown, nor with the police or any other government agency, to halt these investigations or to prevent the publication of the reports within a short time.

To achieve this, some changes will be needed to Part 8A of the Police Act 1990.

Recommendation 3. That such changes be made to Part 8A of the Police Act 1990 to ensure that the Ombudsman can continue his or her investigations and make reports despite opposition from the Police Commissioner or other bodies.

2. Prohibited contact orders.

Under NSW law, prohibited contact orders apply only while a person is in mandatory detention. It is appropriate that the Ombudsman report on their use and abuses while he or she is reporting on mandatory detention.

Recommendation 4. Where a prohibited contact order is made, the Ombudsman should also be required to report on the reasons that were given for the restriction and impact of the restriction on the life of the detainee.

3. Covert searches under Part III of the Terrorism (Police Powers) Act 2002

Some of risks created by this law are those that apply to any form of secret surveillance: the use of the powers for fishing expeditions⁴, the possibility of victimisation and harassment by

⁴ That is, the use of the pretext of a risk of terrorism in order to conduct a search that is really to look for anything that might incriminate the inhabitants under other laws. The fact that the

police officers who come into possession of embarrassing information, and the misuse or misunderstanding of information once it is divorced from its context. There is further the risk that in the absence of anyone to protect the interests of the owner or inhabitants, evidence may be planted.

The CCL is also concerned that an act that provides substantial powers in order to protect lives against a terrorist attack also provides those powers to protect against the mere likelihood that someone will join an organisation that has been proscribed as a terrorist organisation.

It is our submission that these problems are sufficient to call for special scrutiny of police actions; both observation during searches and continual monitoring of the frequency and targeting of searches and of the outcomes in terms of prosecutions and convictions. This monitoring should be in addition to that done by the police themselves for the annual report of the Police Commissioner. It is essential that the reports be independent of the police. It is not of concern to the CCL at this time whether the observation and monitoring is done by the PIC or by the Ombudsman's staff.

Recommendation 4: That members of the Office of the Ombudsman or of the Police Integrity Commission be required to observe each covert search, and that it be a condition of the legality of the searches and of the subsequent use of what is discovered in evidence in legal proceedings, that they do so observe. The Ombudsman's Office or the PIC should prepare a report on each search, to be given to the owner/occupier of the premises searched at the same time that the occupier's notice is given.

Recommendation 5: That the Office of the Ombudsman keep records of covert searches and report each three months on the number of such searches, on the outcomes in relation to the saving of life and on the use of evidence in laying of charges for terrorist offences and for other offences.

4. Targeting places, vehicles and areas: Terrorism (Police Powers) Act 2002

The risks of misuse of such powers are principally the harassment of individuals or of groups by mistake, or associated with prejudice or the pressure of prejudiced public opinion in the face of a terrorist attack or of what is believed to be an imminent terrorist threat—especially repeated threats.

It is difficult to see what meaningful oversight can be provided while the police are taking action in what are, ex hypothesi, emergency conditions.

As before, however, each use of such emergency powers should be the subject of an independent report. While the Police Commissioner properly reports to the Minister of Police and to the Attorney-General, the Ombudsman or the Police Integrity Commissioner should report to the parliament, and if he or she thinks fit, release a report publicly. As before, there

law allows police to use anything found as evidence of a serious offence provides a temptation to this practice.

should be no power of the Police Commissioner to delay or take over an inquiry into the use of these powers.⁵

Recommendation 7: That after each use of police powers under sections Part 2 of the Terrorism (Police Powers) Act, one of the oversighting bodies be required to conduct an investigation and submit a report to the NSW Parliament as to whether the actions assisted in the prevention of a terrorist action or in the response to one, and if so, how. It should also list any concerns the oversighting body has about the actions taken. The investigation should not be subject to any powers of the Police Commissioner to halt or take over an inquiry by the investigating body. Despite anything contained in Part 8A of the Police Act, the Ombudsman or the PI Commissioner as the case may be should also have the untrammelled authority to release a report to the public.

5. Funding

The Office of the Ombudsman is already in straightened circumstances, with limited capacity to do its own investigations of complaints against police. For it to do its work properly, and for it to undertake what is recommended in this submission, it will need increased funding.

Recommendation 8: That funding for the Office of the Ombudsman and for the PIC be increased to allow permit staff to be increased to meet these responsibilities.

⁵ It is of course always possible for such a delay to be requested. It should not be mandatory for the investigator to comply.