Ombudsman submission to the Parliamentary Inquiry: Scrutiny of NSW Police counter-terrorism and other powers

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Thank you for the opportunity to make a submission to your Inquiry.

The Ombudsman's role

The Ombudsman is an independent and impartial watchdog, working for the benefit of the public of New South Wales. While the core work of our office has always been working to resolve or investigate complaints about public authorities, our jurisdiction has expanded significantly since the office opened its doors 30 years ago. Our work now extends across both the public and private sectors, and we have functions which include reviewing police and child protection complaint investigations, assessing the quality of community and disability services delivered by government, scrutinising the implementation of new laws conferring additional powers on police officers and others, and monitoring the use of telephone intercept and other powers by various law enforcement agencies.

Our approach to gauging the adequacy of accountability mechanisms

This submission is based on two broad principles – first, that where different agencies are exercising the same or similar powers, they should be held to account to an equal standard; and second, that where law enforcement powers are increased or varied, accountability mechanisms should be raised to a level commensurate with those new powers. These principles are particularly important where the powers in question have a significant impact on people's rights, and are exercised outside the public eye.

The following comments provide information about the oversight mechanisms which currently apply to counter-terrorism powers. We also draw attention to some gaps, where accountability mechanisms do not accord with the principles expressed above – that is, where different agencies exercising similar powers are not held to account to an equal standard; or where accountability mechanisms are not commensurate with new or expanded law enforcement powers.

I now turn to the terms of reference of the Inquiry.

a) The functions of the Police Integrity Commission and the Ombudsman under the counter-terror laws of NSW and in relation to oversight of the police use of covert and coercive powers

The Ombudsman's oversight of the police use of covert and coercive counter-terrorism powers falls into three main areas – complaint handling, legislative review, and monitoring of telephone intercepts and controlled operations.

Complaint handling

Part 8A of the *Police Act 1990* sets up a regime for dealing with complaints about the conduct of police officers. NSW Police has principal responsibility for investigating or resolving complaints about the conduct of individual officers, or about police practice. NSW Police is required to conduct timely and effective investigations into complaints, advise complainants as to the progress and outcome of inquiries, and find out whether complainants are satisfied with the way their concerns have been addressed.

The Ombudsman is required to consider the adequacy of the police handling and resolution of individual complaints, and keep complaint handling systems under scrutiny, to ensure standards of integrity and fair dealing are maintained. The Ombudsman may also monitor investigations (for example, through Ombudsman staff observing interviews during complaint investigations) and conduct direct investigations into complaints about police where it is in the public interest to do so. Direct investigations may also be concerned with the NSW Police investigation of a complaint.

Complaints about police conduct may be made by members of the public or by police officers. Under clause 20 of the *Police Regulation 2000*, police officers are required to report allegations of criminal or other misconduct to a senior officer.

NSW Police must notify the Ombudsman of all serious complaints, so we can perform our oversight functions. Less serious complaints, as defined by the 'class and kind agreement' made under the *Police Act*, need not be notified. However, they still have to be dealt with appropriately, and we conduct audits of local area commands to ensure they are handling these less serious matters properly.

The Police Integrity Commission also has a role in the complaints system, as set out in Part 4 of the *Police Integrity Commission Act 1996*. NSW Police and the Ombudsman are required to notify the Police Integrity Commission of all 'Category 1' complaints. The Commission may decide to investigate a complaint itself or oversight the NSW Police investigation of a complaint. Otherwise, the complaint is dealt with in accordance with Part 8A of the *Police Act*.

Complaints about the CTCC

Police officers in the CTCC are subject to the Part 8A complaints regime in the same way that other officers are. If a complaint is made about the conduct of a police officer in relation to counter-terrorism, the complaint is dealt with through the usual complaint handling channels established between NSW Police, the Police Integrity Commission and the Ombudsman, under the *Police Act* and the agreements made under that Act.

We note that complaint handling, by its nature, has its limitations as an oversight mechanism. It is essentially reactive, and relies on individuals bringing grievances to the attention of our office, NSW Police or the Police Integrity Commission. Because of this limitation, we often rely on more proactive mechanisms, such as auditing, to supplement our complaint handling role, and to ensure systems are working properly.

The limitation of the complaints system as an oversight mechanism is of particular relevance when considering its adequacy as a check on the exercise of covert counter-terrorism powers. A person who, for example, is under covert surveillance, or whose house is secretly searched, will not be in a position to make a complaint about police conduct. For this reason, the exercise of covert powers may warrant closer scrutiny than the exercise of other, overt police powers.

Right to make a complaint from preventative detention

Part 2A of the *Terrorism (Police Powers) Act 2002* came into force in December 2005, and enables a person to be detained in order to prevent an imminent terrorist act, or preserve evidence of terrorist acts that have occurred. Our role in scrutinising the exercise of Part 2A powers is discussed further below.

We note here, in our discussion of the role of complaint handling as an oversight mechanism, that Part 2A specifically preserves the right of a person in preventative detention to make a complaint. Section 26F states:

> The person being detained is entitled to contact the Ombudsman and the Police Integrity Commission.

Further, section 26Y(2)(d) provides that as soon as practicable after a person is first taken into custody under a preventative detention order, the police officer who is detaining the person must inform the person of any right the person has to complain to the Ombudsman or the Police Integrity Commission in relation to the application for, or making of, the order, or the treatment of the person by police in connection with the person's detention under the order.

While police are entitled to monitor any contact a person in detention has with a lawyer, family member or other prescribed person, police are not entitled to monitor the person's contact with the Ombudsman or the Police Integrity Commission.

Right to make a complaint about the conduct of a NSW police officer assisting ASIO

The Commonwealth Joint Parliamentary Committee on ASIO, ASIS and DSD recently reviewed the operation, effectiveness and implications of Part III, Division 3 of the *ASIO Act 1979*, which contains ASIO's questioning and detention powers in relation to terrorism. In its November 2005 report, the Committee observed that although state police officers are empowered to assist in the execution of an ASIO warrant, a person in detention has no right to contact a state ombudsman where the person wishes to make a complaint about the conduct of a state police officer. The Committee recommended that 'an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided' (Recommendation 12).

The *ASIO Legislation Amendment Bill 2006*, if enacted, would implement this recommendation. The key features of the bill as it relates to the NSW Ombudsman are:

- there are no new powers conferred on the Ombudsman – the bill relies on the Ombudsman's existing legislative basis for dealing with complaints

- the person being detained must be told he or she has a right to make an oral or written complaint to the Ombudsman about state police officers
- the person being detained must be given adequate facilities to make a complaint to the Ombudsman, and
- questioning of the person must be deferred to allow the person to make the complaint.

The bill is currently before the federal Parliament.

Legislative review

The Ombudsman is currently scrutinising the exercise of powers conferred on police officers and others by the *Terrorism (Police Powers) Act* in two areas – covert search warrants and preventative detention. We are unable to disclose details of our review at this stage. However, we have outlined the key legislative provisions, our approach to the review, and other relevant oversight mechanisms.

Covert search warrants (Part 3)

Part 3 of the *Terrorism (Police Powers) Act* came into operation in September 2005, and enables certain police officers and staff members of the NSW Crime Commission to apply to an eligible judge for a covert search warrant, should the officer suspect on reasonable grounds that a terrorist act has been or is likely to be committed, searching the premises will substantially assist in preventing or responding to the terrorist act, and it is necessary to conduct the search without the knowledge of the occupier.

A covert search warrant authorises the nominated officers to enter the subject premises, or premises adjoining the subject premises, without the occupier's knowledge, and search for, seize, place in substitution for a seized thing, copy, photograph, record, operate, print or test any thing described in the warrant. After executing a covert search warrant, the officer must report back to the judge within ten days, stating what actions were taken, who took those actions, and whether or not execution of the warrant assisted in the prevention of or response to the specified terrorist offence. Details relating to the execution of the warrant must be recorded in an occupier's notice, which is to be provided to the issuing judge within six months of the warrant being executed or such further period as is permitted by the court. Following approval of the notice by the judge, the notice is to be provided to the subject of the covert search warrant and occupiers of premises searched.

Preventative detention (Part 2A)

Part 2A of the *Terrorism (Police Powers) Act* came into force in December 2005, following agreement by the Council of Australian Governments (COAG) to strengthen counter-terrorism laws across state and federal jurisdictions. Part 2A permits police to apply to the Supreme Court for orders enabling the detention of a person aged 16 or above in order to prevent an imminent terrorist act, or preserve evidence of terrorist acts that have occurred.

Police can apply for an interim preventative detention order of up to 48 hours, in the absence of the person they wish to detain. The person must be notified of the hearing for the confirmed order, and is entitled to give evidence and have legal representation at that hearing. The maximum period for which a person can be detained under a confirmed order is 14 days. If the date on which the terrorist act is expected to occur changes, a further order can be made, to take effect on the expiry of the existing order. Police must apply to have a preventative detention order revoked if the grounds on which the order were made cease to exist.

Police can also apply to the Supreme Court for a prohibited contact order, if this is reasonably necessary for achieving the purposes of the preventative detention order. Subject to any prohibited contact order, people in preventative detention are entitled to contact a family member, employer or other prescribed person, but only to let them know they are safe and are being detained. Police can monitor all contact made by the detainee, except contact with the Ombudsman or the Police Integrity Commission.

Police can arrange for a person in preventative detention to be detained at a correctional facility. People in preventative detention must be treated with humanity, and must not be subjected to cruel, inhuman or degrading treatment. Police cannot question a person in preventative detention other than for the purposes of identification, welfare, or complying with other legislative requirements. Preventative detention orders can only be made in relation to people aged 16 and above, but people aged 16 or 17 have to be detained separately from adults.

Part 2A also provides police with powers to enter premises, search persons and seize property in relation to the execution of preventative detention orders. Police can request disclosure of identity, and penalties apply for non-compliance.

Part 2A expires after 10 years, that is, in December 2015.

Details of the Ombudsman review

The *Terrorism (Police Powers) Act* requires the Ombudsman to monitor the covert search warrant provisions for two years (section 27ZC), and the preventative detention order provisions for five years, with an interim report after two years (section 26ZO). The Attorney General must table these reports in Parliament as soon as practicable after receiving them.

We are using a range of research strategies in our review of Parts 2A and 3, to ensure our report is balanced and comprehensive. These include:

- analysing information and documents held by relevant agencies, including NSW Police, the Crime Commission, the Department of Corrective Services, the Department of Juvenile Justice and the Attorney General's Department
- consulting with correctional officers and police officers of different ranks about the way the powers are used in practice, including any problems they have identified
- observing the exercise of some powers directly

- monitoring any relevant court proceedings
- tracking media coverage of relevant events
- analysing complaints about police conduct which relate to counter-terrorism powers
- analysing any relevant statistics and looking at trends according to police data
- seeking community input through the publication of consultation papers, and conducting interviews and focus groups with interested parties, and
- comparing the New South Wales experience with developments in other jurisdictions.

Other review mechanisms

We note that in addition to our role in scrutinising the exercise of these powers, the Commissioner of Police must report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants and preventative detention. The Crime Commissioner is also required to report to the Minister and Attorney General annually in relation to the exercise of powers relating to covert search warrants (sections 26ZN and 27ZB).

The Attorney General is also required to review the *Terrorism (Police Powers) Act* to determine whether its policy objectives remain valid, and whether the terms of the Act are appropriate for securing those objectives (section 36). The Attorney General is required to review the Act annually. We understand that, although the Act has been in force since 2002, no reports under this section have been tabled in Parliament yet.

Monitoring of telephone intercepts and controlled operations

The third area in which the Ombudsman oversights the police use of covert counter-terrorism powers is through our monitoring of law enforcement agencies in relation to telephone intercepts and controlled operations.

Telephone intercepts

Under the *Telecommunications (Interception) (New South Wales) Act 1987* (the *Interception Act*), certain law enforcement agencies can apply to a judicial officer or member of the Commonwealth Administrative Appeals Tribunal (AAT) for a telephone intercept warrant.

We oversight four agencies who can use these powers – NSW Police, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption. Our inspection functions under the *Interception Act* are confined to ascertaining the extent of compliance by an agency's officers with the record keeping and destruction requirements set out in Part 2 of the Act. Our role is therefore strictly an auditing role. We do not have any role in scrutinising the process of obtaining warrants or the granting of such warrants – this is solely monitored by the judicial officer or AAT member who grants the warrant.

We are required to inspect each agency's records at least twice a year, and have discretionary power to inspect their records for compliance at any time. Our practice is to conduct spot inspections, as well as our routine six monthly audits. When we conduct inspections, our practice is to inspect every warrant which has been issued. We also conduct a closer inspection of a proportion of warrants in relation to the reception, release and destruction of restricted records. We report the results of our inspections to the Attorney General. We also meet telephone intercept inspectors from other jurisdictions on an ad hoc basis to discuss common inspection issues and concerns.

In the past two years, we have inspected approximately 70 telephone intercept warrants obtained by the Crime Commission which relate to suspected terrorism offences. We have not kept separate records of inspections of telephone intercepts obtained by the CTCC, but any warrants the CTCC obtained in relation to suspected terrorism offences would have been inspected through our usual processes.

Controlled operations

The monitoring regime set up by the *Law Enforcement (Controlled Operations) Act 1998* (the *Controlled Operations Act*) provides a strict form of accountability which aims to minimise the abuse of the powers that have been given to agencies whose officers do undercover work in the investigation of corruption and criminal activity.

We oversight four state law enforcement agencies – NSW Police, the NSW Crime Commission, the Police Integrity Commission and the Independent Commission Against Corruption. We also oversight three Commonwealth law enforcement agencies that are eligible to conduct operations under the NSW Act – the Australian Federal Police, the Australian Customs Service and the Australian Crime Commission. To date, the Australian Crime Commission is the only Commonwealth agency to have conducted controlled operations using their powers under the NSW Act.

The granting of an authority to carry out a controlled operation can be distinguished from authorities to use telephone intercepts or listening devices, in that the latter require a judicial officer to grant a warrant, having first examined the basis of the application. In the case of controlled operations, the authority is granted from within the respective agency, by the agency's chief executive officer or delegate. The monitoring regime for controlled operations is more extensive than the regime relating to telephone intercepts, as our oversight role extends to monitoring this approval process. It is important to note that our monitoring is the primary oversight mechanism for the use of this power.

Further, controlled operations inspections are for the purpose of ascertaining whether or not the requirements of the Act are being complied with. This is a much wider role than for telephone intercepts, as it requires us to oversight the decision making process related to covert operations, as well as audit record keeping requirements.

To facilitate the monitoring and inspection process, the agencies we oversight must notify us within 21 days if an authority to conduct a controlled operation has been granted or varied, or if a report has been received by the agency's chief executive officer on the completion of the operation.

We are required to inspect each agency's records at least once a year, but our practice is to carry out inspections twice a year. As with telephone intercepts, we also conduct spot inspections, in accordance with our discretionary power to inspect records for compliance at any time. When we conduct inspections, our practice is to inspect all applications, authorities, variations and reports held by each agency in relation to controlled operations applied for in the relevant audit period.

We are required to report on our work and activities in relation to controlled operations directly to Parliament, in a separate Annual Report. Our report (which is available from our website) includes details about the types of criminal conduct targeted in controlled operations in New South Wales, the number of people who were authorised to undertake controlled activities, and the results of operations. We can also report to Parliament at any time if we have concerns which we consider should be brought to the attention of the public.

Our monitoring of controlled operations is increasing steadily from year to year. In the last financial year we inspected the records of 419 controlled operations, which is more than twice the number conducted three years before. The majority of operations were carried out in the investigation of drug offences, while others targeted murder, manslaughter, robbery, theft, fraud and weapons offences. Both the Crime Commission and NSW Police have conducted controlled operations in relation to suspected terrorist offences. We have monitored these controlled operations through our usual processes.

We have found, through our monitoring activities, that most applications, authorities, variations and reports are in order, and that agencies generally comply with the relevant legislative requirements. Where we do identify deficiencies, we raise these with the agency directly. We also provide details of some of these matters in our Controlled Operations Annual Report.

Further, we have found that the standard of record keeping by NSW Police has greatly improved over recent years, especially considering the continuing increase in the number of operations authorised. Incidents of non-compliance with statutory requirements can generally be attributed to quality control slippages, and mostly relate to failures to report on the results within the required two month time frame, and failures to obtain (or produce a copy of) a written undertaking from each civilian participant in a controlled operation.

We note that the *Controlled Operations Act* was recently reviewed by the Minister of Police. We made submissions to the review and provided comments on the draft report. The final report of the review was tabled in Parliament on 23 June 2004. The review endorsed our current monitoring function and did not recommend changes to the current oversight system. It did, however, recommend a number of changes to the controlled operations approvals regime, including the streamlining of the authorisation of controlled operations involving less serious criminal conduct. The *Law Enforcement (Controlled Operations) Amendment Act 2006* introduced some of the changes recommended by the review, including provisions relating to cross-border investigations and retrospective authorisations, but did not include the recommended two tier approval process.

How we discharge our secure monitoring functions

The Ombudsman has significant expertise in monitoring compliance with legislative regimes for high security matters. We have almost 20 years experience in conducting inspections under the *Interception Act*, and almost 10 years experience in monitoring compliance with the *Controlled Operations Act*. We have developed sound methodologies for conducting inspections, and have a well developed appreciation of the significance of information having intelligence and security implications.

We also have appropriate internal policies and procedures for maintaining the integrity of such information. We have a specialist unit which conducts all secure monitoring activities, and also deals with complaints and appeals relating to witness protection. The unit is housed in a reinforced secure office within our larger office that has biometric entry security and 24 hour security monitoring. An Assistant Ombudsman unconnected with our police oversight role supervises the unit, and participates in inspections directly. This ensures there is no inappropriate exchange of information between our various functions. Staff of the unit have undergone an external vetting process to obtain appropriate security clearances, and the senior officer in the unit is a former Australian Federal Police surveillance specialist. The Assistant Ombudsman and staff of the unit have been formally trained in counter-surveillance. Two additional Ombudsman officers have recently been vetted and trained so they can assist in carrying out the Ombudsman's secure monitoring functions.

We have also recently developed a new database to help us track monitoring and notification data relating to telephone intercepts and controlled operations.

b) Oversight of the conduct of NSW police officers involved in the Counter Terrorism Coordination Command (CTCC)

To gain a picture of the oversight of the conduct of police officers involved in the CTCC, it is useful to draw a distinction between the ordinary day to day activities of the CTCC on the one hand, and the exercise of special legislative powers on the other.

Day to day work of CTCC officers

The CTCC was established in 2002 to focus on areas including counter-terrorism, public order management, tactical response and the protection of critical infrastructure. Its activities now include surveillance, targeting of suspects, informant management, and joint operations with external agencies. The CTCC is under the authority of the Assistant Commissioner, Counter Terrorism and Public Order Management, who is also responsible for the State Protection Group and the Public Order and Riot Squad.

In the day to day exercise of their functions, police officers in the CTCC are subject to the same oversight regime as other police officers in New South Wales – that is, the complaints system established by Part 8A of the *Police Act* and Part 4 of the *Police Integrity Commission Act*. For a more detailed explanation of this regime, see the section 'complaint handling' above.

CTCC officers are subject to other accountability regimes in the exercise of specific powers relating to counter-terrorism activities. For example, when using telephone intercepts or listening devices, or carrying out controlled operations, they are subject to the relevant legislative schemes for those powers.

Also, as set out in the JPC's Interim Report, there has been some scrutiny of the CTCC through audits carried out by NSW Police in conjunction with the Police Integrity Commission. Section 16 of the *Police Act* requires the Commissioner of Police to audit the operations, policies and procedures of the Protective Security Group (PSG) every year. The audit must examine whether the PSG adheres to its charter and performs its functions effectively, and whether there are proper procedures for the use of intelligence and payment of informants. The Commissioner has to provide a written audit report to the Police Integrity Commission as soon as practicable after the end of each audit period. Section 14(e) of the *Police Integrity Commission Act* requires the Commission to monitor and report on the conduct and effectiveness of the Commissioner's annual audits. From the information available to us, it appears these audits have been quite limited in scope.

We are not aware of any other oversight arrangements for police officers in the CTCC.

The exercise of special counter-terrorism powers

The *Terrorism (Police Powers) Act* confers on police officers three types of powers – special powers to prevent or investigate terrorist acts (Part 2), preventative detention powers (Part 2A) and powers to execute covert search warrants (Part 3). There is no doubt that these powers are extraordinary – this was explicitly acknowledged by those introducing the Act and its subsequent amendments. In relation to the special terrorism powers conferred on officers under Part 2, the then Premier Bob Carr said:

> 'The new powers given to police are confined to limited circumstances [and] are not intended for general use.' (Legislative Assembly, 19 November 2002)

In relation to covert search warrant powers, the Attorney General Bob Debus said:

> 'The powers in the bill are not designed or intended to be used for general policing... These powers are extraordinary.' (Legislative Assembly, 9 June 2005)

And in relation to the preventative detention powers, Mr Milton Orkopoulos, the Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship on behalf of the Attorney General Bob Debus, said:

> 'There is no doubt that these powers are extraordinary, but they are designed to be used only in extraordinary circumstances.' (Legislative Assembly, 17 November 2005)

Although we are not in a position to disclose how often the powers we keep under scrutiny are being used, it is clear that the powers were designed for use only in very limited circumstances, and are not being used by CTCC officers in their day to day work.

Different approval and accountability regimes

The powers conferred on police officers under the *Terrorism (Police Powers) Act* are subject to a higher degree of scrutiny than other police powers. For example:

- The Commissioner of Police is required to report to the Attorney General and Minister for Police each time Part 2 powers are exercised, and annually on the exercise of Part 2A and Part 3 powers, and
- The Attorney General is required to review the Act in its entirety every 12 months, to determine whether its policy objectives remain valid and the terms of the Act are appropriate for securing these.

However, there are two significant differences between the safeguards applying to Part 2 and those applying to Parts 2A and 3:

- Part 2 powers can be authorised by the Commissioner of Police (or certain delegates), with the Minister's concurrence, while preventative detention orders and covert search warrants can only be made or granted by a Supreme Court judge, and
- Unlike the special powers contained in Parts 2A and 3, the Ombudsman has not been given a role to keep the exercise of Part 2 powers under scrutiny.

Part 2 of the *Terrorism (Police Powers) Act* gives police officers significant powers to prevent imminent terrorist acts and to investigate terrorist acts after they have occurred. Specifically, it enables police to find a particular person (a target person), find a particular vehicle (a target vehicle), or prevent a terrorist act in a particular area (a target area). To do this, police can stop and search people and vehicles, enter and search premises, seize and detain things, cordon target areas, require a person to disclose his or her identity, and give directions to government agencies.

Because Part 2 powers can be authorised from within NSW Police (with the Minister's concurrence) rather than by a court, and because the Ombudsman has not been given a monitoring role in relation to Part 2 powers, these powers are subject to a lesser standard of scrutiny than the other counter-terrorism powers contained in the *Terrorism (Police Powers) Act*.

Exclusion of judicial review

Section of the *Terrorism (Police Powers) Act* 13 states:

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

The term 'legal proceedings' includes an investigation into police or other conduct under any Act other than the *Police Integrity Commission Act* (section 13(2)).

During the Parliamentary debates, some members of Parliament expressed concern about the effect of section 13:

> 'The legislation takes away certain rights of review. For example, the Police Minister under the legislation is not accountable to anyone under the legislation... This is a massive licence that is incredibly open to abuse... In order to safeguard the New South Wales population from improper use of such far-reaching powers, authorisations ought to be able to be challenged in the New South Wales Supreme Court... Such invasive powers should only be authorised on reasonably certain grounds and should also be open to scrutiny... Clause 13 is very important; it constitutes the difference between a police state and a balanced judicial system.' (The Hon. Dr Arthur Chesterfield-Evans, Legislative Council, 3 and 4 December 2002)

> 'Peak legal organisations have also expressed concern about the Terrorism (Police Powers) Bill. For example... The Law Society is particularly troubled by the lack of judicial review under the bill, and referred to clause 13... The Law Society argues that immunity from judicial review is anti-democratic and strikes at the fundamental principle that the Government's actions should always be subject to judicial review... This goes against the most basic tenets of our legal system, namely, the separation of powers doctrine. Without an avenue for judicial review, members of the Police Force will essentially be answerable only to themselves.' (The Hon. Helen Sham-Ho, Legislative Council, 3 December 2002)

> 'Clause 13 means that an authorisation is not subject to any form of judicial review... These are quite extraordinary powers... The citizens of New South Wales are at the whim of police officers, who effectively answer to no-one. This unacceptable and extraordinary state of affairs is more akin to a regime of Soviet Russia than to life in New South Wales.' (The Hon. Richard Jones, Legislative Council, 3 December 2002)

> 'Clause 13, as it stands, cuts the courts out completely from overseeing the exercise of new police powers. It is an unreasonable provision and an excessive curtailment of the vital check exercise by the judiciary on executive power.' (Ms Lee Rhiannon, Legislative Council, 4 December 2002)

Moves to amend clause 13 were not successful, and the provision was enacted as drafted. This prohibition on judicial involvement on 'any grounds whatsoever' means that Part 2 powers are, again, subject to a lesser degree of scrutiny than other powers contained in the *Terrorism (Police Powers) Act.*

Scrutiny by Ombudsman for a limited time only

We also note that the Ombudsman's role in keeping special counter-terrorism powers under scrutiny is limited to an initial period of the legislation being in force. The Ombudsman is required to monitor the covert search warrant provisions for two years, and the preventative detention order provisions for five years, with an interim report after two years. There is no provision for ongoing monitoring by the Ombudsman beyond each of the review periods.

Other reviews we have conducted required us to examine police powers which are used frequently, such as powers to conduct forensic procedures or use drug detection dogs. At the end of a review period, we are usually able to gauge whether the new powers are being used effectively and fairly, for both police and the wider community, based on detailed research into the way police officers are using their powers.

The preventative detention and covert search warrant powers differ, however, in that they are not used routinely by police. It may well be that they are not used very often during the review period. For this reason, a longer period of scrutiny may be warranted for the exercise of special counter-terrorism powers than for other, more frequently used police powers. Further, given the extraordinary nature of the powers, scrutiny on an ongoing basis may be warranted. This is something we will specifically address in our reports.

Level of scrutiny under the current oversight arrangements

In its Interim Report, the PJC made the following observations:

- there were specific oversight arrangements put in place for the PSG because of serious problems with its precursor, Special Branch
- the CTCC conducts major investigations, while the PSG was confined to intelligence gathering
- the activities of the CTCC are largely unreported in the public domain
- the budget, staff and resources of the CTCC are greater than those of the PSG were
- a unit with such 'unusual functions' should be subject to a higher level of scrutiny than most, but
- as matters stand, the CTCC is subject to the same level of oversight as any other command within NSW Police.

In considering whether the current oversight mechanisms for the CTCC are adequate, we note that Parliament has singled out terrorism as a special case:

> 'General criminal activity has never aimed to perpetrate the mass taking of life, the widespread destruction of property, or the wholesale disruption of society in the way that terrorism does.' (Attorney General Bob Debus, Legislative Assembly, 9 June 2005, in relation to the covert search warrant provisions)

and has explicitly recognised that expanded powers introduced to deal with the threat must attract particularly strong safeguards:

> 'The Government has consistently proven that strong counter-terrorism laws can be crafted that include strict safeguards and effective oversight.' (Mr Milton Orkopoulos, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship on behalf of the Attorney General Bob Debus, Legislative Assembly, 17 November 2005, in relation to preventative detention)
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> 'In any democracy there must be a healthy suspicion of law enforcement powers. We must carefully monitor their use.' (then Premier Bob Carr, Legislative Assembly, 19 November 2002, in relation to the Part 2 special powers)
>
> 'The citizens of this State have a right to expect that their privacy will be protected from unjustified searches and interference from the State... These powers are extraordinary and will be permitted

> only with the strictest of safeguards.' (Attorney General Bob Debus, Legislative Assembly, 9 June 2005, in relation to the covert search warrant provisions)
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> '[The powers] are designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability mechanisms.' (Mr Milton Orkopoulos, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship on behalf of the Attorney General Bob Debus, Legislative Assembly, 17 November 2005, in relation to preventative detention)

In its Interim Report, the PJC has outlined some compelling reasons justifying ongoing audits of the CTCC. We note that while Parliament has put specific oversight arrangements in place for the exercise of certain extraordinary counter-terrorism powers, there is no such arrangement for the ordinary powers exercised by CTCC officers in their day to day activities. This is despite the fact that the CTCC's charter is broad, encompassing both investigative and intelligence functions, its functions are unusual, and that its day to day work is largely conducted out of the public eye.

Is the role of the Ombudsman sufficiently clear?

In its Interim Report, the PJC discussed the effect of section 13 of the *Terrorism (Police Powers) Act*, and commented that 'the role of the Ombudsman in relation to the CTCC remains ambiguous' (at paragraph 5.6). As explained above, section 13 provides that an authorisation to use Part 2 powers may not be challenged on any grounds whatsoever, other than in an investigation by the Police Integrity Commission.

In the second reading speech for the *Terrorism (Police Powers) Act*, the then Premier Bob Carr stated that section 13 'makes it clear the decisions of senior police are reviewable by the Police Integrity Commission' and that 'the Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the Bill is not affected.' (Legislative Assembly, 19 November 2002)

Our view is that our jurisdiction to receive and investigate complaints about the conduct of police officers exercising powers under the *Terrorism (Police Powers) Act* is unchanged by section 13. That is, the Ombudsman still has jurisdiction to oversight complaints about the conduct of police officers exercising Part 2 powers pursuant to an authorisation, although section 13 prevents any challenge to the authorisation itself.

c) Trends in anti-terror laws and oversight of these extraordinary powers

Trends in anti-terror laws

Recent developments in counter-terrorism in New South Wales reflect a general trend around the globe, where the powers of law enforcement agencies have been expanded in response to the threat of terrorism. These new powers are usually accompanied by safeguards, which may include a more robust oversight regime than usually applies to the exercise of police powers.

In Australia, legislation has been enacted at the federal level to create new terrorism offences, such as preparing for a terrorist act and financing terrorism. Old offences, such as sedition, have been modernised to target activity which promotes terrorism. Preventative detention and control orders

are available to protect the public from terrorist acts or preserve evidence of a terrorist act which has occurred. Recent changes to the federal telephone intercept legislation allow access to stored communications such as emails and text messages, and enable law enforcement agencies to obtain interception warrants for 'B parties' (that is, people who are not suspects). Further, it was recently decided that ASIO's detention and questioning regime, which was introduced in 2003 and was due to expire in July this year, would remain in force. Developments in counter-terrorism in New South Wales have been designed to complement the federal regime of counter-terrorism legislation, so it is important to take this context into account when examining the scrutiny of police counter-terrorism powers in New South Wales.

Many different parties, including members of Parliament, academics, journalists, legal groups, service providers and members of the public, have expressed concerns about elements of the new counter-terrorism laws. Concerns have been raised about:

- the speed with which the laws have been enacted
- how intrusive the laws are, and whether they strike an appropriate balance between national security and civil liberties
- whether the laws will be effective
- the impact the laws may have on innocent parties, who may have no connection to the matters under investigation
- the laws targeting particular groups in the community, in particular the Muslim community
- the laws departing significantly from long established legal principles, and
- whether the laws are consistent with Australia's obligations under international law.

It is against this background that the adequacy of oversight mechanisms must be gauged.

Barriers to effective oversight of counter-terrorism powers

We have encountered two barriers to effective oversight of the CTCC's counter-terrorism powers.

Restrictions on access to information which is necessary for effective oversight

The first barrier to effective oversight is that in some cases, the agencies we oversight may be prohibited from providing certain information which is necessary for our work. For example, there are legal constraints on NSW Police providing information which has been obtained through a telephone intercept granted under Commonwealth law. This means that some of the information we require for our review of Parts 2A and 3 of the *Terrorism (Police Powers) Act* cannot legally be provided.

Some state agencies have also expressed their reluctance to provide information they have obtained through national and international intelligence agencies, as it was provided to the agency on the basis that it would not be disclosed to any other organisation.

While this is a problem for many state agencies, it is particularly apparent in the context of counter-terrorism. Law and policy in this area are federally driven, but it is state police officers and others who are primarily responsible for operational matters, such as the carrying out of search warrants, and keeping people in preventative detention.

Ombudsman officers conducting our legislative reviews in this area have undergone an external vetting process to obtain appropriate security clearances, and we have appropriate internal policies and procedures for maintaining the integrity of sensitive information. We have indicated to the agencies we oversight that we can work flexibly to resolve difficulties relating to access to sensitive information, for example, by viewing sensitive material on site rather than requiring copies, and allowing documents to be provided with the information which cannot be provided blacked out.

However, the situation remains that certain information which is relevant to our review, such as Commonwealth telephone intercept material, cannot legally be provided.

Restrictions on sharing information with other oversight agencies

A second barrier to effective oversight is that the law enforcement agencies we oversight are likely to be working closely with other state or Commonwealth agencies that we do not oversight. Again, this is a feature of counter-terrorism activities, which are likely to be national and international in scope.

Effective scrutiny requires cooperation between the oversight agencies in different jurisdictions. While we are able to liaise with other agencies about their work in this area, the secrecy provisions in the *Ombudsman Act* and other relevant legislation limit our capacity to disclose information. This makes it difficult to share information with other oversight agencies effectively, including information about individual matters, and more generally. As law enforcement agencies increasingly work together, laws must reflect a capacity for the full and free exchange of information between the authorities overseeing their work.

d) Impact of the growth of police powers on the nature of external police oversight

The growth of police counter-terrorism powers has not had a significant impact on the nature of our oversight of NSW Police. Complaints about officers in the CTCC are handled in the same manner as complaints about the conduct of any other police officer, in accordance with Part 8A of the *Police Act* and Part 4 of the *Police Integrity Commission Act*. Since 2003, we are aware of approximately 40 complaints made about the conduct of officers in the CTCC. Most of these deal with matters which are not specific to counter-terrorism. For example, there are complaints about harassment, assault, inappropriate use of email, conflict of interest, poor work performance and loss of police property. There are a handful of matters which relate to counter-terrorism activities specifically. These complaints have all been dealt with through the usual channels.

The powers conferred on police officers under the *Terrorism (Police Powers) Act* are used very rarely, and accordingly there have been few complaints about these. We anticipate a very close review of the handling of these types of complaints by NSW Police. Further, we have arrangements

in place with the Police Integrity Commission for notification between the two agencies about complaints relating to special counter-terrorism powers.

While we have additional roles in keeping under scrutiny the exercise of powers relating to covert search warrants and preventative detention, we have significant expertise in monitoring police compliance with legislation and policy, including expertise in high security matters. Our oversight of special counter-terrorism powers has required some new arrangements. For example, we have created a 24 hour phone line to enable a person in preventative detention to contact the Ombudsman, in accordance with section 26F of the *Terrorism (Police Powers) Act*. Other than these types of arrangements, the nature of our oversight of police has remained largely the same.

e) Any other matter that the Committee considers relevant to the inquiry

As indicated at the outset, this submission is based on the principles that where different agencies are exercising the same or similar powers, they should be held to account to an equal standard; and that where law enforcement powers are increased or varied, accountability mechanisms should be raised to a level commensurate with those new powers.

We have identified some gaps in the system, where accountability mechanisms are not commensurate with expanded law enforcement powers, or where different agencies exercising similar powers are not held to account to an equal standard. These are set out below.

Inconsistencies between the Commonwealth and NSW telephone intercepts legislation

The *Telecommunications (Interception) Act 1979* (Cth) regulates the use of telephone intercepts in Australia. It applies to state as well as Commonwealth agencies. The *Telecommunications (Interception) (New South Wales) Act 1987* (NSW) declares certain New South Wales authorities, including NSW Police, to be agencies for the purposes of the Commonwealth Act. It also sets out the record keeping and destruction requirements the agencies must comply with, and establishes the Ombudsman's inspection functions. The CTCC uses telephone intercepts in its investigative and intelligence functions, and so is subject to the accountability mechanisms established by the Commonwealth and state Acts.

A number of amendments have been made to the Commonwealth legislation, without complementary amendments being made to the New South Wales legislation. This means there are now inconsistencies between the Commonwealth and New South Wales telephone intercepts legislation. As a result, our current monitoring function no longer matches the powers exercised by the agencies we oversight. In particular:

- The *Telecommunications (Interception) Legislation Amendment Act 2000* changed the definition of 'restricted record.' Under the Commonwealth legislation, a 'restricted record' means a record other than a copy that was obtained by means of an interception, whether or not in contravention of subsection 7(1) of a communication passing over a telecommunications system. The definition of 'restricted record' in the New South Wales Act does not exclude 'copies.' This has a significant impact on the management of telephone intercept records by the New South Wales agencies. In effect, it means they

have more onerous record keeping requirements than Commonwealth authorities. We have previously recommended that the Minister conduct a review of the *Telecommunications (Interception) (New South Wales) Act* in conjunction with the eligible authorities to ascertain whether there are sufficient grounds to warrant amending the definition of 'restricted record' to make it congruent with the definition in the Commonwealth Act.

- Amendments to the Commonwealth Act gave the Inspector who oversees the Police Integrity Commission the power to receive restricted records and information obtained from intercepts carried out by certain law enforcement agencies. No amendment has been made to the New South Wales legislation to allow us to inspect any of the intercept records kept by the Inspector.

- There are no specific requirements under the New South Wales Act for agencies to maintain the same records in relation to named person warrants as are included in the Commonwealth legislation. The result is that the New South Wales agencies are only required to keep records of the service or services originally stated on the warrant and are not required to keep records of 'each service' subsequently intercepted.

- Recent amendments to the Commonwealth Act by the *Telecommunications (Interception) Amendment Act 2006* allow, among other things, third party interceptions. The New South Wales Act needs to be amended so we can inspect records relating to these types of interceptions.

We have raised this issue previously, through our Annual Reports. It is of concern that our monitoring functions do not match the powers exercised by the agencies we oversight.

Listening devices and other surveillance tools

The *Listening Devices Act 1984* enables law enforcement authorities to plant listening devices, commonly know as 'bugs', to listen to or record conversations. Listening devices may record images as well as sound. They may also have a tracking capacity, to enable law enforcement agencies to track the location of a car or other moving object.

This type of activity involves a significant intrusion into people's private lives, and so is subject to strict controls. A law enforcement agency has to apply to a judicial officer for a warrant to install and use a listening device. Otherwise, the use of listening devices is generally prohibited, although this is subject to some limited exceptions (see section 5 of the *Listening Devices Act*).

Different accountability regimes for covert activities

There are currently three pieces of New South Wales legislation which authorise law enforcement agencies to act in way which would otherwise be illegal – the *Interception Act*, the *Controlled Operations Act* and the *Listening Devices Act*. These three acts were developed in isolation and, as a result, the accountability processes set out in each are quite different. The main differences are:

- the Ombudsman's inspection functions under the *Interception Act* are confined to auditing the extent of the agency's compliance with the legislative record keeping and destruction requirements
- the *Controlled Operations Act* sets up a more extensive monitoring regime, requiring the Ombudsman to monitor the implementation of authorities to carry out covert operations, as well as audit record keeping requirements, but
- there is no external monitoring of compliance with the *Listening Devices Act*, by the Ombudsman or any other independent oversight body.

Proposed changes to the listening devices regime

The NSW Law Reform Commission published its Interim Report, *Surveillance*, in 2001. The Commission recommended introducing a new *Surveillance Act* which would establish a comprehensive system of surveillance regulation and would replace, among other things, the *Listening Devices Act*. The Commission recommended a broad approach, which 'avoids the arbitrary gaps and anomalies that characterise existing surveillance laws, and extends privacy protection to as wide a range of activity as reasonably possible' (at page xiv). It also recognised the need for external monitoring of compliance by the relevant agencies with the proposed surveillance legislation (at paragraph 8.17). The Commission recommended that the record keeping and inspection requirements contained in the *Interception Act* should be adopted in the proposed surveillance legislation:

> It is a system which has proved to be effective. Inspections have indicated a high level of compliance with statutory requirements. The enforcement agencies in New South Wales have, for some time now, maintained records of documents and information pertaining to the telecommunications surveillance they conduct and have also complied with the independent audit of these records. These agencies should not have any major practical or policy difficulties with the extension of this system to surveillance activities where surveillance devices other than telephone interception devices are used. (at paragraph 8.18)

The Commission also commented:

> There are good reasons for the inspection/monitoring function to be conferred on the Ombudsman. First, the Ombudsman already has the auditing experience in relation to telecommunications interception. Secondly, the familiarity of law enforcement agencies with existing auditing procedures involving the Ombudsman may mean a smoother transition to the new regulatory regime applying to surveillance devices. Thirdly, granting the Ombudsman this function would enable him or her to make useful comparisons between the use of surveillance devices and telecommunications interceptions. (at paragraph 8.21)

The Commission also discussed the merits of conferring the monitoring function on the Privacy Commissioner. The Commission did not have a strong view about whether inspection should be performed by the Ombudsman or Privacy Commissioner, but did recognise the need for external monitoring (see recommendations 72 to 78).

In 2002 a private member's bill was introduced into Parliament which included an oversight scheme, but it lapsed.

In 2003, the Standing Committee of Attorneys-General and Australian Police Ministers Council Joint Working Group on National Investigation Powers reported on cross-border investigative powers for law enforcement, and proposed model provisions for controlled operations and the use of surveillance devices in cross-border operations. In both instances the model provisions included an inspection role by an independent body, such as an Ombudsman, in the various jurisdictions where these activities are carried out. We note that the current absence of any oversight of the listening device regime is inconsistent with the model provisions developed by the working group.

In 2004, the Commonwealth *Surveillance Devices Act 2004* came into force. It requires the Commonwealth Ombudsman to monitor and inspect records relating to the use of a range of surveillance devices, including listening devices, optical devices, data surveillance devices, equipment or programs used to monitor computer input and output and tracking devices. The Act implements the model provisions proposed by the working group and seeks to address concerns raised during the consultation process about the potential abuse of these powers, which give law enforcement agencies an unprecedented ability to record and monitor the private conversations and movements of members of the public.

We had preliminary discussions in 2005 with NSW Police about its intention to develop a proposal for a new legislative regime for the use and monitoring of surveillance devices in New South Wales, based on the new Commonwealth legislation. We are not aware of the progress of any proposed New South Wales legislation in this area.

Our view

Our view remains that the anomalies in the existing oversight system should be addressed. The current system was developed in a piecemeal fashion, to cater for the surveillance technology which was available at the time. As has occurred at the Commonwealth level, there should be comprehensive regulation of this area, including appropriate provisions for external oversight.

NSW Crime Commission

In an inquiry into the current mechanisms for scrutinising NSW Police counter-terrorism powers, it is important to consider whether there are other agencies performing similar functions which are not currently scrutinised to the same level.

As with police officers, Crime Commission staff may be subject to accountability regimes in the exercise of specific powers relating to counter-terrorism. For example, when using telephone intercepts or listening devices, or carrying out controlled operations, they are subject to the relevant legislative schemes for those powers.

However, there is no general oversight regime for Crime Commission officers. The Commission is governed by the NSW Crime Commission Management Committee, which consists of the Crime Commissioner, the Minister for Police, the Commissioner for Police, and the Chair of the Board of the Australian Crime Commission. The principal functions of the Management Committee are to

refer matters to the Commission for investigation, to refer police inquiries into matters relating to any criminal activities to the Commission, to arrange for police task forces to assist the Commission to carry out investigations, to review and monitor the work of the Commission, and to approve the appropriate consultation and dissemination of intelligence and information. The Management Committee cannot refer a matter to the Commission for investigation unless it is satisfied that ordinary police methods of investigation into the matter are unlikely to be effective (sections 24 and 25 of the *NSW Crime Commission Act 1985*).

Members of the Crime Commission and its Management Committee are specifically excluded from the Ombudsman's jurisdiction. The *Ombudsman Act* provides that a person cannot complain to the Ombudsman about 'conduct of a public authority where acting as a member of the NSW Crime Commission, or the NSW Crime Commission Management Committee, under the *NSW Crime Commission Act 1985*' (section 12 and schedule 1, clause 19).

Because they are not subject to any general oversight regime, Crime Commission officers are not subject to the same level of scrutiny as police officers, although they may be performing similar types of work. Section 32 of the *NSW Crime Commission Act* provides that the Commission may arrange for police officers 'to be made available (by way of secondment or otherwise) to perform services for the Commission.' A police officer performing services for the Crime Commission retains his or her rank, seniority and remuneration as a police officer, may continue to act as a constable, and is still subject to the oversight regime set out in Part 8A of the *Police Act*. Crime Commission officers are not subject to this type of oversight.

Further, the fact that the Commission's activities are not subject to public scrutiny, and that it only investigates matters where ordinary police methods of investigation are unlikely to be effective, suggests there is an even greater imperative for appropriate external oversight.

In our view, there is a strong case for consideration of additional and external scrutiny of the Crime Commission. This is consistent with the principle that oversight mechanisms, to be effective, should cover the field where different agencies perform similar functions; and that the strength of oversight mechanisms should be proportionate to the intrusiveness of powers being conferred on law enforcement agencies.

Concluding comments

For oversight to be effective, agencies which exercise similar powers must be held to account to an equal standard. Where law enforcement powers are increased or varied, accountability mechanisms should be raised to a level commensurate with those new powers.

In conclusion, we make the following observations:

- We have a particular role in oversighting the exercise of special powers conferred on police officers under the *Terrorism (Police Powers) Act*. The Ombudsman is required to keep under scrutiny the exercise of powers conferred under Part 2A (preventative detention) and

Part 3 (covert search warrants). We are not required to keep under scrutiny the exercise of powers conferred under Part 2 (special powers). Powers conferred on police officers under the *Terrorism (Police Powers) Act* are used only very rarely.

- In their day to day work, police officers in the CTCC are subject to the same oversight regime as other police officers – that is, the complaints system established by Part 8A of the *Police Act* and Part 4 of the *Police Integrity Commission Act*.
- Because of the covert nature of many counter-terrorism activities, people targeted by these activities may not necessarily know about them, and so may not be in a position to raise concerns through traditional mechanisms like the police complaints system.
- In its Interim Report, the PJC has outlined some compelling reasons justifying ongoing audits of the CTCC.
- Barriers to effective oversight of counter-terrorism powers include restrictions on access to information which is necessary for effective oversight, and restrictions on sharing information with other oversight agencies.
- There is currently no external oversight of the listening devices regime.
- Inconsistencies between the Commonwealth and New South Wales telephone intercepts legislation mean our monitoring function does not match the powers exercised by the agencies we oversight.
- The NSW Crime Commission is not subject to the same level of scrutiny as other comparable agencies.