Review of the *Terrorism (Police Powers) Act 2002*

NSW Attorney General's Department

2007

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ISBN: 0 7347 2898 0

Published by the NSW Attorney General's Department.
Tel: (02) 9228 7258 Fax: 9228 7128

Executive Summary

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

At the time of consultation for this Review, the powers had not yet been exercised. Most submissions were concerned with the policy of the scheme and the adequacy of the safeguards. There were approximately fifty proposals to reform the Act.

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

Recommendations

Recommendation 1: Clarification of what constitutes an "exceptional circumstance" be incorporated into the Police's Standard Operating Procedures for the use of the preventative detention powers to enable a police officer to approve the detention of a young person with an adult.

Recommendation 2: Section 26E be amended to provide that a child be released immediately into the care of a parent or guardian where practical to do so and procedures be developed between DOCS and the NSW Police Force for the care of children who are released or have parents who are detained.

Recommendation 3: Repeal Part 6B of the *Crimes Act 1900* upon commencement of the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007* (Cth).

Recommendation 4: Amend section 26ZA to reflect that a failure to comply is acceptable where compliance with the requirement is not reasonably practicable.

Recommendation 5: Amend section 4 of the Act to expand the definition of "premises" to include vessels and aircraft.

Recommendation 6: Amend section 23 to allow police to supply his/her details and other information as soon as is reasonably practicable *after* exercising the power, if it is not practicable to do so before or at the time of exercising the power.

Recommendation 7: Amend clause 4 of the Regulation to more general terms such as "Assistant Commissioner responsible for Counter Terrorism" and the "Commander responsible for Counter Terrorism investigations".

1. Introduction

On the 23 May 2007, the Director-General of the Australian Security Intelligence Organisation (ASIO), Mr Paul O'Sullivan, gave an opening statement to the Senate Standing Committee on Legal and Constitutional Affairs.

In his speech, the Director-General noted that Australia continues to face a challenging and dynamic security environment and that an attack in Australia remains feasible and could well occur.

Mr O'Sullivan made it clear that the security situation in Australia, in the Asian-Pacific region and in other parts of the world will remain complex and demanding for some time. He noted that:

- There are extremist groups in a number of places around the world who are intent on conducting attacks on Australian interests;
- Individuals in Australia or linked to Australia have been tried and convicted on terrorism-related charges;
- Law enforcement agencies must focus on potential sources of new threats, including areas which previously have not attracted significant attention; and
- All of this must be done in an environment of increasing technological sophistication.

Mr O'Sullivan's assessment of the current security situation highlights the need for NSW to remain vigilant in ensuring that the laws of the State are adequate to manage and contain any eventuality, which may result from a terrorist act or the threat of one.

1.1 Terms of reference for the review

Section 36 of the Act provides as follows:

36 Review of Act

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

(1A) For the purpose of the review, the Minister may require the Commissioner of Police or the Commissioner for the New South Wales Crime Commission to provide information about the exercise of functions in respect of covert search warrants under this Act by members of the NSW Police Force, members of the Crime Commission or members of staff of the Crime Commission.

(1B) For the purposes of the review, the Minister may require the Commissioner of Police to provide information about the exercise of functions under Part 2A by police officers.

(2) The review is to be undertaken as soon as possible after the period of 12 months from the date of assent to this Act and every 24 months thereafter.

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

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

1.2 Conduct of the Review

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

This is the second Review of the Act. The first Review was tabled on 22 November 2006 and concluded that the policy and objectives of the Act still remained valid. However, five legislative amendments were made to clarify the original policy intention of certain provisions.

Consultation for the first Review was undertaken in early 2005 and the current Review covers the intervening period until early 2007. This Review considers the authorisation of special police powers for use in raids carried out in Sydney in November 2005 as part of *Operation Pendennis,* the operation of the covert search warrant scheme and the use of preventative detention orders.

The first Review considered whether the policy objectives were still valid and whether an appropriate balance had been maintained between the rights of the individual and the requirements of law enforcement agencies to effectively deal with a terrorist threat. The Review concluded that the objectives were still valid and that the balance had been maintained.

For the second Review, consultation was conducted in relation to the operation of the Act and whether the policy objectives remain valid. Key stakeholders were invited to make submissions in relation to the Review and an advertisement was placed in newspapers and the Government Gazette calling for submissions from the public. A schedule of persons and organisations that made submissions is at **Appendix 1.**

The Criminal Law Review Division prepared this report, which is the result of the review process and takes into account the responses received, and has determined that the policy objectives do remain valid.

2. Background to the Introduction of the Act

2.1 Background to the Act

On 5 April 2002, in the wake of the terrorist attacks that took place in the United States of America on 11 September 2001, all States and Territories in Australia agreed at the Leaders Summit on Terrorism and Cross Jurisdictional Crime that they would make a reference of power to the Commonwealth in relation to terrorism.

On 4 December 2002 the Parliament of New South Wales passed the *Terrorism (Commonwe alth Powers) Act 2002* referring power to the Commonwealth to make laws with respect to terrorist acts.

On the same day, the *Terrorism (Police Powers) Act 2002* was passed. The intention of the Act was to confer special powers on police officers to deal with imminent threats of terrorist acts and to respond to terrorist acts. The powers contained within the Act are similar to reforms introduced in Britain under the *Terrorism Act 2000*.

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

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

As a result of a decision of the Council of Australian Governments (COAG) on 27 September 2005, the *Terrorism Legislation Amendment (Warrant) Act 2005* and the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* were passed, amending the Act.

The COAG Communiqué states:

> *"COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.*
>
> ...
>
> *State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop,*

question and search powers in areas such as transport hubs and places of mass gatherings."[1]

In addition to the special police powers, the Act now also allows for covert search warrants to be issued and executed and preventative detention orders to be made.

2.2 Objectives of the Act

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

- confer special powers on police officers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after one has occurred;
- to detain suspected persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act; and
- to enable the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the New South Wales Crime Commission for the purposes of responding to or preventing terrorist acts (including getting evidence of the proposed State offence of membership of a terrorist organisation).

When exercised before the occurrence of a terrorist act the object of the scheme is to provide police with extraordinary powers that will assist in preventing the occurrence of the terrorist act.

When exercised after the occurrence of a terrorist act, the object of the scheme is to assist in the apprehension of the perpetrators of the terrorist act and to prevent further terrorist acts occurring.

2.3 Summary of the provisions of the Act

The Act is divided into three key parts:

Part 2: Special Powers;
Part 2A: Preventative Detention Orders; and
Part 3: Covert Search Warrants.

Part 2 of the Act provides that the Commissioner of Police (or another senior police officer) may, with the concurrence or confirmation of the Police Minister, give an authorisation for the exercise of special powers:

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

or for any combination of those purposes.

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1 Council of Australian Governments' Special Meeting on Counter-Terrorism 27 September 2005 Communiqué http://www.coag.gov.au/meetings/270905/index.htm#Strengthening

Section 5 allows for the special powers to be authorised if there is threat of a terrorist act occurring in the *near future* and section 6 allows for the special powers to be authorised when a terrorist act *has been* committed.

Before the special powers can be exercised under either section, the authorising officer must be satisfied that there are reasonable grounds for believing that a terrorist act has occurred or there is a threat of a terrorist act occurring in the near future, and is satisfied that the exercise of those powers will substantially assist in apprehending those responsible or preventing the terrorist act.

The authorisation enables a police officer to:

- demand that a person give his or her name and address (and to request proof of identity) if the officer reasonably suspects that the person is the target person (or in his or her company), is in the target vehicle or is in the target area (including entering or having just left the target area);
- search without warrant a person, and any vehicle, that the officer reasonably suspects contains the target person, or is the target vehicle or that is in the target area;
- enter and search, without warrant, any premises that he or she reasonably suspects contains a target person or target vehicle or that are in the target area;
- place a cordon around the target area or any part of it; and
- seize and detain anything that the officer suspects on reasonable grounds may be used or may have been used to commit a terrorist act or may provide evidence of the commission of a serious indictable offence.

A police officer operating under an authorisation is also permitted to use such force as is reasonably necessary to exercise the power.

Part 2A of the Act concerns the preventative detention scheme. The NSW Preventative Detention Scheme commenced on 16 December 2005. It is part of a uniform model of laws as agreed to at the COAG meeting on 27 September 2005.

The Act creates a scheme where police can apply to the Supreme Court for a preventative detention order if there is a reasonable suspicion that the person:

(a) will engage in a terrorist act, or
(b) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
(c) has done an act in preparation for, or planning, a terrorist act, and

making the order would substantially assist in preventing a terrorist act occurring.

Preventative detention orders can also be made where a terrorist act has occurred in the past 14 days and the order is necessary to preserve evidence.

The maximum period for a preventative detention order under the NSW scheme is 14 days.

Pursuant to s 26ZO the Ombudsman is required to monitor this Part and provide a report to Parliament on the exercising of the powers under the Part as soon as practicable after December 2007.

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

Pursuant to 27ZC the Ombudsman is required to monitor this Part and provide a report to Parliament on the exercising of the powers under the Part as soon as practicable after December 2007.

2.4 The use of the provisions of the Act

The special powers under Part 2 of the Act were authorised for the first time in raids carried out in Sydney in November 2005 as part of *Operation Pendennis.*

The authorisation named 13 target persons under s7(1)(a) of the Act for the purpose of finding such persons. The authorisation was in effect from 7 November 2005 to 13 November 2005. No powers were exercised under the authorisation, as the police searches and arrests occurred under other law enforcement powers.

To date, the powers under Part 2A, relating to preventative detention, have not been utilised. Applications have been made pursuant to Part 3, which concerns Covert search warrants. Five applications have been granted and three of those warrants were subsequently executed.

2.5 Inaugural Review

The NSW Attorney General first reviewed the Act two years after commencement as required by section 36 of the Act and a report was tabled in Parliament on 22 November 2006.

The inaugural Review was concerned only with the operation of the special powers, as at the time of consultation, the provisions relating to the preventative detention scheme and covert search warrants had not yet commenced.

Wide community consultation for the inaugural Review was undertaken however, at the time, the special powers conferred upon police had not been exercised at all. Even so, a number of recommendations flowed from that Review and these were subsequently adopted and the Act amended accordingly.

2.6 Amendments to the Act

The Act has been significantly amended several times since consultation for the first Review was undertaken.

Terrorism Legislation Amendment (Warrant) Act 2005

The *Terrorism Legislation Amendment (Warrant) Act 2005* amended the Act to allow for a covert search warrant scheme. The amendments enabled the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the New South Wales Crime Commission for the

purposes of responding to or preventing terrorist acts (including getting evidence of the proposed State offence of membership of a terrorist organisation).

Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005

The *Terrorism (Police Powers) Amendment (Preventative Detention) Act* amended the Act to allow a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act, or preserve evidence of, or relating to, a recent terrorist act. This amendment ensures that the NSW legislation complements the Commonwealth legislation, which allows for a person to be subject to preventative detention for up to 48 hours.

Police Powers Legislation Amendment Act 2006

The *Police Powers Legislation Amendment Act 2006* implemented the five recommendations, which arose from the first Review.

1. Section 14(2) was amended to clarify that the provision does not empower police to utilise the powers where they are not aware that the powers have been authorised. It was the literal interpretation of the subsection 2 that caused the problem:

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

   The purpose of the provision was to allow police to use the powers where they had not been given a copy of the authorisation, or where they had only been directed to exercise portions of the powers, without knowing the whole of the authorisation.

2. Sections 17(3) and 18(2) were amended so as to be consistent with s204 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPAR Act). The sections now read that a police officer must not detain any longer than is reasonably necessary rather than "may detain for a long as necessary".

3. Section 23 was amended to impose a duty on a plain-clothed police officer to provide the person subject to the exercise of the power with their name and rank.

4. Section 23 was further amended to insert a notice provision in relation to offences contained in the Act – namely a warning that a failure to comply with a direction is an offence under the Act.

5. Division 2 of Part 2 was amended to require that the authorisations be reasonably proportional to the terrorist threat as assessed by the Commissioner for Police or by the person who is making the authorisation should it be a person other than the Commissioner.

Finally, section 36 of the Act was altered to provide that the Act be reviewed every 2 years rather than annually.

3. Discussion of Submissions

3.1 Submissions Received

The NSW Attorney General's Department sent out consultation letters for this second review to key stakeholders in April 2007. Written submissions to the Review were invited, particularly with respect to any comments on the provisions of the Act.

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

- The Judicial Commission of New South Wales;
- The Director of Public Prosecutions (DPP);
- The Commonwealth DPP; and
- Commonwealth Attorney-General's Department.

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

- The Law Society of NSW;
- Privacy NSW;
- The National Children's and Youth Law Centre;
- NSW Department of Community Services;
- The NSW Council of Civil Liberties;
- The Community Relations Commission; and
- The Ministry for Police.

The Legal Aid Commission supported the comments of the Law Society.

3.2 The Law Society of NSW

Special Powers: Part 2

The submission of the Law Society noted its concern that the powers under Part 2 of the Act gives police special powers which can be triggered merely by a person or vehicle being present in the "target area" or being about to enter the target area or having recently left the area.

3.2.1 Reasonable suspicion

The Law Society noted that police are not required to "suspect on reasonable grounds" that the person or vehicle was or will be involved in a "terrorist act". Police are also authorised to use "such force as is reasonably necessary" in exercising their special powers (s21).

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

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

Discussion

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

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

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

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

In Western Australia, s11 of the *Terrorism (Extraordinary Powers) Act 2005* (power in respect of target areas) enables police officers to direct people to remain in, leave, or refrain from entering a target area. It also enables police to direct that vehicles remain in, be removed from, or refrain from entering a target area. In Victoria, s21G(1)(c) of the *Terrorism (Community Protection) Act 2003* (Persons, vehicles or areas targeted by authorization) provides for the authorisation of the exercise of the special powers conferred by the Part in relation to a particular area described in the authorisation. In South Australia, s12 of the *Terrorism (Police Powers) Act 2005* extends special police powers to target areas.

3.2.2 Test of the authorisation of the use of the special police powers

In 2004, section 5 of the Act was amended by the *Crimes Legislation Amendment (Terrorism) Act* so that the special powers could be triggered by a senior police officer believing that a terrorist attack would occur in the "near future" as opposed to being "imminent". The Law Society submitted that the amendment has widened the circumstances in which the police can exercise the extreme powers they have been given.

Submission 2: The Law Society submitted that the test contained in section 5 should revert back to the "imminent" threat test.

Discussion

The second reading speech for the *Crimes Legislation Amendment (Terrorism) Bill* noted, with respect to the amendment of section 5:

> *Experience in working with the Act in exercises has shown that clarification is required to the trigger to activate the powers and also that some additional powers are needed.*
>
> *The Government's intention with this legislation is to give NSW Police the capacity to act when a senior and experienced officer, on the basis of the*

information available, and in light of that officer's experience, feels it is necessary to do so, in order to forestall a possible terrorist attack. In the real world of terrorist investigations, the information available may come from a number of different sources and may not be clear or precise.

The test was amended after it was deemed that the meaning of the section was somewhat ambiguous with regard to whether "imminent" related to the terrorist act or the threat.

The intention of the amendment was not to alter the effect of the test but rather to clarify its meaning. The arrangement of the words and the use of plain English made it clear that the test contemplates a risk of an attack of some kind being made in the near future.

3.2.3 Lack of Judicial Oversight

Section 13 of the Act provides:

13 Authorisation not open to challenge

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

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

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

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

Discussion

Section 13 was enacted for two main reasons:

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

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

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

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

Preventative Detention Orders: Part 2A

The Law Society is completely opposed to the preventative detention scheme. However, if the scheme is to remain in force, the Law Society recommended the following amendments.

3.2.4 Applications for preventative detention orders

The NSW legislation provides for the detention of a person subject to an order for a period of up to 14 days. The Commonwealth legislation only allows for the detention of a person subject to an order for up to 48 hours.

Submission 4: The Law Society submitted that the NSW legislation should be amended to only permit detention for up to 48 hours, which is consistent with the Commonwealth legislation.

Discussion

At the 27 September 2005 meeting of COAG, State and Territory leaders agreed to enact legislation to give effect to measures that, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days. The NSW preventative detention scheme implements this agreement.

The NSW scheme differs in significant respects from the Commonwealth legislation, particularly in respect of the safeguards and accountabilities, which is appropriate in view of the longer detention period. For example:

(1) The Commonwealth scheme is administrative: initial orders are made by a senior police officer, which are later confirmed by judicial officers acting in their personal capacity.

    The NSW scheme is judicial: both the initial and final preventative detention orders are made only by Judges of the NSW Supreme Court.

(2) The Commonwealth scheme at no time allows a hearing on the merits between the parties before the expiry of the detention.

    The NSW scheme permits an initial preventative detention order to be made in the absence of the subject person. However, at subsequent confirmation or revocation

hearings, the detained person will be permitted to be present and to contest the matter.

(3) The Commonwealth scheme contains a number of disclosure offences, designed to keep the making of a preventative detention order secret.

The NSW scheme contains no such disclosure offences, but allows the Supreme Court to make non-publication orders in relation to the proceeding as is usual for all criminal matters before the courts in NSW.

(4) The NSW legislation is also required to be scrutinized by the Ombudsman for a period of five years, who is then required to furnish reports on the operation of the legislation two and five years after the legislation commences.

The length of time was settled on operational police advice and by reference to the United Kingdom precedent.

Queensland, South Australia, Western Australia, Tasmania and the Northern Territory all have legislation which permits detention for up to 14 days. In keeping with the COAG decision and to ensure uniformity across the country, it is important that NSW retains the 14 day provision.

3.2.5 Evidentiary Requirements

The Law Society submitted that the rules of evidence should apply and that the person subject to an order should be provided with all information and evidence that forms the basis of the application.

Submission 5: The Law Society submitted that the legislation should be amended to ensure that the rules of evidence apply and a preventative detainee should be provided with all information and evidence that forms the basis of the application.

Discussion

The rules of evidence can still apply in the normal manner. The provisions create a discretion for the Court to accept evidence despite the rules of evidence, but the Court can still assign weight and probity to any evidence that comes before it.

3.2.6 Disclosure Offences

Section 26Y of the Act requires a police officer detaining a person under a preventative detention order to inform the person of certain matters relating to the effect of the preventative detention order.

Subsection (2) (c) does not however require the police officer to inform the person being detained of the fact that a prohibited contact order has been made in relation to the person's detention, or the name of a person specified in a prohibited contact order that has been made in relation to the person's detention.

The Law Society submitted that keeping prohibition orders a secret is absurd and that this provision (s26Y(3)) should be deleted.

Submission 6: The Law Society submitted s26Y(3) should be repealed.

Discussion

This was an element derived from the Commonwealth scheme.

The orders are designed to prevent suspected co-conspirators from conferring or tipping each other off. The secrecy of the order is designed to prevent a detained person from discerning the extent of police knowledge of the alleged planning and conspiracy to commit a terrorist act.

The orders will have a limited application as police will only need to seek a prohibited contact order against a person with whom the detained person is entitled to make contact under the scheme.

In some circumstances, therefore, a detained person will be able to deduce that a prohibited contact order has been made against a particular person, for example, if they are a family member or employee whom they are entitled to contact. If this were to happen, the Act rightly provides for the ability of the detained person to make an application for the revocation of the order.

3.2.7 Monitoring of client/lawyer communications

Under Division 5 of Part 2A a preventative detainee is restricted with respect to whom he or she may contact. The preventative detainee is entitled to contact a lawyer for specific purposes however s26ZI allows for a police officer to monitor that contact.

The Law Society has submitted that monitoring the communications between a person and their lawyer is an unacceptable obstruction of lawyers performing their duty to their client. They recommend that the provisions be removed or alternatively, a threshold test inserted (similar to the United Kingdom provisions) to provide that a communication cannot be monitored, unless there is a reasonable suspicion that the communication with the attorney may facilitate acts of violence or terrorism.

Submission 7: The Law Society submitted that section 26ZI should be repealed or amended to include a reasonable suspicion test.

Discussion

The Act tries to balance two important principles: the right of the detained person to have access to legal counsel, and the possibility that a detained person will hinder further investigations by tipping off persons still at large, arranging to have evidence hidden or destroyed, or urging others to harm or intimidate witnesses.

In attempting to reconcile these two principles the Act allows the detained person to have access to a lawyer but allows for such contact to be monitored by police.

Police, however, are not free to simply listen in and do whatever they like with what they hear. A monitor is prohibited from publishing what they hear to anyone if the communication is for a legitimate purpose. The penalty for violating this safeguard is a maximum of 5 years imprisonment. Legal client privilege is also specifically preserved.

3.2.8 Multiple orders

The Law Society has submitted that scheme conceivably allows for "rolling warrants" amounting to indefinite detention without charge.

Submission 8: The Law Society submitted that "rolling warrants" should be explicitly prohibited.

Discussion

The aim of the preventative detention scheme is not to provide the ability for law enforcement agencies to keep a person in a constant state of preventative detention and s26K is designed to prevent "rolling warrants".

It is, however, difficult to justify on policy grounds the complete prohibition on a second or subsequent order in relation to a particular person where the requisite test, set out in section 26D, is met. It would be an unsatisfactory situation if a person went on to commit a terrorist act solely because there was a technical bar on seeking a further order despite the tests being satisfied.

There are a number of strong safeguards that will count against the use of "rolling warrants", they are:

- the fact that these orders will be overseen by the Supreme Court which will be monitoring carefully any possible abuse of process;
- the requirement that each application must contain details of previous applications and orders, allowing the Supreme Court to detect improper use; and
- most importantly, the fact that a person, who appears to be intimately involved in an imminent terrorist attack will be charged with a substantive offence rather than preventatively detained on a continuing basis.

3.2.9 Release of person from detention

The Law Society has noted their concerns that section 26W, which provides for people to be released from detention during the period a preventative detention order is in force, could be used to harass people by releasing them during the day and detaining them again at any time.

Discussion

The intention of this provision is not facilitate harassment. It is to allow a person to be dealt with under different schemes, for instance, questioning after arrest.

3.2.10 Accommodation of detained person

Section 26ZC provides for the humane treatment of a preventative detainee.

The Law Society submitted that humane treatment should also include treatment in relation to a person's cultural and religious beliefs. The Society also noted that the Act does not detail where the person is to be detained. And although the Act provides that a person can be detained by Corrective Services there is no restriction on people being detained in other accommodation, including police cells.

Submission 9: The Law Society submitted that section 26ZC(1) should be amended to include respectful treatment in relation to a person's cultural and religious beliefs.

Discussion

The spiritual welfare of a inmate is currently preserved in the *Crimes (Administration of Sentences) Regulation 2001*. It entitles an inmate to attend rites, services and assemblies conducted at the correctional centre, which pertain to the inmate's denomination. It also allows the inmate access to religious books, recognised objects of religious devotion and similar items. The *Terrorism (Police Powers) Regulation,* which can exclude provisions in the *Crimes (Administration of Sentences) Regulation* from operating with respect to preventative detainees, has not yet been drafted. However, it seems clear that providing for a detainee's spiritual welfare would be consistent with the requirements under the TPPA to treat a preventative detainee with dignity and humanely.

The question of where a preventative detainee can be held should not be prescribed in legislation, as operational and security needs may frequently change. Each matter needs to be assessed by the Commissioner for Corrective Services or the Director General of the Department of Juvenile Justice on a case-by-case basis. It is a matter for the Commissioner or Director General to determine the most appropriate place to hold a detainee.

3.2.11 Obligation to inform

Section 26ZA(1) of the Act provides that the obligation of a police officer to provide information to a preventative detainee only applies where it is practicable to do so.

Submission 10: The Law Society submitted that s26ZA(1) should be deleted.

Discussion

This provision was adopted from the Commonwealth and is uniform in the Terrorism legislation around Australia. The provision is restricted in that compliance is only not required if it is the actions of the person being detained under the preventative detention order which make it impracticable to do. The provision does not allow for police to simply disregard the requirement.

3.2.12 Sunset Provision

The Law Society submitted that ten years is too long for a sunset clause and that the legislation should sunset after no more than five years.

Submission 11: The Law Society submitted that s26ZS should be amended to allow for a full Parliamentary review after 5 years.

Discussion

This provision mirrors the complementary Commonwealth and State legislation.

Accountability is still provided for with safeguards such as the Police being subject to oversight by the Ombudsman and the Police Integrity Commission, the Attorney General and the Minister for Police submitting annual reports to be tabled in Parliament, and the Ombudsman monitoring the legislation for a period of 5 years and providing a report 2 and 5 years after commencement of the Act.

Covert Search Warrants

3.2.13 Strenuously opposed to the scheme

The Law Society has noted its strenuous objection to the covert search warrant scheme, and commented that the absence of the requirement to serve notice on an occupier creates a significant potential for abuse.

Discussion

The Act contains strong and robust safeguards in relation to the granting of covert search warrants, their execution, and the requirement that an occupier must, ultimately, be notified that a search has taken place.

In addition to the service of the occupier's notice, Police and the Crime Commission will be required to report annually to the Attorney General and the Minister for Police about the execution of the powers, and the scheme will be subject to both ongoing review and specific monitoring by the Ombudsman for a period of two years.

3.3 Privacy NSW

The submissions of Privacy NSW were partially informed by an Issues Paper released by the NSW Ombudsman in April 2007. Privacy NSW made submissions on four substantive points:

(a) The definition of what amounts to a "terrorist act" is too wide;
(b) Part 2 of the Act should be scrutinised by the Ombudsman in keeping with Parts 2A and 3;
(c) The covert search warrant procedures should be improved; and
(d) The Ombudsman role should continue for as long as the Act remains in force.

3.3.1 Definition of "terrorist act"

Privacy NSW submitted that the definition of what amounts to a terrorist attack in section 3 of the Act is too wide and may encompass actions such as industrial disputes which endanger life or create a serious health or safety risk. It suggests that had the industrial action between unions and Patrick Corporation occurred whilst the Act was in force, it may well have fallen within the definition.

Discussion

The definition was adopted from the Commonwealth *Criminal Code*. The definition excludes advocacy, protest, dissent or industrial action that is not intended to cause physical harm, endanger life or create a serious health or safety risk.

This definition has also been adopted by all other Australian jurisdictions and was the subject of a Constitutional reference of power from the States to the Commonwealth. On that basis there would be a significant problem with unilaterally amending the definition for NSW purposes.

Despite not being defined exhaustively in the legislation, it is clear from the second reading speech that the powers given to police are confined to limited circumstances. The powers are not intended for general use and s3(3) clearly excludes advocacy, protest, dissent and industrial action. As was stated by the Premier when introducing the Bill to the House, "legitimate, non-violent protest cannot trigger the proposed powers".

3.3.2 Part 2 of the Act should be scrutinised by the Ombudsman in keeping with Parts 2A and 3

Privacy NSW submitted that the Ombudsman should be required to scrutinise Part 2 of the Act which would be consistent with his powers under Parts 2A and 3.

Submission 12: Part 2 of the Act should be amended to allow the Ombudsman to scrutinise the special police powers in keeping with Parts 2A and 3.

Discussion

Appropriate safeguards are in place to monitor the authorisation process; s13 preserves the ability of the Police Integrity Commission to review the decisions of senior police and the Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the Act is not affected.

The Act provides under s36(3) that a report on the outcome of the biennial review of the Act is to be tabled in each House of Parliament and as such will be subject to the full extent of democratic scrutiny.

Additionally, s14B provides that as soon as practicable after an authorisation given under this Act ceases to have effect, the Commissioner of Police is to furnish a report, in writing, to the Attorney General and the Police Minister:

- setting out the terms of the authorisation and the period during which it had effect,
- identifying as far as reasonably practicable the matters that were relied on for giving the authorisation,
- describing generally the powers exercised pursuant to the authorisation and the manner in which they were exercised, and
- specifying the result of the exercise of those powers.

The Ombudsman's monitoring role under Parts 2A and 3 reflects the extraordinary nature of the preventative detention and covert search warrant regimes. In relation to Part 2, the Ombudsman appropriately retains his general oversight and complaints handling role.

3.3.3 Covert search warrant procedures should be improved

Privacy NSW is of the view that the procedure relating to covert entry to adjoining premises should be tightened up.

Submission 13: That the Act be amended to provide that a separate warrant is required to enter into premises adjoining the subject premises.

Discussion

Section 27J(1)(e) provides that a covert search warrant must not be issued unless the application for the warrant includes:

> *If it is proposed that premises adjoining or providing access to the subject premises be entered for the purposes of entering the subject premises—the address or other description of the premises that adjoin or provide such*

access and particulars of the grounds on which entry to those premises is required.

Section 27O provides for the adjoining premise to be entered solely for the purposes of entering the subject premises. The naming of an adjoining premise in the application for the covert search warrant therefore does not give police the right to enter that property and deliberately conduct a covert search. If police wanted to do so, they would be required to go through the same procedure as with the subject premise and satisfy a judge that it was necessary.

The Act requires that upon the execution of the warrant, a report must be made to the eligible judge and that an occupier's notice is to be given to the adjoining occupier after execution.

Nothing in the Act precludes disciplinary proceedings against a police officer found to have exceeded the scope of an authorisation under the Act. If it is found that a police officer acted contrary to the Act, he or she may face potential disciplinary proceedings under the *Police Act.*

The making of an application for a covert search warrant is restricted to an eligible police officer, who will typically be a member of the NSW Police Counter Terrorism Unit. By restricting the category of police who may apply to those with expertise in the area, the potential for unintentional authorisations is limited.

3.3.4 The Ombudsman role should continue for as long as the Act remains in force

Privacy NSW noted that the once the initial period of oversight by the Ombudsman lapses, no external oversight mechanism remains.

Submission 14: The Act should provide for the Ombudsman to review the entire Act for as long as the Act remains in force.

Discussion

As is the case with police powers generally, external oversight will continue to be provided through the Ombudsman's ongoing oversight and complaints handling role.

3.4 The National Children's and Youth Law Centre

The National Children's and Youth Law Centre (NCYLC) thanked the Attorney General for the opportunity to comment on the Act and directed its submission to the application of the Act to children and why it considers that the current framework pays insufficient regard to the rights of the child.

3.4.1 Preventative Detention Orders for children aged 16 and 17

The NCYLC acknowledges that preventative detention orders cannot be made against children under the age of 16 but is of the view that the Act should be amended to preclude an order from being made against a child aged 16 or 17 as well. It is the view of the NCYLC that this is needed to align New South Wales with Australia's international obligations under the Convention on the Rights of the Child, which states that children should only be detained as a measure of last resort and have the right to prompt legal advice.

The NCYLC noted that the Act does not require the detention of a child aged 16 or 17 to be a "last resort" nor does it require the child to be brought before a court promptly.

Submission 15: The NCYLC submitted that s26E of the Act should be amended to prohibit preventative detention orders from applying to children aged 16 and 17 years of age.

Discussion

As discussed above, NSW agreed to implement a preventative detention scheme, which was to complement that of the Commonwealth. One of the aspects of the Commonwealth scheme was the detention of young people aged 16 to 18.

It is clear that the powers contained within the Act are designed only to be used in the very specific context of a terrorist attack. It is conceivable that a young person may be involved in a manner that might necessitate his or her detainment to allow police to either prevent a terrorist act, or preserve evidence of a terrorist act that has already occurred. In the event that police are called upon to exercise those powers, it is necessary to have mechanism in place to facilitate the detention of a young person.

Given the order is made by the Supreme Court, there is judicial oversight at the outset.

With respect to children being detained only as a measure of last resort, it is clear that this legislation is intended as precisely that – a last resort. The Second Reading speech pointed out that these powers are designed to be used only in extraordinary circumstances.

3.4.2 Communicating the grounds for the order

The NCYLC raised its concerns that s26J(2), which only entitles a preventative detainee to receive a summary of the ground upon which the order was made, may easily result in the child receiving insufficient information as to why they have been detained. The NCYLC also noted that there is no requirement in the Act to provide a child's parents or guardians with information about why their child has been detained.

Submission 16: The Act should be amended to provide for the communication of adequate information to a child and his or her guardian.

Discussion

There is no obvious reason that juveniles should be given more information than adults about the grounds upon which the order was made. However, more generally, it is noted the special needs of juvenile detainees are provided for by s26ZH, which sets out special contact rules.

3.4.3. No adequate justification for 16 or 17 year olds to be treated like adults

The NCYLC submitted that there was no indication that 16 or 17 year olds are likely to participate in terrorist acts in Australia and that there is no justification for treating them like adults.

Discussion

Terrorism is acknowledged as one of the most serious threats facing Australia and the International community today. International incidents have clearly demonstrated that children are being used more and more frequently as active participants in terrorist attacks.

The risk to the safety of the public must be considered when making appropriate legislation. It is quite conceivable that a child may be so involved in terrorist threat or attack as to justify the use of these powers despite the protections that child would usually be entitled to prevail upon. NSW law enforcement agencies need to be in a position to respond appropriately and need to have the required legislative powers to do so.

Detention in Correctional Centres

3.4.4. Unsatisfactory for children to be detained in correctional centres

The NCYLC submitted that the requirement for a child of 16 or 17 years of age to be detained in a correctional centre is unsatisfactory and against Australia's international obligations under international law.

It was concerned that children detained at Kariong may not be adequately separated from children serving a sentence and adult correctional officers may not be appropriately trained to deal with young offenders.

Submission 17: NCYLC submitted that is it unsatisfactory for 16 and 17 years olds to be detained in a correctional centre.

Discussion

Section 26X(5) clarifies that:

> *a reference in this section to a correctional centre is to be construed, in relation to a detainee under 18 years of age, as a reference to a juvenile detention centre or juvenile correctional centre (and in the case of a juvenile detention centre the reference to the Commissioner of Corrective Services is to be construed as a reference to the Director-General of the Department of Juvenile Justice)*

A 16 or 17 year old child, who is a preventative detainee, may be held in a juvenile detention centre as well as a juvenile correctional centre. Where a person is to be held will be a matter for the Director General of the Department of Juvenile Justice and will be determined according to security needs and other criteria as set out in the legislation and regulations.

The Department of Corrective Services staff at Kariong (the only staff who would handle juvenile preventative detainees) all undergo special training to deal with young people.

Young people who are convicted of very serious offences are transferred to adult gaols at the age of 18.

Search powers

3.4.5. Strip Searches of young people between 10 and 18 years of age

NCYLC raised concerns about the ability of police to strip search children without first obtaining a warrant. A strip search should only be conducted when absolutely necessary, should only be conducted when authorised by a court warrant and when an application is made, the child should be legally represented and have the opportunity to oppose the application.

Further, there should be no exemption from the requirement that an independent adult be present. These powers are contrary to Australia's obligations under Article 2 of the Convention on the Rights of the Child.

Submission 18: NCYLC submitted that the provisions governing the strip search of a child should be strengthened.

Discussion

Schedule 1 of the Act (Conduct of personal searches) is consistent with and directly replicates the search powers provided for in Part 4, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPAR Act).

Section 6 of the Schedule provides:

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

It is acknowledged that strip-searching is a most intrusive form of intervention, especially for children and vulnerable persons. In order to improve procedures and minimise the trauma that a strip search may induce, legislative safeguards have been incorporated into both the Act and the LEPAR Act. These include:

- Conducting the strip search in a private area,
- Not conducting the strip search in the presence or view of a person who is of the opposite sex to the person being searched,
- Not conducting the strip search in the presence or view of a person whose presence is not necessary for the purposes of the search,
- Prohibiting the searching of a person's body cavities or an examination of the body by touch;
- Prohibiting the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

- Not allowing a strip search to involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search; and
- Allowing a strip search to be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

The legislation provides that a strip search must take place in the presence of a parent or guardian unless it is not reasonably practicable in the circumstances to do so.

In the event of an actual or an imminent terrorist attack, it would be unreasonable to impose a blanket prohibition upon police preventing them from strip-searching a child between 10 and 18, who is suspected of being the target of the authorisation, because a parent or guardian could not be found.

The Act provides that a strip search can only be conducted where the seriousness and the urgency of the circumstances require it and the safety of the public has to be balanced against the rights of a child.

It would be undesirable to create powers that were more limited or inconsistent with general law enforcement powers.

3.5 NSW Department of Community Services

Preventative Detention Orders

3.5.1 Place of Detention.

The NSW Department of Community Services (DOCS) is concerned about young people aged 16 or 17 being detained under the auspices of the Department of Corrective Services.

DOCS submitted that it is preferable that young preventative detainees be held either at a juvenile detention centre or at some other alternative facility. DOCS expressed concern that young people who have not been charged or convicted of a serious offence may be placed with the State's most serious juvenile offenders.

DOCS also pointed to the lack of a provision in the Act, which states what constitutes "exceptional circumstances" to enable a police officer to approve the detention of a young person with an adult.

Submission 19: Clarification of what constitutes an "exceptional circumstance" be incorporated into the Police's Standard Operating Procedures for the use of the preventative detention powers.

Discussion

See discussion of the NCYLC Submission at paragraph 3.4.4.

Recommendation 1: Clarification of what constitutes an "exceptional circumstance" be incorporated into the Police's Standard Operating Procedures for the use of the preventative detention powers to enable a police officer to approve the detention of a young person with an adult.

3.5.2 Children under 16 years of age

DOCS noted that section 26E provides that once a police officer has established that a person being detained is under 16 years of age, that officer must release the person "as soon as practicable". The Department submitted that it would be preferable to amend the section to read that the child be released "immediately into the care of a parent or guardian".

Where the parents or guardians have also been detained, the Department recommends that procedures be developed between DOCS and police to enable DOCS to respond appropriately.

Submission 20: Section 26E be amended to provide that a child be released "immediately into the care of a parent or guardian" and procedures be developed between DOCS and police for the care of children who are released or have parents who are detained.

Discussion

As noted above, the preventative detention scheme was adopted directly from the Commonwealth Model and so any amendments must be made in the context of a uniform code across all jurisdictions.

Similar provisions apply in the LEPAR Act for the release of an intoxicated person into the care of a "responsible" person. It would seem appropriate that where a child is under the age of 16 and has recently been detained for a period of time that he or she should be immediately released into the care of a parent or guardian, where practical to do so.

The development of procedures between DOCS and NSW Police to facilitate the Department's involvement in the release of a child or the care of child whose parents have been detained is supported.

Recommendation 2: Section 26E be amended to provide that a child be released immediately into the care of a parent or guardian where practical to do so and procedures be developed between DOCS and the NSW Police Force for the care of children who are released or have parents who are detained.

3.5.3 Maximum period of detention

The Act provides that the maximum period of detention is 14 days under an order. DOCS raised concerns that young people could be subjected to an infinite period of detention. The Department submitted that a maximum period of detention should be set for a young person held under an order.

Discussion

See discussion under paragraph 3.2.7

3.5.4 Powers of police to stop and search children aged 10 to 18

The Department recognised that the stop and search powers in the Act mirror those contained in the LEPAR Act. The Department however is of the view that the strip-searching of a child should always be a last resort and that every possible alternative method of conducting a search should be exhausted first.

DOCS recommended the development of strict guidelines and protocols for police to ensure the powers are exercised correctly. The Department noted that such guidelines already exist under Court Security Legislation.

Submission 21: DOCS recommended the development of strict guidelines and protocols for police to ensure the stop and search powers are exercised correctly.

Discussion

See discussion under paragraph 3.4.5.

3.6 The NSW Council For Civil Liberties

3.6.1 Public Interest Monitor

The NSW Council for Civil Liberties (CCL) recommended that New South Wales follow the Queensland example, and create a position of Public Interest Monitor (PIM). The CCL suggested that the PIM would be a senior, experienced barrister, independent of Government, and with tenure arrangements like those of the Director of Public Prosecutions and would have the power to monitor compliance with the laws in relation to matters concerning all search warrant applications.

Submission 22: The NSW Council for Civil Liberties recommended that New South Wales create a position of Public Interest Monitor.

Discussion

The PIM was established in Queensland in 1998 as a mechanism to oversee the interests of the public and ensure accountability are adequately canvassed during applications for, and the execution of, covert search and surveillance warrants.

In 2002, the NSW Law Reform Commission (NSWLRC) considered the question of whether an agency such as the PIM was needed in New South Wales, in its Interim Report on Surveillance.

The Commission took the view that:

> *The regime recommended in this Report embodies sufficient accountability measures to ensure that public interest concerns are addressed, without the need for a PIM. Courts and tribunals (regardless of which forum is selected to authorise covert public interest surveillance) have been accustomed to identifying and assessing notions of public interest for some time. The Commission considers that the inclusion of a PIM model in the proposed surveillance legislation would not improve the level of scrutiny, which the appropriate issuing authority would ordinarily give to each application for a public interest authorisation. Accordingly, the Commission makes no recommendation on this issue, but raises it for further consideration*[2].

It is noted that in all areas, including the exercise of the covert search powers, police are subject to the oversight of the Police Integrity Commission and the Ombudsman. Further, section 27ZB requires that the Commissioner of Police and the Crime Commissioner report annually on the exercise of the covert search powers, and that the reports be tabled in Parliament.

3.6.2 Charter of a Bill of Rights

The CCL suggested that the Attorney General follow his interstate counterparts and sponsor a NSW Bill of Rights.

The question of whether NSW should adopt a Bill of Rights is beyond the scope of this Review.

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[2] http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r98chp06

3.6.3 Definition of "Terrorist Act"

The CCL submitted that the definition of "terrorist act" is too wide and should be narrowed.

Discussion

See discussion at paragraph 3.3.1

Special Powers

3.6.4 Challenging Authorisation

Section 13 currently reads:

13 Authorisation not open to challenge

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

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

The CCL submitted that this section is of great concern as it prevents a court from reviewing the authorisation during its life. The CCL recommended that the section be repealed.

Submission 23: The NSW Council for Civil Liberties recommended that section 13 be repealed.

See discussion at paragraph 3.2.3.

3.6.5 Protection of Police

The CCL submitted that section 29, which deals with the protection of a police officer, should be reworded so as to ensure that police aren't protected in improper circumstances.

Submission 24: The NSW Council for Civil Liberties recommended that section 29 be reworded.

Discussion

29 Protection of police acting in execution of Part 2 authorisation

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

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

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

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

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

3.6.6 Search powers

The CCL raised their concerns about possible misuse of the powers under Part 2 stating that it is open for a police officer to act upon prejudice. The CCL recommended that the power to search should only be available if the police officer has reason to believe that the search is necessary to prevent an imminent terrorist attack, or to apprehend those responsible for one that has just occurred.

Submission 25: The NSW Council for Civil Liberties recommended that the power to search a target should be limited to where the police officer has reason to believe that the search is necessary to prevent an imminent terrorist attack, or to apprehend those responsible for one that has just occurred.

Discussion

Currently, in order to search a target under an authorisation, the officer must first suspect on reasonable grounds that the person is the target of an authorisation. In order to activate the authorisation, the authorising officer must be satisfied that there are reasonable grounds for believing that a terrorist act has occurred or there is a threat of a terrorist act occurring in the near future, and is satisfied that the exercise of those powers will substantially assist in apprehending those responsible or preventing the terrorist act.

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

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

3.6.7 The indefinite "near future"

The CCL noted that section 5 of the Act was recently amended so that an authorisation for the exercise of the special powers may be given if the police officer giving the authorisation is satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the *near future*, and is satisfied that the exercise of those powers will substantially assist in preventing the terrorist act.

The CCL questioned the need for the amendment and recommended a change back to the requirement that the attack be imminent. They submitted that the words 'In the near future' are vague, and allows the authorisation to be given when alternative means would do as well.

Submission 26: The NSW Council for Civil Liberties recommended section 5 be amended back to "imminent" rather than "near future".

Discussion

See discussion at 3.2.2.

Preventative Detention

The CCL stated with respect to the preventative detention legislation that it is likely to be counter-productive, is contrary to international law, is a dangerous erosion of civil liberties, does not balance the rights of freedom and safety, and is of no aid in protecting people from terrorist acts. The CCL recommend that the entire Part be repealed.

In the event that it is not repealed, the CCL submitted it should be amended in a number of ways.

3.6.8 Section 26D

The object of the Part is to prevent an imminent terrorist attack and the CCL argued that an action, which is not expected for 14 days, is not imminent. The powers granted should be limited to detention for 48 hours, with no possibility of renewal.

The CCL also argued that the test set out in s26D(1)(a) is too low and innocent people will be caught by the legislation.

Submission 27: The NSW Council for Civil Liberties recommended s26K be amended to only allow for detention of up to 48 hours.

See discussion at 3.2.4.

Submission 28: The NSW Council for Civil Liberties recommended s26D be amended to raise the standard of the test for making an order

Discussion

The test at s26D states:

> **26D When preventative detention orders may be made**
>
> (1) Preventing terrorist acts occurring
>
> A preventative detention order may be made against a person if:
> (a) there are reasonable grounds to suspect that the person:
> (i) will engage in a terrorist act, or
> (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
> (iii) has done an act in preparation for, or planning, a terrorist act, and
> (b) making the order would substantially assist in preventing a terrorist act occurring, and

(c) detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act occurring.

Any such terrorist act must be imminent and, in any event, be expected to occur at some time in the next 14 days.

The test in 26D is the same test as was adopted by the Commonwealth and all other States. It incorporates the test of "reasonable grounds to suspect" which is familiar to law enforcement agencies and is used in over 20 statutes in New South Wales.

3.6.9 Section 26K – Period of Detention

The CCL submitted that the period of 14 days is utterly unjustified.

They submit that s26K(5)(b) should be repealed. That section allows for the making of another interim order following a further application for an order. The CCL noted that except where a hearing is continuing, there should be no question of one interim order being followed by another.

The CCL submitted that due to the significant logical problems with the notion of 'the same terrorist act' when discussing future plans, as per section 26K(7) the Act should be repealed. No matter what phrasing is used, with a compliant judge, the power can be misused, they submitted.

Submission 29: The NSW Council for Civil Liberties recommended s26K(5)(b) be repealed.

Discussion

Section 26K(5) states:

Not more than one interim preventative detention order may be made against the same person in relation to the same terrorist act. This subsection does not prevent:

(a) an extension of an interim order under section 26H (5), or

(b) the making of another interim order following a further application for an order.

This section is, again, consistent with the Commonwealth scheme and allows another application to be made. The intention of the section was to allow further applications to be made in the event that fresh evidence came to light.

3.6.10 Section 26M – Revocation of Order

Section 26M(2) provides that an application for the revocation of a preventative detention order must be made by a police officer detaining the person if the police officer is satisfied that the grounds on which the order was made have ceased to exist.

The CCL noted that there is no sanction if police do not do what this section requires. They submit that there needs to be a severe penalty for failing to produce evidence that demonstrates a detainee's innocence.

Submission 30: The NSW Council for Civil Liberties recommended a sanction be imposed for failing to produce evidence

Discussion

Section 105 of the LEPAR Act provides that an arrest may be discontinued at any time and an example of when this may occur is when the arrested person is no longer a suspect or the reason for the arrest no longer exists. There is no monetary penalty attached to that section. Rather, if there is a question of the legality of the detention it is open to the person to bring an action for the tort of false imprisonment.

In addition, there are a number of complaint mechanisms with respect to police conduct including the Ombudsman and the Police Integrity Commission.

3.6.11 Section 26N – Prohibited Contact Orders

The CCL queried how a person who is denied knowledge that a prohibited contact order has been made could to seek to have it revoked?

Discussion

Section 26N (6) provides that a prohibited contact order may be revoked by the Supreme Court, on application made by the person in relation to whom the relevant preventative detention order relates or on application by a police officer.

Sections 26Y(3) and 26Z(3) state:

> Subsection (2) (c) does not require the police officer to inform the person being detained of:
>
> (a) the fact that a prohibited contact order has been made in relation to the person's detention, or
>
> (b) the name of a person specified in a prohibited contact order that has been made in relation to the person's detention.

However, a person will not necessarily be denied knowledge that a prohibited contact order has been made. Section 26N(6) could be relevant in some cases.

3.6.12 Section 26O – Rules of Evidence

The CCL submitted that section 26O introduces a new standard of evidence and should be repealed.

Submission 31: The NSW Council for Civil Liberties recommended that s26O be repealed.

See discussion at paragraph 3.2.5

3.6.13 Section 26P – Restriction on publication

The CCL noted that section 26P allows the Court to suppress publication of part or all of the proceedings; and disclosure is subject to a penalty of imprisonment for up to five years.

The CCL submitted that although the section was understandable, it makes the rapid exposure of misuse impossible. They submitted that the risks involved do not only relate to innocent detainees, but also threaten democracy.

The CCL recommended that a number of safeguards be adopted including:

1. The Ombudsman should be empowered to and required to investigate *every* application and every grant of a preventative detention order.
2. The Public Interest Monitor and the Ombudsman should be exempted from the secrecy requirement, and empowered to reveal directly to the public (i.e. not through the Attorney General) cases of abuse of the powers.
3. The Public Interest Monitor or a representative of the Ombudsman should attend every court hearing of an application for preventative detention including interim detention orders, and be empowered to cross-examine witnesses, address the court and have all the powers that a lawyer would have in a normal trial.

The CCL also recommended that s26P(4) be amended so that the Court is required to set a time limit on the secrecy requirement, other than on particulars that would identify informants and security agents. In particular, the detainee or former detainee should have a copy of the full grounds for the order as soon as the need for secrecy has passed.

The CCL submitted that the section limits disclosure more than is reasonable. They advocated that disclosure should be permissible (i) when a lawyer briefs a barrister or a colleague; and (ii) to the Ombudsman, the PIC and ICAC, providing that identifying material is omitted.

Submission 32: The NSW Council for Civil Liberties recommended that s26P be amended to incorporate substantial safeguards.

Discussion

In situations that involve terrorism and national security, there will often be a need for secrecy and for information to be kept from the wider public. It is impossible to foresee when, if ever, the need for the secure maintenance of information will be obviated. Law enforcement agencies need to be able to perform their duties in the best way possible and the revelation of sensitive information may hinder them significantly.

As discussed above, there are already significant oversight mechanisms in place in order to ensure an appropriate balance between the rights of the individual and the need for the protection of the community from security threats.

3.6.14 Section 26X – Holding detainees in prison

The CCL submitted that there is no reason whatever for the inclusion of this section. They further submitted that it should be replaced by one which *prevents* detainees from being held in prisons, and prevents juveniles from being held in detention centres or juvenile correction centres. They argued that if necessary, special detainment centres should be built for the purpose of holding a preventative detainee.

Submission 33: The NSW Council for Civil Liberties recommended that s26X be repealed or replaced with a provision, which precludes a detainee from being held in a prison.

Discussion

An order for a person to be detained in order to assist in preventing a terrorist act occurring or where an order is necessary to preserve evidence of a terrorist attack must be made by a Supreme Court judge. This prevents orders from being made arbitrarily or capriciously. In the event that a person does need to be detained, it will be necessary to ensure that that detention is secure. There are limited places available to fulfill that requirement and a correctional facility is the best option available.

The Act provides for the humane treatment of a preventative detainee and provides penalties for any person who fails to comply.

3.6.15 Information about prohibited contact orders

The CCL submitted that it is intolerable that a detainee may be prevented from knowing about the restrictions to which he or she is expected to adhere and that a breach of these restrictions may be punished.

The CCL submitted that section 26Y(3) and section 26Z (3) should be repealed.

Submission 34: The NSW Council for Civil Liberties recommended that section 26Y(3) and section 26Z (3) should be repealed

Discussion

See discussion at 3.2.6

3.6.16 Section 26ZA - Compliance with the obligation to inform

The CCL acknowledged that police officers should not be punished for failing to do the impossible however they submitted that section 26ZA(1), which absolves a police officer from informing a detained person of the effect of the order if impractical to do so, will lead to abuse. They noted that subsections 26Y(1) and 26Z(1) already include the words 'as soon as practicable'. That properly leaves an onus on the officer to provide the information required once it becomes practicable to do so.

Submission 35: The NSW Council for Civil Liberties recommended that section 26ZA(1) should be repealed

Discussion

See discussion at 3.2.11

3.6.17 Section 26ZB(7) - Denial of documents

Section 26ZB(7) clarifies that a lawyer for the detainee is not entitled to a copy of or to see any document other than the order.

The CCL stated that the law should provide for access to the material by some other person who can speak for the potential detainee (e.g., a security cleared lawyer) and the Public Interest Monitor and that the section should be amended accordingly.

Submission 36: The NSW Council for Civil Liberties recommended that section 26ZB(7) should be amended to allow certain people access to material.

Discussion

The overarching rationale for the preventative detention scheme is to protect the security interests of the State. The secure preservation of sensitive information is extremely important. The divulging of sensitive material may have major ramifications across the State and the nation in terms of the ability of law enforcement agencies ability to combat risk.

It is acknowledged that in an ordinary situation, a person has a fundamental right to know the case against him or her however in circumstances such as those which would enliven an order, the safety of the public must be weighed against the right of the individual.

Section 26ZB allows for a copy of the order to be given to a lawyer and contained within that order is a summary of the ground upon which the order was made.

3.6.18 Section 26ZC - Humane treatment

The CCL noted that the penalty for a breach of this section is 2 years imprisonment. They submitted that this is too low and either the penalty should be a maximum of ten years' imprisonment, or there should be a section declaring that to remove doubt, other acts that punish torture and lesser forms of physical suasion are not overridden.

Submission 37: The NSW Council for Civil Liberties recommended that section 26ZC should be amended to increase the maximum penalty or introduce a section which allows for the charging of other offences .

Discussion

It is not necessary to either a) increase the maximum penalty or b) explicitly state that other offences are available to charge.

Any person who breaches the section by subjecting a detainee to cruel, inhuman or degrading treatment, or failing to treat a detainee with humanity and respect for human dignity may, if the facts warrant it, be prosecuted for a number of offences pursuant to the *Crimes Act 1900*. Many of these, such as assault occasioning actual bodily harm or the malicious inflicting of grievous bodily harm, carry penalties of 7 years or more. There is no prohibition upon the person being charged with more than one offence and it would be likely that if the circumstances warranted it, the person would indeed be charged with more than one.

3.6.19 Section 26ZD, E, F and G - Permitted Contacts

The CCL submitted that the list of who can be contacted by the detainee should be expanded to permit visits by the detainee's doctor and such medical specialists as the doctor recommends; and it should permit the detainee to contact a fiancé(e).

The CCL further submitted that if the detainee is not fluent in English, an interpreter should be provided at all times to assist with these contacts and his/her other interactions.

Submission 38: The NSW Council for Civil Liberties recommended that section 26ZD,E,F and G should be amended to expand the category of people whom the detainee can contact.

Discussion

A person who is detained pursuant to an order in custody will be subject to the same rules as inmates.[3] The governing legislation is the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987*(as the case requires) and access to medical practitioners is regulated under those Acts.

With respect to contacting a fiancée, the Act permits the detainee to contact a de facto spouse or a person whom he or she lives with. There is no legal recognition of someone who calls themselves a "fiancée" and it would be contrary to the intention of the legislation to broaden the already expansive list any further.

3.6.20 Section 26ZI(6) - Monitoring Contact

The CCL submitted that police being allowed to monitor communications between the detainee and his or her lawyer will inhibit full and frank disclosure by the detainee to his or her lawyer. This will affect the lawyer's advice in ways that may be adverse not only to the client, but adverse to the purposes of the detention. The section should be repealed.

Submission 39: The NSW Council for Civil Liberties recommended that section 26ZI(6) be repealed.

Discussion

See discussion at 3.2.7

3.6.21 Section 26ZL - Waiving rights

The CCL submitted that Subsections 7, 8 and 9 of section 26ZL suppose that a minor, a person who is not of an age to make decisions of a legally significant nature, might nevertheless waive a right, provided one of his/her parents agrees.

They stated that the point of denying young people legal adult status is that they are too inexperienced and too little in control of their emotions to be able to make such decisions wisely.

Further, they submitted, parents have no right to waive the rights of their children. The rights of parents are derived from the rights of their children to have their interests protected. Thus no right is given to allow parents to exercise their children's rights in a way that is contrary to those interests. The subsection allowing parents and detainees together to consent to waiving the young person's rights should be withdrawn.

Submission 40: The NSW Council for Civil Liberties recommended that sections 26ZL(7), (8) and (9) be repealed.

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[3] It should be noted, however, that section 26X(3) provides that the regulations may exclude the subject from the application of any of the provisions of or made under the *Crimes (Administration of Sentences) Act 1999* or the *Children (Detention Centres) Act 1987*.

Discussion

It is acknowledged that these powers are extraordinary and under ordinary circumstances are not available. However, this legislation is dealing with extraordinary events and the subsections allowing a child or his or her guardian to consent in writing to the taking of identification material, is a concession to the limited timeframe in which law enforcement agencies would be working. It also recognises that in some cases the granting of consent may be a way in which to hasten the process, which may lead to the person being released sooner.

3.6.22 Annual reports

The CCL submitted that in the United Kingdom, reports are required every three months. The Police Commissioner here, likewise, should have to report at least that often.

Submission 41: The NSW Council for Civil Liberties recommended that Police be required to report every three months on the use of the powers under the Act

Discussion

The powers conferred under the Act are reserved for use only in situations connected to terrorism. They are not for common use and already have a high degree of oversight.

As has been pointed out in the Review, the preventative detention and the special powers are yet to be used at all and the covert warrant powers have only had limited use.

Given the limited and infrequent use of the powers, an annual report provides sufficient accountability.

3.6.23 Section 26ZS - Sunset Clause

CCL submitted that there should be a sunset clause repealing Part 2A in one year as opposed to the current provision which allows for the Part to sunset after 10 years.

Submission 42: The NSW Council for Civil Liberties recommended that there should be a sunset clause repealing Part 2A in one year.

Discussion

See discussion at paragraph 3.2.11

Covert Search Warrants

The Council holds that this power is unwarranted, and dangerous and submitted that Part 3 of the Act should be repealed.

3.6.24 Membership of a terrorist organisation offence

The CCL submitted that proscription should be done by a Federal judge, in open court, on application by the Federal Attorney-General. An appeal should lie with a superior court on the facts as well as the lawfulness of the proscription. This should be the only method by which an organisation may be proscribed.

The CCL also submitted that membership of a terrorist organisation should not be a criterion for allowing a covert search to go ahead.

Submission 43: The NSW Council for Civil Liberties recommended that amendments should be made to the process of proscribing a terrorist organisation and that proscription should not be a criterion for allowing a covert search to proceed.

Discussion

The procedure by which an organisation is proscribed is outside the scope of this Review as this is a matter for the Commonwealth Parliament.

The offence of membership of a terrorist organisation is found under s310J in Part 6B of the *Crimes Act 1900* (NSW). The *Crimes Act* contains a sunset clause of 2 years for that offence. The sunset clause comes into effect on 13 September 2008.

This offence was introduced as a temporary measure in order to allow the Commonwealth Government to develop a national covert search warrant scheme for use in the investigation of Commonwealth terrorism offences.

In his second reading speech to Parliament in relation to the Act (NSW Legislative Assembly Hansard, 9 June 2005, page 16940) the then Attorney General, the Hon. Bob Debus MP stated:

> *The Government considers that this provision is necessary as a temporary measure because membership of a terrorist organisation is not an offence known to New South Wales law, and New South Wales is constitutionally prevented from enacting a covert search warrant scheme for the investigation of Commonwealth terrorism offences... It is hoped in that time that the development of a covert search warrant scheme can be dealt with at the national level by the Commonwealth and other Australian jurisdictions, and a federal scheme enacted...if that should occur, New South Wales would consider repealing this scheme in order to avoid constitutional and operational inconsistencies.*

The Commonwealth Government has introduced the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007* (Cth) into the Federal Parliament. The Bill was second read on 7 August 2007 and it is anticipated it will be passed in the near future. The Bill will establish a delayed notification search warrant scheme that will enable police officers to covertly enter and search premises for the purposes of preventing or investigating terrorism and other serious Commonwealth offences, without giving notice to the occupier of the premises until operational sensitivities allow.

The introduction of a national covert warrant scheme will ensure consistency between all jurisdictions as to who should be investigating terrorism offences and who should be prosecuting them. A national scheme will also provide for the economical use of resources.

Under the Commonwealth scheme covert search warrants will be available to the Police in all the Australian jurisdictions for use in preventing and responding to terrorist

activities. Such a scheme will enhance the national approach that has been developed on counter terrorism.

Recommendation 3: Repeal Part 6B of the *Crimes Act 1900* upon commencement of the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007* (Cth)

3.6.25 Threshold test

The CCL submitted that the threshold test is too low and that a reasonable ground for suspicion is much lower than a reasonable ground for belief. The eligible judge should, when issuing a covert search warrant, have to determine that there are good grounds for the belief.

They suggested that a requirement for the issue of a warrant should include that there is an imminent threat of a terrorist act, with danger to human life.

Submission 44: The NSW Council for Civil Liberties recommended that section 27K should be amended to require the judge to have determined that there are good grounds for the belief that an order is necessary and that there is an imminent threat of a terrorist act with danger to human life.

Discussion

Pursuant to section 27G, a police officer, can apply for a covert search warrant if he or she suspects or believes on reasonable grounds:

(a) that a terrorist act has been, is being, or is likely to be, committed, and

(b) that the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act, and

(c) that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

Section 27K provides:

Determining application for covert search warrant

(1) An eligible Judge to whom an application for a covert search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue a covert search warrant.

An application can be made where there is either a reasonable suspicion or a reasonable belief. A judge is then required to, prior to making an order, be satisfied that the suspicion or belief was reasonable.

Importantly however, the section continues on, at section 27K(2), to specify a further eight factors which are to be considered when deciding if there are reasonable grounds. These factors include:

(a) the reliability of the information on which the application is based, including the nature of the source of the information,

(b) whether there is a connection between the terrorist act in respect of which the application has been made and the kinds of things that are proposed to be searched for, seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested,

(c) the nature and gravity of the terrorist act,

(d) the extent to which the exercise of powers under the warrant would assist in the prevention of, or response to, the terrorist act,

(e) alternative means of obtaining the information sought to be obtained,

(f) the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act is likely to be affected if the warrant is issued,

(g) if it is proposed that premises adjoining or providing access to the subject premises be entered for the purposes of entering the subject premises:
    i. whether this is reasonably necessary in order to enable access to the subject premises, or
    ii. whether this is reasonably necessary in order to avoid compromising the investigation of the terrorist act,

(h) whether any conditions should be imposed by the Judge in relation to the execution of the warrant.

A "reasonable suspicion" is certainly a lower test than a "reasonable belief" (see *R v Rondo* [2001] NSWCCA 540) however the additional eight factors, which must be considered by the Court before granting the warrant, provide sufficient safeguards and robustness to the test to ensure that warrants are not issued capriciously.

3.6.26 Public Interest Monitor

The CCL recommended that the Public Interest Monitor should be able to cross-examine the applicant for a covert search warrant and any witnesses, and to make submissions to the issuing judge, who in turn should be obliged to take them into account.

See discussion at 3.6.1

3.6.27 Provision of records

The CCL submitted that there should be a means by which the records of police in asking for warrants and in the execution of warrants, can be laid before the issuing authority when a new application is made.

Submission 45: The CCL recommended that the issuing authority should be provided with a record of previous applications for covert search warrants.

Discussion

Nothing in the Act precludes the issuing authority from being provided with that information, if he or she requires it. Section 27K provides a list of factors which the issuing judge is to consider, however the list is not exhaustive. Further, s27J(2) provides

that the applicant must provide (either orally or in writing) such further information as the eligible Judge requires concerning the grounds on which the warrant is being sought.

3.6.28 Supervision of searches

Members of the Office of the Ombudsman should be required to observe each covert search. It should be a condition of the legality of such searches and of the subsequent use of what is found in evidence that they do so observe. The Ombudsman's Office 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.

Submission 46: The CCL recommended that Office of the Ombudsman should be required to observe each covert search.

Discussion

Covert warrants are only issued if a judge of the Supreme Court is satisfied that it is necessary. It is precisely the covert and secret nature of the warrant, which would make this recommendation unworkable.

The operational needs of police should not be compromised when the warrant is issued pursuant to judicial oversight and there are other mechanisms that allow for scrutiny post search, including a report being provided to the judge who issued a covert search warrant within ten days of its execution.

3.6.29 Reporting

The CCL noted that section 27S requires that a report be provided to the judge who issued a covert search warrant within ten days of its execution. However it does not provide any penalty for non-compliance. Such a penalty should be included.

Submission 47: The CCL recommended that section 27S should be amended to include a penalty for a failure to provide an issuing judge with a report after a covert search warrant is executed.

Discussion

In the event of a terrorist attack, it may be that there are somewhat extenuating circumstances surrounding the issuing of a covert search warrant. It is conceivable that in such an event, police may not be in a position to immediately provide a report on the search. A penalty is not appropriate and would do little to facilitate compliance with the section.

Rather, if there is a deliberate derogation of the responsibility to provide a report, it is open to the NSW Police Force to conduct disciplinary proceedings against the offending police officer.

It would also be undesirable to create inconsistencies with the LEPAR Act, which provides, at section 74, that a report is to be given to the authorised officer on execution of warrant.

3.7 Community Relations Commission

3.7.1 Response of an occupier who discovers a covert intruder

The Commission was concerned that the Act is silent with respect to what protection is offered to an occupier when that occupier is confronted with police exercising a covert search warrant.

Discussion

In the case of an occupier committing a violent act against a person executing a covert search warrant, the laws of self-defence will apply.

Self-defence laws in NSW make it clear that a person is entitled to defend himself or herself, to protect their property from being stolen, destroyed or interfered with or to prevent a criminal trespass to any land or premise or to remove a person committing any such trespass (section 418 *Crimes Act 1900*).

However, in exercising the right to self-defence a person must act reasonably and proportionately in the circumstances that are presented to them. A two limb test is applied to cases of self-defence:

1. **Belief of the Person**: this means that the person must believe what they did was necessary to do in self-defence; AND
2. **Reasonableness of Response**: This means that what the person did must be reasonable, given what s/he believed.

Where a defendant has raised evidence of self-defence it is up to the prosecution to disprove one of these things; either

- that an accused did not **genuinely believe** his or her actions were necessary for the purposes of the defence: OR
- that the **response**, given the way the accused perceived the circumstances, was not **reasonable**.

The law of self-defence is based on common sense, reasonableness and proportionality. No one will argue with the right of an individual to protect themselves and their property. However, the law does not countenance disproportionate and brutal responses.

3.7.2 Interpreters for non English speaking detainees

The Commission noted that a failure by the police to provide an interpreter to a detainee did not affect the legality of the detention. The Commission submitted that this is a denial of nature justice.

Discussion

Section 26ZA(3) places a positive obligation upon a police officer to obtain the assistance of an interpreter in order to explain the effect of the preventative detention order to the detainee. Section 26ZA(5) provides that the lawfulness of the detention is not affected by a failure to comply with s26ZA(3).

What constitutes a failure to comply is not clear.

S128(3) of the LEPAR Act provides that a custody manager does not need to arrange for an interpreter to be present if the custody manager believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable.

Recommendation 4: Amend section 26ZA to reflect that a failure to comply is acceptable where compliance with the requirement is not reasonably practicable.

3.7.3 Welfare of dependants

The Commission raised its concerns about what would happen to the dependants of a person detained under a preventative detention order. They also queried what the implications are for a detainee's social security status.

Discussion

With respect to the welfare of dependants as noted at 3.5.2 and in Recommendation 1, where parents or guardians have been detained procedures should be developed between DOCS and police to enable DOCS to respond appropriately.

Regarding the implications for a detainee's social security status, this is an issue for the Commonwealth Government.

3.8 Ministry for Police

Covert Search Warrants

3.8.1 Occupier's Notice

Section 27U of the Act requires that an occupier's notice is to be prepared and served after the execution of a covert search warrant.

Relevantly, section 27U(5) states that:

(5) As soon as practicable after the eligible Judge approves the occupier's notice, the person who executed the warrant is to cause the notice be given to:

(a) any person who, at the time the warrant was executed, was believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed, and

(b) if no such person was an occupier of the subject premises when the warrant was executed-a person of or above the age of 18 years known to have occupied the premises at the time the warrant was executed.

The Ministry for Police raised a concern that section 27U(5) may be interpreted as imposing an obligation upon the person who executes the warrant to serve an occupier's notice on *all* people knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed.

The Ministry submitted that the section is intended to impose an obligation upon the person who executes the warrant to serve the notice upon the occupier in similar terms to section 67(3) of the *Law Enforcement (Powers and Responsibilities) Act* (LEPRA).

Section 67(3) of LEPRA states that a person executing a warrant must either serve the occupier's notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years at the time of entry or if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises, either personally or in such other manner as the authorised officer who issued the warrant may direct, as soon as practicable after executing the warrant.

The Police Ministry suggested that if the contrary interpretation is accepted, it may adversely affect the NSW Police Force's operational effectiveness, in that:

- Serving an occupier's notice on a person who remains the subject of law enforcement and/or intelligence agency interest would alert the person to the fact they have been subject to previous investigation, and would likely jeopardise future police and/or intelligence operations involving that person;

- Serving an occupier's notice on a person of interest, other than the occupier of the premises, would unnecessarily disclose police methodology (i.e. the use of covert search warrants as an investigative technique); and

- the provision of occupier's notices to all persons linked to the commission of the relevant terrorist act pursuant to 27U(5)(a) is a cumbersome requirement for Police. This may involve tens of people, and issuing all persons with an occupier's notice will be difficult and time consuming.

Submission 48: The Ministry for Police recommended that 27U(5) be clarified by reflecting the terms and wording contained in section 67(3) of LEPRA

Discussion

Jeopardising future operations

Pursuant to section 67(3) of LEPRA, police can be granted an extension of time (more than once) regarding when the occupier's notice must be served. The extension cannot exceed six months on any one application. This is contrasted with the covert search warrant scheme, which recognises the likelihood of ongoing investigations by allowing up to 2 years to serve the notice or longer if there are exceptional circumstances which may include jeopardising ongoing investigations.

The delay in the service of the occupiers notice is substantial. This reflects the intrusive nature of covert search powers. It provides a maximum reasonable period in which the state should be permitted to interfere with individual privacy for legitimate investigation purposes. The maximum period reflects the fact that effective prevention and investigation of terrorism offences may require long periods of surveillance.

Disclosing police methodology

The argument that by serving the notice on anyone other than the occupier will lead to police methodology being compromised is questionable. The concept of covert search warrants is well known and the scheme has been reported upon widely by the media. The scheme itself is not a secret and it is unlikely that an occupier would treat the matter of secrecy any differently to any other person served with a notice.

Cumbersome requirement for police

In a democratic society, it is vitally important that the exercising of law enforcement powers is transparent and accountable. While there is a public interest in permitting covert search powers in exceptional circumstances, the exercise of these powers should remain covert for only so long as is required for legitimate law enforcement purposes.

The principle that the balance between law-enforcement and individual privacy should permit the use of covert search powers only in exceptional circumstances, and under strict regulation must be maintained. Given the importance of transparency and accountability in law enforcement activities in any democratic society, there is a public interest in informing occupiers what things have been taken from their property, or placed upon it.

When the legislation was drafted it was deliberately drafted so as to apply to all people knowingly concerned but also occupying the premises at the time the warrant was executed. The intention of the section was for both prerequisites to be satisfied. It was never intended that an occupier's notice should be served on someone who, whilst believed to be knowingly concerned in the commission of the terrorist act, never occupied the property.

Definition of Premises

The Ministry for Police noted that section 4 of the Act currently defines *premises* as *'a building, structure or place, whether built on or not'*. Section 3 of LEPAR Act however defines premises as *'any building, structure, vehicle, vessel or aircraft and any place, whether built or not'*.

Submission 49: It is recommended that s4 be amended to include vessels or aircraft.

Discussion

It is not difficult to imagine a scenario where the police officer suspects on reasonable grounds that a person who is the target of an authorisation may be in a vessel or aircraft or a vessel or aircraft is in an area that is the target of an authorisation.

In order to promote consistency with the LEPAR Act, it would be desirable to have a uniform definition.

Recommendation 5: Amend section 4 of the Act to expand the definition of "premises" to include vessels and aircraft.

3.8.2 Supply police officer's details and other information

The Ministry for Police noted that section 23 of the Act provides similar 'safeguards' to those contained in section 201 of LEPRA but observed that section 23 does not contain a subsection similar to section 201(2)(b) of LEPRA.

Section 201(2) refers to a police officer supplying his or her details and giving warnings to an accused when exercising powers under LEPRA.

The Ministry for Police have proposed that section 23 of the Act be amended in similar terms as section 201(2)(b) of LEPRA to allow a police officer to supply his/her details and other information as soon as is reasonably practicable *after* exercising the power, if it is not practicable to do so before or at the time of exercising the power.

Submission 50: The Ministry for Police recommended that s23 of the Act be amended to mirror section 201(2) of LEPRA.

Discussion

Consistency with LEPRA is desirable and to avoid confusion section 23 should be amended to allow police to supply his/her details and other information as soon as is reasonably practicable *after* exercising the power, if it is not practicable to do so before or at the time of exercising the power.

Recommendation 6: Amend Section 23 to allow police to supply his/her details and other information as soon as is reasonably practicable *after* exercising the power, if it is not practicable to do so before or at the time of exercising the power.

3.8.3 Carrying out Preventative Detention Orders - the interaction between the Act and LEPRA

Part 2A, Divisions 3 and 4 of the Act impose extensive obligations for carrying out Preventative Detention Orders. The Part covers, amongst other things, the arrest of a person subject to the Order.

The Ministry for Police noted that section 5 of LEPRA states that it does not limit the functions a police officer has under an Act or Regulation specified in Schedule 1. However, the *Terrorism (Police Powers) Act* is not mentioned in Schedule 1. Therefore, it remains unclear which Act prevails over the other when exercising arrest or procedural functions under either Act.

The Ministry suggested that it would be more appropriate to rely upon the arrest provisions in LEPRA, as Police would only need to apply a standard set of rules and proposed that the *Terrorism (Police Powers) Act* should be included in Schedule 1 of LEPRA.

Submission 51: The Ministry for Police recommended that the *Terrorism (Police Powers) Act* be included in schedule 1 of LEPRA.

Discussion

The Police Ministry suggested that the arrest provisions under LEPRA should apply to the TPPA, however there is no power under the TPPA to arrest. Rather, the person is detained purusant to section 26Q of the Act.

The question regarding which Act prevails when exercising functions under either Act is in any case a matter of statutory interpretation. If there were conflict, then the "Last in Time" principle prevails. That is, when two statutes conflict, the one enacted last prevails. In this case, the TPPA powers would prevail as it was enacted after LEPRA.

3.8.4 Authorisation to apply for a covert search warrant

Section 27D provides for who may be authorised to apply for a covert search warrant:

1. The Commissioner of Police may authorise an eligible police officer to apply for a covert search warrant issued under this Part.

2. The Crime Commissioner may authorise an eligible staff member of the Crime Commission to apply for a covert search warrant under this Part.

Section 27E provides that the Commissioner of Police can only delegate this power to either an Assistant Commissioner or a person holding a position of or above the rank of superintendent. Only 2 people can hold delegations under this section at any one time.

Under the *Terrorism (Police Powers) Regulation 2005* the power is delegated to the people who hold the position of Assistant Commissioner, Counter Terrorism and the position of Commander, Counter Terrorist Co-ordination Command.

Recently the positions have been re-named. In order to avoid the difficulty of redrafting the Regulation every time a name change occurs, it would be desirable to create more less specific terms for the positions.

Recommendation 7: Amend clause 4 of the Regulation to more general terms such as "Assistant Commissioner responsible for Counter Terrorism" and the "Commander responsible for Counter Terrorism investigations".

4. EMERGENCY POWERS

After the COAG meeting of September 2005, a number of States and Territories enacted legislation to give effect to the COAG agreement. States, such as Tasmania, Victoria and South Australia, when enacting their legislation, extended the special powers of police even further to cover specific events, sites or infrastructure that may be subject to a terrorist threat.

Currently in New South Wales, there are two Acts which can be employed to deal with threats to specific sites or events. As noted above, the TPPA confers special powers on police officers to:

- deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after one has occurred;
- detain suspected persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act; and
- conduct a covert entry and search of premises.

If necessary, the TPPA can operate in conjunction with the emergency powers under the *State Emergency and Rescue Management Act 1989* (SERM Act) to ensure the safety of people attending a special event and the safety of a site.

Under the TPPA and the SERM Act police have an extraordinary array of powers at their disposal in the event of a terrorist threat. For instance, police can, without a warrant, stop people and cars, search (including strip search) people, enter premises, close streets, shut down railways, cordon off area or shut off water and gas supplies.

The question arises as to whether NSW should follow other states and enact specific legislation that grants special semi-permanent powers to police to cover specific events, sites or infrastructure that may be subject to a terrorist threat.

Recently, the *APEC Meeting (Police Powers) Act 2007* was introduced to cover just such a scenario. The legislation was subject to a sunset clause and was subsequently repealed after the close of APEC. This was in recognition of the need to review the extraordinary and exceptional powers granted pursuant to the Act.

Clause 13 of Schedule 5 of LEPRA sets out the terms of a review of the APEC powers:

13 Review of APEC Act by Attorney General and Police Minister

(1) The Attorney General and the Police Minister are to review the APEC Act to determine whether the policy objectives of that Act were met and whether the terms of that Act remain appropriate for future meetings or events comparable to an APEC meeting.

Importantly, that review is specifically tasked with examining the usefulness of the powers during the APEC period and reporting back to Government on the need for any special powers for future major events. A report on the outcome of the review is to be tabled in each House of Parliament within the period of 6 months after the repeal of the APEC Act.

In light of the pending review of the APEC powers and that when consultation for this review was undertaken, no request for submissions on special powers was made, it is more appropriate that the question of special semi-permanent powers be considered in the APEC Act review. The question of special semi-permanent powers covering specific sites or infrastructure may also be usefully considered in the course of that review.

5. Conclusion and Recommendations

Conclusion

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

The extraordinary powers conferred by the *Terrorism (Police Powers) Act* have attracted a significant amount of criticism. It has been argued that the powers are too strong and too intrusive and have not been utilised since the inception of the Act.

The fact that the powers have not been used does not mean that that they should not be in force. The Act reflects the unique threat that terrorism poses by providing police with significant powers to prevent and investigate terrorist acts. The Act makes it clear that the powers are confined to very limited circumstances and are not intended for general use. The many legislative 'safeguards' and level of independent oversight ensures the Act will be appropriately utilised. That the powers have not been exercised is evidence of the willingness of law enforcement agencies to use the extraordinary powers sparingly and judiciously.

The threat of a terrorist act in NSW is still present as demonstrated by the assessment of the Director-General of ASIO.

The State of New South Wales will continue to face significant security challenges and it is vital to be aware and prepared for any eventuality. As noted in the first Review, terrorist activity is distinct in several ways from other criminal activity in that it is highly organised, is difficult to detect and has as its aim the destruction of property and mass civilian casualties.

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

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

Summary of Recommendations

Recommendation 1: Clarification of what constitutes an "exceptional circumstance" be incorporated into the Police's Standard Operating Procedures for the use of the preventative detention powers to enable a police officer to approve the detention of a young person with an adult.

Recommendation 2: Section 26E be amended to provide that a child be released immediately into the care of a parent or guardian where practical to do so and procedures be developed between DOCS and the NSW Police Force for the care of children who are released or have parents who are detained.

Recommendation 3: Repeal Part 6B of the *Crimes Act 1900* upon commencement of the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007* (Cth).

Recommendation 4: Amend section 26ZA to reflect that a failure to comply is acceptable where compliance with the requirement is not reasonably practicable.

Recommendation 5: Amend section 4 of the Act to expand the definition of "premises" to include vessels and aircraft.

Recommendation 6: Amend section 23 to allow police to supply his/her details and other information as soon as is reasonably practicable *after* exercising the power, if it is not practicable to do so before or at the time of exercising the power.

Recommendation 7: Amend clause 4 of the Regulation to more general terms such as "Assistant Commissioner responsible for Counter Terrorism" and the "Commander responsible for Counter Terrorism investigations".

Appendix 1

List of Submissions

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

1. The Law Society of NSW
2. The Department of Community Services
3. The Commonwealth Director of Public Prosecution
4. The Director of Public Prosecutions, New South Wales
5. NSW Legal Aid Commission
6. NSW Council for Civil Liberties
7. The National Children's and Youth Law Centre
8. The Judicial Commission of New South Wales
9. Privacy NSW
10. The Community Relations Commission
11. The Commonwealth Attorney-General's Department
12. Ministry for Police

Appendix 2

TERRORISM (POLICE POWERS) BILL

Page: 6978

Bill introduced and read a first time.

Second Reading

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

That this bill be now read a second time.

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

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

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

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

police and their behaviour are subjected to the oversight of the Police Integrity Commission and the Ombudsman. So there will be that review capacity, as there ought to be. We want accountability to apply even where police are responding to terrorism.

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

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

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

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

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

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

I turn to the new powers granted to police. Clause 7 sets out what the powers are for. They are to permit police to find a particular person, a target person; to find a particular

vehicle, or a vehicle of a particular kind, a target vehicle; and to prevent a terrorist act in a particular area, a target area. They may also be used to target specific premises when a person or place authorisation permits. These different purposes recognise the range of possible scenarios.

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

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

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

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

Part 4 of the bill permits members of law enforcement agencies of other Australian jurisdictions to be authorised to use the powers. This recognises that in an emergency we may want to maximise our capacity to respond to an incident, especially in specialist search units. Part 5 of the bill contains important additional safeguards. Clause 26 requires a report to be provided to the Minister for Police and the Attorney General by the commissioner as soon as practicable after the expiry of an authorisation. Clauses 27 and 28 provide for the return or disposal of property seized under the powers.

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

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

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

Hansard, 19 September 2002