

# Statutory Review Report

## *Terrorism (Police Powers) Act 2002*

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# 1. Executive summary

- 1.1 Section 36 of the *Terrorism (Police Powers) Act 2002* (**the Act**) requires the Attorney General, as the Minister with responsibility for the Act, to review the Act to determine whether its policy objectives remain valid, and its terms remain appropriate for securing those objectives.
- 1.2 The review is to be undertaken, every 3 years, as soon as possible after the reports of the Law Enforcement Conduct Commission (**LECC**) under sections 26ZO and 27ZC of the Act about the exercise of powers under Parts 2A and 3 of the Act have been tabled in each House of Parliament. The last statutory review of the Act was undertaken by the NSW Department of Communities and Justice (**the Department**) in 2018 on behalf of the then Attorney General following the tabling of a report by the Ombudsman under sections 26ZO and 27ZC of the Act in 2017.<sup>1</sup>
- 1.3 This review of the Act was conducted by the Department on behalf of the Attorney General after LECC's 2022 report under sections 26ZO and 27ZC of the Act (**the 2022 LECC report**) was tabled in each House of Parliament on 1 July 2022.
- 1.4 This is the seventh statutory review of the Act. The present review covers the period from the previous statutory review in 2018 to 2023.
- 1.5 In undertaking the review, the Department consulted with key stakeholders and considered their submissions. A list of key stakeholders is included at **Appendix A**. The Department also had regard to the 2022 LECC report.

## Policy objectives of the Act

- 1.6 The review must determine whether the policy objectives of the Act remain valid.
- 1.7 The Act does not have an objects clause or other provision that sets out its objects. Based on the second reading speeches to the Act and its amending legislation, the 2018 statutory review of the Act considered that the policy objectives of the Act are to give police officers:
  - special powers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after they have occurred
  - authority to use force, including lethal force, that is reasonably necessary to defend anyone threatened by a terrorist incident or to secure the release of hostages
  - enable police to use preventative detention orders to detain suspected people to prevent terrorist acts or preserve evidence following a terrorist act, and
  - enable the covert entry and search of premises by specially authorised police officers.<sup>2</sup>

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<sup>1</sup> Until 2017, the Ombudsman had oversight of the exercise of powers under Parts 2A and 3 of the Act. This function, together with the other police oversight functions of the Ombudsman and the former Police Integrity Commission, was transferred to LECC when it was established in 2017 under the *Law Enforcement Conduct Commission Act 2016*.

<sup>2</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p. 14: <https://www.parliament.nsw.gov.au/tp/files/73561/Statutory%20review%20of%20the%20TPPA.pdf>

- 1.8 The 2018 statutory review considered that these objects were valid and did not recommend the inclusion of an objects clause in the Act.<sup>3</sup>
- 1.9 This statutory review has identified an additional object of the investigative detention of persons to prevent an imminent terrorist act and to preserve evidence of, or relating to, a recent terrorist act.
- 1.10 The Department considers that the above objects remain valid and does not recommend amending the Act to include an objects clause.

### **Whether the terms of the Act remain appropriate for securing its policy objectives**

- 1.11 Subject to the recommendations made in this report, the Department considers that the provisions of the Act remain appropriate for securing its policy objectives. The Department does not consider that any of the Act's current provisions should be repealed. This report's main conclusions on the terms of the Act are summarised below.

## **Part 2 – Special Powers**

- 1.12 Special powers have been part of the Act since it was enacted in 2002. The use of special powers may be authorised by the Commissioner of Police or another senior police officer above the rank of superintendent for the purposes of preventing an imminent terrorist act or to apprehend persons responsible for a terrorist act. Special powers may be used by police officers to find a target person or vehicle or prevent a terrorist act in a target area. They include powers to require a person to identify themselves, to search vehicles and premises without a warrant, and create a cordon around a target area to search persons, vehicles or premises in the target area. These powers have not been used during the period covered by this review.
- 1.13 Special powers have not been used by the NSW Police Force (**NSWPF**) since 2015. The Law Society of NSW reiterated submissions it made in 2015 to a previous statutory review of the Act about special powers, which were considered and not adopted by that review. Otherwise, stakeholder submissions to the current statutory review did not specifically address the special powers provisions under Part 2 of the Act.
- 1.14 The Department does not make any recommendations to amend Part 2 of the Act.

## **Part 2AAA – use of force**

- 1.15 Part 2AAA of the Act authorises the Commissioner of Police to declare that Part 2AAA applies to an incident to which police are responding that is or is likely to be a terrorist act. Police officers who use force, including lethal force, that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty, are immune from criminal liability where they use these powers in good faith.
- 1.16 These powers were introduced in 2017 in response to a recommendation by the Lindt Café siege inquest to give police officers protection from criminal liability when

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<sup>3</sup> Ibid, p. 13

using force reasonably and in good faith in accordance with a police action plan. These powers have not been used to date.

- 1.17 Legal Aid NSW, the Law Society of NSW and LECC made submissions for LECC to be given oversight over the exercise of powers under Part 2AAA. The 2018 statutory review considered this issue and concluded that LECC already had sufficient oversight of the exercise of Part 2AAA powers through its oversight of police critical incidents under Part 8 of the *Law Enforcement Conduct Commission Act 2016* (**LECC Act**), which apply to death or serious injury arising from the use of force by a police officer. There has been no change to the legal framework for LECC oversight of critical incidents since 2018 and this review of the Act considers there are no reasons to depart from the 2018 statutory review's conclusion.
- 1.18 The NSW Police Force submitted that the test for a declaration by the Commissioner be expanded to capture a situation to which police are responding that is or is likely to be a terrorist act, or an act preparatory to a terrorist act. The Department acknowledges the concerns expressed by the NSW Police Force about the uncertainty of the application of the Part 2AAA legal framework where a person takes preparatory steps necessary to commit a terrorist act that do not meet the threshold of terrorist act. The scope of the proposed amendment is outside the scope of the recommendation made by the Lindt Café Siege inquest. Given the significance of extending the scope of this power, this Review recommends the NSW Government should undertake standalone consultation with stakeholders on the issue before deciding whether to implement the proposal.

## Part 2AA – Investigative Detention

- 1.19 The investigative detention powers under Part 2AA of the Act were introduced in 2016 to authorise the detention of terrorist suspects for questioning for up to four days by a police officer and for a further ten days if authorised by an eligible Judge of the Supreme Court. The Bill, which introduced Part 2AA into the Act, is the basis for nationally consistent model legislation on investigative detention. The Bill was supported by the then Council of Attorneys-General (**COAG**), with the Australian Capital Territory reserving its position. The Part 2AA investigative detention powers have not been used to date.
- 1.20 Legal Aid NSW, the Advocate for Children and Young People (**ACYF**), the Public Defenders and the Law Society of NSW, reiterated their opposition to Part 2AA and submitted that it should be repealed. There were alternative submissions from LECC and the Bar Association in support of extending LECC's oversight role to oversight of the exercise of powers under Part 2AA of the Act. The issue of LECC oversight was considered by the 2018 statutory review. It noted that the Part 2AA Powers had not been operationally tested. Absent any evidence about the misuse of the powers, it considered that immediate amendments requiring LECC oversight were unnecessary.
- 1.21 This review notes that the powers under Part 2AA of the Act have not yet been operationally tested and concludes that there is no new evidence or arguments that point to the need for additional LECC oversight over Part 2AA of the Act at this stage. The issue could be considered again at the next statutory review if the powers have been used and evidence is available indicating the need for additional oversight.

## Part 2A – Preventative Detention

- 1.22 The preventative detention powers under Part 2A of the Act were introduced in 2005 and form part of nationally consistent legislation agreed to at the meeting of the COAG on 27 September 2005, to authorise the detention of persons to prevent a

terrorist attack or preserve evidence following a terrorist attack. Preventative detention order powers were last used in NSW in 2014.

- 1.23 The 2022 LECC report on the exercise of powers under Part 2A of the Act found that NSWPF were not operationally ready to use preventative detention orders and considered the investigative detention powers under Part 2AA to be the preferred tool in a terrorism operation. LECC recommended that Parliament consider the immediate repeal of preventative detention powers.
- 1.24 LECC made two further recommendations for legislative amendment if Part 2A of the Act remained in force:
  - An amendment to section 26ZF of the Act, to allow a person detained under a preventative detention order to contact the NSW Ombudsman, and
  - Amendments to sections 26Y and 26Z of the Act, to require the nominated senior officer to inform the detained person of their right to complain to the NSW Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.
- 1.25 There was broad support from stakeholders for LECC's recommendation to repeal Part 2A of the Act. The NSWPF did not support this recommendation.
- 1.26 The 2018 statutory review took the view that it would be premature to repeal Part 2A of the Act before the new Part 2AA powers have been operationally tested. Repealing Part 2A would be inconsistent with the national legislative framework for using preventative detention as a tool to prevent and respond to terrorism. The NSWPF continues to advise that preventative detention orders are a valuable counter-terrorism disruption mechanism in the context of an imminent terrorist attack. Accordingly, while acknowledging LECC's concerns about operational readiness to use preventative detention orders, the Department considers that addressing these concerns would be more appropriate than repealing the entire scheme.
- 1.27 The Department notes that Part 2A of the Act is subject to a sunset clause that expires on 16 December 2023. The Department recommends that the sunset clause be extended to 16 December 2026 to provide a further opportunity for the next statutory review to consider Part 2A.
- 1.28 The Department supports the two recommendations made by LECC for legislative amendments to ensure that persons detained on preventative detention orders in correctional centres and youth detention centres be notified of and given the opportunity to contact the Ombudsman to enter a complaint about their treatment in custody.

### Part 3 – Covert Search Warrants

- 1.29 Covert search warrants were introduced into Part 3 of the Act in 2005 as an investigative and preventative tool to prevent and respond to terrorist threats. NSWPF may apply to an eligible Judge of the Supreme Court for a covert search warrant to enter and search premises without the knowledge of the owner or occupier for the purpose of responding to or preventing the terrorist act. A covert search warrant authorises NSWPF to seize items described in the warrant which are found during execution of the warrant and to subject them to testing.
- 1.30 Covert search warrants were later introduced into the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)* in 2009 to support the investigation of serious

criminal offences. The covert search warrant scheme in LEPR builds on the scheme in Part 3 of the Act and contains similar provisions.

- 1.31 The 2022 LECC report on the exercise of police powers under Part 3 of the Act expressed concerns about the collection of DNA samples by NSWPF during the execution of covert search warrants. LECC noted that the covert collection of DNA and forensic samples by NSWPF is currently unregulated in NSW. LECC considered it would benefit NSWPF and the community for the Act to be clear about when authority is being sought under a covert search warrant to take DNA samples, and when that authority has been granted. Accordingly, recommendation 3(a) of LECC's report recommended amending section 27O of the Act to make clear which power a police officer must request in an application for a covert search warrant, and which power the eligible Judge must grant in the warrant, for NSWPF to be authorised to take and analyse DNA samples under the warrant.
- 1.32 LECC recommended at recommendation 3(b) of its report including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed.
- 1.33 LECC recommended amending section 27ZB of the Act to require NSWPF to report to Ministers on the number of covert search warrants under which DNA samples were taken either from the subject premises, or from things seized from the subject premises.
- 1.34 There was broad stakeholder support for these recommendations. NSWPF did not support the recommendations to amend sections 27O and 27ZB of the Act. NSWPF supported including provisions in the DNA Profiles and Forensic Procedures Bill to address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed.
- 1.35 The framework in Part 3 of the Act for issuing covert search warrants sets out a clear process across a number of statutory provisions that requires a police officer to advise an eligible Judge that a search will be made of the premises the subject of the warrant for a kind of 'thing' (including DNA), and that a thing can be seized and tested where seizure and testing of that kind of thing is authorised in the warrant by the eligible Judge.
- 1.36 In addition, the covert search warrant regime in Part 3 of the Act is part of a broader covert search warrant legal framework, while the legal framework regulating the collection of forensic samples is currently under review and a Bill to replace *the Crimes (Forensic Procedures) Act 2001* is being developed by NSWPF. The Department considers that any amendments to Part 3 of the Act concerning the collection of DNA samples under covert search warrant could introduce undesirable inconsistencies with the covert search warrant regime in LEPR. It would be preferable for such proposals to be considered within the broader legal frameworks for search warrants and DNA and Forensic Procedures, which are outside the scope of this statutory review. As noted above, the regulation of the collection of forensic material and the development of a Bill to replace the *Crimes (Forensic Procedures) Act 2001* by the NSWPF is currently in progress.



## 2. Recommendations

**Recommendation 1:**

The NSW Government undertake consultation with key stakeholders on whether authorisations under Part 2AAA of the *Terrorism (Police Powers) Act 2002* should be able to be made in circumstances where a terrorist suspect is or is likely to be engaging in an act preparatory to a terrorist act.

**Recommendation 2:**

Amend section 26ZS of the *Terrorism (Police Powers) Act 2002* to extend the operation of Part 2A of the Act for a further 3 years.

**Recommendation 3:**

Amend section 26ZF of the *Terrorism (Police Powers) Act 2002* to allow a person detained under a preventative detention order to contact the NSW Ombudsman.

**Recommendation 4:**

Amend section 26Y and section 26Z of the *Terrorism (Police Powers) Act 2002* to require the nominated senior officer to inform the person of their right to issue a complaint to the NSW Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.

## 3. Introduction

### Background to the Act

- 3.1 In 2002, the threat of terrorism following the terrorist attacks in the United States on 11 September 2001 and the bombings in Bali on 12 October 2002 led the NSW Parliament to pass the Act to give NSWPF more capacity to prevent and respond to terrorist acts<sup>4</sup> and to pass the *Terrorism (Commonwealth Powers) Act 2002* to refer powers to make laws with respect to terrorist acts to the Commonwealth.<sup>5</sup>
- 3.2 When it was first passed, the Act gave NSWPF authority to use special powers to require a person whose identity is unknown to a police officer to validate their identity, to stop and search vehicles, enter and search premises without a warrant, and enforce a cordon around a target area for the purposes of stopping and searching persons, vehicles or premises in a target area.<sup>6</sup> These special powers are currently located in Part 2 of the Act.
- 3.3 In 2005, a covert search warrant scheme and a preventative detention order scheme were introduced to strengthen law enforcement powers to prevent and respond to terrorist acts.<sup>7</sup>
- 3.4 The covert search warrant scheme enables NSWPF to enter and search private premises without the knowledge of the occupiers for the purpose of preventing or responding to terrorist threats, in accordance with the terms of a covert search warrant issued by an eligible judge of the Supreme Court.
- 3.5 The preventative detention scheme enables the Supreme Court to make a preventative detention order to detain a person aged 16 years or over, who is suspected of being involved in recent or imminent terrorist activity, in custody for up to 14 days to prevent an imminent terrorist act, or preserve evidence of, or relating to, a recent terrorist act.
- 3.6 In the aftermath of the 2014 Lindt Café Siege, two significant amendments were made to the Act.<sup>8</sup> In 2016, an investigative detention scheme was introduced into Part 2AA of the Act to authorise a police officer, without a warrant, to arrest a terrorism suspect for the purpose of investigating a past or future terrorist act and for the purposes of assisting in responding to or preventing a terrorist act. NSWPF may hold and question the terrorism suspect for up to 4 days, and may hold the terrorism suspect for a further period of up to 10 days if authorised by an eligible judge of the Supreme Court.
- 3.7 In 2017, in response to a recommendation by the inquest into the Lindt Café Siege, Part 2AAA was inserted into the Act to provide clarity and certainty around the authority of police to use force, including lethal force, to defend any persons

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<sup>4</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 November 2002, p. 6978, Bob Carr, Premier.

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2002, p. 6696, Bob Carr, Premier

<sup>6</sup> *Terrorism (Police Powers) Act 2002*, as at date of assent, 15 December 2002.

<sup>7</sup> *Terrorism Legislation Amendment (Warrants) Act 2005* and the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*

<sup>8</sup> *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016*

threatened by a terrorist act or to prevent or terminate their unlawful deprivation of liberty<sup>9</sup>.

### Counter terrorism legislative framework in NSW

- 3.8 The Act is not the only NSW legislation that targets the activities of terrorists. It is part of a suite of laws passed in NSW to strengthen law enforcement capabilities to prevent and respond to terrorist acts.
- 3.9 The *Terrorism (High Risk Offenders) Act 2017* provides for the extended supervision and continuing detention of offenders serving prison sentences for NSW indictable offences who pose an unacceptable risk of committing a serious terrorism offence if not kept in detention or under supervision after their sentences expire. It builds on the high risk offenders scheme in the *Crimes (High Risk Offenders) Act 2006* to provide for the post-sentence detention and supervision of offenders serving prison sentences for serious sexual and violence offences.
- 3.10 Additionally, amendments to parole and bail laws have restricted the availability of parole and bail in NSW for terrorism-related offenders. The *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* amended the *Crimes (Administration of Sentences) Act 1999* to provide that terrorism-related offenders were not to be released on parole unless the State Parole Authority was satisfied that the offender would not engage in, incite or assist others to engage in, terrorist acts or violent extremism. This amendment implemented a decision of the then COAG on 9 June 2017.
- 3.11 The *Bail Amendment Act 2015* amended the *Bail Act 2013* (**Bail Act**) to tighten bail for terrorism-related offenders in response to the Lindt Café Siege. The amendments inserted section 22A into the Bail Act to provide that a bail authority must refuse bail in the case of persons charged with, or previously convicted of terrorism offences or subject to terrorism control orders, unless exceptional circumstances exist. Section 18 of the Bail Act was also amended to require a bail authority to consider, as part of the assessment of bail concerns under the unacceptable risk test, whether the accused has associations with terrorist organisations, and whether the accused has advocated, or associated with persons who advocate support for terrorist acts or violent extremism.
- 3.12 NSW counter-terrorism laws also form part of a broader suite of legislative measures passed by all Australian jurisdictions to support law enforcement to prevent and respond to terrorist acts (see **Appendix B**). These Commonwealth, State and Territory legislative schemes contain provisions similar to those in the Act, including special powers to stop and search persons during a counter-terrorism operation, preventative detention schemes and covert search warrants relating to terrorism offences.
- 3.13 The NSW Government has also introduced a range of non-legislative counter-terrorism strategies and programs (see **Appendix C**).

### Australia's national terrorism threat level

- 3.14 On 28 November 2022 the national terrorism threat level was lowered from PROBABLE to POSSIBLE.<sup>10</sup> In announcing the lowering of the threat level, the

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<sup>9</sup> *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017*

<sup>10</sup> Director General of Security, ASIO National Terrorism Threat Level Speech, 28 November 2022: <https://www.asio.gov.au/resources/speeches-and-statements/national-terrorism-threat-level>

Director-General of Security said that it remained plausible that someone would die at the hands of a terrorist in Australia within the next twelve months.<sup>11</sup> He noted that ASIO was still investigating and tracking Australians who embrace violent extremist beliefs, that individuals were still fantasising about killing other Australians, still spouting their hateful ideologies in chat rooms and still honing their capabilities by researching bomb-making and training with weapons. Critically, though, there were fewer of these people than there were previously, and fewer of them were likely to conduct an actual attack in Australia.

- 3.15 The Director-General of Security advised that in recent years, the threat from religiously motivated violent extremists has moderated, as the offshore networks, capabilities and allure of groups like ISIL and al-Qa'ida have been degraded, although the threat has not disappeared. The Director-General noted the development of ideologically motivated violent extremism, particularly nationalist and racist violent extremism, and an increase in extremism fuelled by diverse grievances, conspiracy theories and anti-authority ideologies.
- 3.16 The Director-General of Security credited 'the maturity of Australia's counter-terrorism frameworks, laws and resourcing' with a role in reducing the national terrorism threat level. He stated that the change in the assessment of the national terror threat assumes there would be no radical shifts in counter-terrorism policies, processes, laws or investments.
- 3.17 The Director-General of Security reiterated the remarks he made about the current national terrorism threat level in November 2022 in his 2023 Annual Threat Assessment, noting the attack on Queensland police officers at Wieambella on 12 December 2022.<sup>12</sup>

## The review of the Act

- 3.18 This is the seventh statutory review of the Act. The present review covers the period from the previous statutory review in 2018 to 2023, including the passage of three tranches of amendments:
- The *Terrorism (Police Powers) Amendment (Statutory Review) Act 2018* gave effect to the recommendations arising from the 2018 statutory review of the Act.
  - The *Stronger Communities Legislation Amendment (Crimes) Act 2020* amended section 24A(2) of the Act to provide that a declaration under Part 2AAA of the Act that an incident to which police are responding is a terrorist act applies to each location at which police officers are responding to the incident. It also amended section 36(1B) of the Act to provide that the Minister administering the Act may require the Commissioner of Police to provide information about declarations that incidents are terrorist acts for the purposes of conducting a statutory review.
  - The *Crimes Legislation Amendment Act 2021* extended the operation of preventative detention orders and prohibited contact orders, and the ability to apply for such orders, until 16 December 2023.
- 3.19 The review examines the operation of the Act with respect to its policy objectives, as well as reviewing the recommendations of LECC's 2022 report on the exercise of

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<sup>11</sup> Ibid

<sup>12</sup> Director General of Security, ASIO Annual Threat Assessment Speech, 21 February 2023: <https://www.asio.gov.au/director-generals-annual-threat-assessment-2023>

powers under Parts 2A and 3 of the Act, which was tabled in both Houses of Parliament on 1 July 2022. The review also considers stakeholder submissions about the objects of the Act and the operation of its provisions.

## 4. Review

### Part 1 – Preliminary and objects of the Act

- 4.1 Part 1 of the Act contains provisions for the name of the Act and its commencement, the definitions of certain words that are used in the Act, and a provision to avoid doubt that functions conferred by the Act in relation to a terrorist act may be exercised whether the terrorist act has been, is being, or is likely to be committed in NSW.
- 4.2 The Department did not receive submissions from stakeholders about the provisions in Part 1 of the Act.
- 4.3 In the 2018 statutory review, the Department noted that the Act in its entirety has no overall objects clause, save for the objects clauses for Parts 2AA and 2A.<sup>13</sup> Based on the second reading speeches to the Act and its amending legislation, the Department considered that the policy objectives of the Act are to give police officers:
  - special powers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after they have occurred.
  - authority to use force, including lethal force, that is reasonably necessary to defend anyone threatened by a terrorist incident or to secure the release of hostages
  - enable police to use preventative detention orders to detain suspected people to prevent terrorist acts or preserve evidence following a terrorist act
  - enable the covert entry and search of premises by specially authorised police officers.
- 4.4 The Department considered in 2018 that these objects remained valid.<sup>14</sup>
- 4.5 The objects listed above by the 2018 statutory review do not expressly refer to the investigative detention of persons to prevent an imminent terrorist act and preserve evidence of, or relating to, a recent terrorist act. Noting that such an object is listed in section 26A of the Act as an object of Part 2AA of the Act, the Department considers that also to be an object of the Act.
- 4.6 Some stakeholder submissions to this statutory review expressed opposition to the Act or to large parts of the Act. The Public Defenders questioned the need for the Act, expressing the view that detention without charge or trial is incompatible with a democratic society and suggesting that the covert search warrant scheme for serious offences under LEPRA can undertake the work done by the covert search warrant scheme contained in Part 3 of the Act. In the alternative to repealing the Act, the Public Defenders supported all the recommendations made by LECC in its review of the exercise of powers under Parts 2A and 3 of the Act.
- 4.7 Legal Aid NSW submitted that Parts 2AA, 2A and 3 of the Act should be repealed. Its alternative submissions about specific aspects of the Act are outlined in the discussion of each part of the Act below.

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<sup>13</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p.

<sup>14</sup>: <https://www.parliament.nsw.gov.au/tp/files/73561/Statutory%20review%20of%20the%20TPPA.pdf>

<sup>14</sup> Ibid at p.13

- 4.8 The Law Society of NSW also reiterated opposition it has previously expressed to the investigative and preventative detention regimes in Parts 2AA and 2 of the Act and to the concept of covert search warrants.
- 4.9 The introduction to this report outlines the views of the Director-General of Security about the current national terrorism threat level. In particular, the Director-General advised that there is still a threat of terrorism despite the threat level being reduced from PROBABLE to POSSIBLE.<sup>15</sup> The Director-General of Security credited ‘the maturity of Australia’s counter-terrorism frameworks, laws and resourcing’ with a role in reducing the national terrorism threat level. He stated that the change in the assessment of the national terror threat assumes there would be no radical shifts in counter-terrorism policies, processes, laws or investments.
- 4.10 The Department notes the role attributed to legislation and other counter terrorism measures in reducing the threat of terrorism and that there is still a threat of terrorism in Australia. The Department considers that the objects of the Act remain valid. The Department considers that the Act should remain in force and does not make any recommendations for legislative amendment about the objects of the Act.

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<sup>15</sup> Director General of Security, ASIO National Terrorism Threat Level Speech, 28 November 2022: <https://www.asio.gov.au/resources/speeches-and-statements/national-terrorism-threat-level>

## Part 2 – Special powers

### Background to Part 2 and key provisions

- 4.11 Part 2 was the main scheme in the Act for preventing and investigating terrorist acts when it was enacted in 2002. When the use of special powers is authorised under the Act, they give police officers special powers to search for a target person or vehicle or prevent a terrorist act in a target area as part of an operation to prevent an imminent terrorist act or to apprehend persons responsible for committing a terrorist act.
- 4.12 Division 2 of Part 2 of the Act provides for authorisation of the use of special powers. The Commissioner of Police, a Deputy Commissioner, or a police officer above the rank of superintendent (if the Commissioner or a Deputy Commissioner are not able to be contacted in urgent circumstances), may, with the concurrence or confirmation of the Minister for Police, give an authorisation for the exercise of special powers.<sup>16</sup> The authorising officer must be satisfied that there are reasonable grounds to believe that:
- a terrorist act could occur in the next 14 days and the exercise of the special powers will substantially assist in preventing the terrorist act,<sup>17</sup> or
  - a terrorist act has been committed and the exercise of the special powers will substantially assist in apprehending the persons responsible for committing the terrorist act.<sup>18</sup>
- 4.13 An authorisation may authorise the exercise of the special powers for the purpose of finding a particular person or a particular vehicle, for preventing a terrorist act in a particular target area or apprehending in a particular target area a person responsible for committing a terrorist act, or for any combination of those purposes.
- 4.14 Division 3 of Part 2 of the Act sets out the special powers which may be used by police officers in accordance with an authorisation, including powers to:
- require a person to disclose their identity<sup>19</sup>
  - to stop and search a person<sup>20</sup>
  - to stop, enter and search a vehicle<sup>21</sup>
  - to enter and search premises<sup>22</sup>
  - to place a cordon around a target area for the purposes of stopping and searching persons, vehicles or premises in the target area,<sup>23</sup> and
  - in connection with any such search, to seize things without a warrant.<sup>24</sup>

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<sup>16</sup> *Terrorism (Police Powers) Act 2002*, section 8 and 9

<sup>17</sup> *Ibid*, section 5

<sup>18</sup> *Ibid*, section 6

<sup>19</sup> *Ibid*, section 16

<sup>20</sup> *Ibid*, section 17

<sup>21</sup> *Ibid*, section 18

<sup>22</sup> *Ibid*, section 19

<sup>23</sup> *Ibid*, section 19A

<sup>24</sup> *Ibid*, section 20



- 4.15 Special powers have been authorised five times since they were introduced and used during two of those five authorisations. They have not been authorised and used during the period covered by this review.

#### Consideration of Part 2 by the 2018 statutory review

- 4.16 The 2018 statutory review recommended that the requirements under Part 2 at that time for a police officer who requests a person to comply with a request to warn the person they are required to comply with the request, should be aligned with the warning requirements in section 203 of LEPR to ensure consistency of warning requirements across legislative frameworks.<sup>25</sup>
- 4.17 The 2018 statutory review also recommended that, for the purpose of gathering statistics, the Act should require annual reporting on the number of Part 2 authorisations and the powers which were exercised under those authorisations<sup>26</sup>. This recommendation aimed to provide an additional avenue of scrutiny and transparency regarding the rare times Part 2 powers are used.
- 4.18 These recommendations were implemented by the *Terrorism (Police Powers) Amendment (Statutory Review) Act 2018*.
- 4.19 The 2018 statutory review did not accept stakeholder proposals for a mechanism to limit the size of an area that may be made the 'target' of an authorisation and to make the Commissioner of Police's power to make an authorisation under Part 2 of the Act non-delegable.<sup>27</sup>

#### Stakeholder submissions to this review and consideration of Part 2 by the Department

- 4.20 The Law Society of NSW reiterated submissions it made in 2015 to a previous statutory review of the Act about special powers, which were considered and not adopted. Stakeholder submissions to the current statutory review did not otherwise specifically address the special powers provisions under Part 2 of the Act.
- 4.21 The Department considers that the powers to authorise the use of special powers and the associated safeguards continue to ensure that the appropriate balance is struck between providing powers to prevent and respond to terrorist acts and ensuring they are only used when necessary. The Department does not recommend any changes to Part 2 of the Act.

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<sup>25</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p. 22-23

<sup>26</sup> *Ibid*, p. 23-25

<sup>27</sup> *Ibid*, p. 19-22

## Part 2AAA – Police use of force – ongoing terrorist acts

### Background to Part 2AAA – the Lindt Café siege inquest

- 4.22 In 2017, in response to a recommendation by the NSW State Coroner at the *Inquest into the deaths arising from the Lindt Café siege*, Part 2AAA was inserted into the Act to allow the NSWPF Commissioner to authorise the use of force, including lethal force, that is reasonably necessary to defend a person threatened by a terrorist incident or to secure the release of hostages and to provide police officers who use force in those circumstances with protection from criminal liability.<sup>28</sup>
- 4.23 The NSW State Coroner considered whether NSWPF should have shot and incapacitated Man Haron Monis before he killed one of the hostages leading to NSWPF storming the café and the death of another hostage, including whether NSWPF had lawful authority to do so<sup>29</sup>.
- 4.24 The State Coroner noted that section 230 of LEPRA authorises police officers who exercise functions under LEPRA or any other Act or law in relation to an individual or a thing to use such force as is reasonably necessary to exercise the function, and that section 6 of the *Police Act 1990* gives police the functions of protecting persons from injury and death and protecting from damage.<sup>30</sup>
- 4.25 The State Coroner further noted that section 418 of the *Crimes Act 1900* (**Crimes Act**) provides that a person is not criminally responsible for an offence if the person acts in self-defence. Section 418 of the Crimes Act provides that a person acts in self-defence if and only if the person believes the conduct is necessary:
- (a) to defend himself or herself or another person, or
  - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
  - (c) to protect property from unlawful taking, destruction, damage or interference, or
  - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass.<sup>31</sup>
- 4.26 Section 418 of the Crimes Act further provides that the conduct must be a reasonable response in the circumstances as the person perceives them.
- 4.27 The State Coroner found that, in the circumstances of the Lindt Café Siege, NSWPF had lawful authority to use lethal force from an early stage.<sup>32</sup>
- 4.28 The State Coroner noted that under the legal framework for use of force at the time of the siege, there was a possibility that a police officer's use of force could be subject to review, investigation and legal proceedings with the possibility of disciplinary and criminal sanctions, if the officer was found to have used force unlawfully.<sup>33</sup> The State Coroner accepted that it was not unreasonable for NSWPF

<sup>28</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2017, p. 5, Gladys Berejiklian, Premier

<sup>29</sup> State Coroner of NSW, *Inquest into the deaths arising from the Lindt Café siege: Findings and recommendations* (May 2017) p. 321-324.

<sup>30</sup> *Ibid*, p. 321

<sup>31</sup> *Ibid*, p. 321-322

<sup>32</sup> *Ibid*, p. 323

<sup>33</sup> *Ibid*, p. 323-324

officers to have had doubts about legal justification, given their training, the information available to them on the day, the pressure of events and the agony of the moment.<sup>34</sup>

- 4.29 The State Coroner considered that the legal framework for when lethal force may be used under the common law may unduly constrain officers from responding to a terrorist siege, which may mean that the officer may wait for objective evidence that a hostage taker is about to kill a hostage and expose the hostage to unacceptable risks, as occurred in the Lindt Café siege. The State Coroner noted that a police officer who uses lethal force could subsequently be subject to proceedings at an inquest or a criminal prosecution where the officer's actions could be found to be unlawful and the officer could be subject to an adverse finding and penalty. The uncertainty of being subject to such proceedings and of the consequences of those proceedings could hamper effective responses to terrorist incidents<sup>35</sup>.
- 4.30 Accordingly, the State Coroner recommended consideration be given to amending the Act to ensure that police officers have sufficient legal protection to respond to terrorist incidents in a manner most likely to minimise the risk to members of the public.<sup>36</sup>

### Key provisions of Part 2AAA

- 4.31 Part 2AAA of the Act implements the State Coroner's recommendation by authorising, directing or using force (including lethal force) by a police officer, that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty. Police officers who use force in these circumstances will not incur criminal liability where they act in good faith.
- 4.32 The first step towards the use of force under Part 2AAA of the Act is a declaration by the Commissioner of Police that the incident is a terrorist act to which Part 2AAA applies. Section 24A(1) of the Act provides that the Commissioner of Police may make such a declaration if satisfied that—
- (a) an incident to which police officers are responding is or is likely to be a terrorist act, and
  - (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty.
- 4.33 Section 24A(3) of the Act requires the Commissioner of Police to notify the police officer in charge of the police officers responding to the terrorist act that a Part 2AAA declaration has been made. Section 24A(4) of the Act also requires the Minister for Police to be notified before or as soon as practicable after a Part 2AAA declaration is made.
- 4.34 Section 24B(1) of the Act outlines the scope and content of the police action that can be taken for the purposes of a police action plan to respond to a terrorist act subject to a Part 2AAA declaration. The police action that may be taken is authorising, directing or using force (including lethal force) that is reasonably necessary, in the

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<sup>34</sup> Ibid, p. 323-324.

<sup>35</sup> Ibid, p. 324

<sup>36</sup> Ibid, p. 324

circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty.

- 4.35 Section 24B(2) of the Act provides that a police officer does not incur any criminal liability for taking any such police action for the purposes of a police action plan of the police officer in charge of the police officers responding to the terrorist act. Section 24B(3) of the Act provides that this exemption from criminal liability only applies to action taken by a police officer in good faith. These provisions align with the existing legal framework in section 230 of LEPPRA and section 418 of the Crimes Act for use of force.
- 4.36 Part 2AAA of the Act does not cover the field with respect to the use of force, including lethal force, in response to a terrorist act. Section 24B(6) of the Act provides that Part 2AAA does not limit the powers of police officers to deal with a terrorist act. Police officers may exercise those powers to deal with a terrorist act whether the Commissioner of Police has been requested or has declined to make a Part 2AAA declaration in relation to the terrorist act.
- 4.37 No Part 2AAA authorisations have been made to date.

#### Consideration of Part 2AAA by the 2018 statutory review

- 4.38 Part 2AAA was considered for the first time by the 2018 statutory review. The 2018 review dealt with three main submissions from stakeholders:
- (a) a submission that Part 2AAA authorisations should only be exercised once the NSWPF form a reasonable suspicion that the actions of the perpetrator present a serious risk of death to the hostages,<sup>37</sup> and
  - (b) a submission that LECC should be authorised to regularly review the exercise of functions by NSWPF under Part 2AAA.<sup>38</sup>

The 2018 statutory review did not adopt those submissions.

- 4.39 The submission to limit the power to make Part 2AAA authorisations was considered to be a narrowing of the existing law of self-defence in the Crimes Act and would decrease the NSWPF's power to respond to terrorist acts as opposed to any other situation. The 2018 statutory review considered that this would run counter to the lessons arising from the Lindt Siege.
- 4.40 The submission to extend LECC scrutiny to Part 2AAA of the Act was considered to be unnecessary. The 2018 statutory review noted that LECC already monitors the NSWPF's investigation of critical incidents under Part 8 of the LECC Act, which are incidents involving a police officer or other member of the NSWPF that results in death or serious injury to a person. Where the use of force under Part 2AAA reaches this threshold, it will be managed as a critical incident.
- 4.41 The 2018 statutory review did, however, recommend an annual reporting requirement equivalent to the requirement to report on the exercise of Part 2 powers be introduced. The 2018 review considered that annual reporting on the exercise of

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<sup>37</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p. 26-28

<sup>38</sup> *Ibid*, p. 28-29

Part 2AAA authorisations would provide a further avenue of scrutiny and transparency regarding use of these powers.

### Current stakeholder views

#### LECC oversight of Part 2AAA

- 4.42 Stakeholders were generally supportive of LECC being authorised to regularly review the exercise of functions by NSWPF under Part 2AAA of the Act. Legal Aid NSW, the Law Society of NSW and LECC made or reiterated previous submissions that LECC should be given oversight of the exercise of powers under Part 2AAA of the Act. No other stakeholders made submissions on this issue.

#### The Department's view on LECC oversight of Part 2AAA

- 4.43 As indicated above, the 2018 statutory review considered submissions about the oversight of the exercise of Part 2AAA powers by LECC and did not recommend that LECC scrutiny of the exercise of powers under Parts 2A and 3 of the Act be extended to the exercise of powers under Part 2AAA of the Act.<sup>39</sup>
- 4.44 The 2018 statutory review considered that the critical incident monitoring and review provisions in Part 8 of the LECC Act provided adequate scrutiny of the exercise of police powers under Part 2AAA. It noted that NSWPF is required to consider and respond to concerns and recommendations raised by the LECC and that LECC may make the advice it has given to NSWPF public after the conclusion of the critical incident investigation.
- 4.45 No new issues or developments appear to have been raised in stakeholder submissions to warrant departure from the conclusions reached by the Department on scrutiny of Part 2AAA powers in 2018.

#### Responding to a terrorist incident at multiple locations

- 4.46 Legal Aid NSW reiterated previous concerns about section 24A(2) of the Act, which provides that a Part 2AAA declaration applies to each location at which police officers are responding to the incident. Legal Aid NSW expressed the view that there should be some limitation within the provision, for example, by referring to each location at which police are 'required' to respond.

#### The Department's view on responding to terrorist incidents at multiple locations

- 4.47 The current version of section 24A(2) of the Act was introduced by the *Stronger Communities Legislation Amendment (Crimes) Act 2020*. It replaced a previous version which provided for a Part 2AAA declaration to be made in respect of the specified location at which police officers are responding and in respect of any other related specified location.
- 4.48 The amendment was prompted by concerns that a requirement to declare a specified location may not be fit for purpose for evolving police responses to terrorist actions and is unhelpful in a situation with a mobile terrorist offender.<sup>40</sup> The former wording could lead to broad location descriptions in declarations or unnecessarily strictly defined locations, which could cause operational confusion and go against

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<sup>39</sup> Ibid, p. 28-29

<sup>40</sup> New South Wales, *Parliamentary Debates*, 16 September 2020, p. 3439, Mark Speakman, Attorney General.

Parliament's intent to give police officers certainty when responding to a terrorist incident.

- 4.49 The Department considers that requiring a Part 2AAA declaration to refer to each location at which police are required to respond would defeat the intention of the 2020 amendment to give officers certainty that they can rely on the Part 2AAA provisions when responding to a mobile and rapidly evolving terrorist incident. The Department agrees that the 2020 amendment reflects the intent of the Lindt Café siege inquest's recommendation on use of force powers by giving police officers certainty that their responses to terrorist acts will not attract criminal liability.

#### Test for exercise of powers under Part 2AAA of the Act

- 4.50 The Law Society reiterated its submission to the 2018 statutory review that Part 2AAA powers should only be exercised once NSWPF form a reasonable suspicion that the actions of the perpetrator present a serious risk of death to the hostages.

#### The Department's view on the test for exercise of powers under Part 2AAA of the Act

- 4.51 The Department's view in the 2018 statutory review was that this proposal would narrow the existing law of self-defence and decrease NSWPF's power to respond to terrorist acts as opposed to any other situation. This would run counter to the lessons arising from the Lindt café siege.
- 4.52 No new issues or developments appear to have been raised in stakeholder submissions to warrant departure from the conclusions reached by the Department on the test for the exercise of Part 2AAA powers in 2018.

#### NSWPF proposal to amend the test for making Part 2AAA authorisations

- 4.53 The NSWPF submitted that the test for the use of powers under Part 2AAA be amended to authorise police to respond to 'a situation that is or is likely to be a terrorist act or an act that is preparatory to a terrorist act'. Currently these powers are available in response to 'an incident that is or is likely to be a terrorist act'.
- 4.54 The NSWPF provided an example of a possible situation where the current Part 2AAA powers may not be able to be used to intervene at an early stage to prevent a terrorist act. The example given was where NSWPF have credible intelligence information that a terrorist suspect has loaded an improvised explosive device into a vehicle at a rural location and is driving through a rural area to a target in a metropolitan location.
- 4.55 NSWPF have expressed concern about whether such circumstances constitute an incident 'that is or is likely to be a terrorist act', as defined in section 3 of the Act, for the purposes of making a declaration under section 24A(1) of the Act to authorise the use of force under Part 2AAA. Where a vehicle carrying an improvised explosive device is driven through an isolated rural area, there is less likelihood of that act causing serious harm to persons or property or creating a serious risk to the health or safety of the public or a section of the public, than if it were driven through a metropolitan area. NSWPF expressed some doubt about whether the Commissioner of Police could reasonably be satisfied under section 24A(1) of the Act that the incident is or is likely to be a terrorist act and may have to wait until the vehicle approaches a more populated area before making a Part 2AAA declaration.

#### Consideration of the NSWPF proposal



- 4.56 The NSWPF proposal would extend the circumstances in which a Part 2AAA declaration could be made by the Commissioner of Police to capture acts committed in preparation for a terrorist act which may not in isolation constitute a serious or imminent risk to lives, safety and property.
- 4.57 An act preparatory to a terrorist act, which is an offence under section 101.6 of the *Criminal Code* (Cth), is not defined in statute, but has been held to capture a wide range of conduct. Examples of acts that have been found to constitute an act preparatory to a terrorist act include making a bomb, acquiring materials to make a bomb, requesting a quote for the price of materials that could be used to make a bomb, conducting research on weapons and violent extremist ideology and purchasing a hunting knife.<sup>41</sup>
- 4.58 It is not necessary for a person to have determined a specific target or a particular effect of a terrorist act to commit an act preparatory to a terrorist act, so long as the preparatory act is committed with the intention that an action is intended to be carried out which possesses the characteristics of causing serious physical harm or death to a person, or serious damage to property.<sup>42</sup>
- 4.59 As indicated above, the use of force powers under Part 2AAA of the Act align with the existing legal framework for use of force when responding to criminal activity and do not give police officers significant new powers to use force. The practical impact of the proposal would be to exempt police officers who use force, including lethal force, in responding to an act preparatory to a terrorist act from criminal liability, where force is used in accordance with a police action plan to respond to that act and in accordance with the requirements of Part 2AAA of the Act.
- 4.60 Part 2AAA of the Act was introduced in response to a recommendation of the Lindt Café Siege inquest report. The inquest inquired into the facts of a siege where a terrorist took hostages and posed a risk to their lives and safety. The inquest noted the cautious approach of police officers present at the Lindt Café siege in interpreting the law which authorised the use of force in the context of the possible criminal sanctions they could be exposed to if they unlawfully used force. The inquest's recommendation for legislative amendment to ensure that police officers have sufficient legal protection to respond to terrorist incidents in a manner most likely to minimise the risk to members of the public was made in the context of the findings it made about the police response to the Lindt Café siege. The inquest did not deal with circumstances where a person has taken preparatory steps to commit a terrorist act, which in isolation may not rise to the level of seriousness necessary to constitute a terrorist act, but are necessary to carrying out the terrorist act.
- 4.61 Section 24A(1) of the Act authorises the Commissioner of Police to make a Part 2AAA declaration if satisfied that an incident to which police officers are responding is or is likely **to be** a terrorist act. The Department has considered whether the words 'to be' in the provision contemplate an incident that is or is likely to become or develop into a terrorist act. The Department notes that the Lindt Café siege inquest considered the issue of using force in the factual circumstances of the siege and did not discuss the application of the law on use of force to preparatory steps to a terrorist act. The inquest report and the other extraneous legislative materials for Part

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<sup>41</sup> See *R v Khaled Khayat; R v Mahmoud Khayat (No 14)* [2019] NSWSC 1817, *R v Al-Kutobi; R v Kiad* [2016] NSWSC 1760 and *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 360.

<sup>42</sup> *R v Lodhi* [2006] NSWCCA 121 at [65].

2AAA of the Act do not illuminate whether this provision applies to incidents or situations that are likely to become or develop into a terrorist act.

- 4.62 The Department acknowledges the concerns expressed by the NSWPF about the uncertainty of the application of the Part 2AAA framework in circumstances where a terrorist has taken preparatory steps necessary to commit a terrorist act which do not meet the threshold of a terrorist act. However, the proposal captures factual situations outside the scope of the factual matrix that was considered by the Lindt Café Siege inquest. Given the significance of extending the scope of the power to make declarations to circumstances beyond those contemplated by the Lindt Café Siege inquest, consultation with stakeholders should be undertaken before deciding whether to recommend legislative amendment to the Attorney General.
- 4.63 Accordingly, the Review recommends that the NSW Government undertake further consultation on whether Part 2AAA declarations should be able to be made in circumstances where a terrorist suspect is engaging in an act preparatory to a terrorist act that is not imminent.

**Recommendation 1:**

The NSW Government undertake consultation on whether declarations under Part 2AAA of the *Terrorism (Police Powers) Act 2002* should be able to be made in circumstances where a terrorist suspect is or is likely to be engaging in an act preparatory to a terrorist act.



## Part 2AA – Investigative detention powers

### Background to investigative detention powers and key provisions

- 4.64 Part 2AA of the Act was introduced in 2016 to assist the NSW Police Force to respond to and prevent terrorist acts by authorising the arrest, detention and questioning of any person who is suspected of being involved in a recent or imminent terrorist attack.<sup>43</sup> The rationale for Part 2AA was the need to address operational gaps in NSW's counter-terrorism provisions identified by NSWPF during the counter-terrorism operation, Operation Appleby.<sup>44</sup> The Bill which introduced Part 2AA into the Act is the basis for nationally consistent model legislation on investigative detention and was supported by the Council of Australian Governments, with the Australian Capital Territory reserving its position.<sup>45</sup>
- 4.65 Section 25E(1) of the Act provides that a police officer may arrest a person who is a terrorism suspect for investigation into a past or future terrorist act if the terrorist act concerned has occurred in the last 28 days, or the officer has reasonable grounds to suspect that the terrorist act concerned could occur at some time in the next 14 days. The police officer must be satisfied that the investigative detention will substantially assist in responding to or preventing the terrorist act.
- 4.66 Section 25F of the Act provides that a person under 14 years cannot be arrested or kept in detention under Part 2AA of the Act.
- 4.67 Section 25G(2) of the Act provides that a terrorism suspect may be questioned during investigative detention in connection with the terrorist act for which they were arrested, or in connection with any other terrorist act that occurred within the last 28 days or that there are reasonable grounds to suspect could occur at some time in the next 14 days. Section 25G(6) of the Act provides that a senior police officer who is not in charge of or involved in the investigation must review the detention as soon as practicable after the person is arrested and every 12 hours after the person's arrest.
- 4.68 Sections 25H and 25I of the Act provide that the initial investigative detention period after arrest is a maximum period of four days, which can be extended upon application to an eligible Judge of the Supreme Court in increments of one to seven days to a maximum of 14 days.
- 4.69 Section 25O of the Act applies a range of safeguards under LEPPRA to investigative detention, including:
- the right to contact a lawyer, friend, relative, guardian or independent person
  - the right to have a lawyer present during an investigative procedure, and
  - specific safeguards relating to the detention of vulnerable persons in Division 3 of Part 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016*.
- 4.70 The powers in Part 2AA of the Act have not been used to date.

### Consideration of Part 2AA by the 2018 statutory review

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<sup>43</sup> *Terrorism (Police Powers) Act 2002*, section 25A

<sup>44</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 2016, p. 51, Mike Baird, Premier

<sup>45</sup> *Ibid.*

4.71 The 2018 statutory review received submissions in favour of amending Part 2AA to:

- confer power to order investigative detention exclusively on courts and for courts to supervise detention<sup>46</sup>
- restrict the use of investigative detention to circumstances where it is the least restrictive measure available<sup>47</sup>
- establish a special advocate to present at *ex parte* investigative detention proceedings before an eligible judge<sup>48</sup>
- introduce additional safeguards for children and young people<sup>49</sup>
- enable an eligible judge who determines whether information provided in support of an application to extend investigative detention is criminal intelligence, to have regard to whether the reasons in support of the information being declared criminal intelligence outweigh any unfairness to a respondent<sup>50</sup>
- Provide for LECC oversight of the exercise of Part 2AA powers.<sup>51</sup>

4.72 The Department did not adopt these submissions.

4.73 Relevantly for the purposes of this statutory review, the Department did not consider there was a need to introduce additional safeguards for children and young people detained under Part 2AA of the Act. The Department noted that Part 2AA includes safeguards for children and vulnerable people and picks up the safeguards for children and young people in Division 3 of Part 3 of the LEPR Regulation. It considered that the LEPR Regulation safeguards struck an appropriate balance between the need to investigate a matter and protect children and vulnerable people.

4.74 Also, relevantly for the purposes of this statutory review, the Department did not accept submissions to give LECC oversight over the exercise of powers under Part 2AA. The Department noted that the Part 2AA powers were anticipated to be used sparingly and certain safeguards on their use. The Department noted that Part 2AA had only recently been introduced and Parliament expressly did not extend LECC oversight in Part 2A to Part 2AA. The Department considered that as the Part 2AA powers had not been operationally tested and absent any evidence regarding misuse of the powers, immediate amendments requiring additional LECC oversight were not considered necessary. Any further LECC oversight would need to be considered at the next statutory review, particularly if the Part 2AA powers were used and there was evidence that additional oversight was required.

4.75 Three proposals from stakeholders were adopted and implemented by the *Terrorism (Police Powers) Amendment (Statutory Review) Act 2018*:

- provision of legal aid in investigative detention proceedings<sup>52</sup>
- a legislative requirement to treat people under an investigative detention order with humanity,<sup>53</sup> and

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<sup>46</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p. 35-36

<sup>47</sup> *Ibid*, p. 36

<sup>48</sup> *Ibid*, p. 36-37

<sup>49</sup> *Ibid*, p. 38-39

<sup>50</sup> *Ibid*, p. 39-42

<sup>51</sup> *Ibid*, p. 42-43

<sup>52</sup> *Ibid*, p. 32-33

<sup>53</sup> *Ibid*, p. 33-34

- a requirement to advise a detainee of their right to contact the LECC, their right to contact a lawyer and a copy of an order to extend investigative detention.<sup>54</sup>

## Current stakeholder views

### LECC oversight

- 4.76 As indicated above, some stakeholders, such as Legal Aid NSW, the ACYP, the Public Defenders and the Law Society, reiterated their opposition to Part 2AA and submitted that it should be repealed.
- 4.77 There were alternative submissions in support of extending LECC's oversight role to oversight of the exercise of powers under Part 2AA of the Act. Legal Aid NSW, the ACYP and the Bar Association expressed support for LECC to be given responsibility for monitoring Part 2AA of the Act. LECC also submitted that it should be given oversight of the exercise of powers under Part 2AA of the Act.

### The Department's view on LECC oversight

- 4.78 The Department does not consider it necessary to extend LECC oversight to Part 2AA of the Act. Submissions in favour of giving LECC oversight over investigative detention were canvassed by the 2018 statutory review.<sup>55</sup> The Department took the view in 2018 that as the Part 2AA powers had not been operationally tested and absent any evidence about the misuse of the powers, immediate amendments requiring LECC oversight were unnecessary.
- 4.79 The powers in Part 2AA of the Act have not been used and there is no new evidence or arguments that point to the need for additional LECC oversight over Part 2AA at this stage. The issue could be considered again at the next statutory review if the powers have been used and evidence is available indicating the need for additional oversight.

### The application of Part 2AA of the Act to children

- 4.80 The ACYP made a submission that reiterated the concerns expressed in its submission to the 2018 statutory review that the need for children aged 14 and 15 years to be eligible for investigative detention had not been effectively demonstrated. As indicated above, it recommended repealing Part 2AA of the Act.
- 4.81 The ACYP submitted to the current statutory review that if investigative detention for children is retained, there should be greater oversight of the exercise of police powers, especially in relation to the detention of children and young people. It recommended that Part 2AA be subject to a sunset clause and oversight by LECC.
- 4.82 If Part 2AA were to be retained, the ACYP submitted that provisions should be inserted to promote the best interests of children and acknowledge that children detained under the Act deserve special consideration and support. The ACYP suggested that such provisions could reflect the relevant objects and principles in legislation like section 6 of the *Children (Criminal Proceedings) Act 1987*, section 4 of the *Children (Detention Centres) Act 1987*, section 7 of the *Young Offenders Act*

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<sup>54</sup> Ibid, p. 34-35

<sup>55</sup> Ibid, p. 42-43

1997 and sections 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998*.

#### The Department's view on the application of Part 2AA of the Act to children

- 4.83 The issue of the application of Part 2AA to children aged 14 years and over was considered in the debates on the Bill that introduced Part 2AA.<sup>56</sup> The NSW Parliament passed the Bill unamended, including the provisions applying the legislation to children aged 14 years and over. The NSW Parliament did not make Part 2AA subject to a sunset clause. For the reasons outlined above, the Department does not consider that LECC oversight should be extended to Part 2AA of the Act.
- 4.84 In its discussion of the objects of the Act in the 2018 statutory review, the Department noted that the increasing tendency of children to subscribe to extremist ideologies represented an emerging and troubling aspect of the terrorism threat landscape.<sup>57</sup> It noted the murder of Curtis Cheng by a 15-year-old in Parramatta in 2015 and an increasing number of arrests of young people for terrorism offences. The Department noted that the safeguards for children and vulnerable people detained in police custody under Division 3 of Part 3 of the LEPPRA Regulation apply to young persons aged 14 to 17 years of age detained under Part 2AA of the Act and considered that these protections struck an appropriate balance between ensuring NSWPF have available tools to appropriately investigate a matter while ensuring protections for children and vulnerable people.<sup>58</sup> The Department did not adopt the ACYP's submission that the Act should incorporate objects provisions of the kind found in criminal legislation relating to children.
- 4.85 The Department acknowledges the ACYP's submissions on this issue. However, no new issues or developments appear to have been raised in stakeholder submissions to warrant departure from the conclusions reached by the Department in the 2018 statutory review.

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<sup>56</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 May 2016, p. 33-45.

<sup>57</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p.

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<sup>58</sup> *Ibid* at p. 38-39

## Part 2A – Preventative detention orders

### Background to preventative detention orders and key provisions

- 4.86 Part 2A of the Act creates a preventative detention order (**PDO**) scheme and forms part of nationally consistent legislation agreed to at the COAG meeting on 27 September 2005 to authorise the detention of persons to prevent a terrorist attack or preserve evidence following a terrorist attack.<sup>59</sup>
- 4.87 Under Division 2 of Part 2A, the NSWPF can apply to the Supreme Court for a PDO if there is a reasonable suspicion that the person will engage in a terrorist act, has done an act in preparation for, or is planning, a terrorist act, and a PDO would assist in preventing a terrorist act occurring. PDOs can also be made where a terrorist act has occurred in the past 28 days and the order is reasonably necessary to preserve evidence.
- 4.88 NSWPF can also apply to the Supreme Court for a prohibited contact order against a person subject to an application for a PDO to prohibit contact with a person specified in the prohibited contact order.<sup>60</sup> The Court may make a prohibited contact order if satisfied it is reasonably necessary to achieve the purposes of the PDO.
- 4.89 An application for a PDO cannot be made and a PDO cannot be made against a person under the age of 16 years.<sup>61</sup>
- 4.90 The maximum period for a PDO under the scheme is 14 days.<sup>62</sup> The NSWPF may make arrangements for persons subject to PDOs to be held in correctional centres, in the case of adults, and in youth detention centres, in the case of children and young people under the age of 18 years.<sup>63</sup>
- 4.91 A similar Commonwealth framework for preventative detention is set out at Division 105 of the *Criminal Code 1995* (Cth). Other Australian jurisdictions have similar PDO schemes.<sup>64</sup>
- 4.92 NSW PDOs were first used in 2014 when the NSWPF obtained interim PDOs against three people. They were taken into preventative detention and released when the interim orders expired after two days. These orders were sought as part of a counter-terrorism operation called Operation Appleby conducted by the NSW Joint Counter-terrorism Team (JCTT).<sup>65</sup> The NSWPF have not used PDOs since 2014.
- 4.93 Part 2A is subject to a sunset clause. Section 26ZS of the Act provides that PDOs and prohibited contact orders in force at the end of 16 December 2023 cease to be in force at that time. PDOs and prohibited contact orders cannot be applied for, or made, after 16 December 2023.
- 4.94 Part 2A was due to sunset on 16 December 2021. The *Crimes Legislation Amendment Act 2021* extended the sunset provision until 16 December 2023 to

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<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 2005, p. 20008, Milton Orkopoulos, Minister for Aboriginal Affairs, and Minister Assisting the Premier on Citizenship.

<sup>60</sup> *Terrorism (Police Powers) Act 2002*, section 26N

<sup>61</sup> *Ibid*, section 26E.

<sup>62</sup> *Ibid*, section 26K.

<sup>63</sup> *Ibid*, section 26X.

<sup>64</sup> See Appendix B to this report.

<sup>65</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16 (2017)* p 10.

enable LECC to complete its report on the exercise of Part 2A powers and to enable this statutory review to consider LECC's report.

### The 2022 LECC report on the exercise of Part 2A powers

- 4.95 The 2022 LECC report states that NSWPF are not operationally ready to use PDO powers as they have 'not taken the administrative steps necessary to ensure that it can use those [PDO] powers should the risk of an imminent terrorist act materialise'.<sup>66</sup> The Review states that NSWPF have not 'put in place any approved SOPs, or developed any approved forms, nor maintained an agreement with Corrective Services NSW to ensure that it can utilise a correctional facility to detain a person under a PDO'.<sup>67</sup>
- 4.96 The 2022 LECC report maintains that NSWPF have failed to develop SOPs to support the use of Part 2A powers because PDOs are operationally unattractive to use and the investigative detention powers under Part 2AA would be the preferred tool in a terrorism operation<sup>68</sup>. The LECC Report quotes the NSWPF's *Counter-Terrorism Law Manual* as stating that the powers under Part 2A are 'resource intensive, time restrictive and impractical...it is unlikely that a PDO will be used to prevent a terror attack... noting the significant operational advantage under Part 2AA of being able to question the person in detention'.<sup>69</sup>
- 4.97 Accordingly, LECC recommended that Parliament consider the immediate repeal of preventative detention powers.<sup>70</sup>

### Current stakeholder submissions on retention or repeal of Part 2A of the Act

- 4.98 The NSWPF did not support this recommendation. They maintain that as the investigative detention powers in Part 2AA have not yet been operationally tested, it would be premature to rely solely on them by repealing the PDO powers in Part 2A. Further, NSWPF are of the view that the PDOs remain a valuable tool to disrupt a terrorist attack.
- 4.99 In contrast, the Bar Association, Public Defenders, District Court of NSW, the ACYP, Legal Aid NSW and the Law Society of NSW supported the LECC Review's recommendation that Parliament consider repealing the PDO powers in Part 2A of the Act.

### The Department's view on retention of Part 2A of the Act

- 4.100 In the 2018 statutory review, the Department took the view that it would be premature to repeal Part 2A before the new Part 2AA powers have been operationally tested<sup>71</sup>. As indicated above, the investigative detention powers in Part 2AA have not yet been used.

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<sup>66</sup> Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002*, January 2017 – June 2020, p.72

<sup>67</sup> Ibid.

<sup>68</sup> Ibid, p. 9

<sup>69</sup> Ibid, p. 72

<sup>70</sup> Ibid, p. 73

<sup>71</sup> NSW Department of Justice, *Statutory Review, Terrorism (Police Powers) Act 2002*, June 2018, p. 6 and 46.



- 4.101 All Australian jurisdictions have PDO schemes in accordance with the 2005 COAG agreement. The repeal of Part 2A by NSW would be inconsistent with the COAG agreement and the national framework for preventing and responding to terrorism.
- 4.102 The NSWPF continues to advise that PDOs are a useful counter-terrorism tool. In their view, Part 2A powers remain appropriate and necessary and a valuable disruption mechanism in the context of an imminent terrorist attack.
- 4.103 The Department acknowledges the concerns expressed by LECC about the operational readiness of NSWPF to use PDOs, but considers that addressing the operational concerns would be more appropriate than repealing the entire scheme.
- 4.104 As indicated above, the operation of Part 2A is due to expire on 16 December 2023 under the sunset clause in section 26ZS of the Act. Accordingly, the Department recommends that section 26ZS of the Act should be amended to extend the operation of Part 2A of the Act for a further three years to 16 December 2026.

#### **Recommendation 2:**

Section 26ZS of the *Terrorism (Police Powers) Act 2002* should be amended to extend the operation of Part 2A for a further 3 years.

#### **The application of Part 2A of the Act to children**

- 4.105 The ACYP submitted that if Part 2A were to be retained, provisions should be inserted to promote the best interests of children and acknowledge that children detained under the Act deserve special consideration and support. The ACYP suggested that such provisions could reflect the relevant objects and principles in legislation like section 6 of the *Children (Criminal Proceedings) Act 1987*, section 4 of the *Children (Detention Centres) Act 1987*, section 7 of the *Young Offenders Act 1997* and sections 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998*.

#### **The Department's view on the application of Part 2A to children**

- 4.106 The 2018 statutory review canvassed the issue of safeguards for children on PDOs as part of its discussion of the safeguards for vulnerable people under Part 2A of the Act.<sup>72</sup> Recommendation 12 of the report provided for additional protections for persons under 18 years or with impaired intellectual functioning. However, as indicated in the discussion of Part 2AA of the Act above, the 2018 statutory review did not adopt the ACYP's submission that the Act should incorporate the best interests of the child and other provisions of the kind often found in criminal legislation relating to children.
- 4.107 For these reasons and for the reasons given above in the discussion of Part 2AA of the Act, the Department considers that no new issues or developments appear to have been raised in stakeholder submissions to warrant departure from the conclusions reached by the 2018 statutory review.

#### **A detained person's right to complain about their treatment in detention**

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<sup>72</sup> Ibid, p. 51-55.

- 4.108 The 2022 LECC report noted an apparent lacuna in the Act that prevents persons detained on a PDO in a correctional centre or a youth detention centre from contacting the Ombudsman to complain about their treatment while detained in such centres.<sup>73</sup>
- 4.109 When PDOs were introduced in 2005, section 26ZF of the Act gave persons detained by PDO the right to contact both the NSW Ombudsman and the Police Integrity Commission (**PIC**). The provision's intent was to maintain avenues of complaint for detained persons about their treatment under a PDO. At this time, PIC had oversight of police officer conduct and the NSW Ombudsman had power to deal with complaints about the NSWPF, Corrective Services NSW (**CSNSW**) and Youth Justice.
- 4.110 LECC was established in 2017 to take over all NSWPF oversight functions from PIC and the Ombudsman. The Act was amended by the LECC Act to reflect this by transferring the Ombudsman's powers to review the exercise of powers under Parts 2A and 3 of the Act to LECC. Other references throughout the Act to both PIC and the Ombudsman were amended to refer to the LECC, including the right to contact the Ombudsman under section 26ZF of the Act and the duty of the police officer responsible for a person's detention under a PDO to inform the person of their right to contact the Ombudsman.
- 4.111 The Ombudsman continued to have power under the *Ombudsman Act 1974* to deal with complaints about the conduct of CSNSW and Youth Justice officers after its powers to review police conduct were transferred to LECC in 2017. However, the amendments made to the Act removed the right of persons detained under a PDO in a correctional centre or a youth detention centre to contact the Ombudsman.
- 4.112 Accordingly, at recommendation 10 of its review, LECC has recommended an amendment to section 26ZF of the Act to provide that a detained person may contact the NSW Ombudsman. LECC has also recommended at recommendation 11 of its review that sections 26Y and 26Z of the Act be amended to require the nominated senior officer of the NSWPF who detains a person on an interim PDO and a substantive PDO to inform detained persons of their right to contact the NSW Ombudsman (rather than the LECC) about the conduct of correctional officers or youth justice officers in connection with their detention under a PDO.

### Current stakeholder views

- 4.113 Every stakeholder who provided comment supported or had no objection to these recommendations. The NSWPF stated they had no objections to the amendments as proposed. Corrective Services NSW advised that it supported the recommendations, but emphasised that the obligation to inform a detained person of their rights under a PDO should remain with NSWPF.

### The Department's view

- 4.114 LECC's recommendations reflect that the NSW Ombudsman has oversight of complaints about the treatment of individuals in correctional centres and youth detention centres. In contrast, LECC's function is to investigate and oversee law enforcement officer misconduct and agency maladministration. Accordingly, if a person wishes to complain about their treatment in a correctional centre or a youth detention centre, the appropriate authority to whom that complaint should be made to

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<sup>73</sup> Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002*, January 2017 – June 2020, p.74



is the NSW Ombudsman and not the LECC. The Department also notes with respect to CSNSW's comments that the obligation under sections 26Y and 26Z to inform a detained person of their rights is the nominated officer of the NSWPF who detains the person on the PDO.

**Recommendation 3:**

Section 26ZF of the *Terrorism (Police Powers) Act 2002* (NSW) should be amended to allow a person detained under a preventative detention order to contact the NSW Ombudsman.

**Recommendation 4:**

Sections 26Y and 26Z of the *Terrorism (Police Powers) Act 2002* (NSW) should be amended to require the nominated senior officer to inform the person of their right to complain to the NSW Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.

## Part 3 – Covert search warrants

### Background to Part 3 and key provisions

- 4.115 The covert search warrant scheme in Part 3 of the Act was introduced in 2005.<sup>74</sup> It was introduced to address the covert and secretive activities of terrorist groups by giving NSWPF capability to obtain a warrant to covertly search premises connected to terrorism activities to prevent and respond to terrorist threats.<sup>75</sup>
- 4.116 Covert search warrants under Part 3 of the Act provide NSWPF with powers to enter and search premises without the knowledge of the owner or occupier. Under section 27G of the Act, officers of the terrorism investigations group of the NSWPF<sup>76</sup> may apply to an eligible Judge of the Supreme Court for a covert search warrant if they believe 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.
- 4.117 Division 2 of Part 3 of the Act provides that, prior to making an application for a covert search warrant to an eligible Judge, the police officer must seek authorisation from the Police Commissioner or the Assistant Commissioner responsible for counter terrorism, or the Assistant Commissioner responsible for counter terrorism investigations.
- 4.118 Section 27K of the Act provides that an eligible Judge to whom an application is made may, if satisfied that there are reasonable grounds for doing so, issue a covert search warrant. The eligible Judge must consider a range of matters when deciding whether to issue a covert search warrant, including:
- the reliability of the information on which the application is based
  - any connection between the terrorist act in respect of which the application has been made and the kinds of things proposed to be searched for, seized, substituted for a seized thing, copied, photographed, recorded, operated, printed or tested, under the warrant
  - the nature and gravity of the terrorist act
  - the extent to which the exercise of powers under the warrant would assist in the prevention of, or response to, the terrorist act
  - alternative means of obtaining the information sought to be obtained, and
  - the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act would be affected.

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<sup>74</sup> *Terrorism Legislation Amendment (Warrants) Act 2005*.

<sup>75</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p. 16940, Bob Debus, Attorney General

<sup>76</sup> Section 27A of the *Terrorism (Police Powers) Act 2002* defines a police officer employed in the NSWPF terrorism investigation group as an 'eligible police officer'. Section 27G provides that an eligible police officer who is authorised under Division 2 of Part 3 may apply for a covert search warrant.

4.119 Section 27J of the Act limits the eligible Judge's power to issue a covert search warrant by providing that the judge must not issue a warrant unless the application for the warrant includes certain information, including:

- the address or other description of the subject premises,
- particulars of the grounds on which the application is based,
- the name of any person believed to be knowingly concerned in the commission of the terrorist act in respect of which the application is made and, if no such person is an occupier of the subject premises, any known occupier of the premises,
- the powers that are proposed to be exercised on entry to the subject premises,
- a description of 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.

4.120 Section 27N of the Act requires a covert search warrant to specify certain matters, including:

- the address or other description of the subject premises,
- the name of any person believed to be knowingly concerned in the commission of the terrorist act in respect of which the application is made and, if no such person is an occupier of the subject premises, any known occupier of the premises
- a description of the kinds of things that may be searched for, seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested.

4.121 Section 27O of the Act provides for the issuing of a covert search warrant by the eligible Judge. Subsection (1) lists the actions that a person who has obtained a warrant is authorised to do in executing the warrant. This includes entering and searching the premises that are the subject of the warrant and the seizing, substitution, copying, photographing, recording, operating, printing or testing of any thing or things described in the warrant which are found during the execution of the warrant.

4.122 LECC reported that during the period covered by its report, NSWPF applied for four covert search warrants and all four warrants were granted and executed.<sup>77</sup>

### Consideration of Part 3 by the 2018 statutory review

4.123 The main issue in Part 3 of the Act that was considered by the 2018 statutory review was a submission in support of the repeal of Part 3. The submission was not adopted by the 2018 statutory review.

4.124 The Department noted that similar covert search warrant powers are exercised by NSWPF under the Federal delayed notification search warrant in Part IAAA of the *Crimes Act 1914* (Cth). It noted that Part 3 powers are extraordinary powers that were only used in extraordinary circumstances. The restraint on the use of these powers coupled with the fact that the NSWPF are responsible for the operational

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<sup>77</sup> Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002*, January 2017 – June 2020, p. 17.

response to a terrorism investigation in NSW, indicated that the Part 3 powers should be continued.

### LECC's 2022 report on the exercise of Part 3 powers

- 4.125 Recommendations 3 and 13 of LECC's 2022 report made legislative recommendations relating to the exercise of Part 3 covert search warrant powers.
- 4.126 Recommendation 3 recommended that Parliament consider:
- (a) amending section 27O of the Act to make clear which power a police officer must request in the application, and the eligible Judge must grant in the warrant, in order for police to be authorised to take and analyse forensic samples from the subject premises, or from things seized from the subject premises; and
  - (b) including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed.
- 4.127 Recommendation 13 recommended that Parliament consider amending section 27ZB of the Act to require the NSW Police Force to report on the number of covert search warrants under which DNA samples were taken either from the subject premises, or from things seized from the subject premises.

### Taking and testing of DNA samples by NSWPF in execution of covert search warrants

- 4.128 Recommendation 3 of the 2022 LECC report was informed by LECC's findings about the taking of DNA samples by NSWPF while executing covert search warrants.
- 4.129 LECC reported that NSWPF took DNA samples at the premises, or from items seized from the premises, in connection with the execution of three of the four covert search warrants obtained during the period covered by LECC's report.<sup>78</sup> Testing of a thing seized in the execution of a warrant was a power sought in the application for one of the three covert search warrants under which DNA was taken, in accordance with section 27J of the Act.<sup>79</sup> However, on the application paperwork for the other two warrants, the power to test a kind of thing was struck out by the applicant police officer as not being a power requested to be authorised in those warrants. It appeared to LECC that the taking of DNA samples during the execution of those warrants was opportunistic, rather than planned. LECC reported that it was advised by NSWPF said that the DNA samples taken were ultimately not subject to forensic testing.<sup>80</sup>
- 4.130 LECC reported that when it raised the issue of taking DNA samples under a covert search warrant with NSWPF, NSWPF agreed that taking and/or testing of DNA samples constitutes 'testing a thing' within the meaning of section 27O(1)(l) of the Act and agreed that testing of DNA samples required authorisation by inclusion in the warrant issued under section 27O.<sup>81</sup> The NSWPF advised LECC that police officers

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<sup>78</sup> Ibid, p. 18 and 29.

<sup>79</sup> Ibid, p. 30

<sup>80</sup> Ibid, p. 31

<sup>81</sup> Ibid, p. 30

were now alert to the requirements of the Act in relation to things to be tested, as a result of LECC's review.

#### LECC's consideration of regulation of the taking of DNA and forensic samples

- 4.131 LECC observed that the covert collection of DNA samples by police (i.e. the collection of a person's DNA other than by taking a sample directly from the person with the person's knowledge) is currently not regulated in New South Wales.<sup>82</sup> The *Crimes (Forensic Procedures) Act 2000* (NSW) (**CFP Act**) regulates the circumstances in which police can conduct 'intimate' and 'non-intimate' forensic procedures on a person to obtain 'forensic material', but it does not prohibit taking DNA samples covertly from items the person has (or may have) touched. LECC noted that the Australian Law Reform Commission and the NSW Ombudsman have considered the risks arising from the fact that the covert collection of DNA samples is not regulated and have made recommendations for statutory regulation in this area.<sup>83</sup>
- 4.132 LECC noted an undertaking given by the former Attorney General in 2005 when introducing the Bill which inserted Part 3 into the Act, that the possible collection of DNA under a covert search warrant would be regulated as part of a general regulatory framework to be developed by the former Attorney General's Department, in consultation with NSWPF.<sup>84</sup> LECC also noted that a Forensic Working Party, headed by former Supreme Court Justice Graham Barr, was set up in 2010 to review the CFP Act (**the Barr Review**), as part of a 'major review' of the laws governing DNA and related forensic procedures.<sup>85</sup> LECC noted advice from the Attorney General and the NSWPF about work done to respond to the Barr Review, including that NSWPF had developed a draft DNA Profiles and Forensic Procedures Bill, which was subject to stakeholder consultation in 2021 and that further consultation was anticipated in 2022.<sup>86</sup>
- 4.133 LECC stated that there is no guidance in law or policy for police officers considering taking DNA samples during the execution of a covert search warrant under the Act.<sup>87</sup> LECC expressed the view that there is a need for clear guidance in both the law and policy as to when collection of forensic samples is authorised, how samples are to be recorded, how the information derived from any analysis of those samples is to be stored, how that information is to be used, and when the samples must be destroyed.<sup>88</sup>
- 4.134 As a starting point, LECC considered that it would benefit both the NSWPF and members of the community for it to be clear when authority is being sought under a covert search warrant to take DNA samples, and when that authority has been granted. Accordingly, it recommended that section 27O of the Act be amended to make clear which power a police officer must request in an application for a covert search warrant, and the eligible Judge must grant in the warrant, in order for police to be authorised to take and analyse forensic samples from the subject premises, or from things seized from the subject premises.<sup>89</sup>

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<sup>82</sup> Ibid, p. 31

<sup>83</sup> Ibid, p. 32

<sup>84</sup> Ibid, p. 32

<sup>85</sup> Ibid, p. 32

<sup>86</sup> Ibid, p. 33

<sup>87</sup> Ibid, p. 34

<sup>88</sup> Ibid, p. 35

<sup>89</sup> Ibid, p. 36

- 4.135 LECC also recommended including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed.

#### Current stakeholder views on recommendation 3 of LECC's report

- 4.136 There was broad stakeholder support for recommendation 3 of LECC's report.
- 4.137 However, NSWPF suggested that the amendment proposed in paragraph (a) of recommendation 3 was not necessary. NSWPF expressed the view that the objective of the amendment was already achieved by section 27J(1)(g) of the Act, which requires the officer seeking the warrant to provide the eligible judge with a description of the kinds of things to be searched for, seized, substituted, photographed, recorded, operated, printed or tested. In describing the item or items to be seized or tested in the application for the warrant, NSWPF advise the Judge of their intention (where applicable) to take and analyse forensic samples. Therefore, NSWPF considered that the objective in LECC's recommendation that police specifically be authorised to take and analyse forensic samples is already achieved by describing the items to be seized or tested during the process for the warrant itself.
- 4.138 NSWPF supported paragraph (b) of recommendation 3.

#### The Department's view on recommendation 3 of LECC's report

- 4.139 The word 'thing' is not defined in the Act or in other criminal legislation relating to police powers to execute warrants, such as LEPR. Ordinarily, it has a broad range of meanings that capture a very wide range of objects, items, actions and circumstances. The online version of the Macquarie Dictionary gives 34 examples of its use, including:
1. a material object without life or consciousness; an inanimate object.
  2. some entity, object, or creature which is not or cannot be specifically designated or precisely described: *the stick had a brass thing on it.*
- 4.140 The breadth of the meaning of 'thing' appears to be sufficiently broad to pick up any physical matter such as a DNA sample.
- 4.141 Section 27J(1)(g) of the Act prohibits an eligible Judge from issuing a covert search warrant unless the application for the warrant includes a description of 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 in the course of executing the warrant.
- 4.142 In determining whether there are reasonable grounds to issue a covert search warrant, section 27K(2) of the Act requires the eligible Judge to consider certain matters, including 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.
- 4.143 Section 27N(d) of the Act requires a covert search warrant to specify a description of the kinds of things that may be searched for, seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested.



- 4.144 Section 27O(1)(e),(g) and (l) of the Act provide that a covert search warrant authorises a search for any kind of thing described in the warrant and the seizure and testing of a thing if the warrant authorises the seizure and testing of that kind of thing.
- 4.145 The Department considers that the combined effect of these provisions is that:
- unless a NSWPF application for a covert search warrant under section 27G of the Act includes a description of the kinds of things that NSWPF propose to search for, seize and test while executing the warrant, including DNA where relevant, section 27J of the Act prohibits an eligible Judge from issuing the warrant
  - the eligible Judge must consider under section 27K(2) of the Act whether there is a connection between the terrorist act in respect of which the application has been made and the DNA that is proposed to be searched for, seized and tested, when determining whether there are reasonable grounds to issue the warrant
  - the covert search warrant issued by the eligible Judge must, in accordance with section 27N of the Act, specify a description of the kinds of things that may be searched for, seized and tested, including DNA where relevant, and
  - in accordance with section 27O of the Act, the covert search warrant authorises NSWPF to search for DNA where it is described in the warrant, and authorises NSWPF to seize and test DNA where the warrant authorises the seizure and testing of DNA.
- 4.146 The Department considers that these provisions are clear about which power a police officer must request in an application for a covert search warrant, and the eligible Judge must grant in the warrant, for police to be authorised to take and analyse forensic samples from the subject premises, or from things seized from the subject premises. Accordingly, the Department does not consider it necessary to progress the legislative amendment proposed in recommendation 3(a) of LECC's report.
- 4.147 In addition, covert search warrants are not unique to Part 3 of the Act. They were introduced into LEPPRA in 2009 by the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* to support the investigation of serious criminal offences. LEPPRA's search warrant scheme contains similar provisions to Part 3 of the Act, including provisions to seek authority under a search warrant to search for a kind of thing on the premises and to seize things found on the premises where mentioned in the warrant.<sup>90</sup> Amendments to the Act to address the DNA collection issue raised by LECC may have implications for the search warrant framework in LEPPRA, which are outside the scope of this statutory review.
- 4.148 The Department considers that it would be appropriate for consideration of proposals to amend the provisions in Part 3 of the Act relating to collection of DNA samples to be deferred pending the outcomes and recommendations of the current NSWPF development and consultation on a draft DNA Profiles and Forensic Procedures Bill in response to the Barr review.
- 4.149 With respect to paragraph (b) of recommendation 3, the Department notes that NSWPF supports this recommendation and understands from the NSWPF

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<sup>90</sup> See, for example, *Law Enforcement (Powers and Responsibilities) Act 2002*, sections 47A, 48, 49 and 62

submission that it will address the issue in the forthcoming DNA and Forensics Procedures Bill.

### LECC's recommendation - annual report to the Attorney General and Police Minister

- 4.150 Section 27ZB of the Act provides that the Commissioner of Police must report annually on the exercise of these powers to both the Attorney General and the Minister for Police. Subsection (3) provides a list of items that are to be included in the reports. Recommendation 13 of the LECC Review has recommended that the section be amended, (perhaps by inserting another item to the list in subsection 3), to include the number of covert search warrants where DNA samples were taken from either the subject premises or from items seized from the subject premises.

### Stakeholder views

- 4.151 There was broad stakeholder support for this recommendation, apart from the NSWPF. The NSWPF noted that s27ZB(3)(l) of the Act allows the Attorney General or Minister for Police to request reporting of 'any other matters'. NSWPF contend that should the Attorney General or Minister for Police require information about DNA samples there is already a mechanism for requesting it. Therefore, the recommendation is not necessary.

### The Department's view on contents of annual reports to Ministers

- 4.152 Section 27ZB of the Act requires the Commissioner of Police to report annually to the Attorney General and the Minister for Police on the exercise of powers under Part 3 of the Act on a range of matters relating to covert search warrants. The report must include information about the number of covert search warrants under which any things were seized and the number of covert search warrants under which any things were tested.
- 4.153 As indicated above, NSWPF acknowledged in its response to LECC about the taking of DNA samples during the execution of covert search warrants that the testing of DNA samples constitutes 'testing a thing' within the meaning of section 27O(1)(l) of the Act and agreed that testing of DNA samples required authorisation by inclusion in the warrant issued under section 27O. The NSWPF advised LECC that police officers were now alert to the requirements of the Act in relation to things to be tested, because of LECC's review.
- 4.154 Accordingly, when a DNA sample is taken from premises and tested during the execution of a covert search warrant, those occurrences must be included in the report to the Attorney General and the Minister for Police under section 27ZB of the Act.
- 4.155 As noted above, Part 3 of the Act sits within a broader legal framework for obtaining and executing search warrants. Within that framework are requirements to provide reports to the Attorney General and the Minister for Police about activities relating to covert search warrants for tabling in Parliament.
- 4.156 Section 242A of LEPPRA requires NSWPF and other law enforcement agencies to report annually to the Attorney General and the Minister for Police on the exercise of powers under Part 5 of LEPPRA with respect to covert search warrants by law enforcement officers of those agencies. The reporting requirements under section 242A of LEPPRA are almost identical to those under section 27ZB of the Act and include a requirement to report on the number of covert search warrants under which



any things were seized and the number of covert search warrants under which any things were tested.

- 4.157 Implementing LECC's recommendation would require NSWPF to separately report on the number of covert search warrants under Part 3 of the Act where DNA samples were taken from either the subject premises or from items seized from the subject premises, without a similar requirement for reporting on covert search warrants under LEPPRA.
- 4.158 The Department considers with respect to the proposed amendment to section 27ZB of the Act, that there is a public interest in consistency with other search warrant frameworks, including with respect to reporting on the exercise of covert search warrant powers. The question of what reporting should be undertaken about the collection and testing of DNA samples also sits within the broader issue of the regulation of DNA and forensic procedures which is currently being considered by NSWPF. The Department considers it would be appropriate for this issue to be raised and considered within the broader legal frameworks for covert search warrants and DNA and forensic procedures to ensure that reporting on the taking and testing of DNA samples is consistent across all such frameworks. Accordingly, the Department does not adopt recommendation 13 to amend section 27ZB of the Act.

## Part 4 – Miscellaneous

4.159 Part 4 of the Act provides for a range of miscellaneous matters relating to the administration of the Act, including:

- Return of items that are seized or come into police custody under the Act
- Disposal of property by police officers on application to a court
- Protection of police officers acting under an authorisation under Part 2 of the Act, and
- Ministerial arrangements for things seized in connection with extra-territorial offences.

4.160 No submissions were received from stakeholders about any of the provisions in Part 4 of the Act. The Department does not make any recommendations to amend Part 4 of the Act.

4.161 Finally, the Department notes that schedule 1 of the Act is repealed while schedule 2 of the Act makes provision for savings and transitional provisions. No submissions were received from stakeholders about these provisions and the Department does not make any recommendations to amend them.

## Appendix A: Stakeholders who made a submission to the statutory review

Submissions to the Review were received from the following organisations:

- NSW Information and Privacy Commission
- NSW Police Force
- Legal Aid NSW
- The NSW Bar Association
- The Law Society of NSW
- The Public Defenders
- District Court of NSW
- Law Enforcement Conduct Commission
- Advocate for Children and Young People

## Appendix B: Counter-terrorism laws in Australia

- *Criminal Code* (Cth) Part 5.3
- *Crimes Act 1914* (Cth), Part IAA, Division 3A, Part IAAA and Part IC, Division 1, Subdivision B.
- *Terrorism (Community Protection) Act 2003* (Vic)
- *Terrorism (Police Powers) Act 2005* (SA)
- *Terrorism (Preventative Detention) Act 2005* (SA)
- *Terrorism (Extraordinary Powers) Act 2005* (WA)
- *Terrorism (Preventative Detention) Act 2006* (WA)
- *Terrorism (Emergency Powers) Act 2003* (NT)
- *Police Powers and Responsibilities Act 2000* (Qld), Chapter 9
- *Public Safety Preservation Act 1986* (Qld), Part 2A
- *Terrorism (Preventative Detention) Act 2005* (Qld)
- *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT)
- *Police Powers (Public Safety) Act 2005* (Tas)
- *Terrorism (Preventative Detention) Act 2006* (Tas)

## Appendix C: Non-legislative counter-terrorism strategies and programs

### NSW Counter Terrorism Plan

The NSW Counter Terrorism Plan was published in December 2018 by the State Counter Terrorism Committee.<sup>91</sup>

The NSW Counter Terrorism Plan is a sub-plan of the NSW State Emergency Plan. It informs the public, business, persons working in the counter terrorism field and government about NSW's counter terrorism arrangements.

The Plan outlines responsibilities, authorities and mechanisms to prevent, prepare for, respond to and recover from acts of terrorism within NSW.

The Plan identifies NSWPF as the combat agency for terrorism. The Counter Terrorism and Special Tactics Command within NSWPF has a specific focus on preventing, preparing for, and responding to terrorism in NSW.

The NSW Department of Premier and Cabinet, the NSW Department of Communities and Justice and the NSW Police Force collaborate on and lead state level counter terrorism development.

The NSW Counter Terrorism Plan complements the National Counter Terrorism Plan, which details national arrangements for preventing, preparing for and responding to terrorism.<sup>92</sup>

### Countering violent extremism programs and initiatives

The NSW Government has invested \$49.6 million over four years until 2024 for a range of countering violent extremism (**CVE**) initiatives. These initiatives seek to improve community resilience, divert at-risk individuals away from violent extremism, and disengage violent extremists.

The \$49.6 million allocated to CVE from 2020-2024 includes these initiatives:

- \$13.4 million towards the expansion of the Community Partnership Action (COMPACT) grants program, the online Remove Hate from the Debate campaign and developing community resilience networks. COMPACT supports community-driven youth engagement projects that aim to inspire and empower young people as champions for community harmony.
- \$1.4 million towards other community cohesion initiatives, including continued delivery of an existing online youth-engagement project and new measures to help young people build their digital intelligence and tackle hate-based behaviours.
- \$7 million to support young people and adults in custody who are vulnerable to violent extremism to build resilience, and be diverted and disengaged from violent

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<sup>91</sup> NSW State Counter Terrorism Committee, *New South Wales Counter Terrorism Plan*, December 2018: <https://www.nsw.gov.au/sites/default/files/2021-04/emergency-management-counter-terrorism-plan.pdf>

<sup>92</sup> Australia-New Zealand Counter-Terrorism Committee, *National Counter Terrorism Plan*, 2017, <https://www.nationalsecurity.gov.au/what-australia-is-doing-subsite/Files/anzctc-national-counter-terrorism-plan.PDF>

extremism. This includes resourcing for the Proactive Integrated Support Model (PRISM), and specialised case management capability in Youth Justice.

- \$1.5 million for improved Police capability to identify and respond to bias crime. This will include training for frontline police officers, database enhancements and additional intelligence and analysis resources.
- \$5.6 million for continued delivery of student wellbeing and support programs in schools to address anti-social and extremist behaviour.
- \$4.5 million to fund integrated case management programs. This will strengthen coordination of CVE case management for those vulnerable to extremism and support the reintegration of families returning from foreign conflict zones.
- \$2.5 million for community advice and support for people who are worried about a friend or family member vulnerable to violent extremism.
- \$1 million for specialist mental health capability to enhance advice and education in the context of violent extremism and fixated threats.
- \$900,000 towards engaging with communities, academics, private enterprise and local government to co-design CVE measures and programs.
- \$2.2 million to support ongoing research and ensure CVE programs are responsive to emerging trends and issues and align with best practice.
- \$9.6 million in funding towards implementing CVE strategy, governance and evaluation. This is done by an expert team that leads and coordinates the delivery of CVE policies and programs across the NSW Government.