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

Department of Justice and Attorney General

2010

Contents

ISBN: 978-1-921590-27-6
Published by the NSW Department of Justice and Attorney General
Tel: (02) 8061 9222 Fax: 8061 9370

Executive Summary

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

At the time of this Review, few of the powers in the Act had been exercised. Most submissions were concerned with the policy of the scheme and the adequacy of the safeguards.

It is the conclusion of the Review that the policy and objectives of the Act still remain valid. There are 15 recommendations that aim to clarify the original policy intention of certain provisions.

Recommendations

Recommendation 1: The regulations be amended in order to prescribe each of the proposed exclusions from the *Crimes (Administration of Sentences) Act 1999* contained in Appendix 2 in respect of preventative detainees.

Recommendation 2: The NSW Police Force give consideration to including the provision of interpreters in their Standard Operating Procedures on the exercise of the powers in Parts 2 and 2A of the Act (in particular, sections 16, 23 and 26T).

Recommendation 3: The NSW Police Force record data on requests for, and the provision of, interpreters under the Act.

Recommendation 4: The Act be amended to specify that a written statement requested under section 23(2) of the Act is to be provided within 30 days.

Recommendation 5: The Act be amended to specify that any person detained under a preventative detention order is informed of their general right to contact the Ombudsman under section 26ZF.

Recommendation 6: The Act be amended to specify that any person detained under a preventative detention order is informed of their right to complain to the Police Integrity Commission about the conduct of any police officers.

Recommendation 7: The Act be amended to specify that any person detained under a preventative detention order may communicate with an accredited departmental chaplain, subject to any prohibited contact order and appropriate monitoring.

Recommendation 8: The Attorney General consult with the Supreme Court regarding the possibility of inserting a provision into the Act allowing the Court the discretion to determine whether contact with a lawyer should be monitored or not.

Recommendation 9: The Act be amended to allow a person monitoring detainee-lawyer communications under s26ZI of the Act to consult a lawyer regarding the status of information obtained through monitoring and their obligations under the Act regarding disclosure.

Recommendation 10: The Act be amended to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, where the court is satisfied this is in the interests of justice, and to require police to refer a person in preventative detention to Legal Aid where such an order is in place, or where the person is otherwise unable to contact a lawyer.

Recommendation 11: The Act be amended so that, in relation to detainees who are under 18, police, as far as practicable, are to assist the detainee in exercising their contact rights under the Act with the detainee's parent, guardian or other person who is able to represent their interests.

Recommendation 12: The Act be amended to implement a consistent definition for vulnerable persons subject to a preventative detention order, and provide that police are to assist a vulnerable person in exercising their rights under the Act.

Recommendation 13: The Act be amended to require the nominated senior police officer to release a person from preventative detention as soon as practicable where the grounds for detention no longer exist.

Recommendation 14: The Act be amended to remove the obligation to destroy covert search records, to enable proper oversight of covert search functions.

Recommendation 15: The Act be amended to extend the monitoring function of the Ombudsman in relation to Parts 2A and 3 of the Act, and amend the statutory review provision to ensure that reviews take place according to an appropriate statutory timetable.

1. Introduction

It is clear that the threat of terrorism remains an ongoing concern for government and law enforcement agencies around Australia.

In August 2009, the Commonwealth Government released a Discussion Paper on National Security Legislation for public consultation. The Paper outlined a series of proposals to clarify and strengthen its terrorism related legislation, with a view to ensuring that law enforcement and security agencies continue to have the tools they need to fight terrorism, while ensuring the laws and powers are balanced by appropriate safeguards and are accountable in their operation.

On its Annual Report to Parliament tabled on 27 October 2009, the Australian Security Intelligence Organisation (ASIO) stated that terrorism remains a serious and immediate threat to Australia and is expected to be a destabilising force for the foreseeable future.

Recent convictions and arrests for terror-related activity also highlight the ongoing nature of the threat of terrorism in this country.

All of these issues underscore the need for NSW to remain vigilant in ensuring that the laws of the State are adequate to manage and contain any eventuality, which may result from a terrorist act or the threat of one.

1.1 Terms of reference for the review

Section 36 of the Act provides as follows:

36 Review of Act

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

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

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

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

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

The Act was assented to on 5 December 2002 and commenced operation on 15 December 2002. Reviews of the Act were conducted in 2005/6 and 2007.

1.2 Conduct of the Review

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

This is the third Review of the Act. The first Review was tabled on 22 November 2006 and the second on 13 November 2007. Both Reviews concluded that the policy and objectives of the Act still remained valid, however, legislative amendments were made to clarify the original policy intention of certain provisions.

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

The present Review covers the period from early 2007 until 2009, and in addition to reviewing the policy objectives and terms of the Act, examines recommendations made by the NSW Ombudsman in his review of Parts 2A and 3 of the Act (tabled in October 2008).

Consultation was conducted in relation to the operation of the Act and whether the policy objectives remain valid. Key stakeholders were invited to make submissions in relation to the Review and an advertisement was placed on the website of Criminal Law Review. A schedule of persons and organisations that made submissions is at **Appendix 1.**

Criminal Law Review prepared this report, which is the result of the review process and takes into account the responses received.

2. Background to the Introduction of the Act

2.1 Background to the Act

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

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

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

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

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

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

The COAG Communiqué states:

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

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

The amendments allow for covert search warrants to be issued and executed and preventative detention orders to be made, in addition to the original special police powers,

2.2 Objectives of the Act

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

- confer special powers on police officers to deal with imminent threats of terrorist activity and to effectively respond to terrorist acts after one has occurred;
- to detain suspected persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act; and
- to enable the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the New South Wales Crime Commission for the purposes of responding to or preventing terrorist acts (including obtaining evidence of the NSW offence of membership of a terrorist organisation[2]).

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

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

2.3 Summary of the provisions of the Act

The Act is divided into three key parts:

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

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

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

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

[2] s310J, *Crimes Act 1900*

or for any combination of those purposes.

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

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

The authorisation enables a police officer to:

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

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

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

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

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

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

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

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

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

2.4 The use of the provisions of the Act

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

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

To date, the powers under Part 2A, relating to preventative detention, have not been utilised. Applications have been made pursuant to Part 3, which concerns covert search warrants. Since the commencement of the Act, five applications have been granted and three of those warrants were subsequently executed. There have been no applications for covert search warrants since the last statutory review.

2.5 The inaugural review

The first review of the Act under section 36 was tabled in Parliament on 22 November 2006.

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

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

2.6 The second review

The second review covered the period between consultation for the first review (which took place in early 2005) and early 2007. The review was tabled on 13 November 2007. The second Review considered the authorisation of special police powers for use in raids carried out in Sydney in November 2005 as part of *Operation Pendennis,* the operation of the covert search warrant scheme and the use of preventative detention orders. A number of recommendations were made, which were included in the *Law Enforcement and other Legislation Amendment Act 2007.*

2.7 Amendments to the Act since the second review

The following minor amendments have been made to the Act since the second Review (including the amendments directly flowing from that review).

The *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Act 2007* clarified that the provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* apply to preventative detainees, subject to any exemptions in the regulations. This clarifying amendment commenced on 15 June 2007.

The *Law Enforcement and other Legislation Amendment Act 2007* amended the following sections of the Act as a result of recommendations made in the second review:

- Sections 18 and 22 to provide that, when the exercise of special police powers is authorised in connection with a terrorist act or threatened terrorist act, the power to stop and search vehicles, vessels and aircraft includes the power to enter vehicles, vessels and aircraft;
- Section 26U to provide that, when a preventative detention order is in force in relation to a person, the power to enter and search premises for the person includes the power to enter and search vehicles, vessels and aircraft for the person;
- Section 27A to provide that the covert search warrant scheme in Part 3 in relation to premises extends to vehicles, vessels and aircraft;
- Section 23 (which relates to the identification and other details that a police officer is required to disclose when exercising a special police power) to make it clear that the information may only be provided after the power is exercised if it is not reasonably practicable to provide the information before or at the time of exercising the power;
- Section 26E (which precludes the making of a preventative detention order in relation to a child under 16 years of age and which requires the release from detention of any such child who is inadvertently detained under such an order) to require the child to be released into the care of a parent or other appropriate person;
- Section 26ZA to provide that a police officer detaining a person under a preventative detention order need not comply with the requirement under that section to arrange for an interpreter if the officer believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance not reasonably practicable;
- Section 27U to make it clear that service on a person who was believed to be concerned in the terrorist act for which the warrant was executed is only required if that person occupied the relevant premises when the warrant was executed.

These amendments commenced on 21 December 2007.

Besides minor amendments made by way of statute law revision, the only other amendments made to the Act since the second review involved amendments to the

covert search warrant powers relating to the examination of computers, included in the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009*. The new powers, which were also applied to the general search warrant scheme and the new covert search warrant scheme in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), included:

a) enabling the removal of computers and similar devices from premises the subject of a search warrant, for up to 7 working days (or longer on application) for examination; and

b) enabling the search and examination of computers, including access to computers 'networked' to a computer at the search premises.

These amendments commenced on 29 May 2009.

2.8 Ombudsman's Review of Parts 2A and 3 of the Act

Under sections 26ZO and 27ZC of the Act, the Ombudsman is required to keep under scrutiny the exercise of powers relating to preventative detention orders and covert search warrants. The preventative detention orders are to be reviewed for five years, with an interim report after two, and the covert search warrants were to be reported on after two years.

The Ombudsman's interim report on preventative detention and final report on covert search warrants was finalised in September 2008 and tabled in October 2008. Throughout this review, this collective report will be referred to as "the Ombudsman's Report".

The Ombudsman's Report makes 37 recommendations which impact upon the operations of the NSWPF, Juvenile Justice and the Department of Justice and Attorney General, including Corrective Services NSW.

It was considered appropriate to address the Ombudsman's recommendations in the context of the statutory review of the Act, and a discussion of all the Ombudsman's recommendations is contained in Chapter 4. Where submissions to the statutory review raised issues also considered by the Ombudsman, the substantive discussion of these issues is found in Chapter 4.

3. Discussion of Submissions

3.1 Submissions Received

Criminal Law Review sent out consultation letters for the current review to key stakeholders in August 2009. Written submissions to the Review were invited, particularly with respect to any comments on the provisions of the Act. A list of submissions received is at Appendix 1. The Ombudsman's recent review was also noted, with the expectation that comments would be provided in response to the recommendations made in that report as well.

The following persons and bodies advised that they either had no submissions to make or that they supported the Act and did not have any substantive recommendations for amendment:

- The Chief Magistrate
- The Chief Judge at Common Law
- The Law Council of Australia
- Young Offenders Advisory Council
- Australian Federal Police
- Juvenile Justice NSW

The following organisations made submissions with substantive recommendations for amendments to the Act:

- Law Society of NSW
- NSW Legal Aid Commission
- Corrective Services NSW
- Law Enforcement and Security Co-ordination Division, Department of Premier & Cabinet
- Privacy NSW
- Australian Human Rights Commission
- Community Relations Commission
- NSW Bar Association
- The Public Interest Advocacy Centre

3.2 The Law Society of NSW

The Law Society reiterated its submission to the previous review, requesting that serious consideration be given to implementing the recommendations in the Ombudsman's Report and recommended that the Ombudsman have a monitoring role in relation to Part 2 of the Act.

Discussion

As the Law Society's previous submission was thoroughly examined during the second review of the Act, it is not intended to revisit them in the present review. The submission that the Ombudsman have a monitoring role for Part 2 of the Act was also dealt with in the second review, as it was suggested by Privacy NSW. The Law Society's support for the Ombudsman's recommendations are taken into account in Chapter 4, which deals with the Ombudsman's Report.

3.3 NSW Legal Aid Commission

The NSW Legal Aid Commission (Legal Aid) made a submission that incorporated aspects of its submission to the Ombudsman's review.

3.3.1 Maximum detention period in respect of preventative detention orders

The first issue raised concerned the maximum detention period in respect of preventative detention orders; specifically, the ability to make multiple orders which may exceed the current 14 day limit.

Discussion

Although the Ombudsman recommended that this issue be considered during the present statutory review, it appears to have been significantly ventilated during the previous statutory review (the second review). In that review the various safeguards counting against 'rolling warrants' were discussed. These were also outlined by the former Attorney General in the second reading speech introducing the provisions. Those safeguards include:

- the fact that these orders will be overseen by the Supreme Court which will be monitoring carefully any possible abuse of process; and
- the requirement that each application must contain details of previous applications and orders, allowing the Supreme Court to detect improper use.

The Ombudsman's Report acknowledged these safeguards, along with the fact that the powers are yet to be utilised, and concluded therefore that it is difficult to assess the appropriateness of the current maximum periods from an operational perspective. The Ombudsman's report also noted the views of law enforcement agencies who suggested that police were highly unlikely to seek "rolling" detention orders in preference to charging an individual once sufficient evidence of an offence had been established.

The provisions as drafted allow for a second order to be sought only in relation to a second, separate terrorist act or where the underlying purpose of the order changes. The need for such flexibility is understandable when considering the purpose of the orders is to prevent terrorist attacks or preserve evidence in the immediate aftermath of one. The supervision of the Court, as noted by the Ombudsman, stands as a safeguard against any inappropriate 'rolling' of preventative detention orders.

In light of the above, and noting the Ombudsman's comments, no amendment of the relevant provisions is necessary.

3.3.2 Access by a person against whom an order is sought to information about the grounds for seeking an application

The second submission by Legal Aid was that the preventative detention provisions should be amended to ensure:

- that a summary of the grounds of the application be provided to the detainee or the detainee's lawyer;

- that police have to apply to the Supreme Court to seek an order dispensing with the requirement to provide such a summary, if it is reasonable and appropriate in the circumstances, and
- that the detainee or the detainee's lawyer be provided with access to other evidence and information as the Supreme Court directs.

Discussion

The second statutory review (and the Ombudsman's Report) considered similar arguments, and noted that the Court has the ultimate control of the proceedings and can still make appropriate orders regarding evidence as it sees fit. While these are extraordinary provisions concerning evidence, the provisions are drafted in this way given the sensitivities of the likely situation when these powers might be exercised and the need to protect national security.

It is also noted that an application for an order must fully disclose all relevant matters of which the applicant is aware, both favourable and averse to the making of the order. As noted in the Ombudsman's Report, "without some evidence of a real problem, it is premature to make any further recommendation" (p24).

3.3.3 A detainees access to legal advice

Legal Aid also made submissions concerning a detainee's access to legal advice. Currently, section 26ZG of the Act limits the purposes for which a person the subject of an order may contact a lawyer, to issues surrounding the making or revocation of an order or the detainee's treatment during detention. Legal Aid submitted that the Act be amended to allow the court to provide more flexibility in this regard.

Discussion

The provisions regarding limits of the provision of legal advice reflect the agreement of all jurisdictions at the COAG meeting in September 2005 which agreed that the preventative detention provisions would be enacted nationally. As noted by Legal Aid, given the limited questioning that police can subject the detained person to under the Act, the limitations on contact may not have any substantive effect on the rights of the person.

In light of the national agreement and the fact that these provisions have yet to be utilised, it is not proposed that any amendment to the provisions be made at this time.

3.3.4 Monitoring of a detainee's communications with their lawyer

As this matter was the subject of a recommendation by the Ombudsman, it will be discussed in Chapter 4.

3.3.5 Concern about detention in a correctional centre

Legal Aid submitted that the most restrictive form of detention in a correctional centre involves an inappropriate element of punishment in response to an order that is intended to be precautionary in nature. It was also submitted that this would impose additional obstacles to access by lawyers to detainees.

Discussion

The arguments for and against the appropriateness of detainees being held in correctional centres were canvassed in the Ombudsman's Report. The Ombudsman did not make a specific recommendation on the issue, instead stating that his office would "continue to monitor the issue through the remainder of the review period and will provide further information and a considered view in our final report".

This issue was also examined in the previous statutory review, which made the following concluding comments on the issue:

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

It is therefore not proposed to make any changes to the existing provisions of the Act in this area.

3.3.6 Eligibility for legal aid

As this matter was the subject of a recommendation by the Ombudsman, it will be discussed in Chapter 4.

3.37 Retaining records of covert search warrants

Similarly, as this matter was the subject of an Ombudsman's recommendation, it will also be discussed in Chapter 4.

3.38 Service of occupiers notices for covert search warrants

The final submission was that Legal Aid supports the continued requirements under sections 27U and 27V of the Act relating to the service of occupiers notices (including on adjoining occupiers).

Discussion

No changes are proposed to these provisions of the Act.

3.4 Corrective Services NSW

3.4.1 Exclusions from the provisions of the *Crimes (Administration of Sentences) Act 1999* in respect of preventative detainees

The first submission from Corrective Services NSW (CSNSW) proposed a number of suggested exclusions (under section 26X(3) of the Act) from the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of*

Sentences) Regulation 2008 in respect of preventative detainees. The suggested exclusions are contained at Appendix 2.

Discussion

The rationale in respect of each of the requested exclusions is included in the table provided by CSNSW. The proposed exemptions relate to those provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2008* that are in obvious conflict with the preventative detention provisions, or which otherwise clearly do not apply.

Recommendation 1: The regulations be amended in order to prescribe each of the proposed exclusions from the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2008* contained in Appendix 2 in respect of preventative detainees.

3.4.2 Applicability of offences relating to resisting, hindering or obstructing arrest

The next submission from CSNSW was that the Act should stipulate that offences relating to an arrest for a criminal offence (e.g. resist, obstruct, hinder) also apply to the act of taking a person subject to a preventative detention order into custody (since this person is not actually 'arrested').

Discussion

It is not considered that an amendment of this kind is necessary due to the fact that current offences relating to resisting arrest (whether accompanied by the use of a weapon or another aggravating feature) in the *Crimes Act 1900* each include the act of seeking to prevent a person's lawful detention (see sections 33(2), 33A(2), 33B, 58 and 546C). None of these offences are confined to the act (or attempted act) of arrest.

3.4.3 Applicability of offences relating to escaping from lawful custody

CSNSW has also submitted that there may be a need to stipulate in the Act that preventative detention is lawful custody, and that offences related to escaping or attempting to escape from lawful custody therefore apply to preventative detainees.

Discussion

The rationale for the submission is that there is not currently a specific offence of escaping or attempting to escape from preventative detention custody under the Act, and that any prosecution relating to an escape would rely on preventative detention being held to be "lawful custody" (which is not exhaustively defined in any NSW Act).

Despite this concern surrounding the lack of an exhaustive definition, it does not appear that there would be any significant difficulty in establishing that preventative detention amounts to lawful custody. Putting aside the literal interpretation of the words, the provisions of section 26X(2A), unless specifically excluded, provide that the detainment of a preventative detainee in a correctional centre is subject to the

provisions of the *Crimes (Administration of Sentences) Act 1999* in the same way as other inmates under that Act.

3.5 Law Enforcement and Security Co-ordination Division

The Law Enforcement and Security Co-ordination Division of the Department of Premier and Cabinet had only one submission to the review. By way of general comment, the view was put forward that the police portfolio believe that the terms of the Act remain appropriate, and while the powers have not been extensively used, they have been extensively tested through practical exercises and continue to be appropriate and necessary. The one proposed amendment was that a power be introduced to allow police to remove people from a designated target area if necessary for the purposes of preventing or investigating a terrorist act. The basis for the police portfolio's proposal is that while section 19A of the Act gives a police officer the power to place a cordon around a target area (once authorised), there is no specific power for police to remove people from that target area.

Discussion

When section 19A was introduced, a corresponding amendment to the *State Emergency and Rescue Management Act 1989* was made in order to permit a range of emergency powers to be activated in concert with the special powers in Part 2 of the Act.

Despite the concerns of the Law Enforcement and Security Co-ordination Division, it is considered that the powers in the *State Emergency and Rescue Management Act 1989* are all that is necessary to safeguard public safety "threatened by an actual or imminent emergency" (see s60L). Putting to one side the fact that the threshold for a special powers authorisation for the purpose of preventing a terrorist act is that there is a threat of a terrorist act occurring in the "near future", amending the Act to allow police to remove people from a designated area in order to assist in apprehending people responsible for a terrorist act (i.e- investigating it) may create too wide a scope for the discretionary widespread removal of people from their homes and places of business. This would appear to go beyond the purely safety related objectives of the *State Emergency and Rescue Management Act* provisions, and unduly broaden provisions which have yet to be invoked. Just as many of the calls for reform in the current review have been reserved on the basis that relevant provisions of the Act have yet to be utilised, an even-handed approach to the present submission suggests that it would be premature to consider legislative reform to broaden these powers in the absence of any evidence that they are inadequate.

3.6 Privacy NSW

Privacy NSW submitted that they supported the recommendations in the Ombudsman's Report (explored in Chapter 4), and in particular, shared the concern that no oversight mechanism is provided in the Act once the initial review period by the Ombudsman has elapsed.

3.7 Australian Human Rights Commission

The Australian Human Rights Commission made a number of submissions suggesting amendment to the Act.

3.7.1 Special powers – exclusion of judicial oversight in section 13 of the Act

The Commission expressed concern over the exclusion of any judicial oversight under section 13 of the Act in relation to the authorisation and exercise of the special powers in Part 2 of the Act.

Discussion

This issue was examined during the previous review, in response to a submission from the Law Society that section 13 should be repealed. In that review, it was explained that the provision was enacted for two main reasons:

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

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

Despite concerns from the Commission on the issue of the exercise of the special powers, it was explained in the previous review that section 13 does not prevent judicial review of how the special powers are exercised. It only precludes judicial review of the authorisation itself. Appropriate safeguards are in place to monitor the authorisation process; s13 preserves the ability of the Police Integrity Commission to review the decisions of senior police and the Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the Act is not affected.

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

3.7.2 Revocation of eligible judges under the covert search warrant scheme

The Commission submitted that the power of the Attorney General under section 27B to revoke a declaration of an eligible judge be limited to situations where the judge has withdrawn his or her consent to participate in the scheme.

Discussion

Amendments were made to the Act (and related legislation dealing with 'eligible judges) in November 2009 to remove the power of the Attorney General to revoke the appointment of Supreme Court Judges as eligible Judges for the purposes of issuing search and other warrants and exercising other similar administrative functions, and to make it clear that the selection of the eligible Judge to exercise a function is not made by the Attorney General or other Minister and that the exercise of the function is not subject to the control and direction of the Attorney General or other Minister. These amendments were contained in the *Courts and Crimes Legislation Amendment Act 2009* and commenced on 3 November 2009.

3.7.3 Continuation of the Ombudsman's monitoring functions under section 27ZC of the Act

As this matter was the subject of an Ombudsman's recommendation, it will be discussed in Chapter 4.

3.7.4 Proposed limitation on the power of the court to make a preventative detention order

The Commission submitted that section 26D of the Act should be amended to include a requirement that the court may not make a preventative detention order unless it is satisfied that the purpose for which a preventative detention order is made cannot be achieved by a less restrictive means. While the Commission acknowledges that the court's task in determining whether detention under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act occurring, does import a consideration of proportionality, it has advocated in favour of a more stringent proportionality test.

Discussion

A similar concern relating to section 26D was considered in the second statutory review. In that review it was observed that the test in 26D is the same test as that adopted by the Commonwealth and all other States. As the preventative detention powers have yet to be utilised, it is considered that the case for amending the test in section 26D be deferred until such time (if any) as its execution by the courts has been found to be deficient.

3.7.5 Provision of a summary of the grounds upon which a preventative detention order is made

The Commission submitted that the requirement in section 26J that the order contain a summary of the grounds upon which it was made be supplemented by a provision setting out the minimum requirements for the content of the summary. The Commission expressed concern that as no content is prescribed for the summary, it could therefore be entirely general in nature and insufficient to alert the subject of the order to the factual basis upon which the order was made.

Discussion

This provision necessarily strikes a balance between informing the subject of the order and the need to ensure that sensitive information is adequately protected. Section 26J already specifically provides that the summary need not include any information 'likely to prejudice national security'. Furthermore, in the absence of any demonstrated examples of the provision in practice (on the basis that the provisions have yet to be utilised), there does not appear to be sufficient justification to amend the provision in the manner sought at this time.

3.7.6 The use of Special Advocates or a National Public Interest Monitor

This related submission by the Commission suggests that a Special Advocate (as in the United Kingdom) or Public Interest Monitor be used in cases where information is denied to a detainee on the basis of national security.

Discussion

As noted in the previous review, the overarching rationale for the preventative detention scheme is to protect the security interests of the State. The secure preservation of sensitive information is extremely important. The divulging of sensitive material (even via a Public Interest Monitor or Special Advocate) may have ramifications across the State and the nation in terms of the ability of law enforcement agencies ability to combat risk.

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

At present, it is not proposed to introduce a special advocate or public interest monitor scheme in the NSW.

3.7.7 More expansive contact rights should be included in the Act

The Commission submitted that more expansive contact rights should be included in the Act, including the wider application of those available to people under 18 or who are incapable of managing their own affairs.

Discussion

The contact rights in the Act are equivalent with the Commonwealth provisions and those adopted by the other States. Restriction of contact rights in respect of preventative detainees is considered to be one of the essential aspects of the preventative detention regime. The wider scope given to detainees under 18 (or who are incapable of managing their own affairs) is reflective of the additional vulnerability and needs of these groups.

3.7.8 Monitoring of a detainee's communications with their lawyer

As this matter was the subject of a recommendation by the Ombudsman, it will be discussed in Chapter 4.

3.7.9 Restrictions on a person's contact with their lawyer

The Commission submitted that the restrictions in section 26ZG of the Act in relation to the contact between a preventative detainee and their lawyer are unnecessarily limited and are inconsistent with paragraph 8 of the *Basic Principles on the Role of Lawyers Adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders* which provides that people should be able to 'communicate and consult with a lawyer, without…censorship'.

Discussion

See the discussion at paragraph 3.3.3.

3.7.10 Young people subject to preventative detention orders

The Commission submitted that the Act should be amended to require the court to take into account the best interests of a person under 18 years of age when considering a preventative detention order application. While acknowledging that a preventative detention order cannot be applied for, or made, in relation to a person under 16 years of age, it expressed concern that there is no higher threshold for the detention of a person between 16 and 18 years of age as compared to an adult.

Discussion

This and related issues were considered at paragraphs 3.41 and 3.43 of the second statutory review. In that review, the importance of having a mechanism in place to facilitate the detention of a young person was explained. It was also clarified that the object of the legislation is that the detention of the child is intended to be a measure of last resort, with the second reading speech highlighting that these powers are designed to be used only in extraordinary circumstances.

3.7.11 Limits on contact for people under 18 and those who are incapable of managing their own affairs

The Commission submitted that the limitations on contact between people under 18 years of age and those who are incapable of managing their own affairs and their parents or guardians should be removed or relaxed.

Discussion

The provisions of section 26ZH of the Act are considered to provide adequate scope for these contacts to be extended in appropriate cases, either by the Supreme Court or the police officer who is detaining the person. In the event that these provisions are shown to be inadequate or pose practical difficulties once the provisions have been utilised, the matter may be given further consideration at that time.

3.8 Community Relations Commission

The Community Relations Commission indicated its support for the development of training programs by the NSW Police Force (NSWPF) on the use of interpreters, and noted that it had observed a positive level of awareness and support for the use of interpreters among senior police officers. The Commission also made a number of submissions suggesting amendment to the Act.

3.8.1 Section 26ZA(3A) should be deleted.

The Commission noted that section 26ZA(3) directs police to arrange for an interpreter for a detainee if they have 'reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language'. However, the Commission expressed concern that section 26ZA(3A) undermines the intent of the former section when it states that a police officer 'need not arrange for an interpreter to be present in compliance with the requirement under subsection (3) if the officer believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable'.

Discussion

Section 26ZA(3A) was inserted following a recommendation of the second statutory review, in order to make section 26ZA more consistent with LEPRA. Section 128(3)(a) of LEPRA provides that a custody manager does not need to arrange for an interpreter to be present if the custody manager believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable.

3.8.2 Section 26ZA(4) should be amended to state that 'the assistance of an interpreter may be provided <u>in the first instance</u> by telephone'

The Commission also submitted that section 26ZA(4) should be amended to state that "the assistance of an interpreter may be provided <u>in the first instance</u> by telephone", in order to safeguard against the inappropriate use of telephone interpreters for lengthy sessions.

Discussion

If the proposed amendment were made to the Act, it may create a presumption that any second or subsequent contact with the subject must be made with a face to face interpreter. Such a presumption may delay assistance being given to a detainee where it is difficult to secure the attendance of a suitable interpreter. In the absence of a demonstrated problem, it is proposed to leave the provisions in their current form.

3.8.3 The use of interpreters by police should be made explicit in sections 16, 23 and 26T of the Act, and police be required to record data on requests for, and the provision of, interpreters

While the Commission acknowledged that there are often practical impediments to police communicating with people from language backgrounds other than English in the field, it was submitted that the issue should be explicitly addressed in the Act and in operational policy given the very serious consequences of these investigations. In relation to sections 16, 23 and 26T of the Act, the Commission suggested that police should be directed to contact the Translating and Interpreting Service as soon as operationally practicable, in order to convey simple information to the person being questioned.

The Commission further submitted that police should record data on whether an interpreter was requested, and whether or not such an interpreter was able to be

supplied (with reasons provided if one was not). The Commission submitted that this record-keeping would allow the NSWPF and the Ombudsman to identify situations where an interpreter was not used by police in situations when they in fact were needed.

Discussion

Given the practical impediments acknowledged by the Commission, it appears that it may be more appropriate for consideration to be given to including the former suggestion in the NSWPF Standard Operating Procedures (SOPs), rather than creating a legislative requirement. In relation to the latter suggestion, it is considered that the recording of data on the provision of interpreters would be an appropriate operational requirement to impose on the NSWPF.

Recommendation 2: The NSW Police Force give consideration to including the provision of interpreters in their Standard Operating Procedures on the exercise of the powers in Parts 2 and 2A of the Act (in particular, sections 16, 23 and 26T).

Recommendation 3: The NSW Police Force record data on requests for, and the provision of, interpreters under the Act.

The NSW Police Force supports both of these recommendations.

3.8.4 The need to define the steps involved in determining whether the provision of interpreters is 'reasonably practicable'.

The final submission by the Commission was that the NSWPF should define (in operational policy) the steps required to determine whether the provision of an interpreter is 'reasonably practicable'.

Discussion

It is considered that the determination of whether the provision of an interpreter is reasonably practicable is an assessment that must be made according to the unique set of circumstances of each individual case. It is difficult to conceive how a common set of steps, or a checklist-type approach would serve to provide an adequate level of guidance in every case. Indeed, there may be a potential for such an approach to unnecessarily limit the exercise of the discretion, thereby obviating (at least in part) the need to treat each individual exercise of discretion on its merits.

3.9 NSW Bar Association

The NSW Bar Association made a number of submissions suggesting amendment to the Act.

3.9.1 Power to give directions to agencies

The first concern raised was with the power in section 14A for police to give directions to government agencies to facilitate the exercise of the special powers conferred by the Act. The Bar Association raised concerns that such directions could include directions that agencies (such as Legal Aid or NSW Health) hand over files relating to target persons, and that privacy considerations would be overridden in relation to such files on the basis that the directions must be complied with. The Association also suggested that the annual report provisions of the Act be amended to include a requirement to report on any directions given to agencies.

Discussion

Section 14A was inserted in 2004 in order to ensure that where an authorisation for the use of the special powers was in place, police could expeditiously secure the assistance of other government agencies where necessary. For example, if the train system needed to be shut down within a "target area" police would be able to secure the rapid assistance of CityRail to achieve this.

The special powers conferred by the Act are only to be authorised for very short periods of time, either to prevent an imminent terrorist attack from occurring or to apprehend a person responsible for an attack in its immediate aftermath. In such extreme circumstances, the Government has determined that extreme measures are required in order to protect human life or ensure that perpetrators are brought to justice. However, these measures are only to be used when urgency is required, and it is for this reason that the judicial review mechanism of directions proposed by the Bar Association is inappropriate.

Given the range of possible circumstances that may surround a police investigation immediately prior to or after a terrorist attack, it is also impractical to specify certain agencies that should be exempt from the directions.

With respect to reporting requirements, the Government considers that the requirement for the Commissioner of Police to comprehensively report on the exercise of the powers and their result in the aftermath of their use is an appropriate reporting measure.

3.9.2 Supplying police officer details and information

Section 23 provides for a written statement to be provided, on request, to persons subject to the special powers, stating that the search was conducted pursuant to the Part. The Bar Association suggested that this statement should be provided within a reasonable period, such as 30 days.

The Association also suggested that police be required to explain the "nature of the power" as well as the "reason for the exercise of the power", to avoid confusion about the authority of police to exercise the powers. A similar submission was made in terms of the powers relating to preventative detention orders.

Discussion

The Government considers that a requirement to provide a requested written statement under s23(2) within a specified reasonable period is a reasonable suggestion in principle and will legislate to insert such a requirement into the Act. The recommended timeframe will be 30 days.

Recommendation 4: The Act be amended to specify that a written statement requested under section 23(2) of the Act is to be provided within 30 days.

With respect to the explanation of the nature of the powers being exercised, it is suggested that as a matter of operational policing, police will be able to explain the nature of the powers if asked by those asked to be subject to them. Given that the powers are only intended to be exercised in an emergency situation, however, it is considered impractical to impose a legislative requirement of this nature on police.

3.9.3 Monitoring of communications

This issue is considered later (in Chapter 4) in the context of the Ombudsman's report.

3.9.4 Eligible judges

The Bar Association suggested that the Government had intervened in the administration of the Supreme Court by providing a mechanism for the executive to "filter" the Supreme Court judges who may hear applications for covert search warrants and suggested that the provision must be removed.

Discussion

It is noted that, far from requiring a judge to "apply" to be an eligible judge under the Act, the High Court has held that the conferring of administrative functions upon a judge in their personal capacity cannot occur without that judges consent (*Grollo v Palmer* (1995) 184 CLR 348), hence the need for the provisions allowing the judge to be nominated.

Further, as is noted at 3.7.2 above, the Government has recently amended the provisions relating to eligible judges to make clear that there is no intention for the Government to interfere in the exercise of these functions by judges.

3.10 Public Interest Advocacy Centre

The Centre restates its consistently held view that all "counter-terrorism legislation" introduced over the last decade has been unjustified and suffers from a lack of transparency and accountability. On this basis, the Centre generally calls for the Act to be repealed. A number of specific recommendations are also made.

3.10.1 Supervision of Powers

The Centre recommends that the supervision of powers under the *Terrorism (Police Powers) Act 2002* be referred to the (yet to be established) National Security Legislation Monitor, a NSW Public Interest Monitor or the NSW Ombudsman acting independently of the NSWPF.

The recommendation is made on the basis that an independent and specialist supervisor of anti-terrorism would be preferable to supervision by a generalist agency such as the Ombudsman.

Discussion

The supervision of the exercise of police powers under this Act is considered in Chapter 4 in the context of the Ombudsman's review. It is noted, however, that supervision of a NSW Act by a Commonwealth agency reporting to the Federal Parliament would be both impractical and unsatisfactory.

3.10.2 Rights of preventative detainees

The Centre recommends that the *Crimes (Administration of Sentences) Act 1999* or the relevant regulation be amended to make express reference to the human rights of preventative detainees and that these rights should be protected in the administration of detainees.

Discussion

It is noted that s26ZC of the Act already specifically requires that a person being detained under a preventative detention order must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment. Moreover, anyone who contravenes the provision is subject to a penalty of imprisonment for two years.

4. Ombudsman's Review of Parts 2A and 3 of the Act

As noted earlier, the Ombudsman made 37 recommendations impacting upon the operations of the NSWPF, Juvenile Justice and the Department of Justice and Attorney General, including CSNSW.

The Government supports the majority of recommendations made by the Ombudsman, as outlined in the discussion below. While the Government response to each recommendation made by the Ombudsman is outlined, only those recommendations proposing legislative amendment are included among the formal recommendations of the present review (see recommendations 5 – 15 below).

Ombudsman's Recommendation 1

The NSWPF, CSNSW and Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority.

Discussion

The Government supports this recommendation. To progress this matter officers of the NSWPF are currently liaising with law enforcement agencies in other jurisdictions, including the Australian Federal Police, to ensure that there is an acceptable level of uniformity, at Commonwealth and State levels, both as to progress and content, of a Memorandum of Understanding (MoU) regarding preventative detention.

A separate MoU between Police, CSNSW and Juvenile Justice is expected to be finalised in early 2010.

Ombudsman's Recommendation 2

The NSWPF, CSNSW and Juvenile Justice finalise SOPs on preventative detention as a matter of priority.

Discussion

The Government supports this recommendation. The SOPs are being finalised as a priority. The draft MoU referred to above includes draft SOPs.

Ombudsman's Recommendation 3

The Attorney General, in conducting his review of the policy objectives of the Act, take into account the various submissions and views set out in this report in relation to the maximum detention period.

Discussion

The issues raised in the Ombudsman's report revolve around the ability under the Act to apply for multiple detention orders for an individual person, which would have the potential of extending the maximum detention period beyond 14 days. This issue is discussed in this report at 3.3.1, and the submissions and views set out in the Ombudsman's report were taken into account.

Ombudsman's Recommendation 4

Parliament consider amending the Act so that the nominated senior officer must inform persons who are detained at correctional centres of their right to contact the Ombudsman to make a complaint about the conduct of any correctional officer.

Discussion

The Government supports this recommendation. It is noted that the obligation would also apply where an individual was detained at a Juvenile Justice facility, rather than a correctional centre.

It is noted that the Ombudsman's report acknowledges that the CSNSW policy on preventative detention states that a person is to be advised of their right to contact the Ombudsman at any point. In addition, the NSWPF SOPs already specifically provide that detainees will be informed of their right to contact the Ombudsman.

Notwithstanding, it would appear appropriate to amend Division 4 of Part 2A of the Act to ensure that any person detained under a preventative detention order is informed of their general right to contact the Ombudsman under section 26ZF, which includes the right to make a complaint about the conduct of any correctional officer or juvenile justice officer.

Recommendation 5: The Act be amended to specify that any person detained under a preventative detention order is informed of their general right to contact the Ombudsman under section 26ZF.

Ombudsman's Recommendation 5

Parliament consider amending sections 26Y and 26Z of the Act so as to include a reference to the right of persons detained to complain to the Police Integrity Commission (PIC) about the conduct of any police officers.

Discussion

The Government supports this recommendation. The NSWPF SOPs already specifically provide that detainees will be informed they may contact the PIC to complain about the conduct of any police officer. As such, there is no objection to including a reference to the PIC in sections 26Y and 26Z.

Recommendation 6: The Act be amended to specify that any person detained under a preventative detention order is informed of their right to complain to the Police Integrity Commission about the conduct of any police officers.

Ombudsman's Recommendation 6

Until any legislative amendment is made, the NSWPF SOPs specifically provide that detainees must be informed they may contact the Police Integrity Commission to complain about the conduct of any police officer.

Discussion

As indicated above, this is already the case.

Ombudsman's Recommendation 7

The NSWPF SOPs include a statement of the information which has to be provided to detainees.

Discussion

Such a statement will be included in the preventative detention SOPs.

Ombudsman's Recommendation 8

The NSWPF SOPs provide guidance as to the meaning of 'as soon as practicable'.

Discussion

The Government supports this recommendation. The NSWPF will provide some general guidance in the SOPs as to the meaning of 'as soon as practicable'. While not prescriptive, it is anticipated that such guidance will be broadly consistent with the comments by Victoria Police quoted in the Ombudsman's report – namely, that the phrase means 'as soon as possible, unless some critical imperative impedes it' (at p36).

Ombudsman's Recommendation 9

The NSWPF SOPs provide that where information is not provided because it is not practicable, detailed reasons for the information not being provided should be recorded.

Discussion

The Government supports this recommendation. Where operational considerations impact on when information is provided, Police involved will be in a position to justify any delay in providing the information to a detainee and will make a record of any such decision. Enhancements to the NSWPF COPS Custody Management System have been made that allow for secure, permanent records to be created in this regard.

Ombudsman's Recommendation 10

Police consider informing detainees of the existence of prohibited contact orders, in particular where the detainee wishes to contact a person they would otherwise be entitled to contact, but are prevented from doing so because a prohibited contact order has been imposed.

Discussion

The Government has noted the issues raised in the Ombudsman's report, and considers that the provisions in the Act provide suitable flexibility for police in this area. It is noted there are operational circumstances where it may be inappropriate to notify a detainee of the existence of a prohibited contact order, such as where police do not wish to notify the detainee that an associate is also of interest to any police investigation being undertaken. However, the provisions as currently drafted do not prevent police from informing a detainee of the existence of a prohibited contact order if that is appropriate or indeed, necessary.

Ombudsman's Recommendation 11

Parliament consider amending the Act to allow detainees — subject to any prohibited contact order and appropriate monitoring — to contact accredited departmental chaplains.

Discussion

The Government supports this recommendation. While existing CSNSW policy provides that preventative detainees can be visited by an accredited chaplain, the TPPA does not make this explicit. The Government will amend the Act to provide that a preventative detainee may communicate with an accredited departmental chaplain in accordance with the *Crimes (Administration of Sentences) Act* and the *Children (Detention Centres) Act 1987*, subject to any prohibited contact order and appropriate monitoring. It is noted that this will also apply to Juvenile Justice chaplains. The amendments will specify that the contact will be limited to one on one visits by the chaplain.

Recommendation 7: The Act be amended to specify that any person detained under a preventative detention order may communicate with an accredited departmental chaplain, subject to any prohibited contact order and appropriate monitoring.

Ombudsman's Recommendation 12

Parliament further consider the arrangements for monitoring of detainee-lawyer communication, having regard to the matters set out in this report.

Discussion

A number of submissions to the present review indicated support for this recommendation, including those put forward by Legal Aid, the Australian Human Rights Commission, and the NSW Bar Association.

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

In attempting to reconcile these two principles the Act allows the detained person to have access to a lawyer but requires that this contact is relevant to the preventative detention and allows for such contact to be monitored by police. Such a system is admittedly highly unusual, but the Government considers it an important safety measure appropriate to the highly unusual circumstances that would give rise to a preventative detention order being made.

However, in light of the issues raised in the Ombudsman's Report, the Government will consult with the Supreme Court and other stakeholders regarding the possibility of inserting a provision in the Act allowing the Court the discretion to determine whether contact with a lawyer should be monitored or not. This would allow some flexibility, and ensure that the degree of security used in relation to any preventative detention order was appropriate to the instant circumstances. Conducting this consultation outside of the context of the statutory review will allow this sensitive and complex issue to be given appropriate consideration.

It is proposed that the prohibition on disclosing legitimate information obtained through monitoring a conversation be retained. However, it is proposed that an exception be inserted allowing a monitor to consult a lawyer regarding the status of information obtained through monitoring and their obligations under the Act regarding disclosure.

Recommendation 8: The Attorney General consult with the Supreme Court and other stakeholders regarding the possibility of inserting a provision into the Act allowing the Court the discretion to determine whether contact with a lawyer should be monitored or not.

Recommendation 9: The Act be amended to allow a person monitoring detainee-lawyer communications under s26ZI of the Act to consult a lawyer regarding the status of information obtained through monitoring and their obligations under the Act regarding disclosure.

Ombudsman's Recommendation 13

Parliament consider amending the Act:

• to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, where the court is satisfied this is in the interests of justice

• to require police to refer a person in preventative detention to Legal Aid where such an order is in place, or where the person is otherwise unable to contact a lawyer.

Discussion

The submission by Legal Aid to the present review indicated that the first aspect of this recommendation would complicate the provision of legal aid, which is subject to the means and merit tests and policies approved by the NSW Legal Aid Board, having regard to the provisions of the *Legal Aid Commission Act 1979*, availability of funds and published policies and guidelines. According to Legal Aid, allowing the court to mandate service according to its own criteria would undermine its ability to manage its own resources within the context of its governing legislation.

Legal Aid also advised that their policies have been amended in order to provide for the representation of people facing preventative detention. While this was also noted in the Ombudsman's Report, the Ombudsman nonetheless determined that "[t]here may be some value in this entitlement being made specific in the Act, as is the case in other jurisdictions" (at p45).

Despite the concerns put forward by Legal Aid, the Government supports the Ombudsman's recommendation. It is considered that the power would only likely be invoked by the Supreme Court in exceptional circumstances. Furthermore, the fact that the preventative detention powers have yet to be utilised is indicative of a very low likelihood that the use of the power would create a resource issue for Legal Aid. As the preventative detention powers are subject to regular review (pursuant to existing provisions and in light of further recommendations made later in this Chapter), there would be ample opportunity to review the operation of the proposed provision and its effect on the resources of Legal Aid.

Recommendation 10: The Act be amended to permit the Supreme Court to order that Legal Aid NSW represent persons in relation to preventative detention proceedings, where the court is satisfied this is in the interests of justice, and to require police to refer a person in preventative detention to Legal Aid where such an order is in place, or where the person is otherwise unable to contact a lawyer.

Ombudsman's Recommendation 14

The NSWPF SOPs provide that police are to assist a person in preventative detention to contact Legal Aid if the person is otherwise unable to secure legal advice or representation.

Discussion

The Government supports this recommendation. The SOPs will be updated accordingly following the Government's implementation of the Ombudsman's Recommendation 13.

Ombudsman's Recommendation 15

In developing the Memorandum of Understanding on preventative detention, the NSWPF, CSNSW and Juvenile Justice consider requiring a security assessment of young people to be held in preventative detention, with a view to the detention being the least restrictive reasonably practicable.

Discussion

The Government supports this recommendation in principle.

The crux of the recommendation is that the security assessment be undertaken prior to a decision being made about whether or not to transfer a detainee from police custody. As the MOU between Police, CSNSW and Juvenile Justice referred to on page 28 governs arrangements taking place after this decision has occurred, it is considered that the recommendation would be better implemented through an amendment to the NSWPF SOPs. The SOPs will be amended accordingly.

Ombudsman's Recommendation 16

Parliament consider amending the Act so, in relation to detainees who are under 18:

• Police, as far as practicable, are required to assist the detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.

• Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of the detainee that they are required to provide to the detainee.

Discussion

The Government supports this recommendation in part.

With respect to the provision of information, although some submissions to the present review and that of the Ombudsman indicated support for the recommendation, it is the Government's position that the existing controls on information in the Act are appropriate.

Provided that a person under 18 is appropriately assisted in contacting support persons and a lawyer, then the existing provisions provide the appropriate balance between ensuring that a person's rights are protected and the policy intent in providing for a robust system of preventative detention at times of extreme risk of terrorist activity is achieved. It is considered that the second part of the recommendation would undermine the Act's tight controls on the nature of information permitted to be disclosed by detainees to third parties. It is also noted that these controls are consistent with those provided by the Commonwealth preventative detention scheme.

Recommendation 11: The Act be amended so that, in relation to detainees who are under 18, police, as far as practicable, are to assist the detainee in exercising their contact rights under the Act with the detainee's parent, guardian or other person who is able to represent their interests.

Ombudsman's Recommendation 17

The NSWPF SOPS provide for the following:

• Police, are required, as far as practicable, to assist a young person in preventative detention to exercise their contact rights with a parent, guardian or other person who is able to represent the detainee's interests.

• Where police are required to provide information to a young person in preventative detention, this information should also be provided to the young person's parent or guardian as well as the young person.

• Police should consider any request by a person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours.

• Clear guidance on what would constitute 'exceptional circumstances' such that a senior police officer might approve 16 or 17 year old detainees being detained with persons 18 years and over

• Guidance on what would constitute an 'appropriate person' to release an under 16 year old.

Discussion

The Government supports the majority of this recommendation. The second proposal is not supported (in relation to the provision of information) for the reasons advanced in response to the previous recommendation of the Ombudsman (recommendation 16).

Ombudsman's Recommendation 18

The NSWPF SOPs provide that police should consider the welfare of any known dependants of a person who is taken into custody under a preventative detention order, and make appropriate arrangements in consultation with the Department of Community Services.

Discussion

While the Government supports this recommendation in principle, it is considered that it may be better implemented through the development of an MOU rather than SOPs. The NSWPF will liaise with Community Services NSW to discuss the matter further.

Ombudsman's Recommendation 19

Parliament consider amending the Act so:

• The definition and meaning of incapable person is consistent throughout the Act.

• The meaning of incapable person include a person who is unable to understand the information provided, make decisions under the Act, or rely on rights available under the Act.

• Police are required, as far as practicable, to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.

• Police are required to provide the same information to the parent, guardian or other person who is able to represent the interests of an incapable detainee that they are required to provide to the detainees.

Discussion

The Government supports this recommendation in part. It would appear that the most appropriate course would be to ensure that the definition that applies to vulnerable persons is consistent with other legislation governing police powers. As such, it is proposed that relevant definitions in the Act be harmonised with the definition of 'impaired intellectual functioning' in LEPRA. This should make it easier for police to determine the appropriate consideration that might need to be given to such a person.

However, with respect to the provision of information, it is the Government's position that the existing controls on information in the Act are appropriate. Provided that a vulnerable person is appropriately assisted in contacting support persons and a lawyer, then the existing provisions provide the appropriate balance between ensuring that a person's rights are protected and the policy intent in providing for a robust system of preventative detention at times of extreme risk of terrorist activity is achieved.

Recommendation 12: The Act be amended to implement a consistent definition for vulnerable persons subject to a preventative detention order, and provide that police are to assist a vulnerable person in exercising their rights under the Act.

Ombudsman's Recommendation 20

The NSWPF SOPs provide for the following:

• Guidelines on identifying and communicating with incapable people. These guidelines should be established in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing whether a detainee is incapable for the purposes of the *Terrorism (Police Powers) Act*.

• Police are required to assist an incapable detainee to exercise contact rights with the detainee's parent, guardian or other person who is able to represent the detainee's interests.

• Where police are required to provide information to an incapable person in preventative detention, this information should be provided to the detainee's parent, guardian or other person who is able to represent the interests of the detainee.

• Police should consider any request by an incapable person in preventative detention, when determining the length and frequency of contact with a parent, guardian or other person. In particular, police should permit contact for longer than two hours per day, unless there is a particular reason for limiting contact to two hours.

Discussion

The Government supports this recommendation in part in line with proposed changes as discussed in the response to Recommendation 19. Any necessary changes will be considered for inclusion in the SOPs.

Ombudsman's Recommendation 21

The NSWPF SOPs require the nominated senior police officer and detaining officers to consider at regular intervals, and at least every 24 hours, whether the grounds on which the order was made continue to exist, and to document such considerations.

Discussion

The Government supports this recommendation and it has already been adopted by the NSWPF.

Ombudsman's Recommendation 22

The NSWPF SOPs include information to be provided to detainees (and, for children and incapable persons, their parent, guardians or other nominated person) upon release, including whether or not the person can be taken into preventative detention again under the same order.

Discussion

The Government supports this recommendation and it has already been adopted by the NSWPF.

Ombudsman's Recommendation 23

The NSWPF SOPs include arrangements for the release of children and incapable persons into the care of a parent or guardian.

Discussion

The Government supports this recommendation and it has already been adopted by the NSWPF.

Ombudsman's Recommendation 24

Parliament consider amending the Act to require the nominated senior police officer to immediately release a person from preventative detention where the grounds for detention no longer exist.

Discussion

The Government supports this recommendation in principle. While the existing provisions of the Act facilitate the immediate release of a person at the discretion of police, an amendment will make it clear that a person is to be released when the grounds for holding them no longer exist. In order to account for operational practicalities, it is recommended that the requirement be to release the person "as soon as practicable".

Recommendation 13: The Act be amended to require the nominated senior police officer to release a person from preventative detention as soon as practicable where the grounds for detention no longer exist.

Ombudsman's Recommendation 25

Parliament consider the concerns raised about a detainees' exposure to unwanted media attention, and whether it is appropriate to provide the detainee with greater protection in the form of disclosure offences.

Discussion

The Government supports this recommendation in principle. It is noted the NSWPF SOPs address the issue of disclosure and the fact that disclosure of the existence or details of a preventative detention order should not be made to unauthorised persons or bodies. In light of the experience of CSNSW in dealing with the release of high-profile persons, as outlined in the Ombudsman's report, it is not considered that additional disclosure offences are necessary.

Ombudsman's Recommendation 26

Parliament consider amending the Act to include a code of conduct applicable to law enforcement officers and assistants executing covert search warrants requiring that they be properly briefed, abide by the terms of the warrant and maintain confidentiality.

Discussion

This recommendation is **not supported**.

It is a requirement of law that officers executing a warrant abide by the terms of the warrant and statutory repetition of this and the other aspects of the recommendation is unnecessary. The Review outlined the limited use of this type of warrant and found no evidence of the misuse of the provision.

Ombudsman's Recommendation 27

The Department of Justice and Attorney General, in developing any new regulatory framework governing the covert collection of DNA samples, consider the submissions made to the Ombudsman's review of covert search warrant powers.

Discussion

The Government supports this recommendation. The review of the *Crimes (Forensic Procedures) Act 2000* currently taking place will take into account the submissions and the issues surrounding covert sampling of DNA. It is also noted that the Model Criminal Law Officers Committee (MCLOC) has conducted consultation in relation to non-consensual DNA testing.

Ombudsman's Recommendation 28

The legislation be amended to require covert searches to be recorded in their entirety on video, unless there are compelling circumstances which make this impractical.

Discussion

The Government supports this recommendation in principle only. The NSWPF SOPs have been re-drafted to reinforce the desirability of video recording any search, however, it is not considered appropriate to legislate as recommended by the Ombudsman, given the many operational issues that arise in preparing and executing a covert search warrant.

Ombudsman's Recommendation 29

The report to the judge on the outcome of the search include advice as to whether the covert search was recorded on video (including a copy of the video if recorded) and if not, the reasons why it was not practicable to record the search.

Discussion

As it is not proposed to legislate to require video recording, it would not be appropriate to legislatively require that this be the subject of a report to the issuing judge.

Ombudsman's Recommendation 30

Police SOPs should require covert searches to be recorded in their entirety unless there are compelling circumstances which make this impracticable. The SOPs should also include advice as to what circumstances might be 'compelling'.

Discussion

The Government partially supports this recommendation in principle and NSWPF SOPs reinforce the desirability to have the execution of a covert search warrant recorded. The NSWPF does not support explicitly setting out advice as to 'compelling' circumstances justifying non-recording, as this may result in a disproportionate focus on a limited set of circumstances. In any case, where a warrant's execution is not video taped, police are expected to be in a position to explain why.

Ombudsman's Recommendation 31

The Attorney General consider developing forms to be used by applicants and judges in the administration of the Act. Should forms be developed, the application form and warrant form should clearly require articulation of whether entry to adjoining premises is sought or authorised.

Discussion

The Government supports this recommendation. It is intended that the forms developed will be based on the existing LEPRA covert search warrant forms. These forms clearly establish that the adjoining premises power is an additional item, prompting grounds for the power to be specified in the application and requiring the authorisation of the power to be listed in an "additional information" section of the warrant.

Ombudsman's Recommendation 32

The NSWPF amend the standard covert search warrant document so that applicants and judges are prompted to consider whether entry to adjoining premises is required.

Discussion

The Government supports this recommendation, in accordance with the response to Ombudsman's Recommendation 31.

Ombudsman's Recommendation 33

The NSWPF SOPs include the standard application form used by police and the standard covert search warrant document.

Discussion

The Government supports this recommendation and the SOPs will be adjusted accordingly following the development of forms in response to Ombudsman's recommendation 31.

Ombudsman's Recommendation 34

The Act be amended so covert search records are retained rather than destroyed, to enable proper oversight of covert search functions.

Discussion

The issue was also raised in Legal Aid's submission to the present review.

The Government supports this recommendation. Removing the requirement to destroy the records will bring the Act into line with the covert search warrant regime in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Recommendation 14: The Act be amended to remove the obligation to destroy covert search records, to enable proper oversight of covert search functions.

Ombudsman's Recommendation 35

The Police Commissioner ensure annual reports are prepared retrospectively to the Attorney General and Police Minister pertaining to the exercise of the covert search warrant powers in compliance with the Act.

Discussion

The Government supports this recommendation, and it is noted that the annual reports from the Police Commissioner required under s27ZB of the Act since the publication of the Ombudsman's Report have been received and tabled.

Ombudsman's Recommendation 36

The Attorney General provide a copy of this report to the Standing Committee of Attorneys General for consideration of any additional arrangements or review to facilitate or further examine cross jurisdictional oversight in relation to counter-terrorism powers.

Discussion

The Government supports this recommendation in principle. The most appropriate forum for considering the issues raised by the Ombudsman's Report and the Government response would be the Legal Issues Sub-Committee of the National Counter Terrorism Committee. The Department of Justice and Attorney General will take the appropriate steps to bring the Report and response to the Sub-Committee's attention. The Attorney General will also discuss with the Commonwealth whether the Report and response should be submitted to the proposed National Security Legislation Monitor, which will have an oversight role of counter terrorism operations that may involve the NSWPF.

Ombudsman's Recommendation 37

Should Parliament determine to continue Part 3 of the Act in its present or some amended form, consideration be given to appropriate ongoing accountability including amending the Act to provide for ongoing external scrutiny of the exercise of covert search powers. In particular, Parliament may wish to consider the following arrangements:

- Extending the Ombudsman's monitoring functions under section 27ZC for the period the legislation remains in force, or
- Conferring an auditing role on the Ombudsman to ensure the NSWPF and Crime Commission exercising the powers comply with their legislative obligations.

Discussion

A number of submissions to the present review indicated support for the above recommendation, including those put forward by Privacy NSW and the Australian Human Rights Commission.

The Government supports the recommendation and will amend the legislation to extend the Ombudsman's monitoring functions under s27ZC. It is also proposed that the review provisions for Part 2A of the Act be harmonised with the review powers for Part 3, while preserving the requirement for the Ombudsman to deliver their five year report on preventative detention.

It is also proposed that the Act be amended in order to alter the statutory review provisions. Following the limited use of the provisions of the Act initially, the first statutory review of the Act did not take place until 2006. This has led to the statutory reviews falling outside of the timetable envisaged in the Act. As such, it is proposed to amend the Act to ensure that reviews are undertaken in line with an appropriate statutory timetable.

Recommendation 15: The Act be amended to extend the monitoring function of the Ombudsman in relation to Parts 2A and 3 of the Act, and amend the statutory review provision to ensure that reviews take place according to an appropriate statutory timetable.

5. Conclusion

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

The objectives of the Act are to provide police with special powers to assist in preventing the occurrence of terrorist acts or assist in the apprehension of the perpetrators of a terrorist act following its occurrence.

As indicated at the outset of this review, the threat of terrorism remains real not only on a global scale but within NSW.

The vast majority of submissions to this review did not challenge the need for provisions such as those contained in the Act. By and large, the recommendations for change were of a technical nature, seeking to improve the intended operation of the provisions in practice, although it is noted that, for the most part, the provisions remain largely untested.

It is nevertheless the case that NSW needs to retain an Act such as the *Terrorism (Police Powers) Act* to provide the appropriate law enforcement powers required to deal with extraordinary times of crisis. It is fortunate that law enforcement agencies have not had frequent cause to resort to these powers, but that does not diminish the need to have those powers available should such cause arise.

The Act provides for appropriate safeguards and oversight mechanism, and this Review recommends that those provisions be extended.

Appendix 1

List of Submissions

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

- Australian Federal Police
- Australian Human Rights Commission
- Bar Association
- Chief Judge at Common Law
- Chief Magistrate
- Community Relations Commission
- Corrective Services NSW
- Juvenile Justice NSW
- Law Council of Australia
- Law Enforcement and Security Co-ordination Division, Department of Premier and Cabinet
- Law Society of NSW
- Legal Aid Commission
- Privacy NSW
- Public Interest Advocacy Centre
- Young Offenders Advisory Council

Appendix 2

Exclusions proposed by CSNSW

***Crimes (Administration of Sentences) Act 1999* – sections/ divisions/ parts**	**Proposed exemptions**
19 Review of segregated or protective custody direction by Review Council	All – Serious Offenders Review Council (SORC) has no role in preventative detention
20 Suspension directions by Review Council	All – SORC has no role in preventative detention
21 Procedure for review of segregated or protective custody directions by Review Council	All – SORC has no role in preventative detention
22 Determination of review by Review Council	All – SORC has no role in preventative detention
25 Local leave orders	All
26 Local leave permits	All
26A Conditions of leave as to non-association and place restriction	All
Part 2, Division 3, Sub-Division 2, Interstate Leave of Absence (sections 27-37)	All
38 Absent inmates taken to be in custody	All – detainees are in police custody
41C Transfers to and from juvenile correctional centres	All – detainees are in custody of police; it is not for Minister / Commissioner to make order
41D Procedure to be followed by Review Council as to transfer of juvenile inmate to adult correctional centre	All – SORC has no role in preventative detention
Part 2 Division 5 Prisoners received from Norfolk Island (sections 47-50)	All
Part 2 Division 7 Classification of serious offenders (sections 66-71)	All
72 Custody of inmates	All
79 Regulations	Partial – 79(i), 79(j), and 79(k) (visits, phone calls, letters and parcels) are all inconsistent with *Terrorism Police Powers Act* (TPPA); 79(1) (leave permits) should be exempted if sections 25 and 26 are also exempted – see above.
228 Official Visitors	All – provision is inconsistent with TPPA (but only s 79(5)(ii) is relevant to visiting inmates; remainder relates to appointment of Official Visitors and assignment of Official Visitors to correctional centres

***Crimes (Administration of Sentences) Regulation 2008* – clauses/ divisions/ parts**	**Proposed exemptions**
6 Inmates to be notified of rights and obligations	Partial – 6(f) – preventative detainees not required to be notified of the role of the Official Visitor
Part 2.2 Division 1 Case management	All
Clause 60 Privileges of accredited chaplains	All
Clause 62 Powers of accredited chaplains	Partial – exemption should be drafted so as to only allow one-on-one services with a preventative detainee
Part 2.4 Division 1 Visits to inmates	All – provisions of TPPA over-ride
Part 2.4 Division 2 Special visits	All – provisions of TPPA over-ride
Part 2.4 Division 6 Written communications with inmates	All – provisions of TPPA over-ride
Part 2.6 Division 1 Official Visitors	All – provisions of TPPA over-ride
159 Requests to Minister, Commissioner or Official Visitor	Partial – reference to Official Visitor in sub-clauses (1) and (2). Can be cured by adding "preventative detainee" to sub-clause (5).
Schedule 1, clause 6 (Information to be recorded – fingerprints)	Partial – subject to s. 26ZM TPPA (must be destroyed after 12 months)
Schedule 1, Clause 7 (Information to be recorded – biometric characteristics)	Partial – subject to s. 26ZM TPPA (must be destroyed after 12 months)