

# LECC

Law Enforcement  
Conduct Commission

## Covert Search Warrants & Preventative Detention Orders

Review under the *Terrorism (Police Powers) Act 2002*  
(NSW) January 2017 - June 2020

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June 2022



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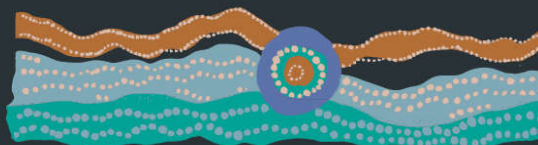
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## RECOMMENDATIONS

**Recommendation 1:** The NSW Police Force revise all search warrant policy documents which it considers apply to the execution of covert search warrants under the *Terrorism (Police Powers) Act 2002* (NSW) as soon as possible, to ensure those documents make clear to officers which policies are to be followed when executing those warrants, and what variations to general search warrant practice are permitted.....22

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- (a) address the two outstanding issues the Commission identified in the new forms for the use of the covert search powers under Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW), and
- (b) develop and deliver updated training on the use of those powers and the new forms ..... 24

**Recommendation 3:** Parliament consider:

- (a) amending s 270 of the *Terrorism (Police Powers) Act 2002* (NSW) to make clear which power a police officer must request in the application, and the eligible Judge must grant in the warrant, in order for police to be authorised to take and analyse forensic samples from the subject premises, or from things seized from the subject premises; and
- (b) including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed..... 36

**Recommendation 4:** The NSW Police Force revise its policy documents to include guidance for officers taking DNA samples under a covert search warrant, including:

- (a) how the taking of DNA samples during a covert search is to be recorded;
- (b) for what purposes the information derived from analysis of those samples is permitted to be used, and
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# CHIEF COMMISSIONER'S FOREWORD

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The preventative detention powers in Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW) (TPP Act) were introduced in New South Wales in 2005, as part of a national framework of counter-terrorism powers. All Australian jurisdictions introduced preventative detention powers following a meeting of the Council of Australian Governments in September 2005.

The covert search powers in Part 3 of the TPP Act were also introduced in 2005. While some jurisdictions have enacted counter-terrorism covert search powers similar to those in the TPP Act, not all have done so.

There have been a total of nine covert search warrants issued under the TPP Act since those powers were introduced. Four of those were issued and executed by police within the reporting period for this review. Police did not use the preventative detention powers in the reporting period. Those powers in fact have only ever been used on one occasion, in 2014.

It is appropriate that these counter-terrorism powers are used rarely, given their extraordinary nature. The infrequent use of these powers, however, creates a challenge. The NSWPF must ensure that officers who may be required to utilise these powers at short notice and in high pressure environments are familiar with the unique requirements in the TPP Act. In practice this can only be achieved through the development and maintenance of up to date policies and forms which clearly guide the officers through every requirement. Unfortunately, the Commission's review revealed multiple issues with the policies and forms the NSWPF had in place.

The Commission identified a number of incidents of non-compliance with legal requirements when the covert search powers were used during the reporting period. The emergence of new compliance issues reinforces the utility and importance of the Commission's ongoing scrutiny function under the TPP Act.

I am pleased that the NSWPF has worked productively with the Commission to address issues regarding the use of the covert search powers. However, it is concerning that 16 years after the preventative detention powers were introduced in New South Wales the NSWPF still does not have in place appropriate guidance for officers to ensure that these powers are used in accordance with the law.

The NSWPF did not provide an explanation to the Commission for why this was the case. However, the concerns police officers have raised over the years about the operational effectiveness of the preventative detention powers are a matter of public record.

The only reasonable inference to be drawn is that the NSWPF thought it so unlikely that it would use the preventative detention powers, due to their limitations, that it did not consider it necessary to allocate time and resources to develop and maintain approved policies and procedures for their use. The grant of new investigative detention powers in Part 2AA of the TPP Act, which have been specifically designed to avoid the limitations of the preventative detention powers in Part 2A, will only reinforce this position.

In these circumstances, for the reasons set out in this report, it is not appropriate that the preventative detention powers continue.



**The Hon R O Blanch AM QC**  
**Chief Commissioner**

29 June 2022

# EXECUTIVE SUMMARY

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The *Terrorism (Police Powers) Act 2002* (NSW) (TPP Act) gives the NSW Police Force (NSWPF) special powers to prevent or respond to suspected terrorist acts. These include the power to apply to the Supreme Court for a preventative detention order, which enables police to detain a person without charge for up to 14 days in order to prevent a suspected imminent terrorist act or preserve evidence of a recent terrorist act.

Police also have the power under the TPP Act to apply to the Supreme Court for a covert search warrant. This enables them to search premises without the knowledge of the owner in order to respond to, or prevent, a terrorist act.

The Commission is required to keep under scrutiny how the NSWPF exercises these powers and, after every three years, prepare a report for the Attorney General and the Minister for Police. The Attorney General is required to table the report in Parliament.

This report covers the period from 1 January 2017 to 30 June 2020 (the reporting period). The NSWPF applied for four covert search warrants in the reporting period under Part 3 of the TPP Act, two in 2018 and two in 2019. All four warrants were issued and executed by police. The execution of the warrants contributed to the arrests and charging of three persons for offences related to terrorism. Two of those persons pleaded guilty and were sentenced to imprisonment.

The NSWPF did not use the preventative detention powers in the reporting period.

The Commission reviewed the extent to which police complied with the TPP Act and NSWPF policy when applying for and executing the four covert search warrants. The Commission also reviewed the extent to which the NSWPF's guidance in policy documents, forms and templates for both types of powers was consistent with the requirements and obligations in the TPP Act.

The Commission's review identified a number of compliance issues.

The Standard Operating Procedures (SOPs) for covert search warrants and preventative detention orders which the NSWPF had on file were both years out of date and did not reflect all the relevant provisions in the TPP Act. When the Commission raised this with police it was informed that neither set of SOPs had ever been corporately endorsed.

The forms the NSWPF had on file for use of the covert search powers and preventative detention powers also contained a number of errors. It was apparent that some of the errors in the forms caused police to fail to comply with certain requirements in the TPP Act when exercising the covert search powers during the reporting period. Most significantly, the NSWPF form for the occupier's notice did not include any fields for information about the execution of the warrant. As a result, none of the occupiers whose premises were covertly searched by police in the reporting period received occupier's notices as required under the TPP Act.

In the course of the review the NSWPF has addressed many of the issues raised by the Commission by updating its covert search warrant forms. However, the NSWPF also informed the Commission in May 2022 that it had archived its outdated covert search warrant SOPs, and would instead refer officers intending to exercise the TPP Act powers to other policy documents, as well as to the TPP Act itself. In the Commission's next review under the Act, which is due to commence in July 2023, the Commission will examine whether this decision has resulted in gaps in the policy guidance needed to support officers.

There were also a number of issues that arose in relation to the execution of the four warrants during the reporting period which require further action. These issues are explored in Chapter 2.

One significant issue is the fact that police took DNA samples at the premises, or from items seized from the premises, in connection with the execution of three of the covert search warrants. The NSWPF had only requested authorisation to ‘test a thing’ in relation to one of those warrants. Although the NSWPF made an operational decision not to analyse any of the DNA samples taken, the collection of these samples by police raises broad issues which will need to be addressed by Parliament. The covert collection of DNA samples by police is currently unregulated in New South Wales.

The NSWPF informed the Commission that over the last couple of years a draft DNA Profiles and Forensic Procedures Bill has been developed, and that as at March 2022 it was being revised in line with feedback from stakeholders. The NSWPF indicated this Bill would be the ‘appropriate vehicle’ for the issues raised by the Commission’s review to be considered. The Commission recommends that Parliament consider amendments to the TPP Act and inclusion of provisions in the DNA Profiles and Forensic Procedures Bill to ensure collection of DNA during a covert search is appropriately regulated.

In addition to the problems with the occupier’s notices, the Commission also noted a lack of compliance with other mechanisms which could help ensure accountability in relation to covert searches. Significantly, only one of the four covert searches was (partially) recorded on video. Also, the key functions of an Exhibit Officer and Independent Officer were not performed by any of the officers who executed the covert searches. The Commission recommends that covert search warrant training for officers should include explanations of the importance of video recording, and how the functions of an Exhibit Officer and Independent Officer should be performed during a covert search.

As the preventative detention powers in Part 2A of the TPP Act were not used in the reporting period, the Commission focused on reviewing the NSWPF’s policies and forms for the use of those powers. In Chapter 3 the Commission notes that the NSWPF does not have any current, corporately endorsed SOPs or forms for those powers. It also no longer has any agreement in place with Corrective Services NSW to ensure it can utilise a correctional facility to detain a person under a preventative detention order (PDO).

The Commission concludes that during the reporting period the NSWPF was not operationally ready to use the preventative detention powers (and at the time of writing, still is not operationally ready). This is despite the fact that the preventative detention powers have been available to police since 2005.

As discussed in Chapter 3, police and others have long expressed concerns about the utility of the preventative detention powers. The inability of police to question a person held in preventative detention, and the criminal liability that attaches to a failure by an officer to comply with certain requirements in Part 2A, are key reasons for these concerns. Both the Independent National Security Legislation Monitor and the Council of Australian Governments Committee have previously recommended that the preventative detention powers be repealed.

In 2016 the NSW Parliament introduced new pre-charge ‘investigative detention’ powers in Part 2AA of the TPP Act. These powers were expressly provided to the NSWPF in order to address the limitations of the preventative detention powers in Part 2A. The

investigative detention powers effectively make the preventative detention powers redundant.

It is apparent, therefore, that the reason the NSWPF has not taken the administrative steps necessary to ensure it can use the preventative detention powers should the risk of an imminent terrorist act materialise is because those powers are not operationally attractive to police. The NSWPF has only ever used the powers once, and after doing so, expressed concerns about requirements in Part 2A that police felt ‘created serious limitations on using the powers effectively’.

The NSWPF’s own *Counter-Terrorism Law Manual* informs officers that police have found the option of using the Part 2A powers ‘resource intensive, time restrictive and impractical’. The Manual concludes that ‘it is unlikely that a PDO will be used to prevent a terror attack’, noting the ‘significant operational advantage’ under Part 2AA of being able to question the person in detention.

The Commission is very concerned that the preventative detention powers continue to be legally available to police when the NSWPF does not have appropriate SOPs, forms and inter-agency arrangements in place to ensure they are used correctly. The powers in Part 2A are due to expire in December 2023. Given the NSWPF’s lack of operational readiness to use the powers and the consequent risk of non-compliance with the unique requirements in the Act, and in light of the powers available to police in Part 2AA, the Commission recommends that Parliament consider repealing the preventative detention powers immediately.

As it will take some time for Parliament to consider that recommendation, in order to address risks and gaps in relation to the Part 2A powers in the interim, the Commission makes recommendations in Chapter 3 to be implemented as soon as possible. The Commission recommends that the NSWPF immediately develop corporately approved SOPs and forms for the use of the preventative detention powers. The Commission also makes recommendations for amendments to the TPP Act to ensure the right of a person detained under a PDO to contact the NSW Ombudsman to make a complaint about their treatment by a correctional or youth justice officer.

In Chapter 4 the Commission discusses its scrutiny function under the TPP Act, including the changes to information provision sections since the Ombudsman last did a review under the Act in 2017. The Commission also discusses the NSWPF’s compliance with its obligations to provide reports to the Attorney General. These include providing the Attorney General with copies of the reports made to the Judge on execution of covert search warrants, and providing annual reports about the use of the Part 2A and Part 3 powers.

1.

# INTRODUCTION

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## 1.1 PURPOSE OF THIS REPORT

The *Terrorism (Police Powers) Act 2002* (TPP Act) gives the NSW Police Force (NSWPF) special powers to prevent or respond to suspected terrorist acts. There are a range of different counter terrorism powers in the TPP Act.

The TPP Act requires the Commission to keep under scrutiny the exercise of the Part 2A preventative detention powers and Part 3 covert search powers conferred on members of the NSWPF (and the preventative detention powers conferred on correctional officers).<sup>1</sup> The Commission's scrutiny function does not extend to the other special powers that police may exercise under the TPP Act.

At the conclusion of every period of three years, the Commission is required to prepare a report on the exercise of the Part 2A and Part 3 powers and provide the report to the Attorney General and the Minister for Police.<sup>2</sup> The Attorney General is required to table the report as soon as practicable after it is received.<sup>3</sup>

Prior to the commencement of the Commission in July 2017, the NSW Ombudsman had responsibility for scrutinising the use of the powers under Parts 2A and 3 of the TPP Act. The Ombudsman produced four reports under the Act, in 2008, 2011, 2014 and 2017. The chronology in Appendix A sets out the history of the development and use of the preventative detention and covert search powers in New South Wales, including the Ombudsman's reports and statutory reviews of the TPP Act.

## 1.2 THE COMMISSION'S REVIEW

This report covers the period from 1 January 2017 to 30 June 2020 (the reporting period). It therefore includes the six months between the period covered by the Ombudsman's last report (which ended 31 December 2016), and the date the Commission started operating (1 July 2017).<sup>4</sup>

Police did not use the preventative detention powers in the reporting period. The last (and only) use of the preventative detention powers was in 2014.

The NSWPF applied for four covert search warrants in the reporting period, two in 2018 and two in 2019. All four warrants were issued, and all four were executed by police.

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<sup>1</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO and s 27ZC.

<sup>2</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(4) and s 27ZC(3) and (8).

<sup>3</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(5) and s 27ZC(4)).

<sup>4</sup> Sub-s 26ZO(4)(a) of the TPP Act on one reading appears to require that the Commission prepare a report on the exercise of the Part 2A powers 'as soon as practicable' after 1 July 2017, the date the Commission commenced operation. Such a report would only have covered a six month period between the end of the reporting period covered by the Ombudsman's last report and 1 July 2017. Also the Ombudsman's last report was only tabled in June 2017, and by July 2017 the Department of Justice had not had time to consider the Ombudsman's recommendations in a statutory review as required by the Act. If the Department had accepted those recommendations Part 2A would have expired (along with the Commission's scrutiny function in that Part). The Department's review of the Act was only tabled in June 2018. The Commission therefore considered it practicable to include its review of the six months from January 2017 to July 2017 in this report (particularly as no powers under Parts 2A or 3 were exercised in that six month period).

Prior to this reporting period, the last time the covert search powers were used was in 2006.

The Commission's review focused on assessing compliance with the requirements in Parts 2A and 3 of the TPP Act. We reviewed what occurred in practice when police applied for and executed the four covert search warrants, looking at their compliance with both the legal requirements and with NSWPF policy. We also reviewed the extent to which the NSWPF's guidance in policy documents, forms and templates for exercising preventative detention and covert search powers was consistent with the requirements and obligations in the TPP Act.

Commission officers reviewed the physical files relating to the four covert search warrants executed in the reporting period. We also reviewed the video recordings police made in connection with three of the warrants (no recordings were made in relation to the fourth warrant).

The Commission sent multiple requests for information and copies of documents to the NSWPF, and the NSWPF provided all information and documentation requested.<sup>5</sup>

In November 2021, the Commission provided the NSWPF with a confidential Issues Paper setting out potential compliance issues that had been identified by the Commission. The NSWPF provided a detailed response to the Issues Paper in January 2022. The Issues Paper was kept confidential as it contained detail that was operationally sensitive. However, all the salient issues that were raised in the Issues Paper have been reflected in this report.

The Commission provided a draft of its report, including its proposed recommendations, to the NSWPF for consideration and comment. The NSWPF provided a detailed response along with copies of forms it had updated in response to issues raised in the Commission's Issues Paper and draft report.

The Commission thanks the NSWPF for providing access to all information and documentation requested, and for the collaborative approach adopted during this review.

The Commission also wrote to the Attorney General, the Hon Mark Speakman SC MP to request certain information for the purpose of this review, and sent a copy of its draft report to the Attorney General to raise certain issues and provide an opportunity for comment. The Commission thanks the Attorney General for the information and responses he provided.

The Commission's next review under the TPP Act will commence in July 2023.

### 1.3 DEVELOPMENTS SINCE THE OMBUDSMAN'S LAST REPORT

In June 2017 the Ombudsman's report on the use of preventative detention powers and covert search powers for the period 1 January 2014 to 31 December 2016 was tabled.<sup>6</sup> The Ombudsman's report included four recommendations.

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<sup>5</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(2) and s 27ZC(2).

<sup>6</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017).

The Ombudsman recommended that the preventative detention powers in Part 2A of the TPP Act should be allowed to expire (at the time that report was written the powers were due to ‘sunset’ on 16 December 2018). It also recommended that the TPP Act be amended to extend the Commission’s scrutiny function to the investigative detention powers in Part 2AA. The Ombudsman’s other two recommendations related to access to information for the purpose of the scrutiny functions under the Act, and are discussed in Chapter 4 ‘Monitoring and Reporting’. Appendix B contains a table which sets out the recommendations in full.

### 1.3.1 STATUTORY REVIEW OF THE TPP ACT IN 2018

Under s 36 of the TPP Act the Attorney General is required to review the Act every three years, as soon as possible after the scrutiny reports by the Ombudsman (and now the Commission) have been tabled.

In June 2018 the (then) Department of Justice completed its sixth statutory review of the TPP Act.<sup>7</sup> The Department made 13 recommendations, six of which related to the powers in Part 2A and Part 3. The Department rejected the Ombudsman’s recommendation that the preventative detention powers be allowed to sunset, instead recommending they be extended for another three years.<sup>8</sup> It also rejected the Ombudsman’s recommendation that the Commission’s scrutiny function be extended to the investigative detention powers in Part 2AA, but recommended that certain safeguards be added to the Part 2AA powers.<sup>9</sup>

The Department recommended that further safeguards and protective provisions be added to Part 2A in relation to preventative detention orders.<sup>10</sup> It also recommended that changes be made to the sections requiring the NSWPF to provide to information to the Commission for the purpose of its scrutiny functions under the Act.<sup>11</sup>

### 1.3.2 TERRORISM (POLICE POWERS) AMENDMENT STATUTORY REVIEW ACT 2018

In 2018 amendments were made to the TPP Act in line with the recommendations of the statutory review. Relevantly for this review:

- preventative detention powers in Part 2A were extended until 16 December 2021 (this is further discussed in Section 3.6 of this report);
- additional safeguards and other protective provisions recommended by the Department were added to Part 2A (discussed in Section 3.3 of this report);
- threshold requirements for a strip search in Part 2A were aligned with the requirements for strip searches in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); and

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<sup>7</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018).

<sup>8</sup> Ibid p 46 (Recommendation 8)

<sup>9</sup> Ibid p 43.

<sup>10</sup> Ibid pp 47-49 and pp 51-55 (Recommendations 9, 10 and 12).

<sup>11</sup> Ibid pp 55-59 (Recommendation 13).



- provisions were inserted to provide certain limited exceptions to the NSWPF's obligation to provide the information required by the Commission to perform its scrutiny function (discussed in Section 4.1 of this report).

### 1.3.3 FURTHER EXTENSION OF PREVENTATIVE DETENTION POWERS

As mentioned above, in 2018 the preventative detention powers in Part 2A were extended until December 2021.

In October 2021 the Attorney General, the Hon Mark Speakman SC MP, introduced the Crimes Legislation Bill 2021 (NSW), to amend the TPP Act to extend the Part 2A powers for another two years. The reason given for the extension was that the Commission's review was underway, and therefore it would be pre-emptive to allow the preventative detention powers to sunset before the Commission could complete its report, and the subsequent statutory review consider that report.<sup>12</sup> The *Crimes Legislation Amendment Act 2021* was passed and on 8 December 2021 the preventative detention powers in Part 2A were extended until 16 December 2023.

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<sup>12</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2021, p 4 (Melanie Gibbons, on behalf of Mark Speakman).



**2.**

# COVERT SEARCH WARRANTS

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## 2.1 OVERVIEW OF PART 3 COVERT SEARCH POWERS

Under Part 3 of the TPP Act police officers in the NSWPF Terrorism Investigations Squad (TIS) can apply to an eligible Judge of the Supreme Court for a covert search warrant for premises if they suspect or believe on reasonable grounds:

- (a) that a terrorist act has been, is being, or is likely to be, committed (and terrorist act is defined to include membership of a terrorist organisation),<sup>13</sup> and
- (b) that the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act, and
- (c) that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.<sup>14</sup>

However, before applying, the police officer must seek authorisation to make the application from the Commissioner of Police or the Assistant Commissioner responsible for counter terrorism.<sup>15</sup> Since August 2021 authorisation can also be given by the Superintendent responsible for counter terrorism investigations.<sup>16</sup>

Once issued, the warrant authorises police officers in the TIS and assistants to enter the subject premises without the occupier's knowledge, impersonate another person for the purpose of executing the warrant and do anything else that is reasonable to conceal anything done in the execution of the warrant from the occupier.<sup>17</sup> If specific authority is sought in the warrant application, the police officers and assistants can also gain access to the subject premises by entering adjoining and adjacent premises without the knowledge of the occupier of those premises.<sup>18</sup>

Once in the premises, the police officers and assistants can search for any kind of thing described in the warrant, and, depending on the powers authorised in the warrant, they may also seize, substitute, copy, photograph, record, operate, print or test any of those things.<sup>19</sup> They may also seize and detain any other thing they find in their search if there are reasonable grounds for suspecting or believing it is connected with a serious indictable offence.<sup>20</sup>

After executing a covert search warrant, the officer must provide a report back to the Judge within 10 days stating who entered the premises, what powers were exercised, detailing the results of the execution of the warrant, and whether or not the execution assisted in the prevention of, or response to, the specified terrorist offence.<sup>21</sup>

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<sup>13</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27A(2).

<sup>14</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27A and s 27G.

<sup>15</sup> *Terrorism (Police Powers) Act 2002* (NSW) ss 27C-27G; *Terrorism (Police Powers) Regulation 2016* (NSW) reg 4.

<sup>16</sup> *Terrorism (Police Powers) Regulation 2021* (NSW) reg 5.

<sup>17</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27O(1)(a), (b) and (m).

<sup>18</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27J(1)(e) and s 27O(1)(d).

<sup>19</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27O(1)(e)-(l).

<sup>20</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27O(1)(h) and (4).

<sup>21</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27S.

An occupier's notice, including details about the execution of the warrant, must be provided to the issuing Judge for approval within six months of the warrant being executed.<sup>22</sup> Once approved, the notice is to be provided to the occupier of the premises searched.<sup>23</sup> The Judge may postpone the giving of an occupier's notice if satisfied there are reasonable grounds to do so, but cannot postpone the giving of the notice for more than 18 months in total unless satisfied exceptional circumstances justify the postponement.<sup>24</sup>

In the Second Reading speech to the Bill that would introduce the counter terrorism covert search powers, then Attorney General Mr Bob Debus explained the policy rationale behind the Parliament granting these powers to police:

This scheme provides police with another tool that answers some of the more difficult characteristics of terrorist activity. For example, while both terrorists and organised crime gangs operate secretively and are aware of the possibility of official surveillance, terrorists operate over a much longer time frame. A terrorist operative may arrive in Australia years before any attack is planned, with no orders other than to lie low. So the first requirement of counter-terrorism covert investigative powers is that they be able to operate over a long period, enabling investigators to target terrorists from the early stages of their activities.

Covertiness is the second requirement. In the preparatory stages of a terrorist plot any hint to the terrorist operatives that their plans or activities have been discovered or that they are under surveillance could mean that they simply abort the entire terrorist operation, allowing the organisation the opportunity to regroup and change the object of its plans. This scheme will allow police to enter private premises without the knowledge of the occupiers for the purpose of preventing or responding to terrorist threats.<sup>25</sup>

## 2.2 SUMMARY OF USE OF COVERT SEARCH POWERS DURING REPORTING PERIOD

The NSWPF applied for four covert search warrants during the review period, two in 2018 and two in 2019. Two of the warrants were applied for in person, in front of a Judge. The other two warrants were 'telephone warrants', as the applications were sent to the eligible Judge by email and issued by the eligible Judge over the phone.

All four warrants were issued and all four were executed.

Each of the warrants was obtained because police suspected the preparation or planning of a terrorist act. None of the warrants was obtained solely on the basis of suspicion of membership of a terrorist organisation.

A request to enter premises adjoining or providing access to the subject premises was only made in relation to one warrant, and authorisation was granted.

Under three of the warrants, police seized items, took them off the premises so they could be copied and/or tested, and then re-entered the premises and returned the items. Under the other warrant only forensic swabs were taken from the premises, and there

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<sup>22</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(1)-(3).

<sup>23</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(5).

<sup>24</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(7)-(9).

<sup>25</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16940.

was no re-entry. Police took DNA samples at the premises, or from items seized from the premises, in connection with the execution of three of the covert search warrants.

The occupier's notices police prepared for each of the four warrants were materially deficient, as they did not include any of the details about the execution of the warrants that were required to be included. In relation to each of these notices, initial postponements of six months were granted. One of the incomplete notices was ultimately given to the legal representative of the occupier. The other three notices were never given to the relevant occupiers.

The warrants were executed as part of investigations that resulted in the arrests and charging of three persons for offences related to terrorism. Two of those persons pleaded guilty and were sentenced to imprisonment. One of those persons was Isaac El Matari, who was convicted of multiple terrorism offences in 2021.

The table below summarises the use of covert search powers during the reporting period. A table summarising the accountability mechanisms for the covert searches (including reports to the Judge on execution and occupier's notices) can be found at Section 2.6.2.

**Table 1: Summary of use of covert search powers**

WARRANT	APPLICATION IN PERSON?	REQUEST TO ENTER ADJOINING PREMISES?	ITEMS SEIZED?	DNA SAMPLES COLLECTED?	RE-ENTRY?
18-001	No	Yes	Yes	Yes	Yes
18-002	Yes	No	Yes	Yes	Yes
19-001	No	No	No	Yes	No
19-002	Yes	No	Yes	No	Yes

## 2.3 OVERVIEW OF NSWPF POLICIES AND PROCEDURES FOR USE OF COVERT SEARCH POWERS

### 2.3.1 ROLES OF THE TERRORISM INVESTIGATIONS SQUAD AND COVERT APPLICATIONS UNIT

The TPP Act restricts the use of the covert search powers to the group of NSWPF staff the Commissioner of Police has designated as the terrorism investigation group (currently the TIS). Only a member of the TIS, referred to in the Act as an 'eligible police officer', can seek authorisation and then apply for a covert search warrant.<sup>26</sup>

Authorisation to execute a covert search warrant can also only be given to police officers in the TIS, however, the Act permits other police officers to assist the TIS in the execution of a covert search warrant.<sup>27</sup>

In exercising the powers in Part 3 of the TPP Act, the police officers in the TIS are assisted by staff in the NSWPF Covert Applications Unit (CAU), which is within the

<sup>26</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27A(1), 27D and 27G.

<sup>27</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27O (1) and (2), s 27P and 27S(1)(iii) and (6).

Operational Legal Services Command. The officers in the CAU are responsible for ensuring that the documents the NSWPF is required to prepare under Part 3, including the applications for covert search warrants, reports to the Judge and the occupier's notices, comply with the legislative requirements.

## 2.3.2 NSWPF POLICIES RELATING TO COVERT SEARCH POWERS

### 2.3.2.1 ARCHIVING OF COVERT SEARCH WARRANT STANDARD OPERATING PROCEDURES

The Ombudsman reported in 2008 that in September 2005 the NSWPF Counter Terrorism and Special Tactics Command had drafted Standard Operating Procedures (SOPs) for covert search warrants.<sup>28</sup> These SOPs were reportedly amended from time to time, in line with recommendations from the Ombudsman.<sup>29</sup>

In July 2020 the Commission requested that the NSWPF provide it with a copy of all current NSWPF policies in relation to the exercise of the covert search warrant powers in Part 3 of the TPP Act.<sup>30</sup> In response, the NSWPF provided a copy of a document which it referred to as 'Covert Search Warrants Standard Operating Procedure'.<sup>31</sup> The title of the Terrorism Investigations Squad appears at the top of the document, and the document contains a statement that it was reviewed and approved by members of that squad in June 2020 (this document will be referred to as the 2020 CSW SOPs in this report).

The Commission then requested copies of any previous SOPs for covert search warrants that were in force from January 2017 until June/July 2020.<sup>32</sup> The NSWPF provided six documents which it referred to as 'Covert Search Warrant SOPs' and which were previous versions of the 2020 CSW SOPs document, with review dates of 22 June 2017, 21 December 2017, 27 June 2018, 20 December 2018, 28 June 2019 and 27 December 2019.<sup>33</sup>

However, when Commission officers met with members of the TIS in 2021, the TIS informed them that the SOPs for covert search warrants under the TPP Act had never been corporately endorsed by the NSWPF.

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<sup>28</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 72.

<sup>29</sup> See for example Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010) pp 39-40; NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 37.

<sup>30</sup> Letter from A/Chief Commissioner, Law Enforcement Conduct Commission, to Commissioner of Police, NSW Police Force, 16 July 2020.

<sup>31</sup> Letter from Commissioner of Police, NSW Police Force, to A/Chief Commissioner, Law Enforcement Conduct Commission, 4 August 2020, Ref D/2020/780655, attachments 'Report on the Use of Covert Search Warrant powers under Pt 3 of the TPPA Reporting Period 1 January 2017 – 30 June 2020' and 'Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 25 June 2020'.

<sup>32</sup> Email from Prevention and Education Team, Law Enforcement Conduct Commission, to Counter Terrorism and Special Tactics Command, NSW Police Force, 10 August 2020.

<sup>33</sup> *NSW Police Force response to the Law Enforcement Conduct Commission request for additional information relating to the use of powers under Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, 11 November 2020, Ref D/2020/1139548, Tab A.

Further, the Commission's analysis of the 2020 CSW SOPs revealed that the document had not been updated to reflect changes to the TPP Act which were made in 2007, 2015 and 2017. This was despite the fact that according to statements appearing at the bottom of the seven versions of the SOPs provided by NSWPF, the document had been 'reviewed' by members of the TIS every six months from January 2017 to July 2020.

The Commission raised these issues in the confidential Issues Paper which was provided to the NSWPF.<sup>34</sup> The NSWPF responded in January 2022, stating that it would review the CSW SOPs and update them, and that it would seek the Commission's feedback in that review.<sup>35</sup>

In the draft report the Commission provided to the NSWPF in March 2022, the Commission included a proposed recommendation that the NSWPF revise its SOPs for covert search warrants under the TPP Act as soon as possible to address the issues identified by the Commission, and provide a copy to the Commission. The Commission also included a number of proposed recommendations that certain content be included in the updated SOPs, to address issues identified in the report (discussed in Section 2.6 below).

In its response to the draft report in May 2022, the NSWPF informed the Commission that the TIS had archived the 2020 CSW SOPs as 'they are superseded by legislation and corporate policy'.<sup>36</sup> The NSWPF, therefore, no longer has any specific SOPs for the use of the covert search powers in the TPP Act.

### 2.3.2.2 OTHER POLICY DOCUMENTS RELIED ON BY NSWPF TO GUIDE OFFICERS

The NSWPF stated that the induction package for TIS officers had been updated to refer officers looking for information about the covert search powers to the NSWPF Handbook, the NSWPF *Counter-Terrorism Law Manual*, and the TPP Act itself. The NSWPF also mentioned to the Commission that all covert search warrants 'are conducted in accordance with standard NSWPF search warrant SOPs'.<sup>37</sup>

The Commission reviewed the versions of the Handbook and the *Counter-Terrorism Law Manual* available on the NSWPF Intranet as at June 2022.

The Handbook does not contain any section on covert search warrants. The section on search warrants states '[i]n New South Wales, search warrants are authorised and regulated by Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA)'; there is no reference to warrants under the TPP Act. The Handbook refers officers to the *Execution of Search Warrants Standard Operating Procedures* (General Search Warrant SOPs). The Handbook only makes one passing reference to

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<sup>34</sup> Letter from Senior Project Officer, Prevention and Education Team, Law Enforcement Conduct Commission, to Commander, Terrorism Investigations Squad, NSW Police Force, 18 November 2021, attachment *Covert search warrants and preventative detention orders under the Terrorism (Police Powers) Act 2002 (NSW): Issues paper for NSW Police Force*.

<sup>35</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.

<sup>36</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

<sup>37</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

covert search warrants: it states that '[m]any of the Search Warrant SOPs and Toolkit items are also appropriate for use in other uninvited entries such as...Covert Search Warrants'.

The Handbook refers officers to a document entitled 'Overarching Policy & Procedures for Search Warrants and Other 'Uninvited Entry' Operations' (Overarching Search Warrant Policy). The purpose of the Overarching Search Warrant Policy is to set out how the procedures for general, non-covert search warrants apply to all other 'uninvited entry and search' powers. That policy states that, in the case of 'covert search warrants', the officers should follow the General Search Warrant SOPs and Search Warrants Toolkit, with certain limited exceptions.

It is important to note there are two types of 'covert search warrants' that the NSWPF can use, counter-terrorism covert search warrants under the TPP Act and general covert search warrants under LEPR. Neither the NSWPF Handbook nor the Overarching Search Warrant Policy specify whether the references to 'covert search warrants' refer to those under the TPP Act, or those under LEPR. In fact, neither document refers to the existence of covert search warrants under the TPP Act. This is of concern to the Commission as in the case of the four warrants executed in the reporting period there were a number of instances of non-compliance with the TPP Act requirements because officers mistakenly relied on practice and forms for LEPR covert search warrants (see Section 2.3.3).

The one NSWPF policy document that does refer to TPP Act covert search warrants is the *Counter-Terrorism Law Manual*. The Manual was created by the Operational Legal Services Command, and contains two pages about counter-terrorism covert search warrants.<sup>38</sup> Those pages summarise the requirements in the TPP Act for the making of an application for a covert search warrant, and what powers can be authorised under such a warrant.

The General Search Warrant SOPs contain detailed instructions for officers about how search warrants should be executed, including the mandatory steps to be undertaken before, during and after the execution of a search warrant, and the roles and duties of search warrant participants.

The Commission welcomes the NSWPF's position that the execution of covert search warrants should generally follow the mandatory steps set out in the General Search Warrant SOPs. This would improve practice in some of the areas noted by the Commission, for example, the lack of video recording of key aspects of the searches during the reporting period (see Section 2.6.2).

However, from the version of the General Search Warrant SOPs that the Commission has seen, it is not clear that they apply to covert searches under the TPP Act. Those SOPs do not, in fact, make a single reference to covert searches. There are also a number of aspects in which the obligations on officers before, during and after execution of a covert search warrant will be different to those applying to execution of an overt search warrant (an obvious example is that the occupier's notice would be served after, rather than during the execution of a covert search warrant). In the context of the Commission's review, the NSWPF itself stated that departures from the General Search

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<sup>38</sup> Operational Legal Advice Unit, NSW Police Force, *Counter-Terrorism Law Manual*, reviewed March 2021, pp 15-16.



Warrant SOPs were necessary in the execution of the warrants in the reporting period, for example, in relation to the presence of independent officers (see Section 2.6.4).

The Commission is concerned that the General Search Warrant SOPs do not provide sufficient guidance to officers about how to execute covert search warrants under the TPP Act. It is not clear from those SOPs that they in fact apply in the case of a counter-terrorism covert search and, therefore, it is not clear when variation in the mandatory steps will be expected/permitted for such a covert. The Commission does not consider that the reference in the Overarching Search Warrant Policy, a separate document, to the application of those SOPs to 'covert search warrants' adequately compensates for the lack of specific reference in the SOPs themselves.

In light of the NSWPF's decision not to maintain any SOPs specifically for the use of the covert search powers under the TPP Act, the Commission recommends that the NSWPF review its General Search Warrant SOPs and other relevant policy documents as soon as possible. The NSWPF should make any amendments necessary to ensure that officers are given sufficient specific direction regarding expectations when executing covert search warrants under the TPP Act. In other sections the Commission's report refers to particular content in the General Search Warrant SOPs that the NSWPF should make clear apply to the execution of covert search warrants: see Sections 2.6.2, 2.6.3 and 2.6.4.

The Commission will seek revised copies of all relevant policy documents from the NSWPF when it commences its next review under the TPP Act in July 2023.

**RECOMMENDATION 1:** The NSW Police Force revise all search warrant policy documents which it considers apply to the execution of covert search warrants under the *Terrorism (Police Powers) Act 2002* (NSW) as soon as possible, to ensure those documents make clear to officers which policies are to be followed when executing those warrants, and what variations to general search warrant practice are permitted.

### 2.3.3 FORMS FOR USE OF COVERT SEARCH POWERS

The *Terrorism (Police Powers) Regulation 2021* (NSW) gives the Attorney General the power to approve forms 'as may be necessary or convenient' for the administration of the TPP Act.<sup>39</sup> This power also appeared in all previous versions of this regulation. However, no forms have ever been approved.

In its 2008 report the Ombudsman noted that the forms the NSWPF used in 2005 and 2006 to exercise the Part 3 powers had not been approved by the Attorney General, and recommended that the Attorney General consider developing forms to be used by applicants and Judges in the administration of the TPP Act.<sup>40</sup> The Department of Justice and Attorney General, in its statutory review of the TPP Act in 2010, stated that the

<sup>39</sup> *Terrorism (Police Powers) Regulation 2021* (NSW) reg 8.

<sup>40</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 83 (Recommendation 31).



Government supported the recommendation, and that it was intended that forms would be developed based on the 'existing LEPPRA covert search warrant forms'.<sup>41</sup>

However, the Ombudsman reported in 2011 that there were still no forms that had been approved by the Attorney General under the TPP Act, and recommended such forms be finalised.<sup>42</sup> The Department of Attorney General and Justice advised the Ombudsman that the forms were 'under development jointly by that Department and the NSW Police Force'.<sup>43</sup>

It is unclear why the TPP Act covert search warrant forms were never finalised and approved by the Attorney General. By contrast, since 2016 the approved forms for use of LEPPRA covert search warrants powers have been set out in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW). Schedule 1 in that Regulation sets out forms for the application for the warrant (Form 2), the warrant (Form 12), the occupier's notice (Form 22) the adjoining occupier's notice (Form 23) and the report about execution of the warrant (Form 28).

The NSWPF does, however, have forms on its system that it used when exercising the Part 3 powers in 2018-2019. The NSWPF also provided the Commission with copies of the blank forms it had on its system in 2020.<sup>44</sup>

The Commission identified a number of inconsistencies between the forms and the terminology and requirements in the TPP Act. It was apparent that some of the errors in the forms caused the NSWPF to fail to comply with certain requirements in Part 3 when exercising the covert search powers during the reporting period.

One significant problem in this regard was that the form the NSWPF used to prepare the occupier's notices for each of the 2018 and 2019 warrants was substantially deficient. The form did not include six of the 10 fields required to be included in the notice under s 27U of the TPP Act. As a result, none of the occupier's notices prepared by the NSWPF during the reporting period contained details about the execution of the relevant warrants, in breach of the TPP Act. This is discussed below in Section 2.8.1.

It appears that a number of the errors in the covert search warrant forms, including the form for the occupier's notice, was due to the text of the forms being copied from the forms used for LEPPRA covert search warrants, without due attention being paid to the different requirements that apply to a TPP Act covert search warrant.

Further, in relation to two of the warrants in the reporting period, the NSWPF actually used a LEPPRA form for the report to the Judge on execution under s 27S, rather than a TPP Act form. As a result, those reports did not contain all the information required by the TPP Act.

When the Commission raised the issues with the forms the NSWPF had used to exercise the TPP Act covert search powers, the NSWPF agreed the forms were not appropriate.

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<sup>41</sup> Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010) p 40. Covert search warrants powers were introduced into the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) in 2009.

<sup>42</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 - 2010* (2011) p 38 (Recommendation 15).

<sup>43</sup> *Ibid* p 38.

<sup>44</sup> Letter from Commissioner of Police, NSW Police Force, to A/Chief Commissioner, Law Enforcement Conduct Commission, 4 August 2020, Ref D/2020/780655, attachments.

The NSWPF stated that ‘a ground up redesign is required to bring them in compliance’.<sup>45</sup> It stated that the CAU would complete this redesign of the forms in the first quarter of 2022 ‘in consultation with LECC and other stakeholders’, and that an accompanying training package would be created for the TIS.<sup>46</sup>

In the draft report the Commission provided to the NSWPF in March 2022, the Commission included a proposed recommendation that the NSWPF address the issues identified by the Commission as soon as possible by creating new forms and training for the use of the covert search warrant powers under the TPP Act. In its response to the draft report in May 2022, the NSWPF informed the Commission that it supported that recommendation, and provided the Commission with copies of the new covert search warrant forms it had developed to address the issues raised.<sup>47</sup>

The Commission reviewed the new covert search warrant forms and notes that they are a significant improvement on the forms used during the reporting period. Almost all of the inconsistencies noted between the old forms and the terminology and requirements in the TPP Act have now been addressed in the new forms. The new forms will also help to address certain record-keeping issues that the Commission identified.

There are only two outstanding issues with language adopted in the new covert search warrant forms, and the Commission has raised these with the NSWPF. The Commission recommends the NSWPF address those remaining issues as soon as possible, and will review copies of the forms to ensure these errors have been addressed when it commences its next review under the Act in July 2023.

In June 2022 the Attorney General informed the Commission that the Department of Communities and Justice will seek copies of the new covert search warrant forms created by the NSWPF in response to the Commission’s draft report, and submit them to the Attorney General for formal approval in accordance with the *Terrorism (Police Powers) Regulation 2021* (NSW).

In terms of training for officers on the use of the covert search powers and the new forms, the NSWPF informed the Commission that the TIS induction package was updated in February 2022, and that the Counter Terrorism and Special Tactics Command ‘will provide relevant training’. The Commission will request copies of the TIS induction package and any other training materials developed for TIS officers as part of its next review under the TPP Act.

**RECOMMENDATION 2:** The NSW Police Force:

- (a) address the two outstanding issues the Commission identified in the new forms for the use of the covert search powers under Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW), and
- (b) develop and deliver updated training on the use of those powers and the new forms.

<sup>45</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002* (NSW), 10 January 2022, Ref D/2022/19069.

<sup>46</sup> Ibid.

<sup>47</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

## 2.4 RULE OF STRICTNESS WHEN ASSESSING COMPLIANCE

In conducting this review, the Commission has taken into consideration that there is a certain principle to be applied when assessing compliance with statutory requirements for the use of search warrant powers. The High Court in *George v Rockett* stated the importance of strict compliance with the statutory requirements relating to search warrants. The Court explained that a search warrant:

authorizes an invasion of premises without the consent of persons in lawful possession or occupation thereof...they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.<sup>48</sup>

These comments would seem to have greater relevance in the case of covert search warrants. The principle of requiring strict compliance with statutory conditions governing search warrant powers has been repeatedly endorsed by courts in New South Wales.<sup>49</sup> In *Director of Public Prosecutions (NSW) v Roberts*, the Supreme Court referred to this principle as the 'rule of strictness', and stated that this rule 'informs the requirement for precision and accuracy required in applications for, and the issue and execution of, search warrants'.<sup>50</sup>

Applying the rule of strictness in this review, the Commission has identified a number of areas where there has not been strict adherence to the legislative requirements for the execution of covert search warrants under Part 3 of the TPP Act. Discussion of these areas is included in Sections 2.6-2.8 of this chapter.

## 2.5 AUTHORISATIONS AND APPLICATIONS FOR COVERT SEARCH WARRANTS

### 2.5.1 WARRANTS SOUGHT TO PREVENT A TERRORIST ACT

The first step in applying for a covert search warrant is for the officer in the TIS to seek authorisation from the Commissioner of Police, the Assistant Commissioner responsible for counter terrorism, or (since August 2021) the Superintendent responsible for counter terrorism investigations.<sup>51</sup> Authorisation to apply may be granted if the officer giving the authorisation suspects or believes on reasonable grounds:

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

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<sup>48</sup> *George v Rockett* (1990) 170 CLR 104, 110-111.

<sup>49</sup> See for example *Carroll v Mijovich* (1991) 25 NSWLR 441, 451 (per Kirby P); *Ballis v Randall* (2007) 71 NSWLR 282, 295; *R v Macdonald (No 13)* [2020] NSWSC 1947, [94]-[96].

<sup>50</sup> (2016) 261 A Crim R 105, 119-120.

<sup>51</sup> *Terrorism (Police Powers) Act 2002* (NSW) ss 27C-27G; *Terrorism (Police Powers) Regulation 2016* (NSW) reg 4; *Terrorism (Police Powers) Regulation 2021* (NSW) reg 5.

- (b) that the entry to and search of premises will substantially assist in responding to or preventing the terrorist act, and
- (c) that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

Authorisation to apply was sought and granted by an appropriate officer in relation to each of the four warrants in the reporting period.

All four of the warrants were sought for the purpose of preventing a terrorist act within the meaning of s 3 of the TPP Act.<sup>52</sup> In the authorisations to apply for each of the warrants, reference was made to the fact that the warrants were being sought on the basis of suspicion of acts being done in preparation for, or planning, terrorist acts (an offence pursuant to s 101.6(1) of the *Criminal Code Act 1995* (Cth)).

Even though the TPP Act defines a ‘terrorist act’ as including the offence of membership of a terrorist organisation for the purposes of the Part 3 powers,<sup>53</sup> none of the warrants were sought solely based on suspected membership of a terrorist organisation.

The seeking of these warrants to disrupt planning for a potential terrorist act is consistent with the preventative purpose for which the NSW Government introduced the covert search powers. In the Second Reading speech to the relevant Bill, then Attorney General Mr Bob Debus explained that the Government intended the Part 3 powers to be both an investigative tool and a preventive tool for police. He stated that ‘[w]hen preliminary or support activity is suspected there is a strong need to act to gather further information to prevent any possible future acts of terrorism that may cost innocent lives’.<sup>54</sup>

The Attorney General explained that the covert search powers were designed to be available to police to prevent a ‘potential terrorist threat’, and to ‘target terrorists from the early stages of their activities’, even if the ultimate act of terrorism would occur overseas and years after the support or preparatory activities.<sup>55</sup>

In fact, one of the persons who was a target of the investigation in relation to which two of the covert search warrants were executed, Isaac El Matari, was ultimately convicted and sentenced for the Commonwealth offence of preparing to commit an incursion into a foreign country (namely Afghanistan) with the intention of engaging in hostile activities (s 119.4 *Criminal Code 1995 Act* (Cth)). He was also convicted of preparing or planning for a terrorist act in Australia (see Section 2.9 of this report for further discussion).

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<sup>52</sup> The Commission notes that the last time the NSWPF used the covert search powers, in 2005 and 2006, the warrants were also sought because police suspected the preparation or planning of a terrorist act: NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 74.

<sup>53</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27A(2).

<sup>54</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16940 (Bob Debus, Attorney General).

<sup>55</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16940-41 (Bob Debus, Attorney General).

## 2.5.2 REQUIREMENT THAT OCCUPIER HAVE NO KNOWLEDGE OF SEARCH

One of the threshold requirements to grant authorisation, and to apply for a covert search warrant, is that it is suspected or believed on reasonable grounds 'that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises' (s 27C(c) and s 27G(c) of the TPP Act).

In the course of this review, the NSWPF informed the Commission that it interprets 'knowledge' in that requirement to mean knowledge of the specifics of the proposed entry and search. The NSWPF also made several comments regarding its interpretation of the language in s 27C(c) and s 27G(c). Discussion of these comments in a public report may risk disclosure of information that is operationally sensitive. It is important, however, that these interpretation points be considered by the next statutory review of the TPP Act. The Commission accordingly raised these matters with the Attorney General in correspondence and requested they be considered by the statutory review.

The Commission also suggested the NSWPF make a change to its authorisation form for covert search warrants to make clear the requirement that the authorising officer suspect or believe on reasonable grounds that the pre-condition in s 27C(c) had been met. The NSWPF adopted this suggestion in the revised authorisation form provided to the Commission in May 2022.

## 2.5.3 REQUESTS TO ENTER PREMISES ADJOINING/ PROVIDING ACCESS TO SUBJECT PREMISES

When applying for a covert search warrant to search the subject premises, an officer can also apply for authorisation to enter premises 'adjoining or providing access to the subject premises', for the purpose of entering the subject premises. If the applicant officer wishes to seek such authorisation, he or she must provide the address or other description of the adjoining/access premises, and the grounds on which entry to those premises is required.<sup>56</sup>

The TPP Act defines 'premises' to include 'a building, structure or place, whether built on or not' (and, for the purposes of covert search warrants, 'a vehicle').<sup>57</sup> There is no definition in the Act for what constitute 'premises adjoining or providing access to' the subject premises.

The Judge determining the application must consider whether entry of the adjoining/access premises is reasonably necessary either to enable access to the subject premises, or to avoid compromising the investigation of the terrorist act.<sup>58</sup>

In 2008 the Ombudsman raised concerns that in four of the five covert search warrants that had been issued in 2005 and 2006, authorisation to enter adjoining premises was granted when it was either not intentionally sought by police in the application, or was sought in error, and without providing reasons why entry to adjoining premises was

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<sup>56</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27J(1)(e).

<sup>57</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 4(1) and s 27A(1).

<sup>58</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27K(2)(g).

necessary. The NSWPF did not, in fact, enter any adjoining premises under those warrants. It appeared that the request for authorisation to enter adjoining premises was being included in applications by default, due to how it was included in the application form.<sup>59</sup> In 2008 and again in 2011, the Ombudsman recommended that new forms be developed to address this issue.<sup>60</sup>

It appears that this past issue has been addressed, as authorisation to enter adjoining/access premises was only applied for, and granted, in relation to one of the four covert search warrants issued in 2018-19. The subject premises for that warrant was a car which was parked in the car park of a residential unit complex. In the warrant application police sought permission to enter adjoining/access premises, being the car space in which the car was parked (the space was allocated to the same person who owned the car). This authorisation was granted, and the car park and car were entered by police.

## 2.5.4 APPLICATIONS MADE BY TELEPHONE OR EMAIL

An application for a covert search warrant may be made in person, or by telephone. If the application is in person, it must be made in writing and the applicant must appear before the eligible Judge and give the information in or supporting the application under oath or affirmation, or by affidavit.<sup>61</sup>

The eligible Judge can, however, issue a covert search warrant on an application made by telephone if the Judge is satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.<sup>62</sup> However, the application must be made by facsimile (which includes email) if the facilities to do so are readily available.<sup>63</sup> Whether the application is made by telephone or sent by email, it is referred to in the Act as a 'telephone warrant'.

Two of the warrants issued in the reporting period were 'telephone warrants'. These are the first telephone warrants to be issued under the TPP Act. The applications for both telephone warrants were sent by email to the eligible Judge.

The Act requires that in the case of a telephone warrant, the issuing Judge must complete and sign the warrant and either provide the warrant to the applicant, or inform the applicant of the terms of the warrant and the date when it was signed.<sup>64</sup> If the Judge does not provide a copy of the warrant to the applicant, the applicant must complete a form of warrant in the terms indicated by the issuing Judge, write on it the Judge's name and date warrant was signed, and provide that copy of the warrant back to the Judge within two business days.<sup>65</sup>

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<sup>59</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 82.

<sup>60</sup> Ibid p 83 (Recommendations 31-33); NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011), p 38 (Recommendations 14 and 15).

<sup>61</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27H.

<sup>62</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27I(1) - (2).

<sup>63</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27I(3) and (9).

<sup>64</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27I(5).

<sup>65</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27I(6).



Having reviewed the NSWPF files for the two telephone warrants, the Commission notes that when the applicant fills out the records for the warrant, as per instructions given over the phone by the eligible Judge, there is a greater risk that the records made and held by the NSWPF do not capture all relevant information.

For example, in relation to one of the telephone warrants, the copy of the 'record of application' filled out by the officer did not include the particulars of the grounds which the eligible Judge relied on to justify issuing the warrant. The eligible Judge is required to cause a record of these particulars to be made.<sup>66</sup>

In relation to the other telephone warrant, there was no record in the NSWPF file that the Judge was satisfied the warrant was required urgently and that it was not practicable for the application to be made in person. It was also not clear from that file whether a copy of the warrant (as filled out by the NSWPF) was provided to the issuing Judge within two business days.

Following review of the Commission's draft report, the NSWPF created a new standalone form to be used by the eligible Judge to record their reasons for refusing or issuing a covert search warrant as required by the TPP Act. The NSWPF also updated its covert search warrant template to include a note at the end reminding the officer to provide a copy of any 'telephone' warrant back to the eligible Judge who issued the warrant within two business days of the warrant being issued.

## 2.6 EXECUTION OF THE COVERT SEARCHES

### 2.6.1 COVERT COLLECTION OF DNA

The NSWPF took DNA samples as part of the execution of three of the covert search warrants executed in the reporting period. The following DNA samples were taken:

- In relation to one covert search warrant, the documents that were seized during the covert search were subjected to a 'DNA tape lift', and then returned to the premises.
- In relation to another warrant, a 'trace DNA swab' was taken from each of the five electronic storage devices that were seized during the covert search, and a strand of hair was taken (it is unclear if this was taken direct from the premises or taken from the electronic devices seized).
- In relation to the third warrant, during the covert search of the premises DNA swabs were taken of a hallway mat, backpack and bathroom sink taps.

#### 2.6.1.1 AUTHORISATION TO TAKE AND TEST DNA SAMPLES

There is no specific power in the TPP Act to take DNA samples in the context of executing a covert search warrant. However, s 27O(1)(l) provides that if the warrant authorises 'the testing of a kind of a thing', then a person executing the warrant is authorised 'to test a thing of that kind and any relevant thing that the person finds in the course of executing the warrant'. This power is, therefore, not automatically conferred by

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<sup>66</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27L.

the issue of a covert search warrant, but can be included if it is specifically requested in the application and the eligible Judge decides to grant that power when issuing the warrant.

Testing of a thing was a power police sought in the application for one of the covert search warrants under which DNA was taken. However, in the applications for the other two warrants, the power to 'test a kind of thing' had been struck out as not being a power requested to be authorised in the warrants. It appears from this that the taking of DNA samples under those warrants was opportunistic, rather than planned.

In the s 27S(1) reports to the Judges about execution of each of the three warrants, the NSWPF did not list the s 27O(1)(l) power to test a thing as one of the powers that was exercised during the execution of those warrants. Further, the NSWPF in its report to Parliament on the use of the covert search powers between June 2018 and June 2019 stated that 'the NSWPF did not test any things under Covert Search Warrants in 2018-2019'.<sup>67</sup>

When the Commission raised this, the NSWPF agreed that taking and/or testing of DNA samples constitutes 'testing a thing' within the meaning of s 27O(1)(l). It agreed that the testing of DNA samples requires authorisation pursuant to s 27O(1)(l).<sup>68</sup>

When the Commission asked what authority the officers relied on when taking the DNA samples for testing under the warrants, the NSWPF stated that it took DNA pursuant to the power in s 27O(1)(h), which is the power to 'seize and detain any other thing that the person finds in the course of executing the warrant and that is connected with a serious indictable offence'. The NSWPF explained that 'DNA was sought to be taken on the basis that it was a thing connected with a relevant offence'. The NSWPF stated that 'police are now [as a result of the Commission's review] alert to the requirements of the T(PPA) in relation to things to be tested'.<sup>69</sup>

### 2.6.1.2 INFORMATION OBTAINED FROM DNA SAMPLES

The TPP Act requires that if a thing is tested, or seized for the purpose of testing, during the execution of a covert search warrant, the s 27S(1) report to the Judge on execution must include 'a description of the thing and the type of information obtained (or proposed to be obtained) by testing'.<sup>70</sup> The s 27S(1) reports for all three warrants did not state what type of information was obtained, or proposed to be obtained, from the DNA tape lifts and DNA swabs taken.

In relation to the swabs taken of the hallway mat, backpack and taps under one of the warrants, the NSWPF told the Commission that the type of information proposed to be obtained was 'information as to the origin of the DNA profile(s) from the items tested...indicating possession and/or persons present within the address'.<sup>71</sup>

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<sup>67</sup> NSW Police Force, *Terrorism (Police Powers) Act 2002 Section 27ZB Annual Report by the New South Wales Police Force: 1 July 2018 - 30 June 2019* (2019) p 4.

<sup>68</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.

<sup>69</sup> Ibid.

<sup>70</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27S(1)(c)(viii).

<sup>71</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.



However, the NSWPF said that it did not actually test or analyse any of the DNA tape lifts or swabs taken under any of the covert search warrants. It stated that an operational decision was made not to pursue any forensic testing.

### 2.6.1.3 COVERT COLLECTION OF DNA CURRENTLY UNREGULATED

The covert collection of DNA samples by police (i.e. the collection of a person's DNA other than by taking a sample directly from the person with the person's knowledge) is currently not regulated in New South Wales.

The *Crimes (Forensic Procedures) Act 2000* (NSW) (CFP Act) regulates the circumstances in which police can conduct 'intimate' and 'non-intimate' forensic procedures on a person to obtain 'forensic material', including DNA samples. It also restricts how the information obtained from analysing such samples is to be stored, for what purposes it may be used, and when the forensic material must be destroyed. Section 82 of the CFP Act provides that evidence which is obtained in breach of the provisions of that Act will generally be inadmissible, unless certain exceptions apply (although the court retains a discretion to admit the evidence).

However, the CFP Act does not prohibit the NSWPF from taking DNA samples covertly from items the person has (or may have) touched. In 2004 the NSW Court of Criminal Appeal in *R v Kane* confirmed that the CFP Act has no application when police take DNA material other than from a person directly. The Court held in that case that because the DNA sample that police took from a cigarette butt was retrieved 'without any reference to, or interference with the person', that retrieval fell outside the scope of the CFP Act and the evidence of the DNA from the butt was admissible.<sup>72</sup>

The Court's conclusion in *R v Kane* was followed by the Supreme Court in *R v White*,<sup>73</sup> another case concerning police retrieving DNA material from a cigarette butt discarded by the person. In *R v White* Studdert J held that s 82 of the CFP Act did not apply to the analysis of the cigarette butt because s 82 only applies to a forensic procedure carried out **on a person**. Justice Studdert noted that the definitions of 'intimate forensic procedure' and 'non-intimate forensic procedure' in the CFP Act did not seem to 'encompass the obtaining of [forensic] material which has been discarded'.<sup>74</sup>

Both the Australian Law Reform Commission and the NSW Ombudsman have considered the risks arising from the fact that the covert collection of DNA samples is not regulated.

In 2003 the Australian Law Reform Commission (ALRC) in its report on the protection of human genetic information considered the application of Part 1D of the *Crimes Act 1914* (Cth) (which regulates the conduct of forensic procedures in similar terms to the CFP Act). The ALRC raised concerns about the use by police of 'informal procedures' to obtain genetic samples, including collection of samples under search warrants. The ALRC noted that such practices 'would result in a parallel system for the collection and use of

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<sup>72</sup> *R v Kane* (2004) 144 A Crim R 496, 501.

<sup>73</sup> [2005] NSWSC 60 (15 February 2005).

<sup>74</sup> *R v White* [2005] NSWSC 60 (15 February 2005) [13].

genetic samples falling outside the formal regulatory framework established under Part 1D'.<sup>75</sup> The ALRC commented that:

The Inquiry considers there is a public interest in ensuring that Part 1D of the Crimes Act is not undermined by the use of informal means to collect genetic samples for law enforcement purposes. The Australian community has a right to expect that the private and sensitive information contained within their genetic samples is used only as specifically permitted by legislation or other court authority.<sup>76</sup>

The ALRC recommended that Part 1D be amended so that, other than crime scene samples, police could only collect genetic samples either (1) directly from the person pursuant to Part 1D, or (2) from a stored sample, either with the person's consent or pursuant to a court order.<sup>77</sup> It does not appear that this recommendation was ever acted upon.

In 2006 the NSW Ombudsman reported on its review of the exercise of powers under the CFP Act.<sup>78</sup> The Ombudsman noted that the CFP Act contains safeguards 'to protect the rights and interests of people who police want to undergo forensic procedures', including electronic recording of the procedure. The Ombudsman consequently raised concerns about 'the failure of the Act to prohibit DNA analysis otherwise than in accordance with the Act', noting the taking of covert DNA samples was outside the scope of the CFP Act and 'essentially unregulated'.<sup>79</sup>

The Ombudsman noted that '[w]e do not know how often police in New South Wales are submitting covert DNA samples for analysis, or the circumstances in which covert samples are being taken'.<sup>80</sup> The Ombudsman recommended that the NSWPF include in its annual reports the number of covert DNA samples submitted for analysis, the reason why the sample was taken covertly, and the results of the analysis.<sup>81</sup> It does not appear that this recommendation was ever implemented.

The Ombudsman concluded that Parliament should specifically consider the matter of covert collection of DNA. Recommendation 54 in the Ombudsman's 2006 report was that:

Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.<sup>82</sup>

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<sup>75</sup> Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) vol 2, p 1049 [41.197-41.199].

<sup>76</sup> *Ibid* p 1052 [41.212].

<sup>77</sup> *Ibid* p 1052-3 [41.213] (Recommendation 41-13).

<sup>78</sup> NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006).

<sup>79</sup> *Ibid* p 20.

<sup>80</sup> *Ibid* p 173.

<sup>81</sup> *Ibid* p 174 (Recommendation 53).

<sup>82</sup> *Ibid* p 174.

#### 2.6.1.4 DEVELOPMENT OF A REGULATORY FRAMEWORK FOR COVERT COLLECTION OF DNA SAMPLES BY POLICE

The possibility of police collecting DNA samples during the execution of a covert search warrant was first raised in 2005, when the Bill that would create the TPP Act covert search powers was being drafted. In the Second Reading speech to the *Terrorism Legislation Amendment (Warrants) Act 2005*, then Attorney General Bob Debus stated:

An important issue that arose during drafting of the bill was the possible collection of DNA samples during covert searches. Given the desirability of regulating the covert collection of DNA samples for law enforcement generally—for example, in executing a search warrant, or by collecting discarded samples from used cups or cigarettes—it has been decided that the possible collection of DNA under a covert search warrant will be regulated as part of a general regulatory framework to be developed by my department. I have asked my department to consult with NSW Police in developing this policy.<sup>83</sup>

The NSW Ombudsman discussed the possibility of DNA samples being collected during a covert search in its 2008 report on the exercise of covert search and preventative detention powers under the TPP Act. The Ministry for Police commented to the Ombudsman that ‘testing of a kind of thing’ under the TPP Act ‘could arguably include the collection of DNA samples’ and ‘[i]t may well be appropriate to have a legislative protocol regarding this issue.’<sup>84</sup> The then Attorney General’s Department indicated to the Ombudsman that regulation of covert collection of DNA samples was still under consideration. The Ombudsman recommended that the Attorney General’s Department consider the submissions made to the Ombudsman’s review, regarding collection of DNA during a covert search, when developing any new regulatory framework for covert collection of DNA samples.<sup>85</sup> This recommendation was supported by the Government.<sup>86</sup>

In April 2010 the NSW Government publicly announced that it would set up a Forensic Working Party, headed by Supreme Court Justice Graham Barr, to review the CFP Act (the Barr Review), as part of a ‘major review’ of the laws governing DNA and related forensic procedures. The Working Party was to include representatives from multiple agencies, including the Department of Justice and Attorney General and the NSWPF. The Government stated that it expected a ‘re-write’ of the legislation ‘to be introduced into Parliament before the end of this year’.<sup>87</sup>

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<sup>83</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16942.

<sup>84</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 79.

<sup>85</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 79 (Recommendation 27).

<sup>86</sup> Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010) p 39.

<sup>87</sup> Premier of New South Wales, ‘Major Review Of State’s DNA Forensics Procedures’ (News Release, 6 April 2010) <<http://entree-media.records.nsw.gov.au/pairtree/acb56d6a7eba4f389f7081a5b558bebc/9d/b2/a8/09/f2/47/4d/b4/80/fd/46/6a/0e/cc/e1/af/0/100406-dna-forensics.pdf>>

In 2011 the Ombudsman noted that the Department of Attorney General and Justice was ‘yet to finalise’ the review of the CFP Act.<sup>88</sup> The final report of the Barr Review was never made public.

As part of this review of the use of powers under the TPP Act, the Commission wrote to the Attorney General, the Hon Mark Speakman SC MP, and the NSWPF, to ask about the outcome of the Barr Review, and to request a copy of the report of that review and information about any work done in relation to the regulation of covert DNA collection.

The Commission was informed that in 2017 the Office for Police (which was then within the Department of Justice) commenced work on a response to the Barr Review. When the Office for Police was merged into the NSWPF in 2019, the NSWPF took over leading this work, however the Attorney General is the lead Minister for that work.

The NSWPF stated that it has developed a draft DNA Profiles and Forensic Procedures Bill which was sent to stakeholders, including courts and Legal Aid NSW, in 2021. The NSWPF informed the Commission in March 2022 that it was working closely with Parliamentary Counsel on a revised draft of the Bill to address concerns raised by stakeholders, and anticipated further consultation with stakeholders in mid-2022.<sup>89</sup>

The Commission has not been provided a copy of the Barr Review, nor has it seen a copy of the draft DNA Profiles and Forensic Procedures Bill prepared by the NSWPF. The NSWPF provided the Commission with excerpts of some of the recommendations made by the Barr Review, but without reading the report of that review the Commission cannot conclude whether the Barr Review report or the draft Bill addresses collection of DNA under a TPP Act covert search warrant.

#### 2.6.1.5 COMMISSION’S ANALYSIS

There is no guidance in law or policy for police officers considering taking DNA samples during the execution of a covert search warrant under the TPP Act. The CFP Act, which controls when and how police can take DNA samples direct from a person, how those samples are to be recorded, how the information derived from analysis of those samples is to be stored, and how the information may be used, has no application when police take DNA covertly.

Given the lack of regulation, it is perhaps not surprising that there was no guidance about the taking of DNA samples in the TPP Act covert search warrant SOPs the NSWPF had in place in 2018-19 when the covert searches were conducted, or in the 2020 version of those SOPs. The SOPs did, however, appear to envision that DNA samples could be collected during a covert search. For example, the SOPs contained references to using the Forensic Services Group ‘for matters including the taking of DNA’.

Despite the lack of guidance, in three out of the four covert searches conducted in the reporting period, samples of DNA were taken from the subject premises, or from items located or seized during the searches of those premises. This is the first time this has occurred in searches conducted under Part 3 of the TPP Act.

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<sup>88</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 36.

<sup>89</sup> Letter from Commissioner of Police, NSW Police Force, to Commissioner, Law Enforcement Conduct Commission, 1 March 2022.

Given police officers are collecting DNA in these circumstances, there is a need for clear guidance in both the law and policy as to when this is authorised, how the samples are to be recorded, how the information derived from any analysis of those samples is to be stored, how that information is to be used, and when the samples must be destroyed. There are particular challenges for police in dealing with DNA collected covertly, including issues with the chain of possession, and accounting for the risks of secondary transfer and contamination of the samples.

There are also limitations on how the results from covertly-collected DNA samples could be used, with possible criminal liability for officers who breach those limitations. Even though the CFP Act does not expressly deal with covert collection of DNA, it does regulate the NSWPF DNA database system. Section 91(2) makes it a criminal offence if a person intentionally or recklessly supplies forensic material for analysis for the purpose of deriving a DNA profile for inclusion in the DNA database system if it is not 'permitted forensic material'. DNA samples collected under the auspices of a covert search warrant would not appear to fall into the definition of permitted forensic material.<sup>90</sup>

The NSWPF stated to the Commission that:

Investigators do NOT provide covert DNA samples for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system. Comparison may be made with existing DNA profiles, however, the covertly obtained DNA sample is not placed into the DNA database.<sup>91</sup>

Whether or not covertly-collected DNA samples are placed on the DNA database, it is clear that legislative reform is needed to provide clarity and certainty to both police and the public in relation to the taking of DNA samples under TPP Act covert search warrants.

As a starting point, it would benefit both the NSWPF and members of the community for it to be clear when authority is being sought under a TPP Act covert search warrant to take DNA samples, and when that authority has been granted. The powers in s 270 of the TPP Act which are expressed in the ambiguous language of seizing 'things' and 'testing' of 'things' may not provide sufficient clarity on this point.

If it was clear in the TPP Act that the power to take DNA samples for testing was something that the police officer applying for the warrant specifically had to request, this would encourage police to turn their minds, prior to the search, to whether they intend to take such samples, and the purpose of taking those samples. If taking of DNA samples was expressly mentioned as a power that the eligible Judge had to specifically authorise in the warrant, this would give the police officers executing the warrant clarity as to whether they have the legal authority to collect such samples during the search, or from items seized during the search.

An example of language that could be used is found in Part 1AAA of the *Crimes Act 1914* (Cth), which provides the Commonwealth equivalent of covert search warrants (called delayed notification search warrants). Section 3ZZCA(h) of that Act refers to a power under the warrant to 'search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes'. Section 3ZZCA(j) also refer to the power to 'sample a thing' (as distinct from 'test the thing') if sampling

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<sup>90</sup> *Crimes (Forensic Procedures) Act 2000* (NSW) s 91(3).

<sup>91</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

that kind of thing was specifically authorised in the warrant (or if it is believed on reasonable grounds to be evidential material).

Another example is found in the *Terrorism (Extraordinary Powers) Act 2005* (WA). Section 27(8)(c) of that Act provides that a covert search warrant authorises the executing officer to 'conduct a forensic test in the target place or target vehicle or on any thing in it'.

In its response to the Commission's draft report, the NSWPF stated that the DNA Profiles and Forensic Procedures Bill 'is the appropriate vehicle' for consideration of the issues raised by the Commission.<sup>92</sup>

The Commission recommends that matters including recording of DNA samples collected under a covert search warrant, analysis of those samples, storage of information derived from the analysis, use of that information and destruction of the samples, be addressed in the draft DNA Profiles and Forensic Procedures Bill being prepared by the NSWPF (or any related legislation).

The Commission also recommends that s 27O of the TPP Act be amended to make clear under what power a police officer can take and analyse forensic samples from the subject premises, or from things found in the course of executing the covert search warrant.

**RECOMMENDATION 3:** Parliament consider:

- (a) amending s 27O of the *Terrorism (Police Powers) Act 2002* (NSW) to make clear which power a police officer must request in the application, and the eligible Judge must grant in the warrant, in order for police to be authorised to take and analyse forensic samples from the subject premises, or from things seized from the subject premises; and
- (b) including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which address how DNA samples obtained in the execution of a covert search warrant should be recorded and stored, how the results of any analysis of those samples may be used, and when the samples must be destroyed.

Following review of the Commission's draft report, the NSWPF amended its covert search warrant application form to include a note that 'testing of a thing' 'includes the carrying out of procedures such as testing for and analysis of DNA, fingerprints, explosives residue, etc.' As the NSWPF comments, this note will make clear to officers that 'if they are seeking the power to test for DNA samples, they must clearly specify this in the application'.<sup>93</sup>

<sup>92</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

<sup>93</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.



The NSWPF also included this same note in its updated form for the s 27S(1) report to the Judge on execution, ‘to ensure the applicant officer reports back to the eligible Judge on whether DNA samples were tested, and what use was made of them.’<sup>94</sup>

However, the Commission notes that until an appropriate regulatory framework is put in place, the collection of DNA samples under covert search warrants creates risks for both the NSWPF and the general public.

The Commission therefore recommends that the NSWPF include in its policy documents guidance for officers about collection of DNA samples during a covert search under the TPP Act. The policy documents should provide guidance on how the taking of DNA samples during a covert search is to be recorded, and for what purposes the information derived from analysis of those samples is permitted to be used. The policy guidance should also warn officers about the potential criminal liability under s 91(2) of the CFP Act if officers supply DNA samples collected covertly for analysis for the purpose of deriving a DNA profile for inclusion in the DNA database system.

In the draft report provided to the NSWPF, the Commission had included a recommendation that these matters be included in its covert search warrant SOPs. However, as discussed above, in its response the NSWPF informed the Commission it archived those SOPs in January 2022 and will not be replacing them. The NSWPF stated that:

there is already corporate knowledge on recording exhibits that are seized during search warrants, including the testing/taking of DNA samples. It is anticipated the [Counter Terrorism and Special Tactics] command will refer their investigators to existing policies and procedures when executing [counter-terrorism covert search warrants]; in the area of testing/taking DNA samples, the same requirements for LEPRAs [covert search warrants] apply for [counter-terrorism covert search warrants].<sup>95</sup>

The NSWPF did not specify what these ‘existing policies or procedures’ were, or provide a copy to the Commission. The Commission was accordingly not able to assess to what extent any ‘existing policies or procedures’ addressed the matter raised by the Commission. However, the general search warrant policy documents reviewed by the Commission (namely, the NSWPF Handbook and policy documents discussed in Section 2.3.2.2) do not discuss taking of DNA samples during a covert search (or refer to a policy document which does so).

The Commission therefore recommends the NSWPF revise its policy documents to include guidance for officers about collection of DNA samples during a covert search under the TPP Act. The Commission will seek revised copies of all relevant policy documents from the NSWPF when it commences its next review under the TPP Act in July 2023.

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<sup>94</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

<sup>95</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

**RECOMMENDATION 4:** The NSW Police Force revise its policy documents to include guidance for officers taking DNA samples under a covert search warrant, including:

- (a) how the taking of DNA samples during a covert search is to be recorded;
- (b) for what purposes the information derived from analysis of those samples is permitted to be used, and
- (c) the potential criminal liability under s 91(2) of the *Crimes (Forensic Procedures) Act 2000* (NSW) if officers supply DNA samples collected covertly for analysis for the purpose of deriving a DNA profile for inclusion in the DNA database system.

## 2.6.2 VIDEO RECORDINGS CONNECTED TO THE COVERT SEARCHES

The NSWPF made video recordings in connection with three of the covert search warrants executed during the reporting period. However, most of the video recordings did not show the actual covert searches. Only one of the covert searches was (partially) recorded.

For CT CSW 18-001, four video recordings were made at the NSWPF Headquarters. No recording was made of the actual search. In the recordings it was said the reason no recording was made at the subject premises was to maintain the covert nature of the operation. The first recording was made about 45 minutes prior to the start of the covert search. The TIS police officer on camera (who appeared in all the recordings) introduced himself and identified by name a camera operator and exhibit officer. He was not the police officer who had applied for the warrant. The recording did not show or name the officers who entered the subject premises.

The next recording was made only minutes after the covert search had been completed, and showed documents which the police officer on camera said were retrieved from the subject premises. A further recording was made roughly 1.5 hours later, in which the police officer stated the documents had been forensically examined and would be returned to the premises. No recording was made of the officers' re-entry of the premises to return the documents. A further recording was made about 30 minutes later, in which the police officer on camera stated that the documents had been returned and the digital copies that had been made of the documents had been placed on a USB and given to the Property Officer (a Federal Agent named and shown on camera).

For CT CSW 18-002, two video recordings were made at the NSWPF Headquarters, the first 25 minutes after the warrant had been executed and the second 2.5 hours after the execution. The police officer on camera in both recordings was the police officer in the TIS who had applied for the warrant. In the first recording the police officer described the purpose of the search and named 11 persons who assisted him in the execution of the warrant (including a video camera operator). In the second recording the police officer listed the different electronic storage devices which he said had been seized from the subject premises, and the trace DNA swabs and strand of hair that had been taken from those seized items. There was no recording of the re-entry of the premises to return the electronic storage devices.



For CT CSW 19-001 four video recordings were made in the subject premises, during the execution of the covert search warrant. The videos do not clearly show the faces, or identify the names, of the three persons who enter the premises. The footage shows the officers walking around the various rooms in the unit, opening cupboards and going through bags. However, the recordings do not show any DNA swabs being taken, which was the key activity undertaken during that covert search.

The recordings also do not show the officer identifying the location of some of the items which it appears were important pieces of evidence in the subsequent prosecution of Isaac El Matari (see Section 2.9)

There were no video recordings made in connection with CT CSW 19-002.

The table below summarises the extent to which video recordings were made in relation to the covert search warrants executed during the reporting period. It also compares this with compliance with the other accountability mechanisms for the exercise of these powers under the TPP Act, which are discussed in the sections below.

**Table 2: Compliance with accountability mechanisms for covert searches conducted in reporting period**

WARRANT	SEARCH RECORDED ON VIDEO?	INDEPENDENT OFFICER PRESENT FOR SEARCH?	REPORT TO JUDGE ON EXECUTION PROVIDED?	REPORT TO JUDGE ON RE-ENTRY PROVIDED?	OCCUPIER'S NOTICE PROVIDED?
18-001	No	No	Yes but incomplete	Yes but incomplete	No
18-002	No	No	Yes but incomplete	Yes but incomplete	No
19-001	Partially	No	Yes but incomplete	N/A	Yes but incomplete
19-002	No	No	Yes but incomplete	Yes	No

### 2.6.2.1 GUIDANCE IN NSWPF SOPS ON RECORDING COVERT SEARCHES

The TPP Act does not require that the execution of covert search warrants are recorded on video.

At the time the four warrants were executed, the NSWPF SOPs for covert search warrants included an expectation that the execution of covert search warrants be video recorded 'unless otherwise impractical to do so'.<sup>96</sup> The SOPs stipulated that the video operator 'is to take no part in the actual search of the premises'.<sup>97</sup> Under the section on 'Execution' the SOPs stated:

<sup>96</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 5 and p 9; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 5 and p 9.

<sup>97</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 5; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 5.

- Where practicable, standard NSW Police Force search warrant procedure is to be followed during the course of execution of the warrant including, but not limited to...video recording of the execution of the warrant (care is to be taken during video recording that methodology is not disclosed)...
- It is desirable that the execution of the warrant be video recorded in its entirety. Should video recording be impractical for any reason, police are to make detailed notes as to the reason(s) why execution of the warrant was not so recorded. These reasons should also be logged in the relevant e@gle.i investigation [the investigation record in the NSWPF electronic database] at the earliest opportunity.

*(Note: in the report to the issuing Judge under s27S police are to state whether or not the search was video recorded. If the search was not recorded, police must state reason(s) why).*<sup>98</sup>

In the section on 'Return or retrieval of things seized or place', the SOPs similarly noted the '[d]esirability of video recording of the re-entry and retrieval/substitution', and included the note that if was impractical to make such a recording, the reasons why should be logged in the electronic database for the investigation, and explained in the s 27S(1) report to the Judge.<sup>99</sup>

The inclusion of these comments in the NSWPF SOPs was a result of recommendations from the Ombudsman in its 2008 report on its review under the TPP Act.<sup>100</sup> The reasoning behind these recommendations are discussed in the section immediately below.

Despite the notes in the SOPs, none of the s 27S(1) reports to the Judges for the four covert search warrants included the reasons why the execution of the warrant was not recorded.

The Commission asked the NSWPF why officers did not record the execution of the warrants, given the SOPs required that, in general, the execution of covert search warrants should be video recorded. The NSWPF responded that:

In the case of each of the search warrant executions, the integrity and covert nature of each of the executions was given the priority. In each case the executions were conducted using the least amount of staffing numbers to maintain the covert nature of them.<sup>101</sup>

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<sup>98</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, pp 9-10; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, pp 9-10.

<sup>99</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 13; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 13.

<sup>100</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 81 (Recommendations 28-30).

<sup>101</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.

## 2.6.2.2 RATIONALE FOR RECORDING THE EXECUTION OF COVERT SEARCH WARRANTS

When reporting on the first uses of covert search warrants under the TPP Act, the NSW Ombudsman succinctly summarised the reasons why recording the execution of covert search warrants is important:

In our view there is considerable merit in police video and audio recording covert searches. A video recording creates an objective, contemporaneous record of the search that can be used for later analysis...it reduces opportunities for police misconduct and protects officers against unjustified allegations of misconduct. We note that police routinely record the execution of ordinary search warrants on video and this practice has been strongly encouraged by the courts. For covert search warrants, where the occupier is neither present nor aware of the search, the reasons for recording the search are even more cogent. Police have also moved to record other policing actions, including through in-car video and closed circuit television in charge rooms and custody areas.<sup>102</sup>

The Commission notes that since the Ombudsman's report, the NSWPF has also adopted the use of Body-Worn Video cameras on a broad scale.

The Ombudsman raised concerns about the effectiveness of the video recordings made of the executions of three of the covert search warrants, in terms of providing accountability for the use of powers by police. The Ombudsman noted that 'much of the footage was out of focus, in darkness or blank', in one search 'it appeared there were many officers involved and only a small amount of the activity undertaken was recorded', and some searches contained periods 'where the camera was not directed at the search activity'.<sup>103</sup>

The Ombudsman concluded that:

The footage we saw was inconsistent as an effective record of the actions taken by police for the purposes of accountability. For the reasons outlined, much of the footage could not be relied upon to protect the integrity of the procedure of the searches or be of value in refuting any allegations of police misconduct.<sup>104</sup>

This led to the Ombudsman recommending that:

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'.<sup>105</sup>

The Department of Attorney General and Justice in its review of the TPP Act in 2010 stated that:

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

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<sup>102</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 80 (citations omitted).

<sup>103</sup> Ibid p 81.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid p 81 (Recommendation 30).

circumstances. In any case, where a warrant's execution is not video taped, police are expected to be in a position to explain why.<sup>106</sup>

### 2.6.2.3 COMMISSION'S ANALYSIS

The Commission is concerned that despite the guidance in the CSW SOPs, the NSWPF only recorded one of the four covert searches undertaken in the reporting period. Further, that footage did not include the key activity undertaken during that search, being the swabbing of items for DNA. The recordings made at the NSWPF Headquarters before and/or after the execution of two of the other warrants are of very limited utility in terms of protecting against challenges to the integrity of evidence gathered during those searches.

The Commission concludes that the comments the Ombudsman made in 2008 can be applied with equal, if not more force in relation to the recordings made of the 2018-19 warrants; namely, the footage was not an 'effective record of the actions taken by police for the purposes of accountability', and 'could not be relied upon to protect the integrity of the procedure of the searches or be of value in refuting any allegations of police misconduct'.<sup>107</sup>

The reasons given by the NSWPF for why the searches were not recorded appear to amount to a position that covert searches in general may not be recorded. The covert nature of the executions and desirability of executing the searches with the least number of personnel possible to maintain their covert nature are considerations which will be relevant for any covert search under the TPP Act.

As the NSWPF states in its General Search Warrant SOPs:

The searching of premises and the seizure of property/exhibits requires video recording to ensure the credibility and integrity of police actions. It is during the execution of search warrants that video recording provides the most reliable account of police activities and serves as a valuable tool to address evidentiary and behavioural risks.<sup>108</sup>

The irreplaceable value of recordings of covert searches is demonstrated by the fact that the recordings at the NSWPF Headquarters made before and/or after the execution of two of the warrants, even though of very limited evidentiary value, did reveal that not all of the people who assisted in the execution of those warrants were listed on the s 27S(1) reports made to the Judges (discussed below in Section 2.7.1).

As discussed in Section 2.3.2, the NSWPF has now archived its covert search warrant SOPs, and has stated to the Commission that all covert searches are conducted in accordance with the General Search Warrant SOPs. The General Search Warrant SOPs state that it is mandatory that an officer perform the role of video operator during the execution of a search warrant, and contains a detailed description of the duties of the video operator.

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<sup>106</sup> Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010), p 40.

<sup>107</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 81.

<sup>108</sup> State Intelligence Command, NSW Police Force, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 44 (Appendix F).

However, it is not clear from the General Search Warrant SOPs that those instructions apply to the execution of a covert search warrant issued under the TPP Act. In accordance with Recommendation 1, the NSWPF should amend the General Search Warrant SOPs to make clear that those SOPs should be followed when executing a covert search warrant under the TPP Act, including the instructions regarding video recording.

The Commission also recommends that the NSWPF should emphasise in training to officers the importance of video recording the execution of covert searches, whenever possible, and explain the purposes behind making such recordings. The NSWPF stated that it supported this recommendation.<sup>109</sup>

**RECOMMENDATION 5:** The NSW Police Force emphasise in training to officers on the covert search powers in the *Terrorism (Police Powers) Act 2002* (NSW) the importance of video recording covert searches, whenever possible, and explain the purposes behind making such recordings.

### 2.6.3 ROLE OF EXHIBIT OFFICERS

The CSW SOPs, at the time the covert search warrants were executed, stated that '[r]oles and responsibilities in respect of the...execution of a covert warrant will generally replicate the roles in standard search warrants SOPs'. The SOPs stated that accordingly it was 'expected' that an Exhibit Officer would be assigned for covert searches, who 'has responsibility for ensuring the integrity of "things" located and/or seized, photographing them in situ: properly recording the finder, location, description and exhibits handling continuity.'<sup>110</sup> The SOPs also stated that '[w]here practicable, standard NSW Police Force search warrant procedure is to be followed during the course of execution of the warrant including, but not limited to...exhibit identification, handling and management.'<sup>111</sup>

In the video recordings made after two of the covert searches it was stated that an Exhibit Officer assisted in the execution. The NSWPF informed the Commission that Exhibit Officers were involved in the execution of the other two covert search warrants, but the roles 'were completed by officers undertaking multiple roles for ease of execution.' In its response to the Commission's draft report, the NSWPF further stated that:

It is noted adherence to a strict adoption of the SOPs does not take into account individual operational circumstances of the warrants. During all four covert search warrants, a designated exhibit officer was assigned, notwithstanding they may have performed multiple roles on the day.

<sup>109</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

<sup>110</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 4; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 4.

<sup>111</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 9; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 9.

This does not conflict with the SOPs, and an exhibit officer is not precluded from undertaking another role during the conduct of a search warrant whether covert or other. The conduct of these covert search warrants was not undertaken in usual covert circumstances and were undertaken with a level of risk to the officers completing the tasks. The use of officers performing multiple tasks was considered the most efficient means of completing the search, while maintaining the integrity of the overall operation.<sup>112</sup>

The Commission agrees that, in principle, the role of an Exhibit Officer can be fulfilled by an officer who is undertaking more than one role during a search. However, it appears from the recordings made, and the s 27S(1) reports to the Judges after execution, that the officers assigned the role of Exhibit Officer in each of the four covert search warrants did not perform a key task the CSW SOPs require of an officer in that role. For three of the searches it does not appear that there were any photographs taken or video recorded of where/when 'things' were located. For the one search that was recorded on video, there was no recording or photographing of the swabbing of items undertaken during that search.

As the NSWPF has now archived its covert search warrant SOPs, it appears officers planning to execute a covert search warrant under the TPP Act will be directed to the General Search Warrant SOPs. The General Search Warrant SOPs direct that the Exhibit Officer is a mandatory role in the execution of a search warrant, and explain that:

The Exhibit Officer has responsibility for ensuring the continuity and integrity of 'things'...located and/or seized, photographing them in situ, properly recording the finder, location, description and exhibits handling continuity until the recording and securing of those items at the police station.<sup>113</sup>

In implementing Recommendation 1, the NSWPF should make clear in the General Search Warrant SOPs that the instructions regarding the responsibility and duties of the Exhibit Officer in those SOPs should be followed when executing a covert search warrant under the TPP Act.

The Commission also recommends that training to officers in relation to exercising the covert search warrant powers in the TPP Act include an explanation of how the role of an Exhibit Officer should be performed during a covert search. The NSWPF stated that it supported this recommendation.<sup>114</sup>

**RECOMMENDATION 6:** The NSW Police Force include in training to officers on the covert search powers in the *Terrorism (Police Powers) Act 2002* (NSW) an explanation of how the role of an Exhibit Officer should be performed during a covert search.

<sup>112</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

<sup>113</sup> State Intelligence Command, NSW Police Force, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 27.

<sup>114</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.



## 2.6.4 INDEPENDENT OFFICERS NOT PRESENT

The NSWPF CSW SOPs at the time the covert search warrants were executed provided that '[w]here practicable, the role of Independent Officer is to be retained in the execution of a covert warrant.' The SOPs stipulated that '[t]he Independent Officer is, where possible, to be of the rank of Inspector or above, and is not to be directly connected or associated with the investigation for which the warrant is sought'.<sup>115</sup>

The NSWPF explains in its General Search Warrant SOPs that the role of the Independent Officer (referred to as the Independent Observer) 'is vital to ensuring impartiality during the execution of search warrants'.<sup>116</sup> Those SOPs set out that generally the duties of the Independent Observer include being present at the premises at the time of the execution of the search warrant, and to enter the premises 'as soon as practicable after the premises have been secured but prior to the commencement of the property search'.<sup>117</sup> The Independent Observer is responsible for '[c]ontinual [m]onitoring' and is to '[r]emain, at all times, with the Search Team and Exhibit Officer as each individual room of the premises is searched and record the entry of any other police person'. The Independent Observer is to '[b]e aware of and view 'things' (exhibits) located during the search in situ prior to removal' and '[r]eview and sign the Property Seizure/Exhibit Form to certify the description of the property'.<sup>118</sup>

There was no evidence to suggest to the Commission that an Independent Officer was present for any of the covert search warrants executed in the reporting period. When the Commission asked the NSWPF why this was the case, it stated:

There is no requirement under the TPP Act to have independent officers present at covert search warrants. However, in line with standard operating procedures upon each CSW being executed, an independent officer was kept updated as to the progress of the execution and completion of them via phone. An independent officer was not placed physically at the warrant sites due to the necessity to maintain a covert nature and reduce persons entering premises covertly.<sup>119</sup>

The NSWPF further explained that:

Although the independent observer was not present for the execution of the searches, they were kept apprised of the conduct of each search warrant, briefed prior to the execution, provided with operational orders and risk assessments, and kept up to date with the execution and completion of the warrants and provided with details of the exhibits seized.<sup>120</sup>

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<sup>115</sup> Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 27 June 2018, p 4; Terrorism Investigations Squad, NSW Police Force, *Covert Search Warrants*, version reviewed 20 December 2018, p 4.

<sup>116</sup> State Intelligence Command, NSW Police Force, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 31.

<sup>117</sup> State Intelligence Command, NSW Police Force, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 31-2.

<sup>118</sup> State Intelligence Command, NSW Police Force, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 32.

<sup>119</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.

<sup>120</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.



The Commission notes that many of the central functions of the Independent Officer described in the General Search Warrant SOPs could not be performed by an officer who was not physically present in the premises in which the covert search was being conducted. The Commission also notes that independent officers were involved in the execution of the three of the covert search warrants in 2005 and 2006, last time the Part 3 powers were used.<sup>121</sup>

In this sense, it is a positive development that officers planning to execute a covert search warrant under the TPP Act will now be directed (through the NSWPF Handbook) to the General Search Warrant SOPs, given the guidance those SOPs provide about the duties to be performed by the Independent Officer. In accordance with Recommendation 1, the NSWPF should make it explicit in the General Search Warrant SOPs that that guidance should be followed when executing a covert search warrant under the TPP Act.

The Commission recommends that covert search warrant training for officers include an explanation of how the functions of the Independent Officer should be performed during a covert search. The NSWPF stated that it supported this recommendation.<sup>122</sup>

**RECOMMENDATION 7:** The NSW Police Force include in training to officers on the covert search powers in the *Terrorism (Police Powers) Act 2002* (NSW) an explanation of how the functions of an Independent Officer should be performed during a covert search.

## 2.7 REPORTS TO THE ELIGIBLE JUDGES AFTER EXECUTION

Section 27S(1) of the TPP Act requires the person who executes a covert search warrant to provide a written report to the eligible Judge who issued the warrant within 10 days after the execution (the s 27S(1) report). The s 27S(1) report must include an address or other description of the subject premises and a statement whether or not the warrant was executed (and if not, reasons why). If the warrant was executed, s 27S requires that the report include:

- the date of execution;
- the name of any person who executed the warrant, and ‘the name of any police officer or intelligence gathering officer who assisted in the execution of the warrant and the nature of the assistance provided’;
- the name of ‘any person believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed and, if no such person is an occupier of the premises, any occupier (if known) of the premises at which the warrant was executed’;
- the powers that were exercised under the warrant;

<sup>121</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 76.

<sup>122</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

- the result of the execution of the warrant (including a brief description of anything seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested);
- if things were copied, photographed, recorded, operated, printed or tested because they were believed to be a ‘relevant thing’ or connected with a serious indictable offence, particulars of the grounds on which that belief was based;
- if a thing was tested or was seized for the purposes of testing— a description of the thing and the type of information obtained (or proposed to be obtained) by testing, and
- statements as to:
  - whether or not the execution of the warrant assisted in the prevention of, or response to, the terrorist act in respect of which the warrant was executed and, if so, how it assisted, and
  - whether or not the execution of the warrant assisted in the prevention of, or response to, any other terrorist act or any serious indictable offence and, if so, how it assisted.<sup>123</sup>

If premises are re-entered for the purpose of returning or retrieving a thing seized or placed during the initial entry under the warrant, the TPP Act requires a further report to be made to the eligible Judge within 10 days after the re-entry (the s 27S(3) re-entry report).<sup>124</sup> That report must include:

- the address or other description of the premises and the date of re-entry
- the name of any person who entered the premises for the purposes of the return or retrieval
- the name of any other police officer or intelligence gathering officer who assisted in the re-entry of the premises or the return or retrieval of the thing and the nature of any assistance provided
- a brief description of the thing, and if the thing was not returned or retrieved—the reasons why the thing was not returned or retrieved.

## 2.7.1 NAMES OF OFFICERS WHO ASSISTED IN THE EXECUTION AND THE NATURE OF ASSISTANCE PROVIDED

The Commission identified an issue regarding compliance with the requirement in s 27S(1)(c)(iii) that the s 27S(1) report include the name of any person who executed the warrant, the name of any police officer or intelligence gathering officer who assisted in the execution of the warrant, and the nature of the assistance provided. The TPP Act specifies that for the purposes of s 27S ‘police officer’ includes a member of the NSWPF, the Australian Federal Police or a police force or service in any other jurisdiction.<sup>125</sup>

The s 27S(1) report on the first warrant executed in 2018 named the officer who applied for the warrant (the applicant officer) and two other officers as being the persons who

<sup>123</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27S(1)(c).

<sup>124</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27S(3).

<sup>125</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27S(6).

executed the warrant. The NSWPF informed us that the two officers named were the officers who actually entered the premises. However, the officers shown or mentioned in the four video recordings relating to the execution of that warrant were not listed in the s 27S(1) report. These included:

- the case officer (who spoke in all the recordings);
- a federal agent who was identified as the camera operator, and
- a federal agent who was identified in the recordings as an Exhibits Officer.

Similarly, the s 27S(1) report on the second warrant executed in 2018 only listed the applicant officer and the name of one officer who assisted the applicant officer in the execution, and stated the officer's role as 'for the purpose of searching'. However, in the video recording made after the execution of that warrant, the applicant officer mentioned, by name and role, 11 officers who assisted him in the execution of the warrant, including an Exhibits Officer, a camera operator, and two AFP special resources officers.

The s 27S(1) report for the first warrant executed in 2019 named all three officers who were shown in the video recording assisting in the execution of the warrant (all of whom entered the premises).

As no video recording was made in relation to second warrant executed in 2019, the Commission is unable to verify whether the s 27S(1) report, which included the name of only one officer who was said to have executed the warrant, was accurate.

The Commission raised the omissions from the s 27S(1) reports for the 2018 warrants with the NSWPF. It appears from the response provided that the NSWPF in those cases had interpreted the requirement to name and describe the role of officers 'who assisted in the execution of the warrant' as only requiring those officers who actually entered the premises to be named. This Commission's view is that the deliberate choice of language in s 27S of 'assisted in the execution' means this requirement is broader than just listing those who entered the premises.<sup>126</sup>

Officers in the NSWPF also suggested to the Commission that the names and roles of certain persons who assisted in the execution of some of the warrants were deliberately left off the s 27S(1) reports because the NSWPF was concerned about disclosing operationally sensitive information.

The Commission notes that while the NSWPF is required to provide a copy of the s 27S(1) report to the issuing Judge, the NSWPF can seek from the eligible Judge a certificate that effectively prohibits that report from being inspected by any occupier of the searched premises. The eligible Judge can issue such a certificate if satisfied that the s 27S(1) report contains matter that either 'could disclose a person's identity, and... if disclosed, would be likely to jeopardise that or any other person's safety', or matter that if disclosed 'may seriously compromise the investigation of any matter'.<sup>127</sup> In fact, the

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<sup>126</sup> This can be contrasted with the language used in s 27S(3)(c), which refers to 'the name of any person who entered the premises for the purposes of the return or retrieval'.

<sup>127</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27L(2); *Terrorism (Police Powers) Regulation 2021* (NSW) cl 6 and cl 7 (for the regulation in force during the reporting period see: *Terrorism (Police Powers) Regulation 2016* (NSW) cl 5 and cl 6).

NSWPF did seek such a certificate in relation to the records (including s 27S(1) reports) for both 2018 warrants, and the eligible Judge issued those certificates.

If, despite the protection provided by the certificates precluding inspection of records, the NSWPF still holds concerns about the requirement in s 27S(1)(c)(iii) it should raise this matter with the Department of Communities and Justice in the next statutory review of the Act.

The Commission's view is that the requirement to include in the report to the eligible Judge the name of all those who assisted in the execution of the warrant (not just those who enter the premises), and the nature of their assistance, is an important accountability mechanism. This is particularly true in relation to the execution of warrants that are not video recorded, which was the case for three of the four covert search warrants executed in the reporting period.

Following review of the Commission's draft report, the NSWPF updated its form for s 27S reports to the eligible Judge to include a note instructing the officer completing the report to '[i]nclude the names of everyone involved in assisting in the execution of warrants and the re-entry of the premises (not just those who enter the premises), and the nature of the assistance provided'. The form then includes a table with columns for the rank, name and organisation of the officer, and a description of the nature of assistance provided. The Commission is satisfied that this instruction in the form will effectively reduce the risk of non-compliance with s 27S(1)(c)(iii) in future.

The s 27S(3) re-entry reports for the two covert search warrants executed in 2018 also did not include names of the persons who re-entered the premises, and any other officers who assisted in the re-entry, as required by s 27S(3)(c) and (d). The NSWPF informed the Commission that in relation to the first warrant in 2018, two officers entered the premises and returned the property seized, and in relation to the second warrant in 2018, one officer re-entered the premises and returned the property.

Since reviewing the Commission's draft report, the NSWPF has also updated its s 27S form to include clear fields for recording the name of persons who re-entered the premises, the name of any other officer who assisted in the re-entry or return or retrieval of a thing, and a description of the assistance provided by each person.

## 2.7.2 REFERENCES TO POWERS EXERCISED

In the s 27S(1) reports for the two covert search warrants executed in 2018 and one of the warrants executed in 2019, there were references to incorrect sections for the powers exercised. It is assumed this was due to the officer mistakenly referring to section numbers for powers listed in the LEPPRA Covert Search Warrant Form 12. The Commission asked for information from the NSWPF and has satisfied itself that the substance of the powers referred to in the s 27S(1) reports were authorised by those warrants.

The updated s 27S form that the NSWPF has developed contains the full list of powers in ss 27O, s 27OA, s 27OB and s 27R, with an instruction to the officer to 'strike out those powers which were not authorised/exercised on entry to the subject premises'. This will help to ensure the officer completing the report correctly indicates which powers were exercised.

The s 27S(1) reports for the three warrants in relation to which DNA samples were taken also failed to identify that the power to ‘test a kind of thing’ was exercised, and the results (or proposed results) of the testing. These issues were discussed above in Section 2.6.1.2. This issue should not arise in future as the updated form the NSWPF developed for s 27S reports contains a note which explains that ‘testing of a thing’ ‘includes the carrying out of procedures such as testing for and analysis of DNA, fingerprints, explosives residue, etc.’

### 2.7.3 MISSING INFORMATION DUE TO USE OF WRONG FORMS

In the case of the two TPP Act covert search warrants which were executed in 2019, the NSWPF used the wrong form for the report to the eligible Judge on execution. The form used was the form for reports on the execution of covert search warrants issued under LEPR, not those issued under the TPP Act. As a result, those reports did not address two of the requirements in s 27S (because they are not required under LEPR). The reports for those warrants did not include:

- the name of any person ‘believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed’ (s 27S(1)(c)(iv)), or
- whether or not, and if so how, the execution of each of the CSWs assisted in the prevention of or response to the terrorist act in relation to which it was executed, or any other terrorist act or any other serious indictable offence (s 27S(1)(c)(ix) and (x)).

It is now a matter of public record that the person ‘believed to be knowingly concerned in the commission of the terrorist act’ in respect of which the two covert search warrants were executed in 2019 was Isaac El Matari. The NSWPF has provided information to the Commission as to how the execution of the warrants assisted in the prevention of a terrorist act. The information that can be publicly disclosed about the connection between the execution of the covert search warrants and El Matari’s conviction is discussed in Section 2.9 below.

The updated s 27S form the NSWPF has developed following the Commission’s draft report includes a clear field for the name and date of birth of the person ‘believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed’. It also includes separate fields requiring the officer completing the form to indicate (1) whether the execution of the warrant assisted in the prevention of or response to the terrorist act in relation to which it was executed (and if so, to explain how) and (2) whether the execution of the warrant assisted in the prevention of or response to any other terrorist act or any other serious indictable offence (and if so, to explain how).

## 2.8 NOTIFICATION TO OCCUPIERS OF PREMISES SEARCHED

Within six months of the execution of a covert search warrant the NSWPF is required to prepare an occupier’s notice and provide it to the eligible Judge who issued the warrant for approval. Per s 27U(2), the occupier’s notice must:

- (a) specify the name of the person who applied for the warrant,
- (b) specify the name of the eligible Judge who issued the warrant,

- (c) specify the date when the warrant was issued,
- (d) specify the date when the warrant was executed,
- (e) specify the address or other description of the subject premises,
- (f) specify the number of police officers or intelligence gathering officers who entered the subject premises for the purposes of executing, or assisting in the execution of, the warrant,
- (g) contain a summary of the nature of the warrant (including the grounds on which a covert search warrant may be issued) and the powers conferred and exercised under the warrant,
- (h) describe any thing seized or placed in substitution for a seized thing,
- (i) describe any thing returned or retrieved under section 27R and the date on which the thing was returned or retrieved, and
- (j) state if the occupier was not, at the time that the warrant was executed, believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed.

As soon as practicable after the eligible Judge approves the occupier's notice, the NSWPF must cause the notice to be given to any person who occupied the subject premises at the time the warrant was executed and 'was believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed', and if there is no such person, to a person at least 18 years of age who was an occupier of the premises at the time of the execution.<sup>128</sup>

The giving of the occupier's notice may be postponed by the eligible Judge who issued the warrant, for a period of six months at a time, if that Judge is satisfied that there are reasonable grounds for that postponement.<sup>129</sup> Multiple postponements may be granted, but the giving of the occupier's notice must not be postponed for more than 18 months in total unless the eligible Judge is satisfied that there are exceptional circumstances justifying the postponement.<sup>130</sup>

## 2.8.1 PROBLEMS WITH THE OCCUPIER'S NOTICES PREPARED BY NSWPF IN REPORTING PERIOD

### 2.8.1.1 DEFICIENCIES IN THE OCCUPIER'S NOTICES

Each of the four occupier's notices the NSWPF prepared for the covert search warrants executed in the reporting period were materially deficient. None of them included any of the details about the execution of the warrants which were required under s 27U(2); that is, none of the occupier's notices included:

- the date of execution;

<sup>128</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(5).

<sup>129</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(7) and (9)(a).

<sup>130</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27U(9)(b).



- the number of police officers or intelligence gathering officers who entered the premises for the purposes of executing, or assisting in the execution of, the warrant;
- a summary of the powers exercised under the warrant;
- a description of any thing seized or placed in substitution for a seized thing, or
- a description of any thing returned or retrieved under s 27R and the date on which the thing was returned or retrieved.

There appear to be two reasons why this occurred. The first was that the '*Form 27U: Occupier's notice for covert search warrant*' the NSWPF used to prepare the occupier's notices was itself deficient. That form contained no fields for those five required details about the execution of the warrant to be recorded. It appears that this form was based on the Form 22 used for occupier's notices for covert search warrants under LEPR, which does not include details about execution.

The second reason is a process issue. Each of the occupier's notices for the four covert search warrants were drafted by the NSWPF and given to the eligible Judge at the same time as the NSWPF submitted the application for the warrant. In each case, on the same day as issuing the warrant, the eligible Judge signed the (deficient) occupier's notice and granted a six month postponement of service of the occupier's notice. As the occupier's notices were prepared and approved prior to the warrants being executed, they could not include any information about the execution.

That practice is clearly not in accordance with the TPP Act. The practice also does not appear to be consistent with the guidance in the 2018 (or 2020) CSW SOPs, as the SOPs included preparation of the occupier's notice after 'post-execution responsibilities'. Again, it appears this practice was adopted because for covert search warrants under LEPR, the occupier's notice does not need to include details of execution and must be served on the occupier as soon as practicable after the warrant is executed, unless a postponement has been granted.<sup>131</sup> The '*Form 1 - Application for covert search warrant*' used by the NSWPF for the TPP Act covert search warrant applications appears to include a request that service of the occupier's notice be postponed which has been copied from the application form for a LEPR covert search warrant.<sup>132</sup>

In addition to the above, two of the occupier's notices omitted further information:

- The occupier's notice for the first warrant executed in 2018 did not state whether, at the time the warrant was executed, the occupier was believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant was executed.
- The occupier's notice for the second warrant executed in 2019 did not appear to include the date the warrant was issued.

<sup>131</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 67(2) and (8).

<sup>132</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) sch 1 (Form 2).



### 2.8.1.2 (DEFICIENT) OCCUPIER'S NOTICES WERE NEVER GIVEN TO OCCUPIERS

In relation to all four covert search warrants issued in the reporting period, the NSWPF sought six month postponements for the giving of the related occupier's notices. The eligible Judges granted these postponements in each case.

The NSWPF ultimately gave the occupier's notice in relation to one of the covert search warrants to the legal representative for the relevant occupier,<sup>133</sup> six months and eight days after the warrant had been executed. The NSWPF never gave the other three occupier's notices to the relevant occupiers.

When the Commission initially asked the NSWPF about this, the NSWPF responded that the reason it had not given the three occupier's notices to the occupiers was because it had verbally advised those occupiers about the execution of the warrants. When questioned further about this response, the NSWPF agreed that verbal notification was not sufficient under the TPP Act.

The TPP Act does not contain any exceptions to the obligation on police to provide a written occupier's notice, containing all the information required by s 27U, to the occupiers described in s 27U(5). The only discretion in terms of giving the occupier's notice belongs to the eligible Judge, and only in circumstances where the identity or location of the occupier is unknown (see s 27U(6)).

The Commission notes that when the NSWPF used the TPP Act covert search powers in 2005 and 2006, it served the occupier's notices in relation to all three of the warrants that were executed (although the giving of two of those occupier's notices was postponed for 24 months in total).<sup>134</sup>

### 2.8.2 PURPOSES OF OCCUPIER'S NOTICES

When the TPP Act covert search powers were introduced in 2005, the Attorney General Mr Bob Debus explained in Parliament that covertness was a key requirement for counter-terrorism investigative powers, and therefore the scheme would 'allow police to enter private premises without the knowledge of the occupiers for the purpose of preventing or responding to terrorist threats.' However, he also emphasised that 'a fundamental tenet of the scheme is that an occupier's notice will be served at some time and that there is no provision for a court to approve a notice never being served.'<sup>135</sup>

Mr Debus stated that the covert search powers in Part 3 of the TPP Act 'are extraordinary and will be permitted only with the strictest of safeguards'. One of the safeguards mentioned was that a complaint about the exercise of the powers could be investigated by the 'established bodies' (now including by the Commission).<sup>136</sup> However if occupiers are unaware that their premises have been searched, and of the details of

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<sup>133</sup> The relevant occupier was also the person believed to be knowingly concerned in the commission of the terrorist act in respect of which that warrant was executed.

<sup>134</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 87.

<sup>135</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16940 and 16942.

<sup>136</sup> Ibid p 16941.

what the police did during that search, the safeguard of a complaints mechanism is effectively meaningless.

Courts in New South Wales have emphasised in the context of general search warrant powers that occupier's notices are an important procedural safeguard, and failure to serve a complete occupier's notice may render the execution of a warrant unlawful.<sup>137</sup>

The NSW Attorney General's Department in its statutory review of the TPP Act in 2007 also emphasised the importance of provision of the occupier's notice, even if postponed. The Department explained:

The delay in the service of the occupiers notice [permitted under s 27U] is substantial. This reflects the intrusive nature of covert search powers. It provides a maximum reasonable period in which the state should be permitted to interfere with individual privacy for legitimate investigation purposes. The maximum period reflects the fact that effective prevention and investigation of terrorism offences may require long periods of surveillance.<sup>138</sup>

The Department highlighted however that:

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

The principle that the balance between law-enforcement and individual privacy should permit the use of covert search powers only in exceptional circumstances, and under strict regulation must be maintained. Given the importance of transparency and accountability in law enforcement activities in any democratic society, there is a public interest in informing occupiers what things have been taken from their property, or placed upon it.<sup>139</sup>

### 2.8.3 MEASURES TO ADDRESS ISSUES WITH OCCUPIER'S NOTICES

The NSWPF has acknowledged that it did not comply with the requirements in s 27U of the TPP Act in relation to service of (complete) occupier's notices for all of the four covert searches conducted in the reporting period.

The Commission set out the issues with the occupier's notices in the Issues Paper provided to the NSWPF. After reviewing that paper the NSWPF stated to the Commission that to ensure compliance in future, the CAU would 'engage in a comprehensive review and redesign' of the template forms for TPP Act covert search warrants, including the occupier's notice form, and create an 'accompanying training package for TIS staff'.

In May 2022 the NSWPF provided the Commission with copies of its re-designed covert search warrant forms. The new form for the occupier's notice clearly requires the officer to include all of the details about the execution of the warrant which are required under s 27U(2) of the TPP Act. The form also expressly states up the top 'This form is to be prepared within six months after the execution of the CSW (i.e. prepared and presented

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<sup>137</sup> See for example *Ballis v Randall* (2007) 71 NSWLR 282, 295, 299-300, 303; *R v McMaster* [2013] NSWDC 90, [31].

<sup>138</sup> NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002* (2007) p 45.

<sup>139</sup> *Ibid* p 46.

after execution)'(emphasis in the original). The form also includes the text of s 27U(5), which sets out the requirement for service of the notice once approved by the eligible Judge.

The NSWPF has also re-designed its covert search warrant application form to remove any reference to requesting postponement of the occupier's notice.

## 2.9 OUTCOMES OF COVERT SEARCHES IN REPORTING PERIOD

The covert search warrants were executed as part of investigations that resulted in the arrests and charging of three persons for offences related to terrorism. Two of those persons pleaded guilty and were sentenced to imprisonment.

One of those persons was Isaac El Matari. The facts of the investigation leading to Mr El Matari's conviction and sentence have been published by the Supreme Court, and therefore can be disclosed.<sup>140</sup>

Mr El Matari is an Australian citizen who was arrested in Lebanon in 2017 for attempting to join and fight with Islamic State (IS) in Syria. He spent nine months in prison and returned to Australia upon his release.

From around December 2018 Mr El Matari was one of the subjects of Operation Zellaer, an investigation conducted by the NSW Joint Counter Terrorism Team (JCTT) into suspected supporters of IS in Australia. The JCTT is comprised of members from the NSWPF, Australian Federal Police, Australian Security Intelligence Organisation and the NSW Crime Commission.

Following Mr El Matari's return to Australia in 2018 he was involved in number of communications and other activities which reflected preparations for planning to conduct attacks in Australia on behalf of IS and to establish an IS insurgency in Australia. The full details of these activities are set out in the published Agreed Facts.

On 26 February 2019, the JCTT executed covert search warrant CT CSW 19-001 at Mr El Matari's unit. According to the Agreed Facts, during the search police observed an incomplete Australian passport application in Mr El Matari's bedside table, his photocard identification, two 511 tactical backpacks and a book from St Mary's library *Terrorism and Extremism* by Grace Jones.<sup>141</sup>

On 18 April 2019, covert search warrant CT CSW 19-002 was executed to obtain Mr El Matari's mobile phone. According to the Agreed Facts, his phone contained a number of violent and pro-IS files, including the following images:

- (a) IS Propaganda and news reporting including news articles about an attack by Kurdish Workers' Party affiliate using a motorcycle-borne improvised explosive device;
- (b) Written documents espousing extremist Islamic ideology;

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<sup>140</sup> *R v El Matari* [2021] NSWSC 1260 (see attachment at end of sentencing reasons titled 'Agreed Facts on Sentence' - <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWSC/2021/1260.html>)

<sup>141</sup> *R v El Matari* [2021] NSWSC 1260, Attachment 'Agreed Facts on Sentence', [65].

- (c) Violent images and videos of fighting, acts of violence, injured and deceased civilians including children and beheadings;
- (d) Combatants firing weapons;
- (e) Images of weapons caches, explosive devices, specific firearms; and
- (f) An image of El Matari with a slaughtered animal.<sup>142</sup>

The Agreed Facts also reveal Mr El Matari was the subject of surveillance and telephone intercepts.

On 2 July 2019 Mr El Matari was arrested and charged with three Commonwealth terrorism offences:

- knowingly being a member of a terrorist organisation (IS) (*Criminal Code Act 1995* (Cth) s 102.3),
- doing an act in preparation for a terrorist act (*Criminal Code Act 1995* (Cth) s 101.6), and
- preparations for incursions into foreign countries for the purpose of engaging in hostile activities (*Criminal Code Act 1995* (Cth) s 119.4).

Mr El Matari pleaded guilty to the two preparation offences, and admitted the offence of knowingly being a member of a terrorist organisation for the purpose of it being taken into account on his sentence. On 11 October 2021 he was sentenced to a total of seven years and four months' imprisonment, with a non-parole period of five years and six months.

As discussed in earlier sections, the covert search warrants executed during the reporting period were all utilised to prevent, rather than respond to, a suspected terrorist act. All of the warrants were used to investigate targets in the early preparatory stages of suspected terrorist activity, consistent with Parliament's intention behind these powers (see Section 2.5.1).

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<sup>142</sup> *R v El Matari* [2021] NSWSC 1260, Attachment 'Agreed Facts on Sentence', [36].

# 3.

## PREVENTATIVE DETENTION ORDERS

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## 3.1 OVERVIEW OF PREVENTATIVE DETENTION POWERS

### 3.1.1 APPLICATION FOR AND MAKING OF PREVENTATIVE DETENTION ORDERS

Under Part 2A of the TPP Act a police officer can apply to the Supreme Court for an order for the detention of a person aged 16 or above for the purpose of preventing a terrorist act occurring, or preserving evidence of a terrorist act that has occurred. The police officer must however first obtain approval to make an application for a preventative detention order (PDO) from the Commissioner of Police, a Deputy Commissioner, or an Assistant Commissioner responsible for counter-terrorism operations.<sup>143</sup>

There are different threshold requirements which must be satisfied in order to apply for a PDO, depending on the purpose for which the PDO is being sought. If the PDO is being sought in order to prevent a terrorist act occurring (under s 26D(1)):

- (1) the police officer must have reasonable grounds to suspect that the person:
  - will engage in a terrorist act, or
  - possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
  - has done an act in preparation for, or planning, a terrorist act, and
- (2) making the order would substantially assist in preventing a terrorist act occurring, and
- (3) detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act occurring, and
- (4) there must be reasonable grounds to suspect that any such terrorist act could occur at some time in the next 14 days.

If the PDO is being sought in order to preserve evidence of a terrorist act that has occurred (under s 26D(2)), the threshold requirements to apply are that:

- (a) a terrorist act has occurred within the last 28 days, and
- (b) it is necessary to detain the person to preserve evidence in New South Wales or elsewhere of, or relating to, the terrorist act, and
- (c) detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of preserving any such evidence.

If the Supreme Court is satisfied that the relevant threshold requirements in s 26D have been met, but it cannot proceed immediately to the hearing and determination of the application, it may make an interim PDO, pending that hearing and determination.<sup>144</sup> An

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<sup>143</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26F(1)(b).

<sup>144</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26H.

interim PDO can only be in force (and therefore only authorise the detention of the person the subject of the PDO) for a maximum of 48 hours.<sup>145</sup> An interim PDO can be made in the absence of, and without notice to, the person subject to the order.<sup>146</sup>

After hearing the substantive application, the Supreme Court will either grant the application and make a PDO or refuse the application.<sup>147</sup> The detained person is entitled to give evidence and have legal representation at this hearing.<sup>148</sup> A person subject to a (final) PDO can be detained for up to 14 days (which includes the 48-hour period of the interim order).<sup>149</sup>

If the date on which the terrorist act is expected to occur changes, a further PDO can be made, to take effect on the expiry of the existing order.<sup>150</sup> The NSWPF must however apply to have a PDO revoked if the grounds on which the order was made cease to exist.<sup>151</sup>

### 3.1.2 RESTRICTIONS AND SAFEGUARDS WHILE PERSON IS DETAINED

The NSWPF can arrange with the Commissioner of Corrective Services for a person in preventative detention to be detained at a correctional centre.<sup>152</sup> However, as will be discussed later in this chapter, the NSWPF has informed the Commission it has no such arrangement with Corrective Services NSW currently in place.

Young people aged 16 and 17 may be detained under a PDO, but generally must be detained separately from adults.<sup>153</sup>

Once a PDO has been made, the Commissioner of Police, a Deputy Commissioner, or an Assistant Commissioner responsible for counter-terrorism operations, must nominate a police officer who is of or above the rank of superintendent, and was not involved in the application for the PDO, to oversee the exercise of functions in relation to the PDO.<sup>154</sup> This person is referred to as the nominated senior police officer.

A person in preventative detention must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.<sup>155</sup> Police cannot question a person in preventative detention other than for the purposes of identification, the person's welfare or complying with other legislative requirements.<sup>156</sup>

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<sup>145</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26L(1).

<sup>146</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26H(3).

<sup>147</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26I.

<sup>148</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26I(3).

<sup>149</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2).

<sup>150</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26K(4), (5) and (7).

<sup>151</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26M(2).

<sup>152</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26X.

<sup>153</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26E and s 26X(5) and (6).

<sup>154</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26R.

<sup>155</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZC.

<sup>156</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZK.



A person in preventative detention is not entitled to contact any person unless the TPP Act expressly provides for such contact.<sup>157</sup> The person is entitled to contact a family member, a person they live with or their employer, but only to let them know that they are safe and are being detained.<sup>158</sup> The person may also contact a lawyer and/or the Commission.<sup>159</sup> If the person in preventative detention is under 18 years of age or has impaired intellectual functioning there are 'special contact rules' that entitle them to visits from certain people, including parents or guardians, for up to four hours per day.<sup>160</sup>

Police may monitor all contact made by the detainee, except contact with the Commission, but must inform them beforehand that the contact will be monitored.<sup>161</sup>

The NSWPF can apply to the Supreme Court for an order prohibiting the person in preventative detention from contacting a specified person (a prohibited contact order), if this is reasonably necessary for achieving the purposes of the PDO.<sup>162</sup> A prohibited contact order can effectively override the person's entitlement under the TPP Act to contact a family member, person they live with, employer or lawyer, but cannot prohibit them from contacting the Commission.<sup>163</sup>

As soon as practicable after a person is first taken into custody under a (interim or final) PDO, the police officer who is detaining the person must inform the person of certain matters.<sup>164</sup> These matters include:

- the people they are entitled to contact under the TPP Act,
- their right to complain to the Commission in relation to the making of the order or their treatment by a police officer in connection with their detention,
- their right to contact a lawyer,
- that they may apply to the Supreme Court to revoke the PDO, and
- the name and work telephone number of the nominated senior police officer, with whom they may raise matters concerning their treatment and entitlements while in preventative detention.

If the police officer does not inform the person of the matters stipulated by the TPP Act, the officer may face criminal penalties of up to two years' imprisonment.<sup>165</sup> However, there is an exception if the actions of the person being detained make it impracticable for the police officer to inform them of those matters.<sup>166</sup>

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<sup>157</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZD.

<sup>158</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZE.

<sup>159</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZF and s 26ZG.

<sup>160</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH.

<sup>161</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZI.

<sup>162</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26N.

<sup>163</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZJ.

<sup>164</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26Y and 26Z.

<sup>165</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26Y(1) and s 26Z(1).

<sup>166</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZA(1).

## 3.2 PURPOSE AND EXERCISE OF PREVENTATIVE DETENTION POWERS

It has been highlighted by the Ombudsman and the Department of Justice that the purpose of detention under a PDO is ‘purely preventative’; it is limited to removing a person’s capacity to participate in a suspected terrorist act or removing their capacity to destroy evidence of a terrorist act that has been committed’.<sup>167</sup> There is no utility in PDOs as an investigative tool as police are prohibited from questioning the person about any suspected terrorist act.<sup>168</sup>

The NSWPF did not make any applications for PDOs during the reporting period. The powers have in fact only ever been used on one occasion, in 2014. The Ombudsman reported on this use in its last report under the Act in 2017:

On 18 and 19 September 2014... police in NSW obtained interim preventative detention orders and took three people into preventative detention. The people were held for two days and then released when the interim orders expired. No charges were laid. The preventative detention powers were used as part of a counter-terrorism operation called Operation Appleby. This operation was conducted by the NSW Joint Counter Terrorism Team (JCCT), which includes officers from the Australian Federal Police (AFP), the NSWPF and the Australian Security and Intelligence Organisation (ASIO).<sup>169</sup>

The Ombudsman further reported that the NSWPF in consultations:

explained that the Supreme Court made the interim orders, consistent with the Act, in the absence of, and without notice to, the three men named in the order or their legal representatives. The application for the interim orders was supported by sensitive national security information. Under the Act, an application by police for an extension of the interim orders was not sought by police because it would require them to disclose the sensitive information to the persons named in the orders and/or to their legal representatives. Police expressed the view that these requirements created serious limitations on using the powers effectively.<sup>170</sup>

The operational issues the NSWPF have raised regarding the Part 2A powers are discussed further in Section 3.6.2 below.

## 3.3 2018 AMENDMENTS TO PREVENTATIVE DETENTION PROVISIONS

Following the Ombudsman’s last report under the TPP Act, the *Terrorism (Police Powers) Amendment (Statutory Review) Act 2018* (NSW) (the 2018 amendments) introduced a number of important provisions that have a protective or other beneficial effect for persons detained under a PDO:

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<sup>167</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 32; Department of Justice (NSW), *Statutory Review of the Terrorism (Police Powers) Act 2002* (2015) p 22.

<sup>168</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZK.

<sup>169</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 10.

<sup>170</sup> *Ibid* p 12.

- Section 26ZLA was inserted to enable police to take photographs or make a video recording of a person detained under a PDO for the purpose of documenting an injury or illness the person suffered while in detention. The Ombudsman had suggested this amendment in its 2017 report, noting: ‘A photographic record of an injury may be necessary for the welfare of the detainee, to ensure police are accountable for any injury that may occur during custody and to protect officers from any false accusations.’<sup>171</sup> The Department of Justice agreed and recommended the amendment in its 2018 Statutory Review of the Act.<sup>172</sup>
- A requirement was inserted that the police officer who is detaining a person under a PDO must, before the contact takes place, inform the person being detained, and any person with whom the person being detained has contact, that the contact will be monitored.<sup>173</sup> This issue had been flagged by the Ombudsman in 2017, and the Department of Justice in 2018 recommended the TPP Act be amended to require this.<sup>174</sup>
- In relation to person detained under a PDO who is under 18 or has impaired intellectual functioning:
  - The number of hours per day that the person is entitled to have contact (including visits) with a parent or guardian or other support person was increased from two hours to four hours.<sup>175</sup>
  - A requirement was inserted that the police officer detaining the person is to ‘assist in locating any person with whom the person detained is entitled to have contact’.<sup>176</sup>
  - A provision was inserted to require that, if the person the detained person wants to have contact with is not acceptable to the NSWPF, the detained person must be told the reasons why that person is not acceptable (subject to a limited criminal intelligence exception), the person must be given an opportunity to nominate someone else to contact. If no nominated contact person is acceptable to police, the NSWPF should offer the person contact with a person who has specialist expertise in working with children and young people, and if appropriate in the circumstances, with culturally and linguistically diverse communities.<sup>177</sup>

<sup>171</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017), p 11.

<sup>172</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) pp 47-48 and Recommendation 9.

<sup>173</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZI(4A).

<sup>174</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 12; Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) pp 48-49 and Recommendation 10.

<sup>175</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH(5)(a); Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) pp 54-55 (Recommendation 12).

<sup>176</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH(8); Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018), pp 54-55 (Recommendation 12).

<sup>177</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH(8); Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) pp 54-55 (Recommendation 12).

### 3.4 SOPS AND FORMS FOR USE OF PREVENTATIVE DETENTION POWERS

In 2008, three years after the commencement of the preventative detention powers, the Ombudsman reported that the NSWPF had not finalised any Standard Operating Procedures (SOPs) for the use of those powers. The Ombudsman recommended that the NSWPF do so as a matter of priority.<sup>178</sup>

In 2011 the Ombudsman noted that the NSWPF SOPs 'were finalised in January 2011'.<sup>179</sup> The Ombudsman commented:

We welcome the finalisation of the NSW Police Force SOPs. While preventative detention powers are yet to be used, given the complexity of the legislative provisions, guidance in the form of SOPs will be an important tool for any police officer exercising responsibilities under the Act.

We noted in our September 2008 Report that finalisation of the SOPs should be a priority, and have been concerned that they have taken so long to complete...It appears that one of the primary reasons for delay in finalising the MoUs and SOPs has been the concerns that the NSW Police Force have about the workability of the preventative detention powers.<sup>180</sup>

In 2014 the Ombudsman reported that the NSWPF SOPs for the preventative detention powers were 'amended in 2012 and 2013 in response to our recommendations', and that 'a further revised version of the SOPs is being prepared'.<sup>181</sup> The Ombudsman noted that the SOPs included guidance for officers:

in relation to making an application for a preventative detention order, taking a person into custody, detention and release of a person subject to a preventative detention order, responsibilities of the nominated senior police officer and the investigator, provision of information to a person subject to a preventative detention order and transferral of physical custody of such a person between police and Corrective Services.<sup>182</sup>

In July 2020 the Commission requested that the NSWPF provide it with a copy of all current NSWPF policies, documents and forms in relation to the preventative detention powers in Part 2A of the TPP Act.<sup>183</sup> In response the NSWPF provided a copy of a document titled: 'Standard Operating Procedures: Preventative Detention Orders (NSW)'.<sup>184</sup> The NSWPF logo appears at the top of the document. The footer in the document states 'NSWPF Preventative Detention SOPs', Counter Terrorism & Special Tactics Command' and states that the document was 'last reviewed' by a member of that

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<sup>178</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 17-18 (Recommendation 2).

<sup>179</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 14.

<sup>180</sup> Ibid p 15.

<sup>181</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review Period 2011 – 2013* (2014) p 15.

<sup>182</sup> Ibid p 15.

<sup>183</sup> Letter from A/Chief Commissioner, Law Enforcement Conduct Commission, to Commissioner of Police, NSW Police Force, 16 July 2020.

<sup>184</sup> Letter from Commissioner of Police, NSW Police Force, to A/Chief Commissioner, Law Enforcement Conduct Commission, 4 August 2020, Ref D/2020/780655, attachments.

squad in July 2020 (this document will be referred to as the 2020 PDO SOPs in this report). The NSWPF also provided copies of ‘templates’ titled ‘Application for approval to apply for a Preventative Detention Order’, ‘Approval to apply for a Preventative Detention Order’, ‘Application for Preventative Detention Order’, ‘Affidavit in support of application for a Preventative Detention Order’ and ‘Preventative Detention Order’.

The Commission reviewed the 2020 PDO SOPs and the templates provided and identified a number of inconsistencies between the SOPs and forms and the provisions in the TPP Act. Significantly, none of the 2018 amendments to Part 2A listed in Section 3.3 above were reflected in the 2020 PDO SOPs. Also, the 2020 PDO SOPs and a number of the templates still contained references to the Police Integrity Commission and the NSW Ombudsman having roles in relation to oversight of NSWPF use of PDOs. However, since July 2017 the Commission has had that role.

The Commission raised these issues with the NSWPF.<sup>185</sup> In January 2022, the NSWPF informed the Commission that the 2020 PDO SOPs had not been corporately endorsed. The NSWPF ‘agreed the document is inconsistent with legislation and change is needed’ and stated that it was ‘anticipated that these SOPs will be subject to comprehensive review in the first quarter of 2022’. The NSWPF also informed the Commission that there were ‘no corporately endorsed application forms for PDOs’, but that ‘[a]s part of the projected review this will be addressed’.<sup>186</sup>

In May 2022 the NSWPF stated that ‘[i]n conjunction with the review of the NSWPF “Part 2AA Investigative detention powers” PDO SOPs and Forms will be reviewed and submitted for corporate endorsement’.<sup>187</sup>

The Commission is very concerned that the NSWPF currently has no corporately endorsed SOPs or templates in place for the use of the preventative detention powers. The Ombudsman in 2011 emphasised the importance of the NSWPF having clear and accurate PDO SOPs in place. At that time, the NSWPF Counter Terrorism and Special Tactics Command had raised concerns about the criminal sanctions which can apply to officers if they fail to comply with certain obligations in Part 2A. That command had noted that:

- the legislation was ‘complex and operationally difficult to implement’;
- the preventative detention provisions ‘are a considerable departure from normal NSWPF custody management procedures, and the uniqueness of the practice and procedure requirements under the PDO regime meant that ‘unfamiliarity increases the likelihood that police may perform or fail to perform an action that results in police being liable for a criminal offence under the Act’;
- the fact the powers had never been used in any jurisdiction and that use of the powers, while possible was ‘not considered probable’ made it difficult for police to

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<sup>185</sup> Letter from Senior Project Officer, Prevention and Education Team, Law Enforcement Conduct Commission, to Commander, Terrorism Investigations Squad, NSW Police Force, 18 November 2021, attachment *Covert search warrants and preventative detention orders under the Terrorism (Police Powers) Act 2002 (NSW): Issues paper for NSW Police Force*.

<sup>186</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002 (NSW)*, 10 January 2022, Ref D/2022/19069.

<sup>187</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197.

ensure ‘relevant staff are or remain familiar with all provisions of the PDO scheme’.<sup>188</sup>

The Ombudsman responded:

We acknowledge that there may be difficulties in keeping officer training current in relation to powers that are seldom used. Clear and detailed SOPs may address some of these difficulties...We recommended in our September 2008 report that the SOPs be finalised as a matter of priority, and note that they were only finalised in January 2011.<sup>189</sup>

The Commission is very concerned that 16 years after the preventative detention powers were introduced the NSWPF still does not have corporately endorsed SOPs and forms in place to ensure that the powers are used correctly. In its response to the Commission’s draft report, the NSWPF did not provide any reason or explanation for why it had not approved any SOPs or forms for the use of these counter-terrorism powers.

As the Ombudsman noted, the NSWPF is aware of the complexity and difficulty involved in implementing the powers, and yet has not taken the steps of approving and maintaining SOPs and forms to support officers to use the powers in accordance with the legislation. The absence of appropriate guidance creates the real risk that should a situation occur that causes the NSWPF to want to utilise the powers, officers may fail to comply with the unique legal requirements under that Part. As the NSWPF is aware, this carries with it the risk of criminal liability for those officers.

In Section 3.6 of this report the Commission explores this issue further in light of the history of the preventative detention powers and issues police have raised about their utility. The Commission ultimately recommends that Parliament consider immediately repealing the preventative detention powers in Part 2A of the TPP Act (see Section 3.6.3). It is imperative that in the interim the NSWPF develops corporately approved and up-to-date SOPs and forms to ensure the Part 2A powers are used in compliance with the law. This is important even if the Commission’s recommendation for immediate repeal of the powers is accepted. Inevitably, it will take some time for the statutory review following this report to be completed and for Parliament to pass amending legislation.

**RECOMMENDATION 8:** The NSW Police Force immediately develop corporately approved Standard Operating Procedures and forms for the use of the preventative detention powers under the *Terrorism (Police Powers) Act 2002* (NSW).

The NSWPF stated that it supported this recommendation, and that ‘[a]ctions to identify amendments to PDO SOPs and Forms are underway with any required updated documents to be subject to corporate endorsement’.<sup>190</sup>

<sup>188</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 28.

<sup>189</sup> Ibid.

<sup>190</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.



### 3.5 ARRANGEMENTS BETWEEN NSWPF AND CORRECTIVE SERVICES AND YOUTH JUSTICE

The TPP Act does not specify where a person in preventative detention is to be detained. However s 26X provides that the NSWPF may arrange with Corrective Services NSW for a person to be detained under a PDO in a correctional centre (or a juvenile detention or correctional centre if the person is 16 or 17 years' old).

In 2008 the Ombudsman reported that the NSWPF intended to enter a Memorandum of Understanding (MoU) with the Department of Corrective Services on preventative detention. The Ombudsman stated that although no formal policy was in place, it was the intention of the agencies that if a person was detained under an interim PDO they would be taken into custody and detained by police.<sup>191</sup> If a final PDO was made, the intention was that the person would be detained in a correctional facility, in maximum security.<sup>192</sup> The Police Integrity Commission and the Ombudsman raised concerns that although the Part 2A powers had been in force since 2005, in 2008 the relevant agencies had not put systems in place to facilitate the exercise of the powers'.<sup>193</sup>

The Ombudsman recommended in 2008 that 'The NSW Police Force, the Department of Corrective Services and the Department of Juvenile Justice finalise the agreements required to facilitate the use of preventative detention powers as a matter of priority'.<sup>194</sup> In 2011 the Ombudsman noted that the MoUs were being circulated but have not been signed and finalised, and again recommended that latter occur as a matter of priority.<sup>195</sup>

In 2014 the Ombudsman reported that in November 2011 the NSWPF, Corrective Services and Juvenile Justice had signed a MoU to 'define, facilitate and govern the arrangements for the detention and management of persons who are subject to a preventative detention order'.<sup>196</sup> The Ombudsman noted:

The main text of this MoU is very broad and is not designed to provide detailed guidance to staff regarding how a person subject to a preventative detention order would be managed. This detailed guidance would normally be provided through procedures developed by each agency, and we also made recommendations in our 2008 and 2011 reports that the NSW Police Force, Corrective Services and Juvenile Justice each finalise these procedures.<sup>197</sup>

The Ombudsman emphasised that:

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<sup>191</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 17 and p 24.

<sup>192</sup> Ibid p 25 and p 30.

<sup>193</sup> Ibid p 17.

<sup>194</sup> Ibid p 18 (Recommendation 1).

<sup>195</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 14-15 (Recommendation 1).

<sup>196</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review Period 2011 – 2013* (2014) p 22.

<sup>197</sup> Ibid.



A key practical consideration is that while a detainee may be in the physical custody of Corrective Services or Juvenile Justice, police maintain overall responsibility for their detention under the Act. Appendix 1 of the MoU explicitly states that:

...although the Commissioner of Corrective Services NSW/Chief Executive of Juvenile Justice has physical custody of the detainee, I (or the police officer hereunder) is taken, for the purposes of section 26X(2)(d) of the Act to be detaining the Subject.

This arrangement is unique and unlike others that operate between these agencies. It is therefore critical that the procedures developed by each agency are consistent and reflect a common understanding of how the custody of a person subject to a preventative detention order will be managed.<sup>198</sup>

The Ombudsman noted in 2014 that Juvenile Justice had finalised its SOPs for preventative detention in July of that year, and Corrective Services had drafted local operating procedures, instead of agency-wide standard operating procedures, for those correctional centres where detainees were most likely to be held, however those procedures had not been finalised.<sup>199</sup>

The Ombudsman raised the concern about the ‘continuing lack of comprehensive and integrated procedures’, noting that it:

increases the risk that transferring a detainee into a correctional or juvenile justice facility may compromise aspects of the detention order. For example, section 26ZD of the Act requires that, with certain exceptions, a person subject to a preventative detention order ‘is not entitled to contact another person’ and ‘may be prevented from contacting another person’. Appropriate procedures would help staff manage the risk that a person detained under a preventative detention order in a correctional or juvenile justice facility comes into contact with other inmates.<sup>200</sup>

In September 2014, when three persons were detained under interim PDOs, they were detained at a police station. As the NSWPF did not apply for final PDOs to be made in relation to those persons, the issue of detention in a correctional facility did not arise.

The Department of Justice reported in its statutory review of the TPP Act in 2015 that Corrective Services had finalised its Local Operating Procedures to apply when Corrective Services NSW was asked by the NSWPF to house a person detained under a PDO.<sup>201</sup> In the Ombudsman’s last report, in 2017, it reported that its recommendations to ensure that the NSWPF, Corrective Services and Juvenile Justice were operationally ready for the use of preventative detention powers had been implemented.<sup>202</sup>

However, it appears that since 2017, the MoU between the NSWPF and Corrective Services NSW has expired, and has not been replaced.

For the purposes of this present review, the Commission asked the NSWPF for a copy of the current MoU the NSWPF had with Corrective Services NSW and the Department of

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<sup>198</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review Period 2011 – 2013* (2014) p 22.

<sup>199</sup> Ibid p 23.

<sup>200</sup> Ibid p 22.

<sup>201</sup> Department of Justice (NSW), *Statutory Review of the Terrorism (Police Powers) Act 2002* (2015) p 28.

<sup>202</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 10.

Communities and Justice under s 26X of the TPP Act. We were informed by the Commissioner of Police in February 2022 that the NSWPF ‘does not currently have a MOU in place’.<sup>203</sup> In May 2022 the NSWPF further stated that it ‘will consider renewing the MOU with Corrective Services NSW and the Department of Communities and Justice for the PDO arrangements and undertake discussions with relevant agencies in this regard.’<sup>204</sup>

The Commission is concerned that despite the repeated recommendations of the Ombudsman over several years about the importance of the interagency arrangements for the use of the Part 2A powers, the NSWPF allowed the arrangements to lapse and has not made a commitment to renew the MoU. This suggests a lack of intention on the part of the NSWPF to use the powers in future. It also creates the risk that if, contrary to those intentions, the powers were utilised, the appropriate arrangements would not be in place to ensure compliance with the Act.

The fact therefore that the NSWPF has not maintained a MoU with relevant agencies to facilitate the detention of a person under a PDO in a correctional facility has influenced the Commission’s recommendation that the Part 2A powers be repealed immediately (see Section 3.6.3 below).

## 3.6 FUTURE OF THE PREVENTATIVE DETENTION POWERS

### 3.6.1 EXTENSION OF PREVENTATIVE DETENTION POWERS UNTIL 2023

The preventative detention powers were introduced into the TPP Act on 16 December 2005. It was originally Parliament’s intention that the powers be temporary; they were enacted with a sunset clause, meaning they would expire after 10 years, on 16 December 2015. However the powers in Part 2A have been continuously extended, as set out in the chronology in Appendix A. Most recently, on 8 December 2021 the preventative detention powers, which were due to expire eight days later, were extended until 16 December 2023.<sup>205</sup>

The reason given in Parliament for the extension of the powers until December 2023 was to allow time for the Commission to finish its current review, and for the Department of Communities and Justice to consider the Commission’s report in its subsequent statutory review of the TPP Act. Ms Melanie Gibbons stated that the extension of the Part 2A powers would:

uphold community safety and protection while the reviews are completed by ensuring that the preventative detention order scheme under the Act continues to be an available tool to prevent the commission of terrorist acts. It will also allow any decision about the future of the preventative detention order regime to be informed by the findings of the pending reviews.<sup>206</sup>

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<sup>203</sup> Letter from Commissioner of Police, NSW Police Force, to Commissioner, Law Enforcement Conduct Commission, 21 February 2022.

<sup>204</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197.

<sup>205</sup> *Crimes Legislation Amendment Act 2021* (NSW) sch 1 cl 1.6.

<sup>206</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2021, p 4 (Melanie Gibbons, on behalf of Mark Speakman).

As the preventative detention powers were not used in the reporting period, the Commission's review cannot provide any substantive analysis of the NSWPF's use of these powers.

However, what the Commission has observed in the reporting period leads it to conclude that in fact, while the Part 2A powers as a matter of law remain an 'available tool' to the NSWPF, the NSWPF is not operationally ready to use the powers. This conclusion is based on the fact that the NSWPF:

- does not have up to date, corporately endorsed Standard Operating Procedures for the use of the preventative detention powers,
- does not have any corporately endorsed forms for the use of preventative detention powers, and
- has allowed the MoU it had with Corrective Services NSW and the Department of Justice to facilitate detention of persons under a PDO in a correctional facility to lapse, and has not made any commitment to renew that MoU.

The failure by the NSWPF to commit resources to develop and obtain corporate approval of SOPs and forms in order to support officers to use the preventative detention powers strongly suggests the NSWPF has no real intention of utilising those powers in future.

This is not surprising, given the concerns raised by the NSWPF (and others) in the past about these powers, as discussed in the section below.

### 3.6.2 HISTORY OF CONCERNS ABOUT UTILITY OF PART 2A POWERS

The Ombudsman noted in its first report under the TPP Act in 2008 that police had expressed doubts about the utility of the preventative detention powers. The view of the counter-terrorism police who spoke to the Ombudsman in 2007 was that:

arrest under the ordinary criminal law would be preferable to arrest under a preventative detention order as a person under arrest for an offence can be questioned and asked to participate in other investigative procedures, whereas a person held in preventative detention, while simply removed from the community, cannot be questioned except for very limited purposes not related to the suspected terrorist act. For this reason, they suggested preventative detention is of little operational utility.<sup>207</sup>

The Ombudsman also reported that:

Officers we spoke to also expressed reluctance to use the powers because preventative detention requires such close supervision, and exposes police to criminal liability for breaching legislative obligations. In their submission to our review counter terrorism police described the overall preventative detention scheme as 'cumbersome, burdensome and difficult to practically implement'.<sup>208</sup>

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<sup>207</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 21.

<sup>208</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 21.

In 2011 the Ombudsman noted that ‘significant delays in finalising the SOPs and the MoUs with Corrective Services NSW and Juvenile Justice NSW appear to demonstrate that the impetus to use the preventative powers is weak’.<sup>209</sup> The Ombudsman also reported that:

One of the primary concerns held by the Counter Terrorism and Special Tactics Command which influences their view as to the utility of the preventative detention provisions is that criminal sanctions that may be brought against police officers for failure to provide detainees with relevant information once they have been taken into preventative detention make police reluctant to use the powers.<sup>210</sup>

As noted above in Section 3.4, the Counter Terrorism and Special Tactics Command also pointed to the complexity of the legislation; that it is ‘operationally difficult to implement’ and officers would be unfamiliar with the unique requirements of the PDO regime as it is ‘a considerable departure from normal NSWPF custody management procedures’.<sup>211</sup> As noted above, in response the Ombudsman stated that in light of these factors it was important for the NSWPF to have in place ‘clear and detailed SOPs’; however, as at May 2022, the NSWPF had not approved any such SOPs.

The Ombudsman recommended that the subsequent statutory review of the TPP Act:

consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the non-use of those powers in the five years following their creation and the other powers available to police to respond to and investigate terrorism.<sup>212</sup>

In 2012 the Independent National Security Legislation Monitor (INSLM) reviewed the Commonwealth preventative detention powers in Division 105 of Part 5.3 of the *Criminal Code Act 1995* (Cth), noting the powers had not been used since their introduction in 2005. The INSLM recommended that the powers be repealed, commenting:

There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.<sup>213</sup>

The Council of Australian Governments (COAG) appointed a committee (the COAG Committee) to review the counter-terrorism powers which were introduced in all Australian jurisdictions after the London terrorist incidents in 2005, including preventative detention orders. In the 2013 *Council of Australian Governments Review of Counter-Terrorism Legislation* report the COAG Committee recommended, ‘by majority’:

that the Commonwealth, State and Territory ‘preventative detention’ legislation be repealed. If any form of preventive detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which,

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<sup>209</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 27.

<sup>210</sup> *Ibid* p 28.

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid* p 34 (Recommendations 12 and 13).

<sup>213</sup> Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report: 20th December 2012* (2013) p 67.

in the view of the majority of the Committee, may further reduce its operational effectiveness.<sup>214</sup>

The majority of the COAG Committee was persuaded by submissions from police in Victoria, South Australia and Western Australia that ‘unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime’.<sup>215</sup>

The Department of Attorney General and Justice in its statutory review of the TPP Act in 2013 noted that the reports from both the INSLM and the COAG Committee had recommended the repeal of preventative detention orders. The Department reported that the jurisdictions would be discussing a national response to those recommendations. It recommended that the decision on whether to repeal or retain the preventative detention orders in Part 2A of the TPP Act be deferred ‘until national discussion has occurred on the recommendations of the two Commonwealth reviews’.<sup>216</sup>

In September 2014 the NSWPF did use the preventative detention powers to detain three men. The Supreme Court made the interim PDOs sought by the NSWPF, but the NSWPF did not seek final orders from the Court to permit the men to be detained beyond 48 hours. The NSWPF told the Ombudsman that police did not seek final PDOs for the men because under the TPP Act that would have required them to disclose sensitive national security information to the persons named in the orders and/or to their legal representatives. Police ‘expressed the view that these requirements created serious limitations on using the powers effectively’.<sup>217</sup>

### 3.6.3 RECENT DEVELOPMENTS AND THE COMMISSION’S ANALYSIS

In May 2016 the Parliament created new pre-charge ‘investigative detention’ powers in Part 2AA of the TPP Act.<sup>218</sup> The then Premier, Mike Baird, explained that the new counter-terrorism investigative detention powers had been agreed at a COAG meeting in April 2016, and were being provided to the NSWPF to address the limitations of the preventative detention powers in Part 2A.<sup>219</sup>

Rather than amending the preventative detention powers to address the operational issues identified by police, the NSW Parliament enacted new powers in Part 2AA. As the Ombudsman noted in its report in 2017:

The Part 2AA provisions resolve the concerns raised by the NSWPF about the requirement under Part 2A to disclose sensitive information to the subject of a PDO in making an application to obtain an extension to an interim PDO....

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<sup>214</sup> Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) p 68 (Recommendation 39).

<sup>215</sup> *Ibid* p 69.

<sup>216</sup> Department of Attorney General and Justice (NSW) *Review of the Terrorism (Police Powers) Act 2002* (2013) pp 26-27 (Recommendation 2).

<sup>217</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 12.

<sup>218</sup> *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW).

<sup>219</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 2016.

Part 2AA also appears to resolve many of the police concerns documented in our previous reports that the Part 2A powers would be operationally difficult to implement and limited by the restriction Part 2A imposes on police by preventing them from interviewing the persons being detained.<sup>220</sup>

The Ombudsman concluded:

It is clear from the history of Part 2A documented in our previous reports that it is highly unlikely that police will exercise the Part 2A powers in the future. Police concerns about these powers have been addressed by the enactment of the pre-investigation detention powers under Part 2AA, thereby removing any occasion for future use of the Part 2A powers.<sup>221</sup>

The Ombudsman therefore recommended that the preventative detention powers in Part 2A be allowed to expire on 16 December 2018.<sup>222</sup>

The Department of Justice in its statutory review of the TPP Act in 2018 rejected this recommendation, and instead recommended the powers be extended for an additional three years. It noted that the new Part 2AA investigative detention powers were 'yet to be operationally tested', and stated its view that the Part 2A preventative detention powers 'remain appropriate and necessary and a valuable disruption mechanism in the context of an imminent terrorist attack'.<sup>223</sup>

It appears, however, that the NSWPF does not view the preventative detention powers as a 'valuable disruption mechanism', as it has not taken the administrative steps necessary to ensure it can use those powers should the risk of an imminent terrorist act materialise. It has not put in place any approved SOPs, or developed any approved forms. It has not maintained any agreement with Corrective Services NSW to ensure that it can utilise a correctional facility to detain a person under a PDO.

Both during the reporting period, and at the time of writing, the NSWPF was not, and is not, operationally ready to use the preventative detention powers, despite multiple recommendations from the Ombudsman over several years, and despite using the powers in 2014.

It is apparent this is because the Part 2A powers are not operationally attractive to the NSWPF. The provisions which police found problematic still remain in Part 2A. The investigative detention powers in Part 2AA have been specifically designed to avoid these limitations. The NSWPF's current Counter-Terrorism Law Manual notes that '[h]istorically, NSWPF have found that the option of utilising Preventative Detention Orders is resource intensive, time restrictive and impractical', and concludes that 'it is unlikely that a PDO will be used to prevent a terror attack', noting the 'significant operational advantage' under Part 2AA of being able to question the person in detention.<sup>224</sup>

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<sup>220</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 13.

<sup>221</sup> Ibid p 17.

<sup>222</sup> Ibid p 18 (Recommendation 1).

<sup>223</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) p 46 (Recommendation 8).

<sup>224</sup> Operational Legal Advice Unit, NSW Police Force, *Counter-Terrorism Law Manual*, reviewed March 2021, pp 13-14.



The Commission is very concerned that the preventative detention powers continue to be legally available to police when the NSWPF does not have appropriate SOPs, forms and inter-agency arrangements in place to ensure they are used correctly. This creates the real risk that if the NSWPF suddenly has cause to turn to the Part 2A powers, the police officers will fail to comply with the unique legal requirements under that Part.

This risk is compounded by the fact the powers are used so rarely. As the NSWPF acknowledged to the Ombudsman back in 2011, the infrequent use of the powers makes it difficult for police to ensure that relevant staff are familiar with all the unique provisions of the PDO scheme. If police are unfamiliar with the requirements in Part 2A, this increases the likelihood that 'police may perform or fail to perform an action that results in police being liable for a criminal offence under the Act'.<sup>225</sup>

When the infrequency of the use of the Part 2A powers is combined with the lack of up to date and approved SOPs and forms for those powers, the risk of non-compliance with the specific requirements in the Act if the powers are actually used is high. This is in fact what occurred in relation to the use of the Part 3 covert search powers, as detailed in Chapter 2 of this report.

It is noted that when the Ombudsman reviewed the NSWPF's use of the preventative detention powers in 2014 it concluded that 'it appeared that police generally complied with the provisions under Part 2A of the Act and with the [PDO SOPs]'.<sup>226</sup> However the Ombudsman did identify three issues to be addressed. The Commission also notes that during that period it appears from the Ombudsman's report that there were accurate (if not corporately endorsed) SOPs in place to guide the officers in their use of the powers, which is no longer the case.

The powers in Part 2A are due to expire in December 2023. However, given the NSWPF's lack of operational readiness to use the preventative detention powers and the consequent risk of non-compliance with the unique requirements in the Act, and in light of the powers available to the NSWPF in Part 2AA, the Commission recommends that Parliament repeal the Part 2A powers immediately. The risk to both members of the community and individual officers if the strict legal requirements in Part 2A are not followed, outweighs any benefit of the continued existence of those powers when those powers have effectively been supplanted by the powers in Part 2AA.

The NSWPF stated that it did not support this recommendation.<sup>227</sup>

**RECOMMENDATION 9:** Parliament consider immediately repealing the preventative detention powers in Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW).

<sup>225</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 28.

<sup>226</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 10.

<sup>227</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.



## 3.7 RECOMMENDED LEGISLATIVE AMENDMENTS TO PART 2A

Until such time as the preventative detention powers are repealed or expire, the Part 2A powers will still be available to the NSWPF. The Commission has therefore made the recommendations below to address an important omission in the legislation which should be implemented as soon as possible. The omission appears to be the result of a failure to reflect changes in jurisdiction from the Ombudsman to the Law Enforcement Conduct Commission in 2017.

### 3.7.1 RIGHT TO CONTACT OMBUDSMAN TO COMPLAIN ABOUT CORRECTIONAL OFFICERS

Under the general complaint provisions in the *Ombudsman Act 1974* (NSW) a person detained under a PDO can complain to the Ombudsman about the conduct of correctional services and youth justice officers who are involved in their detention. However, s 26ZD of the TPP Act prevents a person detained under a PDO from being able to contact any person other than those mentioned in Division 5 of Part 2A. Division 5 does not include any entitlement to contact the Ombudsman, only the Commission.

It seems this omission may be an unintentional result of the creation of the Commission in 2017 and the consequent splitting of the jurisdiction in relation to complaints about members of the NSWPF and complaints about correctional services and youth justice officers, between the Commission and the Ombudsman respectively.

Part 2A of the TPP Act originally including an entitlement to contact the Ombudsman, in s 26ZF. This was because prior to the creation of the Commission, the Ombudsman had jurisdiction to receive complaints about members of the NSWPF, as well as correctional officers. When the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act) commenced and the jurisdiction to receive complaints about the NSWPF was removed from the Ombudsman and given to the Commission, all the references to the Ombudsman in Division 5 of the TPP Act were replaced with references to the Commission.

Having reviewed the Explanatory Notes and Second Reading Speeches to the LECC Act, they do not reveal any intent on the part of Parliament to remove the ability of a person detained under a PDO to make a complaint about the conduct of correctional officers.

The Commission recommends that Parliament consider amending the TPP Act to preserve the right of a person detained under a PDO to contact the NSW Ombudsman, in order to make a complaint about their treatment by a correctional or youth justice officer. It is the NSW Ombudsman that has the jurisdiction and expertise to assist with the resolution of complaints about the treatment of detainees by correctional officers.

The Commission provided excerpts of its draft report to the NSW Ombudsman for comment, as well as to the NSWPF. Both the NSW Ombudsman and the NSWPF stated that they had no objections to this recommendation.<sup>228</sup>

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<sup>228</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A; Letter from NSW Ombudsman to Chief Commissioner, Law Enforcement Conduct Commission, 6 May 2022.

**RECOMMENDATION 10:** Parliament consider amending s 26ZF of the *Terrorism (Police Powers) Act 2002* (NSW) to allow a person detained under a preventative detention order to contact the NSW Ombudsman.

The Commission also considers that the Act should require that the detained person be informed about their right to contact the Ombudsman in relation to their treatment by a correctional officer or youth justice officer. This would seem a necessary corollary of the above amendment.

Likely for the same reasons as mentioned above, the Act only requires the person to be informed of their right to complain to the Commission about their treatment by police officers (or the application for or making of the PDO).<sup>229</sup>

It is noted that in 2008 and 2011 the Ombudsman recommended that Parliament consider amending the Act to specifically require the nominated senior officer to inform persons who are detained in a correctional centre under a PDO of their right to contact the Ombudsman to make a complaint about the conduct of a correctional officer.<sup>230</sup>

The Act was amended in 2010 to require that a person must be informed of their (general) right to contact the Ombudsman (then s 26ZF).<sup>231</sup> The Department of Attorney General and Justice at that time rejected a further amendment, on the basis that the requirement in the Act for police to inform the person of their general right to contact the Ombudsman adequately addressed the issue of provision of information regarding complaints to the Ombudsman about correctional officers.<sup>232</sup>

However, as Part 2A of the TPP Act no longer contains any requirement to inform the person they can contact the Ombudsman, it is appropriate for Parliament to reconsider the need for this further amendment.

The Commission therefore recommends that Parliament consider amending the TPP Act to require that the detained person be informed about their right to contact the Ombudsman in relation to their treatment by a correctional officer or youth justice officer. Both the NSW Ombudsman and the NSWPF stated that they had no objections to this recommendation.<sup>233</sup>

<sup>229</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26Y(2)(c) and (d), s 26Z(2)(c) and (d) and s 26ZF.

<sup>230</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) p 35 (Recommendation 4); NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 25 (Recommendation 10).

<sup>231</sup> Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010), Recommendation 5; *Terrorism (Police Powers) Amendment Act 2010* (NSW) sch 1 cl 5 and cl 7.

<sup>232</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 25; Department of Attorney General and Justice (NSW) *Review of the Terrorism (Police Powers) Act 2002* (2013) p 25.

<sup>233</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A; Letter from NSW Ombudsman to Chief Commissioner, Law Enforcement Conduct Commission, 6 May 2022.

**RECOMMENDATION 11:** Parliament consider amending s 26Y and s 26Z of the *Terrorism (Police Powers) Act 2002* (NSW) to require the nominated senior officer to inform the person of their right to complain to the NSW Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.

The NSWPF PDO SOPs state that ‘Each detainee has the right to contact LECC’ and ‘Police are to ensure that each detainee is aware of this right and given the opportunity to exercise that right where possible’. The Commission also recommends that the NSWPF PDO SOPs remind police to tell those persons detained under a PDO that they can complain about the conduct of correctional officers and juvenile justice officers to the NSW Ombudsman.

The NSW Ombudsman stated that he had no objection to this recommendation.<sup>234</sup> The NSWPF stated that it supported this recommendation, and that in identifying any amendments to be made when updating the PDO SOPs, attention would be given to the recommendations in this report.<sup>235</sup>

**RECOMMENDATION 12:** The NSW Police Force include in the preventative detention order Standard Operating Procedures an instruction to police to inform persons in preventative detention that they can complain to the NSW Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.

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<sup>234</sup> Letter from NSW Ombudsman to Chief Commissioner, Law Enforcement Conduct Commission, 6 May 2022.

<sup>235</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022, Refs D/2022/480490 and D/2022/539197, Annexure A.

# 4. MONITORING AND REPORTING

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## 4.1 COMMISSION'S SCRUTINY POWERS

### 4.1.1 POWERS TO REQUIRE INFORMATION UNDER S 26ZO AND S 27ZC

The TPP Act requires the Commission to keep under scrutiny the exercise of powers Part 2A confers on police officers and correctional officers, and Part 3 confers on members of the NSWPF.<sup>236</sup>

The Act stipulates that 'for that purpose', the Commission may require the Commissioner of Police to provide information about the exercise of those powers.<sup>237</sup> The Commission may also require information from 'any public authority' for the purpose of scrutinising the use of preventative detention powers, and from the Secretary of the Department of Justice for the purpose of scrutinising the use of covert search warrant powers.

The Commission notes that in this review the NSWPF has provided copies of, or access to, all of the information the Commission considered necessary for it to fulfil its scrutiny function. The NSWPF has responded to all requests from the Commission fully. The Commission thanks the NSWPF for the collaborative approach adopted in this review.

### 4.1.2 PAST ISSUES WITH PROVISION OF INFORMATION TO OMBUDSMAN

In 2008 when the NSW Ombudsman reviewed the first five uses of the covert search warrant provisions, it did not report any problems in terms of its access to the information necessary for it to complete its review.

However when the NSW Ombudsman reviewed the first three uses of the (interim) preventative detention order powers in 2014, issues arose between the NSWPF and the Ombudsman as to the provision of certain information in relation to those uses.

The Ombudsman reported that even though it issued multiple formal requirements to the NSWPF to provide information under s 26ZO(2), some of the requested documents were not provided, and other documents were provided but with information redacted. The reasons given by the NSWPF for limiting the information provided related to the operation of secrecy provisions in Commonwealth laws (given Commonwealth agencies had shared information with the NSWPF as part of the operation that led to the use of the powers) and a claim for public interest immunity in relation to certain documents.<sup>238</sup>

The Ombudsman expressed concerns that the restriction of its access to information reduced its ability to provide effective scrutiny of the exercise of the Part 2A powers, as required by the Act. However, the Ombudsman agreed that 'certain information can be restricted without impacting effective oversight, such as information that identifies informants or officers who are operating covertly'.<sup>239</sup>

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<sup>236</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(1) and s 27ZC(1).

<sup>237</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(2) and s 27ZC(2).

<sup>238</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017), p 14.

<sup>239</sup> *Ibid* p 15.

The Ombudsman recommended that the TPP Act be amended to prohibit claims of public interest immunity in the context of requirements for information for the purpose of scrutinising the use of powers under the Act (Recommendation 2).<sup>240</sup> It also recommended that the Attorney General should ‘make representations’ to the Council of Australian Governments and relevant Commonwealth Ministers and agencies to seek amendments to Commonwealth legislation that contained secrecy provisions, to ensure the scrutiny functions under the TPP Act could be performed effectively in future (Recommendation 4).<sup>241</sup>

### 4.1.3 CHANGES TO INFORMATION PROVISIONS IN 2018

In response to Recommendation 2 from the Ombudsman, the Department of Justice recommended changes to the information provisions in its Statutory Review of the TPP Act in 2018.<sup>242</sup> These changes were substantially implemented by the *Terrorism (Police Powers) Amendment Statutory Review Act 2018* (NSW), which inserted the following provisions into Part 2A and Part 3:

(2A) The Commissioner of Police must provide the information required by the Law Enforcement Conduct Commission, but may provide it subject to any one or more of the following conditions:

- (a) that any officer of the Commission (within the meaning of the Law Enforcement Conduct Commission Act 2016) who is to have access to the information has been given a security clearance at an appropriate level by the Commonwealth,
- (b) that the information is not made public by the Commission without consulting the Commissioner of Police on whether making the information public would reveal police methodology or ongoing operations, or would jeopardise relevant information-sharing relationships,
- (c) in the case of information of particular sensitivity identified by the Commissioner of Police, that only Commissioners of the Commission are to have access to the information.

(2B) The Commissioner of Police may only redact or withhold information required by the Law Enforcement Conduct Commission for either or both of the following reasons, and must specify when and the reason the information is redacted or withheld:

- (a) the information identifies an informant or a police officer operating covertly,
- (b) provision of the information contravenes a law of the Commonwealth.<sup>243</sup>

In relation to Recommendation 4 from the Ombudsman, the Department of Justice noted that the Commonwealth Attorney-General’s Department had indicated that no amendment to the Commonwealth legislative framework was envisaged.<sup>244</sup>

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<sup>240</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) p 18.

<sup>241</sup> Ibid p 16 and p 18.

<sup>242</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) p 59 (Recommendation 13).

<sup>243</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(2A)-(2B) and s 27ZC(2A)-(2B).

<sup>244</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) p 57.

As part of its present review, the Commission wrote to the Attorney General to ask whether he had made any representations to the Council of Australian Governments regarding amending Commonwealth secrecy provisions, and if not, the reasons why. In response the Attorney General stated that the 2018 Statutory Review had not supported the Ombudsman's Recommendation 4, and referred to the comments the Commonwealth Attorney-General's Department made to the Statutory Review.<sup>245</sup>

As noted above, during the Commission's review there was no information that the Commission required that the NSWPF sought to redact or withhold. The Commission will continue to monitor the application of the new provisions in its future reviews.

## 4.2 PROVISION OF SECTION 27S REPORTS TO THE ATTORNEY GENERAL

Section 27S(5) requires that for every report to the eligible Judge that the NSWPF is required to prepare on execution of a covert search warrant, or on re-entry of the premises under the warrant, it must ensure a copy is provided to the Attorney General.

As noted in Section 2.7, there was information missing from each of the reports prepared by the NSWPF in relation to the four covert searches conducted in the reporting period. Also, two of the reports were incomplete because they were made using the wrong form (the LEpra form).

The NSWPF informed the Commission that its Covert Applications Unit (CAU) has a spreadsheet in which it records the date that reports prepared under s 27S are provided to the Attorney General. The CAU informed the Commission that the spreadsheet was created after the execution of the first covert search warrant in 2018, so there is no record of whether the s 27S(1) report and the s 27S(3) re-entry report for that warrant were ever provided to the Attorney General. In relation to the other three warrants, the NSWPF stated that:

- A copy of the s 27S(1) report for the second warrant executed in 2018 was provided to the Attorney General on 25 October 2018, but a copy of the s 27S(3) re-entry report was not provided.
- A copy of the s 27S(1) report for the first warrant executed in 2019 was provided to the Attorney General on 6 March 2019 (no re-entry of the premises was conducted so a s 27S(3) re-entry report was not required).
- A copy of the s 27S(1) report for the second warrant executed in 2019 was provided to the Attorney General on 24 April 2019, but a copy of the s 27S(3) re-entry report was not provided.

The provisions of copies of the s 27S(1) and s 27S(3) reports are one of the accountability mechanisms required by the TPP Act. It is important that these reports are provided so they can be reviewed by the Attorney General and can inform the statutory reviews of the TPP Act.

Following review of the Commission's draft report, the NSWPF updated its form for a s 27S report to the eligible Judge to include a field at the end for the date the report was

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<sup>245</sup> Letter from Attorney General, New South Wales, to Commissioner, Law Enforcement Conduct Commission, 31 December 2021.



served on the Attorney General. The s 27S report form also now includes the fields to record the information required for the re-entry report under s 27S(3).

These updates to the s 27S form, along with the spreadsheet maintained by the CAU, reduce the risk of non-compliance with s 27S(5) in future.

## 4.3 ANNUAL REPORTS TO THE ATTORNEY GENERAL AND MINISTER FOR POLICE

The TPP Act requires the Commissioner of Police to report annually to the Attorney General and Minister for Police on the exercise of the powers under Part 2A and Part 3. The NSWPF is to provide the report within four months after 30 June each year.<sup>246</sup> The Attorney General is required to table the reports in Parliament as soon as practicable after they are received.<sup>247</sup>

The Act stipulates the details which must be included in these annual reports.

### 4.3.1 SECTION 26ZN REPORTS ON USE OF PREVENTATIVE DETENTION POWERS

Reports on the use of preventative detention powers (s 26ZN reports) must include details such as:

- the number of applications police made for PDOs (including interim PDOs), the number of PDOs made, and the number of occasions on which a (final) PDO was not made following a hearing;
- the duration of each PDO made;
- whether a person was taken into custody under each PDO and, if so, the period for which the person was detained, and whether they were principally detained in a correctional centre, juvenile correctional centre, juvenile detention centre, police facility or other place;
- the number of prohibited contact orders applied for, and the number made, and the duration of each, and
- ‘particulars of any complaints in relation to the detention of a person under a PDO made or referred during the year to the Law Enforcement Conduct Commission and the outcome of any complaint so made’.<sup>248</sup>

There were three tabled s 26ZN reports which covered the reporting period for the Commission’s review (for 1 July 2016 - 30 June 2017, 1 July 2017 - 30 June 2018 and 1 July 2018 - 30 June 2019).

The tabled s 26ZN reports for July 2017 - June 2018 and July 2018 - June 2019 contain an error. They misstate the requirement in s 26ZN(2)(i) to provide particulars about any

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<sup>246</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(1) and s 27ZB(1)-(2)

<sup>247</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(3) and s 27ZB(5).

<sup>248</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(2).

complaints about detention of a person under a PDO made or referred during the year to the Commission. The reports instead mentioned complaints made or referred to the Ombudsman, or Police Integrity Commission. The NSWPF reported that as 'far as can be ascertained' no such complaints were made or referred in that year.<sup>249</sup> The NSWPF has therefore not updated the template for the s 26ZN reports since July 2017.

As the Commission did not receive any complaints about detention of person under a PDO during the reporting period (the PDO powers not having been used), this error was not material. However, the Commission suggested in its draft report that the NSWPF amend its template for future s 26ZN reports, to ensure compliance with the Act.

Following review of the Commission's draft report, the NSWPF amended its template for s 26ZN reports to correctly include the requirement in s 26ZN(2)(i). The s 26ZN report for 1 July 2019 - 30 June 2020, which was completed by the NSWPF on 11 May 2022 and tabled on 23 May 2022, correctly refers to complaints made to the Commission.

#### 4.3.2 SECTION 27ZB REPORTS ON USE OF COVERT SEARCH POWERS

The NSWPF's annual reports on the use of the covert search powers (s 27ZB reports) must include details such as:

- the number of applications for covert search warrants made, and number of applications granted, and the number of both which were telephone warrants;
- the number of covert search warrants executed;
- the number of covert search warrants under which:
  - any things were seized;
  - any things were placed in substitution for seized things;
  - any things were returned or retrieved;
  - any things were copied, photographed or otherwise recorded;
  - any electronic equipment was operated by eligible police officers;
  - any things were tested;
- 'the number of arrests made in connection with a terrorist act in respect of which a covert search warrant was executed and the number of those arrests that have led to the laying of charges in relation to the terrorist act',
- 'the number of complaints that are made under any Act about conduct relating to the execution of a covert search warrant by an eligible police officer and the number of those complaints that are, or have been, the subject of an investigation under any Act.'<sup>250</sup>

The four covert search warrants executed in the reporting period all fell within the 2018-2019 financial year, so were included in the s 27ZB report for 1 July 2018-30 June 2019.

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<sup>249</sup> NSW Police Force, *Terrorism (Police Powers) Act 2002 Section 27ZN Annual Report by the New South Wales Police Force 1 July 2018 - 30 June 2019* (2019) p 3.

<sup>250</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 27ZB(3).

There were a number of issues with the s 27ZB report the NSWPF provided for 1 July 2018-30 June 2019, as discussed below.

#### 4.3.2.1 NUMBER OF WARRANTS UNDER WHICH THINGS WERE ‘TESTED’

As discussed in Section 2.6.1.1, in its s 27ZB report the NSWPF stated that it ‘did not test any things under Covert Search Warrants in 2018-2019’.<sup>251</sup> However, the NSWPF did take DNA samples from the subject premises under one of the warrants, and took DNA samples from things seized under two other warrants. It appears these matters were not included in the s 27ZB report as it was not clear to the NSWPF whether taking of DNA samples constituted ‘testing’ of a thing within the meaning of the Act.

As discussed above in Section 2.6.1.5, it appears that the NSWPF now accepts that the ‘testing of a thing’ under s 27O(1)(l) includes testing for and analysis of DNA. The NSWPF has included a note to that effect in all of its forms for covert search warrants wherever those forms refer to that power.

In Section 2.6.1.5 the Commission recommends that s 27O of the TPP Act be amended to make clear under what power a police officer can take and analyse forensic samples from the subject premises, or from things found in the course of executing the covert search warrant.

The Commission recommends that s 27ZB be amended to require the NSWPF to specifically report on the number of covert search warrants under which police took DNA samples.

**RECOMMENDATION 13:** Parliament consider amending s 27ZB in the *Terrorism (Police Powers) Act 2002* (NSW) to require the NSW Police Force to report on the number of covert search warrants under which DNA samples were taken either from the subject premises, or from things seized from the subject premises.

#### 4.3.2.2 ARRESTS AND CHARGES CONNECTED TO THE TERRORIST ACT

Section 27ZB(3)(j) requires that in the NSWPF’s report to Parliament on use of the CSW powers in the 2018-2019 financial year it specify:

- the number of arrests made in connection with a terrorist act in respect of which a covert search warrant was executed, and
- the number of those arrests that have led to the laying of charges in relation to the terrorist act.

The NSWPF reported (on 30 August 2019) that ‘[i]n the 2018-2019 reporting period, the NSWPF made 4 arrests in connection with a terrorist act in respect of which a Covert Search Warrant was executed. Of those arrests 4 led to the laying of charges in relation to a terrorist act.’

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<sup>251</sup> NSW Police Force, *Terrorism (Police Powers) Act 2002 Section 27ZB Annual Report by the New South Wales Police Force 1 July 2018 – 30 June 2019* (2019) p 4.

The Commission requested the NSWPF provide the four charge numbers for the charges referred to in the report to Parliament. The NSWPF provided these and informed the Commission that all four charges were connected to the terrorist act in relation to which the two covert search warrants were executed in 2019.

The Commission reviewed the four charges provided by the NSWPF. One of the charges referred to in the s 27ZB report was the charging of Isaac El Matari. As discussed in Section 2.9, the charge against Mr El Matari was comprised of three counts: knowingly being a member of a terrorist organisation (IS),<sup>252</sup> doing an act in preparation for a terrorist act,<sup>253</sup> and preparations for incursions into foreign countries for the purpose of engaging in hostile activities.<sup>254</sup> He pleaded guilty to the two preparation offences, and admitted the offence of knowingly being a member of IS for the purpose of it being taken into account on his sentence. He was sentenced to seven years' and four months' imprisonment, with a non-parole period of five years and six months.<sup>255</sup>

The second charge the NSWPF included in the s 27ZB report also related to a terrorism offence. The original offence charged was withdrawn and replaced with two counts of a different terrorism-related offence, to which the person pleaded guilty. He was sentenced to imprisonment.

However, the two remaining charges the NSWPF counted in its s 27ZB report did not include any terrorism offences. They related instead to fraud and intimidating a police officer.

When asked by the Commission, the NSWPF confirmed that two of the charges mentioned in the s 27ZB report did not relate to the covert searches. They were included in the report as those charges arose out of the same investigation that led to the conviction of Mr El Matari and another for terrorism-related offences.<sup>256</sup>

The Commission is also aware that a further person was charged with a terrorism-related offence as a result of an investigation in which the NSWPF used covert searches powers. However, as this occurred subsequent to the 2018-2019 s 27ZB report being prepared, that charge was not reflected in that report.

The Commission suggests, for the purpose of accountability for the use of the extraordinary powers in Part 3, that the NSWPF ensure in future that only the charges that relate to a terrorist act are reported in the s 27ZB report, as required by s 27ZB(3)(j).

#### 4.3.2.3 COMPLAINTS MADE UNDER ANY ACT

Section 27ZB(3)(k) stipulates the s 27ZB report must include 'the number of complaints that are made **under any Act** about conduct relating to the execution of a covert search

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<sup>252</sup> *Criminal Code Act 1995* (Cth) s 102.3.

<sup>253</sup> *Criminal Code Act 1995* (Cth) s 101.6.

<sup>254</sup> *Criminal Code Act 1995* (Cth) s 119.4.

<sup>255</sup> *R v El Matari* [2021] NSWSC 1260.

<sup>256</sup> NSW Police Force, *Response to Issues Paper on review of powers under Terrorism (Police Powers) Act 2002* (NSW), 10 January 2022, Ref D/2022/19069.

warrant by an eligible police officer and the number of those complaints that are, or have been, the subject of an investigation **under any Act**' (emphasis added).

In the s 27ZB report for July 2018 - June 2019 the NSWPF stated under this item that '[t]he NSWPF did not receive any complaints regarding the execution of Covert Search Warrants in 2018-2019'.<sup>257</sup> This does not fully address the requirement in s 27ZB(3)(k), as under the *Law Enforcement Conduct Commission Act 2016* (NSW) complaints can be made direct to the Commission about the execution by police of a covert search warrant.

The Commission can confirm that it did not receive any complaints relating to the four TPP Act covert search warrants executed by the NSWPF in the reporting period.

The s 27ZB report for 1 July 2019 - 30 June 2020, which was completed by the NSWPF on 11 May 2022 and tabled on 23 May 2022, stated the following in response to the requirement in s 27ZB(3)(k): 'So far as can be ascertained, no such complaints were made, and no complaints are or have been the subject of an investigation under any Act in 2020-2021.'

It is suggested that for all future reports, in order to fully comply with s 27ZB(3)(k), the NSWPF requests information from the Commission about any relevant complaints before finalising its s 27ZB report.

#### 4.3.3 SIGNIFICANT DELAY IN TABLING OF 2019-2020 ANNUAL REPORTS

The table below sets out the dates that the s 26ZN and s 27ZB reports covering the reporting period were due, finalised by the NSWPF, and tabled in Parliament.

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<sup>257</sup> NSW Police Force, *Terrorism (Police Powers) Act 2002 Section 27ZB Annual Report by the New South Wales Police Force 1 July 2018 - 30 June 2019* (2019) p 4.

**Table 3: Annual reports under s 26ZN and s 27ZB for 1 January 2017- 30 June 2020**

REPORT	FOR PERIOD	USE OF POWERS REPORTED?	DATE REPORT DUE TO MINISTER	DATE OF REPORT	DATE TABLED
S 26ZN (Pt 2A powers)	1 July 2016 – 30 June 2017	No	31 October 2017	23 January 2018	15 February 2018
S 27ZB (Pt 3 powers)	1 July 2016 – 30 June 2017	No	31 October 2017	23 January 2018	15 February 2018
S 26ZN (Pt 2A powers)	1 July 2017- 30 June 2018	No	31 October 2018	July 2018	20 September 2018
S 27ZB (Pt 3 powers)	1 July 2017- 30 June 2018	No	31 October 2018	July 2018	20 September 2018
S 26ZN (Pt 2A powers)	1 July 2018-30 June 2019	No	31 October 2019	30 August 2019	3 March 2020
S 27ZB (Pt 3 powers)	1 July 2018-30 June 2019	Yes	31 October 2019	30 August 2019	3 March 2020
S 26ZN (Pt 2A powers)	1 July 2019- 30 June 2020	No	31 October 2020	11 May 2022	23 May 2022
S 27ZB (Pt 3 powers)	1 July 2019- 30 June 2020	No	31 October 2020	11 May 2022	23 May 2022

The Commission is concerned that the s 26ZN and s 27ZB reports for the period 1 July 2019 – 30 June 2020, which were due in October 2020, were only completed by the NSWPF in May 2022. The annual reporting requirements in Part 2A and Part 3 are designed to ensure that the Parliament and the general public receive regular updates about the use of these extraordinary powers.

In its draft report provided to the NSWPF in March 2022 the Commission had included a recommendation that the 2019-2020 reports be tabled as soon as possible. The NSWPF completed the reports on 11 May 2022 and they were tabled on 23 May 2022. The NSWPF also completed its s 26ZN and s 27ZB reports for the period 1 July 2020 – 30 June 2021 on 11 May 2022, and these were also tabled on 23 May 2022.

The Commission will continue to monitor compliance with the annual report requirements in its future reviews under the TPP Act. The Commission suggests that it would be beneficial for the NSWPF to provide a copy of each s 26ZN and s 27ZB report to the Commission at the same time as providing it to the Attorney General and Minister for Police. This would assist the Commission to perform its ongoing scrutiny function under Parts 2A and 3, and enable the Commission to report on compliance by the NSWPF with the obligations in s 26ZN and 27ZB, even if those reports have not been tabled by the Attorney General at the time of the Commission's review.

# APPENDIX A: CHRONOLOGY

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# CHRONOLOGY OF USE AND REVIEW OF POWERS IN PARTS 2A AND 3 OF *TERRORISM (POLICE POWERS) ACT 2002 (NSW)*

DATE	EVENT
5 December 2002	<i>Terrorism (Police Powers) Act 2002 (NSW)</i> (TPP Act) commenced. The Act did not originally contain preventative detention powers or covert search powers.
13 September 2005	Covert search powers were inserted into the TPP Act (in Part 3) by the <i>Terrorism Legislation Amendment (Warrants) Act 2005</i> . The ability to apply for a covert search warrant was restricted to certain members of the NSW Police Force and certain members of the NSW Crime Commission.
13 October 2005	<b>First covert search warrant</b> was issued to the NSW Police Force under the TPP Act. The warrant was never executed.
4-5 November 2005	<b>Second, third and fourth covert search warrants</b> were issued to the NSW Police Force under the TPP Act. The second warrant was never executed, the third and fourth warrants were executed on 5 November 2005.
16 December 2005	Preventative detention powers were inserted into the TPP Act (in Part 2A) by the <i>Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005</i> . The powers were introduced with a sunset clause, meaning the powers would expire in 10 years (December 2015).
23 March 2006	<b>Fifth covert search warrant</b> was issued to the NSW Police Force under the TPP Act. It was executed that same day.
22 November 2006	Report of the first statutory review of the TPP Act by the Attorney General's Department was tabled in Parliament. <sup>258</sup> The Department did not make any recommendations regarding the preventative detention powers or covert search powers (the Department's consultation for the review occurred prior to the covert search powers being exercised).
13 November 2007	Report of the second review of the TPP Act by the Attorney General's Department was tabled in Parliament. <sup>259</sup> The Department made three recommendations in relation to the preventative detention powers, and two recommendations in relation to the covert search powers.
21 December 2007	<i>Law Enforcement and Other Legislation Amendment Act 2007 (NSW)</i> commenced, amending the TPP Act in line with some of the recommendations from the second statutory review of the TPP Act.

<sup>258</sup> NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002* (2006) <[https://www.justice.nsw.gov.au/justicepolicy/Documents/tppa\\_review\\_final\\_online\\_version.pdf](https://www.justice.nsw.gov.au/justicepolicy/Documents/tppa_review_final_online_version.pdf)>

<sup>259</sup> NSW Attorney General's Department, *Review of the Terrorism (Police Powers) Act 2002* (2007) <<https://www.parliament.nsw.gov.au/la/papers/Pages/tabled-paper-details.aspx?pk=47826&houseCode=LH>>

30 October 2008	First statutory report of the NSW Ombudsman, reviewing the exercise of preventative detention and covert search powers from September 2005 to December 2007, was tabled in Parliament. <sup>260</sup> The Ombudsman made 25 recommendations in relation to the preventative detention powers, 11 recommendations in relation to the covert search powers, and one recommendation in relation to cross-jurisdictional oversight of both types of powers.
29 May 2009	Covert search powers were inserted into the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW).
31 August 2010	Report of the third statutory review of the TPP Act by the Department of Attorney General and Justice was tabled in Parliament. <sup>261</sup> The Department made 12 recommendations in relation to the preventative detention powers, one recommendation in relation to the covert search powers, and one recommendation in relation to extending the NSW Ombudsman's statutory scrutiny function in relation to both types of powers.
16 December 2010	<i>Terrorism (Police Powers) Amendment Act 2010</i> (NSW) commenced, amending the TPP Act in line with some of the recommendations from the third statutory review of that Act. This included amending the Act to give the NSW Ombudsman an ongoing scrutiny function in relation to the use of the preventative detention and covert search powers.
24 August 2011	Second statutory report of the NSW Ombudsman, reviewing the exercise of preventative detention and covert search powers from 1 January 2008- 31 December 2010, was tabled in Parliament. <sup>262</sup> The Ombudsman made 15 recommendations in relation to the preventative detention powers, including a recommendation that the following statutory review of the TPP Act consider whether there was an ongoing need for the NSW Police Force to retain the preventative detention powers. The Ombudsman made two recommendations in relation to the covert search powers, and a recommendation about police providing the Ombudsman with information about considered uses of both types of powers.
28 August 2013	Report of the fourth statutory review of the TPP Act by the Department of Attorney General and Justice was tabled in Parliament. <sup>263</sup> The Department made one recommendation for an amendment in relation to the preventative detention powers. The Department also recommended that a decision as to whether to repeal or retain the preventative detention powers be deferred until

<sup>260</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Preventative detention – interim report, Covert search warrants – final report* (2008) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=56719&houseCode=LH>>.

<sup>261</sup> Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010), <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=38707&houseCode=LH>>.

<sup>262</sup> NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=28662&houseCode=LH>>.

<sup>263</sup> Department of Attorney General and Justice (NSW) *Review of the Terrorism (Police Powers) Act 2002* (2013) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=65651&houseCode=LH>>.

	there had been national discussion about two Commonwealth reviews which had recommended such powers be repealed.
18-19 September 2014	<b>First time the NSW Police Force used the preventative detention powers in Part 2A of the TPP Act.</b> The NSW Police Force obtained interim preventative detention orders from the Supreme Court and took three people into preventative detention. The people were held for two days and then released when the interim orders expired. No charges were laid. The powers were used as part of Operation Appleby, a counter-terrorism operation conducted by the NSW Joint Counter Terrorism Team, which included officers from the Australian Federal Police, the NSW Police Force and the Australian Security and Intelligence Organisation.
23 October 2014	<i>Crimes Legislation Amendment Act 2014</i> (NSW) commenced, amending the TPP Act in line with the recommendation from the fourth statutory review of that Act.
11 November 2014	Third statutory report of the NSW Ombudsman, reviewing the exercise of preventative detention and covert search powers from 1 January 2011 to 31 December 2013, was tabled in Parliament. <sup>264</sup> The report had been finalised prior to the use of the preventative detention powers in September 2014. The Ombudsman made two recommendations in relation to the preventative detention powers. The Ombudsman also recommended that the following statutory review consider amending Part 3 of the TPP Act to remove the ability of the NSW Crime Commission to use the covert search powers, as the Crime Commission had indicated it was unnecessary for its members to have access to those powers.
20 October 2015	Report of the fifth statutory review of the TPP Act by the Department of Justice was tabled in Parliament. <sup>265</sup> The Department recommended that the preventative detention powers, which were due to expire on 16 December 2015, be extended until 16 December 2018. It noted that 'operational issues' relating to the preventative detention powers which had been raised by the NSW Police Force were 'currently being progressed at the national level'. The Department also agreed with the Ombudsman and recommended that Part 3 of the TPP Act be amended to remove the covert search powers conferred on the NSW Crime Commission.
5 November 2015	<i>Terrorism (Police Powers) Amendment Act 2015</i> (NSW) commenced, amending the TPP Act to extend the preventative detention powers until 16 December 2018 and remove the ability of members of the NSW Crime Commission to apply for covert search warrants, as recommended by the Department of Justice in the fifth statutory review.
16 May 2016	Investigative detention powers were inserted into the TPP Act (Part 2AA) by the <i>Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016</i> .

<sup>264</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review Period 2011 - 2013* (2014) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=21108&houseCode=LH>>.

<sup>265</sup> Department of Justice (NSW), *Statutory Review of the Terrorism (Police Powers) Act 2002* (2015) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=34417&houseCode=LH>>.

	These powers were created to address operational concerns the NSWPF has raised about the preventative detention powers in Part 2A.
13 June 2017	Fourth statutory report of the NSW Ombudsman, reviewing the exercise of preventative detention and covert search powers from 1 January 2014 to 31 December 2016, was tabled in Parliament. <sup>266</sup> Given the concerns the NSW Police Force raised about the preventative detention powers after using them in 2014, and in light of the introduction of the investigative detention powers, the Ombudsman concluded it was unlikely police would use the preventative detention powers in future. The Ombudsman recommended the Part 2A powers be allowed to expire on 16 December 2018. The Ombudsman also made two recommendations in relation to ensuring that information was not withheld from the body responsible for scrutiny of the powers.
1 July 2017	The TPP Act was amended by the <i>Law Enforcement Conduct Commission Act 2016</i> (NSW) to transfer the scrutiny function in relation to preventative detention and covert search warrant powers from the Ombudsman to the Law Enforcement Conduct Commission (the Commission).
7 June 2018	Report of the sixth statutory review of the TPP Act by the Department of Justice was tabled in Parliament. <sup>267</sup> The Department rejected the Ombudsman's recommendation, and instead recommended that the preventative detention powers be extended for a further three years. The Department made four other recommendations in relation to the preventative detention powers. The Department also recommended amendments to the TPP Act to restrict the information that police could withhold from the Commission when the later was exercising its scrutiny function under the Act.
2018	<b>Sixth and seventh covert search warrants were issued to the NSW Police Force under the TPP Act.</b> Both warrants were executed within hours of being issued.
28 November 2018	<i>Terrorism (Police Powers) Amendment (Statutory Review) Act 2018</i> (NSW) commenced, making a number of amendments to the TPP Act in line with the Department's recommendations in the sixth statutory review, including extending the preventative detention powers until 16 December 2021.
23-26 February 2019	<b>Eighth covert search warrant was issued to the NSW Police Force under the TPP Act.</b> The warrant was sought as part of Operation Zellaer, an investigation conducted by the NSW Joint Counter Terrorism Team into suspected supporters of Islamic State in Australia. One of the subjects of Operation Zellaer was Isaac El

<sup>266</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=71171&houseCode=LH>>.

<sup>267</sup> Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) <<https://www.parliament.nsw.gov.au/la/papers/Pages/taled-paper-details.aspx?pk=73561&houseCode=LH>>.

	Matari. The warrant was executed at Mr El Matari's unit on 26 February 2019. <sup>268</sup>
17-18 April 2019	<b>Ninth covert search warrant was issued to the NSW Police Force under the TPP Act.</b> The warrant was also sought as part of Operation Zellaer, mentioned above. The warrant was executed on 18 April 2019 to obtain Mr El Matari's mobile phone. <sup>269</sup>
8 December 2021	<i>Crimes Legislation Amendment Act 2021</i> (NSW) commenced, amending the TPP Act to extend the preventative detention powers until 16 December 2023.

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<sup>268</sup> *R v El Matari* [2021] NSWSC 1260, Attachment 'Agreed Facts on Sentence', [65].

<sup>269</sup> *R v El Matari* [2021] NSWSC 1260, Attachment 'Agreed Facts on Sentence', [36] and [49].

# APPENDIX B: IMPLEMENTATION OF 2017 RECOMMENDATIONS

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# IMPLEMENTATION OF RECOMMENDATIONS FROM OMBUDSMAN'S 2017 REPORT<sup>270</sup>

RECOMMENDATION	IMPLEMENTED?	COMMENTS
1. Part 2A of the <i>Terrorism (Police Powers) Act 2002</i> should be allowed to expire on 16 December 2018.	Not implemented	On 28 November 2018 the <i>Terrorism (Police Powers) Act 2002</i> was amended to extend the preventative detention order (Part 2A) powers until 16 December 2021. On 8 December 2021 the powers were further extended until 16 December 2023.
2. The <i>Terrorism (Police Powers) Act 2002</i> should be amended so that the Law Enforcement Conduct Commission is not subject to claims of public interest immunity in requiring information from police or other relevant agencies in performing its functions under the Act.	Partially implemented	On 28 November 2018 the <i>Terrorism (Police Powers) Act 2002</i> was amended so that the Commissioner of Police may only redact or withhold information required by the Law Enforcement Conduct Commission if the information identifies an informant or a police officer operating covertly, and/or provision of the information contravenes a law of the Commonwealth. The Commissioner of Police must also specify when and the reason the information is redacted or withheld.
3. The <i>Terrorism (Police Powers) Act 2002</i> should be amended so that the Law Enforcement Conduct Commission is required to keep under scrutiny the exercise of powers by police under Part 2AA of the Act in identical terms to its functions under Part 2A and Part 3.	Not implemented	In its 2018 statutory review of the <i>Terrorism (Police Powers) Act 2002</i> the Department of Justice did not accept this recommendation.
4. To ensure that the Law Enforcement Conduct Commission is able to perform its oversight role effectively, the Attorney General should make representations to the Council of Australia Governments and the relevant Commonwealth Ministers and agencies to seek amendments to relevant legislation, as outlined in Chapter 4 of this report.	Not implemented	The Attorney General noted that the Commonwealth Attorney-General's Department indicated to the 2018 statutory review of the TPP Act that no amendment to the Commonwealth legislative framework was envisaged.

<sup>270</sup> NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2014-16* (2017).



# GLOSSARY

GLOSSARY	DESCRIPTION
CAU	NSW Police Force Covert Applications Unit, within the Operational Legal Services Command
CFP Act	<i>Crimes (Forensic Procedures) Act 2000</i> (NSW)
COAG	Council of Australian Governments
Commission	Law Enforcement Conduct Commission, New South Wales
Covert search warrants/powers	Covert search warrants/powers under Part 3 of the <i>Terrorism (Police Powers) Act 2002</i> (NSW)
CSW	Covert search warrant under the <i>Terrorism (Police Powers) Act 2002</i> (NSW)
Eligible Judge	Judge of the NSW Supreme Court who has, by consent, been nominated by the Attorney General under s 27B of the <i>Terrorism (Police Powers) Act 2002</i> (NSW) to determine applications for covert search warrants under that Act.
General Search Warrant SOPs	NSW Police Force <i>Execution of Search Warrants Standard Operating Procedures</i>
INSLM	Independent National Security Legislation Monitor
Issuing Judge	Judge of the NSW Supreme Court who issued the relevant covert search warrant under the <i>Terrorism (Police Powers) Act 2002</i> (NSW)
LECC	Law Enforcement Conduct Commission, New South Wales
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW)
MoU	Memorandum of Understanding
NSWPF	New South Wales Police Force
Occupier's notice	Written notice which police must prepare and (following judicial approval) provide to an occupier of premises that has been the subject of a covert search under s 27U of the <i>Terrorism (Police Powers) Act 2002</i> (NSW).
PDO	Preventative detention order made under Part 2A of the <i>Terrorism (Police Powers) Act 2002</i> (NSW)
Preventative detention powers/orders	Powers/orders under Part 2A of the <i>Terrorism (Police Powers) Act 2002</i> (NSW)
Reporting period	Period of the Commission's monitoring under the <i>Terrorism (Police Powers) Act 2002</i> (NSW) which is covered by this report, being 1 January 2017 to 30 June 2020
S 27S(1) report	The report on the execution of a covert search warrant which police are required under s 27S(1) of the <i>Terrorism (Police Powers) Act 2002</i> (NSW) to provide to the eligible Judge who issued the warrant.
S 27S(3) re-entry report	The report on re-entry of premises under a covert search warrant which police are required under s 27S(3) of the <i>Terrorism (Police Powers) Act 2002</i> (NSW) to provide to the eligible Judge who issued the warrant.

SOPs	Standard Operating Procedures
TIS	NSW Police Force Terrorism Investigations Squad, within the Counter Terrorism & Special Tactics Command
TPP Act	<i>Terrorism (Police Powers) Act 2002</i> (NSW)

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