

LECC

Law Enforcement
Conduct Commission

Covert Search Warrants & Preventative Detention Orders

Review under the *Terrorism (Police Powers) Act*
2002 (NSW) July 2020 – June 2023

September 2024

LECC

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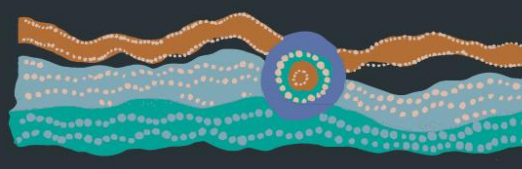
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ISBN 978-1-74003-070-0

The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Foreword

The preventative detention powers in Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW) 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 *Terrorism (Police Powers) Act 2002* (NSW) were also introduced in 2005. While some jurisdictions have enacted counter-terrorism covert search powers like those in the New South Wales Act, not all have done so.

Since the introduction of these powers, there have been a total of 9 covert search warrants issued under the legislation. Four of these occurred during the previous reporting period which covered the years 2017 – 2020. Since their introduction, the preventative detention orders have only been used once, in 2014. During the current reporting period (1 July 2020 to 31 December 2023) neither the covert search warrant nor preventative detention order powers were used.

It is appropriate that these counter-terrorism powers are rarely used, given their extraordinary nature. However, the infrequent use of the powers also creates a challenge, as police officers must be familiar with the powers and able to use them at short notice in high pressure environments. This can only be achieved if policies and forms are created and maintained, which clearly guide officers through every requirement. This has not always been the case for Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002* (NSW).

As part of our previous review, the Commission identified several incidents of non-compliance with legal requirements when the covert search warrant powers were used. The NSWPF worked productively with the Commission to rectify most of the issues relating to the use of the covert search powers. However, we are concerned that the NSWPF has still not revised all search warrant policy documents, even though we previously recommended they do so. The NSWPF has stated that it will prioritise the revision of these policy documents and will provide the Commission with a draft for review by the end of 2024. We will review these as part of our next review of the *Terrorism (Police Powers) Act 2002* (NSW).

It is concerning that 19 years after the preventative detention orders were first introduced, the NSWPF still does not have in place Standard Operating Procedures for preventative detention orders, despite supporting the recommendation we made that these Procedures be finalised and corporately endorsed. The NSWPF has informed the Commission that it will re-prioritise this task. We will review these standard operating procedures as part of our next review of the *Terrorism (Police Powers) Act 2002* (NSW).

We thank the NSWPF for their cooperation in the preparation of this Report and for their timely response to our requests for further information and comment.

The Hon Peter Johnson SC

Chief Commissioner

September 2024

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1. Introduction

1.1 Purpose of this report

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. 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 the Part 3 covert search powers conferred on members of the NSWPF (and the preventative detention powers conferred on correction officers).¹ The Commission's scrutiny function does not extend to the other special powers that the NSWPF may exercise under the TPP Act.

At the conclusion of every period of 3 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.² The Attorney General is required to table the report as soon as practicable after it is received.³

Prior to the commencement of the Commission in July 2017, the NSW Ombudsman had responsibility for scrutinising the use of the powers under Part 2A and Part 3 of the TPP Act. The Ombudsman produced 4 reports under the TPP Act, in 2008, 2011, 2014 and 2017. The Commission produced the previous report under the TPP Act, covering the period 1 January 2017 to 30 June 2020 ('the 2017 – 2020 Report').

1.2 The Commission's Review

This report covers the period 1 July 2020 to 30 June 2023 ('the reporting period'). 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.

Police did not apply for any covert search warrants in the reporting period. Covert search warrants were last applied for in 2018 and 2019. As outlined in the Commission's 2017 – 2020 Report, the NSWPF applied for 4 covert search warrants across 2018 and 2019. All 4 warrants were issued and executed by the NSWPF. Prior to that, covert search powers were last utilised in 2006.⁴

While preparing this report, the Commission sent requests for information and copies of documents to the NSWPF and the NSWPF provided all information and copies of documents as requested.⁵

The Commission's next review under the TPP Act will commence on 1 July 2026 and will cover the period 1 July 2023 – 30 June 2026.

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

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

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

⁴ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*.

⁵ Letter from the Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 9 February 2024.

1.3 Developments since the 2017 – 2020 Report

In July 2022 the Commission's report on the use of preventative detention powers and covert search powers for the period 1 January 2017 to 30 June 2020 was tabled.⁶ The Commission's report included 13 recommendations, including:

- the preventative detention powers in Part 2A of the TPP Act should be immediately repealed (at the time that report was written the powers were due to 'sunset' in 2023)
- changes to the TPP Act and to NSWPF Standard Operating Procedures (SOPs) and policies relating to the obtaining of DNA samples during the execution of a covert search warrant
- the immediate creation and corporate endorsement of SOPs and forms relating to preventative detention orders (none were in existence at the time of reporting)
- the inclusion of reference to covert search warrants conducted under the TPP Act in the overarching search warrant policy.

Appendix A contains a table which sets out the recommendations in full, along with the NSWPF response and the Commission's view as to whether the recommendation has been implemented.

1.3.1 Statutory review of the TPP Act

Under s 36 of the TPP Act, the Attorney General is required to review the Act every 3 years, as soon as possible after the scrutiny reports by the Commission have been tabled.

In May 2023, the Department of Communities and Justice ('the Department') completed its seventh statutory review of the TPP Act.⁷ The Department made 4 recommendations, 3 of which related to the powers in Part 2A and Part 3. The Department rejected the Commission's recommendation that the preventative detention powers be repealed, instead recommending they be extended for another 3 years.⁸

In line with the Commission's recommendation number 10, relating to section 26ZF of the TPP Act, the Department recommended amending the section to allow a person detained under a preventative detention order to contact the NSW Ombudsman.⁹ The Department also supported recommendation 11, that sections 26Y and 26Z of the TPP Act be amended to require the nominated senior officer to inform the person of their right to issue a complaint to the Ombudsman about the conduct of correctional officers or youth justice officers in connection with their detention.¹⁰

⁶ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020* (2022).

⁷ Department of Communities and Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2023).

⁸ Department of Communities and Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2023) p 31 (Recommendation 2).

⁹ Department of Communities and Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2023) p 33 (Recommendation 3).

¹⁰ Department of Communities and Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2023) p 33 (Recommendation 4).

1.3.2 Amendments to the *Terrorism (Police Powers) Act 2002*

In 2023, amendments were made to the TPP Act which implemented the recommendations of the statutory review. Relevant to the Commission's review function:

- preventative detention powers in Part 2A were extended until 2026
- amendments were made to s 26ZF to allow a person detained under a preventative detention order to contact the NSW Ombudsman
- amendments were made to sections 26Y and 26Z to inform the person detained of their right to make a complaint to the NSW Ombudsman.

In the Second Reading Speech, when addressing the extension of the preventative detention powers, the Attorney General for NSW (Mr Michael Daley) stated that as the investigative detention powers contained in Part 2AA of the TPP Act had not yet been operationally tested, it would be premature to repeal Part 2A. Repealing Part 2A 'would also be inconsistent with the national legislative framework for using preventative detention as a tool to prevent and respond to terrorism.'¹¹

¹¹ New South Wales, Parliamentary Debates, Legislative Assembly, 10 October 2023 (Michael Daley).

2. Covert Search Warrants

The NSWPF did not use the covert search powers during the reporting period.

This means that the NSWPF did not apply for any covert search warrants, nor execute any such warrants between 1 July 2020 to 30 June 2023.

This chapter considers the NSWPF policies and procedures that support and instruct officers in the correct use of the covert search powers, as well as the action taken by the NSWPF to implement recommendations made in the Commission's 2017 - 2020 report.

2.1 Part 3 Covert Search Powers

For clarity, the nature of the powers is summarised below.

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),¹² 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.¹³

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.¹⁴ Since August 2021 authorisation can also be given by the Superintendent responsible for counter terrorism investigations.¹⁵

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.¹⁶ 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.¹⁷

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, may also seize, substitute, copy, photograph, record, operate, print or test any of those things.¹⁸ They may

¹² *Terrorism (Police Powers) Act 2002* (NSW) s 27A(2)

¹³ *Terrorism (Police Powers) Act 2002* (NSW) s 27A and s 27G.

¹⁴ *Terrorism (Police Powers) Act 2002* (NSW) ss 27C-27G; *Terrorism (Police Powers) Regulation 2016* (NSW) reg 4.

¹⁵ *Terrorism (Police Powers) Regulation 2021* (NSW) reg 5.

¹⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 270(1)(a), (b) and (m).

¹⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 27J(1)(e) and s 270(1)(d).

¹⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 270(1)(e)-(l).

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.¹⁹

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 the execution assisted in the prevention of, or response to, the specified terrorist offence.²⁰

An occupier's notice, including details about the execution of the warrant, must be provided to the issuing Judge for approval within 6 months of the warrant being executed.²¹ Once approved, the notice is to be provided to the occupier of the premises searched.²² 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.²³

In the 2005 Second Reading Speech to the Bill that introduced the counter terrorism covert search powers, then Attorney General Mr Bob Debus explained that the policy rationale behind Parliament granting these powers to police was to 'provide police with another tool that answers some of the more difficult characteristics of terrorist activity.'²⁴

2.1.1 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.²⁵ 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, or is being, or is likely to be, committed, and
- b) That the entry to and search of the premises will substantially assist in responding to or preventing a 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.

As no covert search warrants were applied for during the reporting period, no authorisations were required.

2.2 NSWPF policies and procedures for covert search powers

2.2.1 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 TPP Act as an 'eligible police officer' can seek authorisation and then apply for a covert search warrant.²⁶ Authorisation to execute a covert

¹⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 270(1)(h) and (4).

²⁰ *Terrorism (Police Powers) Act 2002* (NSW) s27S.

²¹ *Terrorism (Police Powers) Act 2002* (NSW) s 27U(1)-(3).

²² *Terrorism (Police Powers) Act 2002* (NSW) s 27U(5).

²³ *Terrorism (Police Powers) Act 2002* (NSW) s 27U(7)-(9).

²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 2005, p 16940.

²⁵ *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.

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

search warrant can also only be given to police officers in the TIS, however, the TPP Act permits other police officers to assist the TIS in the execution of a covert search warrant.²⁷

In exercising the powers in Part 3 of the TPP Act, officers attached to the TIS are assisted by the NSWPF Covert Applications Unit ('CAU') which is part of the Operational Legal Services Command. The CAU officers 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.

2.2.2 NSWPF policies relating to covert search powers

2.2.2.1 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 SOPs for covert search warrants.²⁸ These SOPs were reportedly amended from time to time, in line with recommendations from the Ombudsman.²⁹

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.³⁰ In response, the NSWPF provided a copy of a document that it referred to as 'Covert Search Warrants Standard Operating Procedure'³¹ (the 2020 CSW SOPs).

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'.³² The NSWPF, therefore, no longer has any specific SOPs for the use of the covert search powers in the TPP Act.

2.2.2.2 Current NSWPF documents relating to CSW powers

In our 2017 – 2020 Report, the Commission recommended that the NSWPF should revise all search warrant policy documents relevant to the execution of covert search warrants under the TPP Act as soon as possible. We saw this as particularly important because the NSWPF had archived the specific SOPs for the use of covert search powers.

Our recommendation aimed to make it clear to officers' which policies should be followed when executing covert search warrants, and what variations to general search warrant practice are permitted.³³ However, in February 2024 the NSWPF advised the Commission that the

²⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 270(1) and (2), s 27P and s 27S(1)(iii) and (6).

²⁸ 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.

²⁹ See for example, Department of Justice and Attorney General (NSW), *Review of the Terrorism (Police Powers) Act 2002* (2010) pp 39-401; NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010* (2011) p 37.

³⁰ Letter from A/Chief Commissioner, Law Enforcement Conduct Commission, to Commissioner of Police, NSWPF, 16 July 2020.

³¹ Letter from the Commissioner of Police, NSWPF, to A/Chief Commissioner, Law Enforcement Conduct Commission, 4 August 2020, 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, NSWPF, *Covert Search Warrants*, version reviewed 25 June 2020.

³² Letter from the Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

³³ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*, p 22.

'Overarching Policy & Procedures for Search Warrants and Other "Uninvited Entry and Search" Operations' ('OSWP') had not been updated.³⁴

The NSWPF had previously told us 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 said that all covert search warrants 'are conducted in accordance with standard NSWPF search warrant SOPs'.³⁵

In June 2024, we reviewed the versions of the Police Handbook and the *Counter-Terrorism Law Manual* available on the NSWPF Intranet. The Police Handbook does not contain any section on covert search warrants. Instead, it refers officers to the OSWP, the purpose of which 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 2 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 the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').

Neither the Police Handbook, nor the OSWP, specify whether the references to 'covert search warrants' refer to those under the TPP Act, or those under LEPRA. In fact, neither document refers to the existence of covert search warrants under the TPP Act.

This continues to be of concern to the Commission as during the previous reporting period, we identified instances of non-compliance with the TPP Act requirements because officers mistakenly relied on practice and forms for LEPRA covert search warrants.

Until the Police Handbook is amended, this issue remains unresolved, and the risk of non-compliance is insufficiently addressed.

The other NSWPF policy document that refers to TPP Act covert search warrants is the *Counter-Terrorism Law Manual*. The Manual was created by the Operational Legal Services Command and contains 2 pages about counter-terrorism covert search warrants.³⁶ 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. However, the version of the General Search Warrant SOPs that the Commission has reviewed,

³⁴ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 9 February 2024.

³⁵ Letter from Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

³⁶ Operational Legal Advice Unit, NSWPF, *Counter-Terrorism Law Manual*, reviewed April 2024, pp 15-16.

do not make it clear that they apply to covert searches under the TPP Act. Those SOPs do not, in fact, make a single reference to covert searches.

This is concerning because there are also a number of aspects in which the obligations on officers before, during, and after the 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).

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 these SOPs that they apply in the case of a counter-terrorism covert search and
- it is not clear when variation in the mandatory steps will be expected/permitted for such a warrant.

While the OSWP (which is a separate document, and not included in the Search Warrant Toolkit) states the General Search Warrant SOPs apply to covert search warrants, this does not adequately compensate for the lack of specific reference to covert search warrants in the General Search Warrant SOPs itself.

If the NSWPF decides not to maintain any SOPs specifically for the use of the covert search powers under the TPP Act, the Commission again recommends that the NSWPF update its General Search Warrant SOPs and other relevant policy documents as soon as possible to make clear how covert searches under the TPP Act should be used.

This was recommendation number 1 in the Commission's 2017 – 2020 Report. The Commission is very concerned that this recommendation, which was supported by the NSWPF, has not been implemented since our last report was published.

In April 2024, the NSWPF told the Commission that it is waiting for the Counter Terrorism and Special Tactics Unit ('CTST') to provide appropriate draft wording to the policy owners (State Crime Command).³⁷

The Commission recommends, once again, that the General Search Warrant SOPs be immediately updated to include references to CSWs.

Recommendation 1: The NSWPF immediately 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)* to ensure those documents make it clear to officers which policies are to be followed when executing those warrants, and what variations to general search warrant practice are permitted.

Following a September 2024 review of the Commission's draft report, the NSWPF committed to prioritising the development of the search warrant policy documents as they relate to the execution of covert search warrants under the TPP Act.³⁸ The Commission will review these policy documents when it undertakes its next review of Parts 2A and 3 of the TPP Act (1 July 2023 – 30 June 2026).

³⁷ Operational Legal Advice Unit, NSWPF, *Counter-Terrorism Law Manual*, reviewed April 2024, pp 15-16.

³⁸ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 10 September 2024.

2.2.2.3 Video recordings of covert searches

The TPP Act does not require that the execution of covert search warrants is recorded on video. As discussed in Section 2.6.2, the NSWPF has now archived its covert 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. The SOPs also contain a detailed description of the duties of the video operator.

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.

Our 2017 – 2020 report recommended that training to officers should emphasise 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.

As part of the current review, the NSWPF informed the Commission that CTST have developed and delivered training in relation to this recommendation.³⁹ The Commission has reviewed the training module that has been delivered and is satisfied that it meets the Commission's recommendation.

2.2.3 Covert collection of DNA

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*⁴⁰ confirmed that the CFP Act has no application when police take DNA material other than from a person directly. The Court's conclusion in *R v Kane* was followed by the Supreme Court in *R v White*.⁴¹ Both the Australian Law Reform Commission and the NSW Ombudsman have considered that there are risks arising from the fact that the covert collection of DNA samples is not regulated.

In 2006 the NSW Ombudsman reported on its review of the exercise of powers under the CFP Act.⁴² 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

³⁹ Letter from Assistant Commissioner to Chief Commissioner, Law Enforcement Conduct Commission, 19 February 2024.

⁴⁰ (2004) 144 A Crim R 496, 501.

⁴¹ [2005] NSWSC 60 (15 February 2005).

⁴² NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006).

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’.⁴³

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.’⁴⁴ 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.⁴⁵ This recommendation was never implemented.

2.2.3.1 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.

Following review of the Commission’s draft of the 2017 – 2020 Report, which raised this issue,⁴⁶ 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 commented at that time, 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’.⁴⁷

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.’⁴⁸

The Commission has considered these forms as part of our current review and does not believe that they adequately address all of the potential problems that could arise when taking DNA samples during the execution of a covert search warrant.

In the Commission’s 2017 – 2020 Report, Recommendation 4 suggested that the NSWPF include guidance in its policy documents for officers taking DNA samples under a covert search warrant.⁴⁹ This recommendation was not supported by the NSWPF. The NSWPF indicated it anticipated that the CTST Command would refer officers to existing policies and

⁴³ NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006) 20.

⁴⁴ NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006) 173.

⁴⁵ NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006) 174 (Recommendation 53).

⁴⁶ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*, 31.

⁴⁷ Letter from Commissioner of Police, NSWPF, to Chief Commissioner of Police, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

⁴⁸ Letter from Commissioner of Police, NSWPF, to Chief Commissioner of Police, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

⁴⁹ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*, 38 (Recommendation 4).

guidance in relation to the taking of DNA samples. However, as noted above, the NSWPF does not have any policy guiding officers in relation to covert collection of DNA samples at all. If the NSWPF maintains that there is no need for policy guidance specific to the use of covert search warrants under the TPP Act, the other policies and relating to the execution of search warrants guidelines (discussed above in 2.2.2) would be an appropriate place to specifically outline relevant guidance to officers for the covert collection of DNA.

Accordingly, the Commission remains very concerned that, until an appropriate regulatory framework is put in place, the collection of DNA samples under covert search warrants is inherently risky for both the NSWPF and the general public.

When provided with a draft version of this Report, the NSWPF informed the Commission that it would not support this recommendation, as ‘existing NSWPF policy provides appropriate safeguards.’⁵⁰ The NSWPF did not specify what these existing policies were or provide a copy to the Commission. Accordingly, we are not able to assess to what extent these existing policies address the issues raised.

The Commission reiterates its recommendation from the previous reporting period that the NSWPF revise its policy documents to include guidance for officers about the collection of DNA samples during a covert search under the TPP Act. The Commission will seek revised copies of these relevant policy documents from the NSWPF when it commences its next review under the TPP Act in July 2026.

Recommendation 2: The NSWPF 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**
- 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.**

2.2.4 Forms for the use of covert search powers

The *Terrorism (Police Powers) Regulation 2021* gives the Attorney General the power to approve forms ‘as may be necessary or convenient’ for the administration of the TPP Act.⁵¹ This power has also appeared in all previous versions of the TPP Act. As part of our 2017 – 2020 Report we identified several issues with the forms that the NSWPF were using for the exercise of Part 3 powers. For example, we identified some inconsistencies between the forms and the terminology and requirements in the TPP Act.⁵²

⁵⁰ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 10 September 2024.

⁵¹ *Terrorism (Police Powers) Regulation 2021 (NSW)* reg 8.

⁵² Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*, p 23.

In response to our previous review of Part 3, the NSWPF updated its covert search warrant forms.⁵³ The updated forms were a significant improvement to those previously used, with almost all inconsistencies being addressed.⁵⁴

While the current forms have fixed inconsistent terminology in most places, this issue has not been amended consistently throughout all the forms. The term ‘eligible issuing officer’ is still used in some of the forms:

- CTCSW 22/000 Form 1 Part 12 refers to ‘Eligible Justice’ in the signing block for the eligible Judge
- CTCSW 22/000 Form 2 refers to ‘the eligible issuing officer’ at the bottom of Part 2 of the form, in italics
- CTCSW 22/000 Form 5 refers to ‘an eligible issuing officer’ under the signing block for the eligible Judge

That is not a term that is used in the TPP Act, which only refers to eligible Judges. To remove any ambiguity around who can issue a TPP Act covert search warrant, the term ‘eligible Judge’ should be used consistently throughout all the forms.

In response to the draft Report, the NSWPF supported this recommendation and will ‘prioritise the minor amendment to the relevant forms’.⁵⁵ We will review these amended forms as part of our next legislative review of the TPP Act.

Regarding training for officers on the use of covert search powers and the new forms, the NSWPF provided the Commission with a copy of the TIS induction package that was updated in February 2022. The Commission has reviewed those training materials and is satisfied that they encapsulate the requirements for covert search warrants under the TPP Act.

Recommendation 3: The NSWPF address the remaining issue the Commission identified in the forms in our 2017 – 2020 report for the use of covert search powers under Part 3 of the *Terrorism (Police Powers) Act 2002 (NSW)*.

2.3 Execution of covert search warrants

2.3.1 Role of Exhibit Officers

As the NSWPF has now archived its covert search warrant SOPs, it appears that 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 explain that the Exhibit Officer is a mandatory role in the execution of a search warrant, and:

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,

⁵³ Letter from the Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

⁵⁴ Law Enforcement Conduct Commission, *Covert Search Warrants & Preventative Detention Orders, Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017 – June 2020*, p 24.

⁵⁵ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 10 September 2024.

location, description and exhibits handling continuity until the recording and securing of those items at the police station.⁵⁶

In response to our 2022 Report the NSWPF updated the training to its officers in relation to exercising the covert search warrant powers in the TPP Act to include an explanation of how the role of an Exhibit Officer should be performed during a covert search.

The Commission reviewed the updated training module in relation to the role of the Exhibit Officer, and is satisfied that it meets our recommendations.

2.3.2 Role of Independent Officers

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'.⁵⁷ The duties of the Independent Observer include being present at the premises at the time of the execution of the search warrant, and entering the premises 'as soon as practicable after the premises have been secured but prior to the commencement of the property search'.⁵⁸ The Independent Observer is responsible for monitoring the execution of the search warrant and is to remain with the Search Team and the Exhibit Officer. The Independent Observer is to view exhibits during the search in place before they are removed, and then to sign the Property Seizure/Exhibit Form.⁵⁹

Officers planning to execute a covert search warrant under the TPP Act are directed (through the NSWPF Handbook) to the General Search Warrant SOPs, and therefore given the guidance those SOPs provide about the duties to be performed by the Independent Officer.

In accordance with Recommendation 2, the NSWPF should make it explicit in the General Search Warrant SOPs that this guidance should be followed when executing a covert search warrant under the TPP Act.

Our 2022 Report recommended that officer training should include an explanation of how the functions of the Independent Officer should be performed during a covert search. The NSWPF supported this recommendation.⁶⁰ The Commission has now reviewed the revised officer training and is satisfied that it meets our recommendation.

⁵⁶ State Intelligence Command, NSWPF, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 27.

⁵⁷ State Intelligence Command, NSWPF, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 31.

⁵⁸ State Intelligence Command, NSWPF, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 31-2.

⁵⁹ State Intelligence Command, NSWPF, *Execution of Search Warrants Standard Operating Procedures*, August 2020, p 32.

⁶⁰ Letter from Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 27 May 2022.

3. Preventative Detention Orders

The purpose of detention under a preventative detention order (PDO) is ‘purely preventative’.⁶¹ 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. Under a PDO police are prohibited from questioning the person about any suspected terrorist act.⁶² Accordingly, PDOs have little utility as an investigative tool.

The NSWPF did not make any applications for PDOs during the reporting period. The powers have only ever been used on one occasion, in 2014.

This chapter summarises the way PDOs work. It considers the NSWPF response to our previous recommendations about the instructions to officers about the use of the preventative detention order powers, and other practical steps needed to ensure readiness to use the powers if the NSWPF should ever decide to deploy them.

3.1 Overview of Preventative Detention Orders

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 years 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 PDO from the Commissioner of Police, a Deputy Commissioner, or an Assistant Commissioner responsible for counter-terrorism operations.⁶³

There are different threshold requirements which must be satisfied 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)):

- a) the police officer must have reasonable grounds to suspect that the person:
 - i) will engage in a terrorist act, or
 - ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
 - iii) has done an act in preparation for, or planning, a terrorist act, and
- b) making the order would substantially assist in preventing a terrorist act occurring, and
- c) detaining the person for the period in 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.

There must be some reasonable grounds to suspect that any such terrorist act could occur at some time in the next 14 days.

⁶¹ 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.

⁶² *Terrorism (Police Powers) Act 2002* (NSW) s 26ZK.

⁶³ *Terrorism (Police Powers) Act 2002* (NSW) s 26F(1)(b).

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 in 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 that 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.⁶⁴ An 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.⁶⁵ An interim PDO can be made in the absence of, and without notice to, the person subject to the order.⁶⁶

After hearing the substantive application, the Supreme Court will either grant the application and make a PDO or refuse the application.⁶⁷ The detained person is entitled to give evidence and have legal representation at this hearing.⁶⁸ 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).⁶⁹

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.⁷⁰ The NSWPF must however apply to have a PDO revoked if the grounds on which the order was made cease to exist.⁷¹

3.1.2 Restrictions and safeguards while a 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.⁷² Young people aged 16 and 17 years may be detained under a PDO, but generally must be detained separately from adults.⁷³

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.⁷⁴ This person is referred to as the nominated senior police officer.

A person in preventive detention must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman, or degrading treatment.⁷⁵ Police cannot question a

⁶⁴ *Terrorism (Police Powers) Act 2002* (NSW) s 26H.

⁶⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 26L(1).

⁶⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 26H (3).

⁶⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 26I.

⁶⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 26I(3).

⁶⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2).

⁷⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 26K(4), (5) and (7).

⁷¹ *Terrorism (Police Powers) Act 2002* (NSW) s 26M(2).

⁷² *Terrorism (Police Powers) Act 2002* (NSW) s 26X.

⁷³ *Terrorism (Police Powers) Act 2002* (NSW) s 26E and s 26X(5) and (6).

⁷⁴ *Terrorism (Police Powers) Act 2002* (NSW) s 26R.

⁷⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZC.

person in preventative detention other than for the purposes of identification, the person's welfare or complying with other legislative requirements.⁷⁶

A person in preventative detention is not entitled to contact any person unless the TPP Act expressly provides for such contact.⁷⁷ 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.⁷⁸ The person may also contact a lawyer and/or the Commission.⁷⁹ 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 4 hours per day.⁸⁰

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.⁸¹

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.⁸² 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.⁸³

As soon as practicable after a person is first taken into custody under a PDO (interim or final), the police officer who is detaining the person must inform the person of certain matters.⁸⁴ 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
- 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 in the TPP Act, the officer may face criminal penalties up to 2 years' imprisonment.⁸⁵ 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.⁸⁶

⁷⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZK.

⁷⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZD.

⁷⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZE.

⁷⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZF and s 26ZG.

⁸⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH.

⁸¹ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZI.

⁸² *Terrorism (Police Powers) Act 2002* (NSW) s 26N.

⁸³ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZJ.

⁸⁴ *Terrorism (Police Powers) Act 2002* (NSW) s 26Y and s 26Z.

⁸⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 26Y(1) and s 26Z(1).

⁸⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZA(1).

3.2 Amendments to preventative detention provisions in 2023

In October 2023, the NSW Parliament passed the *Justice Legislation Amendment (Miscellaneous) Act 2023*, which implemented 2 of the Commission's recommendations from our 2017 – 2020 Report in relation to preventative detention orders under the TPP Act. Amendments were made to sections 26Y, 26Z and 26ZF of the TPP Act, to give effect to recommendations we made in our 2022 report relating to a person's right to contact the Ombudsman.

Mr Michael Daley, Attorney-General of NSW, made the following comments in the second reading speech to the Bill:

The amendments to the *Terrorism (Police Powers) Act* proposed by the bill also implement two recommendations of the Law Enforcement Conduct Commission that were endorsed and recommended by the statutory review of the Act. The amendments at items [1] to [6] of schedule 5 to the bill will ensure that a person detained on a preventative detention order in a correctional centre or a youth justice detention centre, in accordance with an arrangement under section 26X of the Act, will be notified of their right and given the opportunity to contact the NSW Ombudsman to make a complaint about their treatment while held in such a facility.⁸⁷

The Commission welcomes these changes to the TPP Act provisions. The relevant sections now make it clear that people held under a preventative detention order in a correctional centre or youth justice detention centre have the right to contact the Ombudsman and will be given the opportunity to do so if a complaint is to be made.

3.3 NSWPF documents of preventative detention powers

3.3.1 Preventative detention order SOPs

We asked the NSWPF for a copy of all current NSWPF policies, documents, and forms in relation to the preventative detention powers in Part 2A of the TPP Act.⁸⁸ The NSWPF provided a copy of a document titled: 'Preventative Detention *Terrorism (Police Powers) Act 2002* (NSW) Standard Operating Procedures'.⁸⁹ The NSWPF logo appears at the top of the document. The footer in the document states 'NSWPF Preventative Detention SOPs' and states that the document was 'authorised' in January 2024 by the Operational Legal Advice Unit (2024 PDO SOPs).

However, in February 2024 the NSWPF told us that due to 'significant staff changes' the 2024 PDO SOPs have not been finalised, although this 'has been re-prioritised.'⁹⁰

The NSWPF also provided us with 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

⁸⁷ New South Wales, Parliamentary Debates, Legislative Assembly, 10 October 2023 (Michael Daley).

⁸⁸ Letter from Chief Commissioner, Law Enforcement Conduct Commission, to Commissioner of Police, NSWPF, 21 December 2023.

⁸⁹ Letter from Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 9 February 2024.

⁹⁰ Letter from Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 9 February 2024.

- Affidavit in support of application for a Preventative Detention Order
- Preventative Detention Order
- Application for a Prohibited Contact Order.

The Commission remains very concerned that the NSWPF still does not have corporately endorsed SOPs and forms in place to ensure that the powers are used correctly.

The Commission recommends that the NSWPF finalise and corporately endorse the draft 2024 PDO SOPs as soon as possible.

The NSWPF is aware of the complexity and difficulty involved in implementing these powers. Yet it has not taken the steps to approve and maintain SOPs and forms to support officers in using the powers in accordance with the legislation. The absence of appropriate guidance creates the real risk that should a situation occur causing the NSWPF to utilise the powers, officers may fail to comply with the unique legal requirements under that Part. As the NSWPF is aware, this carries the risk of criminal liability for those officers.

Recommendation 4: The NSWPF immediately finalise and corporately endorse the draft Standard Operating Procedures and forms for the use of the preventative detention powers under the *Terrorism (Police Powers) Act 2002 (NSW)*.

In September 2024, the NSWPF stated in response to this recommendation that it supports the finalising of the SOPs and forms for the use of the preventative detention powers under the TPP Act and that it ‘will prioritise finalising’ of those SOPs and forms.⁹¹ We will review the amended SOPs and forms as part of our next review of the TPP Act provisions.

3.3.2 MoU with Corrective Services NSW and Juvenile Justice NSW

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 CCNSW for a person to be detained under a preventative detention order in a correctional facility (or a youth detention or correctional centre if the person is 16 or 17 years old). The NSWPF, CCNSW and JJNSW (now Youth Justice) entered a MoU in 2011 to clarify arrangements for the detention of people under Part 2A.⁹² This MoU expired in 2017.

The Commission asked the NSWPF if it had a current MoU with CCNSW and Youth Justice under s 26X of the TPP Act.⁹³ The NSWPF told us in late May 2024 that there is currently no MoU in place between the 3 organisations. The NSWPF advised that ‘OGC (Office of General Counsel) have commenced working on a draft of a new MoU to include all parties.’ But that ‘MoU documents have not been drafted or finalised’.⁹⁴

The Commission is very concerned that the previous MoU which expired in 2017, has never been updated or replaced despite repeated recommendations about the importance of the interagency arrangements for the use of the Part 2A powers.

⁹¹ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 10 September 2024.

⁹² 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) 22.

⁹³ Letter from Chief Commissioner, Law Enforcement Conduct Commission, to Commissioner of Police, NSWPF, 7 May 2024.

⁹⁴ Letter from Commissioner of Police, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 28 May 2024.

The lack of urgency to update the MoU after it expired suggests a lack of intention to use these powers in the future. It also creates a risk that, if the powers were to be used, the appropriate arrangements would not be in place to ensure compliance with the TPP Act.

Recommendation 5: The NSWPF immediately draft, finalise and sign an interagency MoU for the operation of Part 2A between NSWPF, Corrective Services NSW and Youth Justice NSW.

In response to this recommendation the NSWPF said that it supports the creation of a MoU with Corrective Services NSW and Youth Justice NSW. The NSWPF is ‘currently drafting this MoU with anticipated completion by the end of 2024.’⁹⁵ The Commission will seek a copy of this MoU as part of our next legislative review of the TPP Act provisions.

3.4 Concerns about Part 2A and the Commission’s analysis

Since the PDO powers were first created doubts about their utility have been expressed by both the NSWPF and the Ombudsman in its capacity for keeping the use of those powers under scrutiny.⁹⁶ As has been detailed in past reviews of the TPP Act, concerns with the PDO powers have included:

- that the PDO powers did not allow police to question the detained person⁹⁷
- that using the powers would require police to disclose national security information to the persons named and their legal representatives⁹⁸
- that because the powers are used so rarely, 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’.⁹⁹

In 2016, new powers for investigative detention in Part 2AA of the TPP Act were enacted. These provisions enable police to question a detained person.

The Ombudsman recommended that the preventative detention powers in Part 2A be allowed to expire on 16 December 2018 due to their limited utility and the existence of the new investigative detention powers.¹⁰⁰

The 2018 Department of Justice statutory review of the TPP Act rejected this recommendation. Instead, it recommended the powers be extended for an additional 3 years. It noted that the new Part 2AA investigative detention powers were ‘yet to be operationally tested’ and stated its view

⁹⁵ Letter from Assistant Commissioner, NSWPF, to Chief Commissioner, Law Enforcement Conduct Commission, 10 September 2024.

⁹⁶ 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.

⁹⁷ 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.

⁹⁸ 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.

⁹⁹ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010 (2011)* p 28.

¹⁰⁰ NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002: Review period 2008 – 2010 (2011)* p 11 (Recommendation 1).

that the Part 2A preventative detention powers ‘remain appropriate and necessary and a valuable disruption mechanism in the context of an imminent terrorist attack’.¹⁰¹

It appears, however, that the NSWPF still does not view the preventative detention powers as a ‘valuable disruption mechanism’. The NSWPF has not taken the administrative steps necessary to ensure officers can use those powers should the risk of an imminent terrorist act materialise. The NSWPF has not yet implemented finalised, corporately approved SOPs, or any requisite forms.

The NSWPF’s current Counter-Terrorism Law Manual suggests that police are unlikely to ever use the PDO powers, stating ‘[h]istorically, NSWPF have found that the option of utilising Preventative Detention Orders is resource intensive, time restrictive and impractical’.¹⁰² 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.¹⁰³

The Commission remains concerned that the NSWPF does not have appropriate SOPs and forms in place to ensure the preventative detention powers will be used correctly. This risk remains that officers using the powers in the absence of clear guidance may fail to comply with the unique legal requirements under that Part.

In October 2023 the NSW Parliament passed the Justice Legislation Amendment (Miscellaneous) Bill 2023 which extended the sunset clause for the Part 2A powers for another 3 years, until 2026. The Second Reading Speech stated:

The bill also makes several amendments to the *Terrorism (Police Powers) Act 2002* to implement recommendations made by the statutory review of the Act. The statutory review recommended that the preventative detention scheme in part 2A of the Act should be extended for a further three years. The statutory review noted the conclusion of the previous statutory review of the Act in 2018 – that it would be premature to repeal part 2A before the investigative detention powers in part 2AA of the Act had been operationally tested. These powers have not, as yet, been operationally tested. Repealing part 2A would also be inconsistent with the national legislative framework for using preventative detention as a tool to prevent and respond to terrorism.

The statutory review also noted that the NSW Police Force continues to advise that preventative detention orders remain a valuable counterterrorism disruption mechanism in the context of an imminent terrorist attack. Accordingly, it is appropriate for preventative detention orders to continue to be available for use in the event of a terrorist incident in New South Wales. The amendment at item [7] of schedule 5 to the bill achieves this by amending the sunset provision in section 26ZS of the *Terrorism (Police Powers) Act* so that the operation of part 2A of the Act can continue for a further three years.¹⁰⁴

Until such time as the preventative detention powers are repealed or expire, the Part 2A powers will continue to be available to the NSWPF.

¹⁰¹ Department of Justice (NSW), *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) p 46 (Recommendation 8).

¹⁰² Operational Legal Advice Unit, NSWPF, *Counter-Terrorism Law Manual*, reviewed April 2024, pp 13-14.

¹⁰³ Operational Legal Advice Unit, NSWPF, *Counter-Terrorism Law Manual*, reviewed April 2024, pp 13-14.

¹⁰⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 October 2023 (Michael Daley).

4. Our Scrutiny Powers

4.1 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.¹⁰⁵

The Act stipulates that ‘for that purpose’, the Commission may require the Commissioner of Police to provide information about the exercise of those powers.¹⁰⁶ 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 period 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.

4.2 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 4 months after 30 June each year.¹⁰⁷ The Attorney General is required to table the reports in Parliament as soon as practicable after they are received.¹⁰⁸

4.2.1 Section 26ZN reports on use of preventative detention powers

The Act stipulates the details which must be included in these Annual Reports.

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

¹⁰⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(1) and s 27ZC(1).

¹⁰⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZO(2) and s 27ZC(2).

¹⁰⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(1) and s 27ZB(1)-(2)

¹⁰⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(3) and s 27ZB(5).

- ‘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’.¹⁰⁹

There were 3 reports tabled under s 26ZN covering the reporting period:

- 1 July 2020 - 30 June 2021
- 1 July 2021 - 30 June 2022
- 1 July 2022 – 30 June 2023.

As outlined in these reports, no preventative detention powers were utilised during those time periods.

4.2.2 Section 27ZB reports on the 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.’¹¹⁰

During the Commission’s current reporting period, 3 reports were tabled under s 27ZB for the periods:

- 1 July 2020 – 30 June 2021
- 1 July 2021 – 30 June 2022
- 1 July 2022 – 30 June 2023.

¹⁰⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZN(2).

¹¹⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 27ZB(3).

As outlined in these reports, no covert search warrants were applied for during those periods.

4.2.3 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 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’.

The NSWPF did not report any complaints about the use of powers in the review period, which is perhaps unsurprising as the powers were not used.

Appendix A

Implementation of Recommendations from 2017 – 2020 Report

Recommendation	Implemented?	Comments?
<p>1. The NSWPF revise all search warrant policy documents which it considers apply to the execution of covert search warrants under the <i>Terrorism (Police Powers) Act 2002</i> 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.</p>	Partially implemented	The NSWPF informed the Commission that this recommendation is ‘in progress’. While the covert search warrant forms have been updated, the overarching search warrant policy is yet to be updated.
<p>2.</p> <ul style="list-style-type: none"> a) The NSWPF 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 <i>Terrorism (Police Powers) Act 2002</i>; and b) Develop and deliver updated training on the use of those powers and the new forms. 	Implemented	<ul style="list-style-type: none"> a) Forms have been updated in line with the Commission’s recommendations. b) The Counter Terrorism and Special Tactics Command will provide relevant training.
<p>3. Parliament consider:</p> <ul style="list-style-type: none"> a) Amending s 270 of the <i>Terrorism (Police Powers) Act 2002</i> to make it clear that a police officer must request in the application, and the eligible judge must grant a warrant in order for police to be authorised to take an analyse forensic samples from the subject premises or from things seized from the subject premises. b) Including provisions in the DNA Profiles and Forensic Procedures Bill (or any related legislation) which addresses 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 	Not implemented	This recommendation was not supported by the NSWPF.

Recommendation	Implemented?	Comments?
<p>samples may be used, and when the samples must be destroyed.</p>		
<p>4. The NSWPF revise its policy documents to include guidance for officers taking DNA samples under a covert search warrant, including:</p> <ul style="list-style-type: none"> 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 <i>Crimes (Forensic Procedures) Act</i> if officers supply DNA samples collected covertly for analysis for the purpose of deriving a DNA profile for inclusion in the DNA database system. 	Not implemented	The NSWPF did not support this recommendation as it considers 'there is already corporate knowledge on recording exhibits that are seized during search warrants, including the testing and/or taking of DNA samples.'
<p>5. The NSWPF emphasise in training for officers on the covert search powers in the <i>Terrorism (Police Powers) Act 2002</i> the importance of video recording covert searches, whenever possible, and explain the purposes behind making such recordings.</p>	Implemented	Counter Terrorism and Special Tactics have developed and delivered training in relation to this recommendation. The Commission has reviewed the relevant training module.
<p>6. The NSWPF include in training to officers on the covert search powers an explanation of how the role of an 'Exhibit Officer' should be performed during a covert search.</p>	Implemented	Counter Terrorism and Special Tactics have developed and delivered training in relation to this recommendation. The Commission has reviewed the relevant training module.
<p>7. The NSWPF include in training to officers on the covert search powers an explanation of how the role of an 'Independent Officer' should be performed during a covert search</p>	Implemented	Counter Terrorism and Special Tactics have developed and delivered training in relation to this recommendation. The Commission has reviewed the relevant training module.
<p>8. The NSWPF:</p> <ul style="list-style-type: none"> a) develop corporately approved SOPs and forms 	Not implemented	The preventative detention order SOPs and forms have been drafted, however, they

Recommendation	Implemented?	Comments?
<p>for the preventative detention powers under the <i>Terrorism (Police Powers) Act</i>, or</p> <p>b) give a policy instruction to officers that the preventative detention powers are not to be used.</p>		<p>are yet to be finalised or receive corporate endorsement.</p>
<p>9. Parliament consider immediately repealing the preventative detention powers in Part 2A of the <i>Terrorism (Police Powers) Act 2002</i>.</p>	<p>Not implemented</p>	<p>In 2023, the NSW Parliament passed the Justice Legislation Amendment (Miscellaneous) Bill, which extended the preventative detention powers until 2026.</p>
<p>10. Parliament consider amending s 26ZF of the <i>Terrorism (Police Powers) Act</i> to allow a person detained under a preventative detention order to contact the NSW Ombudsman.</p>	<p>Implemented</p>	<p>In 2023, the NSW Parliament passed the Justice Legislation Amendment (Miscellaneous) Bill, which implemented this recommendation.</p>
<p>11. Parliament consider amending s 26Y and s 26Z of the <i>Terrorism (Police Powers) Act 2002</i> 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.</p>	<p>Implemented</p>	<p>In 2023, the NSW Parliament passed the Justice Legislation Amendment (Miscellaneous) Bill, which implemented this recommendation.</p>
<p>12. The NSWPF include in the preventative detention order SOPs 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.</p>	<p>Not implemented</p>	<p>While this recommendation was supported, the NSWPF are yet to update the preventative detention order SOPs.</p>
<p>13. Parliament consider amending s 27ZB of the <i>Terrorism (Police Powers) Act 2002</i> to require the NSWPF 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.</p>	<p>Not implemented</p>	<p>This recommendation was not supported by the NSWPF.</p>

Glossary

Glossary	Description
CAU	NSWPF Covert Applications Unit, within the Operational Legal Services Command
CFP Act	<i>Crimes (Forensic Procedures) Act 2000 (NSW)</i>
COAG	Council of Australian Governments
Commission	Law Enforcement Conduct Commission, NSW
CCNSW	Corrective Services New South Wales
Covert search warrant/powers	Covert search warrants/powers under Part 3 of the <i>Terrorism (Police Powers) Act 2002 (NSW)</i>
CSW	Covert search warrant under the <i>Terrorism (Police Powers) Act 2002 (NSW)</i>
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 (NSW)</i> to determine applications for covert search warrants under the Act.
General Search Warrant SOPs	NSWPF <i>Execution of Search Warrants Standard Operating Procedures</i>
INSLM	Independent National Security Legislation Monitor
Issuing Judge	Judge of the NSW Supreme Court who has issued the relevant covert search warrant under the <i>Terrorism (Police Powers) Act 2002 (NSW)</i>
JJNSW	Juvenile Justice New South Wales (now Youth Justice NSW)
LECC	Law Enforcement Conduct Commission NSW
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)</i>
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 (NSW)</i>
PDO	Preventative detention order made under Part 2A of the <i>Terrorism (Police Powers) Act 2002 (NSW)</i>
Preventative detention powers/orders	Powers/orders under Part 2A of the <i>Terrorism (Police Powers) Act 2002 (NSW)</i>

Glossary	Description
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 July 2020 to 30 June 2023
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	NSWPF Terrorism Investigations Squad, within the Counter Terrorism & Special Tactics Command
TPP Act	<i>Terrorism (Police Powers) Act 2002</i> (NSW)
Youth Justice NSW	Formerly Juvenile Justice NSW.

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