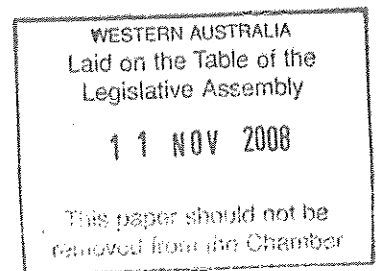


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**REPORT TO THE  
MINISTER**

**REVIEW OF THE  
*Terrorism (Extraordinary Powers) Act 2005***



Legal and Legislative Services  
Western Australia Police

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## **Executive Summary**

The majority of the provisions of the *Terrorism (Extraordinary Powers) Act 2005* came into effect on 16 January 2006, with Part 3, dealing with covert search warrants, coming into operation on 1 July 2006.

The Act provides Western Australia Police with necessary powers in order to prevent a terrorist act from occurring or to be able to appropriately respond in the aftermath of a terrorist attack. These powers supplement the functions performed by Western Australia Police under the National Counter Terrorism Plan (NCTP).

As yet, the provisions of the Act have not been utilised. As a consequence, it is difficult to gauge their efficacy. However, similar police powers were exercised in New South Wales during 'Operation Pendennis' on November 8 2005. From this exercise, and others, certain conclusions can be drawn as to the likely effectiveness of the *Terrorism (Extraordinary Powers) Act 2005*.

## **Recommendations**

Given that the legislation has not yet been utilised, and there are few instances that may be drawn upon to assess the practical effectiveness of the Act, no substantial reforms of the Act are recommended at this time. It may be that by the time the next statutory review takes place, in two years' time, issues of significance may have arisen which may warrant some substantive changes to the Act.

Nevertheless, during the course of the Review a number of issues have been raised which warrant consideration in terms of the drafting of amendments to the Act to improve its effectiveness. These amendments centre around:

- access to drivers' licence information to complement existing methods of identifying people in the event of a terrorist incident;
- the ability of the Commissioner to appoint "special officers" from overseas jurisdictions;
- the retention of records and their destruction once it has been determined they are no longer required; and
- a number of minor clarifications to improve the operation of the Act.

Further information on these matters is detailed in Part 4 of this report.

## **1. Introduction**

### **1.1 Terms of reference for the review**

Section 34 of the *Terrorism (Extraordinary Powers) Act 2005* provides as follows:

#### **34 Review of the Act**

- (1) The Minister must carry out a review of this Act as soon as is practicable after –
  - (a) the first anniversary of the commencement of this section; and
  - (b) thereafter after every third year after the first anniversary.
- (2) The review must review the operation and effectiveness of this Act, whether its provisions are appropriate to prevent and respond to terrorist acts, and whether it should continue in operation.
- (3) The Minister must prepare a report based on the review and, as soon as practicable or no later than 90 days after it is prepared, cause it to be tabled before each House of Parliament.

The Act was commenced on 16 January 2006, with Part 3 coming into operation by proclamation on 1 July 2006. Consequently, the Act is now due for review.

### **1.2 Conduct of the review**

The Review was conducted on behalf of the Minister for Police and Emergency Services by the Legal Services Unit of Western Australia Police.

A minimalist review of the Act was authorised by the Minister on 27 November 2007. It was envisaged this would entail a general assessment of the current level of threat within Australia, consideration of reviews conducted elsewhere, such as in New South Wales, and amendments introduced into legislation as a result of those reviews. Additionally, exercises conducted under the umbrella of the anti-terrorism legislation would form the basis for fine tuning the Act.

The process has involved a detailed consideration of interstate legislation along with a general review of international counter-terrorism legislation and relevant background information. Consultation has been sought at an operational level in Western Australia Police, and the opinion of the State Solicitor's Office has been canvassed in relation to a number of matters. In two years' time, when the Act is again due for review, a more detailed review of the Act may be warranted.

## 2. Background to the Introduction of the Act

### 2.1 Background to the Act

Following the terrorist attacks of September 2001 in the United States of America, the Council of Australian Governments (COAG) agreed to implement counter-terrorism legislation throughout Australia. Subsequently, in mid 2002, counter-terrorism legislation was introduced for the Commonwealth and all Australian States and Territories, designed to meet the emerging challenges of combating terrorism. Later, in 2003, the States and Territories enacted legislation to refer power in these matters to the Commonwealth under the Constitution.

The July 2005 bombings in London shifted the focus of terrorism from 'foreign nationals' to 'home grown' terrorists. Following the 27 September 2005 meeting of the Council of Australian Governments (COAG) to discuss national counter-terrorism arrangements:

*COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years....*

*State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.[Council of Australian Governments' Communiqué. Special Meeting on Counter-Terrorism. 27 September 2005]<sup>1</sup>*

Rather than any diminishing need for this legislation, there now appears to be even more of a need to ensure that Australia's counter-terrorism legislation is up to date and effective. Justice Callinan, in the recent *Thomas* case, cited intelligence reports confirming Australia "continues to be viewed as a legitimate target". (*The Australian*, August 8 2007.<sup>2</sup>

### 2.2 Objectives of the Act

The primary objective of the *Terrorism (Extraordinary Powers) Act 2005* is to confer special powers on police officers to respond to terrorist acts and deal with threats of imminent terrorist acts in Western Australia. Secondly, it enables police officers

<sup>1</sup> . [www.coag.gov.au/meetings/270905/index.htm](http://www.coag.gov.au/meetings/270905/index.htm)

<sup>2</sup> [www.theaustralian.news.com.au/story/0,25197,22223535-7583,00.html](http://www.theaustralian.news.com.au/story/0,25197,22223535-7583,00.html) )

to apply for authority, under a special covert search warrant, to covertly enter and search premises for the purposes of responding to or preventing terrorist acts. It does not allow for covert searches to be conducted outside the parameters of counter terrorism.

### **2.3 Summary of the provisions of the Act**

The provisions of the Act which deal with the exercise of special police powers are based on similar provisions contained in Australian legislation enacted elsewhere. Specifically, the *Terrorism (Police Powers) Act 2002 [NSW]* and the *Terrorism (Emergency Powers) Act 2003 [NT]*. Provisions dealing with covert search warrants are based upon similar provisions such as those contained in the *Terrorism (Community Protection) Act 2003 [VIC]* and the *Police Powers and Responsibilities Act 2000 [QLD]*.

Under the Act, police officers are able to detain and search a person, detain and search a vehicle, obtain personal details of certain people, enter and search any place the officer reasonably suspects may harbour a target person or target vehicle, and/or seize things found that have been used to commit a terrorist act or may provide evidence of the commission of a serious indictable offence. The Act also allows for the appointment of special officers from other jurisdictions and authorises the Commissioner of Police to give directions to government agencies to facilitate the exercise of the special powers conferred on police officers.

Oversight of the powers conferred under the Act is provided via a Commissioner's report to the Minister for Police and the Attorney General as soon as practicable after expiry of a Commissioner's warrant and, in the case of a covert search warrant, a report within 7 days to the Supreme Court Judge who issued the warrant. The reports to the Minister or Attorney-General are required to be tabled in Parliament. The Commissioner is also required to report annually to the Minister for Police in relation to the exercise of powers relating to covert search warrants.

Separate provisions are set down for the searching of people, the return of seized things, the use of animals, and the disclosure of confidential information.

### **2.4 The utilisation of the provisions of the Act**

The investigative powers introduced under the originating legislation have been critical to many of Australia's overseas allies in the fight against terrorism. New South Wales, the Northern Territory and Queensland have already reviewed their corresponding legislation. Extensive comparisons have been made with a range of Federal and State acts to ensure that the proposed legislation both meets the unique Western Australian context and is compatible with the other States' and Commonwealth legislation.

As yet the provisions of the *Terrorism (Extraordinary Powers) Act 2005* have not been utilised. As a consequence, it is difficult to gauge their efficacy. However, similar police powers have been exercised in NSW ('Operation Pendennis' on November 8 2005). From this experience, and to a lesser extent others, certain insights can be drawn which will form the basis of necessary amendments to the Act.

## **2.5 Practice directions**

Although the legislation has not yet been utilised, practice directions have been put in place by the Chief Justice. These cover both the process for applying for a covert search warrant and the process required for a judge to authorise a covert search warrant or validate a Commissioner's warrant.

## **3. Reviews conducted in other jurisdictions**

### **3.1 New South Wales**

The New South Wales' review of the *Terrorism (Police Powers) Act 2002* found that the policy and objectives of the Act remained valid. Five recommendations were made, aimed at clarifying the original intention of certain provisions. Two of the recommendations were State-specific and the other three were already covered in the Western Australian legislation. Only one recommendation highlighted a possible shortcoming in the Western Australian legislation.

### **3.2 Northern Territory**

As was the case in New South Wales, the Northern Territory review of the *Terrorism (Emergency Powers) Act 2003* found that the objectives and scheme of the legislation remained valid. Participation in two major national counter-terrorism exercises identified some potential problems with the operation of the Act and a number of amendments were proposed to correct the inadequacies and maintain consistency with other jurisdictions. Issues identified in the review of the Northern Territory's legislation have been adequately covered in the Western Australian legislation.

### **3.3 Queensland**

Following the enactment of the *Terrorism (Preventative Detention) Act 2005*, the Queensland Government promised to undertake a review of the State's counter-terrorism legislation, resulting in the *Terrorism Legislation Amendment Act 2007*. This act was assented to on 29 August 2007.

The *Terrorism Legislation Amendment Act 2007* amends several earlier acts, including the *Public Safety Presentation Act 1986* to which was added substantial provisions relating to "terrorist emergency". These provisions brought the Queensland legislation into line with that of New South Wales and, consequently, Western Australia. No new issues arose from the Queensland review.

## **4. Issues Identified during the Review**

During the course of the review, several issues were identified which give rise to a number of proposed amendments. These issues are:-

- the need for access to driver's licence information;
- the potential need/desire to appoint overseas police officers as 'special officers' in the event of a terrorism investigation;
- an inconsistency with regard to the burden of proof;

- the need for a provision addressing the retention and/or destruction of documents;
- the necessity of allowing someone other than the applicant to report back to the judge should the applicant be unavailable;
- the amount of time found to be necessary for the compiling of reports; and
- directions from the Supreme Court in relation to covert search warrants.

#### **4.1 Access to driver's licence information**

The State Solicitor's Office has suggested that, in order to enable police officers to better locate a 'target person', police officers should be able to access driver's licence information held by the Department of Planning and Infrastructure. In order to achieve this an amendment to s.42B of the *Road Traffic Act 1974* may be required.

#### **4.2 Appointment of foreign police officers as special officers**

The *Terrorism (Extraordinary Powers) Act 2005* allows the Commissioner to appoint as "special officers" members of the Australian Federal Police or members of the police force of another State or Territory. An agreement currently exists between Australia and New Zealand for the complementary use of police officers for counter-terrorism purposes.

In the event that it may be necessary, or desirable, to engage officers with specialist counter-terrorism skills and/or experience, the Commissioner's capacity to appoint special officers should be extended to encompass members of the police force of other foreign jurisdictions at the Commissioner's discretion. It is considered preferable that this be according to the Commissioner's determination rather than nominating prescribed jurisdictions.

#### **4.3 Burden of proof**

Section 23(2) of the *Terrorism (Extraordinary Powers) Act 2005* requires the Commissioner, before authorising an application for a covert search warrant, to be "satisfied there are reasonable grounds to believe ...", while section 26 states that a judge may issue a covert search warrant "if the judge is satisfied ... there are reasonable grounds for the applicant to have that suspicion" and "that the issue of the warrant is justified".

Elsewhere, in section 19(3) of the Act, the Commissioner is constrained in exercising powers under a Commissioner's warrant unless he or she "reasonably suspects ...", a term which is defined in section 4 of the Act.

In *George v Rockett* (1990) 170 CLR 104, the High Court highlighted a distinction between the evidence needed to ground a suspicion and the evidence needed to ground a belief stating, in part, "facts which can reasonably ground a suspicion may be quite insufficient to ground a belief...." Section 8(1) of the equivalent Victorian legislation specifies "reasonable grounds for the suspicion or belief".

Given that the matters contained in section 23 are almost identical to section 24, to which section 26 applies, it seems anomalous that the Commissioner must be



satisfied to a higher degree as to those matters than the judge who actually issues the warrant. Amendments to the Act are therefore required to clarify these burden of proof issues in relation to applications for covert search warrants.

#### **4.4 Retention and/or destruction of documents**

The equivalent New South Wales legislation requires retention of documents relating to covert searches. It also allows for the destruction of any records made in the execution of the search warrant. The Northern Territory legislation allows for regulations requiring the keeping of records (s.27J), and the Queensland legislation requires a terrorist emergency certificate to be kept by the commissioner for at least six years after the emergency has ended - s.8J(3).

There is no corresponding requirement in the *Terrorism (Extraordinary Powers) Act 2005*. Also, there are no provisions addressing the destruction of records once it has been determined they are no longer required. Provisions consistent with s.27W of the New South Wales legislation are sought, which provides:

##### **27W Destruction of records**

- (1) Within 12 months of the execution of a covert search warrant, the Commissioner of Police or the Crime Commissioner is to determine whether any copy, photocopy or other record made in the execution of the warrant is reasonably required for the purpose of an investigation or proceedings.
- (2) Within each subsequent period of 12 months, the Commissioner of Police or the Crime Commissioner is to further determine whether any such record is reasonably required for that purpose for so long as the record remains in existence.
- (3) The Commissioner of Police or the Crime Commissioner is to ensure that any such record is destroyed as soon as practicable after determining that its retention is no longer reasonably required for that purpose.
- (4) A requirement imposed under this section on the Commissioner of Police applies only in relation to a record made in the execution of a warrant by an eligible police officer.
- (5) A requirement imposed under this section on the Crime Commissioner applies only in relation to a record made in the execution of a warrant by an eligible staff member of the Crime Commission.

#### **4.5 Report to judge about covert search warrant and relevant timeframes**

The *Terrorism (Extraordinary Powers) Act 2005* requires "the authorised applicant named in a covert search warrant" to provide a written report to the issuing judge 7 days after the warrant is executed. A penalty of \$12,000 or 12 months' imprisonment applies. In contrast, the New South Wales legislation allows 10 days for reporting back to the judge, with no penalty attached, and the Northern Territory legislation follows the same line as in New South Wales.

Provision should be made for a person other than the authorised applicant to provide the report to the issuing judge in circumstances where the authorised applicant is not able to do so. This would complement the current provision which allows for the report to be made to the Chief Justice in the absence of the judge who issued the warrant. It is recommended that allowance be made for a senior police officer actively involved in executing the warrant or with adequate knowledge of the matter to provide the report.

Further, the New South Wales Ombudsman indicated that operational matters are delaying reports by an average of 14-16 days; that is a 24-26 day turnaround. Given the potential complexity of a terrorist event and the evidence provided by the New South Wales Ombudsman, it seems reasonable to allow more than 7 days for lodging the report. At the same time, maintaining accountability is paramount. It is suggested that the timeframe for reporting back be extended to 14 days, with no amendment to the current penalty.

#### **4.6 Directions from the Supreme Court in relation to covert search warrants**

Additionally, it is suggested that it may be necessary for the judge to make orders consequent upon receipt of a report in relation to the execution of a covert search warrant. For example, the judge may wish to issue an order relating to the return of seized goods, or order that particular concerns be referred to the Commissioner or the Chief Justice. It is proposed, therefore, that this issue be brought to the attention of the Chief Justice for his comment as to what powers he might like to see contained in the Act for the judge to exercise in terms of the report.

### **5. Conclusion and Recommendations**

#### **5.1 Conclusion**

The Review finds that the policy objectives of the *Terrorism (Extraordinary Powers) Act 2005* remain valid. While such powers cannot guarantee that Western Australia will not be the target of a terrorist attack in the future, they do provide the police and other agencies with the enhanced ability to better investigate terrorist activity and to respond to threats, and to more expeditiously apprehend perpetrators. Accordingly, the Review finds that the provisions of the *Terrorism (Extraordinary Powers) Act 2005* are appropriate to prevent and respond to terrorist acts, and should therefore continue in operation.

#### **5.2 Recommendations**

The review has identified a number of minor amendments to the *Terrorism (Extraordinary Powers) Act 2005* which will strengthen its provisions. These are detailed in Part 4 of this report and are recommended for further progression.