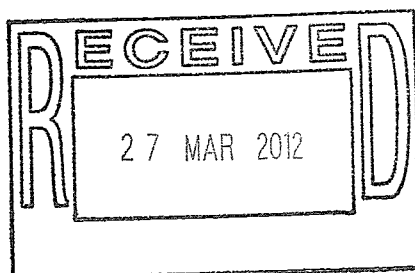


**REPORT TO THE  
MINISTER**

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

Legal and Legislative Services  
Western Australia Police

January 2012



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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).

The fact that the powers can be regarded as a preventative deterrent to terrorism, coupled with the fact that Western Australia has had to mount an extensive police and security operation for the Commonwealth Heads of Government Meeting in October 2011, evidences the need to retain these important powers to combat terrorism.

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

Despite there having been no use of the *Terrorism (Extraordinary Powers) Act 2005* since its enactment, this does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers.

## Recommendations

Given that neither the powers in respect of a Commissioner's warrant nor a covert search warrant have been exercised, 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 2013, 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:

- the definition of "terrorist act";
- the ability of the Commissioner to appoint "special officers" from overseas jurisdictions;
- the execution, reporting, and retention of documents in relation to covert search warrants; and
- a number of minor clarifications to improve the operation of the Act.

Further information on these matters is detailed in Parts 4 and 5 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. The inaugural review of the Act was conducted in 2007/2008 with the subsequent review falling due in 2010.

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

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

A minimalist review of the Act was authorised by the Minister on 22 August 2010. 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 2013, 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.)<sup>1</sup>*

The ongoing need for this legislation is made clear in the Australian Government's 2010 Counter-Terrorism White Paper<sup>2</sup> where it states:

*Terrorism has become a persistent and permanent feature of Australia's security environment. It threatens Australians and Australian interests both at home and overseas. The Government's intelligence agencies assess that further terrorist attacks could occur at any time.*

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<sup>1</sup> Council of Australian Governments' Communiqué. Special Meeting on Counter-Terrorism. 27 September 2005, 'Strengthening Counter-Terrorism Laws', page 3, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2005-09-27/docs/coag270905.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2005-09-27/docs/coag270905.pdf)

<sup>2</sup> Australian Government, Department of the Prime Minister and Cabinet, February 2010, [http://www.dpmc.gov.au/publications/counter\\_terrorism/2\\_the\\_threat.cfm](http://www.dpmc.gov.au/publications/counter_terrorism/2_the_threat.cfm)

Attorney-General Robert McClelland further confirmed Australia's position when on 6 May 2011 he dismissed the recent death of al-Qaeda leader Osama bin Laden as reason to dilute Australia's counter-terrorism laws, saying:

*The threat of terrorism is ongoing and we must remain consistently vigilant.... The government has no plans to water down our counter-terrorism laws following the death of Osama bin Laden.*<sup>3</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 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.

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<sup>3</sup> Chris Merritt, 'Counter-terrorism laws won't be diluted', *The Australian*, 6 May 2011, <http://www.theaustralian.com.au/business/legal-affairs/counter-terrorism-laws-wont-be-diluted/story-e6frg97x-1226050756609>

## **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. As yet, however, the powers of the *Terrorism (Extraordinary Powers) Act 2005* have not been exercised. One application for a covert search warrant was made in 2009/10, however, it was never executed. Consequently, it is difficult to gauge the efficacy of the provisions.

Similar police powers have been exercised in NSW (for example, 'Operation Pendennis' on 8 November 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.

The fact that the powers can be regarded as a preventative deterrent to terrorism, coupled with the fact that Western Australia has had to mount an extensive police and security operation for the Commonwealth Heads of Government Meeting in October 2011, evidences the need to retain these important powers to combat terrorism.

Extensive comparisons have been made with a range of Federal and State Acts to ensure that the legislation meets both the unique Western Australian context and is compatible with the other States' and Commonwealth legislation.

## **2.5 Practice directions**

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.

## **2.6 The inaugural review**

The first review of the Act under section 34 was tabled in Parliament on 11 November 2008. Recommendations arising out of the inaugural review are still under consideration.

## **3. Reviews Conducted in Other Jurisdictions**

New South Wales conducted its third review of the *Terrorism (Police Powers) Act 2002* in late 2009, while the Australian Capital Territory tabled a review of its *Terrorism (Extraordinary Temporary Powers) Act 2006* in late 2010.<sup>4</sup>

Queensland and the Northern Territory have each previously reviewed their corresponding legislation and will be conducting further reviews in 2011/2012. South Australia has twice reviewed its legislation.

Victoria was due to table a review report by the end of June 2011, however, a last minute Bill was passed extending the review period until June 2013. Tasmania has no statutory requirement to review its terrorism legislation and, to date, has not done so.

### **3.1 Australian Capital Territory**

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<sup>4</sup> Media release, 'Terrorism laws to continue', ACT Government, 16 November 2010, <http://www.chiefminister.act.gov.au/media.php?v=10153>

The Australian Capital Territory's review of the *Terrorism (Extraordinary Temporary Powers) Act 2006* resulted in eight recommendations, the principal of which was that the legislation be extended beyond the expiry date of November 2011 to November 2016. The remainder of the recommendations (now amendments) were of a purely administrative nature.

### **3.2 New South Wales**

New South Wales has conducted three statutory reviews of the *Terrorism (Police Powers) Act 2002*. The third review found that the policy and objectives of the Act continue to remain valid. The review made 15 recommendations aimed at clarifying the operation of the Act. Of the 15 recommendations, 12 were implemented by the *Terrorism (Police Powers) Amendment Act 2010* and one by the *Terrorism (Police Powers) Regulation 2011*.

Many of the 15 recommendations flow from the New South Wales Ombudsman's report of 2008 and relate to preventative detention provisions. As such, they are not relevant to the present review of the *Terrorism (Extraordinary Powers) Act 2005* (WA). Recommendations relating to preventative detention provisions will be addressed in the forthcoming review of the *Terrorism (Preventative Detention) Act 2006* (WA).

### **3.3 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, as a consequence, a number of amendments were effected in 2006 to correct the inadequacies and maintain consistency with other jurisdictions. Issues identified in the review of the Northern Territory's legislation are adequately covered in the Western Australian legislation. A subsequent review is due in 2011/2012.

### **3.4 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*.

The *Terrorism Legislation Amendment Act 2007* amended several earlier acts, including the *Public Safety Preservation 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. The terrorist emergency provisions enacted in August 2007 become due for review in August 2012.

A review of the *Police Powers and Responsibilities Act 2000* conducted in 2010 has been directed at areas not related to terrorism. As a result, the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2011*, now before the Queensland Parliament, contains no amendments to terrorism-related powers.<sup>5</sup> It is therefore not relevant to this Review. As the Act is required to be "regularly

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<sup>5</sup> Personal communication, Queensland Police Service, 30 March 2011. The Bill, introduced on 25 August 2011, remains before the Legislative Assembly as at 1 December 2011.



reviewed" (s.807), it is anticipated a review of relevant powers such as covert search provisions will follow in the near future.

### **3.5 South Australia**

The *Terrorism (Police Powers) Act 2005* was reviewed in 2007 and 2010 in accordance with section 30(1) of the Act. No amendments were made as a result of the reviews. The Act is due to expire in 2015 and, failing any amendment to the review or expiry provisions, there is no statutory requirement for any further review of the Act to be undertaken.

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

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

- 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.

Since the inaugural review was conducted, circumstances in respect of some of the above issues have changed. Where relevant, updated comments appear below the recommendations hereunder reproduced from the 2008 Review Report.

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

The State Solicitor's Office 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.

**Update 2011:** This recommendation is no longer relevant. Amendments effected in 2011 now allow for the disclosure of driver licence information and photographs.<sup>6</sup>

### **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

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<sup>6</sup> *Road Traffic Act 1974*, sections 8 and 44AC(3) – inserted by 18 of 2011.

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 required, therefore, 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 – *Public Safety Preservation Act 1986* 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.

**Update 2011:** The third New South Wales review resulted in s.27W being repealed:-

“This provision was originally included in the Act as a safeguard of the privacy of those subject to a covert search. However, it was noted in the Ombudsman’s review that the destruction of these records limits the ability of any independent oversight agency to properly review the exercise of the powers. As such, the Government agrees with the Ombudsman’s recommendation that the requirement to destroy the records should be removed in order to enable proper oversight of the covert search provisions.”  
(NSW Hansard)<sup>7</sup>

The recommendation in relation to the destruction of records is withdrawn. It is appropriate that the records be maintained for independent oversight requirements.

With regard to the retention of covert search documents, it is recommended that consultation take place to establish clear policies and procedures for the retention and secure storage of covert search documentation. Consideration should be given to including a specific provision in the *Terrorism (Extraordinary Powers) Act 2005* or in regulations made in accordance with s.33.

#### **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

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<sup>7</sup> NSW, House of Representatives 2010, *Terrorism (Police Powers) Amendment Bill 2010*, ‘Agreement in Principle’ Speech, [Item 20], 24 June 2010, [http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/b8a1711ce42278e8ca25774b0019df67/\\$FILE/LA%207210.pdf](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/b8a1711ce42278e8ca25774b0019df67/$FILE/LA%207210.pdf)

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.

**Update 2011:** New South Wales legislation was amended in 2009 to allow a person other than the authorised person named in a covert search warrant to provide the necessary report. Section 74A(7) of the *Law Enforcement (Powers and Responsibilities) Act 2002* reads:

If an executing officer for a covert search warrant has died or is absent the report may be provided by another person from the authority in which the executing officer was or is employed who is authorised to make an application for a covert search warrant.

An amendment similar to the above is recommended, along with an extension to the reporting period as previously outlined.

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

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

- the need to amend the definition of “terrorist act”;
- the inclusion of membership offences as grounds for covert search warrants;
- the inclusion of vehicles in covert searches;
- access to and downloading of data from computers ‘networked’ outside premises the subject of a warrant.

#### **5.1 Amending the definition of “terrorist act”**

In February 2009 the Western Australian State Solicitor’s Office provided advice in relation to certain difficulties with the definition of “terrorist act” and proposed a number of solutions, particularly with respect to the matter of ‘intent’. Proposed solutions included:

- (1) specifying acts which are terrorist acts;

- (2) specifying the response required;
- (3) simplifying the intention requirements;
- (4) removing the requirement to show intention in specific circumstances.

These four suggestions are considered below.

- (1) There are specific acts commonly associated with terrorism. It is suggested the legislation could be amended so as to list specific acts without the need to show intention. The difficulty with listing specific acts is that such acts are not always associated with terrorism. Kidnapping may have the singular purpose of extracting a ransom, while hostage-taking may be merely a consequential act associated with bank robbery. To avoid capturing offences not relating to terrorism, an additional element would need to be included. State Solicitors' Office suggested an element relating to the level of response required, as explained in (2).
- (2) Specifying the response required would allow immediate action to be taken in situations where the public is put at high risk of sudden and significant harm, without the need to first establish political, religious or ideological intent. The approach here is to replace the 'twin intention' paragraphs, that is s.5(2)(b) and (c), with words indicating a terrorist act falling within subsection (2) "is an act which is of such a nature or magnitude that it requires a significant and co-ordinated response from 2 or more emergency response agencies". An "emergency response agency" could then be defined to include, for example, police, fire, ambulance, state emergency service, health, child protection, local government, and essential services such as water, electricity and gas. The difficulty of determining intent in order to satisfy the definition of "terrorist act" and obtain a warrant would be consequently overcome and critical delays avoided.

*Discussion:* Similar to the additional element considered necessary if listing specific acts, it is considered, as part of this Review, that something more is required in addition to a significant and co-ordinated response from 2 or more emergency response agencies. At present, a chemical spill or suspected biological threat will provoke such a response from 2 or more agencies.

It is suggested therefore that the required additional element could be a modified intent. Rather than a political, religious or ideological intent designed to influence or intimidate, the intent could be simply defined as an act done knowingly (or that the person should have known) would cause mayhem - that is violent disorder, riotous confusion, havoc, or wanton destruction - or mass casualties. As such, a "terrorist act" would encompass events such as the mass shooting at Port Arthur and the indiscriminate use of explosives, even if the incident simply arose out of a personal grievance.

- (3) Alternatively, the 'twin intentions' could be simplified by deleting s.5(2)(b) (referring to "advancing a political, religious or ideological cause") and modifying s.5(2)(c) by inserting after the word "done" the phrase "or by its nature and context appears to be done", thus restricting the scope of intent to coercing or influencing by intimidation.

*Discussion:* This option seems the most simple amendment, however, it leaves the legislation wide open. For example, if an offender caused a

person's death or caused serious physical harm to a person or damage to property with the apparent intention of intimidating a section of the public, the offender could be charged with a terrorism offence rather than a criminal offence carrying a much lesser penalty. A fight outside a tavern or sports arena could result in a single act of bravado leading to a charge of terrorism. An amendment along these lines would significantly broaden the legislation and is not recommended.

- (4) The final suggestion was to remove the requirement to show intention in specific circumstances. The example given was that of an act falling within subsection (3) where the use of firearms or explosives, or the use of chemical, biological or radiological (CBR) substances, were involved against the public or a section of the public.<sup>8</sup> Such an act would constitute a "terrorist act" whether or not the intention provision was satisfied. The qualification that firearms, explosives or CBR substances must be used against the public or a section of the public purportedly limits the application of this proposed amendment.

Discussion: Failing any more effective amendment to the definition of "terrorist act", this proposed amendment would provide an immediate improvement for rapidly dealing with incidents where the public is significantly endangered but the motive is unclear. An example cited was the use of Sarin gas on the Tokyo subway in 1995.

Other suggestions for amending the definition of "terrorist act" have arisen in the course of desktop exercises and general discussion:

- ( The difficulty of satisfying the legal threshold of 'intent' raised the spectre of a senior police officer's experience, resulting in the suggestion that the question of political, religious or ideological intent be replaced with reasonable suspicion on the part of the police operations commander. A "terrorist act" would become:-

an act that falls within subsection (3) and that causes a Police Operations Commander to reasonably suspect there is or may be a serious risk to public safety, property or infrastructure as a result of extremist activity.

Extremist activity may be defined to include (without limitation) -

the use of bombs and/or other explosive devices;  
the use of firearms in public places or against members of the public;  
the taking of hostages;  
the oral or written declaration of any political, religious or ideological motivation for disturbing the peace or making threats,

commonly associated with organisations or individuals who engage in unlawful, threatening or violent behavior in the interests of a cause or personal vendetta.

This approach follows (1) above in that it lists specific acts. At the same time it removes the 'twin intention' and instead relies on a standard of

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<sup>8</sup> Based on section 1(3) of the *Terrorism Act 2000* (UK).

reasonable suspicion on the part of the senior police officer present at the scene.

- ( The final suggestion is that, rather than s.5(2)(b) being deleted, both s.5(2)(b) and s.5(2)(c) be amended as proposed at (3) above by inserting after the word “done” the words “or by its nature and context appears to be done”. Simplifying the intent in this manner, or removing intent in specific circumstances as at (4) above, is considered the minimum level of amendment required to make the definition of “terrorist act” operationally workable.

This issue needs to be examined further before any concrete reforms can be determined for legislative progression.

## **5.2 Membership offences included in definition of “terrorist act” for covert search warrants**

The New South Wales *Terrorism (Police Powers) Act 2002* includes, at s.27A(2), membership of a terrorist organisation as grounds for application for a covert search warrant. This provision is based on s.310J of the *Crimes Act 1900* (NSW) which makes it an offence to knowingly be part of a terrorist organisation. Western Australia does not have a comparable State provision upon which to rely, however, the inclusion of such a provision is recommended for consideration given that intent has proved particularly difficult to establish during counter-terrorism exercises.

## **5.3 Covert searches to include reference to vehicles**

Section 27A of the *Terrorism (Police Powers) Act 2002* (NSW) specifies, for covert search purposes, that “premises includes vehicles”; “vehicle”, defined in s.4, “includes a vessel or an aircraft”.

Section 22 of the *Terrorism (Extraordinary Powers) Act 2005* (WA), by contrast, provides only for the covert search of a “target place”. A “target vehicle” may be searched under a Commissioner’s warrant (Part 2), however, there is no similar provision for the search of a vehicle under a covert search warrant (Part 3). The term “place” is defined in s.3 in terms of “any land, building or structure” or part thereof.

The definition of “vehicle” in s.3 is broad and clearly allows for vessels, aircraft, and any thing that transports people or goods. It is conceivable that at some time circumstances may arise which make the covert search of a “target vehicle” desirable. The terrorist attack on Mumbai in 2008 was largely effected by sea<sup>9</sup>, making it clear that vehicles such as boats and ocean-going vessels, usually not kept at the “target place”, may become relevant to terrorist investigations.

An amendment allowing for the search of a vehicle under a covert search warrant, in line with the NSW legislation, is recommended.

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<sup>9</sup> Australian Broadcasting Corporation, ‘Pakistani ships seized after Mumbai attacks’, *ABC News*, 28 November 2008, <http://www.abc.net.au/news/stories/2008/11/28/2432350.htm>, (accessed 28 November 2008).

## **5.4 Access to computers outside premises the subject of a warrant**

Section 27OB of the *Terrorism (Police Powers) Act 2002* (NSW) makes provision for access to and downloading of data from computers 'networked' outside premises the subject of a warrant "if the person believes on reasonable grounds that the data might be data that could be seized under the warrant". Access under s.27(8)(e) of the *Terrorism (Extraordinary Powers) Act 2005* (WA) is restricted to the "target place". Consideration should be given to extending access to computers outside the "target place".

## **6. Conclusion and Recommendations**

### **6.1 Conclusion**

The Review finds that the policy objectives of the *Terrorism (Extraordinary Powers) Act 2005* continue to 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.

Despite there having been no use of the *Terrorism (Extraordinary Powers) Act 2005* since its enactment, this does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers.

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.

### **6.2 Recommendations**

The inaugural review identified a number of minor amendments to the *Terrorism (Extraordinary Powers) Act 2005* which will strengthen its provisions. Since then a range of other issues have been addressed and some further amendments considered. These matters are detailed in Parts 4 and 5 of this Review Report and are recommended for further progression.