



STATUTORY REVIEW

Terrorism (Extraordinary Powers) Act 2005

Western Australia Police Force

March 22

1 EXECUTIVE SUMMARY

The *Terrorism (Extraordinary Powers) Act 2005 (WA)* (the Act) was developed in response to the growing threat of terrorism and in the context of a nationally consistent response agreed to at a Council of Australian Governments (COAG) meeting in 2005. It provides the Western Australia Police Force with enhanced powers for the purposes of responding to terrorist threats, better investigating terrorist activity and to more expeditiously apprehend perpetrators.

The Act

The Act confers powers on police in three key respects. Firstly, it confers special powers to deal with threats of terrorist acts and to respond to terrorist acts upon the issuing of a warrant by the Commissioner of Police (the Commissioner). Secondly, it makes provision for the use of force, including lethal force, following a declaration by the Commissioner relating to an incident. Thirdly, it enables the covert entry and search of premises for the purposes of responding to or preventing terrorist acts under the authority of a special covert search warrant.

The powers contained in the Act are wide-ranging, but they are also subject to specified oversight and reporting requirements. At the time of introducing the legislation in 2005, the Minister for Police made it clear that the powers conferred by the legislation are only to be used 'in times of exceptional crisis and imminent danger'¹. The overall purpose of the legislation is to enable police to adequately respond to, prevent, and investigate terrorist acts².

The Review

Section 34 of the Act contains the requirement for the Act to be reviewed. More specifically, it requires the review to address the operation and effectiveness of the Act, whether it is appropriate to prevent and respond to terrorist acts, and whether it should continue in operation. This is the report on the statutory review of the Act.

The methodology for the review involves discussion, findings and recommendations relating to the review requirements based upon:

- Consultation with identified key stakeholders
- Assessment of recent terrorism-related events and other terror scenarios against current provisions of the Act
- Consideration of reviews conducted and legislative amendments in other jurisdictions
- Review of any relevant case law

The review has been conducted by the WA Police Force in consultation with the Department of Premier and Cabinet and the State Solicitor's Office. It covers the period 2015 to 2020.

Conclusion

The extraordinary powers conferred by the Act have not been exercised in Western Australia during the review period. In fact, other than one application for a covert search warrant in 2009/10 that was never executed, these powers have never been exercised.

Despite this, by applying a range of terrorism-related events and scenarios to the Act, taking into consideration the purpose of the Act, previous reviews and reviews conducted in other jurisdictions, this review has been able to make the required assessments of the Act. This review has found that the Act would be effective, that it is appropriate having regard to its purpose and ultimately recommends that the Act continue in operation.

This review makes a total of 9 Findings and 8 Recommendations.

¹ Hansard Legislative Assembly, 14 September 2005 p5307, Mrs M.H. Roberts (Midland – Minister for Police and Emergency Services), Second Reading Speech

² *ibid.*

2 FINDINGS

FINDING 1

Although the powers under the Act have not been exercised to date, numerous scenario exercises have been undertaken using hypothetical terrorist acts. Based on these scenarios, the provisions of the Act would be effective in enabling police to investigate, prevent, or respond to an actual or suspected terrorist act.

FINDING 2

The extraordinary powers conferred on police under the Act are counter-balanced by a number of safeguards and accountability mechanisms, including requiring judicial approval and executive and Parliamentary reporting requirements. The provisions of the Act are appropriate having regard to the purpose of the Act, that is, to enable police to adequately investigate, prevent, or respond to terrorist acts.

FINDING 3

The National Counter-Terrorism Plan requires States and Territories to maintain counter-terrorism related policies, legislation and plans within their jurisdictions. The current security environment, and the frequency and diverse range of terrorist acts overseas and in other parts of Australia, means there continues to be a need for the existence of extraordinary powers legislation. The Act forms an integral part of the national security framework.

FINDING 4

The use of force threshold in Part 2A of the Act does not permit the Commissioner of Police to authorise police officers to use lethal force in relation to a terrorist act that has not yet occurred.

FINDING 5

The power for the Commissioner of Police to authorise others to exercise the Commissioner's functions under the Act are more specific and limited in Part 2A than the authorisation powers under the rest of the Act. At this point in time, however the authorisation powers under Part 2A are considered appropriate.

FINDING 6

There is uncertainty about whether a Commissioner's warrant issued under section 8 can apply to multiple target persons and/or multiple target areas, and/or multiple target vehicles.

FINDING 7

The Act does not expressly provide police with the power to take control or make use of premises and things to utilise for operational purposes where there is a critical need. This may impede police from effectively carrying out their functions in the event of a terrorism incident.

FINDING 8

Currently, in urgent circumstances, an interim authorisation for a Commissioner's warrant may be issued without the prior approval of a judge. This authorisation must be ratified by a judge within 24 hours. Whilst an extension of that time period to 48 hours was considered, the effect of this could mean that the supervisory role of the Supreme Court would essentially be rendered meaningless. Given this, it is deemed that the period of 24 hours for an interim authorisation is appropriate.

FINDING 9

The powers conferred by the Act are unique and wide-ranging so that when the legislation was introduced regular statutory reviews of the use of the powers under this Act were considered necessary. However, given that these powers have not been used to date, three-yearly review periods should be re-considered.

3 RECOMMENDATIONS

RECOMMENDATION 1

It is recommended that the Act continue in operation.

RECOMMENDATION 2

In the absence of a nationally agreed amendment to the definition of ‘terrorist act’, it is recommended that the current definition remain.

RECOMMENDATION 3

It is recommended that, consistent with a key purpose of the legislation, further consideration be given to whether the Act should be amended to allow for the use of lethal force to be authorised to prevent a terrorist act in certain, limited, circumstances.

RECOMMENDATION 4

It is recommended that consideration be given to making the authorisation provisions under Part 2A consistent with the authorisation provisions within the rest of the Act, and that this be revisited at a future review.

RECOMMENDATION 5

It is recommended that consideration be given to whether a Commissioner’s warrant should apply to multiple target persons and/or multiple target areas and/or multiple vehicles.

RECOMMENDATION 6

It is recommended that the Act be amended to include a power to take control of property similar to section 69 of the *Emergency Management Act 2005* and for a general power to make alterations or build temporary structures on that property if required. These powers should be conditional on a Commissioner’s warrant under Part 2 having effect, or a declaration under Part 2A being in place.

RECOMMENDATION 7

It is recommended that consideration be given to amending the Act to provide that where a person has suffered loss or damage as a result of police taking control of or making use of their property, that person is entitled to be paid just and reasonable compensation.

RECOMMENDATION 8

It is recommended that the next statutory review, due to consider whether the Act should continue past its current expiry date of 19 December 2025, also consider whether the rolling three-year review requirement is still required.

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4 BACKGROUND

The *Terrorism (Extraordinary Powers) Act 2005* (the Act) was developed in response to the growing threat of international terrorism and in the context of a nationally consistent response agreed to at a Council of Australian Governments (COAG) meeting in 2005. The Act provides Western Australia with enhanced powers for the purposes of better investigating terrorist activity, responding to threats and to more expeditiously apprehend perpetrators.

5 OVERVIEW OF REVIEW – SCOPE AND METHODOLOGY

Section 34 of the Act contains the requirement for the Act to be reviewed. More specifically, it requires the review to address the operation and effectiveness of the Act, whether it is appropriate to prevent and respond to terrorist acts, and whether it should continue in operation.

The Act requires that the Minister for Police must carry out a review of the Act as soon as practicable after its first anniversary and every third year after that. A report based on the review is to be tabled before each House of Parliament as soon as practicable (but no later than 90 days) after it is prepared.

Three statutory reviews of the Act have been conducted with the most recent review tabled in 2015. It is acknowledged that the next statutory review was scheduled for 2018, but this was delayed due to a number of factors including the development of the *Terrorism (Extraordinary Powers) Amendment Act 2018* (Amendment Act) in response to recommendations of the NSW Coroner's review of the Lindt Café Siege. The Amendment Act came into operation on 13 July 2018. It was considered important to examine the use of force powers provided for by the Amendment Act as part of a review, therefore the two review periods were amalgamated, and this report covers the period 2015 to 2020.

This review examines the Act up to the end of 2020. It considers the efficacy and need for the Act, identifies any issues that exist within the legislated scheme, and examines whether and how the Act may be amended to facilitate and enhance its operational effectiveness.

The Minister for Police approved a targeted review of the Act. The methodology for the review involves discussion, findings, and recommendations regarding the statutory review requirements based upon:

- Consultation with identified key stakeholders
- Assessment of recent terrorism-related events and other terror scenarios against current provisions of the Act
- Consideration of reviews conducted and legislative amendments in other jurisdictions
- Review of any relevant case law.

The review has been conducted by the WA Police Force in consultation with the Department of Premier and Cabinet and the State Solicitor's Office.

The following are not in scope of section 34 of the Act and therefore not considered in this review:

- Operation of, and issues relevant to, the *Terrorism (Preventative Detention) Act 2006*
- The *Terrorism (Commonwealth Powers) Act 2002*
- Matters related to the Commonwealth crowded places strategy and the WA Parliament Community Development and Justice Standing Committee Inquiry and Report: No Time for Complacency; Final Report for the Inquiry into Protection of Crowded Places in Western Australia from Terrorist Attacks (March 2019).

6 OVERVIEW OF THE ACT

The Act confers powers on police in three key respects. Firstly, it confers special powers on police officers to deal with threats of terrorist acts and to respond to terrorist acts upon the approval of a warrant issued by the Commissioner of Police (the Commissioner). Secondly, it makes provision for police use of force, including lethal force, following a declaration by the Commissioner relating to an incident. Thirdly, it enables the covert entry and search of premises by police for purposes of responding to or preventing terrorist acts under the authority of a special covert search warrant.

Special Police Powers

Part 2 of the Act provides for the exercise of special powers to be authorised upon a warrant being issued by the Commissioner. The Commissioner must not issue a warrant (Commissioner's warrant) unless there are reasonable grounds to suspect that a terrorist act has been, is being, or is about to be committed, and that the exercise of special police powers will substantially assist in preventing or responding to the terrorist act³.

The Commissioner's warrant cannot be issued without the prior approval of a Supreme Court judge unless a judge is not able to be contacted. In this case, the warrant may be issued without approval but must be ratified by a judge within 24 hours of issue⁴. As soon as practicable after the Commissioner issues a warrant, a written report must be provided to the Minister for Police outlining the basis, terms and duration of the warrant (maximum duration of seven days)⁵.

The special police powers that are enlivened on the issuing of a Commissioner's warrant are very wide. Subject to the express provisions in the Act, police officers are able to direct the movement of people and vehicles (s.11), stop and search a person or vehicle (s.13-14 and Schedule 2), require a target person (or associate) to disclose their identity (s.12), enter and search a place, including accessing and operating any device or equipment (s.15), and seize anything that the officer suspects on reasonable grounds may be used or may have been used to commit a terrorist act or may provide evidence of the commission of a serious indictable offence (s.16).

The Commissioner is authorised under the warrant to give directions to government agencies to facilitate the exercise of the special powers conferred on police under the Act⁶. The Act also expressly provides that, whilst the warrant is in effect, subject to two limited exceptions, there is no ability to challenge the validity of the warrant⁷.

As soon as practicable after the expiry of the Commissioner's warrant, the Commissioner is required to provide a report to the Minister for Police and the Attorney General that states the terms and period of the warrant, the grounds for issuing the warrant, powers exercised, and the results of the exercise of those powers. The Minister for Police must table in Parliament a copy of the report within 60 days of receiving it⁸.

Police Use of Force – Ongoing Terrorist Acts

Part 2A of the Act makes provision for police use of force, including lethal force, following a declaration by the Commissioner relating to an incident. Part 2A was inserted into the Act as part of the *Terrorism (Extraordinary Powers) Amendment Bill 2018*, which was enacted in response to the NSW State Coroner's investigation into the December 2014 Lindt Café siege.

Prior to the Commissioner making the declaration, the Commissioner must be satisfied that there are reasonable grounds to suspect that the incident is likely to be a terrorist act and that

³ Section 7(2) of the *Terrorism (Extraordinary Powers) Act 2005*

⁴ Section 7(3) and 7(4), *ibid*

⁵ Sections 7(5), 8 & 9, *ibid*

⁶ Section 19, *ibid*

⁷ Section 20, *ibid*

⁸ Section 21, *ibid*

planned and coordinated police action is required to defend a person threatened by the incident, or to prevent a person from being detained, or to end the detention of a person. The declaration applies to each location at which police are responding to the incident. The Commissioner must notify the officer/s in charge of the incident response that the declaration has been made and is also required to notify the Minister for Police before, or as soon as practicable after, the declaration is made⁹.

The declaration must be in writing unless the urgency of the situation necessitates that the declaration be made orally. In any event, details must be recorded contemporaneously, and the declaration must be put in writing within 6 hours of the oral declaration¹⁰. At any time the Commissioner may revoke the declaration¹¹.

When responding to a declared incident, the police action authorised is the authorisation, direction or use of force (including lethal force) that the police officer personally believes, on reasonable grounds, is necessary in order to defend a person threatened by the incident or to prevent or end the unlawful detention of a person or persons¹². A police officer responding to a declared incident in accordance with a police action authorised under a declaration is provided with protection from criminal responsibility. If the declaration is revoked, the protection offered continues to apply until the officer is aware of the revocation¹³.

The Act restricts the Commissioner's power to authorise other officers to perform the Commissioner's statutory functions relating to declared incidents. The Commissioner can only authorise a Deputy Commissioner to perform the Commissioner's functions should the Commissioner be unavailable (due to being on leave, outside the state or otherwise unavailable) or if the office of the Commissioner is vacant at the time¹⁴.

Covert Search Warrants

Part 3 of the Act makes provision for the issue of covert search warrants by a Supreme Court judge. This enables police to search for information and items in a place or vehicle that may be connected to a terrorist act without the knowledge of the target person.

The Commissioner must not authorise a police officer to apply for a covert search warrant unless satisfied of a number of grounds as set out in section 23(2). Additionally, the Commissioner must be satisfied there are reasonable grounds to believe that the covert entry and search of a place or vehicle will substantially assist in preventing a terrorist act or investigating a terrorist act or offence, and that the entry and search of a place or vehicle needs to be carried out without the occupier's or vehicle operator's knowledge.

Written applications must be made in person to a Supreme Court judge by the applicant unless there is an urgent need to obtain a warrant, in which case an application can be made by way of remote communication or orally.

Section 26 of the Act sets out the requirements a judge needs to be satisfied of to issue a covert search warrant and the information the warrant must contain.

Section 27 provides the police powers that may be conferred by a covert search warrant. Primary powers include entering and searching the target vehicle or the target place without the occupier's or vehicle operator's knowledge and seizing things found, impersonating another person, conducting a basic search or strip search of any person who is in the target place or target vehicle (if the officer reasonably suspects that a strip search is necessary and that the seriousness and urgency of the situation require a strip search to be undertaken), and, if expressly authorised in the warrant, entering but not searching an adjoining place. The following ancillary powers are also authorised: substituting a seized thing, recording,

⁹ Section 21C, of the *Terrorism (Extraordinary Powers) Act 2005*

¹⁰ Section 21D *ibid*

¹¹ Section 21E, *ibid*

¹² Section 21F, *ibid*

¹³ Section 21F, *ibid*

¹⁴ Section 21H, *ibid*

photographing, or conducting a forensic examination of anything in the target place or target vehicle, accessing and operating any device or equipment that holds, records or processes data in the target place or target vehicle, and making a reproduction of a record or data.¹⁵

A covert search warrant may authorise the re-entry to the target place or vehicle within seven days of the execution of the warrant to return a seized thing or retrieve a substituted item¹⁶.

Within seven days after the expiry date of the warrant, the authorised applicant of the covert search warrant (or authorised replacement officer) must provide the Supreme Court judge who issued the warrant a written report about the execution of the warrant¹⁷.

The Commissioner must report to the Minister for Police on an annual basis in relation to the exercise of powers relating to covert search warrants¹⁸.

Miscellaneous Provisions

Limited ability for the Commissioner to authorise others to perform statutory functions

Section 31 of the Act sets out the Commissioner's ability to authorise other officers to perform the Commissioner's statutory functions. This section expressly states it does not apply to the functions under Part 2A of the Act.¹⁹ In general, if the Commissioner is unavailable to exercise the functions under the Act, the Commissioner may authorise (in writing) a Deputy Commissioner to perform them.

Additionally, if a Deputy Commissioner is unavailable to exercise these functions, the Commissioner is able to delegate them to a police officer who holds, or is acting in, a rank of Commander or Assistant Commissioner²⁰.

Special officers

The Act provides for the appointment of 'special officers' by the Commissioner. If the Commissioner believes an appointment is necessary, the Commissioner may appoint as a special officer any person who is a member of the Australian Federal Police or police force of another State or Territory, a sworn employee of the New Zealand Police, or a law enforcement officer of a foreign jurisdiction (prescribed in the Regulations)²¹.

The Commissioner may appoint a person as a special officer for the purposes of either Part 2 or Part 2A of the Act as follows:

- Part 2 of the Act - for the more effective exercise of the special police powers that may be exercised under a Commissioner's warrant, or
- Part 2A of the Act - to more effectively respond to a declared incident by exercising use of force (including lethal force) upon declaration of the Commissioner²².

The appointment must be in writing and state the date and time it is made, when it ceases to have effect, and, which Part of the Act it relates to. The appointment lasts for a maximum period of 14 days, but this does not preclude the Commissioner from making another appointment which has effect from the expiry of the previous appointment. The Commissioner can cancel the appointment of the special officer at any time²³.

The provisions of *The Criminal Code* relating to public officers and the provisions of section 137 of the *Police Act 1892* relating to protection from personal liability also apply to special officers²⁴.

¹⁵ Section 27(8) – 27(9A) and 28A, of the *Terrorism (Extraordinary Powers) Act 2005*

¹⁶ Section 27(11), *ibid*

¹⁷ Section 28, *ibid*

¹⁸ Section 30, *ibid*

¹⁹ See section 21H in respect of the Commissioner's functions under Part 2A.

²⁰ Sections 21H & 31, *ibid*

²¹ Section 31A(1), *ibid*

²² Section 31A(3), *ibid*

²³ Section 31B, *ibid*

²⁴ Sections 31C(4) & 31C(5), *ibid*

Offence provision

Section 32 of the Act provides that, unless there is a reasonable excuse, it is an offence for a person to not comply with an order given by a police officer under the Act. The penalty is a fine of \$12 000 and imprisonment for 12 months.

Regulations

The Act provides the ability for the Governor to make regulations²⁵. At present no regulations have been made.

Review of the Act

The Act is required to be reviewed 12 months after the date of commencement and every third year after that. The focus of a statutory review is on the operation and effectiveness of the Act, whether provisions are appropriate to prevent and respond to terrorist acts, and, whether the Act should continue in operation. A report of the statutory review must be prepared by the Minister for Police and tabled before Parliament²⁶.

Expiry of the Act

The Act expires on 19 December 2025²⁷.

7 PREVIOUS STATUTORY REVIEWS AND RECENT AMENDMENTS

Three statutory reviews of the Act have been conducted and the reports tabled in Parliament. The reports were tabled in the Legislative Assembly on 11 November 2008, 27 March 2012 and 17 February 2015.

All three reviews recommended that the Act continue in operation. Of particular note, the 2015 review recommended the expiry date of the Act be amended to extend the Act for a period of 10 years. This was enacted as part of the *Terrorism (Extraordinary Powers) Amendment Act 2015* and, consequently, the Act now expires on 19 December 2025.

The Act was again amended in 2018 by the *Terrorism (Extraordinary Powers) Amendment Bill 2018* to expressly allow for police use of force, including lethal force, during a declared incident. This recommendation followed the Lindt Café siege in Sydney in December 2014.

Previous reviews have also made other minor recommendations for legislative changes in order to enhance the operation, effectiveness or appropriateness of the provisions. Most of the recommendations of these previous reviews have subsequently been incorporated into the Act.

8 OPERATION OF THE ACT IN WA

Other than one application for a covert search warrant in 2009/10 (that was never executed), the powers under the Act have not been exercised in relation to any actual or suspected terrorist act in Western Australia.

Section 30 of the Act requires an annual report to Parliament on the use of covert search warrants, irrespective of whether or not the provisions of Part 3 have been used.

²⁵ Section 33 of the *Terrorism (Extraordinary Powers) Act 2005*

²⁶ Section 34, *ibid*

²⁷ Section 35, *ibid*

9 REVIEWS OF SIMILAR LEGISLATION IN OTHER JURISDICTIONS

Numerous reviews have been conducted in relation to terrorism legislation and terrorism generally in other Australian jurisdictions over recent years. Not all of the reviews on terrorism address extraordinary powers. The significant reviews involving extraordinary powers in this review period are as follows:

1. Commonwealth reviews of Division 3A of Part 1AA of the *Crimes Act 1914*; Stop, search and seize powers
 - (i) Review by the Independent National Security Legislation Monitor; Review of Division 3A of Part 1AA of the *Crimes Act 1914*; Stop, search and seize powers; September 2017.
 - (ii) Review by the Parliamentary Joint Committee on Intelligence and Security; Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime. Division 3A of part 1AA of the *Crimes Act*; Divisions 104 and 105 of the *Criminal Code*; February 2018.
2. New South Wales reviews
 - (i) Review by Department of Justice; Statutory Review of the *Terrorism (Police Powers) Act 2002* – June 2018.
 - (ii) Review by NSW Ombudsman; Review of the Preventative Detention and Covert Search Warrants; Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002* – March 2017.
3. Victoria reviews
 - (i) Expert Panel (Ken Lay AO APM & Hon. David Harper AM QC) on Terrorism and Violent Extremism Prevention and Response Powers – Report 1 – 2017.
 - (ii) Review of the *Terrorism (Community Protection) Act 2003* – December 2020.

9.1 COMMONWEALTH REVIEWS

The ‘stop, search, and seize powers’²⁸ of the *Crimes Act 1914* (Cth) were enacted as part of the national approach to counter-terrorism legislation across Australia. The powers are similar to those contained in the Act under review. An exception is a stand-alone power of emergency entry to premises without warrant. These powers can only be exercised over ‘Commonwealth places’ and where there is a genuine emergency caused by terrorist threats or acts.

9.1.1 INSLM Review

Review by the Independent National Security Legislation Monitor (INSLM) (September 2017)

The INSLM was required to assess the laws in Division 3A in accordance with section 6(1)(b) of the *Independent National Security Legislation Monitor Act 2010*. The review considered Australia’s human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and concluded that the laws are:

- a. consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals
- b. proportionate to the current threats of terrorism and to national security, and
- c. necessary.

The review found that, although the laws are yet to be utilised, they were truly emergency powers and had the capacity to be effective.

The review by the INSLM recommended that the laws continue in operation for a further five years, subject to the addition of new safeguards in the form of enhanced reporting requirements to the relevant minister, the Ombudsman, the Parliamentary Joint

²⁸ Part IAA, Division 3A

Committee on Intelligence and Security and to the INSLM. The purpose of the additional reporting requirements is for each body to be able to review, in accordance with their own powers and procedures, any exercise of Division 3A powers, including the making of a ministerial declaration.

9.1.2 Parliamentary Joint Committee Review

Review by the Parliamentary Joint Committee on Intelligence and Security - Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (February 2018)

Whilst the review was conducted on a range of terrorism related legislative schemes, of relevance to this review is the examination of the stop, search and seizure powers provided for under Division 3A of Part IAA of the *Crimes Act 1914*.

The Committee supported the intention of the powers in Division 3A of Part IAA of the *Crimes Act 1914* and the ability for the Australian Federal Police (AFP) to be able to prevent a terrorist act through the timely use of powers as an essential part of the terrorism prevention framework.

The Committee acknowledged the view expressed in some submissions that the non-use of these powers to date indicates that there is no need for their continuation. However, the Committee considered that these emergency powers are only expected to be used in rare and exceptional circumstances, and the fact that such circumstances have not yet arisen does not mean that the powers should not exist.

The Committee noted that a number of plots against Commonwealth places have been disrupted in recent years. This was viewed as evidence that there is a current and real threat to the facilities that these powers are intended to protect.

The Committee concluded that the stop, search and seizure powers in the *Crimes Act 1914* should continue in their current form, subject to some additional reporting requirements that are intended to strengthen the oversight of the use of the powers.

The Committee found there to be a clear ongoing need for the Division 3A emergency powers in the current volatile security environment and suggested that they will continue to be required for a number of years into the future. The Committee recommended a sunset period of three years with the requirement to conduct a further statutory review prior to the sunset date. That further review will be positioned to examine the continued need and appropriateness of the Division 3A powers and how they fit within the security and counter-terrorism framework at that future point.

The Commonwealth Parliament subsequently amended this legislation to extend its operation for the recommended three years. It should also be noted that in October 2020, the Committee commenced an inquiry into powers of the AFP, including whether the powers should continue.

9.2 NEW SOUTH WALES REVIEWS

9.2.1 Statutory Review

Statutory Review of the *Terrorism (Police Powers) Act 2002*, Department of Justice (June 2018)

The Statutory Review noted that the use of the extraordinary powers under the Act have been appropriately rare:

- Part 2 powers (special police powers) have been utilised on two occasions, firstly in raids carried out in Sydney in November 2005 as part of *Operation Pendennis* and secondly during the Lindt Café Siege.
- Part 2AAA powers (use of force powers) have not been used to date.

- Part 3 covert search warrant powers have also had very limited use, with the NSW Police Force only applying for five covert search warrants since the powers were introduced, of which, three were executed.

The Statutory Review concludes that the policy objectives of the Act remain valid. It also concluded that the terms of the Act remain appropriate for securing those objectives, although some legislative amendments were recommended that related to more stringent reporting requirements. These recommendations regarding enhanced reporting requirements have since been legislated.

9.2.2 NSW Ombudsman Review

Review by NSW Ombudsman of Preventative Detention and Covert Search Warrants: Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002* (March 2017)

The Ombudsman reported that no covert search warrants had been sought or executed within the examination period of 1 January 2014 to 31 December 2016 and made no comments or recommendations about the exercise of covert search powers.

The Ombudsman noted that legislation passed in November 2016 transferred the oversight of covert search powers to the Law Enforcement Conduct Commission.

9.3 VICTORIAN REVIEWS

9.3.1 Expert Panel - Report 1

Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers – Report 1 (Ken Lay AO APM & the Hon. David Harper AM QC (2017))

The Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (Expert Panel) - Report 1 is the first of two reports on how Victoria's legislation, powers and procedures are working to prevent, monitor, investigate, and respond to terrorism. It focused on reforms to police powers to deal with terrorism. It made some recommendations that are relevant to extraordinary powers regarding use of force and special police powers. The second report did not contain any matters relevant to this review.

The Expert Panel did not recommend separately legislating police use of force in responding to terrorist incidents. It recommended an amendment to section 462A of the *Crimes Act 1958* (VIC), which relates to protection from criminal liability.

The suggestion was for further clarification that puts beyond doubt that the protection in section 462A applies to pre-emptive action, including lethal force, employed in response to a life-threatening act.

In terms of special police powers, the Expert Panel recommended amendments be made to the interim authorisation provisions to extend special police powers to protective services officers and to introduce a new power to enable a police officer to take control of premises or things for operation purposes. These have been legislated.

9.3.2 Statutory Review

Review of the *Terrorism (Community Protection) Act 2003* Stage One Report (December 2020)

This report is Stage One of a two stage review. This report meets the statutory reporting timeline and suggests issues to be explored in Stage Two. No urgent or pressing issues were identified that required immediate action. The Stage Two review is expected to be completed late 2021 and will inform the Government's consideration of any necessary reforms to the Act and future of the sunset clause.

10 AMENDMENTS MADE IN OTHER JURISDICTIONS

Most other jurisdictions have made a range of amendments to their extraordinary powers legislation during the review period.

New South Wales: key amendments made to the *Terrorism (Police Powers) Act 2002*

- In line with the recommendations of the NSW Coroner inquiring into the Lindt Café Siege, amendments expressly provide for the use of force, including lethal force that is reasonably necessary to defend anyone threatened by a terrorist incident or to secure the release of hostages where planned and coordinated police action is required.
- Amend strip search powers to align with those under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Strip searches are limited to target persons and are prohibited on persons under the age of 10.
- Any person who has been searched, or has had their vehicle or premises searched, is able to request a statement about the search. The Commissioner is to provide the statement within 30 days of the request being made.
- Requirement for the Commissioner to make an annual report to Minister for Police and the Attorney General on declarations made under the Act and the use of force. This is to be tabled in Parliament.

Victoria: key amendments made to the *Terrorism (Community Protection) Act 2003*

- Powers added to appropriate premises and things for the purposes of incident management during a terrorist act. The powers are subject to an obligation to minimise damage and an ability for an affected person to seek compensation.
- Amendment to the process for interim authorisations.
- Extension of the use of special police powers in Part 3A to Protective Services Officers.
- A requirement for a review of the Act to be conducted by 31 December 2020. The expiration of the Act was changed from 1 December 2016 to 1 December 2021.

Tasmania: key amendments made to *Police Powers (Public Safety) Act 2005*

- Aligning definition of ‘terrorist act’ with the Commonwealth (and nationally agreed) definition.
- Extension of the Act until 31 December 2025.

South Australia: key amendments made to *Terrorism (Police Powers) Act 2005*

- To expressly provide for the use of force, including lethal force, in line with the recommendations from the NSW Coroner inquiring into the Lindt Café Siege.
- Insertion of a new provision for the protection from the disclosure of the identity of police officers in any court proceedings relating to the use of force;
- Extension of the Act until its 20th anniversary (8 December 2025);
- Insertion of a requirement for reviews on the 14th, 16th and 18th anniversaries of the Act as well as a final review four months preceding the 20th anniversary.

Queensland: extraordinary powers are contained in two pieces of legislation: *Public Safety Preservation Act 1986* and the *Police Powers and Responsibilities Act 2000*. Significant amendments have been made to the *Public Safety Preservation Act 1986* and include:

- Extra-territorial application of the Act.
- A mechanism for the conversion of directions given under an emergency situation to a direction under a terrorist threat.
- In 2018 the legislation was amended to allow for the appointment of a Terrorist Emergency Forward Commander and establishment of a Terrorist Emergency Reception Centre, building on the 2007 amendments that enabled the appointment of a Terrorist Emergency Commander.
- Ability to extend a terrorist emergency beyond 7 days to a maximum of 28 days.

- Provision for the issuing of a terrorist emergency certificate to certify the end of a terrorist emergency.
- Expanded terrorist emergency officer powers in declared areas and declared evacuation areas.
- Express powers to search a person and any thing within their possession and a person is also required to provide access to information or assistance to access a device.
- Express power to search or seize a digital device.
- Power to collect biometric information.
- Requiring the Commissioner to give a report to the Minister for Police within 3 months after the end of a terrorist emergency (amended from 6 months).

The only amendment to the Northern Territory *Terrorism (Emergency Powers) Act 2003* was in 2016, which extended the operation of the Act to 30 June 2026.

The ACT amended the *Terrorism (Extraordinary Temporary Powers) Act 2006* to review the Act after 13 years of operation and also for the Act to expire 15 years after commencement (previously 10 years). The Act is due to expire in 2021.

During the review period, the Commonwealth enacted the *Counter-Terrorism Legislation Amendment Act (No.1) 2018*. Whilst this legislation addressed wider terrorism related matters, the extraordinary powers related provisions included:

- Extending the sunset provision to 7 September 2021, and
- Implementing the INSLM recommendation for more reporting requirements. Specifically, requiring the AFP Commissioner to report to the relevant Minister, the INSLM and PJCIS as soon as practicable after any exercise of the stop, search and seizure powers, and requiring the Minister to report annually to Parliament on the use of those powers.

11 CASE LAW

There has been no judicial consideration of the provisions of the Act or similar Acts in other jurisdictions during the review period.

12 DISCUSSION, FINDINGS AND RECOMMENDATIONS

12.1 The operation and effectiveness of the Act

The requirement to review the Act expressly requires that the operation and effectiveness of the Act be considered.

As noted, other than one application for a covert search warrant in 2009/10 (that was never executed), the powers conferred under the Act have not been exercised to date in relation to any actual or suspected terrorist act in Western Australia.

It is therefore not possible to make a finding or recommendation concerning the operation and effectiveness of the Act based on actual events occurring within Western Australia and the utilisation of the provisions of the Act.

Through a series of desktop exercises, it has been possible to apply the provisions of the Act to scenarios based on hypothetical and actual terrorist acts that have occurred in other jurisdictions, both in Australia and internationally.

The exercises applied various scenarios and considered the thresholds for each of the types of powers that would be able to be exercised. The exercises that were undertaken established that the range of powers conferred in the Act are broad enough to enable police officers to investigate, prevent, or respond to a suspected terrorist act.

FINDING 1

Although the powers under the Act have not been exercised to date, numerous scenario exercises have been undertaken using hypothetical terrorist acts. Based on these scenarios, the provisions of the Act would be effective in enabling police to investigate, prevent, or respond to an actual or suspected terrorist act.

12.2 Are the provisions appropriate having regard to its purpose?

At the time of introducing the legislation in 2005, the Minister for Police made it clear that the powers conferred by the legislation are only to be used 'in times of exceptional crisis and imminent danger'²⁹. The overall purpose of the legislation is to enable police to adequately respond to, prevent, and investigate terrorist acts³⁰.

The powers contained in the Act are clearly wide-ranging, however they are also subject to specified oversight and reporting requirements.

Special powers under Part 2 of the Act are only exercisable upon the issuing of a Commissioner's warrant which is required to be approved by the Supreme Court. Recognising that a rapidly developing terrorist threat may make it impractical to obtain prior approval of a Supreme Court judge, the Act allows for the approval of a judge to occur within 24 hours of the warrant being issued. Further, should the judge not ratify the warrant, it will lapse. These are considered sufficient safeguards to limit the use of the extraordinary powers by police officers.

The power of police to use force, including lethal force, under Part 2A of the Act is also limited to the Commissioner making a separate declaration. The Commissioner can only make the declaration if satisfied the incident is, or is likely to be, a terrorist act and that planned and coordinated police action is required to defend a person threatened by the incident, to prevent a person from being detained or to end the detention of a person.

The Commissioner is required to notify the Minister of Police of the declaration before, or as soon as practicable after, the declaration is made. The Act requires the Commissioner to personally exercise the power unless the office of the Commissioner is vacant, or the Commissioner is on leave or out of the state or otherwise unavailable to exercise the functions. One or more Deputy Commissioners may be authorised, in writing, to perform the Commissioner's functions under Part 2A³¹.

Under Part 3 of the Act, a covert search warrant must be approved by a judge of the Supreme Court. The Act also requires further reporting requirements after the execution of the warrant back to the Supreme Court judge³² as well as annual reporting to the Minister for Police about covert search warrants³³.

FINDING 2

The extraordinary powers conferred on police under the Act are counter-balanced by a number of safeguards and accountability mechanisms, including requiring judicial approval and executive and Parliamentary reporting requirements. The provisions of the Act are appropriate having regard to the purpose of the Act, that is, to enable police to adequately investigate, prevent, or respond to terrorist acts.

²⁹ Hansard Legislative Assembly, 14 September 2005 p5307, Mrs M.H. Roberts (Midland – Minister for Police and Emergency Services), Second Reading Speech

³⁰ *ibid.*

³¹ Section 21H of the Terrorism (Extraordinary Powers) Act 2005

³² Section 28 *ibid.*

³³ Section 30 *ibid.*

12.3 Should the Act continue in operation?

A specific requirement of any statutory review conducted pursuant to section 34 is to consider whether the Act should continue in operation.

The Act resulted from a COAG agreement to introduce counter-terrorism legislation throughout Australia. In 2015, COAG released Australia's Counter-Terrorism Strategy (the COAG Strategy) which identifies five interconnected elements necessary to meet the challenge of terrorism, two of which are addressed within this legislation: 'disrupting of terrorist activity within Australia' and 'having effective responses and recovery' should an attack occur³⁴.

More recently, in 2017, the National Counter-Terrorism Plan, developed by the Australia New Zealand Counter-Terrorism Committee (ANZCTC), which complements the COAG Strategy, provides that states and territories 'maintain counter-terrorism related policies, legislation and plans within their jurisdictions with a view to national consistency and interoperability'³⁵.

In 2021, terrorism continues to pose a real threat in this country. Australia's current National Terrorism Threat Level is 'probable'³⁶. The National Terrorism Threat Advisory System is a scale of five levels to provide advice about the likelihood of an act of terrorism occurring in Australia. A 'probable' threat level means 'credible intelligence, assessed by our security agencies, indicates that individuals or groups have the intent and capability to conduct a terrorist attack in Australia'³⁷.

The threat continues to evolve, with extremist ideologies motivating individuals and groups to plan and carry out a range of attacks that may utilise sophisticated or simple and readily available means of effecting a terrorist act. The Director General of Australian Security Intelligence Organisation advised the Parliamentary Joint Committee on Security and Intelligence in April this year that he expects a terrorist attack to occur in Australia within the next year.³⁸

As previously discussed, the powers of the Act have not been utilised (other than the 2009/10 application for a covert search warrant) in Western Australia. However, previous statutory reviews of the Act and reviews conducted in other jurisdictions have consistently concluded that extraordinary powers legislation forms part of the national counter-terrorism framework and that there is an ongoing need for these laws so police are able to undertake any actions required in the event of an actual or likely terrorist act.

The Act is due to expire on 19 December 2025³⁹. Whilst the next statutory review will occur in the lead up to its expiry and will necessarily consider and make a recommendation about the future of the Act as well as any other appropriate amendments, unless the security context changes drastically, it is likely there will be a need to extend the Act's operation past 2025.

FINDING 3

The National Counter-Terrorism Plan requires States and Territories to maintain counter-terrorism related policies, legislation and plans within their jurisdictions. The current security environment, and the frequency and diverse range of terrorist acts overseas and in other parts of Australia, means there continues to be a need for the existence of extraordinary powers legislation. The Act forms an integral part of the national security framework.

³⁴ Australia's Counter-Terrorism Strategy – Strengthening Our Resilience, 2015, COAG, page vii.

³⁵ National Counter-Terrorism Plan, 4th Edition 2017, Australia New Zealand Counter-Terrorism Committee, page 3.

³⁶ Webpage: <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx> as at 27 May 2021.

³⁷ Ibid.

³⁸ Parliamentary Joint Committee on Intelligence and Security – Inquiry into extremist movements and radicalism in Australia, Public Hearing, Thursday 29 April 2021

³⁹ Section 35 *Terrorism (Extraordinary Powers) Act 2005*

RECOMMENDATION 1

It is recommended that the Act continue in operation.

12.4 The definition of terrorist act

The Act defines a ‘terrorist act’ in section 5. The definition contains three elements – motive, intention and action – that have been agreed to nationally. An act cannot be considered a terrorist act unless the motive is the advancement of a political, religious or ideological cause.

The adequacy of the definition has been raised as a matter for further consideration in previous reviews of the Act in WA and in other jurisdictions.

In its 2017 report, the Victorian Expert Panel on Terrorism and Violent Extremism and Response Powers (Expert Panel) suggested that, by restricting the legislative definition of a ‘terrorist act’ to an act motivated by a political, religious or ideological cause, the legislation exposes the community to the danger of a terrorist act motivated by something other than politics, religion or ideology⁴⁰.

The Expert Panel questioned the utility of the definition for terrorist acts where motive cannot be established. Essentially, unless the offender’s motive is to advance a political, religious or ideological cause, what they do is not considered a terrorist act, and none of the legislated counter-terrorism measures could be applied. The Expert Panel accepted that the extent of legislative protection has not yet been fully tested in circumstances in which an action intended to intimidate the public at large, or coerce a government, has clearly been planned, prepared for, or executed, without any motivation to advance a political, religious or ideological cause.

The Expert Panel recommended that the Victorian Government refer to an appropriate inter-jurisdictional body consideration of the legal definition of a terrorist act to remove motive as an essential element of that definition and strengthen the distinction between terrorism and other crimes so as to capture terrorism’s unique significance and gravity and ensure that the necessary tools are always available.

Contrary to the Expert Panel recommendation, the NSW Department of Justice recommended that the existing definition of ‘terrorist act’ be retained, noting that it is a nationally recognised definition that has not caused problems for NSW authorities⁴¹.

The issue has been further considered in national forums and it has been concluded that the motivation element should remain in the definition.

Whilst it is recognised that there are individuals who commit indiscriminate attacks with no underlying motive to advance a political, religious or ideological cause, jurisdictions have measures in place to address this risk. Specifically, most jurisdictions have a specialist unit to deal with obsessed individuals.

Additionally, in 2020, WA undertook a further measure to address this risk by prescribing a ‘hostile act’ hazard for the purposes of the *Emergency Management Act 2005* (EM Act). This hazard specifically focuses on a physical act and removes the need to be satisfied of the person’s intent, thus enabling the declaration of an emergency situation or a state of emergency and the resultant powers under the EM Act at an earlier stage than if it were necessary to show that the act was a terrorist act.

Consequently it is recommended to maintain the status quo.

⁴⁰ State Government of Victoria (2017). *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2*. p. 56-73

⁴¹ Department of Justice, NSW (2018). *Terrorism (Police Powers) Act 2002: Statutory Review*. p. 15-18

RECOMMENDATION 2

In the absence of a nationally agreed amendment to the definition of ‘terrorist act’, it is recommended that the current definition remain.

12.5 Issues arising from scenario exercises

Applying the provisions of the Act to various scenarios is valuable in determining how they may actually operate and what thresholds would be required to be met before the provisions of the Act could be invoked. After applying the Act to numerous scenarios, two issues were identified as requiring further consideration. Both of these issues related to Part 2A, which was inserted by the 2018 Amendment Act. The first is clarification around the threshold for the use of force powers, specifically what would be considered as constituting an incident. The second is the Commissioner’s power to authorise others to exercise his statutory functions.

12.5.1 Clarification of the threshold for use of force powers

When applying the Act’s provisions to various scenarios, there was debate about the threshold for the use of the use of force powers in Part 2A, particularly what constitutes an ‘incident’.

Section 21C(1) provides:

The Commissioner may declare that this Part applies to an incident to which police officers are responding if the Commissioner is satisfied there are reasonable grounds to suspect –

- (a) that the incident is or is likely to be a terrorist act; and
- (b) that planned and coordinated police action is required –
 - (i) to defend a person threatened by the incident; or
 - (ii) to prevent a person from being detained or end the detention of a person.

During the scenarios uncertainty arose around at what point an ‘incident’ is deemed to have commenced (for the purposes of invoking the Part 2A powers). Does the preparation and lead up to an incident occurring mean that it too forms part of an incident?

The term ‘declared incident’ is defined in section 21A as meaning ‘*an incident in respect of which a declaration is made*’. The Commissioner may declare that Part 2A applies to an incident to which police officers are responding if the Commissioner is satisfied that there are reasonable grounds to suspect that ‘*the incident is or is likely to be a terrorist act*’.

The term ‘incident’ is not defined in the Act, however the ordinary dictionary definition of the term ‘incident’ is ‘an instance of something happening; an occurrence or event’⁴². Therefore, a declaration may only be made in respect of a happening, occurrence or event ‘to which police are responding’⁴³. That is, the police officers must be responding to the terrorist act itself or an event that ‘is likely to be a terrorist act’. This language is in the present tense and not in respect of an incident that is *about* to be committed. This is in contrast to a Commissioner’s warrant under Part 2 or a covert search warrant under Part 3 of the Act that may be issued in respect of a terrorist act that the Commissioner *suspects* is about to be committed⁴⁴.

Also considered is the fact that headings to Parts form part of written law.⁴⁵ The heading of Part 2A reads ‘Police use of force: ongoing terrorist acts’. ‘Ongoing’ is generally taken to mean ‘in progress’ or ‘continuing to exist’. A terrorist act which has not yet taken place is therefore not ‘ongoing’.

⁴² *Macquarie Dictionary* online edition

⁴³ Section 21C(1), *Terrorism (Extraordinary Powers) Act 2005*

⁴⁴ Sections 7(2)(a), 23(2)(a) and 24(3)(d), *ibid*

⁴⁵ Section 33(1) of the *Interpretation Act 1984*

The Minister's Second Reading Speech on the *Terrorism (Extraordinary Powers) Amendment Bill 2018* states that the Part 2A provisions were in response to a recommendation by the New South Wales Coroner on the December 2014 Lindt Café siege. The powers are clearly directed towards the resolution of a classic siege situation.

Based on all of the above, it appears the Part 2A powers can only be used with certainty when a terrorist act *is* occurring and, not in the *lead up* to an incident occurring.

In the absence of any express power to use lethal force to prevent a terrorist act, police officers will only be able to use force in self-defence in the circumstances set out in section 248 of the Criminal Code (WA).

As a consequence of the scenario exercises, consideration was given as to whether the Act should be amended to expressly allow police officers to use lethal force to *prevent* a terrorist act in circumstances where it is believed a person is about to commit the act. For example where police have intelligence that suspected terrorists are travelling in a vehicle strongly believed to contain explosives on their way to carry out the terrorist act.

An argument in favour of extending the powers to cover such a scenario is that one of the key objects of that the Act is to prevent, as well as respond to, terrorist acts.

Additionally, the evolving nature of the terrorist threat needs to be considered. In the latest annual threat assessment issued by ASIO the threat level remains at probable, and the most likely terrorist tactics are identified as being for a terrorist to use basic weapons, explosives, firearms or vehicles in a highly mobile attack either at one or several locations. Whilst police would expect to undertake other actions to intercept and prevent the attack it may still be that the option to use force, including lethal force, is necessary in certain circumstances to prevent the terrorist act that will endanger lives from occurring.

The review concludes that further consideration is required on this matter.

FINDING 4

The use of force threshold in Part 2A of the Act does not permit the Commissioner of Police to authorise police officers to use lethal force in relation to a terrorist act that has not yet occurred.

RECOMMENDATION 3

It is recommended that, consistent with a key purpose of the legislation, further consideration be given to whether the Act should be amended to allow for the use of lethal force to be authorised to prevent a terrorist act in certain, limited circumstances.

12.5.2 Commissioner's power to authorise

The second matter that arose during the scenarios related to the limited ability for the Commissioner to authorise others to exercise the Commissioner's functions or powers under the Act.

A terrorism situation is likely to commence without notice and evolve quickly and, although expected to be an extremely rare circumstance, it may not always be possible to immediately contact the Commissioner. Issues surrounding authorisations were contemplated during the scenarios.

Section 31 (which applies to all functions within the Act other than a function under Part 2A) provides that if the Commissioner is unavailable to exercise the functions under the Act, the

Commissioner may authorise a police officer who holds, or is acting in, the office of Deputy Commissioner to perform them.⁴⁶ Additionally, if a Deputy Commissioner is unavailable to exercise the functions, the Commissioner is able to authorise the performance of the functions to a police officer who holds, or is acting in, a rank of Commander or Assistant Commissioner⁴⁷. Authorisations are to be in writing.

Part 2A of the Act applies to the use of force (including lethal force) during a declared incident. The Commissioner can only authorise a police officer who holds or is acting in the office of Deputy Commissioner to perform the Commissioner's functions should the Commissioner be unavailable (due to being on leave, outside the state or otherwise unavailable) or if the office of the Commissioner is vacant at the time⁴⁸.

Consequently, a declaration cannot be made under section 21C of the Act if neither the Commissioner nor an authorised Deputy Commissioner are available. It is considered highly unlikely that this situation would occur, and therefore at this point in time it is deemed that the current provisions of the Act are appropriate.

However, whilst unlikely that a situation will arise whereby the Commissioner and both Deputy Commissioners are unavailable, it is considered prudent that further consideration be given for an authorised Assistant Commissioner or Commander to have the capacity to make such a declaration in very limited circumstances. Such an amendment would make the authorisation powers under Part 2A consistent with the authorisation powers within the rest of the Act.

FINDING 5

The power for the Commissioner of Police to authorise others to exercise the Commissioner's functions under the Act are more specific and limited in Part 2A than the authorisation powers under the rest of the Act. At this point in time, however the authorisation powers under Part 2A are considered appropriate.

RECOMMENDATION 4

It is recommended that consideration be given to making the authorisation provisions under Part 2A consistent with the authorisation provisions within the rest of the Act, and that this be revisited at a future review.

12.6 Commissioner's warrants – Scope of warrants

Section 8(2) of the Act sets out the required content of a Commissioner's warrant as follows:

(2) A Commissioner's warrant —

...

(d) must name or describe (if necessary by using a picture or other visual depiction) one or more of the following —

(i) an area of the State in which the powers in Division 3 may be exercised (the **target area**);

(ii) a person sought (the **target person**) in connection with the terrorist act;

⁴⁶ Section 31(2)(a) of the *Terrorism (Extraordinary Powers) Act 2005*

⁴⁷ Section 31(2)(b), *ibid*

⁴⁸ Section 21H, *ibid*

- (iii) a vehicle sought (the **target vehicle**) in connection with the terrorist act;

The requirement for ‘one or more of the following’ to be named or described in the Commissioner’s warrant raises the question as to whether the warrant could describe multiple target areas and/or multiple target persons and/or multiple target vehicles. This could be relevant in circumstances where there is a terrorist cell operating.

Whilst section 10(c) of the *Interpretation Act 1984* (WA) (Interpretation Act) provides that in any written law ‘words in the singular number include the plural and words in the plural number include the singular’, this is unless (broadly) express provision is made to the contrary or the subject or context is inconsistent with such application.⁴⁹

There is argument that the references in section 8(2) to a target area, target person or target vehicle should be construed in the singular. Warrants are generally directed to a particular place. For example, a search warrant issued under section 42 of the *Criminal Investigation Act 2006* (WA) would not be issued in relation to more than one place.

Notwithstanding that a Commissioner’s warrant may describe one or more target area, target person and/or target vehicle, it appears that separate Commissioner’s warrants would therefore need to be obtained where there are multiple target areas, multiple target persons and/or multiple target vehicles.

Given the uncertainty and because the powers exercisable under a Commissioner’s warrant are so extraordinary, it is considered that section 10(c) of the Interpretation Act cannot be relied upon to extend a Commissioner’s warrant to multiple target areas and/or multiple target persons and/or multiple target vehicles.

Further consideration needs to be given to determine whether the Act needs to be amended and if so, clarifying the circumstances surrounding the use of the Commissioner’s warrant. For example, having to issue multiple individual warrants could impede an urgent response to a multi-site event, for example. It is recommended that this matter should be further reviewed and resolved during the next statutory review.

FINDING 6

There is uncertainty about whether a Commissioner’s warrant issued under section 8 can apply to multiple target persons and/or multiple target areas, and/or multiple target vehicles.

RECOMMENDATION 5

It is recommended that consideration be given to whether a Commissioner’s warrant should apply to multiple target persons and/or multiple target areas and/or multiple vehicles.

12.7 Amendments made in other jurisdictions

This review has outlined amendments that have been made to extraordinary powers legislation in other jurisdictions. It is not the intention of this review to fully consider every amendment made in every other jurisdiction at this time. However, two significant amendments that require consideration in the context of WA legislation are examined below.

12.7.1 The power to appropriate premises and things (Parts 2 and 2A)

The Act does not expressly provide police with the power to commandeer premises and things to utilise for operational purposes where there is a critical need to act quickly or the use or

⁴⁹ Section 3(1)(a) and (b) of the *Interpretation Act 1984*.

alteration of a premises or thing if necessary as a means of last resort i.e. setting up sniper locations or forward command posts.

Legislation and recommendations from other jurisdictions

Prior to being prescribed in the *Terrorism (Community Protection) Act 2003* (Vic) (TCPA) in 2018, the TCPA did not expressly provide police with the power to appropriate premises and things for the purposes of incident management during a terrorist act.

The Victoria Police expressed concern to the Expert Panel⁵⁰ that, without prescribed provisions, the ability for police to effectively carry out their duties in an emergency situation may be inhibited as they must rely on informal arrangements and the goodwill and consent of owners of premises. Victoria Police proposed that a provision similar to that in the *Public Safety Preservation Act 1986* (QLD) (PSPA) be prescribed in the TCPA. Section 8(1) of the PSPA provides that, where there is an emergency situation, an emergency commander⁵¹ may direct an owner (or the person in charge or in control) of any resource, to surrender it and place it under the emergency commander's or police control. A 'resource' is defined as any animal or any thing which may provide aid or be of assistance in an emergency situation.⁵²

The Expert Panel recommended that the TCPA be amended to enable a police officer, if they reasonably consider the use of a certain premises or thing to be necessary to respond to the terrorist act, to:

- direct an owner (or a person apparently in charge or in control) of premises or things within an area that is the target of an authorisation to place it in an officer's control, and
- take possession and make use of premises or things for the purposes of an authorisation.

The Expert Panel also recommended that amendments provide for persons whose premises or things are used by Victoria Police to be able to claim compensation from the State including losses, damage to the premise or thing, and lost earnings during police appropriation of the premises⁵³.

The *Justice Legislation Amendment (Terrorism) Act 2018* (JLAA) subsequently amended the TCPA to introduce powers to appropriate premises and things in the event of a terrorist act in Victoria. It was enacted on 7 August 2018.

Other Western Australian legislation

In Western Australia, the *Emergency Management Act 2005* (the EM Act) contains a power to appropriate premises. Section 69 of the EM Act provides:

'For the purposes of emergency management during an emergency situation or state of emergency, a hazard management officer or authorised officer may take control of or make use of any place, vehicle or other thing'.

Section 75(1) of the EM Act sets out a range of powers that may be exercised by an authorised officer during a state of emergency. These include powers to 'remove, dismantle, demolish or destroy a vehicle, or any premises, in the emergency area' and a power to 'build earthworks or temporary structures, or erect barriers in the emergency area'⁵⁴.

⁵⁰ State Government of Victoria (2017). *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1*. p. 75.

⁵¹ Section 5 *Public Safety Preservation Act 1986* (QLD).

⁵² Schedule – Dictionary *Public Safety Preservation Act 1986*.

⁵³ State Government of Victoria (2017). *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1*. p. 75

⁵⁴ *Emergency Management Act 2005*, s75(1)(f)(m)

Further, under section 78 of the EM Act, a person who suffers loss or damage because of an exercise of a power under (relevantly) section 69 or 75(1)(f) is entitled to be paid just and reasonable compensation.

Discussion

When responding to a terrorist act it is entirely possible that the power to take control or make use of a premises along with a power to make alterations or to build temporary structures could be required. Specifically, in a siege situation police may need to take control of a property to set up either a forward command post or a sniper post. In the latter situation it may be necessary to remove a window or make some other structural alteration to be able to carry out their powers under the Act.

It is therefore recommended that powers similar to that in the EM Act be included in the Act. The power to take control or make use of a property as well as a power to make alterations or build temporary structures could be conditional on:

- A Commissioner's warrant issued under Part 2 of the Act having effect (in the same way as the power to issue a direction to a government agency under section 19 of the Act applies only while a Commissioner's warrant has effect), or
- A Part 2A declaration under section 21C of the Act being in effect (since the making of a declaration is not contingent upon the issue of a Commissioner's warrant).

Given these powers are recommended to be included in the Act, consideration should therefore be given to whether a person be entitled to compensation in respect of loss or damage to property which police have taken control or made use of in the event of a terrorist act as provided for in the Victorian legislation and in the EM Act.

FINDING 7

The Act does not expressly provide police with the power to take control or make use of premises and things to utilise for operational purposes where there is a critical need. This may impede police from effectively carrying out their functions in the event of a terrorism incident.

RECOMMENDATION 6

It is recommended that the Act be amended to include a power to take control of property similar to section 69 of the *Emergency Management Act 2005* and for a general power to make alterations or build temporary structures on that property if required. These powers should be conditional on a Commissioner's warrant under Part 2 having effect, or a declaration under Part 2A being in place.

RECOMMENDATION 7

It is recommended that consideration be given to amending the Act to provide that where a person has suffered loss or damage as a result of police taking control of or making use of their property, that person is entitled to be paid just and reasonable compensation.

12.7.2 Extension of interim authorisations (Part 2)

Current WA legislation

Part 2 of the WA Act prescribes the exercise of special police powers to be authorised through a warrant issued by Commissioner. The Commissioner's warrant cannot be issued without the prior approval of a Supreme Court judge unless a judge is not able to be contacted, in which case the warrant may be issued without approval but must be ratified by a judge within 24 hours of issue.

As soon as practicable after the Commissioner issues a warrant, a written report must be provided to the Minister for Police outlining the basis and terms of the warrant.

Legislation and recommendations from other jurisdictions

The Victorian TCPA prescribes a process similar to the Commissioner's warrant in the WA Act but with a different approval process. In Victoria, the Chief Commissioner must initially submit a written application to the Premier to receive approval to apply to the Supreme Court for an order authorising the exercise of special powers. In the event that there is an urgent need for authorisation, an 'interim authorisation' can be issued before full authorisation is sought from the Supreme Court (with the Premier's approval).

The duration of an interim authorisation was originally 24 hours. To ensure Victoria Police has the flexibility required to obtain appropriate approval, the TCPA was amended in 2018 to extend the duration of interim authorisations from 24 hours to 48 hours. The rationale given for the extension is that the 24-hour period after which the Chief Commissioner must apply to the Supreme Court for an extension is likely to be unduly restrictive for police to effectively respond to a terrorist act – particularly where the target of the authorisation is broadly defined⁵⁵.

It was argued that the extension of time to 48 hours enables Victoria Police to concentrate efforts on organising immediate operational response and conducting post-event investigations, in addition to completing any written instruments required by the TCPA and if required, prepare an application for the Supreme Court.

New South Wales extraordinary powers legislation also prescribes a period of 48 hours for an interim authorisation.

However, within the context of the WA Act, if a Commissioner's warrant is issued without the prior approval of a judge, and that warrant is in force for a period of 48 hours, there is a likelihood that the warrant may be cancelled (under section 9 of the Act) before the approval of a judge is sought or granted. This would mean that the supervisory role of the Supreme Court is essentially rendered of meaningless.

Given the above considerations and in the context of Western Australia where this is yet to be tested, it is deemed that the 24-hour interim authorisation should remain as is.

FINDING 8

Currently, in urgent circumstances, an interim authorisation for a Commissioner's warrant may be issued without the prior approval of a judge. This authorisation must be ratified by a judge within 24 hours. Whilst an extension of that time period to 48 hours was considered, the effect of this could mean that the supervisory role of the Supreme Court would essentially be rendered meaningless. Given this, it is deemed that the period of 24 hours for an interim authorisation is appropriate.

12.8 Frequency of statutory reviews

The powers of the Act are unique and wide-ranging. When the Act was introduced, regular statutory reviews of the use of the powers under this Act and an expiry clause were considered necessary to ensure that the Act was not used unduly or excessively and remained necessary.

As noted throughout this report, other than one application for a covert search warrant in 2009/10 that was never executed, the powers under the Act have not been exercised in relation to any actual or suspected terrorist act in Western Australia.

⁵⁵ State Government of Victoria (2017). *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1*. p.72-74

Given the Act has not been used unduly or excessively in over 15 years of operation, it is considered that three-yearly review periods are no longer warranted. However, the next statutory review should proceed unamended as it is required to consider the extension of the Act past the current expiry date of 19 December 2025. It is therefore recommended that the next statutory review consider whether the rolling three-year review requirement be amended.

FINDING 9

The powers conferred by the Act are unique and wide-ranging so that when the legislation was introduced regular statutory reviews of the use of the powers under this Act were considered necessary. However, given that these powers have not been used to date, three-yearly review periods should be re-considered.

RECOMMENDATION 8

It is recommended that the next statutory review, due to consider whether the Act should continue past its current expiry date of 19 December 2025, also consider whether the rolling three-year review requirement is still required.