

The Committee Manager  
Committee on the Office of the Ombudsman and the Police Integrity Commission  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

11 May 2006

**Re: Inquiry into Scrutiny of NSW Police Counter-Terrorism and Other Powers**

Dear Ms Minnican,

Thank you for the opportunity to contribute to the Inquiry.

The office of the Ombudsman is an essential part of the system of checks and balances that make democracy meaningful in this state. It is tasked with “exposing and eliminating conduct that is illegal, unreasonable, unjust or oppressive, improperly discriminatory, based on improper or irrelevant grounds, based on a mistake of law or fact or otherwise wrong.”<sup>1</sup>

The various pieces of legislation covering police ‘special powers’ in the context of preventing or tracking terrorist acts provide enhanced capability to the police, but at the same time provide a number of opportunities for undetected corruption and misuse of those powers. This concern is recognised by the Government in its provision for increased monitoring of certain powers by the NSW Ombudsman and specific requests for reporting on the implementation of certain extraordinary legislation after two and five years.

However, the NSW Ombudsman does not have powers to monitor all new police powers. Under Part 2, Section 13 of the *Terrorism (Police Powers) Act 2002* an authorisation for the use of “special powers” (as defined in Part 2 of the Act)

may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus.

This provision prevents Ombudsman (or judicial) scrutiny of the exercise of police special powers in the context of alleged misuse of those powers. It was the source of significant controversy at the time of passing and remains the primary concern with the legislation to date.

Furthermore, unlike the covert search warrant and preventative detention powers, part 2 of the Act does not mention the authority of the Ombudsman to monitor, review or report on the exercise of police ‘special powers’.

To grant police immunity under all circumstances is to remove the accountability of the police to the people they are charged to protect. In the potential context of illegal or even accidental misuse of these ‘special powers’, it is fundamental to open and accountable government that the authorisation and exercise of these powers can be reviewed by an appropriate body, such as the Ombudsman.

---

<sup>1</sup> NSW Ombudsman, *Annual Report 2004-05*, p8.

The need for judicial oversight of the implementation of counter terrorism measures has been recognised by expert bodies. The Berlin Declaration of the International Commission of Jurists states:

9. Remedy and reparation: States must ensure that any person adversely affected by counterterrorism measures of a state, or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.<sup>2</sup>

Both of these elements (lack of monitoring and inability to challenge) rely on the infallibility of the NSW Police in the context of highly secret decisions about possible or recent terrorist acts. Such a presumption is impossible to maintain in the face of the evidence.

Since this legislation was passed there have been a number of incidents in the western world in which police and intelligence personnel have deliberately or accidentally acted inappropriately in the conduct of their powers. For example, in 2001 ASIO conducted a raid on the wrong house in Sydney, in 2005 Metropolitan Police in London followed the wrong man to a Tube station leading to a spiral of events that concluded with his wrongful death, and also in 2005 it was discovered the FBI had conducted counter-terrorist surveillance of “Food Not Bombs”, a vegetarian soup kitchen for homeless people in downtown Denver.

John von Doussa, President of the Human Rights and Equal Opportunity Commission, had this to say about insufficiently monitored police powers in commenting on the federal *Anti-Terrorism Bill (No.2) 2005*, but directly applicable here:

If the security services can be guaranteed never to use these new powers mistakenly, and never to abuse them, where in a realistic sense is the danger to our nation and to our security in allowing their conduct to be subject to independent check? Surely to do so would in any event add to community confidence that our ideals of democratic principles and the rule of law are being maintained.

Another element of oversight that we believe would help to prevent potential misuse of police powers is in the exercise of covert search warrants (Part 3 of the *Terrorism (Police Powers) Act 2002*). Because of the nature of these warrants, in which people are not aware that their premises are being searched, as well as the context of high terrorist alert that is necessary for the justification of the warrants, there is an increased possibility of police planting ‘evidence’ at the scene. A simple but effective way to prevent this would be to have a representative of the Ombudsman present during the execution of these warrants. Given the presumed infrequency of covert warrants being issued, such a measure would have little resource implications for the Ombudsman, which in turn would not delay or prevent the police from making their investigations.

---

<sup>2</sup> International Commission of Jurists, *The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (adopted 28 August 2004)

## Recommendations

1. Amend Part 2 of the *Terrorism (Police Powers) Act 2002* to insert a monitoring role of the NSW Ombudsman over the exercise of 'special powers'.
2. Repeal Section 13 of Part 2 of the *Terrorism (Police Powers) Act 2002* so that authorisations may be reviewed by relevant authorities such as the NSW Ombudsman and the judicial system.
3. Amend Part 3 of the *Terrorism (Police Powers) Act 2002* to mandate that an officer of the NSW Ombudsman be present during execution of covert search warrants.

Once again, thank you for the opportunity to make this submission.

Yours sincerely,

Harry Herbert