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Our ref: A12/0591

Attn: Penny Musgrave

Dear Mr Glanfield

Request for submission on the *Terrorism (Police Powers) Act 2002*

I refer to your letter dated 23 March 2012 in which you invited me to provide a submission on the *Terrorism (Police Powers) Act 2002* (NSW) (TPP Act) as part of the review of that Act. The following comments are made in accordance with my functions under section 36(2)(g) of the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) to provide advice on matters relating to the privacy of individuals.

In making this submission I note the findings by the NSW Ombudsman that the preventative detention and covert warrants powers in the TPP Act have not been relied upon by the NSW Police Force to date¹. As noted by the Ombudsman, this calls into question the utility of the particular powers in the TPP Act and more importantly calls into question the need for the Act at all. In my view, instead of regular statutory reviews of the TPP Act by the Attorney General's Department, I suggest that the Ombudsman's findings now require an arms length consideration of the need for the TPP Act at all, especially in light of the highly intrusive and coercive nature of the powers in that Act. Without an arms length consideration of the need for the TPP Act in my view we erode our capacity to assess whether the public policy objectives behind the Act remain sound and whether we are prepared to continue to erode not only what in general terms is an expectation of privacy. I note also that the TPP (in practice) more specifically challenges the existing notions of what we understand to be the fundamental principles of criminal justice in New South Wales. I recommend such a review, but in the interim I make the following submissions on particular issues in relation to this statutory review of the TPP Act.

- Covert search warrant

In our 2007 submission on the review of the TPP Act we expressed the view that the powers conferred by search warrant which allow entry to premises

¹ NSW Ombudsman's 'Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002* (Review period 2008-2010) at pp 27 - 34 & 35 - 42.

'adjoining or providing access to the subject premises' for the purpose of entering the 'subject premises', should be amended to require that a separate warrant be issued for those non-subject premises in order to avoid the accidental inclusion of non-subject premises. I note that section 27 O(1)(d) has not been amended to this effect. We noted previously that entry to non-subject premises 'significantly affects the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act' and that requirement that a separate warrant be issued would avoid unintentional authorisations. I do not resile from this view and suggest that this would involve a minor amendment to the TPP Act and in practice would involve only little additional work by Police and Judges.

- Oversight

In our 2007 and 2009 submissions we expressed concern about the limited oversight role provided to the NSW Ombudsman under the TPP Act. We are pleased to note that the TPP Act has been amended to allow an on-going monitoring and reporting role for the Ombudsman in relation to preventative detention and covert search powers. However as previously noted by this Office, it is not clear why the Ombudsman's role is limited to the oversight of preventative detention and covert warrants powers only and not to matters such as the exercise of special powers (Division 3 of Part 2), or the conduct of strip searches (Schedule 1). If such matters were to be included as matters over which the Ombudsman has oversight we suggest that any such powers be accompanied by reporting obligations similar to those in Parts 2A and 3 of the TPP Act. I note that the NSW Ombudsman currently has broad oversight powers in respect of NSW Police actions concerning conduct related to the use of their powers under the *Police Act 1990* and has performed this role in some capacity since 1978. It would therefore seem sensible (in the absence of any reasons to the contrary relating to disclosure of matters effecting national security etc), that similar conduct under the TPP Act could be oversighted in a similar manner.

I hope this submission assists in the review of the TPP Act. Please contact Ms Jenner on (02) 8019 1603 if you would like to discuss any of the above matters.

Yours sincerely

John McAteer
Deputy Privacy Commissioner
Information & Privacy Commission