THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: CrimJErg:1036134

22 July 2015

Ms Natasha Mann
Director
Crime Policy
NSW Department of Justice
GPO Box 6
Sydney NSW 2001

Dear Ms Mann,

Statutory Review of the Terrorism (Police Powers) Act 2002

I write to you on behalf of the Criminal Law Committee and Juvenile Justice Committee of the Law Society of NSW ("Committees"). The Committees include experts drawn from the ranks of the Law Society's membership.

The Committees' comments on the *Terrorism (Police Powers) Act 2002* are contained in the attached submission.

I trust these comments are of assistance. Any questions may be directed to Rachel Geare, policy lawyer for the Committees, on (02) 9926 0310 or rachel.geare@lawsociety.com.au.

Yours sincerely

Michael Tidball
Chief Executive Officer

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

1. Part 2: Special Powers

Part 2 of the *Terrorism (Police Powers) Act 2002* ("Act") gives the police special powers with respect to people who are suspected on reasonable grounds of being the target of an authorisation or who are in or on a vehicle that is suspected on reasonable grounds to be the target of an authorisation. The powers require disclosure of identity (section 16) or, without warrant, empower police to stop and search a person (section 17), a vehicle (section 18) or premises (section 19).

It is of concern to the Committees that the powers under this Part can be triggered by a person or vehicle merely being present in a "target area", or being about to enter the area or having recently left the area. There is no need for the police to "suspect on reasonable grounds" that a person is, was or will be involved in suspected terrorist activity. Further, police are allowed to use "such force as is reasonably necessary" in exercising their special powers (section 21).

The application of the powers in the Act to people or vehicles who are not the target of an authorisation should be predicated on the police forming a suspicion on reasonable grounds that the powers must be exercised to prevent a terrorist attack or to apprehend the persons responsible for committing a terrorist attack.

The Committees submit that sections 16(1)(c), 17(1)(c) and 18(1)(c) should be amended accordingly.

1.1. Lack of Judicial Review

The effect of section 13 is that an authorisation is not subject to any form of judicial review. This limitation is exacerbated by section 29 which provides that if proceedings are brought against a police officer for acts done pursuant to an authorisation, the officer cannot be convicted or held liable "merely" because "the person who gave the authorisation lacked the jurisdiction to do so". In other words, the authorisation cannot be contested (except by the Police Integrity Commission) and, if the authorisation was given by someone who had no power to do so, an officer acting on it cannot be held liable.

The Committees submit that section 13 should be removed from the Act.

2. Part 2A: Preventative Detention

The Committees are opposed to the preventative detention provisions. Persons not charged with, or found guilty of, a criminal offence should not be imprisoned by the State without trial.

The Committees note that the 2013 COAG Report on the Review of Counter-terrorism Legislation recommended, by majority, that:

> ... the Commonwealth, State and Territory 'preventative detention' legislation be repealed. If any form of preventive detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which, in the view of the majority of the Committee, may further reduce its operational effectiveness.[1]

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[1] Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, Recommendation 39, p.14.

That Report noted that if there were sufficient material to found a detention order, there would be, more likely than not, sufficient material to warrant conventional arrest and charge.[2]

If the preventative detention provisions are to remain in force, the Committees make the suggestions set out below for amendment.

2.1. Applications for preventative detention orders

A. Period of detention

Under section 26D, police can apply to the Supreme Court for a preventative detention order to prevent an imminent terrorist act or to preserve evidence of terrorist acts that have occurred. The scheme in NSW permits an interim preventative detention order to be made by the Supreme Court without notice to the person and in his or her absence for up to 48 hours (section 26H). Within this 48 hour period another hearing to confirm the order must be held. At this hearing the detained person can be represented and heard.

For constitutional reasons, the Commonwealth scheme can only operate for 48 hours. However, the New South Wales scheme operates so that a person can be detained under a preventative detention order without charge for up to 14 days (section 26K), which the Committees submit is excessive.

The maximum length of time a person can be detained should not exceed 48 hours which is consistent with the Commonwealth scheme and the Committees submit this amendment should be made to the NSW scheme.

B. Preventative detention orders and young people

Section 26E provides that a preventative detention order cannot be applied for, or made, in relation to a person who is under 16 years of age.

The Committees are of the view that this section should be amended to exclude anyone under the age of 18 years. The current application to children is contrary to the United Nations Convention on the Rights of the Child[3], to which Australia is a signatory.

C. Evidentiary requirements

The Commonwealth scheme operates administratively and does not allow a hearing on the merits before the expiry of the detention. While the judicial nature of the NSW scheme is preferable to an administrative scheme, the Committees have serious concerns about the evidentiary requirements to gain a preventative detention order. There is no requirement to provide any evidence in support of an application. All that is required under section 26G is that the application must be in writing, and the facts and other grounds upon which the police officer considers that the orders should be made should be set out.

The Supreme Court can take into account any evidence or information that the Court considers "credible or trustworthy in the circumstances and, in that regard, is not bound by the principles or rules governing the admission of evidence" (section 26O). The Committees see no justification for why the rules of evidence should not apply. The

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[2] Ibid, p114.
[3] See Articles 37 and 40.

Committees suggest that it is appropriate for the rules of evidence to be applied by the Supreme Court in making an order, given the serious impact of an order on a person's liberty.

The person detained may request that his or her lawyer be given a copy of the preventative detention order, and the summary of the grounds on which the order is made. However, under section 26ZB(7), the lawyer is not entitled to see any other document. The Committees are strongly opposed to this provision, which denies the lawyer the opportunity to review the evidence against his or her client. A person subject to an order should be provided with all the information and evidence that forms the basis of the application for such an order, and not merely a copy of an order and a summary of grounds on which an order is made. This provision severely impedes a person's ability to oppose an order or to apply for an order to be revoked.

D. Disclosure offences

The scheme in NSW does not contain the disclosure offences contained in the Commonwealth scheme which are designed to keep the making of a preventative detention order secret. However, the Committees understand that the main reason that these offences were excluded from the Act was that:

> "..disclosure offences were not included in the New South Wales scheme as they are not effective in keeping a preventative detention order secret over a 14-day period."[4]

As noted above, the duration of the detention under the State legislation is longer as the order in NSW can be in force for up to 14 days, compared to a maximum of 48 hours under the Commonwealth scheme.

The Supreme Court can make prohibited contact orders to prevent a detained person contacting specified persons (section 26N). Section 26Y(3) provides that a police officer is not required to inform a detained person that a prohibited contact order has been made in relation to that person's detention, or the name of a person specified in the prohibited contact order. Section 26Y(3) should be deleted because it defeats the purpose of section 26N.

Monitoring of client/lawyer communications

Section 26ZI provides that communication between a detained person and a lawyer can only take place if it can be monitored by a police officer. The provision constitutes an unacceptable obstruction to lawyers performing their duty to their client. Although the communication cannot be used in evidence against the person, the rationale for legal professional privilege is to allow full and frank disclosure by the client to the lawyer. In the view of the Committees, section 26ZI is unnecessary and should be removed.

2.2. Multiple orders

The legislation provides opportunity for separate preventative detention orders to be made under sections 26D(1) and 26D(2). Orders made in this manner could see a person detained for up to 28 days (section 26K(3)).

Multiple and consecutive preventative detention orders may be issued in relation to a particular terrorist act, provided that the maximum period of detention is not exceeded.

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[4] NSW Legislative Assembly Hansard, Mr Milton Orkopoulos MP, Second Reading Speech, *Terrorism (Police Powers) Amendment (Preventative Detention) Bill*, 17 November 2005.

However, if the relevant terrorist act does not take place within the anticipated 14 day period and the date of the suspected terrorist act is revised, section 26K(7) provides an opportunity for people to be subject to further orders and they may effectively be detained for very lengthy periods.

The Committees submit that the sections permitting multiple and consecutive orders should be deleted.

2.3. Release of person from preventative detention

Section 26W provides for people to be released from detention during the period a preventative detention order is in force. Under section 26W(5)(b), people released can be returned to detention at any time while the order remains in force. This section could result in people being harassed and families disrupted, by people being released from detention during the day only for police to enter their premises and return them to custody each night during the duration of the order.

The Committees submit that section 26W(5)(b) should be deleted.

2.4. Obligation to inform

Sections 26Y(1) and 26Z(1) require that certain information must be provided to people as soon as practicable after, respectively, a person is taken into custody or a preventative detention order is made. Section 26ZA(1) provides that it is not necessary for police to give the requisite information if it is impracticable to do so.

The Committees submit that section 26ZA(1) should be deleted.

3. Part 3: Covert search warrants

The Committees are strenuously opposed to the concept of covert search warrants. The requirement for notice of an intended search is an important safeguard and in its absence lies the potential for abuse.

The Committees agree with the comments made by the Legislation Review Committee of the Parliament of NSW in its report to Parliament on the Terrorism Legislation Amendment (Warrant) Bill 2005 that introduced the covert search warrant scheme.[5] The Legislation Review Committee commented that the Bill authorises the use of very significant powers against those who may not be involved in terrorist acts. In particular it was noted that:

- the threshold for invoking the powers is suspicion on reasonable grounds (which may lead to the covert entry and search of premises of innocent people);
- it is not necessary that all or any occupiers of the premises be suspected of any criminal acts, although the Judge is to consider the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act is likely to be affected;
- the Bill specifically provides for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises;

[5] Parliament of NSW, Legislation Review Committee, Legislation Review Digest No 8 of 2005, 20 June 2005.

- the Bill allows use of covert search powers on the basis of actions which may have very little connection with any act which might harm a person, such as taking steps to join an organisation that has been proscribed by Commonwealth regulation, although the Judge must consider the nature and gravity of the "terrorist act";

- there is no requirement of imminent threat before a warrant may be issued;

- once a warrant has been issued, the Bill allows the covert search powers to be used to seize "any other thing ... that is connected with a *serious indictable offence*", without the need for any evidence of connection between that thing and a terrorist act.

In the Committees' view, the covert search warrant scheme in the Act seriously undermines the balance between the State's right to investigate and prosecute crime and the rights of individuals to carry out their proper business and lives without fear of intrusion by the State.