THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC/CLIC/PbLC/PWvk:1412104

9 November 2017

Mr Paul Miller
Deputy Secretary
Justice Strategy and Policy
Department of Justice
GPO Box 6
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Mr Miller,

Statutory review of the *Terrorism (Police Powers) Act 2002* (NSW)

Thank you for seeking the Law Society's comments on the statutory review of the *Terrorism (Police Powers) Act 2002* (NSW) ("the Act"). The Law Society's Criminal Law, Human Rights, Children's Legal Issues and Public Law Committees have considered this review.

The Law Society has previously raised serious concerns about the Act and the various amending legislation, and we reiterate the recommendations provided in our previous submissions. Copies of our previous submissions are enclosed:

- Letter to the Department of Justice dated 22 July 2015;
- Letter to the Premier dated 10 May 2016; and
- Letter to the Attorney General dated 13 July 2017.

The Law Society continues to have serious concerns about the Act as it gives police extraordinary powers and contains insufficient safeguards to protect the rights of individuals. We are particularly concerned about the impact of the investigative detention powers in Part 2AA on children and people with cognitive impairments.

In addition to the matters raised in the attached submissions, the Law Society is concerned about the operation of s 26ZH of the Act, relating to special contact rules for a person under 18, or a person who has impaired intellectual functioning detained under a preventative detention order under Part 2A. Section 26ZH(2)(b) of the Act provides police with the power to choose a person with whom the detainee maintains contact, where that person could be unknown to the detainee. As we have previously submitted, preventative detention of people without charge for an extended period of time is a highly coercive exercise of state power and contrary to fundamental common law principles and international human rights law, particularly in respect of children and people with impaired intellectual functioning. Given this, and the fact that the purpose of the contact person is to represent the person's interests, the Law Society's view is that the legislation should be amended to allow the detainee to nominate a contact person (other

than parents or guardians), and to require police to exercise best efforts to locate that person.

Moreover, the Law Society submits that it is unreasonable for the person's contact with their contact person to be limited to two hours, and submits that s 26ZH(5)(a) should be repealed.

We also note that the preventative detention powers in Part 2A have only been used once since their introduction in 2005.[1] In its recent review of Parts 2A and 3 of the Act, the Acting Ombudsman recommended that Part 2A should be allowed to expire on 16 December 2018 as the Part 2AA powers introduced in 2016 'effectively make the Part 2A powers redundant'.[2] The Acting Ombudsman also noted that the extraordinary powers in Part 2AA are not subject to civilian oversight and recommended that the Act be amended to allow the Law Enforcement Conduct Commission (LECC) to scrutinise the exercise of these powers by police.[3] To allow the LECC to perform its independent oversight functions effectively, the Acting Ombudsman also recommended that the LECC be given powers to require the production of relevant information from police.[4] The Law Society supports these recommendations.

Thank you once again for the opportunity to comment. Should you have any questions or require further information, please contact Vicky Kuek, Principal Policy Lawyer on (02) 9926 0354 or at victoria.kuek@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President

Encl.

[1] NSW Ombudsman, 'Preventative Detention and Covert Search Warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 – Review Period 2014–16' (Report, March 2017).
[2] Ibid 17–18.
[3] Ibid
[4] Ibid 14–18.

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

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Law Council
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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]

[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.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC/GUgc:1138968

10 May 2016

The Hon Mike Baird MP
Premier
GPO Box 5341
SYDNEY NSW 2001

By email: office@baird.minister.nsw.gov.au

Dear Premier,

Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016

The Law Society of NSW writes to you to raise serious concerns in respect of the Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016 ("Bill"). While some safeguards have been built into the Bill, the Law Society does not consider them to provide a sufficient safeguard of individual rights and freedoms.

In the Law Society's view, the Bill continues a concerning trend of a marked expansion of police powers, with a corresponding erosion of the rights of individuals, including vulnerable individuals such as children and people with cognitive impairments. For the reasons set out below, the Law Society is unable to support the passage of this Bill in its current form.

The Law Society notes that the legal profession has not been consulted on this Bill prior to its introduction.

1. Operation of the Bill

The purpose of the Bill is to amend the *Terrorism (Police Powers) Act 2002* ("Act") to authorise the arrest, detention and questioning of a person who is suspected of being involved in a recent or imminent terrorist act for the purposes of assisting in responding to, or preventing, the terrorist act. The Bill also extends by three years the sunset date for the offence of membership of a terrorist organisation under the *Crimes Act 1900*.

In addition to the framework currently in place allowing preventative detention, the Bill creates a new framework which enables a police officer to arrest a "terrorism suspect" without warrant, for the purposes of investigative and preventative detention. That person may then be detained for up to 14 days, in some cases without access to information that has formed the basis for the detention; and in some cases, without access to certain people, including their lawyer or members of their family. This framework can apply to children as young as 14 years old.

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2. General concerns

The Law Society has consistently opposed legislation enabling preventative detention.[1] This Bill imports and, in some cases builds on, a number of concerning features of the preventative detention framework, including in particular:

- Detention without charge for up to 14 days, which we note would not be constitutional at a Federal level, and is likely to amount to arbitrary detention.
- Monitoring certain communications, and restrictions on contact with family members.

The Law Society's concerns in respect of the existing preventative detention framework are compounded in respect of this Bill, as the proposed investigative detention framework (1) may apply to children as young as 14 years old; and (2) there is no exemption made for persons with cognitive impairments.[2]

When the Bill refers to "arrest" it applies this concept to people who have not necessarily already committed a criminal offence. Traditionally, "arrest" is the first step in detaining a person to take them before an independent Court to be charged with a criminal offence based on past conduct.

However, the proposed investigative detention framework conflates the detention of individuals for the purpose of charging a person with a criminal offence based on past conduct, with detention for the purpose of investigation of past or future conduct, as well as prevention of future conduct. This framework is outside the usual criminal justice framework, and creates difficulties in respect of usual common law and human rights protections in respect of the right not to be subject to arbitrary detention, the right to be brought before a court without undue delay, and the right to a fair hearing.

To the extent that the Bill allows detention of a person for purposes other than being charged, the Law Society considers that it involves arbitrary detention,[3] and would likely be a breach of Article 9(1) of the *International Covenant on Civil and Political Rights*, which states relevantly:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...

We note that the UN Human Rights Committee has stated clearly that the "fundamental guarantee against arbitrary detention is non-derogable".[4]

3. Specific concerns

In addition to the general concerns raised above, the Law Society has a number of specific concerns about the Bill:

- This framework marks a departure from the Act's existing framework for "preventative detention", which allows for detention only on the order of the Supreme Court, and does not apply to children younger than 16 years.

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[1] See for example the Law Society of NSW submission on the statutory review of the *Terrorism (Police Powers) Act 2002* to the NSW Department of Attorney General and Justice, 16 April 2012,

[2] We note that s 26ZH of the *Terrorism (Police Powers) Act 2002* provides for special contact rules for persons under 18 or with impaired intellectual functioning.

[3] UN Human Rights Committee General Comment no. 35, Article 9 (Liberty and Security of person), states that "to the extent that States parties impose security detention...not in contemplation of prosecution on a criminal charge, the [UN Human Rights Committee] considers that such detention presents severe risks of arbitrary deprivation of liberty" [15]. In the Law Society's view, paragraphs 15 and 16 of General Comment 35 make it clear that in these circumstances, there must be supervision by a Court (not merely an "eligible Judge") - and detention is allowed only where strictly necessary. See UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, <http://www.refworld.org/docid/553e0f984.html>

[4] Ibid, [66]

- The investigative detention framework contains insufficient safeguards in the threshold tests for arrest and ongoing detention.

    - The definition of a "terrorism suspect" is broad. It includes reference to future terrorist acts even if any of the following has not been identified: the identity of the persons who will commit the terrorist act; the kind of terrorist act that will be permitted; or the place or time of the terrorist act. Under cl 25B(1)(c), an individual might fall within the scope of this Bill simply for possessing a "thing" that is "connected with the commission of, or the preparation or planning for, a terrorist act." Presumably, this might include being in possession of a computer, or a mobile phone, and might include the parents of a child using the technology.

    - The framework authorises the detention of a terrorism suspect for investigation into a past or future terrorist act for the purposes of assisting in responding to, or preventing a terrorist act. Where a person has been arrested under these provisions, cl 25C(3) provides that a police officer is not under an obligation to take the suspect before a court or an authorised officer as soon as practicable to be dealt with according to law.

    - This would mean, for example, that a person who is arrested for the purpose of investigating a past terrorist act need not be taken before a court as soon as practicable after arrest. This appears to be a significant departure from established criminal justice processes, where the maximum initial investigation period is four hours[5]. It is not clear why the suspect of a terrorism offence should be treated any differently to a person suspected of committing any other serious criminal offence.

    - The powers of arrest under cl 25E are extraordinary in that they may be exercised by any police officer (rather than those defined as "senior police officers") and they do not require that the approval of a judicial officer unless the police seek to detain the person for more than four days.

    - The use of "eligible" Supreme Court judges may arguably be unconstitutional (at least in relation to the detention of persons not suspected of having already committed a crime), because it requires them to be involved in the continued detention for questioning of such persons after four days. We note that "eligible judges" will be acting as persona designata; that is, acting as an arm of the executive government, and not as a member of the Court in carrying out this function. Even if requiring judges to carry out these functions is not unconstitutional, the Law Society would be concerned that requiring judges to act as an arm of executive government provides no real judicial oversight, and would undermine the Supreme Court.

    - The test for arresting a terrorism suspect is broad. Under cl 25E(1), the police officer may arrest a terrorism suspect if, among other things, the police officer has reasonable grounds to suspect that the terrorist act concerned "could" occur at some time in the next 14 days (and is satisfied that the detention will substantially assist in responding to or preventing the terrorist act). A similar test is applied by the eligible judge in extending a period of detention, under cl 25I of the Bill. The test would be more targeted if the word "could" were replaced with "will" or "will likely". In relation to the threshold for the grounds required, the requirement that a police officer has "reasonable grounds to **suspect**" should at minimum be raised to "reasonable grounds to **believe**". This amendment would be more consistent with existing criminal justice tests, such as the test in s 3W of the *Crimes Act 1914* (Cth).

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[5] See s 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002* which defines the maximum investigation period as '4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant'.

- The investigative detention framework contains insufficient safeguards of the rights of terrorism suspects while they are detained.

    - The framework appears to authorise questioning for up to 16 hours per day (and potentially, even longer). Clause 25G(4) provides that a terrorism suspect must be given the opportunity to rest for a continuous period of at least 8 hours in any period of 24 hours of detention, and to have reasonable breaks during any period of questioning. However, it also states that this subsection does not prevent questioning that a senior police officer determines is necessary and reasonable because of the exceptional circumstances of the case.

    - Clause 25K allows an eligible judge to determine that particular information is "criminal intelligence" and, if so, that information will not be disclosed to the terrorism suspect or his or her lawyer. This could significantly impede the ability of a terrorism suspect to seek any form of review of, or redress for, his or her detention.

    - Clause 25L provides that a police officer may require that contact with family members and others (but not lawyers) be monitored; and clause 25M provides that an eligible judge may direct that a terrorism suspect is not to contact a person specified in the direction (including his or her lawyer). These provisions could have particularly adverse consequences on children who are detained under these provisions (eg, if not able to contact a parent) and any terrorism suspects who are denied access to their lawyers. In relation to lawyers, it is very concerning that the framework does not provide for alternative arrangements to be made to enable the terrorism suspect to access legal representation. Additionally, the broad nature of the term 'monitoring' appears to allow for the recording of contact with family members and others, without their consent and without the need to obtain a warrant. This is a significant move away from established principles and removes judicial oversight, a vital independent safeguard in balancing assessments of risk with any justification of such an invasion of privacy.

    - Clause 25N(1) provides that the regulations may make provision for or with respect to safeguards for persons while under investigative detention. Any such safeguards should be included in the legislation so that they will be the subject of proper parliamentary oversight.

- The Law Society is particularly concerned that the investigative detention framework would apply to children as young as 14 years old. The *Convention of the Rights of the Child* requires that the child's best interests be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).[6] We do not consider that the Government has adequately demonstrated why these extraordinary provisions should apply to minors, nor that it has given sufficient consideration to the potential psychological impact that such detention could have on them (including if they are subject to non-contact orders with family members).

- Clause 25P provides for the Commissioner of Police to provide annual reports on the exercise of power by police officers. Clause 25P(4) outlines the matters that should be included in these reports. The Law Society considers that additional matters should be included in this list, including:

    - the age of the individuals detained under these provisions;

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[6] The *Convention of the Rights of the Child* provides also that children have:
- the right to be protected against arbitrary discrimination or punishment (Art 2);
- the right to freedom of thought, conscience and religion (Art 14);
- particular rights relating to detention, arrest and deprivation of liberty (Art 37); and
- particular rights when alleged as or accused of infringing penal law (Art 40).

- the number of no contact orders made under the provisions, and whether or not they were applied to minors; and
- the number of times a terrorism suspect was denied access to his or her lawyer under the provisions.

- The Bill also proposes to amend the test for making preventative detention orders, under s 26D of the Act. In s 26D(1), the text would change from "any such terrorist act must be *imminent* and, in any event, be *expected* to occur at some time in the next 14 days"; and would be replaced with "there must be reasonable grounds to suspect that any such terrorist act *could* occur at some time in the next 14 days". This appears to be a lower test than the one which is being replaced, and no explanation has been given for the change.

4. Conclusion

The Law Society urges the Government to reconsider in particular the aspects of the Bill discussed above. The fundamental guarantee against arbitrary detention is a non-derogable right, particularly given that the proposed framework will extend to children as young as 14, and does not exempt people with cognitive impairments. The Law Society's view is that there is little or no evidence to suggest that it is either necessary or proportionate to create a new framework for preventative and investigative detention which breaches fundamental rights, in order to meet public and community safety concerns.

Yours sincerely,

Gary Ulman
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:Crim:PWrg1377421

13 July 2017

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Mark ~~Attorney~~ General,

Terrorism Legislation Amendment (Police Powers and Parole) Act 2017

I refer to the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (Act), which was introduced and passed by both Houses of Parliament on 21 June 2017.

The Act makes significant amendments to the *Terrorism (Police Powers) Act 2002* and the *Crimes (Administration of Sentences) Act 1999*. We note that we were not consulted on the legislation prior to its introduction, and nor did we have the opportunity to properly consider or comment on the Bill prior to it being passed.

The Law Society has a number of serious concerns with the Act, which we have detailed below.

Police powers

The Act amends the *Terrorism (Police Powers) Act 2002* to authorise 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.

We are concerned that the Act permits the authorisation of lethal force without a reasonable apprehension of injury or death to another.

Lethal force

Section 24B(1) authorises the use of lethal force on two bases:

1. Police are responding to an incident that is, or is likely to be, a terrorist act; and
2. Police believe force is reasonably necessary to either:
    a. defend people threatened by the terrorist act; or
    b. release hostages.

We have serious concerns with the breadth and haste of application of the term "terrorist act"; a decision which will be made by the Commissioner of Police, and will not be reviewable.

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The legislation creates the potential for any siege situation to be declared a terrorist act and there is a risk that lethal force becomes the norm. Pursuant to section 24B(1), the police can kill a hostage taker without a reasonable suspicion that they will actually injure the hostages; they only need to consider whether it will result in release.

Police can kill a hostage taker to prevent a threat to a hostage, and by definition, any hostage is under threat. Creating this as a test for administrative action is specious, given the test is already made out as a condition precedent i.e. police can kill any hostage taker if they take hostages.

We consider that the threshold for the use of lethal force is far too low. Section 24B(1) should be amended by deleting the phrase "to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty", and replacing it with "to prevent a serious risk of death of hostages".

We further note that increasing the use of lethal force in these situations may expand the risk of collateral damage. Tragically, the deaths of Katrina Dawson in the Lindt Café siege and David Gundy in the execution of a warrant were caused by police action.

Oversight

There are very significant consequences that flow from a declaration that an incident is, or is likely to be, a terrorist act, and these decisions should be subject to oversight.

As with other terrorism issues, the Commissioner of Police should be required to apply for a warrant from the Supreme Court as persona designata. A warrant on evidence under seal, finding that the incident is, or is likely to be, a terrorist act, would represent proper oversight. Duty judges could make these orders on an urgent basis.

It appears that the intention is that the declaration may be made by the Commissioner of Police or a Deputy Commissioner of Police and is not delegable. The legislation should specify that the power is non-delegable to provide certainty.

Parole

The Act amends the *Crimes (Administration of Sentences) Act 1999* to create a presumption against parole for anyone who demonstrates support for, or has links to, terrorist activity.

The amendments to parole are unprecedented in terms of presumption. We do not support these limits on the discretion of the Parole Authority, and note that the issues to be considered should already be considered under the existing test.

The proposed threshold for granting parole is very high, and we query how the Parole Authority could ever satisfy itself that the offender will not engage in terrorist acts. Conversely, the threshold for revocation is very low, and we query what evidence will be required for the Parole Authority to be satisfied that an offender 'may' engage in terrorism.

We submit that the Act should not be retrospective. The changes to sentencing law should not adversely affect the release of people who have already received their sentences. We support open justice and sentencing which is predictable and comprehensible by offenders.

It also appears counterintuitive that a terrorism related offender will now generally be released without supervision at the expiration of his or her sentence. It would appear logical that these types of offenders, more than any other, require a period during which they can be supervised on parole rather than being released with no supervision.

Standard of proof

There is no standard of proof for the consideration of the application of the provision. The Parole Authority considers grants of parole on balance (section 135(1) *Crimes (Administration of Sentences) Act 1999*). However, the Act is silent as to the standard for the antecedent fact.

Section 159C(2) specifies the grounds as follows: "… is known to be a terrorism offender…" without standard, and "…has become aware…" which is unclear.

If the presumption is to remain, the drafting needs to create a clear standard, such as:

> "if the Parole Authority is satisfied on balance that the offender is a terrorism offender…."; and
> "is satisfied on balance that the offender may engage in…"

Evidentiary section

The evidential section, section 159D, is unnecessary. Clause 11(3) of Schedule 1 of the *Crimes (Administration of Sentences) Act 1999* provides:

> The Parole Authority is not bound by the rules of evidence, but may inform itself of any matter in such manner as it thinks appropriate.

Amendment to the *Crimes Sentencing Procedure Act 1999*

Section 159C(4) contains a collateral amendment to the *Crimes Sentencing Procedure Act 1999*. It provides that a court may decline to make a parole order under section 50 of the *Crimes Sentencing Procedure Act 1999* if the offender is known to the court as a terrorism related offender.

The amendment should be made to section 50 of the *Crimes Sentencing Procedure Act 1999* so that people are aware of it.

The Law Society contact for this matter is Rachel Geare, Senior Policy lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President