THE LAW SOCIETY
OF NEW SOUTH WALES

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23 September 2009

Ms Penny Musgrave
Director
Criminal Law Review
NSW Department of Justice and Attorney General

Dear Ms Musgrave,

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

Thank you for the opportunity to make a submission to the review of the *Terrorism (Police Powers) Act* 2002 (Act).

The Criminal Law Committee (Committee) notes that since the previous review in May 2007, the only amendment to the Act has been to clarify that the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* apply to preventative detainees. I enclose the Committee's previous submission on the Act for your consideration.

The Committee has reviewed the comprehensive reports by the NSW Ombudsman on Parts 2A and 3 of the Act. The Committee asks that serious consideration be given to implementing the Ombudsman's recommendations, in particular the continuation of the Ombudsman's monitoring role of Parts 2A and 3 for so long as the legislation remains in force.

The Committee also notes that the Ombudsman does not a have a monitoring role in relation to Part 2 - Special Powers, and that this should be addressed through legislative amendment.

Yours sincerely,

Joseph Catanzariti
**President**

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# *STATUTORY REVIEW OF THE TERRORISM (POLICE POWERS) ACT 2002*

## Submission to the Criminal Law Review Division, NSW Attorney General's Department by the Law Society of New South Wales' Criminal Law Committee

## May 2007

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## 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 Committee 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 Committee submits that sections 16(1)(c), 17 (1)(c) and 18(1)(c) should be amended accordingly.

### Test for the authorisation of the use of the special police powers

The Committee notes that the Act was amended by the *Crimes Legislation Amendment (Terrorism) Act 2004*. The Committee is concerned with the amendment to section 5, which contains the test for the authorisation of the use of the special police powers.

Originally an authorisation would only be given if the senior police officer giving the authorisation was firstly satisfied that there were reasonable grounds for believing that there was an "imminent threat of a terrorist act". The amendment to section 5 has significantly lowered this threshold, and requires only that the senior officer is satisfied that there are reasonable grounds for believing that there is "a threat of a terrorist act occurring in the near future". The Committee is concerned with the effect of the amendment which widens the circumstances in which the police can exercise the extreme powers given to them under the Act.

### 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 Committee submits that section 13 should be removed from the Act.

## PART 2A: PREVENTATIVE DETENTION

The preventative detention scheme implements the agreement reached at the Council of Australian Governments meeting of 27 September 2005 and is intended to complement the preventative detention scheme introduced by the Commonwealth Government in the *Anti-Terrorism Act (No. 2) 2005.*

The Committee is completely 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. If the preventative detention provisions are to remain in force, the Committee makes the following suggestions for amendment.

### Applications for preventative detention orders

Period of detention

Under s 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 New South Wales scheme permits an initial 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 (ss 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.

Due to 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 without charge for up to 14 days (s 26K), which is excessive.

The maximum length of time a person can be detained should not exceed 48 hours which is consistent with the Commonwealth scheme.

Evidentiary requirements

The Commonwealth scheme operates administratively and does not allow a hearing on the merits between the parties before the expiry of the detention. While the judicial nature of the NSW scheme is preferable to an administrative scheme, the Committee has 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 s 26G is that the application must be in writing and set out the facts and other grounds upon which the police officer considers that the orders should be made.

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 (s 26O). The Committee sees no justification for why the rules of evidence should not apply. The Committee suggests 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 s 26ZB(7) the lawyer is not entitled to see any other document. The Committee is strongly opposed to this provision because the lawyer is denied the opportunity to review the evidence against his or her client. A person subject to an order should be provided with all 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.

Disclosure offences

The New South Wales scheme 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 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" (Second Reading Speech: Mr Milton Orkopoulos MP).

As noted above, the duration of the detention under the State legislation is longer - the order 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 (s 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) is accordingly absurd and should be deleted.

**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 of full and frank disclosure by the client to the lawyer will be completely undermined.

Anti-terrorism legislation in the United States and United Kingdom contain a threshold test that must be met before communications between a solicitor and client can be monitored.

In the United States the Attorney General must certify that "*reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism*" (28 CFR Parts 500 and 501: National Security; Prevention of Acts of Violence and Terrorism; Final Rule; 66 Fed. Reg. 55,061, 55,063 [October 31, 2001).

In the United Kingdom the *Terrorism Act 2000* allows for a consultation between lawyer and detainee to be held in the sight and hearing of a police officer, if a senior police officer has "*reasonable grounds to believe that such consultation would lead to interference with the investigation*" (Schedule 8, Part I, s 9 *Terrorism Act 2000*).

The Act contains no such threshold test. Proposed s 26ZI is unnecessary and should be removed. If it is not to be removed, a threshold test should be included along the lines of that in the United States or the United Kingdom.

**Multiple orders**

While much has been made of the fact that the maximum period of a preventative detention order issued NSW police will be 14 days, the public is not aware that the legislation provides opportunity for separate preventative detention orders to be made under ss 26D(1) and 26D(2). Orders made in this manner could see a person detained for up to 28 days (s 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.

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, s 26K(7) provides an opportunity for people to be subject to further orders and thus they may effectively be detained for very lengthy periods.

**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 s 26W(5)(b), people released can be returned to detention at any time while the order remains in force. This section could be used to provide an opportunity for people to be 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.

**Accommodation of detained persons**

Section 26ZC quite properly provides for the humane treatment of people being detained. However, s 26ZC(1) should be amended to include an additional requirement that a person being taken into custody or being detained under a preventative detention order:

> "must be treated with respect in relation to his or her cultural and religious beliefs".

The Act does not detail where people subject to preventative detention orders will be detained, or give any insight into the suitability of accommodation or conditions of detention, particularly for juveniles or other vulnerable detainees.

Although s 26X provides that people may be detained at a correctional centre, there is no restriction on people being detained in other accommodation, including police cells.

**Obligation to inform**

Sections 26Y(1) and 26Z(1) require that certain information must to 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.

Section 26AA(1) should be deleted.

**Sunset provision**

Section 26ZS provides that the preventative detention provisions cease to have effect 10 years after commencement. This period of time is excessively long and, if these

measures are to be introduced, they should be subject to a full Parliamentary review within a maximum of five years.

## PART 3: COVERT SEARCH WARRANTS

The Committee is 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 the potential for abuse is extreme.

The Committee agrees 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.[1] 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 will inevitably 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;
- 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.

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.

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