THE LAW SOCIETY
OF NEW SOUTH WALES

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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.

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