

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

**Legal Aid NSW submission to the
Department of Justice**

July 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979 (NSW)* to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through in-house and private legal practitioners.

Legal Aid NSW provides representation to defendants charged with terrorism offences and legal aid is available for representation in preventative detention order and prohibited contact order proceedings in the Supreme Court.

Introduction

Legal Aid NSW welcomes the opportunity to respond to the Department of Justice review of the *Terrorism (Police Powers) Act 2002 (NSW)* (the Review). As the Parliament of NSW Legislation Review Committee (Legislation Review Committee) has stated,¹ the *Terrorism (Police Powers) Act 2002 (NSW)* (Act) trespasses on a number of fundamental rights and liberties recognised under common law and international law. These rights and liberties are the foundation of the democratic society we seek to protect with anti-terrorism laws.

¹ See, for e.g. Parliament of NSW Legislation Review Committee, Legislation Review Digest, No 15 of 2005, available: <https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/79A01AA5B58E8F0ACA2570C800135F54> (last accessed 31/07/2015); Parliament of NSW Legislation Review Committee, Legislation Review Digest, No 8 of 2005, available: <https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/FB8535BCF47AB0E0CA25702600236F0A> (last accessed 31/07/2015).

Legal Aid NSW has previously expressed serious concerns with the Part 2A Preventative Detention and Part 3 Covert Search Warrant powers under the Act in the context of previous reviews by the Department of Justice and the NSW Ombudsman, many of which are repeated here.

The *Martin Place Siege Joint Commonwealth – New South Wales* review recommended:

Noting the enhancement of control order provisions in late 2014, ANZTC [Australia and New Zealand Counter Terrorism Committee] should monitor the operation of control orders, as well as preventative detention orders, to ensure they meet evolving operational needs.²

Legal Aid NSW notes that ‘the outcome of ANZTC’s work will inform the NSW Governments statutory review of the *Terrorism (Police Powers) Act 2002*.’³ Legal Aid NSW would seek to be consulted in relation to any proposed amendments to the Act as a result of the Review.

Should you require any further information, please contact Alex Curnick, Solicitor, Strategic Policy and Planning – Legal Aid NSW, 02 9219 5909 or alex.curnick@legalaid.nsw.gov.au.

Amendment of Terrorism (Police Powers) Act 2002 and reviews to date

The Act has been amended a number of times since it was introduced in 2002, and has been the subject of multiple reviews by the Legislation Review Committee,⁴ and the NSW Ombudsman in 2008, 2011 and 2014. The Ombudsman’s statutory review function is limited to the operation of Parts 2A and 3 of the Act.⁵ To date, the Legislation Review Committee and Ombudsman have expressed a number of concerns with the Act, some of which have been remedied by legislative amendment.

Part 2: Special Powers

Part 2 of the Act falls outside the scope of the Ombudsman’s review functions and has not been the subject of review by the Legislation Review Committee.⁶ Part 2 of the Act provides for extraordinary stop, search and seizure powers (special powers).

² Recommendation 13, *Martin Place Siege Joint Commonwealth – New South Wales Review*, page x.

³ Letter from Mr Andrew Cappie-Wood (Secretary of the NSW Department of Justice) to Mr Bill Grant (CEO, Legal Aid NSW) re ‘Statutory Review of the Terrorism (Police Powers) Act 2002’, 30 June 2015.

⁴ See, for e.g. Parliament of NSW Legislation Review Committee, Legislation Review Digest, No 8 of 2005; No 15 of 2005; No 7 of 2006; No 1 of 2007; No 10 of 2010. Available:

<https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/V3ListDigests?open&vwCurr=V3LRCDigestsByBill> (last accessed 31/07/2015).

⁵ See *Terrorism (Police Powers) Act 2002* (NSW) ss 26ZO, 27ZC.

⁶ The Parliament of NSW Legislation Review Committee was re-established on 2 June 2015: see <https://www.parliament.nsw.gov.au/legislationreview> (last accessed 31/07/2015).

Section 13: Authorisation not open to challenge

There is no judicial oversight of the granting of an authorisation for the exercise of special powers conferred by Part 2.⁷ Further, the Act provides that an authorisation may not be 'challenged, reviewed, quashed or called into question on any grounds whatsoever'.⁸

Legal Aid NSW appreciates that an authorisation may need to be issued urgently and for the operation to be covert. However, we do not consider that these factors mean that the authorisation should not be the subject of judicial oversight or capable of judicial review. Appropriate safeguards could be put in place to ensure the secrecy of sensitive information. Having regard to the extraordinary nature of the powers that may be exercised pursuant to an authorisation, we consider a judicial review function is essential.

Legal Aid NSW submits that section 13 should be repealed.

Sections 16, 17, 18: Power to require disclosure of identity, search of persons and search of vehicles

Part 2 of the Act provides for special powers that may be exercised by a police officer to require a person to disclose their identity, to stop and search a person and search a vehicle where an authorisation has been granted.

Whilst some of these powers are predicated on a suspicion attaching to the person⁹ or vehicle,¹⁰ the powers are also enlivened when a person or vehicle 'is in an area that is the target of an authorisation.'¹¹ Legal Aid NSW is concerned that these special powers may be triggered by mere presence of a person or vehicle in a 'target area'.¹²

Legal Aid NSW submits that sections 16(1)(c), 17(1)(c) and 18(1)(c) should be amended so that the special powers are predicated upon the police officer forming a reasonable suspicion that the exercise of the powers is necessary to achieve the purposes for which an authorisation may be granted, namely, to prevent a terrorist attack,¹³ or apprehend persons responsible for the attack.¹⁴

Part 2A: Preventative Detention Orders

As the preventative detention powers were first used in late 2014, their recent use does not form part of the Ombudsman's 2014 Review. Legal Aid NSW does not have particulars of the circumstances in which those preventative detention powers were used

⁷ See *Terrorism (Police Powers) Act 2002* (NSW) ss 8, 9.

⁸ See *Terrorism (Police Powers) Act 2002* (NSW) s 13(1).

⁹ See *Terrorism (Police Powers) Act 2002* (NSW) ss 16(1)(a), 17(1)(a), 18(1)(a).

¹⁰ See *Terrorism (Police Powers) Act 2002* (NSW) ss 16(1)(b), 17(1)(b), 18(1)(b).

¹¹ See *Terrorism (Police Powers) Act 2002* (NSW) ss 16(1)(c), 17(1)(c), 18(1)(c).

¹² See *Terrorism (Police Powers) Act 2002* (NSW) ss 16(1)(c), 17(1)(c), 18(1)(c).

¹³ See *Terrorism (Police Powers) Act 2002* (NSW) s 5.

¹⁴ See *Terrorism (Police Powers) Act 2002* (NSW) s 6.

and is therefore unable to comment concerning on any issues that may have arisen in the context of their use.

Although the laws expire in December 2015,¹⁵ Legal Aid NSW notes the Federal government has indicated that it intends to ensure the AFP can continue to use the powers in the future.¹⁶ Legal Aid NSW notes that the Ombudsman has repeatedly queried the ongoing utility of the preventative detention powers¹⁷ and that the NSW Police have expressed concerns about the operational utility of the powers.¹⁸

Legal Aid NSW considers that the objects of the Part 2A preventative detention provisions set out in section 26A of the Act are adequately met by the terrorism offence provisions in part 5.3 the *Criminal Code Act 1995* (Cth) (Criminal Code). These provisions allow for the arrest of persons suspected to be planning or to have committed a terrorist act. For example, section 101.6 of the Criminal Code makes it an offence to plan a terrorist act.

Legal Aid NSW considers that the mere use of the powers does not, of itself, demonstrate the laws are necessary.

Legal Aid NSW submits that in the absence of a clear case that the laws are necessary, the laws should be repealed.

If legislation allowing for preventative detention is to be retained, Legal Aid NSW submits that it should be in the most limited terms and include the greatest number of safeguards possible. A number of suggested amendments are set out below.

Section 26E: No detention of children under the age of 16

Section 26E provides that no child under the age of 16 may be the subject of a preventative detention order.¹⁹ The application of Part 2A to children aged 16 and 17 breaches various common law and international human rights principles.²⁰

Legal Aid NSW submits that section 26E should be amended so that Part 2A does not apply to children of any age.

¹⁵ See *Terrorism (Police Powers) Act 2002* (NSW) s 26ZS.

¹⁶ NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 (Review period 2011 – 2013)*, September 2014, available: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/parts-2a-and-3-of-the-terrorism-police-powers-act-2002-review-period-2011-2013>, [3.1].

¹⁷ See, for e.g. NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 (Review period 2008 – 2010)*, August 2011, available: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/review-of-parts-2a-and-3-of-the-terrorism-police-powers-act-2002>, recommendation 13; see also NSW Ombudsman Report (2014), above n 16, 14. It is noted however that the Ombudsman's comments in the 2014 report pre-date the use of the preventative detention powers in NSW in late 2014.

¹⁸ See, for e.g. NSW Ombudsman Report (2014), above n 16, [3.5], [3.7.1], [3.7.3].

¹⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 26E(1).

²⁰ See, for e.g. *United Nations Convention on the Rights of the Child*, Articles 37, 40.

Section 26K: Period of detention and multiple orders

Under section 26K the maximum period a person may be detained under a preventative detention order is 14 days,²¹ and multiple detention orders can be made.²²

Legal Aid NSW is of the view that 14 days is excessive, compared to a maximum of 48 hours under the Commonwealth scheme. In addition, where multiple and consecutive detention orders are made, the effect of the provision could be long term detention without charge.

Legal Aid NSW considers that the Act should specify a maximum period of detention of 48 hours per order, consistent with the Commonwealth scheme, as opposed to 'up to 14 days.'²³

Legal Aid NSW considers that the Act should specify a maximum period of detention under the Act.

Evidentiary matters

Under the Act there is no requirement that the person who is subject to the application or order be given access to the application in its entirety or the information and evidence on which it is based. People subject to a preventative detention application or order and their lawyers need sufficient detail of the application order to oppose the application or apply for an order to be revoked.

The Act provides for the detainee to receive a copy of the preventative detention order, as soon as practicable after being taken into custody,²⁴ which will contain a 'summary of the grounds on which the order is made,' unless disclosure of the information in that summary 'likely to prejudice national security.'²⁵ Other than the order, the legal representative acting for the detainee is not entitled to see any other document.²⁶ The proceedings must be held in the absence of the public and non-publication orders may be made.²⁷ Further, the Supreme Court is not bound by the rules of evidence.²⁸

Legal Aid NSW recommends the Act be amended to ensure that police must apply to the Supreme Court to dispense with the requirement to provide a summary of the grounds on which the order is made if providing the summary is 'likely to prejudice national security'.

Legal Aid NSW submits that the rules of evidence should apply.

²¹ See *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2).

²² See *Terrorism (Police Powers) Act 2002* (NSW) s 26K, especially ss 26K(4), 26(K)(6)

²³ *Terrorism (Police Powers) Act 2002* (NSW) s 26K.

²⁴ See *Terrorism (Police Powers) Act 2002* (NSW) s 26ZB.

²⁵ See *Terrorism (Police Powers) Act 2002* (NSW) s 26J.

²⁶ See *Terrorism (Police Powers) Act 2002* (NSW) s 26ZB(7).

²⁷ See *Terrorism (Police Powers) Act 2002* (NSW) s 26P.

²⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 26O.

Section 26ZI: Monitoring of client-lawyer communications by police

Section 26ZI(1) provides that communication between a lawyer and a person under a preventative detention order can only take place if it is monitored by a police officer.²⁹

The monitoring of communications between a lawyer and a detained person undermines the lawyer-client relationship. Maintaining communications is crucial to the lawyer-client relationship. It enables the lawyer to establish a relationship of confidence and trust with the client, without which full and frank disclosure will be less likely. Without full and frank disclosure, a lawyer cannot provide appropriate advice. The Legislation Review Committee has expressed similar concerns.³⁰

A solicitor's ethical duties include duties to the court and the community. The *NSW Solicitors' Rules* provide an exception to the rule of client legal privilege which require a solicitor to divulge information obtained from a client if divulging that information would avoid the probable commission or concealment of a felony.

If law enforcement authorities have concerns that a particular lawyer is prepared to assist a detainee in hindering the investigation or committing an offence, the Act enables this to be dealt with by way of a prohibited contact order.³¹

The Government undertook a consultation process with stakeholders in 2013 concerning the viability of inserting a provision in the Act which would grant the Supreme Court discretion to determine whether contact with a lawyer should be monitored.³² The Ombudsman's 2014 Report notes that the Supreme Court did not support the proposal.³³

Legal Aid NSW is of the view that section 26ZI(1) of the Act is unnecessary and should be repealed.

Part 3: Covert Search Warrants

Legal Aid NSW agrees with the comments made by the Legislation Review Committee in its report to Parliament on the *Terrorism Legislation Amendment (Warrant) Bill 2005* which introduced the covert search warrant scheme.³⁴ The absence of the requirement for notice of an intended search gives rise to significant potential for abuse. In addition, the use of covert search warrants against those who may not be involved in terrorist acts is of particular concern.

As a matter of principle, the covert search warrant scheme in the Act undermines the balance between the State's right to investigate and prosecute crime and the rights of

²⁹ See *Terrorism (Police Powers) Act 2002* (NSW) ss 26ZI(1), 26ZG.

³⁰ See Parliament of NSW, *Legislation Review Digest* (No 15 of 2005), above n1, 32, [72].

³¹ *Terrorism (Police Powers) Act 2002* (NSW) s 26N.

³² See NSW Ombudsman Report (2014), above n 16, 19, [3.4.5].

³³ See *Ibid*, 19, [3.4.5].

³⁴ See Parliament of NSW, *Legislation Review Digest* (No 15 of 2005), above n1.

individuals to carry out their proper business and lives without fear of intrusion by the State.

As at September 2014, no applications for a covert search warrant have been made by the NSW Police Force since 2005.³⁵ No application for a covert search warrant has been made by the NSW Crime Commission.³⁶

As there is no evidence or clear case that covert search warrant powers are necessary, and having regard to the powers available under the *Law Enforcement Powers and Responsibilities Act 2002* (NSW),³⁷ Legal Aid NSW is of the view that Part 3 of the Act should be repealed.

However, if the covert search warrant provisions in Part 3 are retained, Legal Aid NSW considers that a number of safeguards should be incorporated into the Act as set out below.

Video recording of searches

The Ombudsman 2008 Review recommendation 28 was:

The legislation be amended to require covert searches to be recorded in their entirety on video, unless there are compelling circumstances which make this impracticable.

Legal Aid NSW notes that the recommendation was supported in principle by NSW Police which updated the warrant SOPs to reinforce the desirability of having the execution of a covert search warrant videotaped.³⁸ Legal Aid NSW notes that the Queensland *Police Powers and Responsibilities Act 2000* (QLD) requires covert searches to be videotaped if practicable.³⁹

Legal Aid NSW considers that given the exceptional nature of the powers and the potential significant delay in notifying occupiers and adjourning premises of the covert search (up to six months, unless further postponed by a Judge), the legislation should be amended in accordance with the Ombudsman's recommendation set out above.

³⁵ See NSW Ombudsman Report (2014), above n16, 33, [4].

³⁶ NSW Ombudsman Report (2014), above n16, 36, [4.6.2].

³⁷ See NSW Ombudsman Report (2014), above n16, 36, [4.6.1]. Note however the views of the Commissioner of Police that the powers pursuant to LEPPRA do not cover all terrorist offences: *Ibid*, 36, [4.6.1].

³⁸ See NSW Ombudsman Report (2011), above n17, 37, [4.2.3].

³⁹ See *Police Powers and Responsibilities Act 2000* (QLD) s 216(e).

Scrutiny of the exercise of covert search warrants powers

Legal Aid NSW reiterates our previous submission endorsing recommendation 16 of the Ombudsman's 2011 report, namely:

That Parliament amend sections 26ZO(2) and 27ZC(2) of the Act to indicate that the Ombudsman may require information about the considered use of the powers.

The Ombudsman's ability to review incidents where the use of covert search warrants have been seriously considered but not used, is necessary for the Ombudsman to fulfil its role of scrutinising the exercise of powers conferred on police under the Act.

Legal Aid NSW notes that this recommendation was not supported by the Attorney General's 2013 statutory review.⁴⁰

Legal Aid NSW endorses the views of the Ombudsman as set out in its 2014 report:

We remain of the view that access to information regarding any considered uses of the powers under review would significantly contribute to our ability to appropriately scrutinise police decision-making. Additionally, as indicated in our 2011 report, we have not sought information that would put operations at risk and would consider receiving the information in a form that did not disclose any operational particulars.⁴¹

NSW Crime Commission Powers

The NSW Crime Commission has indicated that it has not used, nor does it need, the powers under Part 3 of the Act.⁴² Legal Aid NSW notes the Ombudsman's 2014 recommendation 3:

The next statutory review of the Act consider whether there is an ongoing need for the NSW Police Force to retain powers of preventative detention in light of the non-use of those powers in the five years following their creation and the other powers available to police to respond to and investigate terrorism.⁴³

Legal Aid NSW considers that Part 3 of the Act should be amended to remove the powers conferred upon the NSW Crime Commission and its staff.

⁴⁰ See NSW Ombudsman Report (2014), above n16, 34-35, [4.5].

⁴¹ See *Ibid*, 35, [4.5].

⁴² See *Ibid*, 36, [4.6.2].

⁴³ See *Ibid*, 36-37.

Conclusion

Legal Aid NSW is strongly opposed to the preventative detention provisions under the Act and considers that the Criminal Code provides adequate mechanisms to charge and arrest people who plan or commit terrorist acts. In particular, Legal Aid NSW considers that the laws should not apply to children of any age. Legal Aid NSW considers that there is no evidence or clear case that the preventative detention and covert search warrant powers are required and accordingly, Legal Aid NSW is of the view that Part 2A and Part 3 of the Act should be repealed.