

Statutory review of the
Terrorism (Police Powers) Act
2002

Legal Aid NSW submission to
Department of Justice

November 2017

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Legal Aid
NEW SOUTH WALES 

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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 socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing

Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Commonwealth Crime Unit is a specialist unit within the Criminal Law Division at Legal Aid NSW. The CCU provides legal advice and representation to people charged under Commonwealth criminal laws. Assistance is provided in matters including importation of border controlled substances, child sexual exploitation and terrorism.

Legal Aid NSW welcomes the opportunity to make a submission to the NSW Government in relation to the review of the *Terrorism (Police Powers) Act 2002* (NSW). Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Department of Justice's review of the *Terrorism (Police Powers) Act 2002* (NSW) (**the Act**). Legal Aid NSW acknowledges the serious threat posed by terrorism, as outlined in the recent report of the Independent National Security Legislation Monitor (**INSLM**).¹ We also acknowledge the need to balance public security with the rights of the individual and the rule of law, including compliance with Australia's international obligations. As the INSLM noted, the rights recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**) are not absolute, but may be subject to limits when those limits are prescribed by law, are not arbitrary, and conform to the principle of proportionality.²

Legal Aid NSW is concerned that the powers under review go beyond what is needed to address the threat of terrorism, and are therefore disproportionate. The Act undermines a number of fundamental rights and liberties recognised under common law and international law, particularly freedom from arbitrary imprisonment and detention without trial. These rights and liberties are the foundation of the democratic society that anti-terrorism laws seek to protect.

Legal Aid NSW supports all of the recommendations of the NSW Ombudsman's March 2017 Review of Parts 2A and 3 of the Act, including that Part 2A should be allowed to expire on 16 December 2018. We comment in further detail as follows.

Part 2AA Investigative detention

Part 2AA was inserted into the Act in 2016. Its provisions permit the arrest, detention and questioning of a person if there are reasonable grounds to suspect:

- the person has committed or will commit a terrorist act, or
- the person is or has been involved in preparing or planning for a terrorist act, or
- the person possesses a thing that is connected with the commission of, or the preparation or planning for, a terrorist act.

The police officer must be satisfied that the detention will substantially assist in responding to or preventing the terrorist act.³ The terrorist act must have occurred in the last 28 days, or the police officer must have reasonable grounds to suspect that it could occur during the next 14 days.

Legal Aid NSW was not consulted prior to the introduction of Part 2AA.

¹ Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) 4–7

² Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) [5.15]

³ *Terrorism (Police Powers) Act 2002* (NSW) s 24E

Legal Aid NSW does not support preventative detention. We consider that police should rely on their established powers to take action against suspected criminals through the traditional law enforcement approach of arrest, charge and prosecution. Persons not charged with, or found guilty of, a criminal offence should not be imprisoned by the State without trial. We agree with the concerns about Part 2AA expressed by the Law Society of NSW in their letter to the then Premier, the Hon Mike Baird MP.⁴ In particular:

- Section 25H authorises detention without charge for up to 14 days. This is likely to amount to arbitrary detention under article 9(1) of the ICCPR which prohibits arbitrary arrest and detention.
- Where the detention is for the purpose of investigating a past terrorist act, the provisions undermine the protections of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) which permits an investigation period of six hours before a person is taken before a court.⁵ Under Part 2AA, a person can be questioned without being taken before a court for four days.⁶ Legal Aid NSW considers that persons suspected of having committed terrorism offences should be subject to the same safeguards as persons suspected of other serious crimes.
- The provisions dispense with a requirement for an order of the Supreme Court (as is required for preventative detention under Part 2A) and only require a review by a senior police officer every 12 hours.
- Section 25K allows a court that is extending the maximum period of investigative detention to rely on “criminal intelligence” which is not provided to the terrorism suspect or his or her legal representative.⁷

The Australian Law Reform Commission pointed out that ‘there is a strong common law tradition against the use of secret evidence’, and article 14 of the *International Covenant on Civil and Political Rights* provides that defendants must have the opportunity to examine witnesses against them.⁸ A person’s right to know and test the evidence against them is a fundamental element of a fair hearing. However, section 25K means that a person could be detained and questioned for up to 14 days without such hearing. This extraordinary power is also unnecessary in light of the existing common rights of the state to claim public interest immunity under both the common law and section 130 of the *Evidence Act 1995* (NSW).

- The provisions permit detention without charge of children as young as fourteen.⁹ Part 2AA purports to incorporate the protections in the *Law Enforcement (Powers*

⁴ Law Society of NSW, letter to the Hon Mike Baird MP, 10 May 2016

<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1146341.pdf>

⁵ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115, *Terrorism (Police Powers) Act 2002* (NSW) s 25C(3)

⁶ *Terrorism (Police Powers) Act 2002* (NSW) s 25H

⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 25K

⁸ Australian Law Reform Commission *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* Report 129, [8.114]-[8.116]

⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 25F

and Responsibilities) Regulation 2016 with regard to vulnerable persons; however, as such provision is expressed to be “subject to this Part” and “other necessary modifications” such protections are substantially weakened.¹⁰ They are further weakened by:

- the “exceptional circumstances” exception to the maximum period of questioning (16 hours in a 24 hour period) in section 25G(4) (see our further comments below)
- the provision for monitoring contact with family members and others (in section 25L)
- the potential for a prohibited contact direction to be made in relation to a person of any kind, including a relative or a legal representative (section 25M).
- The provisions permit the detention of a person on suspicion that the person will commit a terrorist attack. However, it is already an offence to do ‘any act in preparation for, or planning, a terrorist act’.¹¹ If a person has done acts in preparation for, or planning, a terrorist attack, they should be charged with the offence. If the person has not done such acts, it is difficult to see how a reasonable suspicion that the person will commit a terrorist attack could arise. The evidence of law enforcement agencies before the COAG Review Committee regarding the Part 2A preventative detention power (and its equivalents in other jurisdictions) was 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’.¹² The grounds for detention under Part 2AA are similar to Part 2A and are therefore subject to the same criticism.
- The Act envisages a terrorism suspect being questioned for up to 16 hours per day. Even the requirement that suspects be given the opportunity to rest for 8 hours in every 24, and to have reasonable breaks during questioning, can be suspended in ‘exceptional circumstances’, which are undefined.¹³

Legal Aid NSW considers that Part 2AA should be repealed. In the alternative, we support the Ombudsman’s recommendation that there should be oversight of the use of these extraordinary powers by the Law Enforcement Conduct Commission (**the LECC**), and that the LECC should be able to require the NSW Police Force to provide the information required to exercise effective oversight.¹⁴

We further submit that other minimum protections should include:

¹⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 25O

¹¹ *Criminal Code Act 1995* (Cth) s 101.6

¹² COAG Review Committee, *Council of Australian Governments Review of Counter-Terrorism Legislation* 2013, 70

¹³ *Terrorism (Police Powers) Act 2002* (NSW) s 25G(4)

¹⁴ NSW Ombudsman *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002* March 2017, Recommendations 2, 3

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- a requirement for a court order for investigative detention
 - regular supervision of the detention by a court
 - a provision (equivalent to the ACT legislation) which permits a detention order to be made only where this is ‘the least restrictive way of preventing the terrorist act’¹⁵
 - legislating a role akin to that of special advocates in Commonwealth control order proceedings or the Public Interest Monitor (as is the case in Victoria¹⁶) in ex parte proceedings for investigative detention orders or determinations of applications by police that particular information is “criminal intelligence” under 25K of the Act.

The role of special advocates under the Commonwealth control order regime resulted from a recommendation of the COAG Review Committee and plays a vital role in any decision-making where no positive defence can be put forward on behalf of the accused or respondent.¹⁷

Children and persons with a cognitive impairment should, in any event, be exempted from the Act. In the alternative, additional safeguards should be legislated for vulnerable persons including in respect of applications for prohibited contact directions, applications for detention beyond 4 days and the maximum daily length of questioning. The usual protections of vulnerable suspects contained in LEPR should apply, without exception. Such safeguards are necessary because of the particular vulnerability of children in the face of state power, reflected in Australia’s obligations under the United Nations Convention on the Rights of the Child (**CRC**). As such, the concept of the ‘best interests of the child’ should be a primary consideration in all decisions under Part 2AA.

Part 2A Preventative detention

The Ombudsman has recommended that Part 2A should be repealed, as the Part 2AA powers make the Part 2A powers redundant. The Part 2A powers have been used once since they were enacted, and are unlikely to be used again.¹⁸ As noted above, we support the recommendation of the Ombudsman that Part 2A should expire on 16 December 2018. Given that position, we make only brief additional comments in the alternative.

¹⁵ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 16(3). We note that while Part 2AA is called ‘investigative detention’ it authorises detention for the purpose of both investigation and prevention of terrorism: s 24E

¹⁶ *Public Interest Monitor Act 2011* (Vic) s 4(h)

¹⁷ Independent National Security Legislation Monitor *Control order safeguards (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* [4.1]

¹⁸ NSW Ombudsman *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002* March 2017, Recommendation 1, [4.2], [4.3]

Under Part 2A, a police officer may apply to the Supreme Court for an interim preventative detention order. The Supreme Court may make an interim order in the absence of, and without notice to, the person subject to the order.¹⁹ An interim order must not exceed 48 hours, but further orders may be made, to a maximum of 14 days.²⁰ The grounds on which an order can be made are similar to the grounds for an order for investigative detention under Part 2AA.²¹

A detained person is permitted to contact one family member and a limited category of other people, solely for the purpose of letting the person know that the detainee is safe and being detained.²² They are permitted to contact a lawyer, but for limited purposes.²³ Contact with lawyers, family and others may be monitored.²⁴

As noted above, Legal Aid NSW does not support preventative detention. We note the concerns expressed above concerning persons not charged with, or found guilty of, a criminal offence, being imprisoned by the State without trial. We again note the potential breach of Australia's obligations under article 9 of the ICCPR and the CRC.

As with the investigative detention provisions in Part 2AA, if there is sufficient evidence to ground an application for preventative detention under Part 2A, there is likely to be sufficient evidence to prosecute. As noted above, the evidence of law enforcement agencies before the COAG Review Committee regarding Part 2A (and its equivalents in other jurisdictions) was 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'.²⁵ The Committee concluded that 'the protective and preventative aspect of the legislation would be achieved by traditional methods of arrest, interrogation and charge', and that the preventative detention powers should be repealed.²⁶

Legal Aid NSW is particularly concerned about the potential for children between 16 and 18 to be detained under Part 2A. While the 'special contact rules' provide for children and people with impaired intellectual functioning to have contact with a parent or another person, these rules fall far short of the protections provided by LEPRA. The 'other person' must be acceptable to the police officer, and contact is only permitted for two hours per day (or a longer period if determined by the Supreme Court).²⁷ For a vulnerable child, such limits on contact may be particularly harsh.

Should Part 2A be retained, it should be subject to the safeguards of Part 9 of LEPRA and the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW). At a

¹⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 26H

²⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 26K

²¹ *Terrorism (Police Powers) Act 2002* (NSW) s 26D

²² *Terrorism (Police Powers) Act 2002* (NSW) s 26ZE

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

²⁴ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZI

²⁵ COAG Review Committee, *Council of Australian Governments Review of Counter-Terrorism Legislation* 2013, 70

²⁶ COAG Review Committee, *Council of Australian Governments Review of Counter-Terrorism Legislation* 2013, 70

²⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 26ZH

minimum, section 26ZH (special contact rules for person under 18 or with impaired intellectual functioning) should be amended to remove the maximum time limit of 2 hours for contact visits (section 26ZH(5(a))) and to enable a vulnerable detainee to choose (or at least consent to) an appropriate support person other than their parent or guardian.²⁸

The Ombudsman reported that he has not been able to exercise appropriate oversight concerning the single time that the Part 2A powers were used and recommended that the Act be amended to ensure that future oversight is effective.²⁹ Legal Aid NSW is concerned about the lack of proper oversight, and considers that this recommendation should be implemented.

Part 3 Covert search warrants

Part 3 allows a Supreme Court judge to issue a covert search warrant on application by a police officer who suspects or believes, on reasonable grounds,

- that a terrorist act has been, is being, or is likely to be, committed, and
- that the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act, and
- that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.³⁰

The powers were used in 2005, and have not been used since then.³¹

Legal Aid NSW considers that these powers should be repealed. We share the concerns of the Legislation Review Committee which, when this Bill was introduced to Parliament, noted that:

- The search powers significantly trespass on the personal right to privacy and property.
- The Bill provides for very significant trespasses on the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act.
- The Bill provides no protection in relation to reasonable responses by occupiers discovering covert intruders who are executing a warrant.

²⁸ Consistent with the Regulation 30 of the LEPRA Regulation 2016

²⁹ NSW Ombudsman *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002* March 2017, Recommendation 2

³⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 27G

³¹ NSW Ombudsman *Preventative detention and covert search warrants: Review of parts 2A and 3 of the Terrorism (Police Powers) Act 2002* September 2014, [4.3]

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- Notice to occupiers who have been subject to a covert search warrant does not have to be given for six months, and can be postponed for 18 months, or even longer in 'exceptional circumstances'.³²

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

There is provision for covert search warrants in Part 5 of LEPR. The Ombudsman has noted that the LEPR provisions mirror the provisions in Part 3 of the Act, and could be used to investigate terrorist activities. In some ways the requirements in Part 3 of the Act are more onerous than LEPR.³³ In our view, the Part 3 powers are unnecessary.

If the powers are to be retained, we consider that further safeguards should be incorporated into the Act. The Ombudsman's recommendation that covert searches should be recorded in their entirety should be implemented.³⁴

³² NSW Parliament Legislation Review Committee *Legislation Review Digest* No 8 of 2005 [26]-[45]

³³ NSW Ombudsman *Preventative detention and covert search warrants: Review of parts 2A and 3 of the Terrorism (Police Powers) Act 2002* September 2014, Ch 4

³⁴ NSW Ombudsman *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002* September 2008 [4.4.7]