

## **Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005**

### **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

The object of this Bill is to amend the *Terrorism (Police Powers) Act 2002* (***the Principal Act***) to give effect in New South Wales to the decision of 27 September 2005 of the Council of Australian Governments that States and Territories introduce legislation on preventative detention of persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act (to complement Commonwealth legislation for preventative detention for up to 48 hours). The Commonwealth legislation is an amendment to the Commonwealth Criminal Code set out in the Commonwealth *Anti-Terrorism Bill (No 2) 2005* (***the Commonwealth Bill***).

The principal features of the scheme for preventative detention orders in this Bill are as follows:

- (a) Preventative detention orders may be issued, on the application of a duly authorised police officer, in circumstances relating to preventing an imminent terrorist act or relating to preserving evidence of terrorist acts that have occurred.
- (b) Preventative detention orders may be issued by the Supreme Court (either after detention under the Commonwealth Bill or directly without any such prior Commonwealth detention). The Commonwealth Bill provides for initial preventative detention orders to be made by senior members of the Australian Federal Police (for a period of up to 24 hours) and for continued detention (for a further period of up to 24 hours) to be authorised by continuing detention orders made by specially appointed judges, former judges and members of the Administrative Appeals Tribunal acting in their personal capacity.
- (c) Pending the hearing and final determination of an application for a preventative detention order, the Supreme Court may make an interim preventative detention order in the absence of, and without notice to, the person to be detained. An interim order remains in force for no more than 48 hours after the person is first taken into custody.
- (d) A person may be detained under a preventative detention order that is not an interim order for a maximum period of 14 days. This maximum period is reduced by any period of actual detention under an interim order, another preventative detention order or an order under a corresponding law of the Commonwealth, or another State or a Territory, against the person in relation to the same terrorist act.
- (e) Preventative detention orders may not be made in relation to persons under 16 years of age.
- (f) A police officer or the person detained may apply to the Supreme Court for the revocation of a preventative detention order.
- (g) The Court may make a prohibited contact order that prohibits a person detained under a preventative detention order from contacting persons specified in the order.
- (h) While a person is detained under a preventative detention order, the persons who may be contacted by the detainee, and the nature of the contact, is restricted. Subject to any prohibited contact order, the detained person is entitled to contact certain specified persons, including a family member, a person who the person being detained lives with, the person's employer, the person's lawyer, the Ombudsman and the Police Integrity Commission.
- (i) Unlike the Commonwealth Bill, the detainee is, during the longer period of

detention under the State legislation, entitled to inform family members and others of his or her detention and its duration (not merely that he or she is safe but not contactable).

(j) A person being detained under a preventative detention order must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

(k) A person being detained cannot be questioned except for the purposes of establishing identity or ensuring his or her safety and well-being.

(l) The legislation sunsets after 10 years.

Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the Principal Act set out in Schedule 1.

### **Schedule 1 Amendments**

**Schedule 1 [1]** inserts a new Part 2A (Divisions 1–6) into the Principal Act, which establishes the scheme for preventative detention orders.

Proposed Division 1 (comprising proposed sections 26A–26C) deals with preliminary matters that are similarly dealt with in the Commonwealth Bill.

Proposed section 26A sets out the object of the new Part, which is to allow a person to be taken into custody and detained for a short period of time in order to:

- (a) prevent an imminent terrorist act, or
- (b) preserve evidence of, or relating to, a recent terrorist act.

Proposed section 26B sets out definitions for the purposes of the proposed new Part.

Proposed section 26C ensures that functions expressed to be imposed by the new Part on a police officer detaining a person under a preventative detention order are imposed on the most senior police officer involved in any particular detention.

Proposed Division 2 (comprising proposed sections 26D–26P) deals with the making, duration and revocation of preventative detention orders and prohibited contact orders.

Proposed section 26D sets out the circumstances in which a preventative detention order may be made to achieve the object of the new Part in similar terms to the Commonwealth Bill.

Proposed 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.

Proposed section 26F enables a police officer to apply for a preventative detention order if the police officer is satisfied that those circumstances under section 26D apply and the police officer has obtained the approval of the Commissioner of Police, a Deputy Commissioner of Police or an Assistant Commissioner of Police responsible for counter-terrorism operations.

Proposed section 26G sets out the matters that must be contained in an application for a preventative detention order.

Proposed section 26H enables the Supreme Court (*the Court*) to make an interim preventative detention order, pending the hearing and final determination of the application for a preventative detention order. When making an interim order, the Court is to set a date and time for the hearing and give directions for notice of the hearing to be given to the detainee or his or her representative.

Proposed section 26I provides that the Court, after a hearing of the application for a preventative detention order, is to make a final determination on whether to make the order.

Proposed section 26J provides for the matters that must be set out in a preventative detention order.

Proposed section 26K provides for the maximum period under which a person may

be detained under a preventative detention order, namely, 14 days less any related period of detention in respect of the same terrorist act.

Proposed section 26L provides for the duration of preventative detention orders and provides, in particular, that interim orders cannot extend beyond 48 hours after the person was first taken into custody.

Proposed section 26M provides for the revocation of preventative detention orders by the Court (on the application of a police officer or the detainee).

Proposed section 26N enables a police officer to apply to the Court for an order (referred to as a **prohibited contact order**) prohibiting a person to contact specified persons during the person's detention under a preventative detention order.

Proposed section 26O provides that, as is the case with bail review hearings, the strict rules of evidence do not apply to proceedings before the Court in connection with applications for the making or revocation of preventative detention orders or prohibited contact orders.

Proposed section 26P provides for any such proceedings to be heard in the absence of the public and for the making of suppression orders by the Court. A disclosure in contravention of such a suppression order constitutes an offence punishable by imprisonment not exceeding 5 years.

Proposed Division 3 (comprising proposed sections 26Q–26X) generally deals with matter, relating to the carrying out of preventative detention orders, set out in proposed Subdivision C of Division 105 of the Commonwealth Criminal Code under the Commonwealth Bill.

Proposed section 26Q enables any police officer to take a person who is the subject of a preventative detention order into custody and detain the person while the preventative detention order is in force. The proposed section confirms that the power of police officers to detain and prevent the escape of the detainee is the same as that applicable under the State's law when a police officer arrests a person in connection with an alleged offence.

Proposed section 26R provides for the oversight by a senior police officer nominated by the Commissioner or a Deputy Commissioner of Police (or relevant Assistant Commissioner) of the exercise of functions under a preventative detention order.

Proposed section 26S provides for details of the date and time a person is first taken into custody to be endorsed on the order.

Proposed section 26T enables a police officer to request a person to disclose his or her identity if the officer believes on reasonable grounds that the person may be able to assist in the execution of a preventative detention order.

Proposed section 26U provides for a power to enter premises for the purposes of searching for a person who is the subject of a preventative detention order.

Proposed section 26V provides for the carrying out of ordinary personal searches and frisk searches of a person who is the subject of a preventative detention order.

Proposed section 26W provides that a detainee may be released from detention under an order at any time (including for the purposes of being arrested and charged for an offence). The period during which a person may be detained under a preventative detention order continues to run while the person is released.

Proposed section 26X makes provision in relation to arrangements for a person being detained under a preventative detention order to be detained at a correctional centre or, if under 18 years, at a juvenile detention or correctional centre.

Proposed Division 4 (comprising proposed sections 26Y–26ZB) generally deals with matter, relating to informing a person detained under a preventative detention order about the effect of the order, contained in proposed Subdivision D of Division 105 of the Commonwealth Criminal Code under the Commonwealth Bill.

Proposed sections 26Y, 26Z and 26ZA require a police officer detaining a person under a preventative detention order to inform the person of matters, set out in the proposed sections, relating to the effect of the preventative detention order (and the

rights and obligations of the detainee).

Proposed section 26ZB provides for a person detained under a preventative detention order to be given a copy of the order and a summary of the grounds on which the order is made.

Proposed Division 5 (comprising proposed sections 26ZC–26ZM) generally deals with matter, relating to the treatment of a person detained under a preventative detention order, set out in proposed Subdivision E of Division 105 of the Commonwealth Criminal Code under the Commonwealth Bill.

Proposed section 26ZC requires a person being detained under a preventative detention order to be treated with humanity and respect for human dignity, and not to be subjected to cruel, inhuman or degrading treatment.

Proposed section 26ZD provides for the general restrictions relating to the contact that a person detained under a preventative detention order may have with other people.

Proposed section 26ZE entitles the person being detained to limited contact with certain persons, including a family member, a person he or she lives with, an employee or an employer. The detainee will be entitled to disclose the fact of the person is detained under an order and the period of detention.

Proposed section 26ZF entitles the person being detained to contact the Ombudsman and the Police Integrity Commission.

Proposed section 26ZG enables a person being detained to contact a lawyer.

Proposed section 26ZH makes special provision in relation to the contact that a detained person who is under 18 years of age or incapable of managing his or her affairs may have with a parent, guardian or a person who is able to represent the person's interests.

Proposed section 26ZI provides for monitoring by a police officer of contact that a person being detained under a preventative detention order may have under proposed section 26ZE, 26ZG or 26ZH.

Proposed section 26ZJ provides that an entitlement to contact that a person being detained under a preventative detention order has under proposed section 26ZE, 26ZG or 26ZH is subject to any prohibited contact order relating to the person's detention.

Proposed section 26ZK prohibits a police officer questioning a person being detained under a preventative detention order except for limited purposes.

Proposed section 26ZL makes provision in relation to taking fingerprints, recording the voice, taking samples of handwriting or photographs of a person being detained.

Proposed section 26ZM limits the purpose for which any such personal identification material relating to a detainee may be used and provides for its destruction.

Proposed Division 6 (comprising proposed sections 26ZN–26ZS) generally deals with matter set out in proposed Subdivision F of Division 105 of the Commonwealth Criminal Code under the Commonwealth Bill. Among other things, it provides:

(a) for the preparation of annual reports by the Commissioner of Police in relation to preventative detention orders made during the year concerned (proposed section 26ZN), and

(b) that functions of police officers and correctional officers under the new Part are to be monitored during the first five years by the Ombudsman (proposed section 26ZO), and

(c) that functions of the Ombudsman or the Police Integrity Commission under other Acts are not affected by the new Part (proposed section 26ZP), and

(d) for the sunseting of the new Part at the end of 10 years after its commencement (proposed section 26ZS).

**Schedule 1 [2]** inserts proposed section 30A into the Principal Act, which enables the Independent Commission Against Corruption and the Police Integrity Commission to enter into arrangements with the Commissioner of Police for the use

of their staff or facilities in connection with the investigation of suspected or possible terrorist acts.

**Schedule 1 [3]** makes a consequential amendment to section 34 of the Principal Act.

**Schedule 1 [4]** inserts proposed section 36 (1B) into the Principal Act, which enables the Minister to require the Commissioner of Police to provide information about the exercise of functions by police officers under the proposed Part 2A for the purposes of the review of the Principal Act provided for in section 36.