Terrorism (Police Powers) Amendment Bill 2015
Bail Amendment Bill 2015 (Proof)

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Extract from NSW Legislative Council Hansard and Papers Tuesday 27 October 2015 (Proof).

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [9.55 p.m.], on behalf of the Hon. John Ajaka: I move:

That these bills be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Terrorism (Police Powers) Amendment Bill 2015 to amend the Terrorism (Police Powers) Act 2002 in relation to the schemes for preventative detention orders and covert search warrants, and the Bail Amendment Bill 2015, to amend the Bail Act 2013 to make further provision for bail decisions.

The New South Wales Government is resolved to take all possible steps to protect the community from the risk of terrorism. These bills are an important part of that work.

The recent events at Parramatta and which took place at Martin Place last year have reinforced the need for ongoing review and scrutiny of our legislation, to ensure New South Wales laws remain up to date and able to respond to terror threats.

These bills will ensure that the NSW Police Force can continue to apply for preventative detention orders to detain a person for up to 14 days where it is necessary to prevent a terrorist act or preserve evidence following a terrorist act.

They will also strengthen the Bail Act 2013 so that some people accused of a criminal offence can only be bailed if there are exceptional circumstances, including those subject to a terrorism control order or with a previous terrorism conviction. Links with terrorist organisations and support for violent extremism will also be added to the list of matters taken into account when making a bail decision.

It is appropriate that the Government makes these changes to ensure these laws remain effective and are responsive to the extraordinary harm which can be caused by terrorism.

Background to the Terrorism (Police Powers) Act 2002 and Review

The Terrorism (Police Powers) Amendment Bill implements the legislative recommendations of the statutory review of the Terrorism (Police Powers) Act 2002. The Review was conducted by the Department of Justice and tabled today, 20 October 2015.

The statutory review was the fifth review of the Terrorism (Police Powers) Act. The fifth review covers the period 2013 to 2015 and examines the operation of the Act with respect to its policy objectives.

The Review also covers recommendations made by the NSW Ombudsman's 2014 review of parts 2A and 3 of the Terrorism (Police Powers) Act, tabled in Parliament on 11 November 2014.

The Terrorism (Police Powers) Act was assented to on 5 December 2002 and confers special powers on police officers to deal with imminent threats of terrorist activity and to respond to terrorist attacks.

The Terrorism (Police Powers) Act was drafted in the wake of the September 11 terrorist attacks and Bali bombings, when all States and Territories in Australia agreed to refer powers to the Commonwealth in relation to terrorism.

The policy objectives of the Terrorism (Police Powers) Act are to give police officers special powers to deal with imminent threats of terrorist activity and effectively respond to terrorist acts after an attack has occurred.

The Terrorism (Police Powers) Act enables police to use preventative detention orders to detain suspects for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act. The Act also establishes a regime that enables the covert entry and search of premises by specially authorised police officers.

In accordance with a recommendation of the Ombudsman's 2011 review of parts 2A and 3 of the

Terrorism (Police Powers) Act and the 2013 Department of Justice statutory review, a key consideration of this review relates to the preventative detention scheme.

In December 2014, the Commonwealth Government extended the sunset period for its preventative detention order scheme for a further three years. The Commonwealth cited the current heightened terror threat environment and extended the scheme, believing it is crucial for law enforcement agencies to retain effective mechanisms to respond to and manage emerging terror threats.

The New South Wales Government acknowledges that States and Territories, including New South Wales, agreed to enact these extraordinary powers as part of a complementary scheme to the Commonwealth legislation. It is also important that law enforcement agencies have the necessary powers to keep our community safe.

Findings of the Review

The Justice Strategy and Policy branch of the Department of Justice has undertaken the review on my behalf. In undertaking the review, the Department of Justice engaged with relevant stakeholders including:

• NSW Police Force;

• Australian Federal Police;

• Law Society of NSW;

• Legal Aid NSW;

• Public Defenders Office; and

• Justice Price, the Chief Judge of the District.

As already noted, the review was conducted at a time when Australia continues to face an increased security threat.

The Commonwealth Government's recent Review of Australia's Counter Terrorism Machinery 2015 notes the threat of terrorism in Australia is rising and becoming harder to combat, particularly as there are an increasing number of Australians joining extremist groups overseas, as well as an increasing number of potential terrorists, supporters and sympathisers in our community.

Against this background, the review recognises the need to ensure that Commonwealth, State and Territory counterterrorism frameworks remain robust, and that law enforcement and security agencies have the tools they need to operate effectively.

In light of this heightened security threat, the review concluded the policy objectives of the Terrorism (Police Powers) Act remain valid, and made two key recommendations that require legislative amendment:

(1) To extend the operation of the preventative detention order powers under the Terrorism (Police Powers) Act, which are due to expire on 16 December 2015 for a further three years until 16 December 2018; and

(2) To remove the NSW Crime Commission's powers to apply for covert search warrants, which was requested by the NSW Crime Commissioner. The review considered the power to apply for a covert search warrant should be limited to those agencies that directly need to use such powers and, accordingly, has agreed with the NSW Crime Commissioner's request for the powers to be removed from the NSW Crime Commission.

Explanation of PDO scheme

The scheme for preventative detention orders, known as PDOs, is established under part 2A of the Terrorism (Police Powers) Act. The scheme commenced on 16 December 2005 and is due to sunset on 16 December 2015. It is part of uniform model laws as agreed to at the Council of Australian Governments [COAG] meeting on 27 September 2005.

Under the scheme, the NSW Police Force can apply to the Supreme Court for a PDO if there is a reasonable suspicion that the person will engage in a terrorist act, or has done an act in preparation for, or planning, a terrorist act, and the PDO would assist in preventing a terrorist act occurring.

PDOs can also be made where a terrorist act has occurred in the past 28 days and the order is reasonably necessary to preserve evidence. The maximum detention period for a PDO under the scheme is 14 days.

The Australian Federal Police and the NSW Police Force both submitted to the review that the PDO

powers remain useful in their "toolkit" of law enforcement powers.

The review notes the concerns raised by stakeholders regarding the retention of the PDO scheme, in particular by the Law Society of NSW, Legal Aid NSW and the Public Defenders, who all reiterated their opposition to the PDO provisions on the basis that persons who are not charged with, or found guilty of, a criminal offence should not be imprisoned by the State without trial. However, the review recommends extension of the PDO scheme for a further three years.

As noted in the second reading speech on the Terrorism (Police Powers) Amendment (Preventative Detention) Bill in 2005, when the Labor Party introduced the PDO powers, these were designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability measures.

These measures include oversight by the Supreme Court, that people be treated humanely, that people be given a copy of the relevant order, and that detained persons may contact specified people and have access to a lawyer.

As these safeguards remain in place under the Terrorism (Police Powers) Act and, against the background of a heightened security threat, the review concludes the PDO provisions should be retained, and the sunset date for those provisions should be extended for a further three years, until 16 December 2018.

Summary of Terrorism (Police Powers) Amendment Bill

I now turn to the detail of the Terrorism (Police Powers) Amendment Bill. Schedule 1 of the bill relates to amendments to the preventative detention order provisions in part 2A of the Terrorism (Police Powers) Act.

These powers are extraordinary and appropriately have to date been used sparingly. Importantly, the preventative detention order provisions seek to maintain a balance between protecting the rights of persons subject to an order, against the need to protect the community from terrorist acts. For example, the Terrorism (Police Powers) Act provides for a prohibition on questioning the detained person, and the NSW Ombudsman maintains oversight over the use of these powers.

Schedule 1 clauses [1] and [2] extend the current sunset provision of the preventative detention order powers, which will now continue to operate until 16 December 2018.

Part 3 of the Terrorism (Police Powers) Act relates to covert search warrants. These provisions commenced on 16 December 2005 and enable specially authorised police officers or staff of the NSW Crime Commission to covertly enter and search premises, under the authority of a special covert search warrant, for the purposes of responding to or preventing terrorist acts. Only eligible Supreme Court judges can issue such warrants.

The Ombudsman's 2014 review of the powers noted that in January 2014 the NSW Crime Commissioner expressed the view that, while there is a continued need for the covert search powers, it is unnecessary for those powers to be available to the NSW Crime Commission.

The NSW Crime Commissioner advised that the use of those powers would ordinarily be deferred to the NSW Police Force, and that the NSW Crime Commission lacks the appropriately trained staff and equipment necessary to conduct covert searches.

The review supported this recommendation, agreeing that the extraordinary powers conferred by the Terrorism (Police Powers) Act should be strictly limited to agencies that would directly use them.

Accordingly, schedule 1 clauses [3] to [20] of the Terrorism (Police Powers) Amendment Bill remove the powers of the NSW Crime Commissioner and staff of the NSW Crime Commission under that part.

Schedule 1 clauses [21] to [23] make consequential amendments to the Terrorism (Police Powers) Act, and enable any saving and transitional regulations to be made, as a consequence of the amendments contained in the Terrorism (Police Powers) Amendment Bill.

Conclusion of the Terrorism (Police Powers) Amendment Bill

The New South Wales Government acknowledges the current trend towards low-tech "lone actor" attacks, which are exponentially harder to disrupt as there may be no visibility of planning and no time delay between intent and action.

Against this background, the New South Wales Government recognises the need to ensure that Commonwealth, State and Territory counterterrorism frameworks remain robust, and that law enforcement and security agencies have the tools they need to operate effectively.

Extending the PDO scheme is but one measure the New South Wales Government has to address the increasing threat of terrorism. It is a sensible proposal to extend this scheme for a further three years.

The Bail Amendment Bill

The Bail Amendment Bill has three purposes. First, it makes amendments to the Bail Act 2013 to give effect to recommendations made by former Attorney General, now District Court Judge, John Hatzistergos in the final report of his review of the Bail Act. Second, it makes amendments to the Bail Act in response to the Sentencing Council's report on additional "show cause" offences completed earlier this year. Third, it makes amendments to the Bail Act in response to the joint Commonwealth-New South Wales Martin Place siege review.

Hatzistergos Review

In June 2014, the Government established the Hatzistergos review of the Bail Act 2013 to ensure the safety of the community, victims and witnesses is at the forefront of all decisions made on bail.

The Hatzistergos review made an interim report in July 2014, which included a number of recommendations to strengthen provisions in the Bail Act. The Government accepted all of the recommendations, which were implemented through the Bail Amendment Act 2014.

The key feature of the Bail Amendment Act was to introduce a new "show cause" test for adults charged with certain offences that pose significant risks to the community. This new "show cause" test has been in force since 28 January 2015 and requires people charged with these offences to "show cause" why their detention is not justified.

Judge Hatzistergos has now completed his final review of the Bail Act and has made a number of final recommendations, which have been accepted by the Government. This bill does not implement the second limb of recommendation 15, which would allow police to make a bail determination after a person has had a mental health assessment. The intersection between the Bail Act 2013 and the Mental Health (Forensic Procedures) Act 1990 is complex and the New South Wales Government will bring forward an amendment after it receives advice from the Bail Act Monitoring Group.

Overall, Judge Hatzistergos found the amended Bail Act and the "show cause" test are working well, and his recommendations in the final report aim to address operational issues and further streamline the operation of the Bail Act.

These recommendations were formed after extensive consultation with stakeholders and careful consideration of bail decisions made under the Bail Act, as amended.

These are important changes that will continue to strengthen and streamline the operation of the Bail Act 2013 and ensure that serious offenders are dealt with appropriately.

Sentencing Council Report

The Government referred three matters to the Sentencing Council in connection with the Bail Act in September 2014 and in January 2015.

The Sentencing Council was asked to consider:

• Whether the "show cause" category under the Bail Act should be extended to include people charged with an offence while already serving a sentence, that is, in prison or in the community;

• The definition of "serious personal violence offence" within the "show cause" category; and

• The existing "show cause" category of committing a serious indictable offence while on bail.

The Sentencing Council recommended the definition of "serious personal violence offence" be expanded to include offences under the law of the Commonwealth, another State or a Territory or of another country that are similar to the offences under part 3 of the Crimes Act 1900 (NSW) that are punishable by imprisonment for a term of 14 years or more.

The Bail Amendment bill picks up this recommendation and will ensure that a person charged with a "serious personal violence offence" in New South Wales, who has been convicted of a similar offence in any jurisdiction, will now be required to show cause why their detention is not justified.

The other matters referred to the Sentencing Council will be considered as part of the Sentencing Council's ongoing role in monitoring the "show cause" categories.

Martin Place Siege Review

The Bail Amendment Bill also makes amendments to the Bail Act in response to the joint Commonwealth-New South Wales Government Martin Place siege review.

The siege review recommended that bail authorities be required to take into account links with terrorist

organisations or violent extremism.

The Bail Amendment Bill implements this recommendation by adding new terrorism-related factors to the list of matters which are taken into account for the "unacceptable risk" test that bail authorities apply when considering whether or not to grant bail. These will include a person's associations with terrorist organisations and statements or activities in support of terrorist acts or violent extremism.

In addition, as announced on 28 August this year, the Bail Amendment Bill will introduce a new test requiring bail to be refused unless there are "exceptional circumstances". This new "exceptional circumstances" test will apply to an accused person charged with an offence carrying a custodial penalty who:

• is subject to a terrorism control order;

• has a previous terrorism conviction under Commonwealth or New South Wales law; or

• has separately been charged with a terrorism offence and the proceedings have not yet concluded.

The new test will also apply to a person charged with being a member of a terrorist organisation under the New South Wales Crimes Act 1900. The new exceptional circumstances test provides for a higher threshold than the existing "show cause" test, so that bail will only be granted when the circumstances are exceptional.

A similar test applies under section 15AA of the Commonwealth Crimes Act 1914 so that bail must not be granted for a Commonwealth terrorism offence unless exceptional circumstances exist to justify bail. While the new test will be applied on a case-by-case basis, New South Wales courts may find guidance in decisions under the Commonwealth provisions.

Summary of the Bail Amendment Bill

I now turn to the detail of the Bail Amendment Bill.

Schedule 1 contains amendments to implement the final recommendations of the Hatzistergos review of the Bail Act 2013 and the recommendation of the NSW Sentencing Council in its report "Bail—Additional Show Cause Offences".

Clause [1] will amend section 4 to insert necessary definitions.

Clause [2] will amend section 16B to insert a new "show cause" offence for a serious indictable offence committed by an accused person subject to an arrest warrant issued under the Bail Act 2013 or part 7 of the Crimes (Administration of Sentences Act) 1999. The "show cause" test already applies to a serious indictable offence committed while on bail or parole. This amendment will correct an anomaly so that the "show cause" test applies if bail or parole has been revoked and a warrant has been issued before the alleged further offending.

Clause [3] will amend section 16B to insert a new definition of "serious personal violence offence" as recommended by the NSW Sentencing Council. The expanded definition will require a person accused of a "serious personal violence offence" in New South Wales to satisfy the "show cause" test if previously convicted of a similar offence in any Australian or overseas jurisdiction. Currently, the definition only includes previous New South Wales offences.

Clause [4] will add a history of compliance or noncompliance with additional sentencing orders to the list of matters in section 18 which must be considered by a bail authority in assessing bail concerns under the unacceptable risk test. A history of compliance or noncompliance may assist in assessing the level of risk and likelihood of future compliance with orders and conditions.

Clause [5] will amend section 18 to require a bail authority to consider any previous warnings issued to an accused regarding noncompliance with a bail acknowledgment or bail condition if a further breach is established. Previous warnings from police officers or bail authorities may also be relevant to assessing the level of risk and likelihood of future compliance.

Clause [6] will amend section 18 of the Bail Act so that if the accused person has been convicted of an offence but not yet sentenced, the bail authority must take into account the likelihood of a custodial sentence being imposed when assessing bail concerns for the purposes of the unacceptable risk test. This is consistent with the existing requirement to consider the likelihood of a custodial sentence if the person is convicted, which applies to bail decisions before a verdict is reached. A strong likelihood of imprisonment may be relevant to a concern that the offender will fail to appear in later proceedings.

Clause [7] will amend section 28 of the Bail Act so that arrangements can be made by bail conditions for a person to be released on bail to be admitted to a residential rehabilitation facility. Under this type of "pre-release condition", an accused person who is suitable for rehabilitation can be remanded in custody until a place becomes available in the residential facility.

The expanded note to be inserted by clause [8] clarifies that in making such a condition, the court can provide for the accused person to be accompanied to the facility, for example, by a family member.

Clause [9] will amend section 43 to permit a police officer of or above the rank of sergeant to make a bail decision if an accused person is receiving treatment in hospital and it is not reasonable to take the person to a police station due to incapacity or illness. This will avoid the need to organise a bedside court where the police officer makes a decision to grant bail.

Clause [10] is a consequential amendment to section 47 which provides for review by a senior police officer of a bail decision made by a police officer at a hospital.

Clause [12] will amend section 78 to remove the requirement for a bail authority to be satisfied that the decision to refuse bail is justified, having considered all possible alternatives. This requirement currently applies when the bail authority is reconsidering bail because the accused person has failed or is about to fail to comply with a bail acknowledgment or a bail condition. Removing this requirement clarifies that the show cause and unacceptable risk tests apply where a breach has been established, as for any other bail decision.

The note to be inserted by clause [11] clarifies that the power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision.

I would like to take this opportunity to thank Judge Hatzistergos for his careful and detailed work in reviewing the Bail Act 2013. The Government welcomes the review's finding that overall the Act is working well, and will continue to monitor its operation and the implementation of these amendments through the Bail Act Monitoring Group.

Schedule 2 of the Bail Amendment bill makes amendments to the Bail Act in response to the joint Commonwealth-New South Wales Martin Place siege review.

Clause [1] will amend section 4 to insert necessary definitions and clause [2] makes a consequential amendment to section 16B.

Clause [3] will amend section 18 to include three new terrorism-related factors in the list of matters to be considered by the bail authority in an assessment of bail concerns for the purposes of the unacceptable risk test. These are whether the accused has any associations with a terrorist organisation, whether the accused has made statements or carried out activities advocating support for terrorist acts or violent extremism, and whether the accused has any associations or affiliation with any persons or groups advocating such support.

Links to terrorism and those who advocate support for it are relevant in assessing bail concerns under section 18 for the purposes of the unacceptable risk test. The bail authority must refuse bail if satisfied there is an unacceptable risk that the accused will fail to appear, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence.

In assessing bail concerns, the bail authority relies on the information made available to it, and it is acknowledged that a person's links to terrorism will not always be known or able to be disclosed. In particular, information may be held by a Commonwealth agency or available to only a limited number of police officers. Information may also be classified or sensitive, and unable to be disclosed without compromising an ongoing investigation or officer safety.

Clause [4] will insert a new test so that bail must be refused unless it is established that exceptional circumstances exist. It will apply when a person is charged with being a member of a terrorist organisation under section 310J of the NSW Crimes Act 1900.

The new test will also apply to an accused person charged with any offence carrying a custodial penalty in three circumstances. The first is if the accused has already been charged with a terrorism offence under Commonwealth law as defined in the Commonwealth Crimes Act 1914, or section 310J of the NSW Crimes Act 1900, and the proceedings relating to that offence have not concluded. The second is if the accused person has a previous conviction for a Commonwealth or New South Wales terrorism offence. The third is if the accused is subject to a control order under the Commonwealth Criminal Code.

The new test provides for a higher threshold than the existing "show cause" test so that bail will only be granted when the circumstances are exceptional.

A similar test applies under section 15AA of the Commonwealth Crimes Act 1914 so that bail must not be granted for a Commonwealth terrorism offence unless exceptional circumstances exist to justify bail. While the new test will be applied on a case-by-case basis, New South Wales courts may find guidance in decisions under the Commonwealth provision.

Clause [4] also clarifies that if the offence is also a "show cause" offence, the requirement that the accused person establish exceptional circumstances will apply instead of the "show cause" test. If the person is able to establish that exceptional circumstances exist, the bail authority must then go on to

apply the unacceptable risk test.

The Bail Amendment Bill will commence upon proclamation. Time for implementation of these changes is needed to ensure that systems and forms are updated, and appropriate training and resources are in place for the police, judiciary and legal profession. These reforms are a priority and the Government will ensure they commence as soon as operationally possible.

Conclusion of the Bail Amendment Bill

When concerns were raised over bail decisions under the 2013 Bail Act, the Government listened and took decisive action.

Today's Bail Amendment Bill is the culmination of a comprehensive review of the State's bail laws. The amendments set out in this bill further strengthen the bail laws in New South Wales and reinforce the necessary legislative framework for bail authorities to apply when making bail decisions.

Recent events within Australia have highlighted the need to ensure that New South Wales legislation remains effective in preventing and combating terrorism, while ensuring civil liberties are properly protected and retained.

There is no doubt this is a delicate balancing act, but it is the Government's view that protection of the community must remain the paramount concern.

This is why the New South Wales Government is working closely with the Commonwealth Government to ensure that counterterrorism laws and measures are properly directed at combatting the threat of terrorism not only to the New South Wales community, but all Australians. The Government will also continue to monitor the operation of the bail laws to ensure they are adequate and working effectively.

The introduction of these bills will ensure the respective laws remain effective and are responsive to the extraordinary harm which can be caused by terrorism.