TERRORISM (POLICE POWERS) AMENDMENT BILL 2015

BAIL AMENDMENT BILL 2015

Bills introduced on motion by Ms Gabrielle Upton, read a first time and printed.

Second Reading

Ms GABRIELLE UPTON (Vaucluse—Attorney General) [8.36 p.m.]: I move:

That these bills be now read a second time.

The Government is pleased to introduce the Terrorism (Police Powers) Amendment Bill 2015 and the Bail Amendment Bill 2015. 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 in Parramatta and those that took place in Martin Place last year have reinforced the need for ongoing review and scrutiny of our laws to ensure they remain up to date and are able to respond to terror threats. These bills will ensure that the New South Wales police 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 be released only 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 make these changes to ensure these laws remain effective and are responsive to the extraordinary harm that can be caused by terrorism.

The Terrorism (Police Powers) Amendment Bill 2015 implements the legislative recommendations of the statutory review of the Terrorism (Police Powers) Act 2002, which 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 Terrorism (Police Powers) 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.

<49>
The Terrorism (Police Powers) Act was assented to on 5 December 2002 and it 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 their powers relating to terrorism to the Commonwealth. 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 to respond effectively 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 to preserve evidence following a terrorist act. The Terrorism (Police Powers) 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 was 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 those extraordinary powers as part of a complementary scheme to the Commonwealth legislation. It is also important that the law enforcement agencies have the necessary powers to keep our community safe.

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 stakeholders, including the NSW Police Force, the Australian Federal Police, the Law Society of New South Wales, Legal Aid New South Wales, Public Defender's Office, and Justice Price, the Chief Judge of the District Court. 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 that the threat of terrorism in Australia is rising and becoming harder to combat, particularly because there are an increasing number of Australians joining extremist groups overseas as well as an increasing number of potential terrorist supporters and sympathisers in our community.

Against this background, the review recognises the need to ensure that the 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 it made two key recommendations that require legislative amendment: first, 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-year period until 16 December 2018; and, secondly, to remove the New South Wales Crime Commission's powers to apply for covert search warrants, which was requested by the New South Wales Crime Commissioner. The review considered the power to apply for covert search warrants should be limited to those agencies that directly need to use such powers and, accordingly, has agreed with the New South Wales Crime Commissioner's request for the powers to be removed from the New South Wales Crime Commission.

The preventative detention order [PDO] scheme 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 the uniform model laws as agreed to at the Council of Australian Governments [COAG] meeting on 27 September 2005. Under the scheme, New South Wales police 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 will 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 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 preventative detention order scheme, particularly by the Law Society of New South Wales, Legal Aid New South Wales, and the Public Defender's Office, which reiterated their opposition to the PDO provisions on the basis that persons who are not charged with or found guilty of criminal offences should not be imprisoned by the State without trial. However, the review recommends an 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 preventative detention order powers they were designed to be used only in extraordinary circumstances and are to be accompanied by strong safeguards and accountability measures. Those measures include oversight by the New South Wales 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. Those safeguards remain in place under the Tourism (Police Powers) Act and against the background of a heightened security threat. The review includes that the PDO provision should be retained and that the sunset date for those provisions should be extended for a further three years, until 16 December 2018.

I now turn to the detail of the Terrorism (Police Powers) Amendment Bill. Schedule 1 to the bill relates to amendments to the preventative detention order provisions. Part 2A of the Terrorism (Police Powers) Act establishes a scheme for preventative detention orders. Those powers are extraordinary and, appropriately, they have been used sparingly to date. Importantly, the preventative detention order provisions seek to maintain a balance between protecting the rights of people who are 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. The NSW Ombudsman retains oversight of the use of those powers.

Schedule 1, items [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 the covert search warrants. Those provisions commenced on 16 December 2005 and enable specially authorised police officers or staff of the New South Wales 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 Crime Commissioner expressed the view that while there is a continuing need for the covert search powers, it is unnecessary for those powers to be available to the New South Wales Crime Commission. The New South Wales Crime Commissioner advised that the use of those powers would ordinarily be deferred to the NSW Police Force and that the New South Wales 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 use them directly. Accordingly, schedule 1, items [3] to [20] of the Terrorism (Police Powers) Amendment Bill 2015 remove the powers of the New South Wales Crime Commissioner and staff of the New South Wales Crime Commission under that part.

Schedule 1, items [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 2015. The New South Wales Government acknowledges the current trend towards low-tech "lone actor" attacks, which are exponentially harder to disrupt as there is no visibility of planning and no time delay between the intent and the 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 preventative detention order scheme is but one measure that 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.

I now turn to the Bail Amendment Bill 2015. It has three purposes. First, it makes amendments to the Bail Act 2013 to give effect to recommendations made by the former Attorney General, now District Court Judge, John Hatzistergos, in the final report of his review of the Bail Act. Secondly, it makes amendments to the Bail Act in response to the Sentencing Council's report on additional show cause offences completed earlier this year. Thirdly, it makes amendments to the Bail Act in response to the joint Commonwealth-New South Wales Martin Place siege review.

I now turn to the Hatzistergos review. In June 2014 the Government established the Hatzistergos "Review of the Bail Act 2013" to ensure that the safety of the community, victims and witnesses is at the forefront of all decisions made on bail. The Hatzistergos review delivered an interim report in July 2014, which made a number of recommendations to strengthen provisions in the Bail Act. The Government accepted all 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 a significant risk to the community. This new show cause test has been in force since 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 and in line with community expectations.

I turn to the 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 test and the categories under the Bail Act should be extended to include people charged with an offence while already serving a sentence—that is, when they are in prison or in the community—to look at the definition of serious personal violence offences within the show cause category, and to look at the existing show cause category of committing a serious indictable offence while on bail.

The Sentencing Council recommended that the definition of serious personal violence offence in section 16B (3) of the Act be expanded to include offences under the law of the Commonwealth, another State or Territory or of another country that are similar to the offences under part 3 of the Crimes Act 1900 that are punishable by imprisonment for a term of 14 years or more. The Bail Amendment Bill 2015 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 council's ongoing role in monitoring the show cause categories.

I now turn to the Martin Place siege review. The Bail Amendment Bill 2015 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 2015 implements this recommendation by adding new terrorism-related factors to the list of matters that can be taken into account for the unacceptable risk test that bail authorities apply when considering whether 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 by the Premier on 28 August this year, the Bail Amendment Bill 2015 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 been charged separately 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 be granted only 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.

I now turn to the detail of the Bail Amendment Bill 2015. 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 recent report "Bail—Additional Show Cause Offences". Item [1] will amend section 4 to insert necessary definitions. Item [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.

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

Item [5] will amend section 18 to require a bail authority to consider any previous warnings issued to an accused regarding non-compliance 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. Item [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.

Item [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 item [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.

<51>
Item [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. Item [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. Item [11] 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.

his 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 item [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 findings of the review 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 to the Bail Amendment Bill makes amendments to the Bail Act in response to the Joint Commonwealth-New South Wales Martin Place Siege Review. Item [1] will amend section 4 to insert necessary definitions and item [2] makes a consequential amendment to section 16B. Item [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.

Item [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 New South Wales 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 New South Wales 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 be granted only 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.

Item [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.

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 counter-terrorism laws and measures are properly directed at combatting the threat of terrorism not only to the New South Wales community, but to 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 that can be caused by terrorism. I commend the bills to the House. [*Quorum called for*.]

<52>
[*The bells having been rung and a quorum having formed, business resumed.*]

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.