



NSW Legislative Council Hansard

Terrorism Legislation Amendment (Warrants) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 22 June 2005.

Second Reading

The Hon. TONY KELLY (Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, Minister for Lands, and Minister Assisting the Minister for Natural Resources) [10.16 a.m.]: I move:

That this bill be now read a second time.

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

Leave granted.

The citizens of this State have a right to expect that their privacy will be protected from unjustified searches and interference from the State. Society recognises, however, that there are certain circumstances when an individual's right to privacy must be weighed against the greater public interest in order to allow law enforcement agencies to uphold the law and prevent criminal activity, especially when many lives are potentially at stake. The threat posed by terrorism clearly poses unique challenges. The Madrid bombings, which killed 191 people in March 2004, gave an indication of the type of threat and the devastation posed by terrorism in today's society. Closer to home, the Bali bombings in October 2002, which killed 88 Australians among the 202 lives lost, awakened our community to the possibility that Australians could be targeted by terrorist acts, both at home and abroad.

General criminal activity has never aimed to perpetrate the mass taking of life, the widespread destruction of property or the wholesale disruption of society in the way that terrorism does. The powers set out in this bill are not designed or intended to be used for general policing. Their use is restricted to the NSW Police Counter-Terrorism Co-ordination Command and to the units of the NSW Crime Commission assigned the task of investigating and responding to terrorism. Law enforcement agencies already have a wide array of investigation powers at their disposal and all these will continue to be employed in the fight against terrorism.

This scheme provides police with another tool that answers some of the more difficult characteristics of terrorist activity. For example, while both terrorists and organised crime gangs operate secretly and are aware of the possibility of official surveillance, terrorists operate over a much longer time frame. A terrorist operative may arrive in Australia years before any attack is planned, with no orders other than to lie low. So the first requirement of counter-terrorism covert investigative powers is that they be able to operate over a long period, enabling investigators to target terrorists from the early stages of their activities. Covertiveness is the second requirement. In the preparatory stages of a terrorist plot any hint to the terrorist operatives that their plans or activities have been discovered or that they are under surveillance could mean that they simply abort the entire terrorist operation, allowing the organisation the opportunity to regroup and change the object of its plans. What this scheme will allow police to do is enter private premises without the knowledge of the occupiers for the purpose of preventing or responding to these terrorist threats.

The Government sees this legislation not only as an investigative tool but also as a preventive tool. When preliminary or support activity is suspected there is a strong need to act to gather further information to prevent any possible future acts of terrorism that may cost innocent lives. This is recognised in the formulation of the applicable test to "prevent or respond to" the attack. Given the global nature of terrorism, information gathered here might be relevant to a planned or potential terrorist attack in another country. As such, the information derived from this scheme may be given to foreign law enforcement agencies, where its use may prevent a possible terrorist attack.

These powers are extraordinary and have been permitted only with the strictest of safeguards. These safeguards include the following. Warrants may be issued only when there is a reasonable suspicion or belief that a terrorist act has been, is being, or is likely to be committed. Annual reports must be made to the Attorney General and the Minister for Police regarding the exercise of these powers. Any complaint regarding the exercise of these powers can be investigated by the established bodies, the NSW Ombudsman, the Commissioner of Police and, where appropriate, the Police Integrity Commission. The scheme will be kept under constant legislative review through the existing review provisions in the *Terrorism (Police Powers) Act*, which requires yearly reports. The scheme is subject to independent monitoring by the Ombudsman for a period of two years.

Those safeguards are an attempt to balance the legitimate needs of law enforcement and the right of privacy that all citizens enjoy. The House will also note that schedule 4 to the bill creates an offence of membership of a

terrorist organisation, which will be section 310J of the *Crimes Act 1900*. This offence is in the same terms as the Commonwealth membership offence. Of course, a terrorist organisation need not be a highly formalised structure, with a formal name or public profile. The Government considers that this is necessary as a temporary measure because membership of a terrorist organisation is not an offence known to New South Wales law, and New South Wales is constitutionally prevented from enacting a covert search warrant scheme for the investigation of Commonwealth terrorism offences.

Honourable members will note that this offence is subject to a sunset clause after a period of two years. It is hoped in that time that the development of a covert search warrant scheme can be dealt with at the national level by the Commonwealth and other Australian jurisdictions, and a Federal scheme enacted. I have written to the Federal Attorney-General to urge him to pursue this matter. My colleague the Minister for Police has also been successful in having the Australasian Police Ministers Council adopt a resolution requesting the National Counter-Terrorism Committee to draft such a proposal. This would be the more appropriate arrangement given the 2002 reference of power that New South Wales and the other States made to the Commonwealth in relation to terrorism; and if that should occur, New South Wales would consider repealing this scheme in order to avoid constitutional and operational inconsistencies.

I now turn to the details of the bill. I do not intend to canvass every section of the bill—many are self-explanatory. I will, however, highlight the more important details contained in the bill and elaborate on them where appropriate. Schedule 1 contains the principal amendments to the *Terrorism (Police Powers) Act 2002*. Proposed section 27A contains the definition of terrorist act. A terrorist act is defined to include the proposed State offence of membership of a terrorist organisation, created by schedule 4 to the bill. References to the commission of a terrorist act and to preventing or responding to a terrorist act are, in that case, to be construed as referring to the actual commission of the offence and as obtaining or providing evidence of the commission of that State offence.

The new offence of membership of a terrorist organisation will address situations where a person is a member of such an organisation but does nothing more in preparation for a terrorist act. The Commonwealth terrorism offences cover a broad range of terrorist activities and importantly criminalise preparatory or support activity, such as financing a terrorist organisation, or providing terrorist training, which may be conducted a long time before an actual terrorist attack, and may be committed in countries different to where any attack ultimately occurs, and by persons who do not ultimately play any other role. New South Wales has not sought to duplicate all of the existing Commonwealth terrorism offences because it considers that to do so would undermine the national approach to counter terrorism that is led by the Commonwealth, and because it considers that this bill provides sufficiently wide powers for preventing and responding to terrorist acts and potential terrorist acts.

The test that must be met when applying for a covert search warrant under section 27G is that the person giving the authorisation or making the application, as the case may be, suspects or believes on reasonable grounds that: a terrorist act has been, is being, or is likely to be, committed; that the entry to and search of 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. The important points to note in relation to that test are, firstly, there must be a reasonable suspicion or belief that a terrorist act has been, is being, or is likely to be committed. For instance, if police can demonstrate a reasonable suspicion that a person in Australia is financing terrorism or recruiting members for a terrorist organisation, with a view to planning or committing acts of terrorism, in Australia or elsewhere, this scheme will be available to prevent or respond to the potential terrorist threat.

Secondly, section 4A makes it clear that the ultimate act of terrorism may occur overseas. Clearly, the covert search of a terrorist financier's house in Australia may disrupt al-Qaeda funding and prevent acts of terror occurring, whether in Australia or elsewhere. Thirdly, the purpose of the covert search warrants is to 'prevent or respond to' a terrorist act. In practice, it would not necessarily be NSW Police or the NSW Crime Commission that would prevent the final act of terrorism. It may very well be that NSW Police locates information using a covert warrant which discloses preliminary or support activity occurring in London. NSW Police would obviously not act on that information itself, but would pass the information through liaison mechanisms to appropriate authorities in the United Kingdom. The warrants may be made in person and by telephone under sections 27H and 27I. Proposed section 27J sets out the matters that must be included in an application for a covert search warrant. An eligible judge may issue a covert search warrant under section 27K if satisfied that there are reasonable grounds for doing so.

When determining whether there are reasonable grounds to issue a covert search warrant, the judge is to consider, amongst other things: the reliability of the information on which the application is based; whether there is a connection between the terrorist act concerned and the kinds of things that are proposed to be searched for, seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested; the nature and gravity of the terrorist act; the extent to which the exercise of powers under the warrant would assist in the prevention of, or response to, the terrorist act; alternative means of obtaining the information sought; and the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act is likely to be affected if the warrant is issued.

Leaving aside the concept of membership of a terrorist organisation, terrorist act is defined to include an act or threatened act of force. As I have said, this act may come years after, and in a different country to, the various support or preparatory activities which this bill also is intended to cover. In some circumstances it may not be possible for a New South Wales agency to provide explicit detail of a final act of terrorism when applying for a warrant. The bill is drafted in a flexible way to allow a broad range of material to be placed before the court in order to support an application. Proposed section 27M provides that if an application for a covert search warrant has been refused, a further application may not be made for the same warrant unless the further application provides additional information that justifies the making of the further application. This is the same safeguard that applies to normal search warrants to discourage judge shopping.

Proposed section 27N sets out the matters that must be specified in a covert search warrant. Proposed section 27O sets out the powers conferred by a covert search warrant, which includes the power to enter, without any occupier's knowledge, the premises the subject of the warrant, and to use such force as is reasonably necessary when entering; to impersonate another person for the purposes of executing the warrant; to enter the adjoining premises, for the purpose of entering the subject premises; to search the subject premises for any kind of thing described in the warrant; to seize a thing or replace a thing; to copy, photograph or record a thing; and to test a thing of that kind and any thing that the person finds in the course of executing the warrant if authorised in the warrant to do so.

An important issue that arose during drafting of the bill was the possible collection of DNA samples during covert searches. Given the desirability of regulating the covert collection of DNA samples for law enforcement generally—for example, in executing a search warrant, or by collecting discarded samples from used cups or cigarettes—it has been decided that the possible collection of DNA under a covert search warrant will be regulated as part of a general regulatory framework to be developed by my department. I have asked my department to consult with NSW Police in developing this policy. The warrant must be executed within 30 days of issue. Proposed section 27S requires a person to whom a covert search warrant has been issued to report back to the eligible judge who issued the warrant about the execution of the warrant.

Proposed section 27U requires an occupier's notice to be provided for the approval of an eligible judge, within six months of the execution of a covert search warrant. The proposed section enables an eligible judge to postpone, for a period of up to six months at a time, the giving of the occupier's notice if satisfied that there are reasonable grounds for doing so. This is in recognition of the fact that terrorist investigations may stretch over years rather than months. However, the giving of an occupier's notice must not be postponed for a total period of more than 18 months unless the eligible judge is satisfied that there are exceptional circumstances justifying the postponement. This formulation makes it clear that a fundamental tenet of the scheme is that an occupier's notice will be served at some time and that there is no provision for a court to approve a notice never being served.

The Government takes these powers seriously. Along with power comes responsibility. A new offence for a person to give false or misleading information to an eligible judge in an application for a covert search warrant is created by proposed section 27Z. The proposed offence is punishable by a maximum penalty of \$11,000 or two years imprisonment, or both. Proposed section 27ZA makes it an offence, with certain exceptions and in certain circumstances, for a person to intentionally or recklessly publish an application for a covert search warrant, a report prepared under section 27S, an occupier's notice or any information derived from such an application, report or notice. The proposed offence is punishable by a maximum penalty of \$5,500 or 12 months imprisonment, or both.

Schedule 1, item [2] inserts proposed section 29A into the *Terrorism (Police Powers) Act 2002*, which enables the Minister to enter into arrangements with the Commonwealth in relation to the transmission of things lawfully seized under the scheme. This is similar to a provision in the Search Warrants Act and recognises that vital evidence relating to Federal matters—for example, Commonwealth terrorism offences prosecutions—might be discovered during the execution of a warrant. Schedule 1, item [3] amends section 36 of the *Terrorism (Police Powers) Act 2002* to enable the Attorney General to require the Commissioner of Police or the Commissioner for the New South Wales Crime Commission to provide information, for the purposes of the annual review of that Act, about the exercise of functions by members of NSW Police, members of the Crime Commission or members of staff of the Crime Commission.

The other important aspect of this bill is the amendment to the Listening Devices Act 1984 contained in schedule 3. Item [1] amends section 16 of the Listening Devices Act 1984 to extend from 21 days to 90 days the maximum period during which a warrant authorising the use of a listening device is in force in relation to specified Commonwealth terrorism offences. This again recognises the fact that terrorist investigations may extend over longer periods than normal criminal investigations. These are extraordinary powers that the Government is enacting in response to the extreme threat that a terrorist attack poses to the peace and stability of our society. They are only enacted with the strictest safeguards and strong and effective oversight. The Premier, when introducing the *Terrorism (Police Powers) Act 2002*, said that he looked forward to the day when the threat of terrorism had been eliminated from our State and laws and powers like this can be removed from

our statute books. I echo those sentiments. I commend the bill to the House.

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