

Terrorism Legislation Amendment (Warrants) Bill 2005

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

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the *Terrorism (Police Powers) Act 2002* to enable the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the New South Wales Crime Commission for the purposes of responding to or preventing terrorist acts (including getting evidence of the proposed State offence of membership of a terrorist organisation),

(b) to amend the *Listening Devices Act 1984* to extend from 21 days to 90 days the maximum period during which a warrant issued under that Act for the use of a listening device remains in force if the warrant is issued in connection with certain Commonwealth terrorism offences, and the proposed State offence,

(c) to amend the *Crimes Act 1900* to create a State offence that is equivalent to the Commonwealth offence of membership of a terrorist organisation.

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 most of the proposed Act on a day or days to be appointed by proclamation. It provides for the commencement of clause 6 on the second anniversary of the commencement of clause 5. (See explanation of effect of clauses 5 and 6 below.)

Clause 3 is a formal provision that gives effect to the amendments to the *Terrorism (Police Powers) Act 2002* set out in Schedules 1 and 2.

Clause 4 is a formal provision that gives effect to the amendments to the *Listening Devices Act 1984* set out in Schedule 3.

Clause 5 is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 4. These amendments create a State offence that is equivalent to the Commonwealth offence of membership of a terrorist organisation. These amendments are to be repealed on the second anniversary of their commencement.

Clause 6 provides for the repeal of those amendments and of the amendments to proposed section 27A (2) of the *Terrorism (Police Powers) Act 2002*, which defines **terrorist act** to include the proposed State offence.

Schedule 1 Principal amendments to Terrorism (Police Powers) Act 2002

Schedule 1 [1] inserts a new Part 3 (sections 27A–27ZC) into the Principal Act, which establishes the scheme for covert search warrants.

Proposed section 27A contains definitions for the purposes of the proposed Part. In particular, **terrorist act** is defined to include the proposed State offence of membership of a terrorist organisation (see Schedule 4) and 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 offence.

Under proposed section 27D, certain police officers (**eligible police officers**), and certain staff members of the New South Wales Crime Commission (**eligible staff members of the Crime Commission**), may be authorised to apply for a covert search warrant by the Commissioner of Police and the Commissioner for the New South Wales Crime Commission respectively.

Proposed sections 27E and 27F restrict the persons to whom the Commissioner of Police and the Commissioner for the New South Wales Crime Commission,

respectively, may delegate their function of authorising persons to apply for covert search warrants.

Proposed section 27G enables eligible police officers or eligible staff members of the New South Wales Crime Commission to apply to eligible Judges of the Supreme Court for a covert search warrant. In order to deal with issues raised by *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, applications may be made only to Judges who consent, under proposed section 27B, to being involved in issuing covert search warrants.

An authorisation to apply for a covert search warrant may be given under proposed section 27C, or an application for such a warrant may be made under proposed section 27G, if the person giving the authorisation or making the application (as the case may be) suspects or believes on reasonable grounds:

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

Proposed sections 27H and 27I provide for the making of applications for covert search warrants in person and by telephone.

Proposed section 27J sets out the matters that must be included in an application for a covert search warrant.

Proposed section 27K provides that an eligible Judge may issue a covert search warrant 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):

- (a) the reliability of the information on which the application is based, and
- (b) 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, and
- (c) the nature and gravity of the terrorist act, and
- (d) the extent to which the exercise of powers under the warrant would assist in the prevention of, or response to, the terrorist act, and
- (e) alternative means of obtaining the information sought, and
- (f) 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.

Proposed section 27L requires an eligible Judge who determines an application for a covert search warrant to record all relevant particulars of the grounds that the Judge has relied on to justify the issue of the warrant or the refusal to issue the warrant (as the case may be). It also provides that any matter that might disclose the name or residential address of a person must not be recorded if the Judge is satisfied that to do so might jeopardise the safety of any person.

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.

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 are as follows:

- (a) to enter, without any occupier's knowledge, the premises the subject of the warrant,
- (b) to impersonate another person for the purposes of executing the warrant,
- (c) to use such force as is reasonably necessary for the purpose of entering the

subject premises,

- (d) if the warrant authorises entry to premises adjoining the premises the subject of the warrant—to enter the adjoining premises, using such force as is reasonably necessary, for the purpose of entering the subject premises,
- (e) to search the subject premises for any kind of thing described in the warrant,
- (f) to break open any receptacle in or on the subject premises for the purposes of that search if it is reasonably necessary to do so,
- (g) if the warrant authorises the seizure of a kind of thing—to seize and detain a thing of that kind and any relevant thing that the person finds in the course of executing the warrant,
- (h) to seize and detain any other thing that the person finds in the course of executing the warrant and that is connected with a serious indictable offence,
- (i) if the warrant authorises the placing of a kind of thing in substitution for a seized thing—to place a thing of that kind on the subject premises in substitution for a thing seized under paragraph (g),
- (j) if the warrant authorises the copying, photographing or recording of a kind of thing—to copy, photograph or otherwise record a thing of that kind and any relevant thing that the person finds in the course of executing the warrant,
- (k) if the warrant authorises the operation of a kind of electronic equipment—to operate any electronic equipment of that kind, and any relevant electronic equipment that the person finds in the course of executing the warrant, and print, copy or otherwise record information from that equipment,
- (l) if the warrant authorises the testing of a kind of thing—to test a thing of that kind and any relevant thing that the person finds in the course of executing the warrant.

Proposed section 27P allows a person to execute a search warrant with the aid of assistants.

Proposed section 27Q provides for the expiration of a covert search warrant.

Proposed section 27R enables a covert search warrant to authorise the return of a seized thing or the retrieval of a thing that has been placed in substitution for something that has been seized. Generally, the thing concerned must be returned or retrieved within 7 days of the execution of the warrant.

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 27T provides that a covert search warrant is not invalidated by any defect other than a defect that affects the substance of the warrant in a material particular.

Proposed section 27U requires an occupier's notice to be provided for the approval of an eligible Judge, within 6 months of the execution of a covert search warrant.

Following approval by the Judge, the notice is to be given to:

- (a) any person suspected of being knowingly concerned in the commission of the terrorist act concerned, and
- (b) if no such person was an occupier when the warrant was executed, an occupier of the premises concerned.

The proposed section enables an eligible Judge to postpone, for a period of up to 6 months at a time, the giving of the occupier's notice if satisfied that there are reasonable grounds for doing so. 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.

Proposed section 27V provides for similar notices to be prepared and given to occupiers of premises adjoining premises that are the subject of a covert search warrant if the execution of the warrant involved entry to those adjoining premises.

Proposed section 27W provides for the destruction of any records obtained in the

execution of a covert search warrant if the Commissioner of Police (in the case of records obtained by NSW Police) or the Crime Commissioner (in the case of records obtained by the New South Wales Crime Commission) is satisfied that their retention is no longer required.

Proposed section 27X provides that, if an eligible Judge who has issued a covert search warrant has died, has ceased to be an eligible Judge or is absent, the report required to be provided to the Judge under proposed section 27S on the execution of the warrant, and the power to postpone the giving of an occupier's notice under section 27U, may be provided to, or exercised by, any other eligible Judge.

Proposed section 27Y provides that matters required to be dealt with by an eligible Judge under the proposed Part are to be dealt with in the absence of the public.

Proposed section 27Z makes it an offence for a person to give false or misleading information to an eligible Judge in an application for a covert search warrant. The proposed offence is punishable by a maximum penalty of \$11,000 or 2 years imprisonment, or both.

Proposed section 27ZA makes it an offence, with certain exceptions, for a person to intentionally or recklessly publish an application for a covert search warrant, a report prepared under proposed section 27S, an occupier's notice or any information derived from such an application, report or notice:

- (a) before the related occupier's notice is served, or
- (b) if the identity or whereabouts of any person believed to be knowingly concerned in the commission of the terrorist act concerned, or the identity or whereabouts of the relevant occupier, is unknown—before directions are sought from an eligible Judge in relation to the giving of the occupier's notice in these circumstances.

The proposed offence is punishable by a maximum penalty of \$5,500 or 12 months imprisonment, or both.

Proposed section 27ZB requires the Commissioner of Police and the Commissioner for the New South Wales Crime Commission to each report to the Attorney General and the Minister for Police on an annual basis in relation to the exercise of powers relating to covert search warrants.

Proposed section 27ZC requires the Ombudsman to monitor the exercise of powers relating to covert search warrants by members of NSW Police, the Crime Commissioner and staff of the New South Wales Crime Commission for 2 years from the commencement of the new Part 3.

Schedule 1 [2] inserts proposed section 29A into the Principal Act, which enables the Attorney General to enter into arrangements with a Minister of the Commonwealth in relation to the transmission to or from the Commonwealth of things seized under the Principal Act or Commonwealth law, where the things seized are relevant to the investigation of an offence.

Schedule 1 [3] amends section 36 of the Principal Act 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.

Schedule 2 Consequential amendments to Terrorism (Police Powers) Act 2002

Schedule 2 contains amendments that are consequential on the amendments made by **Schedule 1 [1]**, including renumbering.

Schedule 2 [17] and [18] enable regulations of a savings and transitional nature to be made as a consequence of the proposed Act.

Schedule 2 [18] also makes it clear that the scheme for covert search warrants contained in proposed Part 3 of the Principal Act applies in relation to terrorist acts committed before, as well as those committed after, the commencement of that Part.

Schedule 3 Amendment of Listening Devices Act 1984

Schedule 3 [1] amends section 16 of the *Listening Devices Act 1984* (the **Act**) 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 if the offence to which the warrant relates is a terrorism offence.

Schedule 3 [2] inserts into section 16 of the Act a definition of **terrorism offence** for the purposes of the proposed amendment made by **Schedule 3 [1]**. **Terrorism offence** is defined to mean the proposed State offence of membership of a terrorist organisation (see Schedule 4) or an offence under any of the following provisions of the Commonwealth Criminal Code:

- (a) section 101.1 (Terrorist acts),
- (b) section 101.2 (Providing or receiving training connected with terrorist acts),
- (c) section 101.4 (Possessing things connected with terrorist acts),
- (d) section 101.5 (Collecting or making documents likely to facilitate terrorist acts),
- (e) section 101.6 (Other acts done in preparation for, or planning, terrorist acts),
- (f) section 102.2 (Directing the activities of a terrorist organisation),
- (g) section 102.3 (Membership of a terrorist organisation),
- (h) section 102.4 (Recruiting for a terrorist organisation),
- (i) section 102.5 (Training a terrorist organisation or receiving training from a terrorist organisation),
- (j) section 102.6 (Getting funds to or from a terrorist organisation),
- (k) section 102.7 (Providing support to a terrorist organisation),
- (l) section 103.1 (Financing terrorism).

These offences carry penalties ranging from 10 years to life imprisonment.

Schedule 4 Amendment of Crimes Act 1900

Schedule 4 inserts proposed Part 6B into the *Crimes Act 1900* to create a State offence that is equivalent to the Commonwealth offence of membership of a terrorist organisation. This Part is to be repealed on the second anniversary of its commencement.