NSW Legislative Assembly Hansard

Terrorism (Police Powers) Amendment (Preventative Detention) Bill

Extract from NSW Legislative Assembly Hansard and Papers Thursday 17 November 2005.

Second Reading

Mr MILTON ORKOPOULOS (Swansea—Minister for Aboriginal Affairs, and Minister Assisting the Premier on Citizenship) [7.30 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Terrorism (Police Powers) Amendment (Preventative Detention) Bill amends the Terrorism (Police Powers) Act 2002 to implement a preventative detention scheme designed to detain persons in order to prevent a terrorist attack or preserve evidence following a terrorist attack. There is no doubt that these powers are extraordinary, but they are designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability measures. This scheme implements the agreement reached at the Council of Australian Governments [COAG] meeting of 27 September 2005 and will complement the preventative detention scheme introduced by the Commonwealth Government in the Anti-Terrorism Bill (No. 2) 2005. All States and Territories of Australia agreed to enact preventative detention legislation.

The New South Wales scheme replicates the Commonwealth provisions in that it provides for the detention of a person, thus incapacitating them; restrictions on communications, which is true of all arrested and detained persons; and the monitoring of the detained persons communications to ensure that there is no exchange of information between suspects or plans made to evade capture or destroy evidence. However, this bill differs in a number of important respects, namely, due to constitutional reasons the Commonwealth scheme can operate for only 48 hours. The New South Wales scheme operates for up to 14 days. The Commonwealth scheme is administrative. Initial orders are made by a senior police officer and they are later confirmed by judicial officers acting in their personal capacity.

The New South Wales scheme is judicial. Both the initial and final preventative detention orders are made only by judges of the New South Wales Supreme Court. The Commonwealth scheme at no time allows a hearing on the merits between the parties before the expiry of the detention. The New South Wales scheme permits an initial preventative detention order to be made in the absence of the subject person. However, at subsequent confirmation or revocation hearings the detained person will be permitted to be present and to contest the matter. The Commonwealth scheme contains a number of disclosure offences designed to keep the making of a preventative detention order secret.

The New South Wales scheme contains no such disclosure offences, but allows the Supreme Court to make non-publication orders in relation to the proceeding, as is usual for all criminal matters before the courts in New South Wales. A 14-day scheme where a person was arrested secretly and held incommunicado without access to the courts would offend not only fundamental principles, such as habeas corpus, but also basic commonsense. In the end the disclosure offences were not included in the New South Wales scheme as they are not effective in keeping a preventative detention order secret over a 14-day period. But their inclusion would have added greatly to the complexities of the bill. The bill implements a fairer scheme of preventative detention. This balance, sadly lacking in the Commonwealth bill, will mean the legislation can still operate effectively in preventing a terrorist attack and in preserving evidence of an attack, but ameliorates some of the more rigid and unreasonable aspects of the Commonwealth bill.

The principal features of the New South Wales preventative detention scheme are as follows. Police may apply to the Supreme Court for a preventative detention order under proposed section 26D to prevent an imminent terrorist act or to preserve evidence of terrorist acts that have occurred. Proposed section 26G sets out the matters that must be contained in an application for a preventative detention order. Urgent phone applications are available. Pursuant to proposed section 26H, the Supreme Court will be able to issue an interim preventative detention order of up to 48 hours in the absence of the subject person. After making an interim order the court will set a date and time for a hearing to make a final order and give directions that the subject person be notified of this hearing date. Within this 48 hours another hearing to confirm the order will be held—proposed section 26I. At this hearing the detained person can be represented and heard. A confirmed order can be made for a period of up to 14 days.

The matters that must be set out in a preventative detention order are listed at proposed section 26J. A police officer or the person detained may apply to the Supreme Court for the revocation of a preventative detention order at any stage as provided under proposed section 26M. During the hearings, material with national security implications will be protected by the National Security Information (Criminal and Civil Proceeding) Act 2004 and by appropriate public interest immunity applications. The maximum period under which a person may be

detained under a final order is 14 days—proposed section 26K—and 48 hours for an interim order—proposed section 26L. The maximum of 14 days will include any period of detention under an interim order, or other corresponding preventative detention order of a State, Territory or Commonwealth law for the same terrorist act. That is, including every order, whether from New South Wales or the Commonwealth, 14 days is the total maximum period for detention under this scheme.

The bill provides certain safeguards for young people. First, preventative detention orders may not be made in relation to persons under 16 years of age as provided by proposed section 26E. There are special safeguards for persons aged between 16 and 18 years of age, as well as persons incapable of managing their own affairs, such as the right to contact someone who is able to represent their interests, a guarantee of two hours contact a day with parents or guardians and limitations on the type of identification material that can be taken without a court order—proposed section 26AH. Pursuant to proposed section 26N the Supreme Court may make a prohibited contact order that prohibits a detained person from contacting specific people.

An order can be made where the Supreme Court is satisfied that this will assist in achieving the purposes of the preventative detention order. Proposed section 26AD provides that a person may be prevented from contacting another person unless they are entitled to under the Act. Proposed section 26AE entitles the detained person to limited contact with certain persons, including a family member, a person he or she lives with, an employee or an employer. Unlike the Commonwealth bill, the detainee will be entitled to disclose the fact if the person is detained under an order and the period of detention. Proposed section 26AG enables a person being detained to contact a lawyer, although any contact a detained person has can be monitored by a police officer—proposed section 26AI.

The police are prohibited, however, from disclosing any communication between the detained person and his or her lawyer where that communication has a proper basis—such as giving instructions to a lawyer regarding a final orders hearing. Breach of this condition will carry a maximum penalty of five years imprisonment and will prevent monitoring police from passing on communications that would otherwise have been private and privileged. These conversations between the detained person and his or her lawyer cannot be used in court proceedings. Proposed section 26AF entitles the person being detained to contact the Ombudsman and the Police Integrity Commission in order to lodge complaints about his or her detention or treatment. These communications will not be monitored by police.

Other safeguards in the bill include a requirement that the person be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment—section 26AC. A person being detained cannot be questioned except for the purposes of establishing identity or ensuring his or her safety and wellbeing—proposed section 26AK. A senior police officer must be responsible for the exercise of functions under a preventative detention order—proposed section 26R. This is a role similar to a custody manager under part 10A of the Crimes Act 1900. That is, an officer independent of the investigation and not involved with the making of the order will oversee the exercise of the powers. Proposed sections 26Y, 26Z and 26AA require a police officer detaining a person under a preventative detention order to inform the person of certain matters, including the details of the order and any restrictions that apply; and the detained person's rights to contact certain people and have access to a lawyer. It is an offence to fail to inform a detained person of these details, carrying a maximum penalty of two years imprisonment.

Section 26AB requires the detained person to be given a copy of the order and a summary of the grounds on which the order is made. Section 26AN requires the Commissioner of Police to provide annual reports to the Attorney General and the Minister for Police in relation to the exercise of the powers, and these reports will be tabled in Parliament. The functions of the Ombudsman and the Police Integrity Commission under other Acts are not affected—proposed section 26AP. The scheme will be monitored by the Ombudsman for a period of five years, with an interim report at two years—proposed section 26AO. A sunset provision is included so that the scheme will expire in 10 years time—proposed section 26AS.

Other provisions of the bill include the following. 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. Courts can take into account credible or trustworthy material and can give each piece different weight according to its nature. 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 five years. The police powers in relation to arrest and search are clearly set out in the 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.

Police have the same powers as if they were arresting a person for an alleged offence. 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 It is an offence under this provision not to comply with a request to disclose one's identity. 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, and proposed section 26V provides for the carrying out of ordinary searches and frisk searches of a person who is the subject of a preventative detention order. There are specific provisions in relation to taking fingerprints, recording voice, taking samples of handwriting or photographs of a person being detained—proposed section 26AL.

Proposed section 26AM limits the purpose for which any such personal identification material relating to a detainee may be used and provides for its destruction. In terms of the intersection of these provisions with other legislation, 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. These extraordinary powers are invoked in the face of the threat of terrorism.

The Government has consistently proven that strong counter-terrorism laws can be crafted that include strict safeguards and effective oversight. Whilst being ever vigilant as to the security and safety of the citizens of New South Wales I also want to assure the public that the Government will always attend to the liberties and freedoms that are the mark of our democracy. I repeat the commitment of the then Premier Carr in introducing the Terrorism (Police Powers) Act in 2002, that we look forward to a time when these powers are no longer needed and can be removed from the statute books of New South Wales. I commend the bill to the House.