

Passed by both Houses



New South Wales

Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney,*

, 2016



New South Wales

Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016

Act No , 2016

An Act to amend the *Terrorism (Police Powers) Act 2002* to authorise the arrest, detention and questioning of terrorism suspects for the purposes of assisting in responding to or preventing recent or imminent terrorist acts; to amend the *Crimes Act 1900* to continue the operation of the offence of being a member of a terrorist organisation; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Terrorism (Police Powers) Act 2002 No 115

[1] **Section 4B Interpretation**

Omit the definition of *recognised law enforcement officer* from section 4B (1).

[2] **Section 5 Authorisation of special powers to prevent terrorist acts**

Omit “there is a threat of a terrorist act occurring in the near future” from section 5 (a).

Insert instead “a terrorist act could occur at some time in the next 14 days”.

[3] **Section 14, note**

Omit “recognised law enforcement officer as referred to in Division 4”.

Insert instead “recognised law enforcement officer as referred to in Part 10B of the *Police Act 1990*”.

[4] **Part 2, Division 4 Recognised law enforcement officers**

Omit the Division.

[5] **Part 2AA**

Insert after Part 2:

Part 2AA Investigative detention powers

25A Object of Part

The object of this Part is to authorise the arrest, detention and questioning of a person who is suspected of being involved in a recent or imminent terrorist act for the purposes of assisting in responding to or preventing the terrorist act.

25B Meaning of “terrorism suspect”

- (1) For the purposes of this Part, a person is a *terrorism suspect* if there are reasonable grounds for suspecting that:
 - (a) the person has committed or will commit a terrorist act, or
 - (b) the person is or has been involved in preparing or planning for a terrorist act, or
 - (c) the person possesses a thing that is connected with the commission of, or the preparation or planning for, a terrorist act.
- (2) This section extends to a future terrorist act even if any of the following has not been identified:
 - (a) the identity of the persons who will commit the terrorist act,
 - (b) the kind of terrorist act that will be committed,
 - (c) the place where or the time when the terrorist act will be committed.
- (3) This section extends to terrorist acts committed, and acts done in preparation or planning for terrorist acts, before the commencement of this Part.

25C Meaning of “investigative detention”

- (1) For the purposes of this Part, *investigative detention* is the detention of a terrorism suspect for investigation into a past or future terrorist act for the purposes of assisting in responding to or preventing the terrorist act.

- (2) In this Part, **responding** to a terrorist act includes apprehending and prosecuting the persons involved in committing the terrorist act and preventing those persons and their associates from committing further terrorist acts.
- (3) A police officer who arrests a terrorism suspect for the purpose of investigative detention under this Part is not under an obligation to take the suspect before a court or an authorised officer (within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*) as soon as practicable to be dealt with according to law.

25D Other definitions

In this Part:

day means a period of 24 hours.

detention warrant means a warrant issued by an eligible Judge under this Part that extends the maximum period of investigative detention of a terrorism suspect.

eligible Judge means a Judge of the Supreme Court authorised to issue a covert search warrant under Part 3, but does not include any such Judge who has revoked consent to exercising functions under this Part by notice in writing to the Attorney General.

senior police officer means the Commissioner of Police, a Deputy Commissioner of Police or any other police officer of or above the rank of Superintendent.

telephone includes fax, email or other electronic communication.

25E Power to arrest terrorism suspects for investigative detention

- (1) A police officer may, without a warrant, arrest a terrorism suspect for the purpose of investigative detention under this Part if:
 - (a) the terrorist act concerned occurred in the last 28 days, or
 - (b) the police officer has reasonable grounds to suspect that the terrorist act concerned could occur at some time in the next 14 days,and the police officer is satisfied that the investigative detention will substantially assist in responding to or preventing the terrorist act.
- (2) A police officer may also arrest a terrorism suspect for the purpose of investigative detention under this Part if directed to do so by another police officer. That other police officer is not to give such a direction unless that other police officer may lawfully arrest the person without a warrant under this section.
- (3) A terrorism suspect is subject to investigative detention under this Part only if:
 - (a) the police officer informs the terrorism suspect at the time of arrest that the terrorism suspect is being arrested for the purpose of investigative detention under this Part, and
 - (b) the arrest has not been discontinued.
- (4) A police officer may discontinue an arrest under this section at any time.
- (5) An arrest under this section must be discontinued:
 - (a) on the expiry of the maximum period of investigative detention under this Part, or
 - (b) as soon as practicable after the police officer in charge of the investigation of the terrorism suspect ceases to be satisfied that the

person is a terrorism suspect or ceases to be satisfied that continuing the investigative detention will substantially assist in responding to or preventing a terrorist act, or

- (c) if, following a review by a senior police officer under subsection (6), the senior police officer is satisfied that there are no reasonable grounds to suspect that the person is a terrorism suspect or is satisfied that there are no reasonable grounds to suspect that continuing the investigative detention will substantially assist in responding to or preventing a terrorist act.
- (6) A senior police officer is to review whether an investigative detention under this Part should be continued:
- (a) as soon as practicable after the terrorism suspect is arrested, and
 - (b) every 12 hours after the arrest of the terrorism suspect.

The senior police officer who conducts the review cannot be a police officer who is in charge of, or involved in the conduct of, the investigation.

- (7) A terrorism suspect cannot be arrested under this section on more than 1 occasion in connection with the same terrorist act.
- (8) However, subsection (7) does not prevent a further arrest under this section in reliance on information obtained after the end of the earlier period of investigative detention. In that case, the maximum period of investigative detention cannot exceed 24 hours unless authorised by a detention warrant.

25F No investigative detention of person under 14 years of age

- (1) A person under 14 years of age cannot be arrested or kept in investigative detention under this Part.
- (2) If:
 - (a) a person is under investigative detention, and
 - (b) the police officer in charge of the investigation is satisfied on reasonable grounds that the person is under 14 years of age,the police officer must discontinue the arrest as soon as practicable.
- (3) The person is to be released into the care of a parent or other appropriate person.

25G Questioning of terrorism suspects during detention

- (1) In this section, *questioning* of a person includes carrying out an investigation in which the person participates.
- (2) A terrorism suspect may, during investigative detention under this Part, be questioned:
 - (a) in connection with the terrorist act for which the person was arrested, or
 - (b) in connection with any other terrorist act that occurred within the last 28 days or that there are reasonable grounds to suspect could occur at some time in the next 14 days.
- (3) If there are reasonable grounds for suspecting that the terrorism suspect has committed a particular offence, the terrorism suspect may also be questioned while detained under this Part for the purpose of investigating whether the person committed the offence. The terrorism suspect may be so questioned only if there are reasonable grounds for suspecting that the offence may be related to the terrorist act or if postponing the investigation until after the end

of investigative detention under this Part may jeopardise the investigation or prosecution of the offence.

- (4) A terrorism suspect may be questioned during investigative detention under this Part only if the person is given the opportunity to rest for a continuous period of at least 8 hours in any period of 24 hours of detention and to have reasonable breaks during any period of questioning. This subsection does not prevent questioning that a senior police officer determines is necessary and reasonable because of the exceptional circumstances of the case.

Note. Part 3.11 of the *Evidence Act 1995* sets out circumstances in which information obtained from the questioning of a detained suspect may be excluded by a court in subsequent criminal proceedings instituted against the suspect.

- (5) This section does not prevent questioning of a person for the purposes of:
- (a) ensuring the safety and well-being of the person, or
 - (b) allowing a police officer to comply with a requirement imposed by law on the police officer in relation to the detention of the person.

25H Maximum period of investigative detention

- (1) The maximum period of investigative detention of a terrorism suspect under this Part is:
- (a) the period of 4 days, or
 - (b) if the maximum period of investigative detention is extended by a detention warrant—the maximum period authorised by the warrant.
- (2) The total maximum period of investigative detention cannot exceed 14 days after the terrorism suspect was arrested.

25I Warrant to extend initial period of investigative detention

- (1) A police officer authorised by a senior police officer may, before the end of the current maximum period of investigative detention, apply to an eligible Judge for a warrant to extend the maximum period of investigative detention if:
- (a) the police officer has reasonable grounds for suspecting that the person continues to be a terrorism suspect, and
 - (b) the police officer is satisfied that the extension will substantially assist in responding to or preventing the terrorist act.
- (2) The terrorism suspect, or his or her legal representative, may make representations to the eligible Judge about the application.
- (3) An eligible Judge may issue a detention warrant that extends the maximum period of investigative detention of the terrorism suspect by a period not exceeding 7 days.
- (4) The maximum period of investigative detention may be extended by a detention warrant on more than 1 occasion, so long as the total period of investigative detention after the arrest of the terrorism suspect does not exceed 14 days.
- (5) An eligible Judge is not to issue a detention warrant unless satisfied that:
- (a) the investigation is being conducted diligently and without unnecessary delay, and
 - (b) there are reasonable grounds for suspecting that the person continues to be a terrorism suspect, and

- (c) there are reasonable grounds for suspecting that any future terrorist act concerned could occur at some time in the next 14 days (or so occur if the terrorism suspect is released from detention), and
 - (d) the extension will substantially assist in responding to or preventing the terrorist act concerned.
- (6) A detention warrant may contain such directions as the eligible Judge considers appropriate in relation to the conditions under which the terrorism suspect is kept in custody for investigative detention. The investigative detention of the terrorism suspect is subject to any such direction included in the warrant.
- (7) As soon as reasonably practicable after a detention warrant is issued, the custody manager for the terrorism suspect:
- (a) must give the terrorism suspect a copy of the warrant, and
 - (b) must orally inform the terrorism suspect of the nature of the warrant and its effect.
- (8) An eligible Judge who deals with an application for a detention warrant is to disqualify himself or herself from presiding in any subsequent trial of the terrorism suspect for an offence that relates to the matters to which the application relates.

25J Provisions relating to applications for and issue of detention warrants

- (1) An application for a detention warrant may be made by the applicant in person or by telephone.
- (2) In the case of an application made in person, the eligible Judge is not to issue a detention warrant unless the information given by the applicant in or in connection with the application is verified before the Judge on oath or affirmation or by affidavit. The eligible Judge may administer an oath or affirmation or take an affidavit for the purposes of the application.
- (3) In the case of an application made by telephone:
- (a) the eligible Judge is not to issue a detention warrant unless satisfied the warrant is required urgently and that it is not practicable for the application to be made in person, and
 - (b) the detention warrant is to be furnished to the applicant or the applicant is to be informed by the eligible Judge of the terms of the warrant, and
 - (c) the applicant must, within 1 day after the day on which the warrant is issued, give or transmit to the eligible Judge an affidavit setting out the information on which the application was based that was given to the eligible Judge when the application was made.
- (4) A copy of an affidavit under this section is to be provided to the terrorism suspect or to his or her legal representative.
- (5) A person must not, in or in connection with an application for a detention warrant in person or by telephone, give information to an eligible Judge that the person knows to be false or misleading in a material particular. This subsection applies whether or not the information given is also verified on oath or affirmation or by affidavit.
Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.
- (6) An eligible Judge who issues or refuses to issue a detention warrant must cause a record to be made of the grounds relied on by the eligible Judge to justify the

issue of or refusal to issue the warrant. The regulations may make provision for or with respect to the keeping and inspection of any such record.

- (7) This section is subject to section 25K.

25K Prevention of disclosure of criminal intelligence

- (1) In this section, *criminal intelligence* means any report or other information whose disclosure:
- (a) will have a prejudicial effect on the prevention, investigation or prosecution of an offence, or
 - (b) will result in the existence or identity of a confidential source of information relevant for law enforcement purposes being revealed or made discoverable, or
 - (c) will result in confidential investigative methods or techniques used by police or security agencies being revealed or discoverable, or
 - (d) will endanger a person's life or physical safety.
- (2) The eligible Judge to whom an application for a detention warrant is made may, at the request of the applicant, determine that particular information provided in or in connection with the application is criminal intelligence.
- (3) If the eligible Judge makes that determination:
- (a) the information is not to be provided to the terrorism suspect, or to his or her legal representative, for the purpose of making representations to the eligible Judge about the application or other purpose and is to be excluded from the copy of any affidavit provided to the terrorism suspect or to his or her legal representative (but the terrorism suspect, or his or her legal representative, is to be informed that a determination under this section has been made), and
 - (b) the eligible Judge is to ensure that the information is not disclosed in the record made of the grounds relied on by the eligible Judge to justify the issue of or refusal to issue the detention warrant, or otherwise disclosed by the eligible Judge to any person, and
 - (c) the eligible Judge is, to the extent that the information was relied on as grounds to justify the issue of the detention warrant, to include a statement to that effect in the record made by the eligible Judge.
- (4) If the eligible Judge refuses to make that determination:
- (a) the applicant is entitled to withdraw the information as grounds for issuing the detention warrant, and
 - (b) the information so withdrawn is not to be disclosed to any person or taken into consideration by the eligible Judge in deciding whether to issue the detention warrant.

25L Monitoring contact with family members and others (except legal representatives)

- (1) This section applies to contact that a terrorism suspect has with a person while under investigative detention that the police officer in charge of the investigation of the terrorism suspect requires to be monitored (except contact with the legal representative of the terrorism suspect).
- (2) The contact a terrorism suspect has with any such person may take place only if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively

monitored by a police officer exercising authority in connection with the investigative detention.

- (3) The contact may take place in a language other than English only if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter (including an interpreter who is a police officer).
- (4) If the terrorism suspect indicates that he or she wishes the contact to take place in a language other than English, the police officer who is detaining the terrorism suspect is to:
 - (a) arrange for the services of an appropriate interpreter to be provided if it is reasonably practicable to do so during the period during which the person is being detained, and
 - (b) if it is reasonably practicable to do so—arrange for those services to be provided as soon as practicable.

25M Prohibited contact direction in detention warrant

- (1) A police officer who applies to an eligible Judge for a detention warrant in relation to a terrorism suspect may request the eligible Judge to direct, in and by the warrant, that the terrorism suspect is not, while under investigative detention pursuant to the warrant, to contact a person specified in the direction (a *prohibited contact direction*). The information given by the police officer in connection with the application for the detention warrant is to include the grounds on which any such direction is requested.
- (2) The eligible Judge may include the prohibited contact direction in the detention warrant if satisfied that the direction is reasonably necessary to achieve the purposes of the investigative detention under this Part. The investigative detention of the terrorism suspect is subject to a prohibited contact direction included in the detention warrant.
- (3) A prohibited contact direction may prevent contact with a specified person of any kind (including a legal representative of the terrorism suspect).
- (4) A prohibited contact direction may be revoked by an eligible Judge, on application made by the terrorism suspect concerned or on application made by a police officer.
- (5) For the purpose of making a prohibited contact direction, a detention warrant may be issued before the expiry of the current maximum period of investigative detention (including before the expiry of the initial period of 4 or 2 days after the arrest of the terrorism suspect). The warrant may limit the maximum period of investigative detention to the then current maximum period of detention, and in that case section 25I (5) (a) and (d) do not apply to the issue of the warrant.
- (6) A terrorism suspect may be prevented from contacting a person to be specified in a proposed prohibited contact direction requested under this section until the request has been determined.

25N Additional safeguards for detained persons

- (1) The regulations may make provision for or with respect to safeguards for persons while under investigative detention.
- (2) Those provisions are in addition to the safeguards applied by section 25O.

Note. The applied provisions under section 25O include the special safeguard provisions for children under 18 years and other vulnerable persons of Division 3 of Part 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*.

250 Application of other legislation

- (1) The following provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (and the regulations and other instruments made under that Act in connection with those provisions) extend (subject to this Part) to the powers of police officers under this Part, with any modifications prescribed by the regulations and any other necessary modifications:
 - (a) Part 9 (Investigations and questioning), other than the provisions of that Part relating to the maximum period of detention for investigation,
 - (b) Part 10 (Other powers relating to persons in custody and to other offenders),
 - (c) Part 15 (Safeguards relating to powers),
 - (d) Part 18 (Use of force),
 - (e) section 232 (Protection of police acting in execution of warrant),
 - (f) any other provisions prescribed by the regulations.
- (2) The provisions of the *Crimes (Forensic Procedures) Act 2000* (and the regulations and other instruments made under that Act) relating to suspects extend (subject to this Part) to terrorism suspects arrested under this Part.
- (3) A reference in the provisions referred to in subsections (1) and (2):
 - (a) to an investigation as to whether a detained person committed the offence for which the person is arrested—is to be construed as including a reference to an investigation for the purposes of assisting in responding to or preventing a terrorist act, or
 - (b) to Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* or to an investigation period under that Part—is to be construed as including a reference to this Part or to a period of investigative detention under this Part.
- (4) Nothing in this Part prevents a terrorism suspect from being arrested under another law on the termination of an arrest under this Part, or from being arrested under this Part on the termination of an arrest under another law, in relation to the same terrorist act. Any such period of detention under this Part is to be taken into account for the purposes of determining whether an investigation period under another law is reasonable, and any such period of detention under another law is to be taken into account for the purposes of the issue of a detention warrant under this Part.
- (5) In subsection (4), a reference to another law is a reference to another law of this jurisdiction or, to the extent that the legislative power of Parliament permits, a reference to a law of the Commonwealth or of any other jurisdiction.

25P Annual reports and information to be given to Police Minister and Attorney General

- (1) The Commissioner of Police must promptly advise the Police Minister and the Attorney General whenever a terrorism suspect is arrested under this Part.
- (2) The Commissioner of Police must report annually on the exercise of powers under this Part by police officers.
- (3) Each report is to be provided, within 4 months after each 30 June, to the Police Minister and the Attorney General.

- (4) The report is to specify the following matters in relation to the year ended on that 30 June:
 - (a) the number of terrorism suspects arrested under this Part,
 - (b) the period for which each such terrorism suspect was detained under this Part (including whether a detention warrant was issued and the additional period of detention authorised by the warrant),
 - (c) the number of complaints made under any Act about conduct relating to investigative detention under this Part and the number of those complaints that are, or have been, the subject of an investigation under any Act,
 - (d) any other matters requested by the Police Minister or the Attorney General.
- (5) The report may be combined with any other annual report of the NSW Police Force.
- (6) The report is to be tabled in each House of Parliament as soon as practicable after it is received by the Attorney General.

25Q Review of Part

- (1) The Minister is to review this Part to determine whether the policy objectives of this Part remain valid and whether the terms of this Part remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the commencement of this Part.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

[6] Section 26D When preventative detention orders may be made

Omit “Any such terrorist act must be imminent and, in any event, be expected to occur at some time in the next 14 days.” from section 26D (1).

Insert instead “There must be reasonable grounds to suspect that any such terrorist act could occur at some time in the next 14 days.”.

Schedule 2 Amendment of Crimes Act 1900 No 40

Section 310L Repeal of Part

Omit “13 September 2016”. Insert instead “13 September 2019”.