

TERRORISM (EXTRAORDINARY POWERS) AMENDMENT BILL 2018

EXPLANATORY MEMORANDUM

OVERVIEW

The purpose of the Bill is to amend the *Terrorism (Extraordinary Powers) Act 2005* (the Act) to:

- allow the Commissioner of Police (or where he or she is unavailable, a Deputy Commissioner) to make a declaration. That declaration needs to be on reasonable grounds to suspect an incident police are responding to is or is likely to be a terrorist act;
- provide that where a declaration is made, use of force, including lethal force, that is reasonably necessary to defend anyone threatened by a terrorist incident, or to prevent or secure the release of hostages, is authorised; and
- provide police officers with sufficient legal protection to allow them to respond to terrorist incidents.

CLAUSE 1 – SHORT TITLE

Sets out the name of the Act.

CLAUSE 2 – COMMENCEMENT

This clause provides for the Act to come into operation as follows:

- a) Sections 1 and 2 – on the day on which this Act receives Royal Assent;
- b) the rest of the Act – on the day after that day.

CLAUSE 3 – ACT AMENDED

This clause provides that this Act amends the *Terrorism (Extraordinary Powers) Act 2005*.

CLAUSE 4 – PART 2 DIVISION 4 DELETED

Part 2 Division 4 of the Act provides for the appointment of special officers by the Commissioner. This will be replaced by section 31A (the appointment of special officers) and section 31B (the method they can be appointed).

Clause 4 deletes Part 2 Division 4.

CLAUSE 5 – PART 2A INSERTED

This clause inserts into the *Terrorism (Extraordinary Powers) Act 2005*, after section 21, Part 2A Police use of force: ongoing terrorist acts.

This Part inserts the following new provision into the Act.

Section 21A provides the definition of specified terms relating to a declaration of an incident.

Section 21B specifies categories of police support officers who do not have the powers, duties, obligations, authorisation or exemptions of a police officer under this Part. Police support officers include a special constable; an Aboriginal police liaison officer; and a police auxiliary officer.

Section 21C provides that the Commissioner may declare that Part 2A (Police use of force: ongoing terrorist acts) applies to an incident to which police officers are

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responding. The Commissioner has to be satisfied there are reasonable grounds to suspect that the incident is or is likely to be a terrorist act.

The Commissioner must also reasonably suspect that a planned and coordinated police response is required to defend any persons or prevent or end the detention of hostages.

The declaration will apply to the general location where police officers are responding and may include multiple locations where attacks are happening simultaneously. This allows for flexibility in deploying police in the event of a mobile terrorist attack.

The Commissioner is required to notify the police officer in charge of the declared incident, and the Minister. The Minister is to be notified before the making of the declaration or as soon as practicable after the declaration is made.

Section 21D provides that a declaration must be made in writing. In urgent circumstances, a declaration may be made orally, however, details must be recorded contemporaneously and the declaration must be put in writing as soon as practicable. In any event, the declaration must be made in writing within 6 hours.

Section 21E requires the Commissioner to revoke the declaration if no further police action is required. The Commissioner must notify the police officer in charge of the declared incident that the declaration has been revoked. Then, to ensure the information is passed to all involved, the police officer in charge of the declared incident must notify the other police officers responding to the incident of the revocation.

Section 21EA provides that a revocation must be made in writing. In urgent circumstances, a declaration may be made orally, however, details must be recorded contemporaneously and the declaration must be put in writing as soon as practicable. In any event, the revocation must be made in writing within 6 hours.

Section 21F sets out the police action that is authorised under a declaration. When responding to a declared incident, the authorisation, direction or use of force (including use of lethal force) is such that a police officer personally believes, on reasonable grounds, it is necessary to defend, prevent or end the unlawful detention of persons.

Each officer who authorises, directs or uses lethal force must individually believe on reasonable grounds that the action they take is necessary to defend a person threatened by the incident, or prevent a person being detained or end the unlawful detention of a person. A police officer responding to a declared incident in accordance with a police action authorised under a declaration is provided with protection from criminal responsibility.

Nothing in section 21F limits the availability of any justification, excuse or defence which would otherwise be available to a police officer under Chapter V or Chapter XXVI of *The Criminal Code*.

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If a declaration is revoked, the protection offered by section 21F continues to apply until the officer becomes aware of the revocation.

If a court should find that a purported declaration was invalid, the protection offered by section 21F continues to apply until the officer becomes aware of the finding.

Section 21G makes clear that Part 2A does not limit the powers police officers already have under any other written law or the common law, regardless of whether or not the incident may have been a declared incident under Part 2A.

Section 21H provides for the Commissioner's functions under Part 2A to be performed by an authorised Deputy Commissioner. The circumstances under which the Commissioner may delegate his or her powers include only if:

- (a) the office of Commissioner is vacant;
- (b) the Commissioner is on leave or out of the State; or
- (c) the Commissioner is otherwise unavailable to exercise the functions.

The Commissioner may authorise in writing one or more Deputy Commissioners to perform his or her functions. In the event any of the Commissioner's functions, under Part 2A, are performed by a person other than the Commissioner, that person must notify the Commissioner of the fact as soon as possible.

CLAUSE 6 – SECTION 31 AMENDED

Section 31 currently allows the Commissioner of Police to authorise certain other senior police officers to be able to perform his functions under the Act, when the Commissioner is absent etc.

Proposed new section 21H adds additional limitations on the ability of the Commissioner of Police to authorise other senior police officers to perform his or her functions under the new Part 2A.

As a consequence, section 31 of the Act needs to be amended to cross-reference these further limitations in section 21H.

CLAUSE 7 – SECTIONS 31A, 31B AND 31C INSERTED

This clause inserts three sections after section 31. These sections are based on, and expand, the provisions previously located in Part 2 Division 4 of the Act (deleted by clause 4).

Section 31A inserts a power to appoint special officers, that is:

- a member of the Australian Federal Police; or
- a member of the police force from another State or of a Territory; or
- a sworn employee of the New Zealand Police; or
- a law enforcement officer of a foreign jurisdiction prescribed for the purposes of this subsection;

if the Commissioner believes the appointment is necessary.

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The Commissioner may appoint special officer for the purposes of Part 2 or Part 2A. That is, for the purposes of exercising powers under a Commissioner's warrant or for the exercise of use of force provisions in relation to an ongoing terrorist act.

The Commissioner must not make an appointment of a special officer unless he or she is of the opinion the appointment is necessary, either:

- (a) in the case of an appointment under Part 2, for the more effective exercise of powers available under a Commissioner's warrant as defined in section 6; or
- (b) in the case of an appointment under Part 2A, to more effectively respond to a declared incident as defined in section 21A.

Section 31B inserts provisions relating to special officer appointments under section 31A. The appointment must be in writing; state the date and time it is made; and the date and time it ceases to have effect. It must also state which Part it relates to; and be signed by the Commissioner. The Commissioner may make the appointment subject to any condition he or she thinks fit.

An appointment is restricted to a period of 14 days from the date and time the appointment is made. The Commissioner can cancel the appointment of a special officer at any time. A special officer's appointment has effect until the date and time stated in it or until it is cancelled, whichever happens first.

The appointment of two or more special officers may be in one instrument of appointment.

A special officer's appointment cannot be extended, however, there is nothing preventing the Commissioner from making a further special appointment under section 31A that has effect from the time the current appointment ceases to have effect.

Section 31C inserts provisions governing the functions of special officers. Special officers are defined in accordance with the breadth of their functions under Part 2, Part 2A or Parts 2 and 2A.

Unless a special officer's appointment provides to the contrary:

- a Part 2 special officer is restricted to performing functions under Part 2 and otherwise any function a police officer has and may perform under the Act or any written law or common law except for those functions relating to Part 2A;
- a Part 2A special officer is restricted to performing functions under Part 2A and otherwise any function a police officer has and may perform under the Act or any written law or common law except for those functions relation to Part 2; and
- Part 2A applies to a Part 2A special officer the same as if to a police officer referred in Part 2A. Any reference to a police officer in Part 2A applies equally to a Part 2A special officer. This means special officers have the same power as police officers for the purposes of Part 2A.

The provisions make clear a special officer is to be taken to be a public officer for the purposes of *The Criminal Code*. Also, for the purposes of the *Police Act 1892* section 137, a special officer is to be taken to be member of the Police Force.

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If an appointment as a special officer was invalid, the protection offered by section 31C continues to apply until the officer becomes aware of the invalidity.