

Australia: Terrorism Laws: Preventative Detention and Prohibited Contact Orders

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AUSTRALIA

TERRORISM LAWS: PREVENTATIVE DETENTION AND PROHIBITED CONTACT ORDERS

Executive Summary

Preventative Detention Orders and Prohibited Contact Orders are two mechanisms available under the Australian criminal law for addressing terrorism concerns. A Preventative Detention Order permits detention of a person for a short period of time (up to forty-eight hours), while a Prohibited Contact Order prohibits the detained person from contacting individuals named in the order. Both may be sought by the Australian Federal Police, subject to certain procedural rights of the person detained or prohibited from contact.

I. Introduction

A Preventative Detention Order is an order issued by a Senior Australian Federal Police (AFP) Member or a nominated current or ex-judicial officer¹ that permits a person to be taken into custody and detained for a short period of time to prevent an imminent terrorist attack or to preserve evidence relating to a terrorist attack.² A Prohibited Contact Order is an order issued by a Senior AFP Member or a nominated current or ex-judicial officer that prohibits contact with a specified person or class of persons.³ The Australian Federal Police (AFP) may seek a Preventative Detention Order and may seek a Prohibited Contact Order in relation to a person currently subject to a Preventative Detention Order, or in relation to a person for whom the AFP are seeking a Preventative Detention Order.⁴ Issuance and use of these orders is governed by the Criminal Code Act 1995 (Cth).

II. Preventative Detention Orders

A Preventative Detention Order permits a person to be detained in police custody or remanded to a state or territory remand centre⁵ for a short period of time, to prevent an imminent terrorist act from occurring or to preserve evidence relating to a terrorist attack.⁶

¹ Criminal Code Act 1995 (Cth) §§ 100.1, 105.2. All Code sections cited in this report refer to provisions in the Criminal Code found within the Schedule to the Act.

² *Id.* § 105.1.

³ *Id.* § 105.14A.

⁴ *Id.* Part 5.3.

⁵ *Id.* § 105.27.

⁶ *Id.* §105.1.

State and Territory governments have passed legislation permitting preventative detention for up to 14 days,⁷ although there are restrictions on multiple preventative detention orders.⁸

A. Procedure and Grounds for Issuing a Preventative Detention Orders

The process of obtaining a Preventative Detention Order involves an Initial Detention Order granted by an Issuing Authority (a senior member of the AFP) and a Continued Preventative Detention Order issued by an Issuing Authority (judicial officer). An Issuing Authority for a Continued Preventative Detention Order is appointed by the Minister and is a current or ex-judicial officer, or the president or deputy president of the Administrative Appeals Tribunal, who is a lawyer of five years standing.⁹

A Preventative Detention Order may only be issued where:

1. There are reasonable grounds to suspect that the subject of the order¹⁰ will engage in an imminent terrorist act, possesses any thing connected with the preparation of or engagement in a terrorist attack, or has undertaken any act in the planning or preparation of a terrorist act;
and
 2. Making the order would substantially assist in preventing a terrorist act from occurring, and/or detaining the subject of the Preventative Detention Order is necessary for preventing the occurrence of a terrorist act,¹¹
- or
3. It is reasonably necessary to detain the subject to preserve evidence of a terrorist attack that occurred within the last twenty-eight days.¹²

An Issuing Authority may refuse to issue a Preventative Detention Order if no information is provided regarding the basis for the order.¹³

⁷ See Terrorism (Police Powers) Act 2002(NSW); Terrorism (Preventative Detention) Act 2005 (Qld); Terrorism (Preventative Detention) Act 2005 (SA); Terrorism (Preventative Detention) Act 2005 (Tas); Terrorism (Community Protection) (Amendment) Act 2006 (Vic); Terrorism (Preventative Detention) Act 2005 (WA); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Terrorism (Emergency Powers) Act (NT). State and territorial legislation is not discussed in this report.

⁸ Criminal Code Act 1995 (Cth) § 105.6.

⁹ *Id.* §§ 105.2, 100.1.

¹⁰ The terrorist attack must be imminent that is expected to occur within the next 14 days. *Id.* § 105.4(5).

¹¹ *Id.* § 105.4.

¹² *Id.* § 105.4(6).

¹³ *Id.* § 105.4(7).

B. Time Periods

An Initial Preventative Detention Order has effect from the time when it is made;¹⁴ however, the maximum time for which a person may be detained runs from when they are taken into custody.¹⁵ An Initial Detention Order may be extended but such an extension may not extend the period of time that a person is in custody beyond twenty-four hours.¹⁶ If a person is not taken into custody within forty-eight hours of an Initial Preventative Detention Order being issued the order ceases to have effect.¹⁷ An Initial Preventative Detention Order ceases upon revocation but does not cease merely because the subject is released from detention.¹⁸

Once an Initial Preventative Detention Order is made the AFP may apply to the relevant Issuing Authority for a Continued Preventative Detention Order; however, the time period that the subject of the order may be detained runs from when they were first taken into custody and must not be for more than a total of forty-eight hours.¹⁹

A Continued Preventative Detention Order commences when made and may be extended to the duration of the maximum forty-eight hour period.²⁰

C. Persons Below the Age of 18 or Incapable of Managing Their Affairs

A Preventative Detention Order may not be applied for, or issued in relation to, a person below the age of sixteen years.²¹ Special rules apply to a person who is above the age of sixteen but below the age of eighteen and to persons incapable of managing their own affairs.²²

A person under the age of eighteen must not be detained with persons above the age of eighteen years, except in exceptional circumstances and with the written approval of a senior AFP member.²³

D. Use of Force

When a Preventative Detention Order is in force, the police may take into custody the subject of the order and have the same powers and obligations as though making an arrest.²⁴

¹⁴ *Id.* §§ 105.8(3)(a), 105.9.

¹⁵ *Id.* § 105.8(3)(b)(i).

¹⁶ *Id.* § 105.10.

¹⁷ *Id.* § 105.9(2).

¹⁸ *Id.* § 105.9.

¹⁹ *Id.* § 105.12(5).

²⁰ *Id.* §§ 105.13-105.14.

²¹ *Id.* § 105.5.

²² *Id.* §§ 105.39, 105.43(4)-(9), (11).

²³ *Id.* § 105.33A.

²⁴ *Id.* § 105.19.

E. Rights of Detained Persons

Persons detained under a Preventative Detention Order who have an inadequate knowledge of English or a physical disability that prevents their reasonable communication must be given access to an interpreter and assisted in contacting a lawyer.²⁵

Unless impractical to do so,²⁶ as soon as practicable after a person is detained under an Initial Preventative Detention Order or Continued Preventative Detention Order the police officer detaining the person must inform them: (1) that the Preventative Detention Order has been made and the period for which they may be detained; (2) of any restrictions on whom they may contact; (3) that a Continued Preventative Detention Order may be applied for; (4) that they have a right to make representations (including representations to the Senior AFP Member nominated by the Commissioner of the AFP as overseeing the preventative detention)²⁷ and complaints (to the Commonwealth Ombudsmen or relevant police complaints body); and, (5) that they may seek a remedy from the Federal Court.²⁸ Police are not, however, obliged to inform the subject being detained that a Prohibited Contact Order exists or the names of any person included in the Prohibited Contact Order.²⁹

A detained person or their lawyer must be given a copy of the Preventative Detention Order.³⁰

Proceedings against Preventative Detention Orders are limited and may not be brought in a State or Territory court while the Preventative Detention Order is in force.³¹

Generally, a detained person may not contact any another person. Subject to a Prohibited Contact Order, however, a detained person may contact a family member or a member of their household; their employer, employee or business partner/colleague; or any other person (with the permission of the police officer detaining the person) for the purpose of notifying that person that they are safe but will be out of contact for a short period of time.³²

A detained person may not reveal that they are the subject of a Preventative Detention Order, that they are being detained, or the period of their detention.³³

²⁵ *Id.* § 105.5A.

²⁶ *Id.* § 105.31(1).

²⁷ All Preventative Detention Orders must nominate a Senior AFP Member with oversight of the order. *Id.* § 105.19(5)-(7).

²⁸ *Id.* §§ 105.28, 105.29.

²⁹ *Id.* §§ 105.28(3), 105.29(3). See discussion of Prohibited Contact Orders, Part II, *infra*.

³⁰ Criminal Code Act 1995 (Cth) § 105.32.

³¹ *Id.* § 105.51. Decisions made in relation to Preventative Detention Orders or Prohibited Contact Orders are not reviewable on the grounds of natural justice or procedural fairness under the Administrative Decisions (Judicial Review) Act 1977 (Cth). *Id.* §§105.51(4)-(9). The Administrative Appeals Tribunal (Security Appeals Division) may review a decision by an Issuing Authority to grant or extend a Preventative Detention Order provided the application for review is not made while the order is in force. *Id.* §105.51(5).

³² *Id.* §§ 105.34, 105.35.

³³ *Id.* § 105.35(2).

A detained person may contact a lawyer for the purposes of obtaining advice or instructing the lawyer to act on their behalf, and the Commonwealth Ombudsman or State/Territory police complaints body for the purposes of making a complaint.³⁴

Contact with a person other than the Commonwealth Ombudsman or State/Territory police complaints body may be monitored.³⁵ However, contact between a detained person and their lawyer regarding advice or instructions to act may not be used as evidence in court against the person detained.³⁶

The detained person, their lawyer or any person they contact while detained may make representations to the Senior AFP Member with oversight of the order.³⁷

F. Searches of Detained Persons

Any person who is taken into police custody in accordance with a Preventative Detention Order may be subjected to either:

- A frisk search,³⁸ provided the police have reasonable grounds to suspect that the person is carrying a seizable item³⁹ (and any seizable item found may be seized);⁴⁰ or
- An ordinary search,⁴¹ provided the police have reasonable grounds to suspect that the person is carrying evidence relating to a terrorist act or a seizable item⁴² (and any item found may be seized).⁴³

G. Requirement to Assist

It is an offense for any person to refuse to assist the police in executing a Preventative Detention Order⁴⁴ by providing their name and address.⁴⁵ Any person who assists the police

³⁴ *Id.* §§ 105.36, 105.37.

³⁵ *Id.* § 105.38.

³⁶ *Id.* § 105.38(5).

³⁷ *Id.* § 105.19(8).

³⁸ A frisk search involves a search of a person by running hands over a person's outer garments, and an examination of anything that is worn

and so requests must be told the name, duty station, rank, and serial number of the police officer who has requested assistance.⁴⁶

H. Use of Reasonable Force & Entry Onto Premises

Where a Preventative Detention Order is in force and the police believe, on reasonable grounds, that the subject of the order is on any premises, the police may enter those premises, using such force as is reasonable and necessary in the circumstances to take the person into custody.⁴⁷

Police may enter the premises at any time of the day or night, provided they do not enter a dwelling house⁴⁸ between 9:00 p.m. and 6:00 a.m., unless police believe on reasonable grounds that it is not practicable to take the person into custody at another time or that the entry at this time is necessary to prevent the concealment or destruction of evidence relating to a terrorist act.⁴⁹

I. Questioning of Detained Persons

A person detained under a Preventative Detention Order may not be questioned.⁵⁰ However, they may be released from detention and questioned under either the Australian Security Intelligence Organisation Act 1979 (Cth) or the Crimes Act 1914 (Cth).⁵¹

J. Treatment of Detained Persons

A person detained under a Preventative Detention Order must be treated humanely with respect for human dignity and must not be subjected to cruel, inhuman, or degrading treatment.⁵²

Obligations imposed on the police when detaining a person under a Preventative Detention Order are deemed to fall on the most senior AFP member or, in the absence of an AFP member, on the most senior police officer.⁵³

⁴⁵ *Id.* § 105.21(2).

⁴⁶ *Id.* § 105.21(4).

⁴⁷ *Id.* § 105.22.

⁴⁸ A Dwelling House includes a conveyance, or a room in a hotel, motel, boarding house, or club, in which people ordinarily retire for the night. *Id.* § 105.22(3).

⁴⁹ *Id.* § 105.22(2).

⁵⁰ *Id.* § 105.42. It is an offense for a police officer or a member of the Australian Security Intelligence Organisation (ASIO) to question a detained person other than to establish their identity and to ensure their safety and well-being. *Id.* § 105.42. Nor may a police officer take or use identification material of a detained person other than with their consent or for the purpose of confirming identification. *Id.* §§ 105.43, 105.44. Identification material includes prints of fingers, hands, feet or toes; voice or video recordings; photographs; or samples of handwriting. *Id.* § 100.1(1).

⁵¹ *Id.* § 105.25.

⁵² *Id.* § 105.33.

⁵³ *Id.* § 105.3.

K. Offenses in Relation to Preventative Detention Orders

It is an offense for a person detained under a Preventative Detention Order, a lawyer contacted by a person detained under a Preventative Detention Order, or for a parent or guardian contacted by a person detained under a Preventative Detention Order to disclose to another person⁵⁴ that a Preventative Detention Order has been made, that the person is detained, or the period of detention.⁵⁵

It is an offense for a person who has legally received disclosed information regarding a person's detention to disclose that information to any further person, or for any person who is monitoring contact made by a detained person to disclose any information gained from that monitoring.⁵⁶ It is also an offense for a person to contravene safeguard provisions, that is, to engage in conduct that contravenes the provisions relating to: (1) informing detained persons of the substance of the Preventative Detention Order or extension of the Preventative Detention Order; (2) questioning, or taking and using the identification material of, a detained person; (3) the humane treatment of detained persons; or, (4) the prohibition on detention of persons below the age of eighteen with persons above this age.⁵⁷

III. Prohibited Contact Orders

A Prohibited Contact Order prohibits a detained person from contacting a person named in the order while the detained person remains in preventative detention.⁵⁸

A. Procedure and Grounds for Issuing a Prohibited Contact Order

The AFP may apply to an Issuing Authority⁵⁹ for a Prohibited Contact Order in relation to a person who is the subject of an application for a Preventative Detention Order or a current Preventative Detention Order.⁶⁰

A Prohibited Contact Order may be issued where it is necessary to:⁶¹

- Prevent risk to operations being undertaken to prevent a terrorist attack;
- Prevent serious harm to a person or the destruction of evidence;

⁵⁴ This includes disclosure to another parent or guardian whom the detained person is not permitted to contact or has not contacted. *Id.* §105.41(4A).

⁵⁵ *Id.* §105.41.

⁵⁶ *Id.* §§105.41(6), (7).

⁵⁷ *Id.* §105.45.

⁵⁸ *Id.* §§ 105.15(1), (4), 105.16(1), (4).

⁵⁹ *Id.* § 105.14A(2). The Issuing Authority may be the Issuing Authority for either an Interim Preventative Detention Order or a Continued Preventative Detention Order; that is, either a senior member of the AFP, or an Issuing Authority appointed by the Minister (a current or ex-judicial officer, or president or deputy president of the Administrative Appeals Tribunal who is a lawyer of five years standing). *Id.* §§ 100.1, 105.2.

⁶⁰ *Id.* §§105.15(1), 105.16(1).

⁶¹ *Id.* §105.14A(4).

- Preserve evidence in relation to a terrorist attack or prevent the interference with the gathering of such evidence; or
- Prevent interference with the arrest of a person who is suspected of having committed an offense against the terrorism provision of the Criminal Code Act 1995 (Cth), the taking into custody of a person who is subject to a Preventative Detention Order, or the service of a Control Order on a person.

An Issuing Authority may refuse to grant a Prohibited Contact Order where it does not believe it has been given sufficient information.⁶²

The AFP must notify the Commonwealth Ombudsman in writing of the issuance of a Prohibited Contact Order and provide the Ombudsman with a copy of Order.⁶³

B. Time Period

When the grounds for the basis of the Prohibited Contact Order cease to exist, the AFP must notify the relevant Issuing Authority, who must in turn revoke the Prohibited Contact Order.⁶⁴

⁶² *Id.* § 105.14A(5).

⁶³ *Id.* §§ 105.15(6), 105.16(6).

⁶⁴ *Id.* § 105.17(4), (6).