



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

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Standing Committee on Justice and Community Safety
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Dear Committee Secretary

Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

Australian Lawyers for Human Rights ('ALHR') is grateful for the opportunity to provide this submission in relation to the *Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022* ('the Bill'). This submission reflects our concerns about the Terrorism (Extraordinary Temporary Powers) Act ('the TETP Act') and our view that the protections provided for in the Bill are not sufficient to comply with Australia's international legal obligations.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Acknowledgements

ALHR acknowledges the traditional owners and custodians of the lands on which we work in the Australian Capital Territory as the first people of this country. We recognise that the land belonging to these peoples was never ceded, given up, bought, or sold. We pay our respect to Elders past, present and emerging and express our strong support for the Uluru Statement from the Heart.

Executive Summary

ALHR welcomes the Committee's review of the Bill and the additional human rights protections contained within the Bill. However, ALHR continues to hold significant concerns that the regime established under the TETP Act fails to comply with the Australian government's international human rights law obligations.. It is our view that the Bill does not go far enough in order to address these concerns or to safeguard the human rights of people in the Australian Capital Territory (the ACT).

The TETP Act allows for individuals to be detained under a preventative detention order, without charge, for up to 14 days, where there is evidence that a terrorist act is imminent, or where a terrorist act has occurred, and detention is determined to be the least restrictive way to prevent an attack.

Of most concern to ALHR is that preventative detention orders ('**PDO**') expose a person who has not been charged, tried or convicted of an offence to the deprivation of their liberty. The ongoing extension of such temporary extraordinary measures risks moving the ACT perilously close to normalising a system which allows arbitrary detention. Such a regime is inconsistent with Australia's international legal obligations. Moreover, we submit it does not make the ACT a safer place but rather makes us less safe by threatening the principles that form the fundamental structure of our common law and criminal justice system.

ALHR notes that many objections relating to the human rights of individuals potentially affected by the TETP Act were raised in the 2021 review of the TETP Act and we therefore do not seek to replicate them here.

The Bill proposes to extend the operation of the TETP Act for a further five years (to 19 November 2027) as it is due to expire on 19 November 2022. In the absence of further amendments to increase the TETP regime's compliance with Australia's international legal obligations, ALHR does not support this extension.

Further, we are concerned that there is a lack of sufficient evidence-base for the need to, and utility, of continuously extending measures that were intended, when legislated, to be "temporary". We note that, as of November 2020, no applications had been made for a PDO under the TETP Act by law enforcement. The TETP Act is named the Terrorism Extraordinary Temporary Powers Act precisely because these powers were designed to be '*extraordinary*' and '*temporary*'. Over 16 years later the TETP Act's mandate has expired.

ALHR therefore submits that it is time for the Legislative Assembly to reconsider the need for these extraordinary and oppressive powers and to assess whether the use of the ACT's existing criminal laws can achieve a more appropriate and proportionate balance between the ACT Government's obligation to protect Canberrans from terrorism and Australia's international obligations to preserve and promote fundamental human rights.

Recommendations

1. The ACT's existing criminal laws should be used to address the alleged intent to engage in criminal conduct that involves terrorism.
2. The Legislative Assembly should, therefore, begin formally examining how and when the TETP Act will be repealed.
3. That ACT should adopt an evidence-based approach to the threat of terrorism which focusses on the rehabilitative role and purpose of criminal justice, especially in terms of increased resources for programs aimed at de-radicalisation and the prevention of radicalisation in the first place
4. If the TETP Act is not repealed, then ALHR endorses the additional protections contained in the Bill but recommends that the Bill be strengthened in order to provide more comprehensive human rights safeguards that reflect:
 - a. established principles of the Australian criminal justice system; and
 - b. Australia's international human rights law obligations, particularly having regard to:
 - i. The need to protect the human rights of individuals who may have impaired capacity, disability or other vulnerabilities.
 - ii. The need to constrain the maximum permitted duration of a PDO to a period consistent with international legal standards..

Relevant international legal obligations

ALHR believes that the TETP Act must adhere to the Australian Government's international legal obligations under binding instruments and in accordance with contemporary norms of human rights and fundamental freedoms as expressed by various UN Treaty Bodies and Special Rapporteurs. Primarily, Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*¹ provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Further, in its General Comment number 8 on Article 9² of the ICCPR, the United Nations Human Rights Committee (**UNHRC**) stated:

*Paragraph 3 of article 94(of the ICCPR) requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time- limits are fixed by law in most States parties and, in the view of the Committee, delays **must not exceed a few***

¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

² Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

days”.. (and] ... pre-trial detention should be an exception and as short as possible.
(emphasis added)

and

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions. (emphasis added)

More recently, In 2015, the UN Working Group on Arbitrary Detention developed the “*Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court*”³ at the request of the UNHRC. Guideline 17 states the following:

Where persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism are deprived of their liberty:

- a) *they shall be immediately **informed of the charges against them, and shall be brought before a competent and independent judicial authority, as soon as possible, and no later than within a reasonable time period;***
- b) *they shall enjoy the effective right to judicial determination of the arbitrariness and lawfulness of their detention;*
- c) *the exercise of the right to judicial oversight of their detention does not impede on the obligation of the law enforcement authority responsible for the decision to detain or to maintain the detention, to present the detainee before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before the judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process; and*
- d) *in the development of judgments against them, they shall have a right to enjoy **the necessary guarantees of a fair trial, access to legal counsel, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process*** (emphasis added).

ALHR recognises that unlike other jurisdictions the TETP requires PDO to be authorised by the Supreme Court if certain conditions are met. However, these conditions fall short of an individual actually being charged with an offence and detained under the normal provisions of the criminal law. We note comments by former Independent National Security Legislation Monitor (INSLM), Bret Walker SC:

There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism.

³ UN Human Rights Council, *Report of the Working Group on Arbitrary Detention : United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, A/HRC/30/37, available at: <https://www.refworld.org/docid/55d2f44a4.html>

No concrete and practical examples of when a [preventative detention order] would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined. Police should instead rely on their established powers to take action against suspected criminals through the arrest, charge, prosecution and lengthy incarceration of suspected terrorists.⁴

Finally, while the explanatory statement to the Bill argues that allowing the TETP Act to lapse “would leave the ACT without effective counter-terrorism laws and would require law enforcement to rely on the Commonwealth’s more rights restrictive preventative detention scheme to detain terrorism suspects” it is ALHR’s view that, given there has been no evidence to date of the need for these powers, rather law enforcement could continue to rely on their normal powers under the criminal law to carry out their duties in a manner that protects and uphold the fundamental safeguards built into our criminal justice system and expressed within international standards.

The proposed safeguards

ALHR welcomes the additional safeguards provided in the Bill, namely to:

- (i) increase the special contact limit from 2 hours to 4 hours;
- (ii) require police to exercise best efforts to locate the detainee’s support person;
- (iii) require police to explain reasons if a contact person has been deemed unacceptable;
- (iv) to enable contact with diplomatic representatives;
- (v) increase protections for people with impaired decision-making ability by extending the contact time with family and requiring police officers to take reasonable steps to assist them in exercising their contact rights; and
- (vi) allow identification material to be taken to record any illness or injury suffered while in detention.

However, it is our view that these additional safeguards do not overcome the disproportionate impost on human rights outlined above. With the benefit of a short extension for this submission we have been able to review the submissions provided by the ACT Ombudsman, Human Rights Commission and Legal Aid Commission⁵ and endorse the record keeping recommendations

⁴ INSLM, *Declassified Annual Report*, December 2012, p. 67 at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ReviewofAFPowers/Report/section?id=committees%2Freportjnt%2F024517%2F73529

⁵ See https://www.parliament.act.gov.au/__data/assets/pdf_file/0016/2011570/Submission-01-Legal-Aid-ACT.pdf

made by Legal Aid to strengthen the protections afforded to people with impaired decision making capacity.

We are particularly concerned that people with disabilities, impaired decision-making capacity, mental illness and/or who are Aboriginal and Torres Strait Islander have particular vulnerabilities that may not be appropriately responded to under a PDO and that the Bill does not adequately recognise their unique rights and needs and status as some of the most vulnerable members of society. The maximum permitted duration of a PDO is 14 days which is an extended period of time in a custodial environment and which could present a genuine risk to the rights, safety and wellbeing of people with complex vulnerabilities.

The maximum permitted duration of a PDO is 14 days

The TETP currently enables a person to be taken into custody and detained for up to 14 days without that person being charged or convicted of having committed a criminal offence. ALHR submits that a maximum of 14 days is an excessive and unnecessary period of time for detention of a person who is entitled to a presumption of innocence. In our view this constitutes arbitrary detention.

As outlined above, many international human rights instruments to which Australia is a party establish that any detention of a person should be only for a reasonable time period and should not exceed a few days. Therefore, in the case that there is a detention of a person for 14 days, such a detention could be classified as arbitrary under international human rights law. ALHR submits that such a period of detention without charge would not be a proportionate response to any circumstances, and it provides inadequate safeguards of individual rights and freedoms.

We therefore recommend that the Bill be amended to constrain the maximum permitted duration of a PDO to a period consistent with international standards which suggest that it “must be as short as possible” and “should not exceed a period of a few days.” We therefore suggest that a PDO should not permit detention beyond 72 hours.

Conclusion

ALHR submits that there is a lack of evidence-base to support an assertion that the regime established under the TETP Act is a proportionate response to the threat of terrorism in the ACT and should be extended for a further five years.

If the operation of the TETP Act is to be extended for a further five years, ALHR submits that the Legislative Assembly must be confident that there exists sufficient evidence to support the provisions being reasonable, necessary and proportionate to achieving the legitimate objective of protecting the public from a terrorist act. We submit that this must necessarily involve an examination of legislative alternatives which are not as far-reaching.

Article 4(1) of the ICCPR contemplates that a State will take measures derogating from its obligations under the ICCPR only *‘in time of public emergency which threatens the life of the nation,’* only *‘to the extent strictly required by the exigencies of the situation’* and only for so long

as that emergency lasts. ALHR believes that reasonable, necessary and proportionate legislation will not:

- (i) detract from established principles of the Australian criminal justice system;
- (ii) fail to comply with international human rights standards, nor
- (iii) abrogate rule of law principles;

ALHR acknowledges that it is vital to achieve a proportionate and effective balance between the ACT Government's obligations to protect its citizens from terrorism and Australia's international obligations to preserve and promote its citizens' fundamental human rights. However, it is also essential that anti-terrorism laws adhere to the Australian government's international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be retained.

ALHR respectfully urges the Committee to think about the kind of society we want in the ACT. Although abhorrent incidents of violent terrorism instil fear in us all and devastate the families directly involved, the reality is that in Australia we are far more likely to be victims of domestic violence, drunk drivers and, sadly, overpolicing. An evidence-based approach would move away from extreme measures that have not been shown to have a utility and focus on the rehabilitative role and purpose of criminal justice, especially in terms of increased resources for programs aimed at de-radicalisation and the prevention of radicalisation in the first place.

Please do not hesitate to contact me at [REDACTED] if you would like to discuss any aspect of this submission.

Yours sincerely,

Kerry Weste



President
Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.