



STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson MLA (Deputy Chair), Mr Andrew Braddock MLA

Inquiry into Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022
ANSWER TO QUESTION TAKEN ON NOTICE
6 June 2022

Asked by Dr Marisa Paterson MLA on 6 June 2022: Dr Helen Watchirs took on notice the following question(s):

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In relation to:

DR PATERSON: Thank you. My question comes from the Australian Lawyers for Human Rights and they outline that the—under the United Nations Human Rights Committee, hang on, the international covenant on civil and political rights, that detention may not exceed a few days. The 14-day—and as you said, the commonwealth having a 48-hour window, do you feel that—yes, your views on the fact that we may contravene international human rights through this law and also, what your views are of the 14-day period.

Dr Watchirs: Certainly, I think the UK may have changed the number of days but if I could take that on notice to check what the current regime is there. They have had a number of judicial interpretations of that scheme and it has been tested. There was a scheme where it only applied to overseas born citizens and that was found to be discriminatory, so it was overruled.

So if I could have more time to look at that issue of the 14 days. But certainly, it was deemed compatible back in 2006, and we were told that that was absolutely necessary. So we did not find that it was incompatible at the time.

DR PATERSON: Thank you.

Dr Watchirs: I mean, there is so many thresholds, you could not keep them for the whole 14 days unless you had that evidence all the way through.

Dr Helen Watchirs OAM: The answer to the Member's question is as follows:—

We understand that the Australian Lawyers for Human Rights (ALHR) have raised concerns in their [submission](#) about whether preventative detention orders (PDOs) issued under the *Terrorism (Extraordinary Temporary Powers) Act 2006* (TETP Act) are consistent with obligations under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to liberty and security of the person and prohibits arbitrary arrest or detention. The ALHR submission notes that the UN Human Rights Committee has stated that, in order to comply with Article 9, any person arrested or detained has to be brought "promptly" before a judge, and that delays must not exceed a few days.¹ Further, pre-trial detention should be an exception and as short as possible.²

¹ Human Rights Committee, [General Comment 8: Article 9 \(1994\)](#). Note that GC 8 was [replaced](#) in 2014.

² Ibid.

In broad terms, pre-charge detention is likely to be consistent with Article 9 of the ICCPR if the detention is not disproportionate and is regulated by sufficient safeguards to ensure that the detention is not arbitrary. Key factors will be whether the detention was subject to prior judicial authorisation and whether there is judicial control over the period of detention.

In my view, the PDOs regime under the TETP Act is consistent with the rights in Article 9 of the ICCPR, which are also reflected in s 18 of the *Human Rights Act 2004* (HR Act), for the following reasons:

- Full judicial oversight: All PDOs, including interim orders, must be made by the Supreme Court - there is therefore no inconsistency with the requirements under Article 9 of the ICCPR to bring a detained person 'promptly' before a judge as under the TETP Act as a person cannot be detained under a PDO absent a court order.
- High threshold test: The TETP Act applies high thresholds for making a PDO, ie, the police may only apply for, and the Supreme Court may only make, a PDO on the basis that it is the *least restrictive means* to prevent a terrorist attack, or the *only effective way* to preserve evidence relating to a terrorist attack
- 24 hours interim order: Under the TETP Act, the period of an interim PDO (which can be issued on an ex parte basis) is restricted to 24 hours, which in my view achieves a proportionate balance between the need to urgently detain a person, and that person's right to be heard in relation to that detention, consistent with Article 9 of the ICCPR, which protects a person's right to be brought before a court as soon as possible to challenge the lawfulness of his or her detention.
- Limited maximum duration for final order: Further, the Supreme Court is only empowered to make a final PDO for an initial *maximum* period of 7 days. Following this, the court is able to order detention for a further 7 days following a full reconsideration of the matter. The maximum period of 14 days will take account of any periods of preventative detention under a corresponding Commonwealth or State law or detention for questioning under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).
- Review rights: The detained person is also able to seek a review of the PDO at any time. The grounds for seeking a review are not limited and a detainee may seek to have an order set aside or amended. The Supreme Court must set the order aside if it considers that the grounds either did not exist or no longer exist and it may set aside or amend an order based on new information.

I note that the UK has a similar pre-charge detention regime for terrorism suspects who can be detained for up to 14 days under the *Terrorism Act 2000* (UK).

Approved for circulation to the Standing Committee on Justice and Community Safety



Date: 10 June 2022

By Dr Helen Watchirs, OAM President and ACT Human Rights Commissioner