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**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

REVIEW OF THE TERRORISM (EXTRAORDINARY TEMPORARY POWERS) ACT 2006

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ACT
Government

STATUTORY REVIEW

**Terrorism (Extraordinary
Temporary Powers) Act 2006**

Attorney-General
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1. EXECUTIVE SUMMARY

- 1.1. This is a report on the statutory review (the review) of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (the Act). The Act commenced on 19 November 2006 and provides extraordinary measures to allow law enforcement agencies to respond to prevent or investigate a terrorist act that is imminent or has recently happened. The special measures authorised by the Act include the preventative detention of terrorism suspects in certain limited circumstances and special police powers to be used for preventative and investigative purposes.
- 1.2. The Act is arranged into the following Parts:
 - Part 1: Preliminary
 - Part 2: Preventative detention orders
 - Part 3: Special powers
 - Part 4: Miscellaneous
- 1.3. Section 100 requires a statutory review of the operation and effectiveness of the Act to be undertaken after 13 years of operation (19 November 2019). The Attorney-General must present the report of the review to the Legislative Assembly as soon as practicable after 19 November 2020 and no later than 19 May 2021.
- 1.4. The review considered provisions in the Act and the findings of recent counter-terrorism legislative reviews in other Australian jurisdictions. The review also involved a targeted consultation process to obtain the views of relevant stakeholders on the operation and effectiveness of the Act. A list of the stakeholders that made submissions is at [Annexure A](#).
- 1.5. The review has found that the policy objectives of the Act remain relevant, and that the scheme contains a range of important human rights safeguards that distinguish it from comparable schemes in other Australian jurisdictions. However, noting the extraordinary nature of the powers in the Act, there may be an opportunity to refine or enhance these safeguards. This opportunity should be further explored prior to any extension of the Act.

2. INTRODUCTION

- 2.1. Terrorism poses an ongoing and dynamic threat to the safety of individuals in the Australian Capital Territory (ACT), Australia and the world. Following the 11 September 2001 terrorist attacks in the United States and the July 2005 terrorist attacks in London, the Council of Australian Governments (COAG) agreed to develop a national framework to combat terrorism. It was agreed by COAG that each jurisdiction would enact legislation to strengthen existing counter-terrorism laws. It was agreed that the new laws would be designed to be necessary, effective against terrorism, contain appropriate safeguards, and be exercised in a way that is evidence-based, intelligence-led and proportionate. The Commonwealth, and all of the States and Territories have since enacted counter-terrorism legislation allowing preventative detention in limited circumstances.¹ The Commonwealth regime allows for the preventative detention of an individual for up to 48 hours, and the regime in the states and territories allows for preventative detention for up to 14 days.
- 2.2. In agreeing to strengthen ACT counter-terrorism laws, the ACT Government committed to addressing the interactions of any legislative response with the *Human Rights Act 2004* (ACT). As a result, in developing the Act to give effect to the COAG agreement, the ACT Government gave consideration to human rights obligations and the fundamental principles of justice: the rule of law, proportionality, respect of legal process and the separation of powers.
- 2.3. Safeguards were incorporated into the Act which distinguish it from comparable legislation introduced in the other jurisdictions. The ACT Standing Committee on Legal Affairs noted, in its report on the exposure draft of the Act, the inclusion of stringent pre-conditions that must be satisfied before an application for a preventative detention order can be made, the central role of the ACT Supreme Court and the general compliance with international human rights standards.²
- 2.4. This is the third statutory review of the Act. The Act commenced on 19 November 2006 and was initially due to expire on 19 November 2011. The Act was reviewed in accordance with section 100 in 2010 and 2015. Each of those reviews found that the policy objectives of the Act remained valid and the Act was extended for a further five years following each review. Following the 2011 review, a number of amendments were made to the Act to clarify provisions and strengthen safeguards.³
- 2.5. During this review, the operation and effectiveness of the Act has again been examined with consideration of its policy objectives in the current context.
- 2.6. The National Terrorism Threat Level has remained at Probable since November 2015 when the threat advisory system was introduced.⁴ This threat level reflects that there is credible intelligence that indicates that individuals or groups have the intent and capability to conduct a terrorist attack in

¹ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); Division 105 of the *Criminal Code 1995* (Cth); *Terrorism (Police Powers Act 2002* (NSW); *Terrorism (Emergency Powers) Act 2003* (NT); *Terrorism (Preventative Detention) Act 2005* (QLD); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (TAS); *Terrorism (Community Protection) Act 2003* (VIC); *Terrorism (Preventative Detention) Act 2006* (WA).

² Standing Committee on Legal Affairs February 2006, *Report on Terrorism (Extraordinary Temporary Powers) Bill 2005 – exposure draft*, p. 27.

³ *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011* (ACT).

⁴ Office of the Attorney-General November 2015, *New National Terrorism Threat Advisory System*, media release, accessed 1 February 2021, https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4218156/upload_binary/4218156.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4218156%22.

Australia.⁵ Since the last review of the Act, there have been several terrorist acts in Australia and New Zealand. In October 2015, a teenager shot and killed an employee of the New South Wales (NSW) Police Force in a terrorist act. In September 2016, a man engaged in a terrorist act by stabbing a neighbour in Minto, NSW. In March 2019, a man committed two mass shootings in mosques in Christchurch, New Zealand. He was convicted of 51 murders, 40 attempted murders and engaging in a terrorist act. While there have been no recent terrorist acts in the ACT, as the seat of the Australian Parliament, and Australian Government agencies, the ACT remains a possible target. The review considered whether the legislative framework and powers in the Act remain necessary in this context.

2.7. The review also considered the findings of recent reviews of counter-terrorism laws in Australia including:

- *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (Parliamentary Joint Committee on Intelligence and Security 2018);
- *Statutory review of the Terrorism (Police Powers) Act 2002* (NSW Department of Justice 2018);
- *Expert Panel on terrorism and violent extremism prevention and response powers* (Ken Lay AO APM and the Hon David Harper AM QC 2017); and
- *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, (Independent National Security Legislation Monitor 2017).

⁵ Australian Government, *National Security*, accessed 1 February 2021, <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>.

3. REVIEW

Terms of reference

- 3.1. Section 100 of the Act provides that the Attorney-General must review the operation and effectiveness of the Act after it has been in operation for 13 years (19 November 2019) and must present a report of the review to the Legislative Assembly before the end of the Act's 14th year of operation (19 November 2020).
- 3.2. In March 2020, a public health emergency was declared in the ACT due to the COVID-19 pandemic. The *COVID-19 Emergency Response Legislation Amendment Act 2020* (ACT), which commenced on 14 May 2020, amended section 100 of the Act to add that "if the Minister believes that, because of the COVID-19 pandemic, it is not reasonably possible to present a report of the review before 19 November 2020, the Minister must present a report of the review to the Legislative Assembly as soon as practicable after 19 November 2020; but not later than 19 May 2021." As a result of COVID-19, there was a need to reprioritise resources to focus on progressing urgent temporary legislative amendments as part of the pandemic response. In September 2020, the former Attorney-General, Gordon Ramsay MLA, decided that, because of the COVID-19 pandemic, it was not reasonably possible to present a report of the review of the Act before 19 November 2020.

Overarching objections to the Act

- 3.3. While threats of terrorism in Australia are real and government needs to be prepared and have appropriate legislation to support law enforcement and intelligence, any restrictions on human rights in the name of national security should be carefully scrutinised.
- 3.4. There have previously been concerns raised about the scheme, including the extent to which it impinges upon rights that are ordinarily protected under the *Human Rights Act 2004*. The utility of the scheme, particularly the need for preventative detention powers, was questioned in 2012 by the former Independent National Security Legislation Monitor (INSLM), Bret Walker SC, who noted:

*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. 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.*⁶
- 3.5. Additionally, the Council of Civil Liberties has been consistently concerned about the operation of the scheme, and provided comments to that effect in the course of this review.

Overall operation of the Act

- 3.6. The objective of the Act is to provide law enforcement with special powers to respond and investigate where there is evidence that a terrorist act is imminent or where a terrorist act has occurred.
- 3.7. Part 1 of the Act sets out introductory provisions including the statutory definition for the key phrase "terrorist act".

⁶ Independent National Security Legislation Monitor, *Declassified Annual Report (2012)*, 67. At <https://www.inslm.gov.au/reviews-reports/annual-reports>

- 3.8. Part 2 of the Act sets out provisions relating to preventative detention orders (PDO). These provisions relate to applying for a PDO, making a PDO, extending a PDO, setting aside or amending a PDO and safeguards for detained persons.
- 3.9. Part 3 of the Act allows the Chief Police Officer (CPO) to apply to the Supreme Court or the Magistrate Court for two categories of special powers:
- Preventative authorisations; and
 - Investigative authorisations.
- 3.10. The special powers that are allowed under an authorisation include the power to require a person to provide personal details, the power to search people and vehicles, the power to move vehicles, the power to search premises, the power to cordon areas and the power to seize items during a search.
- 3.11. Part 4 of the Act sets out miscellaneous provisions including in relation to the review and expiry of the Act.
- 3.12. Schedule 1 of the Act sets out provisions relating to the conduct of personal searches by police officers.
- 3.13. To date, ACT Policing has not made an application for a PDO, a preventative authorisation or an investigative authorisation under the Act.⁷ In 2014, three people were held under PDOs in NSW.⁸ In 2015, one person was held under an interim PDO in Victoria.⁹ The PDO regime has not otherwise been used in Australia.

Preamble

- 3.14. A preamble is part of an Act and can be used in the interpretation of an Act.¹⁰ In determining the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.¹¹ The preamble is an important part of the Act that provides an indication of the purpose of the legislation and the context in which it was introduced. The preamble highlights that the Act is based on the agreement made at the special meeting of the COAG on counter-terrorism held on 27 September 2005 in recognition of the clear need for laws to combat terrorism. The preamble states that the Legislative Assembly considers that the extraordinary measures in the Act are justified in extreme circumstances and recognises the Legislative Assembly's commitment to the dual goals of protecting the ACT community from terrorism, and promoting the International Covenant on Civil and Political Rights and the *Human Rights Act 2004* (ACT).
- 3.15. The preamble specifically notes that it is critical that fundamental legal principles such as the rule of law, respect for the legal process, the separation of powers and respect for human rights are preserved. The stated commitment to human rights and fundamental legal principles is not just symbolic, as the safeguards that have been incorporated into the Act distinguish it from comparable legislation introduced in other jurisdictions to give effect to the COAG agreement.

⁷ Submission of ACT Policing November 2020.

⁸ Australian Federal Police September 2014, *Clarification of Operation Appleby numbers*, media release, accessed 1 February 2021, https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3425449/upload_binary/3425449.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3425449%22.

⁹ *In the Matter of an Application for a Preventative Detention Order in respect of Causevic* [2015] VSC 248.

¹⁰ *Legislation Act 2001* (ACT), s. 126.

¹¹ *Legislation Act 2001* (ACT), s. 138.

3.16. The Act has been described as “model legislation”¹² and the COAG Committee has said that it “contains more stringent requirements than do other legislative schemes for the use of preventative detention orders. Where a person is sought to be detained it must be shown that the order is the ‘least restrictive way of preventing the terrorist act’. Where an order is sought to preserve evidence, it must be shown that detaining the person is the ‘only effective way of preserving the evidence’. In fact, the ACT legislation appears to reflect the obligation to adhere to human rights standards more rigorously than the legislation of the other States and Territories.”¹³

3.17. The ACT’s commitment to supporting and implementing national counter-terrorism principles subject to consideration of human rights obligations and the fundamental principles of justice should be continued.

Part 1: Preliminary

3.18. Part 1 of the Act sets out introductory provisions including the definition for the key phrase “terrorist act”.

3.19. A terrorist act is defined in section 6 as follows:

- (1) An act is a **terrorist act** if –
 - (a) It does any of the following:
 - (i) Causes serious harm that is physical harm to a person;
 - (ii) Causes serious damage to property;
 - (iii) Causes a person’s death;
 - (iv) Endangers the life of someone other than the person doing the act;
 - (v) Creates a serious risk to the health or safety of the public;
 - (vi) Seriously interferes with, seriously disrupts, or destroys, an electronic system; and
 - (b) It is done with the intention of advancing a political, religious or ideological cause; and
 - (c) It is done with the intention of –
 - (i) Coercing, or influencing by intimidation, the government of the Territory, the Commonwealth, a State, another Territory or a foreign country, or a part of a State, another Territory or foreign country; or
 - (ii) Intimidating the public.
- (2) However, an act is not a **terrorist act** if –
 - (a) It is advocacy, protest, dissent or industrial action; and
 - (b) It is not intended to do any of the following:
 - (i) Cause serious harm that is physical harm to a person;
 - (ii) Cause a person’s death;
 - (iii) Endanger the life of someone other than the person doing the act;
 - (iv) Create a serious risk to the health or safety of the public.

3.20. The phrase “terrorist act” is used throughout the Act as a pre-condition to the making of a PDO under section 18, a preventative authorisation order under section 66 and an investigative authorisation order under section 73. The definition of the term is largely consistent with the definition used in the corresponding legislation of the Commonwealth, States and the Northern

¹² Council of Australian Governments Review Committee 2013, *Council of Australian Governments Review of Counter-Terrorism Legislation*, p. 67.

¹³ *Ibid.*

Territory. The term “terrorist act” is also used in several criminal offences in the *Criminal Code 1995* (Cth) (the Code).

- 3.21. The definition of “terrorist act” in Australian legislation requires three elements to be satisfied: action, motive and intention. These elements are reflected in section 6(1)(a), (b) and (c) of the Act respectively.
- 3.22. In 2012, the Independent National Security Legislation Monitor (INSLM) recommended that motive be removed as an element of the defined term “terrorist act” in the Code.¹⁴ The INSLM noted that “[w]hile motive may be powerful evidence in a criminal trial it is not generally a separate element of an offence.”¹⁵
- 3.23. In 2018, the *Expert Panel on terrorism and violent extremism prevention and response powers* (Expert Panel) similarly recommended that the Victorian Government refer to an appropriate inter-jurisdictional body consideration of amendments to the legal definition of a “terrorist act” to remove motive as an essential element of the definition, and strengthen the distinction between terrorism and other crimes so as to capture terrorism’s unique significance and gravity.¹⁶ There may not be any evidence of motive, particularly in the case of a lone actor, and an endeavour to find a motive may divert resources during a critical incident.¹⁷
- 3.24. The Expert Panel noted the importance of national consistency but advised that if this recommendation were not accepted nationally then the Victorian Government should consider making the amendment regardless.¹⁸
- 3.25. The Expert Panel opined that motive is not necessary for the definition of a “terrorist act” because the existing definition creates operational risks and could risk the safety of the community where an act is motivated by something other than a political, religious or ideological cause. The Expert Panel acknowledged that it was not aware of any cases where the motive aspect of the definition had caused particular issues.¹⁹ However, the Expert Panel noted that an absence of any issues to date is not, in itself, a sufficient reason to avoid legislative reform.²⁰
- 3.26. The existing definition of a “terrorist act” is consistent with definitions in the United Kingdom, Canada, South Africa and New Zealand.²¹ The Expert Panel’s research found that outside of these jurisdictions, motive of advancing a political, religious or ideological cause is not a requirement in the definition of terrorism.²² The Expert Panel noted that the international community has also expressed, for example in the United Nations’ Security Council’s Resolution 1566 (2004), that the definition of terrorism is characterised by the intention to terrorise and not by motive.²³
- 3.27. Nevertheless, the motive element in the existing definition operates as an additional safeguard to confine the operation of the extraordinary provisions in the Act and corresponding legislation. As noted above, the ACT Legislative Assembly, at the time the legislation was passed, considered that the extraordinary measures in the Act are only justified in extreme circumstances. An amendment to

¹⁴ Independent National Security Legislation Monitor 2012, *Declassified Annual Report*, Recommendation VI/1.

¹⁵ *Ibid* p. 115.

¹⁶ Ken Lay AO APM and the Hon David Harper AM QC 2017, *Expert Panel on terrorism and violent extremism prevention and response powers* (Report 2), Recommendation 14.

¹⁷ *Ibid* p. 63.

¹⁸ Ken Lay AO APM and the Hon David Harper AM QC 2017, *Expert Panel on terrorism and violent extremism prevention and response powers* (Report 2), p. 73.

¹⁹ *Ibid* pp. 62, 69-71.

²⁰ *Ibid* p. 62.

²¹ *Ibid* p. 59.

²² *Ibid*.

²³ *Ibid* p. 60.

- the definition of “terrorist act” to remove the element of motive would broaden the extreme circumstances in which the special measures could be used and this is not proposed.
- 3.28. In addition, it is important for jurisdictions to continue to strive for a degree of national consistency and a coordinated approach in responding to counter-terrorism. The definition of “terrorist act” was originally developed by agreement of the Commonwealth, States and Territories and any change should also be developed by agreement.
- 3.29. In response to the Expert Panel’s recommendations, the Victorian Government introduced amendments to several Victorian Acts including the *Terrorism (Community Protection) Act 2003*.²⁴ However, the definition of “terrorist act” was not amended. The definition has not been amended in any other Australian jurisdiction. The 2018 review of the comparable NSW legislation recommended that the definition of “terrorist act” be retained due to the importance of national consistency in preventing and responding to terrorist threats.²⁵
- 3.30. The existing definition of “terrorist act” in the Act should be retained as it provides an important safeguard that limits the use of the extraordinary measures in the Act and reflects a nationally consistent approach.

Part 2: Preventative detention orders

A measure of last resort

- 3.31. Section 8 provides that the purpose of Part 2 of the Act is to allow a person, in certain limited circumstances, to be taken into custody and detained for up to 14 days “as a measure of last resort”.
- 3.32. The inclusion of the term “as a measure of last resort” reflects the ACT Government’s commitment to creating a human rights compliant regime. The term is not used in comparative legislation in other Australian jurisdictions.
- 3.33. A PDO is a form of pre-charge detention which may limit rights, such as the right to liberty, under the *Human Rights 2004 (ACT)*. Section 28 of the *Human Rights 2004 (ACT)* provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. A relevant factor in determining whether a limit is reasonable is whether there is any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. The purpose set out in section 8 of the Act highlights that a PDO should only be used as an exceptional measure where there are no other less restrictive measures available under the existing criminal law to prevent a terrorist act or preserve evidence of a terrorist act.

Applying for and making PDOs

- 3.34. Pursuant to section 16, a senior police officer may apply to the Supreme Court for a PDO, with approval by the CPO, to either prevent an imminent terrorist act or preserve evidence relating to a recent terrorist act. An application for a PDO to prevent a terrorist act may be made where (s. 16(3)):
- The police officer suspects, on reasonable grounds, that the person:
 - Intends, and has the capacity, to carry out a terrorist act; or
 - Possesses something connected with the preparation for, or carrying out of, a terrorist act; or
 - Has done an act in preparation for, or planning, a terrorist act; and
 - The police officer is satisfied, on reasonable grounds:

²⁴ *Justice Legislation Amendment (Terrorism) Act 2018 (Vic)*.

²⁵ NSW Department of Justice 2018, *Statutory review of the Terrorism (Police Powers) Act 2002*, Recommendation 1.

- That it is reasonably necessary to detain the person to prevent a terrorist act; and
 - That detaining the person under the order is the least restrictive way of preventing the terrorist act; and
 - That detaining the person for the period for which the person is to be detained under the order is reasonably necessary to prevent the terrorist act.
- 3.35. The terrorist act must be imminent and, in any event, be expected to happen some time within the next 14 days (s. 16(4)).
- 3.36. An application for a PDO to preserve evidence may be made where (s. 16(5)):
- The senior police officer is satisfied, on reasonable grounds that:
 - A terrorist act has happened within the last 28 days; and
 - It is reasonably necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act; and
 - Detaining the person under the order is the only effective way of preserving the evidence; and
 - Detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence.
- 3.37. The Supreme Court may make a PDO if satisfied, on reasonable grounds, of the matters set out in section 18(4) or section 18(6). These reflect the requirements which the senior police officer must be satisfied in making the application.
- 3.38. In summary, the basis for making a PDO in the ACT requires the Supreme Court to be satisfied on reasonable grounds that a PDO is:
- The least restrictive means to prevent a terrorist act; or
 - The only effective way to preserve evidence.
- 3.39. This high threshold for making a PDO is another unique feature of the ACT framework and reflects human rights proportionality considerations. In comparison, the NSW scheme is based on a lower threshold. The Supreme Court may make a PDO if it is satisfied the PDO:
- Would substantially assist in preventing a terrorist act;²⁶ or
 - Is necessary to preserve evidence.²⁷
- 3.40. Section 20 of the Act empowers the Supreme Court to make an interim PDO for up to 24 hours. An interim PDO may be made in the absence of, and without notice to, the person or any representative of the person (s. 20(4)). In comparison, some other jurisdictions including Victoria and the Commonwealth allow interim PDOs to be made by senior police officers instead of by a court.
- 3.41. A senior police officer may apply to the Supreme Court under section 24(1) for an extension of a PDO and the Supreme Court, pursuant to section 26(1), may grant such an extension if satisfied, on reasonable grounds, that the extension is reasonably necessary for the purpose for which the order was made. However, the total period of a PDO is limited to 7 days after the person is first detained under the PDO, or 14 days after the person is first taken into custody and detained, or detained, under any PDO, or corresponding PDO, for the same terrorist act (s.26(2)).
- 3.42. To date, no PDOs have been applied for by ACT Policing or made under the Act. ACT Policing continues to monitor the security environment in the ACT and will assess all matters on a case-by-case basis, including any requirement to use these provisions.²⁸

²⁶ *Terrorism (Police Powers) Act 2002* (NSW), s. 26D(1)(b).

²⁷ *Terrorism (Police Powers) Act 2002* (NSW), s. 26D(2)(b).

²⁸ Submission of ACT Policing November 2020.

3.43. ACT Policing advises that it works closely with the Australian Federal Police (AFP) to determine the appropriate investigative approach in a suspected terrorism investigation.²⁹ Internal AFP policy provides guidance for investigators on the Commonwealth PDO scheme and asks investigators to consider the jurisdiction and offences involved to determine if a Commonwealth, state or territory order is appropriate.³⁰

3.44. The AFP noted at a public hearing before the INSLM that it would be more likely to apply for a PDO under complementary state or territory legislation given the extended duration of those orders in comparison to under the Commonwealth scheme, which only allows for PDOs of up to 48 hours.³¹ ACT Policing considers the current arrangement between ACT Policing and the AFP is an effective and collaborative approach to ACT-based terrorism offences.³²

Safeguards

3.45. Section 11 states that a PDO cannot be applied for, or made, for a child (defined in the *Legislation Act 2001* as a person who is under 18 years old). Section 11 also creates positive obligations for a police officer who suspects, or has any grounds to suspect, that a detained person may be a child to make reasonable enquiries about the person's age. If, after making those enquiries, the officer believes on reasonable grounds that the person is a child, the officer must release the person from detention. Failure to comply with these obligations is an offence contrary to section 11(4).

3.46. In Victoria, a PDO cannot be applied for, or made, in relation to a person who is under 14 years of age. In the other Australian jurisdictions, a PDO cannot be applied for, or made, in relation to a person under 16 years of age. Legislative amendments were made to the Victorian Act in 2018 to lower the age from 16 to 14 following recommendations of the Expert Panel.³³ The minimum age of 18 years in the ACT legislation distinguishes the ACT scheme and again demonstrates robust human rights protections.

3.47. Section 13 sets out rights in relation to PDO applications including that a person is entitled to be given a copy of the application, be present at the hearing and be represented by a lawyer of the person's choice. The right to legal representation is an important safeguard that is essential to allowing a respondent to properly challenge a PDO and ensure that there is judicial oversight as to whether the PDO is a measure of last resort in the circumstances.

3.48. Section 14 requires the applicant to provide a copy of the application to Legal Aid who must appoint a person from the Public Interest Monitor under section 62 for the purpose of the application. The Public Interest Monitor is entitled to be present at the hearing, ask questions of those giving evidence and make submissions. Section 62 establishes a Public Interest Monitor panel of lawyers appointed by the Minister.

3.49. The Public Interest Monitor also represents the public interest where it is proposed that a direction for a prohibited contact order be made in relation to a detained person under section 56. The inclusion of the Public Interest Monitor in the ACT scheme helps to promote the right to a fair trial. The Public Interest Monitor is similar to the provision for a Public Interest Monitor in the *Terrorism (Preventative Detention) Act 2005* (QLD). However, it is not a feature included in every PDO scheme.

3.50. Section 48 provides that a person detained under a PDO must be treated with humanity and respect for the inherent dignity of the human person, and must not be subjected to cruel, inhuman or

²⁹ Ibid.

³⁰ Ibid.

³¹ Independent National Security Legislation Monitor, *Transcript of Proceedings*, Public Hearing, Canberra, 19 May 2017, (Michael Phelan).

³² Ibid.

³³ *Justice Legislation Amendment (Terrorism) Act 2018* (Vic), cl. 17.

degrading treatment by anyone exercising authority under the PDO or implementing or enforcing it. A failure to comply with the section is an offence (s. 48(2)). This requirement reflects section 10 of the *Human Rights Act 2004* (ACT) which protects individuals from torture or any treatment that is cruel, inhuman or degrading.

Contact provisions

- 3.51. Division 2.11 provides contact rights for a person who is detained under a PDO. These provisions are subject to any prohibited contact order that is made under section 32. Section 50 allows a person detained under a PDO to contact certain persons, such as a family member or employer. Sections 53 and 54 set out special contact rules for a detained person who has impaired decision-making ability.
- 3.52. However, the contact may only take place if it can be effectively monitored by a police officer exercising authority under the PDO (s. 55(1)). The contact may only take place in a language other than English if the content and meaning can be effectively monitored with the assistance of an interpreter (s. 55(2)).
- 3.53. The legislative right to contact a family member is another measure that distinguishes the ACT PDO scheme. In the NSW and Commonwealth schemes, the detained person is only able to inform a family member that they are safe.
- 3.54. A detained person is also entitled to contact with the Human Rights Commissioner, the Ombudsman, the Integrity Commissioner and a lawyer (ss. 51 and 52). Contact between a person detained under a PDO and their lawyer must not be monitored unless a direction requiring contact to be monitored has been made under s. 56(2). A direction under section 56(2) may only be made by a senior police officer in limited circumstances. In addition, before making a direction, the senior police officer must give Legal Aid written notice, consult with the Public Interest Monitor and take into account any submissions made by the Public Interest Monitor (s. 56(3)). In contrast, in the NSW and Commonwealth PDO schemes all legal communications are monitored without exception. Section 56 allows only limited derogation of these principles and contains appropriate statutory safeguards.
- 3.55. Section 58 prohibits questioning of a person detained under a PDO except for in very narrow circumstances, such as to ensure the detained person's safety and wellbeing. A recording of the questioning must be made (s. 58(3)). Prohibition on questioning is a common feature in PDO schemes and differentiates detention under a PDO from detention under ordinary arrest powers. The Parliamentary Joint Committee on Intelligence and Security (PJCS) has noted that the purpose of the PDO scheme is for prevention and protection, and that there are alternative powers available for investigative purposes.³⁴
- 3.56. Investigative detention orders, with a similar threshold to PDOs, have been introduced in NSW to complement the PDO regime.³⁵ Victoria has also removed the prohibition on questioning a person detained under a PDO in accordance with recommendations made by the Expert Panel.³⁶ The questioning framework that is in the Victorian Act is consistent with questioning that is conducted under the *Crimes Act 1958* (Vic).
- 3.57. In 2016, COAG agreed to introduce nationally consistent and strengthened pre-charge detention laws with the NSW investigative detention regime to be used as the model.³⁷ It would be preferable

³⁴ Parliamentary Joint Committee on Intelligence and Security 2018, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, p. 103.

³⁵ *Terrorism (Police Powers) Act 2002* (NSW), Part 2AA.

³⁶ *Justice Legislation Amendment (Terrorism) Act 2018* (Vic), cl. 38.

³⁷ Ken Lay AO APM and the Hon David Harper AMQC 2017, *Expert Panel on terrorism and violent extremism prevention and response powers* (Report 1), p. 24.

that any changes to the questioning provisions in the Act be considered as part of the COAG process to ensure a consistent interjurisdictional approach.

Part 3: Special powers

Preventative authorisations

3.58. Pursuant to section 64, the CPO may apply to the Supreme Court or the Magistrates Court for a preventative authorisation. The CPO may make the application only if:

- The CPO believes, on reasonable grounds, that a terrorist act is happening or will happen some time within the next 14 days; and
- The CPO is satisfied, on reasonable grounds, that the authorisation would substantially assist in preventing the terrorist act, reducing its impact or both; and
- The making of the application has been approved, in writing, by the Chief Minister.

3.59. Section 65 sets out the requirements for the contents of an application under section 64 including the name or description of an area in which the powers may be exercised, a person sought in relation to the terrorist act or a vehicle sought in relation to the terrorist act.

3.60. The court may make a preventative authorisation under section 66 if satisfied, on reasonable grounds, that:

- A terrorist act is happening or will happen some time within the next 14 days;
- The authorisation would substantially assist in preventing the terrorist act, reducing its impact or both; and
- If the authorisation is for or includes an area – it is reasonably necessary to give the authorisation for that area.

3.61. A preventative authorisation ends no later than 7 days after the authorisation is given (s. 68(2)). The authorisation may include conditions and restrictions on the exercise of powers under the authorisation (s. 68(3)). A preventative authorisation can be set aside or amended on application by the CPO or an interested person (s. 69). A preventative authorisation cannot be extended (s. 70(1)). However, another authorisation can be made for the same terrorist act (s. 70(2)).

Investigative authorisations

3.62. Pursuant to section 71, the CPO may apply to the Supreme Court or the Magistrates Court for an investigative authorisation. The CPO may make the application only if:

- The CPO believes, on reasonable grounds, that a terrorist act has happened within the last 28 days, is happening or will happen some time within the next 14 days; and
- The CPO is satisfied, on reasonable grounds, that the authorisation would substantially assist in achieving one or more of the following purposes:
 - Apprehending a person responsible for the terrorist act;
 - Investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act);
 - Reducing the impact of the terrorist act; and
- The making of the application has been approved, in writing, by the Chief Minister.

3.63. Section 72 sets out the requirements for the contents of an application under section 71 including the name or description of an area in which the powers may be exercised, a person sought in relation to the terrorist act or a vehicle sought in relation to the terrorist act.

3.64. The court may make an investigative authorisation under section 73 if satisfied, on reasonable grounds, that:

- A terrorist act has happened within the last 28 days, is happening or will happen some time within the next 14 days; and
- The authorisation would substantially assist in achieving one or more of the following purposes:
 - Apprehending a person responsible for the terrorist act;
 - Investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act);
 - Reducing the impact of the terrorist act; and
- If the authorisation is for or includes an area – it is reasonably necessary to give the authorisation for that area.

3.65. A preventative authorisation ends no later than 24 hours after the authorisation is given (s. 75(2)).

The authorisation may include conditions and restrictions on the exercise of powers under the authorisation (s. 75(3)). An investigative authorisation can be set aside or amended on application by the CPO or an interested person (s. 76). An investigative authorisation cannot be extended (s. 77(1)). However, another authorisation can be made for the same terrorist act (s. 77(2)).

3.66. To date, no preventative or investigative authorisations have been applied for by ACT Policing or made under the Act.³⁸ ACT Policing continues to monitor the security environment in the ACT and will assess all matters on a case-by-case basis, including any requirement to employ these provisions.³⁹

Special powers

3.67. Division 3.4 sets out the authorised special powers which may be used under a preventative or investigative authorisation. The powers include:

- Power to require personal details – section 79
- Power to stop and search a person – section 80
- Power to stop and search a vehicle – section 81
- Power to move or cause to move a vehicle that is parked or left standing in the target area – section 82
- Power to enter and search premises in a target area – section 83
- Power to cordon off a target area or any part of it – section 84
- Power to seize a thing during a search under Division 3.4 – section 85

3.68. A police officer exercising a power under Division 3.4 may use force that is reasonably necessary for exercising the power (s. 86(1)).

3.69. Schedule 1 of the Act sets out provisions relating to the conduct of personal searches by police officers under section 41 (Search of a person taken into custody under preventative detention order) or section 80 (Power to search people under special powers). The provisions set out rules for the conduct of searches and include a number of safeguards. They reflect similar provisions in Part 10 of the *Crimes Act 1900* (ACT) relating to personal searches generally.

Safeguards

3.70. The role of judicial oversight in the special powers authorisations is another extra safeguard that has been incorporated by the ACT Government into the Act. In some other jurisdictions, such as Victoria, the interim authorisations may be made by senior police officers.⁴⁰

³⁸ Submission of ACT Policing November 2020.

³⁹ Ibid.

⁴⁰ *Terrorism (Community Protection) Act 2003* (Vic), ss. 21D and 21E.

- 3.71. Pursuant to section 93, the CPO must ensure that police officers who exercise special powers under Part 3 are adequately trained about their obligations under human rights legislation applying in the ACT. While police officers should already be aware of these obligations, it is meaningful for it to be included as a legislative requirement in the Act.
- 3.72. Section 95 requires the CPO to give the Minister a written report about an authorisation and exercise of powers under it as soon as possible after the authorisation ends. The Minister must present a copy of the report to the Legislative Assembly. This requirement provides an additional layer of scrutiny and oversight by ACT elected representatives.

Part 4: Miscellaneous

- 3.73. Section 96 provides that in a proceeding under the Act, evidence obtained, directly or indirectly, from torture is inadmissible. This safeguard being explicitly stated in the legislation is unique to the ACT legislation and reflects section 10 of the *Human Rights Act 2004 (ACT)* which prohibits torture and cruel, inhuman or degrading punishment.
- 3.74. Section 98 of the Act requires the relevant Director-General to include a report on the use and effectiveness of the Act during the year in the annual report. The annual report must include information such as the number of PDOs made during the year.
- 3.75. Section 101 provides that the Act expires 15 years after the day it commences (19 November 2021).
- 3.76. As discussed below, the sunset clause and the requirement to regularly review the Act are critical safeguards that operate to ensure that the Act remains effective, justified and proportionate.

Discussion

Views on extension

- 3.77. ACT Policing, the ACT Human Rights Commission (HRC), Legal Aid ACT and the Security and Emergency Management Branch (SEMB) support an extension of the Act.
- 3.78. ACT Policing considers that the provisions and powers in the Act are necessary to ensure the safety of the community in the event of a terrorist act or the threat of such an act. ACT Policing supports the extension of the Act for an additional five years in line with previous extensions of the Act. ACT Policing submits that “the fact that the powers have not been used demonstrates that the safeguard provisions in the Act are working effectively and that police are not applying the provisions arbitrarily.”⁴¹
- 3.79. SEMB notes that “the Act forms part of Australia’s national counter-terrorism scheme, which is underpinned by Australia’s National Counter-Terrorism Strategy (the Strategy). The focus of the Strategy is to challenge violent extremist ideologies and stop people from becoming terrorists. Equal attention must also be given to disrupting and preventing terrorist activity within Australia and responding and recovering effectively.”⁴²
- 3.80. The HRC states that although the Act has not been used, it is prudent to maintain the Act due to the cross-jurisdictional nature of Australia’s response to terrorism. The HRC submits that “[a]s a human rights consistent model for responding to the threat of terrorism, the Act plays an important role in moderating the approach taken elsewhere in Australia, including at the Commonwealth level. It may also provide a point of leverage to help influence cooperative schemes and legislation to be more consistent with human rights standards.”⁴³ As discussed throughout this report, the ACT framework contains some stringent human rights safeguards which are not included in comparable schemes.

⁴¹ Submission of ACT Policing November 2020.

⁴² Submission of Security and Emergency Management Branch November 2020.

⁴³ Submission of ACT Human Rights Commission November 2020.

3.81. Many of these are captured in the HRC submission which notes:

“the ACT scheme contains significant safeguards that distinguish it from comparable schemes in other jurisdictions, including:

- Full judicial review and oversight
- Higher and more stringent tests for making PDOs
- Express prohibition on the admissibility of evidence obtained from torture
- Shorter duration of interim orders
- Restrictions on rolling warrants
- Limitations on duration of PDOs:
 - The ACT laws provide for 14 days preventative detention, however, the Supreme Court will only be empowered to order detention 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 ASIO Act.
- Court ordered compensation for wrongful detention
- Presumption of confidential legal communication
- Assistance for legal representation
- Prohibition on the detention of children
- Additional safeguards during detention, for example:
 - Detainees must be separated from people who are on remand or who are convicted, there must be appropriate support for persons with special needs, including psychiatric disabilities and that detention arrangements accommodate cultural or religious needs
 - Provision to develop protocols on the humane treatment of detainees. The practical detention arrangements can be improved by guidelines and protocols developed by the CPO with the approval of the Attorney-General
 - Additional safeguards for children and persons with impaired decision-making ability who are in the care of the person subject to a detention application
- No disclosure offences
- Detainees must be held at a facility that is appropriate to their needs and the risks they pose
- Transparency in application process – an application must fully disclose all matters, both favourable and adverse to the making of the order
- Requirement to appoint a Public Interest Monitor to safeguard the public interest at a hearing for a PDO or a prohibited contact order
- Additional accountability and oversight by the Ombudsman and Human Rights Commissioner
- Human rights training for police officers exercising special powers.”⁴⁴

3.82. Legal Aid ACT submits that “the Act balances the need to empower authorities to respond to potential terrorist acts without unjustifiably encroaching onto the individual liberties of ACT

⁴⁴ Submission of ACT Human Rights Commission November 2020.

- residents and citizens. The powers conferred are extraordinary, but necessary to respond to an extraordinary threat, and contain sufficient safeguards to limit the possibility of potential abuse.”⁴⁵
- 3.83. In 2017, the INSLM recommended that the Commonwealth PDO regime be renewed.⁴⁶ The INSLM noted that PDOs have the capacity to be effective and that the regime contains appropriate safeguards for protecting individuals’ rights.⁴⁷
- 3.84. The Expert Panel noted in its 2018 report that the high threshold required for a PDO means that police will, in many circumstances, be in a position to arrest and charge a person.⁴⁸ In particular, the evidence required for a PDO would likely be sufficient for charges to be laid for preparatory or other terrorism offences in the Code. The threshold for arrest without a warrant for a terrorism offence is “suspects on reasonable grounds”⁴⁹ and detention for investigation purposes is permitted.⁵⁰ Moreover, the application process for a PDO is complex and may divert resources during urgent circumstances.⁵¹ The Expert Panel also noted that arrest powers are operationally advantageous as they allow for questioning of the detained person.⁵² As discussed above, Victoria has removed the prohibition on questioning a person detained under a PDO⁵³ and NSW has introduced a complementary investigative detention regime to address operational gaps in the PDO regime.⁵⁴
- 3.85. The PJICIS has noted that PDOs are a measure of “last resort that are only expected to be used in times of an unfolding emergency (or in its immediate aftermath) and when traditional investigative powers available to law enforcement are inadequate...The fact that the AFP has never used PDOs at a Commonwealth level reflects that this purpose is understood.”⁵⁵ In 2018, the PJICIS recommended that the Commonwealth PDO scheme be continued⁵⁶ and the NSW Department of Justice recommended that the NSW PDO regime be extended.⁵⁷
- 3.86. There is also a strong case for a level of cross-jurisdictional consistency in Australian counter-terrorism laws. National cohesion is essential to maximise the operational effectiveness of ACT law enforcement and to ensure the overall integrity of the national response to terrorism. While it is true that the Act has not been used and that there have been no recent terrorist acts in the ACT, the National Terrorism Threat Level reflects that there is credible intelligence that individuals or groups have the intent and capability to conduct a terrorist attack in Australia. There have been several recent terrorist acts in other cities in Australia and New Zealand which evidence that this threat is

⁴⁵ Submission of Legal Aid ACT November 2020.

⁴⁶ Independent National Security Legislation Monitor 2017, *Review of Divisions 104 and 104A of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, pp. 80-81.

⁴⁷ *Ibid* p. 80.

⁴⁸ Ken Lay AO APM and the Hon David Harper AMQC 2017, *Expert Panel on terrorism and violent extremism prevention and response powers* (Report 1), p. 28.

⁴⁹ *Crimes Act 1914* (Cth), s. 3WA.

⁵⁰ Part 1C of the *Crimes Act 1914* (Cth).

⁵¹ *Ibid* p. 35.

⁵² Ken Lay AO APM and the Hon David Harper AMQC 2017, *Expert Panel on terrorism and violent extremism prevention and response powers* (Report 1), p. 34.

⁵³ *Justice Legislation Amendment (Terrorism) Act 2018* (Vic), cl. 38.

⁵⁴ *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 2016, 51 (Mike Baird).

⁵⁵ Parliamentary Joint Committee on Intelligence and Security 2018, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, p. 103.

⁵⁶ *Ibid* Recommendation 11.

⁵⁷ NSW Department of Justice 2018, *Statutory review of the Terrorism (Police Powers) Act 2002*, Recommendation 8.

real. The ACT needs and should have a legislative framework that enables it to effectively respond to a terrorism incident were it to occur.

- 3.87. If the Act were not extended, law enforcement agencies in the ACT could still use the Commonwealth PDO regime in Division 105 of the Code. For that reason, a level of cross-jurisdictional consistency would remain. However, there are key differences between the regimes of the ACT and the Commonwealth and when compared to the Commonwealth PDO regime, the additional safeguards reflected in the ACT regime weigh heavily in its favour.
- 3.88. However, support for extension of the Act was not universal. Civil Liberties Australia (CLA) submitted that the Act should be allowed to expire. CLA submits that the legislation is “excessive and unnecessary” and that this is proven by the fact that the legislation has not been used. CLA describes the Act as “literally useless” and argues that terrorism should be managed under the normal criminal law.
- 3.89. In addition a number of earlier reviews of the Commonwealth PDO regime recommended its repeal, and the repeal of the complementary state and territory regimes.⁵⁸

Regular reviews

- 3.90. It is recognised that the measures in the Act are extraordinary and that any extension of the Act should not be indefinite. In that context, the review and sunset clauses in sections 100 and 101 act as ‘framework’ safeguards to ensure that the Act continues to be regularly scrutinised to ensure that it remains necessary and proportionate.
- 3.91. ACT Policing, noting that the terrorism environment is dynamic and fast moving, supports regular reviews of the Act as necessary to ensure that it provides appropriate powers and safeguards.
- 3.92. The HRC submits that “[t]o ensure that extraordinary legislation, developed to deal with exceptional circumstances, does not become ordinary by default, it must be reviewed regularly and publicly.”⁵⁹
- 3.93. Legal Aid ACT also supports a further review, noting that “[i]t is imperative that the Act, which possesses the capacity to unacceptably introduce on human rights be subject to rigorous and regular review to ensure that it is best adapted to the exigencies and ever-changing threat of terrorism.”⁶⁰
- 3.94. Although CLA does not support an extension of the Act, it agrees that if the Act is extended it should be subject to a further mandatory statutory review.

Change considerations

- 3.95. It has been considered whether amendments of the kind made to the Victorian Act following the Expert Panel’s recommendations should be adopted in the ACT.⁶¹ The changes made to the Victorian Act include:
- Extending the period of an interim PDO for up to 4 days for an adult and up to 36 hours for a child;
 - Removing Supreme Court oversight for interim PDOs;
 - Removing the prohibition on questioning a person detained under a PDO;
 - Extending the PDO scheme to 14 and 15 year olds;

⁵⁸ Independent National Security Legislation Monitor 2012, *Declassified Annual Report*, Recommendation III/4; Council of Australian Governments Review Committee 2013, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Recommendation 39.

⁵⁹ Submission of ACT Human Rights Commission November 2020.

⁶⁰ Submission of Legal Aid ACT November 2020.

⁶¹ *Justice Legislation Amendment (Terrorism) Act 2018* (Vic).

- Amending the threshold for a PDO from “imminent and expected to occur, in any event, at some time in the next 14 days” to “capable of being carried out, and could occur, within the next 14 days”;
- Allowing special power authorisations to be made without Premier approval if he or she is not available; and
- Allowing special powers to be exercised by protective service officers.

3.96. All of these amendments broaden police powers and increase the limitations on human rights. The ACT Legislative Assembly, in enacting the ACT terrorism scheme, committed to the dual goals of protecting the ACT community from terrorism and promoting the International Covenant on Civil and Political Rights and the *Human Rights Act 2004* (ACT). In this context, it would be difficult to justify amendments such as those made to the Victorian Act. Accordingly, it is not proposed that the ACT should adopt these changes.

3.97. In any case, ACT Policing considers the current powers to be proportionate and necessary for the prevention of terrorism, and that no amendments to the Act should be made.

3.98. The HRC “considers that the Act provides for sufficient safeguards against arbitrariness and does not require further amendment should its operation be extended.”⁶²

3.99. The ACT Government has consistently aimed to strike the appropriate balance between implementing legislation that is consistent with terrorism legislation introduced in other jurisdictions in accordance with the COAG agreement and promoting human rights. The Act has been described by stakeholders as “model legislation”⁶³ and as “a human rights consistent model for responding to the threat of terrorism”.⁶⁴ Human rights obligations and fundamental principles of justice should continue to be a key consideration in supporting and implementing national counter-terrorism regimes in the future.

3.100. However, it is appropriate to consider and potentially recalibrate this balance so as to improve the safeguards in the Act, ahead of it being extended.

4. CONCLUSION

4.1 No specific amendments were proposed by stakeholders, though the ongoing concern by stakeholders about the importance of preventing rights intrusions was clear. Given that extension of the Act was not universally supported and noting the extraordinary nature of the powers in the Act, it is appropriate to give further consideration to opportunities for change that might enhance the right to personal liberty while still ensuring the safety and security of the community.

4.2 That work will include careful consideration of any protections afforded in the legislation of other jurisdictions and be undertaken before the sunset of the Act, later this year.

ANNEXURE A: LIST OF SUBMISSIONS

Submissions to the review were received from the following:

⁶² Submission of ACT Human Rights Commission November 2020.

⁶³ Council of Australian Governments Review Committee 2013, *Council of Australian Governments Review of Counter-Terrorism Legislation*, p. 67.

⁶⁴ Submission of ACT Human Rights Commission November 2020.

- ACT Human Rights Commission
- ACT Policing
- Civil Liberties Australia
- Legal Aid ACT
- Security and Emergency Management Branch, Justice and Community Safety Directorate



ACT
Government

Justice and Community Safety Directorate
Legislation, Policy and Programs

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