



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

Submission Number: 03

Date Authorised for Publication: 31 May 2022

Our ref: A2252780

27 May 2022

Kathleen de Kleuver
Committee Secretary
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020 CANBERRA ACT 2601

By email to: LACommitteeJCS@parliament.act.gov.au

Dear Ms de Kleuver

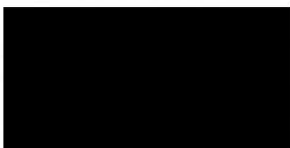
Submission to the Standing Committee on Justice and Community Safety

Thank you for the opportunity to make a submission to the Standing Committee on Justice and Community Safety's (the Committee) Inquiry into the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022.

I welcome the Committee's consideration of my submission and I am happy to appear before it if requested.

Please contact me on [REDACTED], Symone Andersen (Acting Senior Assistant Ombudsman, [REDACTED] or [REDACTED]), or Rebecca Vonthethoff (Senior Assistant Ombudsman, [REDACTED]), if we can be of further assistance to the Committee.

Yours sincerely



Penny McKay
Acting ACT Ombudsman

**Submission by the
ACT Ombudsman**

Inquiry into Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

Submission by the Acting ACT Ombudsman, Penny McKay

27 May 2022

Introduction and summary

Thank you for the opportunity to make a submission to the inquiry of the Standing Committee on Justice and Community Safety (Standing Committee), into the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022 (the Bill), presented in the Legislative Assembly on 5 May 2022.

This submission outlines:

- the roles of the ACT Ombudsman, including under the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) (the Act)
- the roles of the ACT Ombudsman and Commonwealth Ombudsman in the context of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

The roles of the ACT Ombudsman

The Office of the ACT Ombudsman is created by the *Ombudsman Act 1989* (ACT), and the Commonwealth Ombudsman currently performs the role of the ACT Ombudsman.

The role of the ACT Ombudsman is to influence systemic improvements in public administration in the ACT, as well as provide assurance to the public that ACT Government agencies and other designated entities that fall within our jurisdiction act with fairness and integrity.

The ACT Ombudsman's role is delivered by the Office of the Commonwealth Ombudsman (OCO) under a service agreement between OCO and the ACT Government. The agreement outlines activities undertaken by the ACT Ombudsman in relation to ACT agencies which include:

- managing individual complaints (including investigation when warranted) about ACT agencies
- conducting own motion investigations in relation to ACT agencies
- outreach activities to inform the public and ACT agency staff about the role of the ACT Ombudsman, and
- making recommendations to improve public administration.

Preventative detention orders (PDOs) and oversight of places of detention

Under the Act a senior police officer may apply to the ACT Supreme Court for a PDO to:

- prevent a terrorist act which is imminent and expected to occur within the following 14 days, or
- preserve evidence relating to a recent terrorist act which has occurred in the past 28 days.

The ACT allows an individual to be detained for up to 14 days. This is consistent with PDO regimes established in other states and territories. Section 43(8) of the Act foreshadows detention in a correctional centre. However, neither the Act nor the Bill define precisely where someone is to be held once taken into custody and detained in accordance with section 35 of the Act.

ACT Policing advised my Office that to date under the Act, no PDOs have been made and the CPO has not made any written arrangements regarding detention under a PDO.

As outlined below, my Office is among the entities that should be consulted on PDO detention arrangements (if the Chief Police Officer makes such arrangements) and would oversee places where people are detained under a PDO (if one is issued). My Office's role stems not only from the provisions of the Act, but also as National Preventive Mechanism (NPM) responsible for monitoring places of detention more generally under the OPCAT.

The role of the ACT Ombudsman under the Act

Under the Act:

- the ACT Ombudsman may make representations to the senior police officer nominated by the Chief Police Officer (CPO) to supervise the exercise of functions in relation to a PDO made for a person (section 36(4)(c))
- the ACT Ombudsman must be consulted by the CPO if the latter makes written arrangements in relation to the detention of people under PDOs, before seeking the Minister's approval of the arrangements (section 43(2))
- any written arrangements made by the CPO must:
 - provide for the ACT Ombudsman to be told about each place where a person is detained (section 43(4)(f))
 - provide for the ACT Ombudsman to be able to visit a place where a person is detained (section 43(4)(g))
 - be given to the ACT Ombudsman when first made and when changed, in the event the CPO makes such written arrangements (section 43(6))
- the police officer detaining a person under a PDO must tell the person detained they have a right to complain to the ACT Ombudsman in relation to:
 - the application for the PDO (section 44(2)(g)(i))
 - the person's treatment under the order (section 44(2)(g)(ii))
 - the person's detention, or continued detention, under the order (section 44(2)(g)(iii))
- a person detained under a PDO is entitled to contact, and be contacted by, the ACT Ombudsman (section 51).

The ACT Ombudsman has not been required to exercise our functions under the Act. The ACT Ombudsman remains ready to perform these functions, which remain unchanged by the Bill, to support oversight and safeguards for those detained under a PDO.

Ombudsman roles as National Preventive Mechanism for places of detention under OPCAT

In addition to the role of the ACT Ombudsman under the Act, my Office is responsible for monitoring places of detention as NPM under OPCAT.

Australia ratified OPCAT on 21 December 2017. OPCAT requires signatory states to establish a system of regular preventive visits to places of detention by independent bodies known as NPMs. It also requires that signatories accept visits from the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

On 1 July 2018, the Commonwealth Government nominated the Commonwealth Ombudsman as NPM with responsibility for overseeing places of detention under the control of the Commonwealth,¹ and as Coordinator for the network of NPMs across Australia.²

On 20 January 2022, the ACT Government nominated a multi-body NPM comprised of the ACT Inspector of Correctional Services, the ACT Human Rights Commission and the ACT Ombudsman. The ACT NPM is responsible for preventive monitoring of places of detention under the control of the ACT.

Relationship between NPM function and the PDO regime

Independent of the Act and any detention arrangements adopted under the PDO framework, an NPM would have jurisdiction to monitor places where persons under a PDO are detained. Such places could include correctional facilities or watch houses.

If the place of detention is under the control of the ACT, monitoring would generally be carried out by the ACT NPM. If the place of detention is under the control of the Commonwealth, monitoring would generally be carried out by the Commonwealth NPM.

Conclusion

Whether it is through our role under the Act or our capacities as NPM, my Office will work with ACT Policing, the ACT Human Rights Commissioner and the Inspector of Correctional Services – among others – to oversee PDO detention arrangements and places of detention.

¹ See *Ombudsman Regulations 2017* (Cth), reg 16.

² See *Ombudsman Regulations 2017* (Cth), reg 17.