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COPY

MEMBER FOR MOLONGLO

The Hon Anthony Whealy QC
Chair
COAG Counter-Terrorism Review Committee
Security Law Branch
3-5 National Circuit
BARTON ACT 2600

Dear Mr Whealy

Thank you for providing the ACT Government an opportunity to make a submission to the Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation.

As you may be aware, the ACT will have an election on 20 October 2012 and consequently, the ACT Government will operate under caretaker conventions from 14 September 2012.

Consequently, I write to provide you with an analysis of the approach that the ACT has taken with counter-terrorism laws to date. Of particular importance is the ACT Government's decision to depart from the approaches adopted by the States and the Northern Territory. The ACT Government chose to give effect to important fundamental legal concepts and human rights with the inclusion of protections and safeguards in its counter-terrorism law. I attach to this letter an analysis on the ACT approach to counter-terrorism laws (at Attachment 1).

Review of the Terrorism (Extraordinary Temporary Powers) Act 2006

When enacted, the *Terrorism (Extraordinary Temporary Powers) Act 2006* (TETPA), section 100 called on me as Attorney-General to review its operation and effectiveness after it had been in operation for 3 years, and to present a report of the review to the ACT's Legislative Assembly before the end of the TETPA's fourth year of operation.

The '*Review of the Terrorism (Extraordinary Temporary Powers) Act 2006*' was presented to the Legislative Assembly on 16 November 2010. A copy of the review is at [Attachment 2](#).

The review considered the counter-terrorism legislative reviews that had been conducted by Commonwealth, State and Territory jurisdictions, the security environment and the complementary role of the Commonwealth and State and Territory counter-terrorism legislative schemes.

The review made 8 recommendations, with 6 of those recommendations relating to amendments to the TETPA. These amendments were given effect to in the *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011*.

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Terrorism (Extraordinary Temporary Powers) Amendment Act 2011

The *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011* (the Amendment Act) was passed by the Legislative Assembly on 18 October 2011.

The Amendment Act extended the operation of the TETPA to 2016, requires the Government to conduct a second review of the TETPA and made a number of amendments to ensure that the rights and responsibilities that the TETPA imposes were clear..

These amendments were made to improve the operation of the TETPA and to provide police with additional care considerations if a child is being released from preventative detention, clarified the information obligations of police under section 78 of the TETPA and made an amendment to include a note that states that a person must be immediately released from preventative detention **if** the Supreme Court has set aside a preventative detention order.

I have attached the Amendment Act and the Explanatory Statement at Attachment 3. The Explanatory Statement contains a detailed human rights analysis, which primarily considers the need for the continuation of the TETPA given the security environment as it stood in 2011 and the ACT's obligations under the HR Act.

I trust that this information is of assistance to you. Should you require any further information, please contact Ms Nikki Bensch of the Legislation and Policy Branch in my Directorate on 6205 3390 or at nilcki.bensch@act.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Corbell', written over a vertical line that serves as a separator between the signature and the typed name below.

Simon Corbell MLA
Attorney-General

13 September 2012

ACT Approach to Counter-Terrorism Legislation

1. Terrorism (Extraordinary Temporary Powers) Act 2006

The ACT's *Terrorism (Extraordinary Temporary Powers) Act 2006* (TETPA) was developed to give effect to the September 2005 COAG agreement that jurisdictions would enact clear laws to strengthen Australia's legislative response to terrorism. The ACT's TETPA commenced on 19 November 2006.

The objective of the TETPA is to provide law enforcement agencies with appropriate legal powers to respond where there is evidence that a terrorist act is imminent, or where an act has occurred. The TETPA provides these powers to law enforcement agencies in two ways.

First, part two of the TETPA provides for preventative detention powers. These powers allow police officers to bring an application to the ACT Supreme Court for a preventative detention order. A preventative detention order allows a person to be taken into custody and detained for up to 14 days.

Part two also provides procedural and representational rights for people who are subject to an application for a preventative detention or prohibitive contact order. Section 48 of the TETPA requires that a person who is taken into custody, or detained, is treated with humanity and respect for human dignity and is not subjected to cruel, inhuman or degrading treatment.

Second, part 3 provides police with additional investigative powers. These powers are described as 'authorisations' and are divided into two categories:

- an investigative authorisation; or
- a preventative authorisation;

The TETPA provides that these authorisations must be made by either the Magistrates Court or the Supreme Court.

An investigative authorisation will be made under section 73 of the TETPA if a court is satisfied on reasonable grounds that a terrorist act has happened within the last 28 days, is happening, or will happen sometime within the next 14 days and the authorisation will substantially assist in apprehending a person responsible for the terrorist act, investigating the terrorist act or reducing the impact of the terrorist act.

A preventative authorisation will be made under section 66 of the TETPA if the court is satisfied on reasonable grounds that a terrorist act is happening or will happen in the following 14 days and the authorisation will assist in preventing or reducing the impact of the terrorist act.

Both investigative and preventative authorisations allow police officers to require personal details, to search people, to search vehicles, to move vehicles, to enter and search premises, to cordon a target area and to seize things the officer suspects on reasonable grounds may be used, or may provide evidence of, a terrorist act or serious offence.

2. *Human Rights Act 2004*

Following the September 2005 COAG agreement, the ACT Government committed to address the interaction of any counter-terrorism legislative response with the ACT's Human Rights Act 2004 (the Human Rights Act) in a robust and transparent manner.

In addition to the recognition by COAG that any new laws would only be implemented where necessary, contain appropriate safeguards against abuse, be based on evidence, and be proportionate, the ACT Government determined that the paramount considerations were our human rights obligations and the fundamental principles of justice (the rule of law, proportionality, respect for legal process and the separation of powers).

Following the Commonwealth Government's initial legislative proposal, the Anti-Terrorism Bill 2005, the ACT Government sought specialist human rights advice on the Bill and the effect on the ACT's obligations under the HR Act in the event the Commonwealth approach was adopted by the ACT. This advice was completed by Mr Lex Lasry QC (now Justice Lasry) and Ms Kate Eastman. This advice is provided at [Attachment A](#).

As a consequence of this assessment of the Anti-Terrorism Bill 2005, the ACT Government proposed the Terrorism (Extraordinary Temporary Powers) Bill 2005, which departed significantly from the Anti-Terrorism Bill 2005. The ACT Legislative Assembly Standing Committee on Legal Affairs Report on the TETPA¹ noted that there were many features of the ACT legislation that distinguished it from other jurisdictions. These features included:

- the preconditions that must be satisfied before a preventative detention order can be approved;
- the central role of the ACT Supreme Court;
- the Information that must be given to people who are preventatively detained;
- the availability of compensation in the event of a preventative order that should not have been made or the exercise of a special authorisation where a person suffers loss or expense; and
- the general compliance with international human rights standards.

The Human Rights Act, section 37 requires the preparation of a written compatibility statement for presentation in the Legislative Assembly. In determining whether the TETPA was compatible with the Human Rights Act, the ACT Government obtained further legal

¹ Standing Committee Report on Legal Affairs, Repmi on Terrorism (Extraordinary Temporary Powers) Bill 2005- Exposure Draft, February 2006

advice. This advice was prepared by Ms Kate Eastman and determined that the TETPA was compatible with HR Act. This advice is included at Attachment B.

The preamble to the TETPA recognises the commitment of the ACT Government to the dual goals of protecting the ACT community from terrorism activity and respecting and promoting the International Covenant on Civil and Political Rights as recognised in the Human Rights Act.

As a result of the importance placed on these fundamental obligations and principles, the TETPA differs in a number of ways from the legislation enacted in some State and Territory jurisdictions. These differences include the following features:

2.1 Judicial review and oversight

With regard to the preventative detention powers, the power to make both interim and final preventative detention and prohibited contact orders was conferred on the ACT Supreme Court. This ensures judicial review and oversight of processes. This provides for procedural fairness by allowing the respondent to call witnesses, produce material and make submissions.

Under section 31 of the TETPA, a person who is detained under a preventative detention order is able to seek a review of the preventative detention order at any time. Unlike some other jurisdictions, the ACT Government determined that this right should not be limited to require a person who is subject to a preventative detention order to satisfy any grounds prior to being granted a review.

The TETPA also provides that all investigative and preventative authorisations are made to the Magistrates or Supreme Courts.

2.2 Preventative detention orders- least restrictive option

The TETPA includes safeguards to ensure that preventative detention orders are only available if they are the least restrictive way of preventing a terrorist act.

Section 16 (b) (ii) (applying for preventative detention order) provides that the senior police officer who is considering making an application for preventative detention must be satisfied, on reasonable grounds, that detaining the person under a preventative detention order is the least restrictive way of preventing the terrorist act. Additionally, section 18 (4) (c) (making preventative detention order) provides that the Supreme Court must be satisfied, on reasonable grounds, that detaining the person is the least restrictive way of preventing the terrorist act.

2.3 Prohibition on the admissibility of evidence obtained from torture

Section 96 of the TETPA provides that evidence obtained, directly or indirectly, from torture is inadmissible. The section applies regardless of whether the torture was carried out inside or outside the ACT.

2.4 Duration of interim preventative detention orders

Section 21 (2) of the TETPA provides that the end time for an interim preventative detention order must be no later than 24 hours after the person is first detained under the order. This 24-hour duration is shorter than some other Australian jurisdictions, whose interim preventative detention orders generally extend for 48 hours.

A 24-hour period is an appropriate balance between the need to urgently detain a person and that person's right to be heard in relation to that detention. A further consideration was that in a jurisdiction the size of the ACT, 24 hours is adequate time to permit arrangements to be made to allow the Supreme Court to consider making final orders.

2.5 Prohibition on rolling warrants and questioning of detainees

The TETPA does not allow for multiple preventative detention orders. Section 12 of the TETPA details these restrictions. For example, section 12 (1) ensures that where a person is detained under a preventative detention order, and that order was made to assist with the prevention of a terrorist act happening within a particular period, then a subsequent order cannot be applied for, or made, for the person to prevent the same terrorist act as the original preventative detention order.

However, section 26 of the TETPA allows the Supreme Court to extend, or further extend, the period for which a preventative detention order is in force if satisfied on reasonable grounds that the extension is reasonably necessary for the purpose for which the order is made.

Section 26 (2) provides that the period for which the preventative detention order is extended must be stated in the subsequent order of the Supreme Court. This period must end:

- no later than 7 days after the person is first detained under the order as extended, or further extended; **and**
- no later than 14 days after the person is first taken into custody and detained, or detained under any preventative detention order, or corresponding preventative detention order, for the same terrorist act.

2.6 Limitations on the duration of preventative detention orders

Section 21 (3) of the TETPA states that the end time for a preventative detention order must be:

- no later than 7 days after the person is first detained under the order; **and**

- no later than 14 days after the person is first taken into custody and detained, or detained under any preventative detention order, or corresponding preventative detention order made on the same basis for the same terrorist act.

2.7 Compensation

Section 31 (5) of the TETPA allows the Supreme Court to order the ACT Government to pay compensation to a person if the court considers that, because of facts and circumstances that were not before the court when the preventative detention order was made, extended or last extended, the order should not have been made.

Section 88 of the TETPA allows a person to seek compensation following the exercise of a special authorisation if the person suffers loss or expense because of the exercise, or purported exercise of a special authorisation.

2.8 Presumption of confidential legal communications

During the development of the TETPA, the ACT Government was concerned that the proposed Bills of other jurisdictions provided that contact and communication with a preventative detainees lawyer must only take place if conducted in such a way that the contact, and the contact and meaning of the communication, could be effectively monitored by a police officer.

The ACT Government determined that the approach proposed in other jurisdictions was in direct conflict with well-established jurisprudence and detainees' right to a fair trial, where subsequent charges are laid. Human rights standards require that detainees should be able to consult a lawyer as soon as is reasonably practicable, privately and at any time.

Clear and unambiguous safeguards are included in the TETPA to protect detainees' right to consult a lawyer. Section 52 (1) provides that a person who is detained under a preventative detention order is entitled to contact a lawyer privately and at any time for the purposes of:

- obtaining advice from a lawyer in relation to a preventative detention and a prohibited contact order;
- arranging for a lawyer to act for the person in relation to a preventative detention or a prohibited contact order;
- arranging for a lawyer to act for the person in relation to any other proceeding for a remedy in relation to a preventative detention order;
- arranging a lawyer to act for the person in relation to a complaint to the ombudsman or any other entity in relation to the preventative detention order;

Section 52 (2) provides that the form of contact that the detained person may have with a lawyer is in person and by phone, fax or email.

Section 56 provides that the contact between a person detained under preventative detention and their lawyer must not be monitored unless a senior police officer (the Chief Police

Officer or another officer of or above the rank of Superintendent) directs that contact be monitored. A direction may be made if the senior police officer believes, on reasonable grounds, that 1 or more of the consequences under section 56 (2) may happen if the contact is not monitored.

2.9 Assistance with obtaining legal representation

Section 52 of the TETPA includes provisions that entitle a person who is detained under a preventative detention order to be represented by the legal aid commission or be assisted by the legal aid commission to obtain legal representation.

2.10 Prohibition on the detention of children

The ACT Government recognised the Convention on the Rights of the Child and departed from the position in other Australian jurisdictions by ensuring that children under the age of 18 years must not be detained under a preventative detention order.

Section 11 of the TETPA provides that a preventative detention order cannot be applied for, or made, for a child.

2.11 Additional safeguards during detention

The ACT Government ensured that the TETPA included safeguards in relation to the detention of people on preventative detention. These safeguards include a requirement that a person who is taken into custody or detained under a preventative detention order must be treated with humanity and respect for the inherent dignity of the human person and must not be subjected to cruel, inhuman or degrading treatment (section 48) and special contact provisions that apply to people who have impaired decision-making ability (section 53).

2.12 No disclosure offences

The ACT Government determined that the TETPA would not include offences that would apply to a person who discloses the existence of a preventative detention order.

2.13 Publication of court proceedings

The ACT Government determined not to adopt the approach of the Commonwealth and some of the States and Territories to provide that proceedings under the counter-terrorism legislative schemes were heard in the absence of the public and that the court may make orders in relation to the suppression of publication of the whole or any part of the proceedings or of the evidence given in the proceedings.

The ACT Government determined that decisions relating to the conduct of proceedings should rest with the courts and that existing powers of the Supreme Court were adequate to determine appropriate publication of its proceedings.

2.14 Disclosure in the application process

Section 17 (5) of the TETPA provides that an application for a preventative detention order must include a statement by the applicant that the application fully discloses all matters of

which the applicant is aware that are, or may be, relevant to the making of a decision on the application, whether or not they are favourable or adverse to a decision to make an order.

2.15 Public Interest Monitor

The ACT Government adopted the Queensland model for the inclusion of a public interest monitor. Section 62 of the TETPA provides that the Minister must appoint lawyers to a public interest monitor panel.

The public interest monitor represents the public interest at a hearing for an application for a preventative detention order or prohibited contact order (section 14) or where a senior police officer has directed that a detainee's contact with their lawyer is monitored (section 56).

2.16 Human Rights Training

Section 93 of the TETPA requires that the Chief Police Officer must ensure that police officers who exercise special powers under part 3 of the TETPA have adequate training about their obligations under human rights legislation that applies in the ACT.

2.17 Reporting Requirements

Section 95 of the TETPA requires the Minister to prepare a written report about the exercise of special powers under part 3 of the TETPA as soon as possible after a special powers authorisation ends. This report must be presented in the Legislative Assembly not later than 6 sitting days after the Minister receives the report.

2.18 Conduct of personal searches

Schedule 1 of the TETPA includes provisions for the conduct of personal searches, which reflect the ACT's human rights framework.

