

Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023

Submission to the Parliamentary Joint Committee on
Intelligence and Security

5 October 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the *Counter-Terrorism and Other Legislation Amendment Bill 2023*.
2. The ALA agrees that national security and counter-terrorism measures are of utmost concern to us all. There is no more important an obligation of a government than to keep people under its jurisdiction safe. The ALA believes that this is best achieved by ensuring law reform is evidence-based and complies with Australia's obligations under the Constitution and international human rights law. We oppose, however, the introduction of laws that are just as likely to increase risks to the population as they are to increase safety, whilst sacrificing fundamental rights and freedoms.
3. As the UN General Assembly has said:

[T]he promotion and protection of human rights for all and the rule of law is essential to all components of the [United Nations Global Counter-Terrorism] Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.²

4. The ALA's submission highlights the extent to which these powers interfere on people's privacy, liberty and other civil and human rights. Ultimately, we recommend that these powers should be repealed or allowed to expire with the sunset clauses.
5. The ALA opposes amending the *Crimes Act 1914* ('Crimes Act') to extend the operation of Division 3A of the Crimes Act (which provides for police powers in relation to terrorism) for a further three years until 7 December 2026. For example, part IAA of the *Crimes Act* allows a police officer to stop, question and search persons, and seize items, in a Commonwealth place (such as an airport) without a warrant. Under the proposed Bill, a police officer may continue to exercise these powers in a 'prescribed security zone' without requiring any suspicion on reasonable grounds that the person may have just committed, might be committing, or might be about to commit, a terrorist act.
6. Section 3UEA of *the Crimes Act* enables warrantless entry to any premises (whether or not in a Commonwealth place) to search for a thing that may be used in connection with a terrorism

² United Nations General Assembly, Resolution 60/288 The United Nations Global Counter-Terrorism Strategy, UN Doc A/RES/60/288 (2006), p 9.

offence. We note that in practice, the power will only be available where a telephone warrant could not be obtained first. Thus, the limited situations in which this power could conceivably be used, combined with its extraordinary nature, suggests that serious consideration should be given to its repeal.

7. The ALA strongly believes that such extraordinary police powers risk the human rights of all Australians and that it is essential for promoting integrity, accountability, and trust in both public and non-public institutions to seriously consider repealing them. The ALA highlights existing evidence which indicates that existing powers of investigation and prosecution are adequate to meet the threat posed by terrorism. We believe that control orders, preventative detention orders and warrantless searches have no place in Australian society and should be repealed.

Police powers in relation to terrorism (stop, search and seize powers)

8. These powers were introduced into Part IAA of the Crimes Act (Cth) in 2005 and allow the AFP or other police officers to stop and search people in Commonwealth places based on a reasonable suspicion that the person has just committed, or is about to commit, a terrorist act. In such 'prescribed security zones', officers can search people without any suspicion of wrongdoing.
9. The ALA continues to voice its concern that this legislation allows the search of a premises and seizure of items on the premises without a warrant, regardless of where the premises is and whether it is in a Commonwealth place of a declared area under s3UEA. The ALA contends that oversight of counter-terrorism powers is crucial to ensuring legislation operates appropriately. The ALA also believes that adequate oversight requires proper authorisation for the use of powers. Under these laws, police are required, except in very limited circumstances, to obtain a warrant on each occasion that they wish to exercise those powers. While warrantless powers can be justified in very limited circumstances, the reduction in oversight also creates a risk of misuse.
10. Warrantless searches can be conducted where officers suspect on reasonable grounds that they are necessary to prevent something on the premises from being used in connection with a terrorism offence, or to prevent a serious threat to a person's life, health or safety. Such powers have given rise to significant levels of community concern when they were introduced

and commentators noted the government had not adequately clarified the need for these powers, that they granted unreasonable levels of discretion to Ministers and the police; and they were open to abuse. Police officers already have substantial powers to search people and premises, and emergency warrants are also available.

11. The ALA contends that these powers have the potential to infringe the rights to privacy, freedom of assembly and freedom of association. As far as the ALA is aware, these powers have never been used despite being available for 18 years. We therefore question the need to maintain these extraordinary powers.
12. The ALA believes that warrants must be required before any search takes place. Ex post facto validation is inadequate. While we support increased reporting requirements in line with the COAG recommendation, we also believe that this is inadequate to properly protect the rights that warrants protect. If there is any reform required to facilitate urgent searches, the appropriate reform should ensure that safeguards can also be implemented in a timely fashion, should an urgent need arise. Such reforms might include providing funding for judges to be able to authorise urgent warrants.

Preventative Detention Orders ('PDO's')

13. The ALA believes that any law reform intended to enhance national security should be based on evidence and comply strictly with international human rights law. Legislation allowing PDOs and warrantless searches undermines fundamental human rights protections that have existed under the Westminster system for centuries.
14. The ALA contends that preventative detention orders, which have not been issued to date, have no place in Australian society and should be repealed. We believe that law reform intended to enhance national security should be based on evidence and comply strictly with international human rights law. Legislation which allows control orders, PDOs and warrantless searches undermines fundamental human rights protections that have existed under the Westminster system for centuries.
15. According to eminent scholars, PDOs are extraordinary:

Significant period of detention without charge lie beyond the bounds of what would normally be considered reasonable in a liberal democracy. It is a power more commonly found in undemocratic regimes lacking basic rights. This is exemplified by the fact that a person subject

to a PDO may contact one family member only to say that they are safe and unable to be contacted for the time being. Receiving such a call would no doubt confuse, and perhaps terrify, a spouse or parent.

16. The ALA believes that PDOs effectively constitute incommunicado detention, without charge or trial.³ We continue to question these powers and argue that they go beyond what is necessary and proportionate. The existence of these powers means that PDOs only add to powers that law enforcement officials already have in limited circumstances, including for individuals not suspected of any wrongdoing. We submit that there should be no place for such powers in a liberal democracy such as Australia.

The case for a federal Human Rights Act

17. Australia remains the only liberal democracy without a bill of rights or enforceable federal human rights act. While modern-day human rights law largely codifies and clarifies centuries of common law protections (such as habeas corpus), Australian courts have found that legislative abrogation of these protections is permissible so long as it is sufficiently clear.
18. The ALA considers that a federal HRA would ensure that those who wield power within Australia's federal institutions are subjected to a code of conduct, in accordance with the rule of law, that would operate to prevent them from exercising power in such a way as to infringe upon the rights of people domiciled in Australia or under Australian jurisdiction.
19. A HRA can be a powerful tool not only in keeping society diverse, fair, respectful and inclusive, but also being an essential adjunct to the institutions of parliamentary democracy and the common law. A federal HRA would also give domestic effect to Australia's international human rights obligations, including those detailed in and enlivened by the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and more.

³ See Senate Standing Legal and Constitutional Affairs Legislation Committee, Provisions of the AntiTerrorism Bill (No. 2) 2005, Additional comments and points of dissent by Senator Natasha Stott Despoja on behalf of the Australian Democrats, from 203.

20. This would also have the effect of modernising our democracy and facilitating the development of Australia's human rights law jurisprudence.

Conclusion

21. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the review of the *Counter-Terrorism and Other Legislation Amendment Bill 2023*.

22. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



Greg Barns SC

Chair, Criminal Justice Special Interest Group

Australian Lawyers Alliance