

Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Submission to the Parliamentary Joint Committee on
Intelligence and Security

27 October 2020

Contents

Who we are.....	4
Introduction	5
The standard of proof required for an ESO	5
The extension of court-only evidence proceedings to ESO proceedings	6
The exclusion of decisions made by the Minister from judicial review.....	7
Conclusion.....	7

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 Parliamentary Joint Committee on Intelligence and Security ('the Committee') review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 ('the Bill').
2. The Bill seeks to establish an extended supervision order ('ESO') scheme for high-risk terrorist offenders. Under an ESO, a court may impose 'any conditions (prohibitions, restrictions or obligations) that it is satisfied on the balance of probabilities are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious terrorism offence'.
3. This submission will concentrate on the following issues:
 - The standard of proof required for an ESO;
 - The extension of court-only evidence provisions to ESO proceedings; and
 - The exclusion of decisions made by the Minister for Home Affairs under Division 105A of the *Criminal Code* from judicial review under the Act.

The standard of proof required for an ESO

4. The ALA submits that the standard of proof required for making an ESO should not be lower than that for a continuing detention order ('CDO'), namely 'to a high degree of probability'.
5. The standard of proof that must be satisfied in order to make an ESO is 'the balance of probabilities', rather than the higher standard of 'to a high degree of probability'. The latter is the standard that applies to the making of a CDO. According to the Explanatory Memorandum of the Bill, the reason for this is to reflect 'the less restrictive nature of ESOs as an alternative to CDOs'.
6. The ALA submits that the higher standard of proof – 'to a high degree of probability' – should be adopted when determining the outcome of an ESO application, given the following considerations:
 - the ramifications for and restrictions on the person subject to an ESO, such as surveillance of that person (including surveillance without a warrant), restrictions on

where and when that person can reside or travel (including handing over their passport/s), as well as how and with whom that person can communicate for the duration of an ESO;

- that some human rights as recognised by the *International Covenant on Civil and Political Rights* (ICCPR) are tested by this legislation, as referenced in the above examples (freedom of movement, freedom of expression, and more);
- that an ESO will curtail a person's right and ability to work, engage in education and/or undertake training (as recognised in Articles 6 and 13 of *International Covenant on Economic, Social and Cultural Rights*);
- that an ESO is an order pertaining to the risk of future action/s rather than an offence committed in actuality; and
- the UN Human Rights Committee's determination that the use of additional detention should be a 'last resort',² and so the standard of proof required should reflect the gravity of such an order.

The extension of court-only evidence proceedings to ESO proceedings

7. The Bill seeks to extend court-only evidence provisions to ESO proceedings. The ALA is concerned that this extension would mean that a person who is subject to ESO proceedings, and their representative, could be excluded from proceedings 'while the Court considers highly sensitive information'.
8. Given that an ESO can limit an individual's right to liberty and security of the person, the ALA considers that ESO proceedings should take place in open court, that the person who is the subject of those proceedings should be present in court, and that the person should have a right to be legally represented by the advocate of their choice in court during those proceedings.

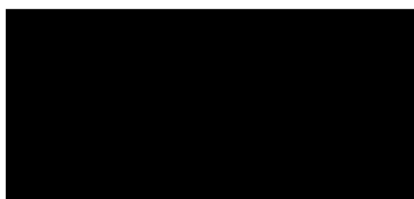
² UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21].

The exclusion of decisions made by the Minister from judicial review

9. The Bill amends Schedule 1 of the *ADJR Act* to exempt decisions made by the AFP Minister under Division 105A of the *Criminal Code* as decisions to which the *ADJR Act* does not apply. According to the Explanatory Memorandum, this means that judicial review under the *ADJR Act* will not be available for decisions made by the AFP Minister under Division 105A.
10. The ALA submits that given the impact on freedoms and basic rights that an ESO would have on an individual, there should be the option for judicial review under the *ADJR Act* – especially if an ESO might only be reviewed annually, and if the initial standard of proof that the AFP Minister has the onus of fulfilling is lower for an ESO than other schemes (e.g. a CDO, see above).

Conclusion

11. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020. The ALA is available to provide further assistance in relation to any of the matters raised by this submission.



Graham Droppert
President
Australian Lawyers Alliance