THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:Crim:PWrg1377421

13 July 2017

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Mark ~~Attorney~~ General,

Terrorism Legislation Amendment (Police Powers and Parole) Act 2017

I refer to the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (Act), which was introduced and passed by both Houses of Parliament on 21 June 2017.

The Act makes significant amendments to the *Terrorism (Police Powers) Act 2002* and the *Crimes (Administration of Sentences) Act 1999*. We note that we were not consulted on the legislation prior to its introduction, and nor did we have the opportunity to properly consider or comment on the Bill prior to it being passed.

The Law Society has a number of serious concerns with the Act, which we have detailed below.

Police powers

The Act amends the *Terrorism (Police Powers) Act 2002* to authorise force, including lethal force, that is reasonably necessary to defend anyone threatened by a terrorist incident or to secure the release of hostages, where planned and coordinated police action is required.

We are concerned that the Act permits the authorisation of lethal force without a reasonable apprehension of injury or death to another.

Lethal force

Section 24B(1) authorises the use of lethal force on two bases:

1. Police are responding to an incident that is, or is likely to be, a terrorist act; and
2. Police believe force is reasonably necessary to either:
    a. defend people threatened by the terrorist act; or
    b. release hostages.

We have serious concerns with the breadth and haste of application of the term "terrorist act"; a decision which will be made by the Commissioner of Police, and will not be reviewable.

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The legislation creates the potential for any siege situation to be declared a terrorist act and there is a risk that lethal force becomes the norm. Pursuant to section 24B(1), the police can kill a hostage taker without a reasonable suspicion that they will actually injure the hostages; they only need to consider whether it will result in release.

Police can kill a hostage taker to prevent a threat to a hostage, and by definition, any hostage is under threat. Creating this as a test for administrative action is specious, given the test is already made out as a condition precedent i.e. police can kill any hostage taker if they take hostages.

We consider that the threshold for the use of lethal force is far too low. Section 24B(1) should be amended by deleting the phrase "to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty", and replacing it with "to prevent a serious risk of death of hostages".

We further note that increasing the use of lethal force in these situations may expand the risk of collateral damage. Tragically, the deaths of Katrina Dawson in the Lindt Café siege and David Gundy in the execution of a warrant were caused by police action.

Oversight

There are very significant consequences that flow from a declaration that an incident is, or is likely to be, a terrorist act, and these decisions should be subject to oversight.

As with other terrorism issues, the Commissioner of Police should be required to apply for a warrant from the Supreme Court as persona designata. A warrant on evidence under seal, finding that the incident is, or is likely to be, a terrorist act, would represent proper oversight. Duty judges could make these orders on an urgent basis.

It appears that the intention is that the declaration may be made by the Commissioner of Police or a Deputy Commissioner of Police and is not delegable. The legislation should specify that the power is non-delegable to provide certainty.

Parole

The Act amends the *Crimes (Administration of Sentences) Act 1999* to create a presumption against parole for anyone who demonstrates support for, or has links to, terrorist activity.

The amendments to parole are unprecedented in terms of presumption. We do not support these limits on the discretion of the Parole Authority, and note that the issues to be considered should already be considered under the existing test.

The proposed threshold for granting parole is very high, and we query how the Parole Authority could ever satisfy itself that the offender will not engage in terrorist acts. Conversely, the threshold for revocation is very low, and we query what evidence will be required for the Parole Authority to be satisfied that an offender 'may' engage in terrorism.

We submit that the Act should not be retrospective. The changes to sentencing law should not adversely affect the release of people who have already received their sentences. We support open justice and sentencing which is predictable and comprehensible by offenders.

It also appears counterintuitive that a terrorism related offender will now generally be released without supervision at the expiration of his or her sentence. It would appear logical that these types of offenders, more than any other, require a period during which they can be supervised on parole rather than being released with no supervision.

Standard of proof

There is no standard of proof for the consideration of the application of the provision. The Parole Authority considers grants of parole on balance (section 135(1) *Crimes (Administration of Sentences) Act 1999*). However, the Act is silent as to the standard for the antecedent fact.

Section 159C(2) specifies the grounds as follows: "… is known to be a terrorism offender…" without standard, and "…has become aware…" which is unclear.

If the presumption is to remain, the drafting needs to create a clear standard, such as:

> "if the Parole Authority is satisfied on balance that the offender is a terrorism offender…."; and
> "is satisfied on balance that the offender may engage in…"

Evidentiary section

The evidential section, section 159D, is unnecessary. Clause 11(3) of Schedule 1 of the *Crimes (Administration of Sentences) Act 1999* provides:

> The Parole Authority is not bound by the rules of evidence, but may inform itself of any matter in such manner as it thinks appropriate.

Amendment to the *Crimes Sentencing Procedure Act 1999*

Section 159C(4) contains a collateral amendment to the *Crimes Sentencing Procedure Act 1999*. It provides that a court may decline to make a parole order under section 50 of the *Crimes Sentencing Procedure Act 1999* if the offender is known to the court as a terrorism related offender.

The amendment should be made to section 50 of the *Crimes Sentencing Procedure Act 1999* so that people are aware of it.

The Law Society contact for this matter is Rachel Geare, Senior Policy lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President