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QUEENSLAND GOVERNMENT AGENCY SUBMISSION

CRIME AND CORRUPTION COMMISSION

REVIEW OF THE TERRORISM (PREVENTATIVE DETENTION) ACT 2005

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INTRODUCTION

The Queensland Government welcomes the opportunity for Queensland Government agencies to provide submissions to the Crime and Corruption Commission's (CCC) review of the *Terrorism (Preventative Detention) Act 2005* (TPDA). The CCC has been requested to carry out this review at the behest of the Minister for Police and Minister for Corrective Services, who is in turn statutorily required by section 83A of the TPDA to review the need for, and effectiveness of, the TPDA.

This submission has been prepared by the Department of Premier and Cabinet and the Queensland Police Service (QPS). The focus of the submission is two-fold. Firstly, it seeks to outline the TPDA's place within the national framework of counter-terrorism laws and the extent to which recent reviews and proposed legislative developments nationally may impact upon the TPDA.

Secondly, the submission provides operational policing implications of the key issues identified by the CCC for the review, in the context of the prevailing threat environment. Although the TPDA has never been used in Queensland, the QPS has been involved in a number of exercises where the TPDA's provisions have been considered in a practical sense. Identifying, investigating, preventing and responding to terrorism is core business for the QPS and the TPDA exists alongside a range of specialist counter-terrorism and general police powers at the QPS' disposal to combat terrorism in Queensland. It is this experience that has guided the submission's comments in relation to the operational need for, and effectiveness of, the TPDA's provisions.

It should be noted that this submission refers to current Government policy positions. The submission also identifies policy, as well as practical operational implications of reforms proposed, as way to inform the CCC's deliberations on these issues. The operational policing issues identified were provided by the QPS.

The recommendations from the review will be taken into account in finalising the position of Government on any reforms to be made to the TPDA. Any relevant finding or recommendation will also be taken into account in determining a final position on the outstanding reform matters agreed to at the Special Council of Australian Governments (COAG) meeting from October 2017.

NATIONAL CONTEXT

NATIONAL THREAT LEVEL

The national security threat level increased following the commencement of the TPDA. When the TPDA was first introduced in 2005, the National Public Alert Level was at 'Medium'. This level was increased to 'High' on 12 September 2014. A new national threat advisory system was introduced in 2015 and placed the threat level as 'probable'. Despite the change in system, there was no actual change in threat level at this time.

The current threat level remains at 'probable' and is based on assessments from the National Threat Assessment Centre within ASIO.

COORDINATED AND CONSISTENT NATIONAL RESPONSE TO TERRORISM

The COAG Special Meeting on Counter-Terrorism held on 5 October 2017 highlighted the fundamental importance of a nationally consistent response to terrorism. At this meeting First Ministers cemented their recommitment to national consistency through the signing of an updated Intergovernmental Agreement (IGA) on Australia's National Counter-Terrorism Arrangements.

As outlined in the preamble to this IGA, effective jurisdictional cooperation has long been acknowledged as critical to Australia's fight against terrorism. The updated IGA now directly

acknowledges the importance of national consistency of our approaches, referring to "nationally consistent approaches to countering terrorism, with an emphasis on interoperability, across the prepare, prevent, respond and recover spectrum" in an updated Purpose section.[1] As a further example in the specific context of counter-terrorism laws, it is noted that while a commitment to a 'comprehensive and complementary legal regime' previously formed part of the IGA, the 2017 updates specifically emphasise the need to support national consistency in areas of state and territory counter-terrorism legislative reform via the development of model principles or legislation where 'possible and appropriate'.[2]

The IGA on Counter-Terrorism Laws, which entered into force on 25 June 2004, is the other significant agreement in this space. The IGA on Counter-Terrorism Laws followed the enactment of constitutional references by the states to support the comprehensive national application of a framework of federal terrorism offences under Part 5.3 of the *Criminal Code Act 1995 (Cth)* ('the Commonwealth Criminal Code') The IGA outlines a process for consultation and agreement between the Commonwealth and state and territory governments on amendments to Part 5.3 of the Commonwealth Criminal Code and related regulations prescribing terrorist organisations.

The Queensland Government recommitted to a nationally consistent approach at the Special COAG meeting in October 2017. This involves ensuring, as far as possible, the interoperability of capabilities and coordination of response mechanisms, including relevant legislative provisions, with the Commonwealth and other states and territories. The Queensland Government is committed to ensuring that Queensland's legislation remains in step with national arrangements and that there are no gaps in this regard to ensure an effective coordinated response. As outlined below, Queensland recently amended the TPDA to ensure its currency and effectiveness within the national scheme. It is noted however that Queensland (as other jurisdictions also do) retains its ability to introduce or retain measures that fall outside a nationally consistent approach if this represents the best means to address the particular risks in Queensland.

PREVENTATIVE DETENTION LEGISLATION

UNIFORM NATIONAL PREVENTATIVE DETENTION LAWS

The TPDA was first introduced in 2005 after the Queensland Government made a commitment at COAG on 27 September 2005, to strengthen counter-terrorism laws by enacting legislation to provide for preventative detention of terrorism suspects for up to 14 days. All other states and territories introduced consistent preventative detention provisions at the same time. The state and territory regimes were designed to complement the Commonwealth's own preventative detention order (PDO) regime under Part 5.3 of the Commonwealth Criminal Code, which due to constitutional constraints, was only able to provide for the preventative detention of persons up to a maximum of 2 days.

Both the state and territory and Commonwealth provisions share the same key components and allow a person to be preventatively detained for the purpose of preventing a terrorist act from occurring or preserving evidence of a recent terrorist act. The questioning of detained persons is strictly limited and no form of investigative questioning is permitted. The detained person is subject to significant restrictions on contact with other persons but is entitled to less restrictive contact arrangements with a lawyer, particularly if the lawyer has a security clearance.

Queensland's most recent amendments to the TPDA, contained in the *Counter-Terrorism and Other Legislation Amendment Act 2017* (CTOLAA 2017), included an amendment to the threshold test for

[1] Inter-Governmental Agreement on Australia's Counter-Terrorism Arrangements, 5 October 2017, section 2.3 (b).
[2] Inter-Governmental Agreement on Australia's Counter-Terrorism Arrangements, 5 October 2017, section 4.2.

preventative detention orders.[3] This change ensured that Queensland's provisions aligned with earlier changes enacted by the Federal Government to its own regime under Part 5.3 of the Commonwealth Criminal Code. In 2016 the Federal Government replaced the previous 'imminence test', with a requirement that the terrorist act is 'capable of being carried out, and could occur, within the next 14 days'.[4] The previous threshold was considered extremely difficult to meet as it effectively required police to establish that the terrorist act *would* occur in the next 14 days.

REVIEWS OF COMMONWEALTH PREVENTATIVE DETENTION LEGISLAITON

As with the TPDA, the Commonwealth's preventative detention provisions have never been used. In 2016 the Commonwealth provisions expired and were extended for a period of two years, until 7 September 2018. Two recent reviews of the Commonwealth provisions, have recommended that, despite their lack of use, the provisions should be continued. The first review, the *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, was delivered on 7 September 2017 by the Independent National Security Legislation Monitor (INSLM), Dr James Renwick SC (INSLM Review). The Parliamentary Joint Committee on Intelligence and Security (PJCIS) was responsible for the second review, the *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime: Division 3A of Part 1AA of the Crimes Act 1914; Divisions 104 and 105 of the Criminal Code*, and released its report on 1 March 2018 (PJCIS Review).

In a joint submission to the PJCIS Review, the Federal Attorney-General's Department and the Australian Federal Police (AFP) observed: *"In the current threat environment, where there is an increase in the threat of smaller-scale opportunistic attacks by lone actors, and where there is less time for law enforcement agencies to respond to an attack, the PDO is a valuable tool that enables police to disrupt terrorist activity"*. [5] The Federal Government has yet to indicate a formal response to either review.

The INSLM found that the non-use of preventative detention orders should not automatically lead to a finding that the powers are redundant. Instead, the INSLM considered that the Commonwealth preventative detention regime was a necessary and proportionate response to the terrorist threat. Based on this assessment the INSLM recommended that the Commonwealth provisions be continued for a further period of 5 years.[6]

Nevertheless, the INSLM placed a significant rider on this recommendation. Despite recommending their continuation, the INSLM remained unconvinced that the Commonwealth provisions provided an adequate response to the need for preventative detention powers in the current threat environment. In this regard the INSLM noted the AFP's concession that the availability of lengthier detention periods under the complementary state and territory regimes would mean that these regimes would generally be preferred.[7]

The INSLM further noted COAG's consideration of New South Wales' (NSW) investigative detention model, now in force under Part 2AA of the *Terrorism (Police Powers) Act 2002* (NSW), at its meeting on 1 April 2016.[8] At this meeting, all states and the Northern Territory, with the Australian Capital

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[3] *Counter-Terrorism and Other Legislation Amendment Act 2017* (Qld), Section 45, Amendment of s 8 (Basis for applying for, and making, a preventative detention order).

[4] *Counter-Terrorism Legislation Amendment Act 2016* (Cth), Schedule 5, Item 2.

[5] PJCIS Review, *Submission 13*, p 19.

[6] INSLM Review, p. 80.

[7] INSLM Review, p. 81.

[8] INSLM Review, p. 81.

Territory (ACT) reserving its position, agreed, "in-principle, to the NSW model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects".[9]

In reaching its conclusion that the Commonwealth preventative detention regime be continued for a further three years, the PJCIS Review acknowledges the nature of the current threat environment. The PJCIS, however, did not suggest that the Commonwealth's PDO provisions in their current form are ill-suited to meeting operational need. In particular, the PJCIS described preventative detention orders as *"a power of 'last resort' that are only expected to be used in times of an unfolding emergency (or in its immediate aftermath) and when the traditional investigative powers available to law enforcement are inadequate to contain the threat".*[10] Further, the PJCIS considered that in the current threat environment it was important for the AFP to be able to respond directly to threats, alongside available state and territory response powers.[11]

With respect to the prohibition on questioning the detained person, and criticisms from some submitters that the provisions do not assist in the investigation of terrorism acts, the PJCIS distinguished the preventative purpose of the provisions from investigative powers available under other legislative provisions. On this point the PJCIS referred to the Commonwealth's pre-charge detention provisions under Part 1C of the *Crimes Act 1914* (Cth) and coercive questioning powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).[12]

In recommending a sunset period of three years instead of five years as recommended by the INSLM, the PJCIS noted that this timeframe would allow an examination of necessity in the context of the prevailing threat environment and relevant developments in other legislation.[13]

OTHER RELEVANT LEGISLATION

INVESTIGATIVE DETENTION UNDER PART 1C CRIMES ACT 1914 (CTH)

The 5 October 2017 COAG Communique notes: "To support national consistency and interoperability – and boost the powers and effectiveness of our security and law enforcement agencies – leaders agreed to a range of legislative measures", This included, as referred to above, the enhancement of the Part 1C of the *Crimes Act* (Cth).

Part 1C of the *Crimes Act* provides police with powers to arrest, without warrant, an individual on suspicion of committing, or having committed, a Commonwealth terrorism offence and to detain that person for an extended period prior to having to lay charges.[14] Persons arrested on suspicion of terrorism related offences can be detained for an initial investigation period of up to four hours (this is limited to two hours where the person is under 18 years old or is an Aboriginal or Torres Strait Islander person).[15] The investigation period can be extended by application to a magistrate for up to a total of 24 hours[16] and the magistrate can also specify certain additional time as 'dead' time[17] effectively allowing a total maximum detention period of up to 10 days.

[9] *COAG Meeting Communiqué*, 1 April 2016.

[10] PJCIS Review, p. 103.

[11] PJCIS Review, p. 103.

[12] PJCIS Review, p. 103.

[13] PJCIS Review, p. 103.

[14] *Crimes Act 1914* (Cth), s 3WA.

[15] *Crimes Act 1914* (Cth), s 23DB(5).

[16] *Crimes Act 1914* (Cth), s 23DF(7).

[17] *Crimes Act 1914* (Cth), s 23DB(11), places a 7 day limit on the amount of time that can be disregarded.

The Federal Government has yet to introduce the proposed amendments but indicated in a submission to the PJCIS Review that the key features of the proposed model will be as follows:

- an initial investigative detention period of 8 hours
- a total investigative detention period of 14 days, authorised by a magistrate in 7 day increments where any extension beyond the first extension will be subject to a higher threshold as to the necessity of the ongoing detention of the individual
- the removal of disregarded and specified time provisions and a clear cap on the maximum period of detention.[18]

INVESTIGATIVE DETENTION UNDER PART 2AA TERRORISM (POLICE POWERS) ACT 2002 (NSW)

The New South Wales investigative detention regime provides for terrorism suspects to be arrested and detained for investigative purposes without charge for an extended period. Detention is up to 4 days following arrest by a police officer and can be extended by a detention warrant for a total maximum of 14 days.[19] During this time suspects can be questioned for up to 16 hours a day.[20] This legislation sits in addition to NSW's existing PDO regime.

As outlined above, in April 2016 First Ministers agreed at COAG that all jurisdictions (except ACT) would consider the need for state-based pre-charge detention legislation using the NSW legislation as a model.

In submissions to the PJCIS review, the Federal Government considered that, subject to the implementation of the proposed enhancement to Part 1C of the Crimes Act, states and territories may no longer see the desirability in implementing state-based investigative detention provisions in line with the NSW regime. This submission noted that "the enhanced Commonwealth pre-charge detention regime will apply uniformly to all States and Territories, and continued reliance on this regime would support national consistency and interoperability in the investigation of Commonwealth terrorism offences".[21]

Queensland is continuing to consider the need for a state based pre -charge detention legislative regime.

VICTORIAN PROPOSALS

In 2017 the Victorian Government commissioned an Expert Panel to examine the effectiveness of Victoria's counter-terrorism legislation. The Expert Panel released two reports providing a raft of recommendations in relation to terrorism and violent extremism prevention and response powers.

In its first Report the Expert Panel recommended changes to Victoria's current preventative detention laws to: (a) permit police to question a suspect; (b) permit police to take a person into custody without first obtaining a Court order; (c) extend the maximum period for interim detention from 48 hours to four days; and (d) provide for an appropriate mechanism to protect sensitive criminal intelligence. [22]

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[18] PJCIS Review, *Submission 13*, p. 20.

[19] *Terrorism (Police Powers) Act 2002*, s 25H.

[20] *Terrorism (Police Powers) Act 2002*, s 25G(4).

[21] PJCIS Review, *Submission 13*, p. 21.

[22] Victorian Government, *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers – Report 1, 2017*, recommendation 2.

This modified preventative detention scheme was further considered in the second report of the Expert Panel in relation to minors, and the Expert Panel recommended that it apply to persons who are 14 or 15 years of age.[23]

The Victorian Expert Panel noted that in the current environment there is a serious risk of minors as young as 14 or 15 engaging in terrorist activity and recommended a range of additional safeguards to apply to all minors under the recommended modified preventative detention scheme.

The Victorian Government has accepted in-principle all 42 recommendations of the Expert Panel.

SPECIFIC ISSUES HIGHLIGHTED FOR CONSIDERATION BY THE CCC

The CCC has posed a range of questions to guide submitters to the review. As noted above, this submission is limited to approved current Government policy positions. The submission identifies policy, as well as practical operational implications in relation to all the broad themes encompassed by these questions, namely:

- Overall need for the TPDA
- Overall effectiveness of the TPDA
- Scope of preventative detention orders
- Seeking and making preventative detention orders
- Police powers in relation to detainees and safeguards against abuse
- National consistency and interoperability.

OVERALL NEED FOR THE TPDA

It is the case that there have been no applications for a PDO in Queensland to date. This is because there has been no opportunity or need to make such an application. The legislation is designed for a very specific set of circumstances. Its focus is disruption and prevention, or the preservation of evidence, rather than investigation, and as such it would only rarely be used.

Nevertheless, the rationale proffered for the introduction of the TPDA in 2005, remains even more relevant in the current threat environment. As highlighted by the CCC the explanatory notes to the Terrorism (Preventive Detention) Bill 2005 considered that the Bill's provisions were "essential because the nature of the terrorism threat means that police may need to intervene earlier to prevent a terrorist act which less knowledge than they would have had using traditional policing methods".[24]

The current threat environment involves increasing risk of lone actor and other opportunist attacks which are less sophisticated, involve rapid targeting and require less planning, although the destructive impact is no less significant. The TPDA provides a limited, but important, ability for police to act to preserve evidence or prevent a terrorist attack where there may otherwise be insufficient information to arrest an individual. The ability to act to protect the community where conventional powers may be unavailable, whilst this is likely to occur only in exceptional circumstances, continues to be critical to police in responding to terrorism.

An application under the TPDA would be considered by police in circumstances where there was insufficient evidence or information to meet the Part 1C arrest threshold under the *Crimes Act* (Cth). In the current threat environment, where attacks are often planned and executed with little turnaround time, the ability to utilise the TPDA may be the only effective option. It must also be noted that the TPDA has a different focus to the investigative detention provisions under Part 1C. The focus

[23] Victorian Government, *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers – Report 1, 2017*, recommendation 18.
[24] Terrorism (Preventative Detention) Bill 2005, *Explanatory Notes, p. 1.*

of Part 1C is the investigation of an offence where the detained person is a terrorism suspect. The TPDA's focus is the prevention of a terrorist attack, or the preservation of evidence in the aftermath of a terrorist attack. Significantly, a PDO could conceivably be made in relation to a person who is not a suspect.[25]

Nevertheless, it is expected that, subject to threshold requirements being met, the investigative detention provisions under Part IC would almost always be utilised by law enforcement in preference to an application under the TPDA. The additional powers to question a suspect under Part 1C necessarily make these provisions of increased utility to police. Further, a new lower arrest threshold for Commonwealth terrorism offences was introduced in 2014, replacing the previous threshold of 'believes on reasonable grounds' with 'suspects on reasonable grounds'.[26] This change has increased the powers of arrest and detention with respect to terrorism suspects and has narrowed the circumstances in which the TPDA would be utilised.

For these reasons it cannot be assumed that the proposed amendments to Part 1C will, or should have, any implications for the ongoing need for the TPDA. The proposed amendments to extend the detention period in Part IC recognise the complexity of modern investigations and are designed to provide important investigative support. The ability to question a terrorism suspect for an extended period means that in most circumstances arrest under Part 1C will be the preferred option. However, the possibility for situations where the threshold for arrest cannot be met, or where there is an urgent need to detain a non-suspect cannot be discounted, and in these cases the TPDA's provisions may represent the only effective option to protect the community and prevent a terrorist attack or to preserve evidence following a recent attack.

In summary, the terrorist threat within Australia continues to evolve, and Queensland is not immune. The existence of the TPDA ensures that the QPS has the necessary power to rapidly and effectively respond to terrorist threats and incidents in circumstances where conventional policing powers are insufficient. The recent reviews of the INSLM and PJCIS of the Commonwealth's preventative detention order provisions (referred to above) highlight the arguments for and against the retention of the provisions, but both recommended their continuation. It is submitted that in order to adequately protect the public, it is critical to ensure that police are adequately empowered to respond to the range of terrorist threats which may threaten public safety. Removing a potentially critical and proactive enforcement option that is designed to enhance community safety carries significant risk. The security environment, like the criminal environment, adapts and evolves over time. A shift in the target of law enforcement operations can be partially responsible for this. Therefore, despite the lack of use in recent times, circumstances in the future may very well change to compel police to use PDO order powers with more frequency and effect.

OVERALL EFFECTIVENESS OF THE TPDA

Consideration of whether a PDO may be required often arises in state police (and national) counter-terrorism exercises where investigators are required within the devised scenario to assess whether an application under the TPDA may be necessary and whether the relevant thresholds are met. The QPS specifically tested the use of the TPDA in Exercise Platinum Rain in 2010. A number of issues with the TPDA were identified as a result of this exercise, and a range of amendments, designed to address these issues, and thereby improve the effectiveness of the TPDA, were made in the *Counter-Terrorism and Other Legislation Amendment Act 2016 (CTOLAA 2016)* and the *CTOLAA 2017*.

[25] Refer to PJCIS consideration of application of Commonwealth PDOs to non-suspects based on examples provided by the Federal Attorney-General's Department and the AFP in relation to the use of PDOs for the preservation of evidence: *PJCIS Review of police, stop, search and seizure powers, the control order regime and the preventative detention order regime*, February 2018, pp. 96 – 98.

[26] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

Exercise Platinum Rain raised operational issues in relation to urgent applications for preventative detention orders and enabling electronic/phone/fax/email applications for a PDO in urgent circumstances. Whilst Queensland's PDO scheme did enable that application for a PDO by phone or other similar facility, the legislation required the preparation of a written application prior to the application being made. The legislation also required a person to be named in the application which prevented PDOs being obtained for a person whose name was not known or only partially known. The amendments made to the TPDA by the *CCTOLAA 2016* addressed these issues.[27]

In addition, issues were raised with the ability of police to obtain DNA and Identifying Particulars from persons detained under a PDO. Section 69 of the TPDA places limits on the taking of identifying particulars (IDPs) from a person under a PDO by restricting their use to identification purposes. This section was amended by the *CTOLAA 2016* by inserting a note to clarify that identifying particulars can be taken from a person under the *Police Powers and Responsibilities Act 2000* (Qld) where the person has been released from a PDO, even though the PDO may still be in force.

Issues were also raised during Exercise Platinum Rain in relation to the 'imminence test' and the limitation on entry of a dwelling between 9pm and 6 am to take the person into custody under a PDO. The amendments made to the TPDA by the *CTOLAA 2017* addressed these issues. This was achieved by:

- replacing the imminence test with a capability threshold test to obtain a PDO. this amendment reflected the 2016 amendments made to the Commonwealth preventative detention scheme and ensured operational utility between the Commonwealth and Queensland's PDO scheme.
- amending section 41 by removing the restriction on entry of a As outlined above_dwelling between 9pm and 6am to take a person into custody under a PDO; and
- section 41 was also amended to reduce the threshold for entry from 'believes on reasonable grounds' to 'suspects on reasonable grounds', that the person, the subject of the PDO, is on the premises.

Whilst not directly related to an issue raised during exercises, it is worthwhile noting that, the *Counter-Terrorism and Other Legislation Amendment Act 2015* (Qld)[28] extended the extraterritorial application of the TPDA, to the same area to which the 'substantive criminal law' of Queensland is applied to the maritime environment under the Crimes at Sea Cooperative Scheme.[29] This was to enable Queensland to exercise preventative detention powers out to 200 nautical miles seaward of the Territorial Sea Baseline or to the outer limit of the continental shelf, if further, to protect Queensland against violence. This extraterritorial application will enable the use of TPDA powers where the QPS interdicts a vessel within the adjacent area. This would also include circumstances where the Australian Defence Force was handing back control of an incident to the QPS following its interdiction of the vessel using powers under Part IIIAAA of the *Defence Act 1903* (Cth).

SCOPE OF PREVENTATIVE DETENTION ORDERS

Preventative detention orders allow for a maximum period of detention of 14 days.[30] Any extension of the initial police-ordered period of detention is based on judicial consideration of the material relied upon to justify the detention.[31] It is noted that the Commonwealth's proposal to extend the

[27] *CTOLAA 2016* (Qld) included amendments to section 25 allowing a PDO to be made in respect of a person whose real name is not known, provided the person is able to be identified as the subject of the PDO and amendments to section 79, extending powers for police officers to make applications by phone or electronically etc, to include Prohibited Contact Orders and removing the requirement for preparation of a written application prior to making an urgent application prior to making an urgent application for an initial order for a PDO.

[28] COLAA 2015 also extended the sunset provision for the TPDA for a further ten years and included the review requirement within four years under section 83A.

[29] *Intergovernmental Agreement – Crimes at Sea*, 16 November 2000.

[30] All states and territories have PDO schemes allowing for a maximum period of detention of 14 years and apply broadly the same threshold test. Refer TPDA, s 12.

[31] Under the TPDA, s 7, an issuing authority for a final PDO is a judge or retired judge appointed by the Minister.

investigative detention provisions under Part 1C of the *Crimes Act 1914* and the NSW investigative detention legislation both allow for a 14 day period of detention. The 14 day time limit under the NSW scheme is designed to give investigators sufficient time to pursue lines of investigation prior to having to lay charges or release the suspect.[32]

One concerning development in the terrorism threat internationally over recent years has been the increasing involvement of children as young as 14 in this type of offending. The utilisation of social media, particularly for grooming purposes by extremists, is partly responsible for this. A number of juveniles have been charged in Australia with terrorism offences, and the individual responsible for the murder of NSW police employee Mr Curtis Cheng was just 15 years old. Concern has also been identified with the return of foreign fighters to Australia, some of whom are expected to return with young children who may have been routinely exposed to religious and/or violent extremism. The changing threat with respect to the involvement of juveniles has led to amendments to the Commonwealth control order regime, which previously was limited to persons aged 16 or over, but has now extended to include juveniles aged 14 and 15.[33] NSW's investigative detention regime extends to 14 year olds.[34]

Under the TPDA, preventative detention orders can be made in respect of persons aged 16 and over.[35] The nature of the current threat environment makes the age limit applying to preventative detention orders a particularly relevant area for inquiry. As outlined above the application of preventative detention order provisions to minors was recently given specific by the Victorian Expert Panel who recommended lowering the current age threshold to 14 and 15 year olds.

Generally speaking the application of counter-terrorism laws to juveniles has involved the inclusion of additional safeguards. This recognises the special vulnerability of children and their need to be treated separately. When lowering the threshold for control orders, the Commonwealth amendments to Part 5.3 of the Commonwealth Criminal Code also included enhanced protections for persons aged between 14 and 15 years. This included a requirement that the issuing court take into account the 'best interests' of the young person as a 'primary' consideration when determining the nature of obligations, prohibitions and restrictions to impose under the control order.[36]

The TPDA includes specific safeguards for persons under 18 years old or persons incapable of managing their own affairs in relation to contact arrangements[37] and the taking of identification material.[38]

SEEKING AND MAKING PREVENTATIVE DETENTION ORDERS

The CCC has noted differences in the level of approval for initial and final preventative detention orders across Australian jurisdictions. Specifically, the CCC notes that any police officer can apply for a preventative detention order under the TPDA whereas in most other Australian jurisdictions, police officers must seek approval or be specifically authorised to apply for an order.

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[32] In his second reading speech for the Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016 (NSW) the then Premier, and Minister for Western Sydney, Mr Mike Baird, referred to the fact that "the maximum detention period of 14 days reflects the complex investigation techniques that may be required to protect the community from terrorism". Refer NSW Legislative Assembly, *Hansard*, 4 May 2016.

[33] Commonwealth Criminal Code, s 104.28 was amended by the *Counter-Terrorism Legislation Amendment Act (No.1) 2016* (Cth) to lower the age limit, with enhanced protections for young persons between the ages of 14 and 17 years.

[34] *Terrorism (Police Powers) Act 2002* (NSW), s 25F.

[35] TPDA, s 9.

[36] *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) amended sections 104.4 (2), 104.24(2) to include the new 'primary consideration' but retained the existing objects of control orders (protection of the public from a terrorist act etc.) as the 'paramount' consideration applying to the issuing of all control orders, regardless of the age of the subject

[37] TPDA, s 60.

[38] TPDA, s 69(4).

Whether or not this is an aspect of the regime that should be changed is a matter for Government policy. This submission notes, that, in practice, the complexity of an application for a PDO means that applications will always be made by a suitably experienced police officer working through the QPS Counter-Terrorism structure with the help of a lawyer to ensure that the application is made to the requisite standard.

The CCC has observed that in some Australian jurisdictions PDOs are required to be made to the Supreme Court. In Queensland initial approval of applications for preventative detention orders can only be given by an Assistant Commissioner or above and final orders only following consideration of a specially appointed Judge or retired Judge of the Supreme Court judge.[39]

These authorisation arrangements avoid delays in situations where timing imperatives are critical to ensuring public safety. The ability for a senior commissioned officer to make the initial order was designed to avoid delays associated with organising a formal court application, noting that the period of detention under an initial order is limited to 24 hours.40 Allowing a Supreme Court Judge or retired Supreme Court Judge to make final orders under the TPDA ensured judicial oversight for orders that operate for longer periods of time.

A number of judges have been appointed as issuing authorities for final orders and a number of further appointments currently being considered by the Minister for Police and Corrective Services. Further details can be provided by the QPS, if required.

The CCC have questioned whether any additional criteria should be included in the threshold criteria to be satisfied for obtaining preventative detention orders. It is noted that the criteria in section 8 of the TPDA require police to demonstrate that either (i) detention will *substantially assist* in preventing a terrorist act; or (ii) detention is *necessary* for the purpose of preserving evidence. In both cases the police must also show that detaining the person for the period for which the person is to be detained under the PDO, is *reasonably necessary* for the purpose of either preventing a terrorist act or preserving evidence of a terrorist act. In the event that there were other reasonable avenues available to the police to prevent the terrorist act or preserve evidence in the circumstances as known at the time of an application, it is arguable that police would face considerable difficulty in meeting the existing thresholds.

As outlined above both the Commonwealth PDO regime under Part 5.3 of the Commonwealth Criminal Code and the TPDA have been amended to address identified issues associated with the previous imminence test.

POLICE POWERS IN RELATION TO DETAINEES AND SAFEGUARDS AGAINST ABUSE

Persons who are the subjects of a PDO have very limited rights of communication. The TPDA in Queensland restricts detainee communications to specific individuals for the limited purpose of allowing detainees to advise that they are safe but not contactable during the period of the order. Persons able to be contacted include an employee or employer, a business partner, a lawyer and any other person agreed to by the police officer.[41] These contact rights can be restricted by the officer obtaining a prohibited contact order, which prohibits the person from contacting specified persons where the prohibition of such contact will assist in achieving the objectives of the preventative detention order.[42] For example, where contact may result in a primary actor becoming aware of their

[39] TPDA, s 7.

[40] Refer section 12 'Restrictions on period of detention under multiple preventative detention orders'. Note that under section 18 'Duration of initial order', an initial orders ceases to have effect after 72 hours. This is the maximum period of time available to police to find the person and take them into custody before the order ceases to have effect. The period of detention stated in the order (up to the maximum prescribed 24 hours) begins to run as soon as the person is taken into police custody.

[41] TPDA, Part 5, Division 2.

[42] TPDA, Part 2, Division 4.

accomplice's detention which may lead to the person expediting an attack, taking avoidance action or the destruction of evidence.

It is noted that whilst non-contact orders can be obtained from an issuing authority to prevent a detainee from communicating, such an order is left to the discretion of the issuing authority and needs to be justified. Depending on the circumstances and the intelligence at hand, there is a foreseeable risk that the authority may refuse to issue such an order, or issue an order which is limited in nature. This may lead to information being provided indirectly to the primary actor about the police investigation, resulting in the primary actor adopting evasive activities.

The CCC has highlighted that the TPDA places significant restrictions on the questioning of detainees and, in this context notes that there have been recent moves in Australia to allow questioning of detained terrorism suspects for investigative purposes. As referred to above, NSW has introduced an investigative detention regime allowing for the questioning of terrorism suspects for up to 14 days and recommendations have been by the Victorian Expert Panel to expand the Victorian PDO regime to include questioning.

The Victorian Expert Panel report explores the issues around preventative and investigative detention in detail, and in that recommending a questioning power should form part of the Victorian PDO scheme also includes a number of proposed limitations and safeguards.[43] The Victorian recommendations are made in light of the preventative aims of the PDO legislation and are designed to be consistent with that purpose. In recommending these significant changes to the PDO regime, the Victorian Expert Panel acknowledged the need to balance individual liberties with the need to protect the community.

The extraordinary nature of the PDO regimes across Australia is routinely noted. The ability to detain a person for up to 14 days, without charge, and with significant restrictions on contact with other persons is not found in other comparable legal systems.[44] The potential for these significant powers to be abused is countered in the PDO regimes by a significant range of safeguards.

The TPDA includes provision for oversight of the detention by a senior police officer[45] and requirements to inform the detained person about the PDO,[46] including a person's entitlement to contact a lawyer and other specified persons and to complain to the ombudsman or CCC. Persons detained under PDOs are to be treated humanely and must not be subject to cruel, inhuman or degrading punishment.[47] Penalties of up to two years imprisonment apply for non-compliance with many of these safeguards.[48] Queensland, was also the first jurisdiction to include a role for the Public Interest Monitor (PIM) in its PDO scheme. The PIM has an important role in representing the public interest in initial and final PDO applications and applications for prohibited contact orders.[49]

NATIONAL CONSISTENCY AND INTEROPERABILITY

The overarching policy considerations for national consistency and interoperability of Australia's counter-terrorism laws have been canvassed in detail above. The intent of this section of the submission is to identify the way in which the TPDA provisions, specifically, promote national consistency and interoperability in Australia's approach to counter-terrorism.

[43] Victorian Government, *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers – Report 1, 2017*, p. 35.

[44] For example, Parliamentary Joint Committee on Intelligence and Security, *Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime,* February 2018, p. 108.

[45] TPDA, s 38.

[46] TPDA, Part 4.

[47] TPDA, s 52.

[48] TPDA, s 54.

[49] TPDA, ss 20, 24 and 34.

The submission considers that a nationally consistent approach to preventing and responding to terrorist threats underpins Australia's national security in a complex and evolving threat environment. To support national consistency and interoperability — and boost the powers and effectiveness of security and law enforcement agencies — COAG has agreed to a range of legislative measures including enhancing the existing Commonwealth pre-charge detention regime under Part 1C of the *Crimes Act 1914*. In the current terrorist threat environment, plots develop quickly and there is often less time for law enforcement to detect and disrupt plots.

Joint Counter-Terrorism Teams (JCTTs) are established in each state and territory to help ensure a coordinated and collaborative, nationally consistent approach to combatting terrorism. JCTTs conduct counter-terrorism operations with the intention of disrupting terrorism and/ or bringing criminal prosecutions for breaches of terrorism legislation. Queensland's JCTT is comprised of members of the AFP, Australian Security Intelligence Organisation (ASIO) and the QPS. Key objectives of the JCTT contribute significantly to achieving national consistency in our response to the terrorist threat, namely:

- to work cooperatively and in partnership for the prevention of terrorism and the investigation of terrorism offences for the purposes of investigating terrorist groups and their associates
- contributing to a coordinated response to a terrorist act within and across jurisdictions in accordance with the National Counter-Terrorism Plan
- providing an immediate support capacity and capability in response to a terrorist act across jurisdictions recognising the real potential of a multi-jurisdictional and trans-national event
- supporting effective liaison arrangements between law enforcement and international partners and ensuring effective participation in international referral arrangements
  assessing the nature and seriousness of referred matters, undertake an effective coordinated response to each matter, and develop and contribute to mechanisms for improving real-time responses to terrorism.

The strength of the JCTTs relies on nationally consistent powers associated with the investigation of terrorism. Such a framework provides a consistent platform for investigative decisions in a multi-jurisdictional environment. Experience has shown that preventative counter-terrorism investigations frequently have a cross-border element regarding evidence or the relationships between suspects and/or persons of interest. Nationally consistent legislation allows for the development of consistent investigative strategies and assists with the development of training for investigators who are often deployed across jurisdictions for operation resolution. Different legislation across different jurisdictions creates complexities, particularly for Australian Federal Police, who would need to be trained in different laws across different jurisdictions.

As the submission has already noted, provisions consistent with the TPDA exist across Australia at both state and territory and the federal level. Whilst there are some variations between jurisdictional schemes, for instance in procedures and safeguards, the overall objective of the schemes is the same. Any departures from the approach of national consistency, run the risk of particular jurisdictions becoming a more attractive location for individuals to engage in terrorist-related activities.

Further, all jurisdictions' preventative detention legislation contain an extraterritorial application to enable an order for the preventative detention of a person in that jurisdiction in circumstances where the person was planning an attack in another jurisdiction. This was to overcome the necessity for person to be transferred across State borders. This ability for the person to be detained in the jurisdiction where they are located only works when there is significant interjurisdictional consistency between schemes.

Interoperability is optimised with national consistency. The referral of state powers to support terrorism offences of national application is the foundation for Australia's nationally consistent approach to combatting terrorism. However, relevant state and territory legislative provisions also have a significant role to play. In the context of the national framework of PDO regimes, it is accepted

that the State PDO regimes are likely to be more effective than the Commonwealth provisions because of detention under that model being limited to 48 hours.

Where there is sufficient evidence to arrest an individual on suspicion of commission of a Commonwealth terrorism offence, the current practice is to utilise the powers of arrest under Part 1C of the Crimes Act within the framework of a Joint Counter-Terrorism team investigation. Both state police and federal police are trained to use the Part 1C framework. It is noted that the fundamental importance of interoperability for law enforcement agencies was a key theme of the Special COAG meeting. Notably at this meeting, all Australian governments agreed to the Commonwealth's proposal to enhance investigative detention powers under Part IC of the *Crimes Act 1914*, recognising that this was essential to the effectiveness of the JCTTs. The COAG communique relevantly states: "*They [the JCTTs] often need to make arrests very soon after becoming aware of a threat and this relies on the interoperability and consistency of our pre-charge legislation."*

It is noted however that the formal Queensland Government position retains the ability to make decisions to introduce legislation particular to Queensland where this is considered necessary and appropriate to address the particular risks and circumstances in Queensland.

CONCLUSION

The Queensland Government has confirmed its commitment to national consistency as the most effective means of countering the threat of terrorism. However, Queensland will make its own assessment of the effectiveness of its own legislative arrangements, and retains the ability to make decisions to introduce legislation particular to Queensland where this is considered necessary and appropriate to address the particular risks and circumstances in Queensland.

The Queensland Government looks forward to hearing the findings and recommendations of the CCC's review. This will be an important piece of work in guiding Queensland, alongside other Australian jurisdictions, in the ongoing assessment of the suitability and effectiveness of our counter-terrorism laws.