GAT;dgr

12 April 2018

Dr Rebecca Denning
Director, Policy and Research
Crime and Corruption Commission
GPO Box 3123
Brisbane Qld 4001

By email: TPDAreview@ccc.qld.gov.au

Dear Dr Denning

Re: Review of the Terrorism (Preventative Detention) Act 2005 (Qld)

Thank you, on behalf of the Bar Association of Queensland ('the **Association**'), for the opportunity to make a submission to the Crime and Corruption Commission's ('the **CCC**') review of the *Terrorism (Preventative Detention) Act 2005* (Qld) ('the **TPDA**').

The Association welcomes the CCC's review as an opportunity to undertake a comprehensive review of the necessity of, and justification for, the TPDA.

In late 2005, the Association and the Queensland Law Society ('the **QLS**') made a joint submission to the Premier and the Minister for Justice and Attorney-General ('the **submission**') concerning the *Terrorism (Preventative Detention) Bill 2005* (Qld) ('the **TPDB**'). A copy of the submission is **enclosed**, which we request be kept confidential.

In the submission, the Association and the QLS opposed the introduction of the TPDB on the basis that preventative detention orders ('**PDOs**') are both unnecessary and an attack on the fragile rights, freedoms and liberties enjoyed by Queensland citizens.

The Association maintains this position.

Necessity of the TPDA

The Explanatory Note to the TPDB claims the introduction of preventative detention powers were *'essential'* because:

> *'the nature of the terrorist threat means that police may need to intervene earlier to prevent a terrorist act with less knowledge than they would have had using traditional policing methods'.*[1]

[1] Explanatory Notes, *Terrorism (Preventative Detention) Bill 2005* (Qld) 1.

BAR ASSOCIATION OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

These powers have not been used since the TPDA's introduction in 2005,[2] making it difficult to maintain and justify an argument that they are *'essential'*.

The first Independent National Security Monitor ('the **INSM**'), Bret Walker S.C., concluded the same in relation to the Commonwealth's PDO provisions in the INSM Annual Report 2012:

> *'There is, simply, no actual experience of any kind to draw on when reporting on the CT Laws' innovation which is the preventative detention order ("PDO"). None has been made. No-one has seriously considered seeking a PDO, according to an exhaustive review of all relevant files. This must raise serious doubts about the effectiveness, appropriateness and necessity of the PDO provisions'.*[3]

Mr Walker SC recommended the Commonwealth PDO provisions be repealed on the basis that *'there is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism'*.[4]

The Council of Australian Governments ('the **COAG**') similarly recommended a repeal of the Commonwealth, State and Territory PDO provisions in its 2013 review of counter-terrorism legislation in Australia.[5] It is significant that the COAG no longer supports the PDO provisions in the TPDA, given they were introduced to give effect to the COAG's agreement of 27 September 2005.[6]

If the requirements of a PDO under the TPDA are able to be satisfied (i.e. the police officer has reasonable grounds to suspect that a person will engage in or prepare for or plan a terrorist act which is capable of occurring within the next 14 days),[7] the person could immediately, on the same evidence that gives rise to the reasonable belief, be arrested and charged with one or more of the numerous inchoate or preparatory terrorism offences under Division 101 of the *Criminal Code Act 1995* (Cth)[8] ('the **Commonwealth offences**').

In its 2013 review, the COAG concluded the following in relation to police operations (emphasis added):

> *'... three of the police submissions (Victoria, South Australia and Western Australia) have unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime.*
>
> *Various reasons have been provided to the Committee as to why this is so. First, the complexities of preparing an initial detention application, compliance with the law and securing an initial order was thought by some to be unduly onerous and cumbersome. Secondly, the 'thresholds' were, to others impractical ... Thirdly, there was overall agreement that the inability*

---

[2] Crime and Corruption Commission, *Review of the Terrorism (Preventative Detention) Act 2005: Call for public submissions* (March 2018) 3.
[3] Bret Walker SC, *Declassified Annual Report* (20 December 2012) 45.
[4] Ibid 67.
[5] Commonwealth of Australia, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 71.
[6] Explanatory Notes, *Terrorism (Preventative Detention) Bill 2005* (Qld) 1.
[7] *Terrorism (Preventative Detention) Act 2005* (Qld) s 8(3)(a).
[8] Section 3WA(1) of the *Crimes Act 1914* (Cth) also enables a constable to, without a warrant, arrest a person for a terrorism offence if suspected on reasonable grounds that the person has committed or is committing the offence.

to question a detained suspect, even if he or she were willing to give information, was virtually fatal to operational effectiveness. Finally, the view was expressed that, at a practical level, if there were sufficient material to found a detention order, there would be, more likely than not, sufficient material to warrant conventional arrest and charge'.[9]

Thus, it is unclear why a police officer would seek to utilise PDOs under the TPDA as an alternative to arresting a person, other than if the police officer does not have a sufficient basis to formulate a belief on reasonable grounds to make an arrest[10] for an inchoate offence pursuant to the Commonwealth anti-terrorism legislation.[11]

If this were the case, on any occasion, the Association would have even stronger concerns regarding the proportionality of a system within which a police officer is able to preventatively detain a person in circumstances where there is not enough evidence to form the necessary belief to arrest them under the Commonwealth terrorism offences.

Proportionality

The protection of individual rights and liberties in an Australian democracy without a Bill of Rights depends on systems of checks and balances to control the abuse of power. These systems are intended to maintain public confidence in the Government's protection of individual rights and liberties in an effort to avoid a breakdown in the community's respect for the rule of law.

One of these systems involves the principle of proportionality in the exercise by the Parliament of its powers to legislate. Where legislation is intended to interfere with the rights and liberties of an individual to achieve a legitimate social purpose, the degree of this interference should be proportionate to what is necessary to achieve the legislation's legitimate purpose.

The Association is concerned that the TPDA has the potential to interfere, disproportionately, with the following equally important principles intended to protect the rights and liberties of Queensland citizens:

1. <u>No detention without arrest (i.e. freedom from arbitrary detention).</u>

   The TPDA provides for detention of persons who have not been charged with any offence if there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with a terrorist act, or has done an act in preparation/planning for a terrorist act[12] which is capable of being carried out, and could occur, within the next 14 days.[13]

---

[9] Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (1 March 2013) 69.
[10] *Crimes Act 1914* (Cth) s 3W
[11] *Criminal Code 1995* (Cth) s 101 and following: for example, s 101.2 (receiving training); s 101.4 (possessing things); s 101.5(collecting or making documents); and s 101.6 (any act done in preparation for or in planning).
[12] *Terrorism (Preventative Detention) Act 2005* (Qld) s 8(3)(a).
[13] Ibid s 8(4): the crossover with the inchoate terrorism offences discussed at footnote 11 is obvious from a single reading of the provisions. Indeed, because of the timing element, the mental element for the TPDA requirements is more difficult to satisfy by evidence than they right to arrest for the Commonwealth offences.

Thus persons may be detained who have not been charged with any crime. Preventative detention appears, in the circumstances, to be a means of avoiding the rigour of having a detainee come before an arrest court where the impartial court can exercise its time honoured power to have the charge presented and deal with questions of adjournment and bail. This is contrary to the fundamental legal principle of detention only with charge and a right to trial to adjudicate and punish criminal guilt, a principle upon which our entire criminal legal system is based.

The impact of this potential infringement is magnified when one considers that children between 16 and 18 years of age are able to be detained on the same grounds.[14]

2. Strict separation of powers between the legislature, executive and judiciary.

The TPDA provides that a senior police officer[15] is the issuing authority for an 'initial order': an order that a person be taken into custody and detained[16] for 24 hours.[17] The process for obtaining an initial order involves only members of the executive,[18] absent independent oversight by the judiciary.

A judge or a retired judge,[19] acting strictly in a personal capacity,[20] is the issuing authority for a 'final order': an order that a person may be taken into custody and detained, or further detained[21] for up to a maximum of 14 days.[22] Without detracting from the seniority and experience of judges and retired judges acting in a personal capacity, the Association is of the view that the involvement of such persons in a personal capacity provides the worst of all possible worlds for the well-being of chapter III courts whose role is to exercise judicial power. On the one hand, it mires judges and ex-judges in the process of exercising executive force against citizens in exceptional circumstances. At the same time, it does not carry the safeguard of indicating that the power must be exercised independently, impartially and judicially as it might if the power was bestowed on a superior court judge acting in their capacity as a court or a member of the court.[23]

3. Procedural fairness for all persons.

The TPDA, previously, denied persons in detention any communication with a lawyer, unless this communication was monitored.[24] The insertion of section 59A by the *Terrorism Legislation Amendment Act 2007* (Qld) provides an exception whereby communication with a security-cleared lawyer is not monitored[25] unless the police officer makes an application to the issuing authority (either a senior police officer or a judge or retired judge acting in a

---

[14] Ibid s 9.
[15] Ibid s 7(1).
[16] Ibid s 17(3).
[17] Ibid s 17(5).
[18] The issuing authority is a senior police officer pursuant to section 7(1), and then s 38(1) requires a nominated police officer to oversee the performance of functions and exercise of powers under the TPDA.
[19] *Terrorism (Preventative Detention) Act 2005* (Qld) s 7(2).
[20] Ibid 77(1).
[21] Ibid 25(4).
[22] Ibid 25(6).
[23] *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, [20], per Gleeson CJ.
[24] *Terrorism (Preventative Detention) Act 2005* (Qld) s 59(1).
[25] Ibid s 59A(1).

personal capacity, depending on the type of order) for an order that this communication be monitored.[26]

The ability of a detained person to have uninhibited communication with their lawyer is a crucial component of procedural fairness. Where a detained person's communications are susceptible to being monitored, there is the potential for natural justice in respect of the final order and any review of the order to the Supreme Court, to be denied.

Procedural fairness may be further impacted where the detained person is only given a 'written summary' of the application for a PDO.[27] Where a person does not have access to the full material upon which an order for their detention has been made, they are not able to adequately and fairly argue their case in an application for a review of this order.

The Context of Other Powers and Prosecutions

The investigative powers of the Australian Security Intelligence Organisation ("**ASIO**"), the Australian Federal Police ("the **AFP**") and state police forces to investigate criminal acts including terrorist offences have been continually augmented since the events of September 2001.

These changes include powers bestowed upon ASIO to obtain questioning warrants[28] and detention and questioning warrants[29] by 2003 amendments to the ASIO Act.

ASIO has very wide powers to obtain warrants to intercept communications from the Attorney-General of the Commonwealth pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the **TIA Act**").[30] In addition, the AFP, certain other Commonwealth agencies and declared State agencies[31] may apply for warrants to intercept communications.[32] In the case of a Queensland agency, the application is to a judge or a member of the Administrative Appeals Tribunal.[33] The purpose of such warrants is to intercept communications in connection with the investigation of serious offences[34] which include terrorism offences.[35]

The effect of the availability of these powers has been lengthy telephone intercepts with suspected terrorist individuals and groups investigated and monitored for many months. The amount of such surveillance is seen in trials which have been conducted which have taken place over many months much of the time being taken up in listening to such interceptions. An example of such a trial is the 2007-2008 trial of *R v Abdul Nacer Benbrika and others* conducted in the Victorian Supreme Court over 2007-2008.[36]

---

[26] Ibid s 59A(2).
[27] Ibid s 23(1).
[28] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D-34E
[29] Ibid ss 34F-34G
[30] *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9, 9A, 9B: in the case of emergency, the Director-General has authority to issue warrants: see s 10.
[31] Ibid ss 34-36.
[32] Ibid s39.
[33] Ibid s 45.
[34] Ibid s 46.
[35] Ibid s 5D.
[36] See https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws

The effect of these very wide and intrusive powers is that it is now even more obvious than it was in 2005 that preventative detention is an unnecessary and disproportionate departure from the principle that persons are arrested for wrong-doing if it is intended that they be detained. An obvious justification for this principle is that the further conduct of the prosecution is overseen by the Courts carrying out their judicial duties and the immediate custody of the arrested person is determined by the courts applying the bail laws according to the principles laid down in those laws.

Conclusion

Thank you again for the opportunity to contribute to this important and long overdue review.

The Association is of the opinion that the TPDA should be repealed.

The Association would be pleased to provide further feedback, or answer any queries you may have.

Yours faithfully

[redacted]

G A Thompson QC
President

encl