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Review of the Terrorism (Preventative Detention) Act 2005
Crime and Corruption Commission
Policy and Research unit
GPO Box 3123
Brisbane Qld 4001

Via email only: TPDAreview@ccc.qld.gov.au

Dear Crime and Corruption Commission,

Submission in relation to the review of the *Terrorism (Preventative) Detention Act 2005 (Qld)*

Australian Lawyers for Human Rights ('ALHR') is grateful for the opportunity to provide this submission in relation to the Crime and Corruption Commission's (CCC) review of the *Terrorism (Preventative) Detention Act 2005 (Qld)* ('TPDA'). We understand that the TPDA is being reviewed to determine the need for and effectiveness of this legislation.

SUMMARY

ALHR welcomes the CCC's timely review of the TPDA. Ultimately, ALHR holds significant concern about the operation of the TPDA and the lack of adherence of this regime to the Australian government's obligations under international law including international human rights laws.

The TPDA provides significant power to authorised officers to immediately abolish the fundamental right to liberty of a person on the subjective grounds of reasonable suspicion.

Ultimately, ALHR believes that preventative detention legislation as provided in the TPDA is ineffective and unnecessary and threatens the rights, freedoms and liberties of people in Queensland. Furthermore, ALHR notes that since its inception on 16 December 2005, the TPDA has not in fact been used.

Of most concern to ALHR is that preventative detention orders ('PDO') expose a person who has not been charged, tried or convicted of an offence to effectively incommunicado executive detention and therefore the TPDA should be repealed. ALHR therefore ultimately recommends that:

1. The TPDA should be repealed effective immediately;
2. If the TPDA is not repealed, it should be amended to provide more adequate safeguards of individual rights and freedoms as recognised in the common law and international human rights law.

This submission will touch primarily on the following key issues:

- 1. The Australian government's relevant legal obligations under international law (which the Queensland government is also required to uphold pursuant to Article 27 of the 1969 Vienna Convention of the Laws on Treaties).**
- 2. Do the provisions of the TPDA provide an adequate and appropriate balance between community safety and the rights and freedoms of individuals? If not, what is required to address the imbalance?**
- 3. No preventative detention orders (PDOs) have been sought in Queensland since the TPDA commenced on 16 December 2005. Does this lack of use suggest that the TPDA is not necessary?**
- 4. The maximum permitted duration of a PDO is 14 days. Is this appropriate? If it is not, what is a more appropriate alternative?**
- 5. In Queensland, the subject of a PDO must be at least 16 years of age. Is 16 an appropriate minimum age, or should it be increased or decreased?**



ISSUES

1. Australia's relevant legal obligations under international law

ALHR believes that the TPDA must adhere to the Australian government's international legal obligations under various binding instruments and in accordance with contemporary norms of human rights and fundamental freedoms as expressed by various UN Treaty Bodies and Special Rapporteurs.

There is also an arguable onus upon the Queensland government to assist (or alternatively to not oppose) the federal Australian government in honouring and adhering to the obligations stipulated in the international human rights treaties it has ratified¹ pursuant to Article 27 which provides as follows:

¹ 1966 International Covenant on Civil and Political Rights (ICCPR); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); 1963 International Convention on the

Internal law and observance of treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

ALHR's primary concern relates to the powers provided to officers by the TPDA to detain persons without charge as this ability threatens a number of universally recognised and fundamental human rights including the fundamental right to liberty of people in Queensland.

ALHR acknowledges that Australia is an anomaly amongst western liberal democracies and common law legal systems as being bereft of a bill of rights or federal Human Rights Act. Queensland has also failed to enact legislation to legislatively protect fundamental human rights (as Victoria and the Australian Capital Territory have done via the enactment of the *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) respectively).

However, ALHR also acknowledges that the common law provides some very limited (and extremely vulnerable) legal protection to fundamental liberties such as the presumption of innocence and right to silence. However, such fundamental liberties are being increasingly eroded by counter-terrorism legislation and so-called national security legislation.

As the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism stated in their 2010 Report:

Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium and long-term strategy to combat terrorism.²

(References omitted)

Australia is legally obliged to comply with those international human rights instruments which it is a signatory to and which it has ratified. Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)³ expresses the sacredness of individual liberty in democratic, rule-of-law countries, such as Australia.

Article 9(1) provides:

Elimination of All Forms of Racial Discrimination (ICERD); *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); *1981 Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); *1989 Convention on the Rights of the Child* (CRC); *2006 Convention on the Rights of Persons with Disabilities* (CRPD).

² United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Ten areas of best practices in countering terrorism", (Human Rights Council, Sixteenth Session, 22 December 2010), para. [12], available at <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>> 25 March 2018.

³ Signed by Australia on 18 December 1972 and ratified on 13 August 1980.

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Further, in 1982 the Human Rights Committee (CCPR) stated:

*Paragraph 3 of article 9⁴(of the ICCPR) requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays **must not exceed a few days**"⁵... (and] ... **pre-trial detention should be an exception and as short as possible.**"⁶*

(Emphasis added)

Particularly in regards to counter-terrorism laws, the United Nations General Assembly has strongly and repeatedly affirmed Resolution 64/168 "Protection of Human Rights while Countering Terrorism", which urges States Parties to fully comply with their international legal obligations, particularly human rights, including:

- Protecting all human rights bearing in mind that certain counter-terrorism measures may impact on the enjoyment of these rights.
- Respecting safeguards concerning the liberty, security and dignity of the person and taking all necessary steps to ensure that persons deprived of liberty are guaranteed their international legal rights, including review of detention and fundamental judicial guarantees.
- Respecting the right of persons to equality before the law, courts and tribunals and to a fair trial.
- Ensuring that laws criminalising terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international human rights law.
- Ensuring that interrogation methods used against terrorism suspects are consistent with international legal obligations and are reviewed to prevent the risk of violations of international law.

⁴ ICCPR Article 9(3) provides: *Anyone arrested or detained on a criminal charge shall be brought **promptly before a judge** or other officer authorized by law to exercise judicial power and shall be **entitled to trial within a reasonable time** or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.* (emphasis added)

⁵ Office of the United Nations High Commissioner for Human Rights, CCPR General Comment No. 08: Right to liberty and security of persons (Art. 9) (sixteenth session 1982): 30/06/1982.

⁶ Ibid, para. [3].

- Ensuring due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, and obligations under the international Covenant on Civil and Political Rights.
- Drafting and implementing all counter-terrorism measures in accordance with the principles of gender equality and non-discrimination.⁷

In 2015 the UN Working Group on Arbitrary Detention developed the “Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court”⁸ at the request of the Human Rights Council. Guideline 17 states the following:

Where persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism are deprived of their liberty:

- a) they shall be immediately informed of the charges against them, and **shall be brought before a competent and independent judicial authority, as soon as possible, and no later than within a reasonable time period;***
- b) they shall enjoy the effective right to judicial determination of the arbitrariness and lawfulness of their detention;*
- c) the exercise of the right to judicial oversight of their detention does not impede on the obligation of the law enforcement authority responsible for the decision to detain or to maintain the detention, to present the detainee before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before the judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process; and*
- d) in the development of judgments against them, they shall have a right to enjoy the **necessary guarantees of a fair trial, access to legal counsel, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process.** (emphasis added)*

2. Do the provisions of the TPDPA provide an adequate and appropriate balance between community safety and the rights and freedoms of individuals? If not, what is required to address the imbalance?

In the assessment of counter-terrorism laws it is vital to achieve an effective balance between the government's responsibilities (including international obligations) to protect its citizens from terrorism, and its responsibilities and international obligations to preserve and promote its citizens' fundamental human rights and liberties.

⁷ This includes not resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law, including on racial, ethnic and/or religious ground.

⁸ <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15903>> 25 March 2018

While powers under counter-terrorism laws are often sought to be justified on the basis that it is reasonable to utilise particular powers to prevent the commission of a terrorist offence that may severely impact many innocent lives, the need for such powers must be subject to ongoing review.

ALHR believes that the TPDA does not provide adequate safeguards and that the detention provided for under the Act is arguably arbitrary.⁹ ALHR has identified the following principal issues with the TPDA which impact upon individual rights and freedoms:

1. The preventative detention regime requires the same agency (AFP) to request and issue the initial order. ALHR submits that this is a system where there is a clear apprehension of bias and procedural unfairness.
2. An issuing authority for a final order includes a judge or a retired judge,¹⁰ however, they do not exercise judicial power but act in their personal capacity and at no time is the detainee brought before a court.¹¹
3. There is no provision for an *inter partes* hearing at any stage.
4. The Code prevents communication by adult detainees with family, housemates or work colleagues apart from the right to advise them that he or she is "safe but is not able to be contacted for the time being."¹²
5. The lack of right of an accused to have uninhibited communication with their lawyer.¹³

ALHR submits that further safeguards would need to be ensured if the TPDA were to continue in force. These should be in accordance with international obligations such as those stated by The Human Rights Committee (HRC) in relation to preventative detention and Article 9 of the ICCPR, being that the detention:

*... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2), and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.*¹⁴

⁹ Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 9.

¹⁰ *Terrorism (Preventative Detention) Act 2005* (Qld) s 7(2).

¹¹ *Terrorism (Preventative Detention) Act 2005* (Qld) s 77(1).

¹² *Terrorism (Preventative Detention) Act 2005* (Qld) s 56(1).

¹³ *Terrorism (Preventative Detention) Act 2005* (Qld) s 58.

¹⁴ Human Rights Committee, *CCPR General Comment No. 8*, 16th session, [4], (1982).

The United Nations Human Rights Committee has commented that a decision as to continued preventative detention must be considered a determination attracting the right to a fair trial under Article 14 ICCPR.¹⁵

3. No preventative detention orders (PDOs) have been sought in Queensland since the TPDA commenced on 16 December 2005. Does this lack of use suggest that the TPDA is not necessary?

The fact that no PDOs have been sought in Queensland cannot of itself provide a definitive basis to say that they are not necessary. What can be said is that the provisions in the TPDA provide authorities with extraordinary powers that are contradictory to traditional notions of criminal justice and the role played by the judiciary and the executive. As has been outlined above, the processes outlined in TPDA inadequately safeguards individuals, and violate some human rights.

Although terrorism is a live threat, it is questionable as to whether it is a threat of such a significant degree in Queensland and Australia that it threatens the 'life of the nation'.¹⁶ Certainly there has been no public emergency of such magnitude officially proclaimed by the Australian or Queensland governments. ALHR submits that these laws are not 'required by the exigencies of the situation'.¹⁷ ALHR submits that the laws under the TPDA have not been utilised because they are not necessary to combat terrorism in Queensland and Australia and because they fundamentally undermine the right of Queenslanders to liberty.

ALHR acknowledges that, in performing the delicate balancing between two different objectives, there may from time to time be some justified government actions which may impact upon fundamental freedoms, however such measures are appropriate only in extreme circumstances and for a temporary and limited time, such as national security in times of war. Such laws are problematic in the current climate of the seemingly eternal "War on Terror" after the World Trade Tower attacks, because governments have sought to justify and transmute what was once an extreme and temporary measure to the status of a new norm.

ALHR further recommends that in combatting terrorism, the Queensland government and security agencies should be investing more resources in front end policies of prevention including intervention programs for youth at risk of extremism.

Preventative detention orders expose a person who has not been charged, tried or convicted of an offence to effectively incommunicado executive detention and therefore the TPDA should be repealed.

4. The maximum permitted duration of a PDO is 14 days. Is this appropriate? If it is not, what is a more appropriate alternative? ^[1]_{SEP}

¹⁵ Human Rights Committee, UN Doc CCPR/C/79/Add.81, [27] (1997) (concluding observations on India).

¹⁶ *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation:* Article 4(1) of the ICCPR

¹⁷ See footnote 14.

The TPDA currently enables a person to be taken into custody and detained for up to 14 days without that person being charged, convicted, or even suspected of having committed a criminal offence. ALHR submits that a maximum of 14 days is an excessive and unnecessary period of time for detention, and impacts upon the rights, freedoms and liberties of people in Queensland.

As outlined above, many international human rights instruments to which Australia is a signatory proclaim that any detention of a person should be only for a reasonable time period and should not exceed a few days.¹⁸ Therefore, in the case that there is a detention of a person for 14 days, such a detention could arguably be classified as arbitrary under international human rights law. ALHR submits that such a period of detention without charge would not be a proportionate response to any circumstances, and it provides inadequate safeguards of individual rights and freedoms. This is also due to a low threshold for the issuing of a PDO which requests detention for up to 14 days, as the person need not be suspected of having actually committed a criminal offence.

Further it is questionable how the issuing of a PDO in response to a terrorist act, which is considered imminent and expected to occur at some time within the next 14 days, could actually be met in practice. The AFP has expressed the following concern:

*Despite credible intelligence that a terrorist act is imminent, the ability to predict in advance the precise timeframe in which the act may happen may be particularly challenging. It is not clear what a court would expect in relation to evidence given by the AFP that the terrorist act is expected to occur within 14 days.*¹⁹

ALHR submits that the more appropriate alternative is that the TPDA be repealed effective immediately and that our smart State no longer have dangerous laws which abrogate the rule of law and the fundamental human rights of Queenslanders and Queensland's children.

5. In Queensland, the subject of a PDO must be at least 16 years of age. Is 16 an appropriate minimum age, or should it be increased or decreased? ^[1] _[SEP]

ALHR is very disturbed that the Queensland government has on its books the ability to detain Queensland children without charge in arbitrary executive detention for any period of time. Such executive power is profoundly repugnant to the rule of law as a cornerstone to democracy, to Australian values of fairness and freedom and to fundamental and universally recognised human rights.

¹⁸ See Office of the United Nations High Commissioner for Human Rights, CCPR General Comment No. 08: Right to liberty and security of persons (Art. 9) (sixteenth session 1982): 30/06/1982; and the 2015 UN Working Group on Arbitrary Detention's "Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court" <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15903>> 25 March 2018

¹⁹ AFP Additional Submission to the INSLM, 16 August 2012, quoted in *INSLM Report* (Bret Walker, 'Declassified Annual Report' (Annual Report, Independent National Security Legislation Monitor, 20 December 2012)).

Whilst ALHR would argue that there is no age at which it is appropriate for any human being in Queensland to be detained without charge in arbitrary detention, ALHR would especially like to emphasise that the current legislative power to detain children is especially offensive. In accordance with the rule of law, Australian values and universal standards of international human rights law, these un-democratic powers must be repealed forthwith.

CONCLUSIONS

In the assessment of Queensland's counter-terrorism laws, it is necessary to achieve an effective balance between the government's responsibilities:

- in upholding the fundamental principles and institutions of democracy and the rule of law;
- to protect its citizens from terrorism, and
- its international obligations to preserve and promote its citizens' fundamental human rights.

ALHR strongly believes that the current TPDA is unnecessary and ineffective in preventing terrorism in Queensland. Rather than protect Queensland citizens, it authorizes unrestrained, unaccountable, unfettered and un-democratic power of the executive to be used against Queenslanders including Queensland children. The TPDA does not ensure adequate safeguards of individual rights and freedoms and in fact it authorizes the abject violation and abrogation of such fundamental human rights and civil liberties. This is unacceptable in a western liberal democracy and common law legal system. As such, ALHR submits that the TPDA must be repealed forthwith. If the TPDA is not repealed it should be significantly substantively amended to provide further safeguards of human rights and freedoms.

If you would like to discuss any aspect of this submission, please contact the author on  or president@alhr.org.au


Yours Faithfully,
Benedict Coyne
President
[Australian Lawyers for Human Rights](http://www.alhr.org.au)

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