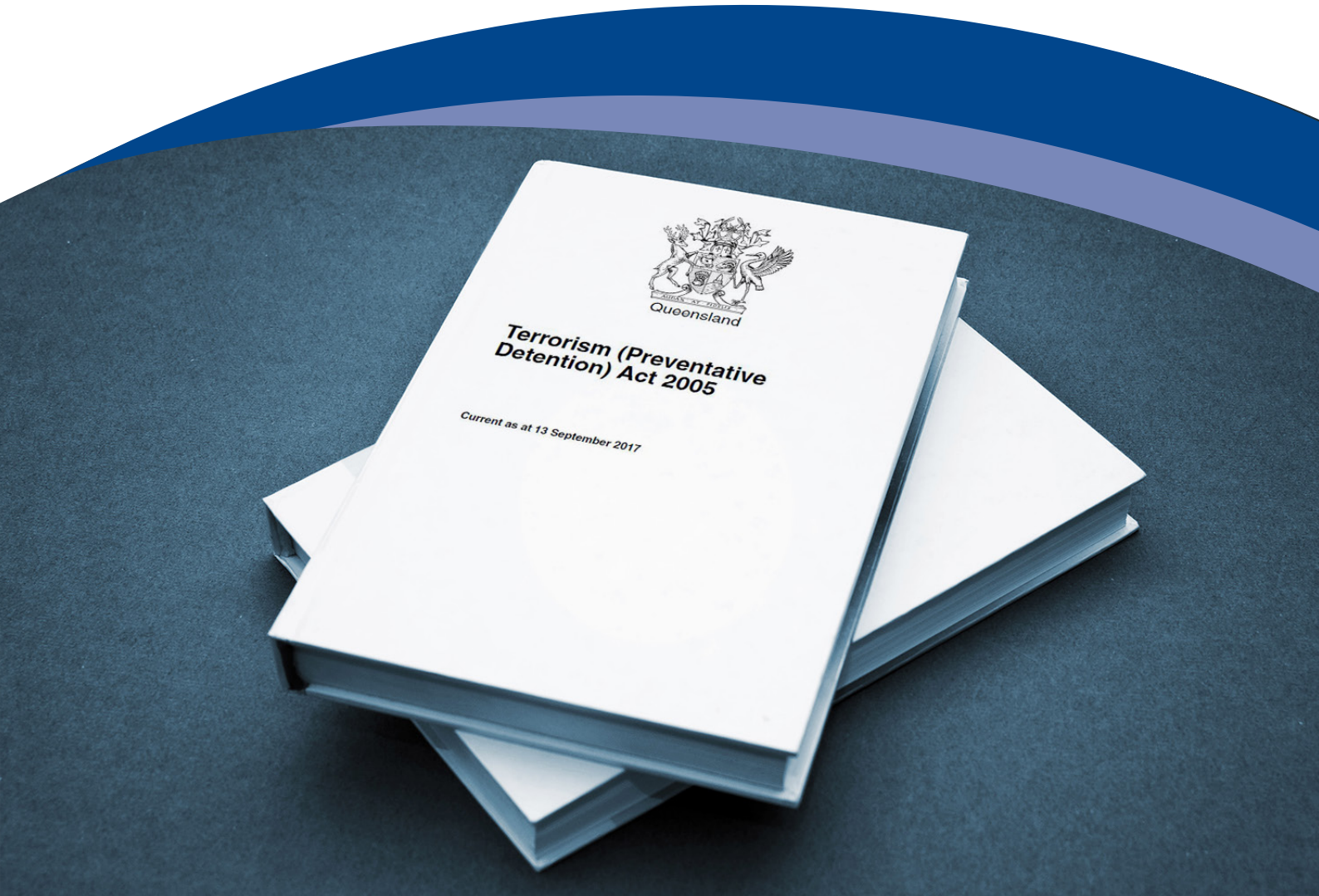
Crime and Corruption Commission
QUEENSLAND

Review of the *Terrorism (Preventative Detention) Act 2005*

Report by the Crime and Corruption Commission to the Minister for Police and Minister for Corrective Services

September 2018



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Abbreviations

ACT	Australian Capital Territory
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
ALA	Australian Lawyers Alliance
ALHR	Australian Lawyers for Human Rights
ASIO	Australian Security Intelligence Organisation
CCC	Crime and Corruption Commission
COAG	Council of Australian Governments
COPD	Custodial Operations Practice Directive (Queensland Corrective Services)
Cth	Commonwealth
CTOLAA	Counter-Terrorism and Other Legislation Amendment Act (Qld)
IBAC	Independent Broad-based Anti-corruption Commission (Victoria)
IGA	Intergovernmental Agreement
INSLM	Independent National Security Legislation Monitor
NSW	New South Wales
NSWLA	New South Wales Legislative Assembly
NSWLC	New South Wales Legislative Council
NSW TPPA	*Terrorism (Police Powers) Act 2002* (NSW)
NT	Northern Territory
PCO	prohibited contact order
PDO	preventative detention order
PIM	Public Interest Monitor
PJCIS	Parliamentary Joint Committee on Intelligence and Security (Commonwealth)
QCCL	Queensland Council for Civil Liberties
QCS	Queensland Corrective Services
QDW	questioning and detention warrant (under the *Australian Security Intelligence Organisation Act 1979*)
QLA	Queensland Legislative Assembly
Qld	Queensland

QPS	Queensland Police Service
QW	questioning warrant (under the *Australian Security Intelligence Organisation Act 1979*)
s.	section
SA	South Australia
SLCLC	Senate Legal and Constitutional Legislation Committee (Commonwealth)
ss.	sections
Tas	Tasmania
Tasmanian TPDA	*Terrorism (Preventative Detention) Act 2005* (Tas)
TPDA	*Terrorism (Preventative Detention) Act 2005* (Qld)
TPDB	Terrorism (Preventative Detention) Bill 2005 (Qld)
Vic	Victoria
Victorian JLATA	*Justice Legislation Amendment (Terrorism) Act 2018* (Vic)
Victorian TCPA	*Terrorism (Community Protection) Act 2003* (Vic)
WA	Western Australia

Summary and recommendations

About the review

In September 2005, the Council of Australian Governments (COAG) agreed to a national approach to preventative detention as part of a commitment to strengthening Australia's counter-terrorism laws. Queensland's *Terrorism (Preventative Detention) Act 2005* ("the TPDA") commenced on 16 December 2005. The objective of the TPDA is to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent a terrorist act that is capable of being carried out, and could occur, in the near future from occurring; or
- preserve evidence of, or relating to, a recent terrorist act.

The TPDA has never been used, but section 83A of the TPDA requires the Minister for Police and Minister for Corrective Services ("the Police Minister") to review the need for, and effectiveness of, the legislation. In March 2017, the Police Minister gave his approval for the Crime and Corruption Commission (CCC) to conduct the review and, in line with the requirements of section 83A, the CCC commenced its work on the review in October 2017.

To conduct its review, the CCC examined legislation and associated materials; invited written submissions from key stakeholders and members of the public; reviewed previous reports on preventative detention legislation in other Australian jurisdictions, and academic literature; analysed administrative data from the Queensland Police Service (QPS); and reviewed policies, procedures and training materials from the QPS, Queensland Corrective Services (QCS) and the Department of Child Safety, Youth and Women.

Key findings

Need for the TPDA

In examining the need for the TPDA, the CCC first set out to determine whether preventative detention as provided for under the TPDA fills a specific gap in counter-terrorism capabilities. The CCC noted that situations where a person could be detained under the TPDA may often overlap with situations suitable to the use of other counter-terrorism laws and powers, especially arrest powers under Part IC of the Commonwealth *Crimes Act 1914*. However, the CCC was persuaded that situations may arise where other laws and powers cannot be relied upon to prevent or preserve evidence of a terrorist act. The CCC concluded that, in these limited circumstances, preventative detention as provided for under the TPDA fills a gap in Queensland's counter-terrorism capabilities, albeit a small one. No specific alternatives to preventative detention were proposed to or identified by the CCC to address this gap.

The CCC considered that the extraordinary nature of preventative detention meant that it was important to further consider whether the provisions of the TPDA achieve an appropriate balance between protecting the community from terrorist acts on one hand, and maintaining the rights, freedoms and liberties of individuals on the other. The CCC identified strong criticisms about the extent to which some aspects of the TPDA infringe on individual rights. These particularly related to police monitoring of contact between detainees and their lawyers, the limited information given to people about the reasons for their detention, detainees' significantly restricted rights of communication, and the absence of the court's involvement in making preventative detention orders (PDOs). In the CCC's view, the counter-terrorism objectives of the TPDA justify limitations on some rights, freedoms and liberties. Overall, however, the CCC concluded that some changes should be made to the TPDA to

ensure that its provisions better protect individual rights and achieve a more appropriate balance between these and community safety (see Recommendations 1 to 4 and Recommendations 7 to 9).

Effectiveness of the TPDA

The CCC sought to examine the effectiveness of the TPDA in three areas:

- preventing and preserving evidence of terrorist acts, as per the TPDA's objectives
- promoting national consistency and interoperability
- protecting against misuse and abuse.

In each case, the lack of use of the TPDA meant there was little objective evidence for the CCC to use to make firm conclusions about the effectiveness of the legislation. Consequently, the CCC focused on identifying and examining issues that may limit the effectiveness of the TPDA if it was to be used in the future.

The CCC found that:

- Three key factors may limit the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts. Specifically:
  - Police are unable to question a person detained under a PDO, despite the fact that detainees may hold valuable information that could help to prevent or preserve evidence of a terrorist act.
  - PDOs can only be obtained for people aged 16 years and over, but there is an apparent emerging trend for younger children to be involved in terrorist activity in Australia and overseas.
  - Some problems in the QPS, QCS and youth detention centre policies and procedures in place to operationalise the TPDA, including out of date content, may prevent the legislation from being used as efficiently and effectively as possible should a situation requiring a PDO arise.
- The TPDA is a key component of Queensland's response to terrorism that helps the state to fulfil its ongoing commitment to national consistency. However, there are two aspects of Australia's preventative detention laws — the minimum age limit for preventative detention and the duration of initial periods of detention — where national consistency may be particularly important for achieving interoperability, but where differences are emerging among jurisdictions.
- The TPDA has been noted to contain an extensive range of safeguards, including safeguards that are not found in other jurisdictions' preventative detention laws (for example, the involvement of the Public Interest Monitor in PDO applications). However, existing safeguards may not be sufficient to ensure that the general requirement for detainees to be treated with humanity and respect for human dignity is met in practice.

The CCC has identified five areas for change that it believes would help to improve the likely effectiveness of the TPDA if the legislation was to be used in the future (see Recommendations 5 to 9).

Importance of national coordination

In conducting its review, the CCC noted that the TPDA does not operate in isolation from Australia's other counter-terrorism laws. This legislative framework has undergone significant changes in recent years, and continues to do so. These changes have implications for the ongoing need for and effectiveness of the TPDA, and therefore need to be monitored. In the CCC's view, the nature of recent legislative changes in Australia also poses a risk to the goal of national consistency. The CCC considers that further coordination by COAG and a clear direction for Australia's preventative detention regime and other counter-terrorism laws is essential to optimising Australia's counter-terrorism efforts.

Recommendations

Providing greater scope for confidential communications between people detained under a PDO and their lawyers

The TPDA allows police to monitor a detainee's contact with their lawyer, if that lawyer does not hold a security clearance or if the person who issues the PDO determines that contact with a security-cleared lawyer should be monitored. Although monitored communications cannot be used as evidence against the detainee in any court proceedings, there are no specific restrictions on the use of evidence *derived* from monitored communications. Concerns have been raised that police monitoring fundamentally violates client–lawyer privilege and undermines the purpose of legal representation so that detainees cannot effectively challenge their detention under a PDO. To achieve a more appropriate balance between ensuring community safety and maintaining a detainee's right to legal representation, the CCC believes that the TPDA should be amended to provide greater scope for confidential communications between a detainee and the lawyer of their choosing, and to clarify how monitored communications can be used.

Recommendation 1 (p. 24)

That the *Terrorism (Preventative Detention) Act 2005* ("the TPDA") be amended to:

(a) prohibit the monitoring of any contact between a person detained under a preventative detention order (PDO) and a lawyer, unless the issuing authority for the PDO determines that monitoring is reasonably necessary to achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act)

(b) provide that any evidence derived from, or obtained as a result of, a monitored communication between a person detained under a PDO and a lawyer which, apart from the application of the TPDA, would have been a confidential communication subject to legal professional privilege is not admissible against the person in any court proceedings

(c) permit a person who monitors contact between a person detained under a PDO and a lawyer to disclose or use information communicated in the course of that contact if doing so is reasonably necessary to help achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act).

Examining mechanisms to both protect sensitive information and ensure people detained under a PDO can effectively challenge their detention

The TPDA only requires the subject of a final PDO to be given a summary of the application, which is prepared by police, and information does not have to be given to the subject if disclosing it is likely to prejudice national security or compromise law enforcement activities. Concerns have been raised that these provisions prevent the subject of a PDO application from being fully informed about the reasons for their detention, undermining their ability to argue their case. While the CCC acknowledges that there is a need to protect sensitive information, it also considers that a person should be given as much information as possible to be able to effectively challenge their detention. In this regard, the CCC believes that impending changes to processes for the protection of "counter-terrorism intelligence" in Victoria may provide a useful model for similar changes in Queensland.

Recommendation 2 (p. 25)

That consideration be given to adapting forthcoming provisions for the protection of counter-terrorism intelligence in Part 5 of the Victorian *Terrorism (Community Protection) Act 2003* [as per section 71 of the *Justice Legislation Amendment (Terrorism) Act 2018*] for inclusion in the *Terrorism (Preventative Detention) Act 2005*.

Giving people detained under a PDO increased contact rights

The TPDA only permits detainees to contact family members and others (for example, members of their household and employment contacts) for the very limited purpose of letting these people know that they are safe but unable to be contacted during their detention under the PDO. Detainees also have no right to receive visitors. The CCC believes that detainees should be given increased contact rights, and that this can be done without compromising the counter-terrorism objectives of PDOs.

Recommendation 3 (p. 25)

That the *Terrorism (Preventative Detention) Act 2005* be amended to:

(a) enable a person detained under an initial or final preventative detention order (PDO) to contact a person identified in section 56(1) for any purpose

(b) enable a person detained under a final PDO to be visited by a person identified in section 56(1).

Contact under these provisions would be subject to any prohibited contact order made in relation to the person's detention.

Compensating certain people detained under a PDO for losses resulting from their detention

The TPDA's current compensation scheme is limited to compensating detainees for unlawful acts and breaches of basic statutory treatment obligations related to the enforcement of a PDO. In the CCC's view, more is required to balance the strong public interest justification for using extraordinary PDO powers without resort to arrest. The CCC considers that a sensible public interest policy would vest the State with responsibility to provide appropriate compensation for people who, despite not being party to a terrorism offence, suffer foreseeable damage upon their detention without any finding of error or failure in the administration of the TPDA.

Recommendation 4 (p. 26)

That the *Terrorism (Preventative Detention) Act 2005* be amended to enable a person who is:

(a) detained under a preventative detention order (PDO); and

(b) not charged with a related terrorism offence (that is, a terrorism offence related to the terrorist act for which the PDO was made) within 14 days from the day the PDO ends (noting that this is the time when either the initial PDO or any related final PDO ceases to have effect)

be compensated by the State for foreseeable losses incurred as a direct or indirect result of their detention, regardless of the lawfulness of the detention.

Allowing police to question people detained under a PDO in certain circumstances

The inability of police to question a person detained under a PDO may limit the operational effectiveness of the TPDA. To address this, the CCC considers that police should be allowed to question a person for the purpose of obtaining information that may help to achieve the objective of the PDO in preventing or preserving evidence of a terrorist act. This must be subject to an extensive range safeguards to ensure there is an appropriate balance between protecting individual rights and ensuring that the powers available to police are as effective as possible.

Recommendation 5 (pp. 30–31)

That the *Terrorism (Preventative Detention) Act 2005* be amended to allow police to question a person detained under a preventative detention order (PDO) if the issuing authority for the PDO is satisfied that there are reasonable grounds to suspect that:

(a) the person has or may be aware of information related to the terrorist act for which they have been detained; and

(b) questioning the person may help to achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act).

The questioning provisions should be accompanied by an extensive range of safeguards as provided for in the *Justice Legislation Amendment (Terrorism) Act 2018* (Vic), including but not limited to:

- provisions to ensure detainees have the right to remain silent
- provisions to ensure detainees have the right to communicate with a lawyer before questioning commences, and to have a lawyer present during questioning
- provisions to limit any periods of questioning to a reasonable duration and to provide detainees with sufficient breaks from questioning
- a requirement for all questioning to be recorded
- additional safeguards for detainees who are children, including a requirement that questioning be recorded by audio-visual means and an obligation on police to ensure a lawyer is present during questioning.

Improving policies, procedures and training materials that support the TPDA

There are some problems in QPS and QCS policies, procedures and training materials that may prevent the TPDA from being used as efficiently and effectively as possible should a situation requiring a PDO arise. These include out of date content, and information that may be difficult to locate and understand. The CCC also found that, although people under the age of 18 years may be detained under a PDO in a youth detention centre, there are no specific policies in place regarding this. To address these problems, all agencies with a role in carrying out PDOs should ensure that they have a robust framework in place to operationalise the TPDA. In particular, all relevant QPS and QCS policies, procedures and training materials should be reviewed and amended, and appropriate policies and procedures regarding the detention of children under PDOs in detention centres should be developed.

Recommendation 6 (p. 34)

That all agencies with a role in carrying out preventative detention orders (PDOs) develop, or review and amend, policies, procedures and training materials relevant to PDOs to ensure that the *Terrorism (Preventative Detention) Act 2005* ("the TPDA") is properly operationalised. In particular, the content of all relevant documents should be:

(a) consistent with the current provisions of the TPDA and other relevant legislation

(b) presented so as to enable PDOs to be applied for, obtained and carried out efficiently and in accordance with the TPDA.

Increasing safeguards for children detained under PDOs

The TPDA currently permits people aged 16 years and over to be detained under a PDO. Victoria has recently decided to extend its PDO laws to children as young as 14 in response to an apparent emerging trend for younger children to be involved in terrorist activity in Australia and overseas. The CCC considers that the matter of a nationally consistent minimum age limit for preventative detention is a

complex one most appropriately considered by COAG. The Queensland Government may consider asking for it to be added to the agenda for the upcoming COAG special meeting on counter-terrorism.

It is possible that COAG will agree to lower the age limit for preventative detention to 14 years. In any event, but particularly if the minimum age limit in the TPDA is decreased, the CCC believes that the TPDA should be amended to include a range of additional safeguards for children, consistent with requirements in Victoria.

Recommendation 7 (p. 36)

That the *Terrorism (Preventative Detention) Act 2005* be amended to incorporate additional safeguards for children (that is, people under the age of 18 years) detained under preventative detention orders (PDOs). These should include, but not necessarily be limited to:

(a) a requirement that a child be detained at a youth detention centre unless the issuing authority, having regard for factors including the child's age and vulnerability, the grounds on which the PDO is made and the risk posed by the child, considers that it is reasonably necessary for the child to be detained at a corrective services facility

(b) provisions to enable the relevant issuing authority to make a PDO subject to any condition it considers reasonably necessary to impose to adequately protect the child's welfare and interests

(c) active monitoring of a child's detention by the Queensland Ombudsman, including physical inspections, to ensure that the child is being treated appropriately and that their welfare and interests are being adequately protected.

Strengthening safeguards to ensure detainees are treated with humanity

The TPDA requires detainees to be "treated with humanity and with respect for human dignity", and includes a number of other safeguards to ensure appropriate standards in the treatment of detainees. However, these may be insufficient to address concerns that have been raised about the possible treatment of people detained under PDOs — for example, the potential for detainees to be placed in solitary confinement as a result of the requirement that they be kept segregated from others. To ensure that the general requirement for detainees to be treated with humanity and respect for human dignity is met in practice, the CCC believes that specific standards for the treatment of detainees should be articulated, and that there should be more independent oversight of a person's detention under a PDO.

Recommendation 8 (p. 40)

That the Queensland Police Service work with all other agencies that may be involved in a person's detention under the *Terrorism (Preventative Detention) Act 2005* to develop written guidelines that specify the minimum conditions of detention and standards of treatment for people detained under a preventative detention order.

Recommendation 9 (p. 40)

That the TPDA be amended to:

(a) require the nominated police officer under section 38(1) to notify the Queensland Ombudsman and the Crime and Corruption Commission as soon as practicable after a person is taken into custody under a preventative detention order

(b) enable the Queensland Ombudsman to make representations to the nominated police officer under section 38(4).

1 Introduction

Background

In September 2005, the Council of Australian Governments (COAG) agreed to a national approach to preventative detention as part of a commitment to strengthening Australia's counter-terrorism laws. Specifically, COAG agreed that:

- the Commonwealth laws on terrorism, located in the Commonwealth Criminal Code, would be amended to provide for "preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community"
- similar legislation allowing preventative detention for up to 14 days would be enacted in each state and territory to complement the Commonwealth regime, which was limited to 48 hours because of constitutional constraints (COAG 2005, pp. 3–4).

Within ten weeks of the COAG agreement, the Queensland Parliament passed the *Terrorism (Preventative Detention) Act 2005* ("the TPDA"). The objective of the TPDA is to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent a terrorist act that is capable of being carried out, and could occur, in the near future from occurring; or
- preserve evidence of, or relating to, a recent terrorist act.[1]

The TPDA has been in operation since 16 December 2005, but has never been used.

The CCC's review

In 2015, when the TPDA was extended for a further 10 years,[2] a review requirement was inserted into section 83A. This requires the Minister for Police and Minister for Corrective Services ("the Police Minister") to:

- review the need for, and effectiveness of, the TPDA
- table a report on the outcome of the review in Queensland Parliament by 19 November 2018.

In its submission to the Legal Affairs and Community Safety Committee's consideration of the Counter-Terrorism and Other Legislation Amendment Bill 2015, the Crime and Corruption Commission (CCC) indicated its support for the inclusion of the review clause and its preparedness to undertake the review in line with similar legislative reviews conducted on ministerial referral (CCC 2015). The Police Minister gave his approval for the CCC to conduct the review in March 2017 and, in line with the requirement in paragraph (a) of section 83A, the CCC commenced its work on the review in October 2017.

Aims

Consistent with section 83A of the TPDA, the CCC's review had two key aims.

(1) To examine the need for the TPDA. To achieve this aim, the CCC sought to answer the following questions:

1 Section 3, TPDA. Note that when the TPDA was originally passed, the first part of the object of the Act was expressed in more narrow terms: to "prevent a terrorist act occurring in the near future". Section 3 was amended to its current form in 2017 by section 44 of the *Counter-Terrorism and Other Legislation Amendment Act 2017* ("CTOLAA 2017").

2 The TPDA was originally due to expire 10 years after commencement, on 16 December 2015. The TPDA is now due to expire on 16 December 2025 (s. 83), as per section 13 of the *Counter-Terrorism and Other Legislation Amendment Act 2015* ("CTOLAA 2015").

(a) Does preventative detention as provided for under the TPDA fill a specific gap in counter-terrorism capabilities?

(b) Is there an alternative way to address the capability gap that impacts less on rights and freedoms than the TPDA does?

(c) Do the provisions of the TPDA achieve an appropriate balance between protecting society from the threat of terrorism, and protecting the rights, freedoms and liberties of individuals?

(2) To examine the effectiveness of the TPDA. To achieve this aim, the CCC sought to answer the following questions:

(a) Is the TPDA effective in preventing and preserving evidence of terrorist acts, as per its objectives?

(b) Is the TPDA effective in promoting national consistency and interoperability?

(c) Is the TPDA effective in protecting against misuse and abuse?[3]

The CCC's review considered other aspects of Queensland's and Australia's counter-terrorism framework as necessary for achieving these aims (see Chapter 2), but otherwise did not examine counter-terrorism legislation, policy and practice beyond preventative detention. The CCC's review also did not set out to determine the likelihood of a situation occurring that would require the use of the TPDA.

How the CCC conducted the review

To answer the above questions, the CCC examined information from the following sources:

- legislation and associated materials
- written submissions from stakeholders
- previous reports on preventative detention legislation in other Australian jurisdictions, and academic literature
- administrative data from the Queensland Police Service (QPS)
- policies, procedures and training materials from the QPS, Queensland Corrective Services (QCS) and the Department of Child Safety, Youth and Women.

Legislation and associated materials

The CCC examined the provisions of the TPDA and other relevant legislation, including:

- key amending acts (for example, the *Counter-Terrorism and Other Legislation Amendment Act 2015*)
- equivalent preventative detention legislation in other Australian jurisdictions [for example, Division 105 of the *Criminal Code Act 1995* (Cth), Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW)]
- the *Crimes Act 1914* (Cth)
- the *Australian Security Intelligence Organisation Act 1979* (Cth).

Where relevant, the CCC also examined associated materials including explanatory notes, Records of Proceedings (Hansard) and parliamentary committee review reports. A full list of legislation and associated materials cited in this report is provided on page 48.

Written submissions

In March 2018, the CCC called for public submissions to the review via its website.[4] The CCC also sent

3 The CCC acknowledges that there may be alternative ways to conceptualise need and effectiveness, and it is sometimes difficult to differentiate between issues relating to need and issues relating to effectiveness. The issue of safeguards is an example of this. The CCC has adopted this approach to cover important issues while reflecting the requirements in section 83A of the TPDA as closely as possible.

4 See the public submissions paper available at <www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/review-of-the-terrorism-preventative-detention-act-2005>.

direct invitations for written submissions to:

- 10 Queensland government stakeholders (see Appendix 1 for a full list of organisations invited to make a written submission)
- 11 Commonwealth and interstate government stakeholders (see Appendix 1)
- 18 non-government entities (see Appendix 1)
- 28 individuals the CCC identified as having academic expertise relevant to the review.

The CCC received 10 written submissions, as indicated in Table 1 below. All public submissions are on the CCC's website.

Table 1. List of written submissions to the review.

Number	Author
1	Legal Aid Queensland
2	Queensland Ombudsman
3	Australian Lawyers Alliance
4	Queensland Council for Civil Liberties
5	Bar Association of Queensland
6	Name withheld (confidential submission)
7	Australian Lawyers for Human Rights
8	Commonwealth Attorney-General's Department
9	Western Australia Police Force
10	Queensland Government Agencies

After receiving the Queensland Government Agency submission, the CCC conducted follow-up consultations with staff from the QPS and the Department of the Premier and Cabinet to clarify and expand on some of the issues raised in the submission.

Previous reports and academic literature

Preventative detention legislation in other Australian jurisdictions has been subject to a large number of reviews. These include:

- government reviews, such as the 2013 COAG review of counter-terrorism legislation and a series of reviews of the New South Wales (NSW) legislation by the NSW Department of Justice
- reviews by independent oversight bodies, such as the Independent National Security Legislation Monitor (INSLM)[5] and the NSW Ombudsman
- reviews by expert panels, such as the 2017 Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers in Victoria ("the Victorian Expert Panel").

The CCC examined reports on these reviews for findings and recommendations relevant to the review of the TPDA.

Preventative detention legislation in Australia and other countries has also been subject to a large volume of academic commentary. Given the lack of research on the TPDA specifically, the CCC undertook a comprehensive literature search to identify journal articles, books and other academic sources related to preventative detention in Australia more generally. Information from these sources was considered alongside the findings and recommendations of previous reviews.

5 The INSLM is a statutory role responsible for reviewing the operation, effectiveness and implications of counter-terrorism and national security laws, and considering whether the laws contain appropriate safeguards for protecting individual rights, remain proportionate to terrorism or national security threats, and remain necessary (s. 6, *INSLM Act 2010*).

QPS administrative data

To inform its examination of the effectiveness of the TPDA, the CCC requested data from the QPS about:

- the number of applications for a preventative detention order (PDO) made under the TPDA (from 16 December 2005 to 30 June 2018)
- the number and nature of terrorist acts that occurred in Queensland:
  - before the introduction of the TPDA (from 5 April 2002[6] to 15 December 2005)
  - after the introduction of the TPDA (from 16 December 2005 to 30 June 2018)
- the number and nature of terrorist acts that were prevented in Queensland:
  - before the introduction of the TPDA (from 5 April 2002 to 15 December 2005)
  - after the introduction of the TPDA (from 16 December 2005 to 30 June 2018).

The QPS advised that no applications for a PDO had been made under the TPDA, and no terrorist acts had occurred in Queensland in either of the time periods data was requested for (several individuals had been charged with terrorist offences, however). No data was available about terrorist acts prevented before the introduction of the TPDA, but the QPS provided some relevant information for the time after the introduction of the TPDA.

Policies, procedures and training materials

As part of the consideration of effectiveness, policies, procedures and training materials relating to the TPDA were obtained from the QPS and QCS. The CCC reviewed:

- the QPS Control Order and Preventative Detention Order Handbook (as at its last update in June 2013)
- the QPS Counter Terrorism Training Manual (as at October 2017)
- nine QCS Custodial Operations Practice Directives (COPDs) relevant to the management of people detained under a PDO in a corrective services facility (as in effect at 21 June 2018).

The CCC also sought information from the Department of Child Safety, Youth and Women about policies governing the detention of children under PDOs in Queensland's youth detention centres. The CCC was advised that there are no specific policies regarding the detention of children under PDOs, but there is a suite of policies regarding the operation of detention centres generally.[7]

About this report

The purpose of this report is to describe the outcomes of the CCC's review of the TPDA, to allow the Police Minister to fulfil the requirement in section 83A, paragraph (b).

The remainder of the report is divided into three chapters:

- Chapter 2 provides an overview of the TPDA and other key elements of the legislative framework in which it operates.
- Chapter 3 discusses the CCC's findings about the need for the TPDA.
- Chapter 4 discusses the CCC's findings about the effectiveness of the TPDA.

The report ends with a conclusion outlining the key findings of the review and noting the implications of ongoing changes to the legislative framework in which the TPDA operates.

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6 This date was selected as it was when COAG first agreed to pursue a new national framework to combat terrorism (see COAG 2002). Also around this time, the first tranche of specific counter-terrorism legislation was introduced in Federal Parliament.

7 Most of these policies are publicly available at <publications.qld.gov.au/dataset/youth-detention-policies>.

2 The TPDA in context

The TPDA is one element of a much broader framework of counter-terrorism laws in Australia, including a nationally consistent regime of preventative detention laws. The purpose of this chapter is to outline the key features of the TPDA and the legislative context in which it operates, focusing on those elements most relevant to the issues discussed in the following chapters.

Background to Australia's preventative detention laws

Following the terrorist attacks in the United States on 11 September 2001, the focus of global counter-terrorism efforts shifted from investigating and prosecuting crimes to disrupting and preventing future terrorist acts. This was reflected in the United Nations Security Council resolution adopted on 28 September 2001, which called upon all states to "take the necessary steps to prevent the commission of terrorist acts" (Resolution 1373, p. 2).[8]

The consequence of this in Australia was a move to strengthen existing counter-terrorism arrangements and develop a new national framework to meet emerging counter-terrorism challenges (COAG 2002). On 24 October 2002, all Australian governments entered into the Intergovernmental Agreement (IGA) on Australia's National Counter-Terrorism Arrangements.[9] The IGA aimed to enable:

> (a) effective nation-wide prevention, response, investigation and consequence management arrangements based on best-practice;
>
> (b) a comprehensive and complementary legal regime across all jurisdictions; and
>
> (c) effective cooperation, coordination and consultation between all relevant agencies in all jurisdictions. (IGA, Paragraph 2.2)

It was further agreed that the state and territory governments would all pass legislation referring power to the Commonwealth to make laws relating to terrorist acts. Following the enactment of relevant legislation, a second IGA was entered into on 25 June 2004.[10]

Against this backdrop, and following the terrorist attacks in London on 7 July 2005, COAG agreed on 27 September 2005 to further strengthen Australia's counter-terrorism laws. A range of new measures were agreed to, including stop, question and search powers, control orders,[11] and a national preventative detention regime. In relation to preventative detention, it was agreed that:

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8 Available at <www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001)>.

9 Available at <www.dpc.wa.gov.au/ossec/CounterTerrorismArrangements/ProtectingCriticalInfrastructure/Documents/2002IGAonCounter-TerrorismArrangments.pdf>.

10 IGA on Counter-Terrorism Laws, 25 June 2004, available at <www.coag.gov.au/sites/default/files/agreements/IGA%20on%20Counter-Terrorism%20Laws.pdf>. The primary purpose of the IGA is to set out a process for obtaining agreement from the states and territories in relation to any amendments proposed to relevant Commonwealth legislation.

11 Under Division 104 of the *Criminal Code Act 1995*, a person can be subject to a "control order" to substantially assist in preventing a terrorist act or the facilitation of a terrorist act, or where the person has been involved in training with a listed terrorist organisation, or has engaged in or facilitated hostile activity in a foreign country, or has been convicted of a terrorism offence. Under a control order, a person can be prohibited or restricted from engaging in certain conduct (for example, being in certain locations, leaving Australia, communicating or associating with certain people, or possessing or using certain items) and can be required to fulfil particular obligations (for example, remaining at particular premises for up to 12 hours a day, wearing a tracking device, reporting to a specified person at a specified time and place, or participating in counselling or education). Control orders can apply to any person aged 14 years or older, and can be in effect for up to 12 months (three months for children).

- the Commonwealth Criminal Code would be amended to provide for "preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community"
- similar legislation allowing preventative detention for up to 14 days would be enacted in each state and territory to complement the Commonwealth regime, which was limited to 48 hours because of constitutional constraints (COAG 2005).

In the 18 months that followed, all jurisdictions enacted legislation providing for the temporary detention of a person to prevent a future terrorist act or preserve evidence of a past terrorist act. Details of the legislation enacted in each jurisdiction is provided in Table 2.

Table 2. Preventative detention legislation in Australia.

Jurisdiction	Legislation	Commencement	Current expiry date
Cth	*Criminal Code Act 1995* — Division 105	14 December 2005	7 September 2021[a]
Qld	*Terrorism (Preventative Detention) Act 2005*	16 December 2005	16 December 2025
ACT	*Terrorism (Extraordinary Temporary Powers) Act 2006*	19 November 2006	19 November 2021
NSW	*Terrorism (Police Powers) Act 2002* — Part 2A[b]	16 December 2005	16 December 2018
NT	*Terrorism (Emergency Powers) Act 2003* — Part 2B	28 June 2006	30 June 2026
SA	*Terrorism (Preventative Detention) Act 2005*	8 December 2005	8 December 2025
Tas	*Terrorism (Preventative Detention) Act 2005*	1 March 2007	31 December 2025
Vic	*Terrorism (Community Protection) Act 2003* — Part 2A[c]	9 March 2006	1 December 2021
WA	*Terrorism (Preventative Detention) Act 2006*	22 September 2006	22 September 2026

a As per section 11 of the *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*.

b The NSW Department of Justice has recommended that Part 2A be extended for another three years (NSW Department of Justice 2018). A bill to implement these and other recommendations will be introduced to the NSW Parliament later in 2018 (Speakman 2018).

c Part 2 of the *Justice Legislation Amendment (Terrorism) Act 2018*, which will commence on 1 October 2018, will insert additional provisions into a new Part 2AA (see further discussion on pages 28 to 30).

Although COAG originally agreed that the new laws would all expire ("sunset") after 10 years, and despite a recommendation in 2013 to repeal the regime (see COAG 2013a), each jurisdiction has subsequently extended its sunset provision so that the full suite of preventative detention laws remains in effect today. To date, Australia's preventative detention laws have been used on only two occasions — against three individuals in NSW in September 2014, and one individual in Victoria in April 2015.[12]

Overview of the TPDA

As Queensland's response to the September 2005 COAG agreement, the TPDA commenced on 16 December 2005. It has been significantly amended on four occasions since (2007, 2015, 2016 and 2017).[13] This section of the report outlines the TPDA's current objectives and the key provisions most relevant to the issues discussed in Chapters 3 and 4. The TPDA should be consulted directly for full details.

12 See NSW Ombudsman 2017 and Expert Panel on Terrorism 2017a for more details.

13 See the *Terrorism Legislation Amendment Act 2007*, the CTOLAA 2015, the *Counter-Terrorism and Other Legislation Amendment Act 2016* ("CTOLAA 2016"), and the CTOLAA 2017.

Objectives

The TPDA allows a person over the age of 16 years to be taken into custody and detained for a short period of time, up to 14 days,[14] to either:

- prevent a terrorist act that is capable of being carried out, and could occur, in the near future (that is, within the next 14 days) from occurring [15]
- preserve evidence of, or relating to, a recent terrorist act (that is, one that has occurred within the last 28 days).[16]

The full definition of a terrorist act as per the TPDA is included in Appendix 2.

Key provisions

The TPDA allows people to be detained under two types of "preventative detention orders" (PDOs) — initial PDOs and final PDOs.[17]

- Initial PDOs can be in force for up to 24 hours.[18]
- Final PDOs can be in force for up to 14 days from the time the person is first detained, including any period of detention under an initial PDO or a PDO made under preventative detention laws in another jurisdiction.[19]

For both types, the TPDA sets out a number of requirements for applying for and making PDOs, and specifies police powers in relation to detainees. The TPDA also contains a number of safeguards against misuse and abuse.

Requirements for applying for and making PDOs

Applicants and issuing authorities

The TPDA allows any Queensland police officer to apply for a PDO.[20] For initial PDOs, applications are made to and decided by a senior police officer (Assistant Commissioner, Deputy Commissioner or Commissioner).[21] For final PDOs, applications are made to and decided by a judge or retired judge of the Supreme Court who has been appointed by the Police Minister for that purpose.[22] Judges performing this function act in a personal capacity rather than as a court or a member of the court (see further discussion on pages 22 to 23).[23]

Application process

For both types of PDOs, there is a requirement for there to be a written application that fully discloses all matters, both favourable and adverse to the order being made.[24] An application for an initial PDO may be made orally (that is, without preparing a written application), if it is "reasonably necessary to apply in that way because of urgent circumstances".[25]

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14 Sections 9(1) and 12(2), TPDA.

15 When the TPDA commenced, there was a requirement for a terrorist act to be "imminent and, in any event, be expected to occur at some time in the next 14 days". This change is discussed further on page 8 under "PDO criteria".

16 Sections 3 and 8, TPDA.

17 Sections 15 and 22, TPDA. While the TPDA refers to "initial orders" and "final orders", the CCC uses "PDOs" rather than "orders" for consistency throughout the report.

18 Sections 12(1) and 17(5), TPDA.

19 Sections 12(2) and 25(6), TPDA.

20 Sections 15(1) and 22(1), TPDA.

21 Sections 7(1) and 17(1) and Schedule, TPDA.

22 Sections 7(2) and 25(1), TPDA.

23 Section 77, TPDA.

24 Sections 15 and 22, TPDA.

25 Section 79A, TPDA.

PDO criteria

Several criteria need to be met before a PDO can be sought or made. These vary according to the intended purpose of the PDO.

- For PDOs intended to prevent a terrorist act, the applicant and the person making the order (that is, a senior police officer for an initial PDO and a judge or retired judge for a final PDO) must be "satisfied" that firstly:
  - (a) there are reasonable grounds to suspect that the person to be detained:
    - (i) will engage in a terrorist act; or
    - (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
    - (iii) has done an act in preparation for, or in planning, a terrorist act; and
  - (b) making the order would substantially assist in preventing a terrorist act; and
  - (c) detaining the person for the period to be specified under the order is reasonably necessary for substantially assisting in preventing a terrorist act occurring

  and secondly:
  - (d) there are reasonable grounds to suspect a terrorist act is capable of being carried out, and could occur, within the next 14 days.[26] Note that this requirement has only been in effect since September 2017.[27] Previously, the applicant and the person making the order had to be satisfied that "a terrorist act must be imminent and, in any event, be expected to occur at some time in the next 14 days".
- For PDOs intended to preserve evidence of a terrorist act, the applicant and the person making the order must be "satisfied on reasonable grounds" that:
  - (a) a terrorist act has occurred within the last 28 days; and
  - (b) it is necessary to detain the person to preserve evidence in Queensland or elsewhere of, or relating to, the terrorist act; and
  - (c) detaining the person for the period to be specified under the order is reasonably necessary for preserving the evidence.[28]

Places of detention

Once a PDO has been made, the subject of the PDO can be detained at:

- a watchhouse
- a corrective services facility
- a detention centre.[29]

Any person can be detained at a watchhouse or corrective services facility, but only a person under the age of 18 years can be detained at a detention centre.[30]

Police powers in relation to detainees

Limits on questioning detainees

Police questioning of detainees for the purpose of investigating an offence or planned offence is not an objective of PDOs (see page 7). As such, the TPDA provides that police can only question a detainee to:

- find out whether they are the person stated in or described by the order

26 Sections 8(3) to 8(4), TPDA.

27 Section 45 (Amendment of s. 8), CTOLAA 2017.

28 Section 8(5), TPDA.

29 Section 46(1), TPDA.

30 Sections 46(2) to 46(3), TPDA.

- find out their identity (if the person is the person described by the order)
- ensure their safety and wellbeing
- allow police to comply with a requirement in relation to their detention.[31]

Breaching these restrictions is an offence with a maximum penalty of two years imprisonment.[32]

Despite these provisions, a detainee may be released from detention under a PDO and questioned according to provisions under other legislation.[33] In particular, a detainee can be released in order to be detained and questioned:

- under an Australian Security Intelligence Organisation (ASIO) warrant
- under Part IC of the Commonwealth Crimes Act.

More information about these laws is provided on page 10 ("Overview of other relevant legislation").

Prohibited contact orders

Under the TPDA, police may apply for a "prohibited contact order" (PCO) in relation to a person who is the subject of a PDO application or who is already being detained under a PDO. A PCO prevents the detainee from contacting a specific named person for the duration of their detention. The relevant issuing authority (see page 7) may make a PCO if they are satisfied that doing so will assist in achieving the purpose for which the PDO was made (that is, preventing or preserving evidence of a terrorist act).[34]

Monitoring contact

All permitted contact between a detainee and a family member, friend or employment contact may only take place if it can be effectively monitored by police.[35] A detainee's contact with a lawyer is also monitored by police if:

- the lawyer is not a "security-cleared lawyer"[36]
- for a final PDO, the issuing authority has made an order allowing police to monitor the detainee's contact with a security-cleared lawyer, on the grounds that this will assist in achieving the purpose for which the PDO was made (that is, preventing or preserving evidence of a terrorist act).[37]

Monitored communications between a detainee and a lawyer cannot be admitted as evidence against the detainee in any court proceedings,[38] and monitors are prohibited from disclosing information from a monitored communication.[39]

Safeguards against misuse and abuse

The TPDA contains a number of safeguards. Where relevant, these are discussed in more detail in Chapter 3 (in considering whether the TPDA achieves an appropriate balance between community safety and individual rights) and Chapter 4 (in considering the effectiveness of the TPDA in protecting against misuse and abuse). Briefly, however, the TPDA's safeguards include:

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31 Sections 3 (note) and 53, TPDA. See also the Explanatory Notes to the Terrorism (Preventative Detention) Bill 2005 (p. 5).

32 Section 54, TPDA.

33 Section 45, TPDA.

34 Sections 32 and 33, TPDA.

35 Section 59(1), TPDA.

36 A security-cleared lawyer is a lawyer who has been given a security clearance at an appropriate level by the Commonwealth Attorney-General's Department (Schedule, TPDA).

37 Sections 59(1) and 59A, TPDA.

38 Section 59(5), TPDA.

39 Section 68, TPDA.

- checks and balances in the processes for applying for, making and executing PDOs. For example, the TPDA imposes obligations on police to ensure that the subject of a PDO is given information about their detention.[40]
- specific rights given to detainees. For example, detainees have the right to contact family members and a lawyer, subject to lawful monitoring,[41] and must be treated with "humanity and… respect for human dignity".[42]
- avenues for oversight and review. For example, the Public Interest Monitor (PIM) is notified of all PDO and PCO applications,[43] and a person detained under a final PDO can apply to the Supreme Court at any time to have the order revoked or varied.[44]
- requirements for publicly reporting on the use of PDOs. In particular, the Police Minister must report all PDO applications to Parliament within six months.[45]

For a number of safeguards, failure to comply is an offence with a maximum penalty of two years imprisonment.[46]

Relevantly, the TPDA also includes a remedial scheme, including provision for compensation. This enables a detainee to challenge the legality (including procedural fairness) of a PDO, and hold the State and others liable for certain mistreatment that amounts to a legal wrong[47] committed against the detainee.[48]

Overview of other relevant legislation

To help understand some issues discussed in Chapters 3 and 4, this section of the report provides an overview of two key pieces of Commonwealth legislation relevant to the TPDA's operation:

- Part IC of the Crimes Act, which provides for investigative detention in relation to Commonwealth offences, including terrorism offences
- Part III Division 3 of the ASIO Act, which provides ASIO with powers to detain and question people in relation to terrorism offences.

This section does not describe other jurisdictions' preventative detention laws. In most cases, these are substantially similar to the TPDA, and points of difference are identified and discussed where relevant in Chapters 3 and 4.

Part IC of the Crimes Act — investigative detention for Commonwealth offences

In the counter-terrorism context, Part IC of the Crimes Act provides law enforcement officers, including Queensland police officers, with the power to detain and question a person who has been arrested for a terrorism offence (see Box 1). Specifically, it allows an arrested person to be detained without charge for an "investigation period" of up to four hours[49] to enable officials to investigate whether the person

40 Part 4, TPDA.

41 Sections 56 and 58, TPDA.

42 Section 52, TPDA.

43 Sections 16, 24 and 34, TPDA.

44 Section 71, TPDA.

45 Section 76C, TPDA.

46 Section 54, TPDA. For other safeguards, there are no penalties for non-compliance.

47 That is, a tort or breach of statutory obligation owed to the detainee.

48 Section 75, TPDA.

49 Two hours if the person is or appears to be under the age of 18 years, an Aboriginal person or a Torres Strait Islander [s. 23DB(5), Crimes Act].

committed the offence (or another Commonwealth offence).[50] The initial investigation period can be extended for up to 20 hours upon successful application to a magistrate,[51] providing a maximum total investigation period of 24 hours.[52]

Box 1: Terrorism offences under the Commonwealth Criminal Code

A terrorism offence is defined in the Crimes Act to include a number of offences under the Commonwealth Criminal Code (and also the *Charter of the United Nations Act 1945*; see s. 3(1) of the Crimes Act for the full definition). These particularly include the following offences in Division 101:

- engaging in a terrorist act (s. 101.1)
- providing or receiving training connected with terrorist acts (s. 101.2)
- possessing things connected with terrorist acts (s. 101.4)
- collecting or making documents likely to facilitate terrorist acts (s. 101.5)
- other acts done in preparation for, or planning, terrorist acts (s. 101.6).

Other terrorism offences in the Criminal Code include treason (Division 80, Subdivision B) and various offences relating to terrorist organisations (Division 102), financing terrorism (Division 103), foreign incursions and recruitment activities (Part 5.5), and international terrorist activities using explosive or lethal devices (Division 72, Subdivision A).

Under section 3WA of the Crimes Act, police officers can arrest a person without a warrant for a terrorism offence if the police officer "suspects on reasonable grounds" that the person has committed or is committing the offence (and proceeding by summons would not achieve one of several purposes set out in the section).

There are some periods of time where questioning is delayed or suspended that are disregarded when calculating the total investigation period ("disregarded time", also referred to as "dead time"). This includes where:

- time is taken to allow the person to be transported from the place of arrest to the place of questioning
- time is taken to allow the person to receive medical attention
- time is taken to allow the person to communicate with a lawyer, friend, family member or other person
- the person cannot be questioned because of their intoxication
- time is taken to allow the person to rest
- upon application by an investigating official, a magistrate has specified that a period of time is to be disregarded ("specified time").[53] Specified time cannot extend beyond seven days.[54]

In October 2017, COAG agreed to enhance the pre-charge detention regime under Part IC of the Crimes Act (COAG 2017). No amendments have yet been introduced into federal parliament, but a submission by the Commonwealth Attorney-General's Department and Australian Federal Police (AFP) to a recent review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) indicated that the proposed new model will provide for an initial detention period of eight hours, and a maximum total detention period of 14 days. Extensions to the initial detention period will involve a tiered process, with magistrates able to approve:

- extensions for up to seven days according to existing criteria[55]

50 Sections 23DB(2) and 23DB(5), Crimes Act.

51 Section 23DF(7), Crimes Act.

52 Twenty-two hours if the person is or appears to be under the age of 18 years, an Aboriginal person or a Torres Strait Islander.

53 See section 23DB(9) of the Crimes Act for a complete list of situations where time can be disregarded.

54 Section 23DB(11), Crimes Act.

55 See section 23DF of the Crimes Act.

- extensions for a further seven days according to a higher threshold requiring the magistrate to be satisfied that ongoing detention is necessary.

Provisions for disregarded and specified time will also be removed and there will be "a clear cap" on the maximum permitted period of detention (PJCIS 2018a, p. 89).

Part III Division 3 of the ASIO Act — special detention and questioning powers for terrorism offences

Part III Division 3 of the ASIO Act provides ASIO officials with the power to detain and question people in relation to terrorism offences.[56] Specifically, it enables the Director-General of ASIO, with the consent of the Commonwealth Attorney-General, to request from an issuing authority[57] two types of warrants — questioning warrants (QWs) and questioning and detention warrants (QDWs).[58] These differ as follows:

- Under a QW, the person who is the subject of the warrant must appear before a "prescribed authority"[59] for questioning at a specified time.[60] A QW can be in force for no longer than 28 days.[61]
- Under a QDW, the person who is the subject of the warrant must appear before a prescribed authority for questioning at a specified time, and is taken into custody and immediately detained.[62] A person can be detained until questioning ends, but for no longer than 168 hours (seven days).[63]

A person cannot be questioned under either type of warrant for longer than eight hours in total, unless this is extended by the prescribed authority for up to a maximum of 24 hours.[64]

To request or make a QW or QDW, there must be reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[65] To request a QDW, the Director-General of ASIO must also be satisfied that:

- relying on other methods of collecting the intelligence would be ineffective
- there is a written statement of procedures to be followed in the exercise of authority under the warrant[66]
- there are reasonable grounds for believing that the person may do one of the following if not immediately taken into custody and detained:
  - alert someone involved in a terrorism offence that the offence is being investigated
  - not appear for questioning
  - destroy, damage or alter relevant records or things.[67]

A person who is the subject of a QW or QDW must, in accordance with the warrant, appear for questioning, give any information requested of them, must not make a statement that is knowingly false

56 Compared with the definition of a terrorism offence in the Crimes Act (see Box 1), the definition of a terrorism offence in the ASIO Act only captures offences in Division 101 of the Criminal Code and offences relating to terrorist organisations (Division 102), financing terrorism (Division 103) and international terrorist activities using explosive or lethal devices (Division 72, Subdivision A).

57 A judge appointed by the Commonwealth Attorney-General under section 34AB of the ASIO Act.

58 Sections 34D and 34F, ASIO Act.

59 A prescribed authority is defined in section 34B of the ASIO Act.

60 Section 34E(2), ASIO Act.

61 Section 34E(5), ASIO Act.

62 Section 34G(3), ASIO Act.

63 Section 34G(4), ASIO Act.

64 Section 34R(1) to (6), ASIO Act. Where an interpreter is present, a person may be questioned for up to 48 hours [ss. 34R(8)–(12)].

65 Sections 34D(4), 34E(1), 34F(4) and 34G(1), ASIO Act.

66 Under section 34C of the ASIO Act.

67 Section 34F(4), ASIO Act.

or misleading in a material particular, and must produce any record or thing requested of them, subject to a penalty of five years' imprisonment.[68]

The PJCIS reported in March 2018 that, since the provisions were introduced in 2003, ASIO has never requested or been issued with a QDW, and it has not requested or been issued with a QW since 2010 (PJCIS 2018b). With the QDW and QW provisions due to expire on 7 September 2018, the PJCIS has recommended that the existing detention powers be repealed, and the framework for compulsory questioning be remodelled in new legislation to be introduced by the end of 2018 (PJCIS 2018b). To allow sufficient time for this legislation to be developed and reviewed, the operation of the existing provisions will continue to 7 September 2019.[69]

68 Sections 34L(1) to (6), ASIO Act.

69 Section 18, *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*.

3 The need for the TPDA

In framing its review of the need for the TPDA, the CCC sought to determine whether the TPDA appropriately fills a legislative gap, not the likelihood of a situation occurring that would require the use of the TPDA. The CCC considered that, to conclude the TPDA is legally necessary, it would need to determine:

- preventative detention as provided for under the TPDA fills a specific gap in counter-terrorism capabilities
- there is no alternative way to address the capability gap that involves less impact on rights and freedoms
- the TPDA's provisions achieve an appropriate balance between protecting society from the threat of terrorism, and protecting the rights, freedoms and liberties of individuals.

This chapter discusses the CCC's findings in these areas.

Role of the TPDA in filling a specific gap in counter-terrorism capabilities

There has been significant debate as to whether Australia's preventative detention laws are necessary to fulfil a counter-terrorism objective that cannot be achieved via other laws and powers. This section of the report discusses the key issues in this debate, drawing on comments about both the TPDA specifically and Australia's preventative detention laws more generally. It concludes with the CCC's assessment that preventative detention as provided for under the TPDA fills only a very small gap in Queensland's counter-terrorism capabilities, but a gap nonetheless.

Arguments that preventative detention as provided for under the TPDA does not fill a gap in counter-terrorism capabilities

Since the introduction of Australia's preventative detention laws in 2005, a number of general assertions have been made that the laws are unnecessary to respond to terrorism. For example, the submissions made to this review by the Australian Lawyers Alliance (ALA), the Queensland Council for Civil Liberties (QCCL), the Bar Association of Queensland ("the Bar Association"), and Australian Lawyers for Human Rights (ALHR) all concluded that the TPDA was not needed. These views are consistent with the findings of some previous reviews, including a 2012 review of the Commonwealth PDO provisions by the first INSLM (INSLM 2013),[70] and the 2013 COAG review of counter-terrorism legislation (COAG 2013a).[71, 72]

Underlying these assertions is the view that preventative detention does not fill any specific gap in counter-terrorism capabilities. Those who doubt the need for preventative detention argue that the initial justification for the laws was limited and vague, and no specific deficiencies in existing laws and powers were ever clearly articulated (INSLM 2013; Tyulkina & Williams 2015).[73] This reflects the view that other laws and powers were — and continue to be — sufficient to achieve the objectives of

70 There have been three different INSLMs since the role began in 2010: Mr Bret Walker SC (in office until April 2014), the Hon. Roger Gyles AO QC (in office until early 2017) and the current INSLM, Dr James Renwick SC.

71 The 2013 COAG review was conducted by a six-person committee chaired by the Hon. Anthony Whealy QC, a retired judge from the NSW Court of Appeal. Refer to COAG 2013b for the response to the review from COAG itself.

72 See also submissions discussed in NSW Department of Attorney General and Justice 2013 and PJCIS 2018a.

73 See also similar comments made during the debate of the Terrorism (Preventative Detention) Bill 2005 ("the TPDB") by the then Member for Ashgrove, the. Hon Jim Fouras AM [QLA (Fouras) 2005, p. 4683], and the then Member for Murrumba, the Hon. Dean Wells [QLA (Wells) 2005, p. 4692].

preventative detention (COAG 2013a; INSLM 2013; Tyulkina & Williams 2015).[74] The ALA and the Bar Association both made observations to this effect in their submissions to the CCC's review.[75]

In arguing that there is no gap in counter-terrorism capabilities that would necessitate preventative detention, critics routinely highlight the applicability of other aspects of Australia's counter-terrorism framework. Chief among these is the extensive range of preparatory and other terrorism offences in Division 101 of the Commonwealth Criminal Code and the pre-charge detention regime in Part IC of the Commonwealth Crimes Act (see discussion on pages 10 to 11, including Box 1). In its submission, the Bar Association argued that in circumstances where the criteria for a PDO can be satisfied, then the person could also be arrested and charged with a terrorism offence and detained for questioning in accordance with Part IC of the Crimes Act (see also similar arguments in COAG 2013a). Indeed, many commentators have made observations consistent with the first INSLM's view that "it is hard to imagine a case where an officer could meet the PDO threshold but not the threshold for arrest" (INSLM 2013, p. 55).[76] On this basis, it is argued that normal powers of arrest are sufficient to prevent terrorist acts and preserve evidence of terrorist acts in circumstances where preventative detention laws could be used.

To a lesser extent, similar arguments have been made that other parts of the counter-terrorism framework can be used to prevent and preserve evidence of terrorist acts. For example, it has been argued that:

- ASIO questioning and detention warrants, which allow a person to be detained for up to seven days and questioned for 24 hours (see pages 12 to 13), would be a viable and arguably more useful alternative to a PDO in many circumstances (Ananian-Welsh 2015; Blackbourn et al. in PJCIS 2018a; Department of Justice Victoria 2014).
- If the criteria for a PDO to prevent a terrorist act can be satisfied, then it is likely that a Commonwealth control order could also be obtained for the person (Ananian-Welsh 2015; Blackbourn et al. in PJCIS 2018a; Department of Justice Victoria 2014). Further, "the terms of a control order are far more flexible, potentially far-reaching and durable than the brief period of detention available under a PDO" (Ananian-Welsh 2015, p. 779).[77]
- If the criteria for a PDO to preserve evidence of a terrorist act can be satisfied, then the threshold for search and seizure would also be met and police could take possession of the evidence using these routine powers (INSLM 2013).

From this perspective, there is simply no gap in counter-terrorism capabilities that preventative detention is needed to fill. Some have pointed to the lack of use of the TPDA and the sparing use of Australia's other preventative detention laws as supporting this conclusion (see, for example, the submissions made to this review by the ALA, ALHR and the Bar Association).[78]

Arguments that preventative detention as provided for under the TPDA fills a gap in counter-terrorism capabilities

Contrasting with the above arguments is the view of government and law enforcement stakeholders that preventative detention laws like the TPDA remain a necessary component of Australia's counter-terrorism framework. The Queensland Government Agency submission to the CCC's review stated:

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74 See also submissions discussed in NSW Ombudsman 2008, PJCIS 2018a and Senate Legal and Constitutional Legislation Committee (SLCLC) 2005.

75 See also similar comments made during the debate of the TPDB by the then Member for Nanango, Mrs Dorothy Pratt [QLA (Pratt) 2005, p. 4691].

76 See also Tyulkina & Williams 2015 and submissions discussed in NSW Ombudsman 2008 and SLCLC 2005.

77 As explained in footnote 11, a control order obtained under Division 104 of the Criminal Code Act can be in effect for up to 12 months (three months for children) and can be used to impose a wide range of prohibitions, restrictions and obligations on the subject. These include prohibitions and restrictions on being in certain locations or communicating or associating with certain people, and obligations to remain at particular premises for up to 12 hours a day or wear a tracking device.

78 See also NSW Ombudsman 2011 and submissions discussed in PJCIS 2018a.

> 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. (Queensland Government Agency submission, p. 8)[79]

Similarly, the AFP and NSW Police Force have both indicated that PDOs "remain crucial in their 'toolkit' of law enforcement powers" (NSW Department of Justice 2015, p. 16; see also Commonwealth Attorney-General's Department and AFP in PJCIS 2018a, NSW Department of Justice 2018 and NSW Ombudsman 2014), and Western Australia Police has referred to its preventative detention powers as "important" and "essential" for preventing and preserving evidence of terrorist acts (Western Australia Police 2012, p. 16 and 2016, pp. 7 & 17). The most recent reports by the current INSLM and the PJCIS have likewise concluded that the Commonwealth preventative detention provisions were necessary and should be extended (INSLM 2017; PJCIS 2018a).[80]

Those who see a continued need for preventative detention laws especially argue that normal criminal justice processes are not able to provide an effective response to terrorism in all circumstances. In particular, they note that circumstances may arise where police suspect that a terrorist act is planned or has recently occurred, but where arresting and charging the person is not possible (see discussions in COAG 2013b; Department of Justice Victoria 2014; Expert Panel on Terrorism 2017a; NSW Ombudsman 2014; PJCIS 2018a). This may be because:

- there is insufficient evidence to support an arrest. This can reflect the nature of terrorism, especially the fact that terrorist acts are planned in secret and, "in the current threat environment,… are often planned and executed with little turnaround time" (Queensland Government Agency submission, p. 7). An example offered by the AFP to the recent PJCIS review highlights this kind of scenario (see Box 2).
- sensitive information cannot be relied on to support criminal proceedings. As the Senate Legal and Constitutional Legislation Committee (SLCLC) explained in its review of the Anti-Terrorism Bill (No. 2) 2005 (Cth):

  > The covert nature of intelligence gathering means that law enforcement agencies may be presented with information crucial to disrupting or preventing a terrorist act, but which is 'unreliable' in that the information, for example, cannot be revealed without jeopardising a source, is insufficient to support a charge or may be inadmissible in a court. On this view, the criminal justice system is incapable of responding appropriately to the threat. (SLCLC 2005, pp. 5–6)

- the person in question is a "non-suspect" or an unwitting actor in a terrorist plot. For instance, the AFP has stated that it:

  > …may consider applying for a PDO in a situation where a terrorist suspect has given a bag containing an explosive device to a second person who is believed to have no knowledge of its contents and refuses to cooperate with police. (Commonwealth Attorney-General's Department and AFP in PJCIS 2018a, p. 97)

Other situations where normal policing powers may be insufficient include where an urgent PDO is required to protect evidence of a recent terrorist act while police obtain search warrants or conduct further inquiries in relation to individuals whose involvement is unclear. It is argued that, in circumstances like these, preventative detention ensures police are able to act where other powers leave a gap.

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79 The Commonwealth Attorney-General's Department made similar comments in its submission to the CCC's review.

80 The findings of the current INSLM (Dr James Renwick SC) differed to the findings of the first INSLM (Mr Bret Walker SC) in the 2012 review noted on page 14. On the issue of necessity, Dr Renwick SC stated in his 2017 report that he was "not prepared to reject what has been said by the AFP, [the Commonwealth Attorney-General's Department], ASIO and Mr [John] Lawler [AM APM, former AFP Deputy Commissioner and former Chief Executive Officer of the Australian Crime Commission], noting also the support of the NSW Police" and that, in his view, "the significant changes both in the modus operandi of terrorist attacks [including the tendency for plots to develop rapidly] and those carrying them out warrant… some form of preventative detention regime" (INSLM 2017, p. 80).

Box 2: Scenario requiring a PDO — insufficient information for arrest

Consider there has been an explosion in a crowded place in the Melbourne central business district. There are significant casualties. Police arrest a person suspected of causing the explosion and establish that the terrorist suspect had called an unknown associate around the time of the attacks. The associate is previously unknown to police, and at this stage, there is insufficient information to reach the threshold for arrest, and further investigation is required. A Commonwealth PDO is issued by a senior AFP member in relation to the associate.

Source: Commonwealth Attorney-General's Department and AFP in PJCIS 2018a, p. 94.

In arguing that preventative detention fills a gap in counter-terrorism capabilities, government and law enforcement stakeholders have acknowledged that the availability of other laws and powers means the gap is only a small one.[81] In particular, the range of terrorism offences in the Commonwealth Criminal Code together with the provisions in Part IC of the Crimes Act provide wide scope for police to respond to terrorism. On this point, the Queensland Government Agency submission to the CCC's review stated:

> …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 IC necessarily make these provisions of increased utility to police. (Queensland Government Agency submission, p. 8)[82]

The submission notes that this is particularly so following the lower threshold for arrest introduced into the Crimes Act in 2014,[83] and indicates that the preference for police to use these powers over the TPDA would continue if proposed amendments to extend the period of detention available under Part IC are passed (see page 11). Nevertheless, the submission maintained that:

> 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. (Queensland Government Agency submission, p. 7)

In this context, the lack of use of the TPDA is not unsurprising.

The CCC's conclusion: a small gap, but a gap nonetheless

In the CCC's view, there is some validity to the arguments presented by those who see no specific need for preventative detention. First, the CCC understands criticisms that the initial justifications for Australia's preventative detention laws were limited. The CCC considers that this is especially so with respect to the use of preventative detention to preserve evidence of a recent terrorist act — the rationale for this "limb" of preventative detention was not clearly articulated when laws like the TPDA were first introduced and it has not always been extensively scrutinised in subsequent reviews. Second, the CCC agrees that situations suitable to the use of other counter-terrorism laws and powers may often overlap with situations where a PDO could be used. This is particularly true for the pre-charge detention regime under Part IC of the Crimes Act, which is preferred by police over preventative detention given it is seen to have greater operational utility. In these circumstances, identifying a specific gap in counter-terrorism capabilities necessitating preventative detention was not straightforward.

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81 See also similar conclusions in Ananian-Welsh 2015 and Forcese 2010.

82 See also similar comments from NSW Police Force officers in NSW Ombudsman 2008 and 2011.

83 In 2014, the threshold for police officers to arrest a person without a warrant for a terrorism offence was lowered from a belief on reasonable grounds to a suspicion on reasonable grounds [s. 3WA(1), Crimes Act as amended by s. 47 of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* commencing on 1 December 2014].

Notwithstanding this, the CCC is satisfied that the small gap in counter-terrorism capabilities identified by law enforcement and government stakeholders is not sufficiently covered by other elements of the current legislative framework. Put another way, the CCC accepts that there is the potential for situations to arise where other laws and powers cannot be relied upon to prevent a terrorist act or preserve evidence of a terrorist act. In reaching this conclusion, the CCC acknowledges that specific examples provided by police in the course of this and other reviews about situations where they would need to seek a PDO tend to be so nuanced that they can appear purely hypothetical. However, the CCC believes that these scenarios cannot be discounted, especially in a threat environment that the CCC accepts is continually evolving and difficult to predict. The CCC is therefore persuaded that situations may arise where police need to act quickly to prevent or preserve evidence of a terrorist act, but where it is not possible for police to meet the threshold for arrest and where other options such as ASIO warrants, control orders and search and seizure powers would be unsuitable or inadequate. In these limited circumstances, preventative detention as provided for under the TPDA fills a gap in Queensland's counter-terrorism capabilities, albeit a small one.

It will be necessary to monitor any changes to Part IC of the Crimes Act (see pages 11 and 12) and questioning and detention powers under the ASIO Act (see page 13) to ensure this conclusion remains valid.

Alternatives for achieving the TPDA's objectives

The CCC's conclusion: no specific alternatives to address the gap

The CCC's findings in relation to alternative ways to address the gap identified above are brief. No specific alternatives to preventative detention were proposed to or identified by the CCC to prevent terrorist acts or preserve evidence of terrorist acts in the limited circumstances where other laws and powers cannot be used.

Achieving an appropriate balance between security and individual rights

Finding that preventative detention is needed to fill a gap in Queensland's counter-terrorism capabilities does not take away the fact that it is an extraordinary measure. It is, therefore, important to consider whether the provisions of the TPDA achieve an appropriate balance between protecting the community from terrorist acts on one hand, and maintaining the rights, freedoms and liberties of individuals on the other. This section of the report explores this concept of balance and highlights relevant concerns about the TPDA and Australia's other preventative detention laws. It then discusses several specific aspects of the TPDA that have been subjected to particularly strong criticisms for the extent to which they infringe on the rights of individual detainees. It concludes with the CCC's view that some changes should be made to the TPDA to ensure that it better protects individual rights.

The concept of balance

There is a general acceptance that legislation like the TPDA must strike a balance between promoting security and community safety, and preserving fundamental human rights and liberties. As the following extract so clearly articulates, the reason for pursing such a balance is obvious when considering the consequences of a position that is skewed one way or the other.

> A risk-minimizing society would permit mass detentions in the expectation that the minimal increase in public safety from the dragnet would [outweigh] the massive injury to civil liberties. A rights-maximizing society, however, would deny the state the power to detain except through conventional criminal proceedings (for which it would impose demanding standards), even at the risk of leaving people free whose intent and capacity are clear but whose terrorist acts lie in the future.

> These polar positions do not, however, represent the inevitable balancing in which a liberal democracy must engage to reconcile security with rights. Somewhere on the spectrum between a system of detention that seeks to eliminate all risk (but at a severe cost to civil rights) and a system that preserves absolutist civil liberties (without responding to risk) is an optimal point that is tolerable in democratic, rights-respecting societies… (Forcese 2010, p. 4)

General concerns about balance in the TPDA and Australia's other preventative detention laws

Despite agreement as to the importance of balance, finding the "right" balance is not straightforward. As the current INSLM has noted, "fair minded, informed, people may disagree as to how the balance is to be struck" (INSLM 2017, p. 1). This is reflected in the differing views put forward about the overall proportionality of the TPDA and other preventative detention laws.

- On one side are those who regard preventative detention laws like the TPDA as striking an appropriate balance between community safety and individual rights. This includes those members of parliament who supported the original Terrorism (Preventative Detention) Bill 2005 ("the TPDB"),[84] and the current INSLM in his recent report on the Commonwealth preventative detention provisions (INSLM 2017).[85] Here, the importance of responding to terrorism and protecting the community from its potential consequences, including the large-scale loss of life, is seen to justify the often significant extent to which individual rights are limited through preventative detention.
- On the other side are those who regard preventative detention laws like the TPDA as disproportionate to their counter-terrorism objectives — that is, as undermining fundamental human rights and having other adverse consequences to a greater extent than they help to protect the community from terrorism. The ALA, the Bar Association and ALHR all made submissions about the TPDA along these lines. Likewise, the first INSLM concluded in his 2012 review that preventative detention could not reasonably be considered "a proportionate interference with liberty" (INSLM 2013, p. 45).[86]

These competing views provide no obvious answer to the question of balance. It is useful, however, to consider the more particular concerns underlying the view that there is a lack of balance.

Those who argue that preventative detention constitutes too great an infringement on individual rights emphasise two concerns. The first is that preventative detention can have significant personal consequences for detainees and their families. These can include emotional trauma and the inability to engage in education, as well as the loss of income or employment, reputational damage and major interruptions to family life. The ALA raised some of these issues in its submission, stating:

> Ramifications of detention can be devastating… People could lose their jobs or accommodation. Families could be left without their main breadwinner or primary carer for children or elderly relatives. Further, a person subjected to a PDO could suffer reputational damage, due to the stigma of being detained in relation to a terrorist offence, even if they are suspected of no wrongdoing themselves. An individual's entire life could be ruined. (ALA submission, p. 5)

The second concern highlighted by those who regard preventative detention laws as disproportionate is that preventative detention significantly infringes upon human rights and freedoms and undermines

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84 See, for example, comments made during the debate of the TPDB by the then Leader of the Opposition, the Hon. Lawrence Springborg [QLA (Springborg) 2005, p. 4675], the then Member for Robina, Mr Robert Quinn [QLA (Quinn) 2005, p. 4677], and the Member for Caloundra, Mr Mark McArdle [QLA (McArdle) 2005, p. 4686].

85 Specifically, the current INSLM concluded that the Commonwealth PDO provisions (and control order regime) were "consistent with [Australia's human rights, counter-terrorism and international security obligations] and contain appropriate safeguards for protecting the rights of individuals [and] proportionate to the current threats of terrorism and to national security…" (INSLM 2017, p. 87).

86 See also submissions discussed in PJCIS 2018a.

fundamental legal principles. There have been especially strong criticisms that the TPDA and other preventative detention laws:

- violate the right to liberty and freedom from arbitrary detention by permitting people to be detained without arrest, charge, trial or evidence of guilt (ALHR submission; Bar Association submission; Mathew 2008, Michaelson 2005 cited in Rix 2006; QCCL submission; Tyulkina & Williams 2015)[87]
- deny detainees the right to effectively challenge their detention, especially by limiting their ability to have confidential communications with a lawyer and preventing them from being given detailed information about the case against them (Ananian-Welsh 2015; Bar Association submission; Eminent Jurists Panel on Terrorism 2009; Mathew 2008; Nesbitt 2007)[88]
- unnecessarily restrict detainees' rights of communication so that, in practice, preventative detention is effectively incommunicado detention,[89] which is otherwise prohibited to protect against the ill-treatment of detainees (ALA submission; ALHR submission; Eminent Jurists Panel on Terrorism 2009)[90]
- undermine the role of the court and a detainee's right to have their detention subject to judicial determination, oversight and review (Ananian-Welsh 2015; Bar Association submission; Eminent Jurists Panel on Terrorism 2009; Nesbitt 2007; Tyulkina & Williams 2015).[91]

Concerns about some specific aspects of the TPDA

Concerns relevant to the CCC's assessment of balance have especially been raised in relation to four specific aspects of the TPDA:

- provisions that permit police to monitor contact between a detainee and their lawyer
- limits to the information given to people about the reasons for their detention
- significant restrictions on a detainee's contact with other people during their detention
- the fact that PDOs are issued by police officers and individual judges, not the court.

Each of these is discussed below.[92]

Police monitoring of a detainee's contact with their lawyer

As explained on page 9, the TPDA allows police to monitor a detainee's contact with their lawyer, if that lawyer does not hold a security clearance or if the issuing authority has determined that contact with a security-cleared lawyer should be monitored.[93] The rationale for providing police with this capability is that monitoring is necessary to ensure the purpose of the PDO is not undermined — for example, by allowing a detainee to "tip off" another person about police activities, encourage another person to conduct activities to further a planned terrorist act, or arrange to have evidence destroyed. The known involvement of lawyers as professional facilitators in serious and organised crime generally suggests that this is a legitimate concern (see, for example, Australian Criminal Intelligence Commission 2017).

87 See also submissions discussed in NSW Department of Attorney General and Justice 2013, NSW Ombudsman 2008, PJCIS 2018a and SLCLC 2005.

88 See also submissions discussed in NSW Ombudsman 2008, PJCIS 2018a and SLCLC 2005.

89 That is, detention where a person is not able to have any communication with others.

90 See also submissions discussed in SLCLC 2005.

91 See also submissions discussed in PJCIS 2018a and SLCLC 2005.

92 Some concerns about balance were also raised in relation to the detention of children under the TPDA. This issue is discussed in Chapter 4 (pages 31 to 32 and 35 to 36).

93 Some separate concerns about security clearances, including the time it takes to process clearances and the potential impact on a person's choice of lawyer, have been noted in previous reviews of preventative detention laws (NSW Ombudsman 2008). Practical issues relating to security-cleared lawyers have also been discussed in the context of other national security laws (see, for example, PJCIS 2016).

The TPDA's monitoring provisions attempt to achieve a balance between ensuring community safety and maintaining a detainee's right to legal representation by prohibiting monitored communications from being used as evidence against the detainee in any court proceedings and prohibiting monitors from disclosing information, as noted on page 9. Despite this, some have argued that the monitoring provisions go too far. In particular, concerns have been raised that the capacity for police monitoring fundamentally violates client–lawyer privilege and undermines the purpose of legal representation (ALHR submission; Eminent Jurists Panel on Terrorism 2009; Nesbitt 2007; QCCL submission).[94] It is argued that, where contact is monitored, a detainee is unlikely to make full and frank disclosures to their lawyer for fear of the information being used by police to conduct further investigations and obtain evidence against them (noting that there are no specific restrictions on the use of evidence *derived* from monitored communications). This may in turn affect the quality of advice a lawyer is able to provide and reduce their capacity to represent the detainee's interests. These issues were highlighted in the submissions from the QCCL and the Bar Association as follows:

> No lawyer will give their client advice whilst being monitored. No client will be open and frank with their lawyer if they know they are being monitored. In those circumstances the right to legal representation will become useless. (QCCL submission, p. 7)

> 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. (Bar Association submission, p. 5)

Overall, the problems posed by police monitoring of detainee–lawyer communications are said to severely limit the detainee's capacity to effectively challenge their detention under a PDO.

Limits to the information given to detainees about their detention

Similar concerns about the capacity for detainees to effectively challenge their detention have been raised in light of the relatively limited information they are given about the reasons behind a PDO. Under the TPDA, the subject of an application for a final PDO (or an extension of a final PDO) is only given a summary of the application, which is prepared by police,[95] and information can be excluded from the summary if disclosing it is likely to prejudice national security or police methods or investigations.[96] Although there are provisions that allow the issuing authority to direct police to give the subject more information,[97] police are again not required to disclose any information that would prejudice either national security or "the maintenance or enforcement of a lawful method or procedure for protecting public safety".[98] It is argued that these types of provisions prevent the subject of a PDO application from being fully informed about the case against them, thus undermining their capacity to properly contest the application when it is heard by the issuing authority (Ananian-Welsh 2015; Eminent Jurists Panel on Terrorism 2009; Nesbitt 2007; QCCL submission).[99] The inability to access detailed information about the grounds for a PDO or the material supporting it also means that a person who is detained is unable "to adequately and fairly argue their case" in any subsequent application to the Supreme Court to have the PDO reviewed or revoked (Bar Association submission, p. 5).

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94 See also submissions discussed in NSW Department of Attorney General and Justice 2013, NSW Ombudsman 2008 and SLCLC 2005. Comments along these lines were also made during the debate of the TPDB by the then Member for Gladstone, Mrs Liz Cunningham [QLA (Cunningham) 2005, p. 4689].

95 Section 23(1), TPDA.

96 Section 23(4), TPDA. See also section 803, *Police Powers and Responsibilities Act 2000* (Qld),

97 Section 23(3B), TPDA.

98 Section 23(3C), TPDA.

99 See also submissions discussed in NSW Ombudsman 2008, PJCIS 2018a and SLCLC 2005.

Significant restrictions on a detainee's contact with others

Another aspect of the TPDA that has raised significant concerns is the fact that it affords detainees very limited rights of communication (ALA submission; ALHR submission; Eminent Jurists Panel on Terrorism 2009; Fairall & Lacey 2007; Nesbitt 2007; Tyulkina & Williams 2015).[100] These concerns particularly focus on:

- the fact that a detainee is only permitted to contact family members and others for the very limited purpose of letting these people know that they are safe but unable to be contacted during their detention under the PDO[101]
- the possibility that a detainee may be prevented from having even this limited contact as a result of a prohibited contact order (PCO; see page 9).

These provisions have the potential to significantly compound the adverse consequences of detention on a detainee's family life and employment highlighted on page 19. Detainees also have no right to receive visitors generally,[102] and are required to be segregated from other people detained at their place of detention.[103]

As with police monitoring of detainee–lawyer contact, the rationale for restricting detainee's communication rights so significantly is that there is a need to ensure the counter-terrorism objectives of the PDO cannot be subverted. However, it may be argued that this is not sufficient to justify exposing a person to what some regard as "effectively incommunicado… detention" for up to 14 days (ALHR submission p. 2). As the NSW Ombudsman has observed:

> …fourteen days is a long time for a person to be detained with no personal contact other than the initial contact to advise a family member or other person that the person is safe and in detention. The potentially negative impact of this on a detainee could be considered harsh in light of the preventative, rather than punitive, rationale for their detention. (NSW Ombudsman 2008, p. 41)

The issuing of PDOs by police officers and individual judges

One final aspect of the TPDA that has caused concern is that PDOs are not issued by a court (see page 7). The fact that initial PDOs are applied for and made by police without any oversight by the judiciary has attracted especially strong criticism. For example, the QCCL stated in its submission:

> [The QCCL] remains vehemently opposed to the empowering of a police officer to issue these orders. International human rights law, natural justice and common sense require that the person making such orders be not only independent but be seen to be such. There is no way that a police officer can be regarded as an impartial and independent authority for the purposes of issuing these orders. (QCCL submission, p. 6)[104]

For final PDOs, the involvement of serving and retired Supreme Court judges as issuing authorities has been noted to provide "a degree of impartiality and scrutiny" (SLCLC 2005, p. 30). However, some regard this as inadequate given that these individuals "do not exercise judicial power but act in their personal capacity, and at no time is the detainee brought before a court" (ALHR submission, p. 6). Similar criticisms were raised by the Bar Association in its submission.[105]

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100 See also submissions discussed in SLCLC 2005.

101 Section 56(1), TPDA.

102 A detainee may have contact with a lawyer (s. 58, TPDA) and the ombudsman or the CCC (s. 59, TPDA). Children and people with impaired capacity are also entitled to have contact with a parent, guardian or other person able to represent their interests (s. 60, TPDA). In these cases, contact may include the detainee being visited.

103 Section 46(10), TPDA.

104 See also ALHR submission, Bar Association submission, Fairall & Lacey 2007, Tyulkina & Williams 2015 and submissions discussed in SLCLC 2005.

105 See also submissions discussed in SLCLC 2005.

The reason for having final PDOs issued by judges acting in their personal capacity is that there were concerns vesting the TPDA's preventative detention powers in courts would be contrary to the Commonwealth Constitution. The basis for these concerns is explained in more detail in Box 3. Relevantly, then Premier Peter Beattie made the following comments on this issue during the consideration of the TPDB:

> …we would have preferred to confer power to make final preventative detention orders on Supreme Court judges acting judicially. However, to minimise the risk of constitutional invalidity, we have provided for the powers to be exercised by judges acting in their personal capacity… This reduces the risk of the High Court finding that the exercise of these powers by serving judges in a personal capacity is incompatible with the exercise of the judges' other functions, which of course are performed in a judicial capacity. [QLA (Beattie) 2005a, p. 4697]

Notwithstanding these concerns in Queensland, PDO laws in NSW, Victoria, Tasmania and the Australian Capital Territory (ACT) all involve the Supreme Court as the issuing authority for a PDO.

Box 3: Constitutional considerations relevant to the role of judges as issuing authorities under the TPDA

The Commonwealth Constitution postulates that there be an integrated Australian court system for the exercise of the judicial power of the Commonwealth, which also allows those state courts capable of being vested with Commonwealth judicial power to be able to exercise non-judicial functions subject to *Kable*[106] considerations.[107]

The *Kable* decision found an implication from the Commonwealth Constitution that state legislation cannot vest executive or administrative functions in a state court if the operation of the legislation would be incompatible with the institutional integrity of the state court within the integrated Australian court system.[108] State courts cannot have functions incompatible with the independent and impartial exercise of judicial power.[109] Hence state courts cannot be subject to legislative or executive direction that compromises their institutional integrity[110] and independence as a court.[111] For public interest reasons, the TPDA does not provide a detainee the right to adduce evidence to challenge the application and does not impose a duty on the issuing authority to give reasons for making a final PDO. While it is permissible for state legislation to place such powers in the executive, subject to judicial review, vesting these powers in a court could leave a final PDO open to challenge on grounds under the *Kable* principle.

The CCC's conclusion: some changes should be made to better protect individual rights

The CCC considers that the counter-terrorism objectives of the TPDA justify limitations on some rights, freedoms and liberties. Overall, however, the CCC believes that some changes should be made to the TPDA to ensure that its provisions better protect individual rights and achieve a more appropriate balance between these and community safety. The CCC's proposals are explained in more detail below.

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106 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

107 *Kuczborski v Queensland* (2014) 254 CLR; *State of Queensland v Together Union* (2014) 1 Qd R 257 at 273 per Holmes, Muir and White JJA.

108 *Wainohu v New South Wales* (2011) 243, CLR 181; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; *State of Queensland v Together Union* (2014) 1 Qd R 257.

109 *State of Queensland v Together Union* (2014) 1 Qd R 257 at 273 per Holmes, Muir and White JJA.

110 The separate obligations to provide procedural fairness and to provide reasons are considered to be some of the defining characteristics of a court: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67] per French CJ; at 99–103 [156]–[170] per Hayne, Crennan, Kiefel and Bell JJ; at 105–111 [180]–[198] per Gageler J. See also *Wainohu v New South Wales* (2011) 243, CLR 181 at 220 [72] per French CJ and Keifel J; at 230 [110]–[111] per Gummow, Hayne, Crennan and Bell JJ.

111 *State of Queensland v Together Queensland* (2014) 1 Qd R 257.

First, the CCC believes that the monitoring provisions of the TPDA should be amended to provide greater scope for confidential communications between a detainee and the lawyer of their choosing, and to clarify how monitored communications can be used. Specifically, the CCC is of the view that:

- the monitoring of a detainee's contact with any lawyer should only be permitted pursuant to a decision by the issuing authority that monitoring is necessary to prevent a terrorist act or preserve evidence of a terrorist act (whichever ground the PDO is issued on)[112]
- in addition to the monitored communication itself, any evidence derived from a monitored communication between a detainee and their lawyer which, apart from the application of the TPDA, would be a confidential communication subject to legal professional privilege should be inadmissible in any court proceedings against the person.

These changes are similar to those contained in recent amendments to the Victorian PDO legislation.[113] The CCC also considers that the current provisions prohibiting disclosure by a monitor should be amended to clarify and ensure that information from a monitored communication can be disclosed or used if necessary to achieve the aims of the PDO in preventing or preserving evidence of a terrorist act.

Recommendation 1

That the *Terrorism (Preventative Detention) Act 2005* ("the TPDA") be amended to:

(a) prohibit the monitoring of any contact between a person detained under a preventative detention order (PDO) and a lawyer, unless the issuing authority for the PDO determines that monitoring is reasonably necessary to achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act)

(b) provide that any evidence derived from, or obtained as a result of, a monitored communication between a person detained under a PDO and a lawyer which, apart from the application of the TPDA, would have been a confidential communication subject to legal professional privilege is not admissible against the person in any court proceedings

(c) permit a person who monitors contact between a person detained under a PDO and a lawyer to disclose or use information communicated in the course of that contact if doing so is reasonably necessary to help achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act).

Second, the CCC believes that consideration should be given to revising the TPDA's provisions in relation to the disclosure of sensitive information. The CCC acknowledges that there is a need to protect information that might compromise national security or law enforcement activities. It also considers, however, that a person who is the subject of an application for a final PDO (or the extension of a final PDO) should be given as much information as possible to be able to make meaningful representations to the issuing authority.

In this regard, the CCC believes that impending changes to processes for the protection of "counter-terrorism intelligence"[114] in Victoria may provide a useful model for similar changes in Queensland. The CCC particularly notes provisions in Victoria to:

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112 The CCC notes that similar provisions in the ACT enable monitoring to take place at the direction of a senior police officer [s. 56(2), *Terrorism (Extraordinary Temporary Powers) Act 2006*]. The CCC considers that it is more appropriate and simpler for this responsibility to rest with the relevant issuing authority, especially given that the issuing authority is also responsible for issuing PCOs.

113 When Part 2 of the *Justice Legislation Amendment (Terrorism) Act 2018* ("Victorian JLATA") commences on 1 October 2018, the *Terrorism (Community) Protection Act 2003* will provide that: a) a detainee's contact with a lawyer during their detention under a police detention decision must not be monitored unless a senior police officer is satisfied that monitoring is "reasonably necessary" [new ss. 13AZY(1)–(2)]; and b) "any information derived from, or obtained as a result of," the monitoring of specified communications between the detainee and a lawyer is not admissible in evidence against the detainee in any court or tribunal proceedings [new ss. 13AZY(7) and 13ZG(5)].

114 See section 64, Victorian JLATA.

- allow the court to determine what information should be withheld from the subject of a proceeding related to a PDO,[115] having regard to both the public interest in protecting sensitive information and the public interest in disclosing information to ensure that the subject is able to effectively challenge their detention (Expert Panel on Terrorism 2017a)
- enable the court to appoint a barrister to act in a "special counsel" role to represent the interests of the subject where sensitive information is withheld from the subject.[116] In recommending a role for special counsel, the Victorian Expert Panel noted that, unlike the PIM who represents the public interest, the special counsel would advocate on behalf of the subject in proceedings that the subject is excluded from or that deal with information that is withheld from the subject and their own legal representative (Expert Panel on Terrorism 2017a).

The CCC's view is that consideration should be given to how the mechanisms for the protection of counter-terrorism intelligence to be included in Part 5 of the Victorian *Terrorism (Community Protection) Act 2003* ("the Victorian TCPA") can be adapted for inclusion in the TPDA, having regard for Victoria's experiences in implementing and using its provisions.

Recommendation 2

That consideration be given to adapting forthcoming provisions for the protection of counter-terrorism intelligence in Part 5 of the Victorian *Terrorism (Community Protection) Act 2003* [as per section 71 of the *Justice Legislation Amendment (Terrorism) Act 2018*] for inclusion in the *Terrorism (Preventative Detention) Act 2005*.

Third, the CCC believes that detainees should be entitled to have more contact with family members and others.[117] This should include personal visits for people detained under a final PDO, and the opportunity for all detainees to communicate with others for broader purposes than those currently provided for in the TPDA (see earlier discussion on page 22). For example, it would be desirable for a person detained under a PDO to be able to discuss child-minding arrangements, finances and other household matters with a family member. Although the CCC acknowledges the need to ensure that the purpose of a PDO is not undermined by the detainee's contact with the outside world, the capacity for police to monitor conversations and obtain PCOs offers a way of managing risks that may arise from more permissive contact provisions.

Recommendation 3

That the *Terrorism (Preventative Detention) Act 2005* be amended to:

(a) enable a person detained under an initial or final preventative detention order (PDO) to contact a person identified in section 56(1) for any purpose

(b) enable a person detained under a final PDO to be visited by a person identified in section 56(1).

Contact under these provisions would be subject to any prohibited contact order made in relation to the person's detention.

The CCC's final suggestion for change goes beyond the specific aspects of the TPDA dealt with so far. In recognition of the extraordinary powers conferred by the TPDA, particularly the ability to detain without arrest a person who may not actually be involved in a terrorist act, and the significant personal consequences that a person may face as a result of their detention, the CCC believes that the TPDA's existing compensation scheme should be modified to impose a responsibility on the State to provide appropriate compensation in certain circumstances. The CCC considers the TPDA's current compensation scheme to be insufficient in this regard.

115 New sections 23 to 29, Victorian TCPA as per section 71, Victorian JLATA.

116 New sections 32 and 33, Victorian TCPA as per section 71, Victorian JLATA.

117 See section 56(1), TPDA.

Essentially, the current compensation scheme is limited to accord with general law principles for compensating against unlawful acts and to provide a nominal compensation scheme for breaches of basic statutory "human dignity" treatment obligations related to the enforcement of a PDO.[118] However, the scheme provides no right to compensation for foreseeable loss or damage suffered by a detainee as a result of a lawful PDO (for example, direct consequential losses of income, employment and housing), despite the detainee not necessarily being proved to have participated in a terrorist act let alone having committed a terrorist offence.

The CCC considers that there is a strong public interest justification for using extraordinary PDO powers without resort to arrest. To balance this, however, the CCC considers that a sensible public interest policy would vest the State with responsibility to provide appropriate compensation for people who, despite not being party to a terrorism offence, suffer foreseeable damage upon their detention without any finding of error or failure in the administration of the TPDA.

Recommendation 4

That the *Terrorism (Preventative Detention) Act 2005* be amended to enable a person who is:

(a) detained under a preventative detention order (PDO); and

(b) not charged with a related terrorism offence (that is, a terrorism offence related to the terrorist act for which the PDO was made) within 14 days from the day the PDO ends (noting that this is the time when either the initial PDO or any related final PDO ceases to have effect)

be compensated by the State for foreseeable losses incurred as a direct or indirect result of their detention, regardless of the lawfulness of the detention.

One area of concern discussed above where the CCC does not recommend any changes is in relation to the issuing authorities for PDOs. For initial PDOs, the CCC is satisfied for senior police officers to continue to be able to make initial PDOs, in the interests of operational efficiency and having regard for the maximum period of detention of 24 hours under these orders. For final PDOs, the CCC did consider whether the issuing authority should be changed from an individual judge or retired judge to the Supreme Court. Such a change would ensure preventative detention decisions in Queensland receive the same level of judicial oversight as preventative detention decisions in NSW, Victoria and other jurisdictions. However, the CCC was concerned that such a change may open the TPDA to constitutional challenges, consistent with the original rationale for making individual judges the issuing authority for final PDOs (see page 23). The CCC ultimately concluded, therefore, that it was most appropriate for final PDOs to continue to be issued by judges acting in their personal capacity (and by retired judges), subject to judicial review.

118 Section 75, TPDA.

4 The effectiveness of the TPDA

As indicated in Chapter 1, the CCC sought to examine the effectiveness of the TPDA in:

- preventing and preserving evidence of terrorist acts, as per the TPDA's objectives
- promoting national consistency and interoperability
- protecting against misuse and abuse.

In each case, the lack of use of the TPDA — and the limited use of similar laws in other Australian jurisdictions — meant there was little objective evidence for the CCC to use to make firm conclusions about the effectiveness of the legislation. Consequently, the CCC focused on identifying and examining issues that may limit the effectiveness of the TPDA, and ways that these issues may be addressed. This chapter discusses the CCC's findings in this context.

Effectiveness in preventing and preserving evidence of terrorist acts

In the absence of evidence from operational experiences, a number of general assertions have been made about the counter-terrorism effectiveness of the TPDA and similar preventative detention laws. These are discussed below, before consideration is given to three specific factors that may limit the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts if the legislation is used in the future.

General assertions about the effectiveness of preventative detention laws in preventing and preserving evidence of terrorist acts

General assertions about the counter-terrorism effectiveness of the TPDA and other preventative detention laws in Australia reflect two opposing viewpoints. On one hand, it has been argued — mainly by law enforcement and government stakeholders — that Australia's preventative detention laws will likely be an effective response to terrorism in circumstances when their use is required. The Queensland Government Agency submission to this review stated:

> …in these cases [where the threshold for arrest for a Commonwealth terrorist offence cannot be met, or where there is an urgent need to detain a non-suspect] 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. (Queensland Government Agency submission, p. 8)[119]

Similar claims have been made about the effectiveness of the TPDA in parliament.[120] In other Australian jurisdictions, several reviews have concluded generally that preventative detention laws provide an effective means of protecting the community from terrorism (see, for example, Department of Justice Victoria 2014; Western Australia Police 2012).

On the other hand, it has been argued — mainly by non-government stakeholders — that Australia's preventative detention laws are not an effective response to terrorism. Both the ALA and ALHR made submissions to this effect in relation to the TPDA. The 2013 COAG review similarly concluded that Australia's preventative detention laws were ineffective in achieving their counter-terrorism objectives (COAG 2013a), as did the 2012 INSLM report on the Commonwealth PDO provisions (INSLM 2013).

119 Similar comments were made in a confidential submission to the CCC's review (Submission 6).

120 See, for example, comments made by the then Police Minister, Mrs Jo-Ann Miller, in introducing the Counter-Terrorism and Other Legislation Amendment Bill 2015 [QLA (Miller) 2015, p. 1873].

While strong claims have been made on both sides, they are subjective and untestable given the limited use of Australia's preventative detention laws. Consequently, these claims cannot be relied upon to determine the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts. The CCC determined in these circumstances that, rather than making a definitive conclusion as to effectiveness, it would be more beneficial to focus on key factors that may limit the operational effectiveness of the TPDA if it was to be used in the future.

Factors that may limit the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts

Through its review, the CCC identified three key factors that may limit the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts. These are:

- the inability of police to question a person detained under a PDO, as explained on pages 8 to 9
- the restriction of PDOs to people aged 16 years and over
- policies and procedures that may prevent the legislation from being implemented efficiently and effectively when required.

Each of these factors is discussed in detail below.

The inability to question a person detained under a PDO

Arguably the most significant factor said to limit the effectiveness of the TPDA and other preventative detention laws is the prohibition on questioning detainees. Police agencies across Australia have consistently noted that the inability to interrogate a person while they are detained under a PDO poses a significant operational impediment and undermines the utility of preventative detention.[121] Particular emphasis has been placed on the "operationally unsatisfactory situation" created by PDOs, whereby detainees may hold valuable information that could help to prevent or preserve evidence of a terrorist act, but police are unable to obtain this (COAG 2013a, p. 68; see also INSLM 2013). The ALA's submission to the CCC's review concluded that, in this context, "PDOs are not a particularly effective means of preventing terrorism" (ALA submission, p. 10). In stronger terms, the 2013 COAG review noted overall agreement among law enforcement agencies that the prohibition on questioning in Australia's preventative detention laws was "virtually fatal to operational effectiveness" (COAG 2013a, p. 70; see also similar comments from the first INSLM in INSLM 2013).

Relevant to these concerns, two jurisdictions — NSW and Victoria — have sought to strengthen their counter-terrorism laws by allowing police to question detainees for investigative purposes. These states have taken two different approaches to achieve this.

In NSW, there are now two separate pre-charge detention regimes in the *Terrorism (Police Powers) Act 2002* ("the NSW TPPA"). As noted in Table 2 on page 6, Part 2A of the NSW TPPA contains traditional preventative detention provisions. Part 2AA, which commenced in May 2016, contains "investigative detention" provisions that allow police to arrest (without a warrant), detain and question "a person who is suspected of being involved in a recent or imminent terrorist act for the purposes of assisting in responding to or preventing the terrorist act".[122] "Responding to" includes prosecuting the persons involved in committing the terrorist act and preventing those persons and their associates from committing further terrorist acts.[123] Other key features of the NSW model are outlined in Box 4 below.

In April 2016, COAG agreed in-principle to develop "a strengthened nationally consistent pre-charge detention scheme for terrorism suspects" consistent with the NSW model (COAG 2016). While noting the 2016 COAG agreement, Victoria has recently decided to pursue an alternative model that involves

121 See, for example, police agency submissions discussed in COAG 2013a and comments from the NSWPF in NSW Department of Justice 2015 and NSW Ombudsman 2011.

122 Section 25A, NSW TPPA.

123 Section 25C(2), NSW TPPA.

incorporating questioning powers into the existing preventative detention regime. Specifically, the passing of the *Justice Legislation Amendment (Terrorism) Act 2018* ("the Victorian JLATA") means that, as of 1 October 2018, police will have the power to question a person detained under the equivalent of an initial PDO (a "police detention decision").[124] The new provisions in the Victorian TCPA will allow police to question a detainee about a terrorist act in relation to which they were detained and any other terrorist act that:

(a) the police officer making the police detention decision has reasonable grounds to suspect could occur within 14 days after the detention decision was made; or

(b) occurred in the 28 days before the detention decision was made.[125]

The provisions will also enable the Supreme Court, upon issuing the equivalent of a final PDO, to place conditions on the detention prohibiting further questioning of the detainee by police, or limiting police questioning to specific times or for a specified period.[126] Other key features of the new Victorian model are outlined in Box 4 below.

Box 4: Key features of investigative detention in NSW and Victoria

Pre-charge detention under Part 2AA of the NSW TPPA

- Any police officer can arrest a terrorism suspect for the purpose of investigative detention if they are satisfied about the criteria in s. 25E.
- A senior police officer is required to review the detention every 12 hours to ensure the criteria is still satisfied [ss. 25E(5) and (6)].
- In contrast to NSW's preventative detention scheme, 14- and 15-year-olds may be kept in investigative detention [s. 25F].
- The maximum period of detention is four days, though the detention can be extended to a maximum period of 14 days if an eligible judge makes a detention warrant [ss. 25H and 25I].
- Detainees must be given the opportunity to rest for at least eight hours (continuous) in any 24 hour period, and to have "reasonable breaks" during any period of questioning [s. 25G].

Preventative detention with questioning provisions under the Victorian TCPA

- An authorised police officer can take into custody and detain any person who is 14 years or older if they are satisfied about the criteria in new s. 13AC. This is referred to as a "police detention decision".
- Under a police detention decision, adults can be detained for up to four days and children can be detained for up to 36 hours [new s. 3 definition of "maximum police detention period" and ss. 13AA and 13AZZG].
- In relation to the questioning of a detainee under either a police detention decision or a PDO made by the Supreme Court that is not subject to a questioning prohibition condition [new s. 13E(2A)(a)]:
  - Detainees have the right to communicate with a lawyer before questioning and to have a lawyer present during questioning [new ss. 13AZF and 13ZNE].
  - The duration of any period of questioning must be "reasonable" [new ss. 13AZC(4) and 13ZNB(4)].
  - Detainees must be given a continuous rest period of eight hours in any 24 hours of detention, and to have "reasonable breaks" during any period of questioning [new ss. 13AZC(5) and 13ZNB(5)].

Having regard to the in-principle COAG agreement and the model in Victoria, the CCC first set out to determine whether there was a need for police to be able to question a person detained under the TPDA. In particular, the CCC considered whether the inability to question detainees for seemingly investigative purposes, rather than being a barrier to the TPDA's effectiveness, appropriately reflected

124 New Part 2AA, Victorian TCPA as per section 9, Victorian JLATA.

125 New section 13AZC(1), Victorian TCPA as per section 9, Victorian JLATA.

126 New section 13E(2A), Victorian TCPA as per section 13, Victorian JLATA.

the intention of the legislation. Relevantly, the PJCIS noted in its recent report on Commonwealth PDOs that:

> …the purpose of the provisions is the protection of the community via the prevention of terrorism acts, not the investigation of terrorism offences. Alternative powers are available to law enforcement and security agencies for the purpose of investigations include pre-charge detention of terrorism suspects under Part IC of the Crimes Act, and coercive questioning powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*. (PJCIS 2018a, p. 103)[127]

The CCC also noted arguments that the prohibition on questioning is an important and appropriate safeguard for laws that permit people to be detained without arrest or charge or where a person is not even suspected to be a knowing participant in terrorist activities (see, for example, ACT Standing Committee on Legal Affairs 2006; ALA submission; Nesbitt 2007). In the latter case, police may be unlikely to obtain information useful for preventing or preserving evidence of a terrorist act even if they were permitted to question detainees. Altogether, these factors present a reasonable basis for arguing against the inclusion of questioning powers in a preventative detention scheme like the TPDA.

Despite the cogency of the above arguments, the CCC also saw significant value in enhancing the potential effectiveness of the TPDA by permitting police to question people detained under a PDO in certain circumstances. The CCC particularly noted the view of the Victorian Expert Panel that, "while a questioning power may suggest an investigative focus, the [proposed Victorian] scheme — in the form preferred by the Panel — remains intrinsically preventative in nature" (Expert Panel on Terrorism 2017a, p. 36). In the CCC's view, the preventative focus of any preventative detention scheme would be maintained where the focus of police questioning was on achieving the existing objectives of PDOs. Most importantly, the impending changes in Victoria persuaded the CCC that, provided sufficient safeguards were in place, a modified preventative detention scheme including questioning powers could strike an appropriate balance between protecting individual rights and ensuring that the powers available to police were as effective as possible in preventing and preserving evidence of terrorist acts.

To this end, the CCC is of the view that the provisions of the TPDA should be amended to permit police to question a person who is detained under a PDO. The CCC does, however, suggest some departures to the Victorian model that it considers will better protect individual rights. In particular, the CCC proposes that police should not be permitted to question a person detained under a PDO as a matter of course. Instead, questioning should only be permitted where the issuing authority is satisfied that there are reasonable grounds to suspect the person has or may be aware of information related to the terrorist act for which they have been detained, and that questioning the person to obtain this information may help to achieve the objective of the PDO in preventing or preserving evidence of the terrorist act.[128] An extensive range of safeguards should also be included, as in the new Victorian legislation.[129] Further details about the model envisaged by the CCC are outlined in Recommendation 5 below.

Recommendation 5

That the *Terrorism (Preventative Detention) Act 2005* be amended to allow police to question a person detained under a preventative detention order (PDO) if the issuing authority for the PDO is satisfied that there are reasonable grounds to suspect that:

(a) the person has or may be aware of information related to the terrorist act for which they have been detained; and

[continued on next page]

127 See also similar conclusions in Department of Justice Victoria 2014, NSW Department of Justice 2015 and NSW Ombudsman 2008.

128 Also contrary to the Victorian model, the CCC does not propose to extend the maximum duration of detention permitted under an initial PDO (see further discussion on page 37).

129 See, for example, new sections 13AZC to 13AZG and 13AZJ to 13AZL, Victorian TCPA as per section 9, Victorian JLATA.

[continued from previous page]

(b) questioning the person may help to achieve the purpose for which the PDO was made (that is, to prevent a terrorist act from occurring or to preserve evidence of a recent terrorist act).

The questioning provisions should be accompanied by an extensive range of safeguards as provided for in the *Justice Legislation Amendment (Terrorism) Act 2018* (Vic), including but not limited to:

- provisions to ensure detainees have the right to remain silent
- provisions to ensure detainees have the right to communicate with a lawyer before questioning commences, and to have a lawyer present during questioning
- provisions to limit any periods of questioning to a reasonable duration and to provide detainees with sufficient breaks from questioning
- a requirement for all questioning to be recorded
- additional safeguards for detainees who are children, including a requirement that questioning be recorded by audio-visual means and an obligation on police to ensure a lawyer is present during questioning.

The restriction of PDOs to people aged 16 years and over

A second factor identified as potentially limiting the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts is the fact that the legislation only permits PDOs to be made for people aged 16 years or over. This is significant given an apparent emerging trend for younger children to be involved in terrorist activity in Australia and overseas. On this issue, the Queensland Government Agency submission stated:

> 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,[130] 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. (Queensland Government Agency submission, p. 10)

These observations are consistent with those made by the Victorian Expert Panel and others (Department of Justice Victoria 2014; Expert Panel on Terrorism 2017b; Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016).[131] In an environment where there is a real possibility of terrorist acts being committed or facilitated by children under the age of 16, the current age limit in the TPDA may pose a risk to its effectiveness in preventing and preserving evidence of terrorist acts. The issue of determining an appropriate age limit for preventative detention is nevertheless a complex one.

On one hand, lowering the age limit in the TPDA would be an appropriate response to the involvement of younger children in terrorist activities and necessary to achieve the TPDA's counter-terrorism objectives. The recent decision to extend Victoria's preventative detention provisions to 14 and 15-year-olds, consistent with the Commonwealth control order regime and NSW's investigative detention

130 The report of the Victorian Expert Panel noted that, at that time, 6 of the 43 people before the Australian courts on terrorism-related charges were juveniles (Expert Panel on Terrorism 2017b, p. 99).

131 See also comments made during the debate of the NSW Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016 by the then Deputy Premier, the Hon. Troy Grant [NSWLA (Grant) 2016, p. 35] and the Hon. Catherine Cusack [NSWLC (Cusack) 2016, p. 23].

regime, reflect this view.[132] In making its recommendation, the Victorian Expert Panel referred to the persuasiveness of the PJCIS's position that:

> …it is conduct that threatens the safety of the Australian community which guides the development of counter-terrorism policy and legislative reform, irrespective of the age, ethnicity or religious affiliation of individuals. (PJCIS 2016 cited in Expert Panel on Terrorism 2017b, p. 100)

On the other hand, the prospect of any child being detained under a PDO raises significant concerns. Several submissions to this review included strong objections to the preventative detention of people under the age of 18.[133] Specifically:

- The QCCL stated its continuing view that PDOs "should not be imposed on persons under the age of 18" (QCCL submission, p. 8).
- The ALA suggested the ability to detain children under a PDO was contrary to the United Nations Convention on the Rights of the Child,[134] which requires that children are detained only as a last resort, and only for the shortest possible period of time.[135]

  > We do not accept that detention of children would ever be necessary in relation to terrorism matters, where that child is not suspected of having committed or posing a risk of committing a terrorist offence. Where such suspicions exist, based on available evidence, the appropriate course is to charge the child concerned. (ALA submission, p. 14)

- ALHR, in noting its general opposition to preventative detention, called the power to detain children under the TPDA "especially offensive" (ALHR submission, p. 9). It further stated:

  > 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. (ALHR submission, p. 8)

Clearly, these concerns would only be magnified if the age limit in the TPDA was lowered to allow even younger children to be detained than is already possible.

Consistent with these concerns, the CCC has some reservations about extending preventative detention to children younger than 16 years of age. However, it also acknowledges that doing so may better permit the TPDA to achieve the objectives of preventing and preserving evidence of terrorist acts in the current threat environment. Notwithstanding this, the CCC believes that any potential changes to the age limit in the TPDA must be considered in the context of national consistency and interoperability. For this reason, the CCC's consideration of the age limit is concluded in the next section (see page 35).

Problems with policies and procedures

One final factor that the CCC considers may limit the counter-terrorism effectiveness of the TPDA is that the policies and procedures in place to operationalise the legislation may prevent it from being used as efficiently and effectively as possible should a situation requiring a PDO arise. Overall, the CCC found the QPS and QCS policies and procedures it reviewed to be detailed and extensive. However, the CCC also noted some problems that may potentially undermine the ability of police to swiftly apply for, obtain and carry out a PDO when they need one. Additionally, the CCC identified that there are no specific policies in place regarding the detention of children under PDOs in youth detention centres.

Most notably, the QPS Preventative Detention and Control Order Handbook ("the Handbook") is out of date, having been last updated in 2013. Since that time, a number of significant changes have been

132 Sections 9 and 17, Victorian JLATA.

133 See also submissions discussed in NSW Ombudsman 2008 and SLCLC 2005.

134 See also Fairall & Lacey 2007.

135 Article 37(b), *Convention on the Rights of the Child*, available at <www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

made to the TPDA as a result of legislative amendments in 2015, 2016 and 2017.[136] These include changes relevant to applying for a PDO, including:

- the capacity for applications for initial orders to be made orally in urgent circumstances
- the lower threshold for a PDO to prevent a terrorist act — as discussed on page 8, it is now only required that there be reasonable grounds to suspect that a terrorist act is "capable of being carried out, and could occur, within the next 14 days", not that it is "imminent".

The Handbook does not reflect all such changes. Some similar problems with out of date information were also noted in the October 2017 version of the QPS's Counter Terrorism Training Manual reviewed by the CCC (for example, reference to the pre-September 2017 grounds for applying for a PDO to prevent a terrorist act).

The CCC recognises that the QPS is aware the Handbook is out of date, and that separate information sheets outlining the legislative changes have been provided to all QPS officers. The CCC also recognises that, in practice, an application for a PDO would involve a specialist counter-terrorism officer with a thorough understanding of the TPDA's current provisions. In identifying some problems with the information contained in QPS documentation, the CCC is not suggesting that the QPS is ill-prepared to respond to terrorist threats. However, in the rapidly developing situations in which PDOs are said to be most necessary, the process for implementing the TPDA should be as straightforward, unambiguous and user-friendly as possible. It is essential, therefore, that relevant information can be easily located when needed, and that the QPS has a system in place to ensure that the content of its policies, procedures and training remains up to date, especially given the dynamic nature of the legislative framework in which the TPDA operates.

In relation to QCS, the CCC notes that the detention of a person in a corrective services facility under a PDO is governed for the most part by the same general Custodial Operations Practice Directives (COPDs) that apply to prisoners. While special considerations for detainees under the TPDA are included where relevant, the CCC identified some ambiguities in these that may not completely and accurately reflect the provisions of the TPDA. For example, the explanation of monitoring provisions could leave open the possibility that a detainee is inadvertently permitted unmonitored contact with a security-cleared lawyer where monitoring has been ordered by the issuing authority. Given that detaining a person under a PDO would be a highly unfamiliar process, the CCC further queries whether the inclusion of relevant processes within general COPDs may make it difficult for a QCS officer to quickly locate, extract and understand special procedures for preventative detention. Again, this may pose a barrier to the fast and effective implementation of a PDO.

A similar problem identified by the CCC was the absence of any PDO-specific policy materials governing the detention of children in Queensland's two youth detention centres (Brisbane Youth Detention Centre and Cleveland Youth Detention Centre). Unlike the QCS COPDs discussed above, the CCC noted that relevant detention centre policies (for example, the visits to young people policy) included no reference to special considerations for detainees under the TPDA. In the CCC's view, the absence of a detailed policy framework to operationalise the TPDA as it relates to the detention of children in detention centres leads to a risk of relevant PDOs being implemented inefficiently, ineffectively and improperly.

To address these issues, all agencies with a role in carrying out PDOs should ensure that they have a robust framework in place to operationalise the TPDA. In particular, all relevant QPS and QCS policies, procedures and training materials should be reviewed and amended where required, and appropriate policies and procedures regarding the detention of children under PDOs in detention centres should be developed. This is particularly important in light of the CCC's view that a child who is the subject of a PDO should ordinarily be detained at a youth detention centre (see Recommendation 7, page 36). It is essential that all materials are up to date, accurate and complete, and written and stored in such a way

136 See CTOLAA 2015, CTOLAA 2016 and CTOLAA 2017.

that, should the TPDA need to be used, the process for applying for, obtaining and carrying out a PDO is able to be implemented quickly and correctly.

Recommendation 6

That all agencies with a role in carrying out preventative detention orders (PDOs) develop, or review and amend, policies, procedures and training materials relevant to PDOs to ensure that the *Terrorism (Preventative Detention) Act 2005* ("the TPDA") is properly operationalised. In particular, the content of all relevant documents should be:

(a) consistent with the current provisions of the TPDA and other relevant legislation

(b) presented so as to enable PDOs to be applied for, obtained and carried out efficiently and in accordance with the TPDA.

Effectiveness in promoting national consistency and interoperability

Few specific comments on the effectiveness of the TPDA in promoting national consistency and interoperability were made in submissions, and the lack of use of the TPDA made this otherwise difficult to determine. This section of the report therefore focuses on the CCC's findings in relation to two key issues relevant to this aspect of the TPDA's effectiveness:

- Queensland's ongoing commitment to nationally consistent counter-terrorism arrangements, and the role of the TPDA in helping Queensland to fulfil this commitment
- aspects of Australia's preventative detention laws where national consistency is thought to be particularly important for achieving interoperability, but where differences are emerging among jurisdictions, potentially decreasing interoperability.

Queensland's commitment to national consistency and the role of the TPDA

As noted in Chapter 2, the pursuit of national consistency has been at the forefront of Australia's counter-terrorism arrangements since the first IGA was signed on 24 October 2002. This reflects a view that national consistency is essential to effectively responding to the terrorism threat (see, for example, Queensland Government Agency submission). Given the complex and cross-jurisdictional nature of many terrorist activities, national consistency particularly aims to:

- ensure counter-terrorism operations requiring cooperation between multiple jurisdictions are able to be conducted effectively
- prevent the creation of "safe havens" where terrorist actors can exploit legislative weaknesses in a particular jurisdiction.

With these goals in mind, Queensland has joined the Commonwealth and the other states and territories in formally committing to a nationally consistent response to terrorism, which includes provisions for preventative detention. This commitment is reflected in the current National Counter-Terrorism Plan and, as noted in the Queensland Government Agency submission, was recently re-emphasised with the signing of an updated IGA on 5 October 2017.[137]

In this context, the TPDA is clearly a key component of Queensland's response to terrorism that helps the state to fulfil its ongoing commitment to national consistency. Notwithstanding the small gap in counter-terrorism capabilities that the TPDA fills (see pages 17 to 18), without it, Queensland police would be less able to assist other agencies in cross-jurisdictional operations, and Queensland's counter-terrorism laws would be less stringent than those in other Australian jurisdictions. In this sense, the very existence of the TPDA performs an important function in ensuring Queensland remains in line with

137 IGA on Australia's Counter-Terrorism Arrangements, 5 October 2017, available at <www.coag.gov.au/sites/default/files/agreements/iga-counter-terrorism.pdf>.

other jurisdictions and has the capability to support interoperability. The extent to which the TPDA actually promotes interoperability is nevertheless dependent on several key aspects of the legislation.

Emerging areas of inconsistency in Australia's preventative detention laws that may decrease interoperability

In considering the issue of national consistency, the CCC noted that there is no requirement for national *uniformity*. That is, within Australia's agreed counter-terrorism framework, there remains scope for some jurisdictional differences. This was noted in the Queensland Government Agency submission:

> …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. (Queensland Government Agency submission, p. 3)

In regards to preventative detention laws, there are indeed a number of differences between the jurisdictions.

The CCC's view is that some aspects of preventative detention legislation can differ between jurisdictions without adversely affecting interoperability. The most significant example of this is in relation to safeguards. By and large, different jurisdictions can — and do — have different protections that reflect their particular concerns. The TPDA, for instance, includes a role for Queensland's PIM that is not found in all other jurisdictions.[138] However, extra safeguards like this do not pose an impediment to conducting effective cross-jurisdictional operations.

In contrast, there are some other aspects of preventative detention legislation where national consistency — even national uniformity — may be important for achieving interoperability. These include:

- the criteria for obtaining a PDO
- the minimum age at which people may be detained under a PDO
- the duration of detention permitted under a PDO.

Notably, the minimum age of detention and the duration of detention are both areas where some inconsistencies are emerging between jurisdictions.[139] These inconsistencies are discussed in further detail below given the implications they may have for Queensland in ensuring that the TPDA is effective in promoting national consistency and interoperability.

Minimum age limit

Currently, Australia's preventative detention laws operate under two different age limits — 18 years in the ACT, and 16 years in all other jurisdictions, including Queensland. When Part 2 of the Victorian JLATA commences on 1 October 2018, this will introduce a third age limit — 14 years (see discussion on pages 31 to 32). This raises the question of whether the age limit in the TPDA and other preventative detention laws should also be lowered to 14 years, in the interests of promoting national consistency and interoperability.

The CCC believes that the matter of a nationally consistent minimum age limit for preventative detention is one most appropriately considered by COAG, not driven by the states. The CCC acknowledges that the Victorian Expert Panel referred to COAG's agreement to strengthen pre-charge

138 Victoria and the ACT are the only other jurisdictions that include a role for the PIM in preventative detention.

139 The CCC notes that there are also some ongoing inconsistencies between jurisdictions in relation to the criteria for obtaining a PDO. These reflect the fact that only three jurisdictions — Queensland, NSW and Victoria — have followed the Commonwealth in moving from a requirement that the terrorist act in question be "imminent, and in any event, expected to occur at some time in the next 14 days", to a requirement that the terrorist act "is capable of being carried out, and could occur, within the next 14 days" (note that the wording of the NSW provisions varies slightly from the wording of the Queensland, Commonwealth and proposed Victorian provisions). The Commonwealth PDO provisions were first changed in response to a recommendation from the first INSLM in his 2012 report (INSLM 2013).

detention based on the NSW model in justifying its recommendation to extend the application of preventative detention to children aged 14 and 15 years (Expert Panel on Terrorism 2017b). However, the CCC notes there has been no specific national agreement to lower the minimum age limit for preventative detention, and no other jurisdictions have made moves to do so. Given the importance of this issue to national consistency, the Queensland Government may consider asking for it to be added to the agenda for the upcoming COAG special meeting on counter-terrorism.

It is possible that COAG will agree to lower the age limit for preventative detention to 14 years, consistent with its previous acceptance of the NSW investigative detention provisions. In any event, but particularly if the minimum age limit in the TPDA is decreased, the CCC believes that the TPDA should be amended to include a range of additional safeguards for children, as per requirements in Victoria.[140] Notable Victorian safeguards include:

- A requirement that children be detained in a youth justice facility unless determined otherwise by the police officer making a police detention decision or the Supreme Court making a PDO.[141] In both cases, a number of factors are required to be taken into account, including the person's age and vulnerability, the grounds on which the PDO is made, and the security risk posed by the person.[142] The CCC believes it would be appropriate to adopt similar provisions in Queensland, especially in light of the recent transition of 17-year-olds out of adult prisons.
- A role for the Victorian Commission for Children and Young People in examining the conditions of detention for any child detained under the TCPA (including, for example, the provision of meal and toilet breaks and access to fresh air, recreation and health services) to ensure child detainees are treated appropriately.[143] On this point, the CCC acknowledges the Queensland Ombudsman's submission to this review that "the *Ombudsman Act 2001* equips this Office with the powers to undertake the tasks that the [Victorian] Expert Panel recommends that the Commission for Children and Young people should perform" (Queensland Ombudsman submission, p. 1).

These and other safeguards that the CCC considers should be adapted for inclusion in the TPDA are outlined in Recommendation 7 below.

Recommendation 7

That the *Terrorism (Preventative Detention) Act 2005* be amended to incorporate additional safeguards for children (that is, people under the age of 18 years) detained under preventative detention orders (PDOs). These should include, but not necessarily be limited to:

(a) a requirement that a child be detained at a youth detention centre unless the issuing authority, having regard for factors including the child's age and vulnerability, the grounds on which the PDO is made and the risk posed by the child, considers that it is reasonably necessary for the child to be detained at a corrective services facility

(b) provisions to enable the relevant issuing authority to make a PDO subject to any condition it considers reasonably necessary to impose to adequately protect the child's welfare and interests

(c) active monitoring of a child's detention by the Queensland Ombudsman, including physical inspections, to ensure that the child is being treated appropriately and that their welfare and interests are being adequately protected.

140 See Victorian TCPA and Victorian JLATA. Note that the Queensland Ombudsman put forward a similar view in his submission.

141 New section 13AD(1), Victorian TCPA as per section 9, Victorian JLATA, and current section 13F(8), Victorian TCPA.

142 New section 13AD(2), Victorian TCPA as per section 9, Victorian JLATA, and current section 13F(8), Victorian TCPA.

143 New Part 1B, Victorian TCPA as per section 8, Victorian JLATA. For more details, see Expert Panel on Terrorism 2017b, p. 108.

Duration of detention

Another area of emerging inconsistency is the duration of detention permitted under PDOs. While the maximum duration of preventative detention is 14 days in all states and territories,[144] there is variation in the duration of detention permitted under initial PDOs (called "interim" or "urgent" PDOs in some other jurisdictions, and "police detention decisions" in the new Victorian legislation). Specifically, the permitted duration of detention under these initial PDOs is:

- four days in the new Victorian legislation[145] (currently 48 hours)[146]
- 48 hours in NSW and Tasmania (where the order is made by the Supreme Court)[147]
- 24 hours in Queensland and all other jurisdictions that provide for such orders (Western Australia and the Northern Territory do not).[148]

On the face of it, different initial periods of detention in different jurisdictions may undermine the interoperability of Australia's preventative detention laws. Specifically, it raises the possibility that, in operations involving people in multiple jurisdictions, individuals in one jurisdiction could be released from preventative detention before individuals in another jurisdiction, potentially allowing them to advance a terrorist act or destroy evidence. This is clearly contrary to the goals of preventative detention and national consistency.

In light of this, the CCC considered whether the maximum duration of detention under an initial PDO in Queensland should be extended for up to four days as in Victoria. In doing so, it was noted that the primary rationale for the change in Victoria was that it "is necessary to allow police sufficient scope to undertake what may be very complex and difficult investigations on the basis of very limited information" (Expert Panel on Terrorism 2017a, p. 35; see also similar comments from the NSWPF in NSW Department of Justice 2015). It was also noted that a duration of four days is consistent with the initial period of investigative detention permitted under Part 2AA of the NSW TPPA (the investigative detention regime; see page 28), which COAG previously agreed to adopt as a model for enhanced pre-charge detention provisions (COAG 2016).

The CCC ultimately concluded that it is not appropriate or necessary to extend the duration of initial detention under the TPDA to four days. There were two key reasons for this. First, the CCC considers that four days is too long to allow a person to be detained without arrest or charge and without a PDO issued by an authority independent of the police. Likewise, the CCC did not consider it appropriate or necessary to extend the duration of an initial PDO to 48 hours as in other jurisdictions. In the CCC's view, it is more appropriate for police to seek a final PDO if they wish to detain a person for longer than 24 hours. Second, the CCC believes that interoperability can be achieved so as long as the maximum duration of detention is 14 days in all jurisdictions. A detainee in Queensland would only be released before a detainee in Victoria (or NSW or Tasmania) if police were unable to obtain a final PDO under the TPDA. In these circumstances, it would be highly questionable to allow a person to be detained for longer than this under an extended period of initial detention.

While the CCC is firm in its position, others may have differing views. The emerging variation in initial detention periods may therefore be another issue worth discussing at the next COAG special meeting on counter-terrorism. In particular, it may be useful for COAG to determine whether it is important for there to be national consistency in the duration of initial PDOs or whether, as the CCC believes, national

144 Recall that, for constitutional reasons, the maximum duration of detention under a Commonwealth PDO is only 48 hours. As noted by the Commonwealth Attorney-General's Department in its submission to the CCC's review, this does not affect interoperability.

145 36 hours for children (see Box 4). New section 3 definition of "maximum police detention period", Victorian TCPA as per section 4, Victorian JLATA, and new sections 13AA and 13AZZG, Victorian TCPA as per section 9, Victorian JLATA.

146 Section 13G(2), Victorian TCPA.

147 Section 26L(1), NSW TPPA; section 9(3), *Terrorism (Preventative Detention) Act 2005* (Tas) ("Tasmanian TPDA")

148 Section 4(4), *Terrorism (Preventative Detention) Act 2005* (SA); section 9(1), Tasmanian TPDA; section 21(1)–(2), *Terrorism (Extraordinary Powers) Act 2006* (ACT).

consistency in the maximum duration of final PDOs is sufficient. To this end, it may be useful for COAG to determine more generally which elements of preventative detention should be uniform or consistent across jurisdictions, and which elements can differ without any adverse effects on the ability of police in different jurisdictions to conduct effective joint operations. The Queensland Government may consider seeking to have this added to the agenda for the next COAG special meeting on counter-terrorism.

Effectiveness in protecting against misuse and abuse

The fact that the TPDA has never been used means that it has not been misused or abused, but also that its safeguards have not been tested. This has led to differing views about the adequacy of the TPDA's safeguards and its overall effectiveness in protecting against misuse and abuse. These general views are discussed below, before some specific limitations and suggestions for strengthened safeguards in the TPDA are considered.

General views about the adequacy of the TPDA's safeguards

It has been noted throughout the TPDA's existence that there is the potential for the legislation to be misused and abused.[149] This is particularly so given the significant powers contained in the TPDA, and the departure from traditional criminal justice processes and protections that these entail. A number of safeguards have therefore been included in the TPDA, with the aim of minimising the potential for misuse and abuse without adversely affecting operational effectiveness. Although there is no disagreement as to the importance of rigorous safeguards in the TPDA, there are differing views about the extent to which the TPDA's existing safeguards meet this criteria.

Some have highlighted the extensive range of safeguards on the TPDA and the significant protections these offer. In outlining to parliament the safeguards contained in the original TPDB, then Premier Peter Beattie stated:

> I have been determined, and so has my government, to ensure that as many safeguards as are reasonably appropriate are included in the bill… That is a very long list of accountability measures to ensure that natural justice and people's basic rights are protected. [QLA (Beattie) 2005b, pp. 4065 & 4067]

The Queensland Government Agency submission to the CCC's review likewise noted the "significant range of safeguards" contained in preventative detention laws like the TPDA (p. 12). Particular emphasis has been placed on additional safeguards included in the TPDA that are not present in other jurisdictions' preventative detention laws, especially the Commonwealth. This includes broader family contact provisions,[150] and a role for the PIM in "representing the public interest in initial and final PDO applications and applications for prohibited contact orders" (Queensland Government Agency submission, p. 12).[151]

Others, however, have argued that the safeguards in the TPDA do not go far enough. For example, the ALA stated in its submission that it "does not believe that the safeguards that exist around [PDOs] are adequate, given the extraordinary nature of the detention that these orders facilitate" (ALA submission, p. 14). ALHR and the QCCL expressed similar views in their submissions. Consistent with this, the 2013 COAG review of counter-terrorism laws discounted restructuring Australia's preventative detention regime, noting that the additional safeguards that would need to be included would only further reduce

149 See, for example, submissions to this review by the ALA and the QCCL, and comments made during the debate of the TPDB by the then Member for Nanango, Mrs Dorothy Pratt [QLA (Pratt) 2005, p. 4690] and the then Leader of the Opposition, the Hon. Lawrence Springborg [QLA (Springborg) 2005, p. 4675].

150 In contrast to the TPDA, the Commonwealth PDO provisions do not permit a detainee to inform a family member (and others) that they are being detained under a PDO for up to 14 days, only that they are safe but not able to be contacted for the time being [s. 105.35(1), Criminal Code Act].

151 As noted in footnote 138, Victoria and the ACT are the only other jurisdictions that provide for involvement of the PIM.

the operational effectiveness of the laws and the likelihood of them being used by police (COAG 2013a). From this perspective, the safeguards currently included in the TPDA are generally insufficient to protect against misuse and abuse. Some specific limitations are discussed further below.

Specific limitations and suggestions for strengthened safeguards in the TPDA

Many critiques of the TPDA have outlined specific limitations to existing safeguards. The most significant of these have been dealt with in Chapter 3, in the context of the CCC's findings about the extent to which the TPDA's provisions achieve an appropriate balance between protecting community safety and maintaining individual rights. The CCC's recommendations in that chapter are intended to address these problems. Recommendation 7, to incorporate into the TPDA additional safeguards for children, will also address some concerns raised about existing safeguards.

One other issue the CCC focused on in reviewing the TPDA's safeguards was the extent to which they are capable of ensuring detainees are treated with "humanity and… respect for human dignity" as required under section 52 (see page 10). In addition to this general obligation and the associated penalty for noncompliance,[152] the TPDA includes a number of other safeguards to ensure appropriate standards in the treatment for detainees. In particular:

- Once a PDO is made, a senior police officer (that is, a police officer at the rank of Superintendent or higher) who is not involved in the PDO application is nominated by the Commissioner or Deputy Commissioner to be responsible for overseeing the performance of functions and exercise of powers in relation to the PDO.[153]
- A detainee and their lawyer are entitled to make representations to the oversighting police officer about the performance of functions and exercise of powers in relation to the PDO, and the treatment of the detainee in connection with their detention (among other matters).[154]
- A detainee is entitled to contact the Ombudsman[155] or the CCC to complain about the PDO (that is, the application for the PDO or the making of the PDO) and their treatment in connection with it.[156]

While these are important safeguards, they may be insufficient to address concerns that have been raised about the possible treatment of people detained under PDOs. In particular, it has been suggested that the requirement to keep detainees segregated from other people at their place of detention may effectively lead to detainees being placed in solitary confinement, contrary to the requirement for detainees to be treated with humanity and respect for human dignity (see, for example, submissions discussed in SLCLC 2005). The concerns discussed in Chapter 3 about detainees' significantly restricted rights of communication are also relevant here.

After considering safeguards in other jurisdictions, the CCC believes there are two ways of strengthening the TPDA's safeguards that would help to ensure the general requirement for detainees to be treated with humanity and respect for human dignity is met in practice.

First, specific standards for the treatment of detainees should be articulated. Relevantly, the CCC notes that the *Terrorism (Extraordinary Temporary Powers) Act 2006* in the ACT requires the AFP's written arrangements for the detention of people under PDOs to include "guidelines about the minimum conditions of detention and standards of treatment for detainees".[157] Noting that no such guidelines are currently included in the QPS or QCS materials it reviewed, the CCC considers that these should be developed for inclusion in relevant policies and procedures.

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152 A maximum penalty of two years imprisonment (s. 54, TPDA).

153 Section 38(1), TPDA.

154 Section 38(4), TPDA. Where the detainee is a child or of impaired capacity, the detainee's parent, guardian or other support person and the relevant chief executive (see s. 62) may also make representations to the senior police officer.

155 Defined to include both the Queensland Ombudsman and the Commonwealth Ombudsman (Schedule, TPDA).

156 Section 57, TPDA.

157 Section 43, Terrorism (Extraordinary Temporary Powers) Act.

Recommendation 8

That the Queensland Police Service work with all other agencies that may be involved in a person's detention under the *Terrorism (Preventative Detention) Act 2005* to develop written guidelines that specify the minimum conditions of detention and standards of treatment for people detained under a preventative detention order.

Second, there should be more independent oversight of a person's detention under a PDO. The CCC has noted impending changes in Victoria, which will require police to notify the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC) whenever the equivalent of an initial PDO is made.[158] It will also allow the Victorian Ombudsman and IBAC to make the same type of representations to the oversighting police officer as detainees and lawyers are currently entitled to do under the TPDA.[159] The CCC's view is that similar changes should be made to the TPDA to provide increased independent oversight of PDOs in Queensland (see Recommendation 9). One key point of difference is that the CCC does not consider that it should be given a specific role in making representations to the oversighting police officer about the person's detention. The CCC considers that it would be sufficient for it to be notified whenever a person is taken into a custody under a PDO, and to respond to any suspected corruption in relation to the person's detention or their treatment in accordance with its corruption functions under the *Crime and Corruption Act 2001*.[160] This is consistent with the CCC's oversight role in relation to police-related deaths and other significant events like police shootings.

Recommendation 9

That the TPDA be amended to:

(a) require the nominated police officer under section 38(1) to notify the Queensland Ombudsman and the Crime and Corruption Commission as soon as practicable after a person is taken into custody under a preventative detention order

(b) enable the Queensland Ombudsman to make representations to the nominated police officer under section 38(4).

In making these recommendations, the CCC notes ongoing work in relation to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),[161] which the Australian Government ratified in December 2017. The primary objective of OPCAT is to prevent the mistreatment of people in detention, and a key element of this is the establishment of an independent national body to inspect places of detention and make recommendations for strengthened safeguards against abuse. To determine more specifically how OPCAT should be implemented in Australia, the Australian Human Rights Commission (AHRC) has been conducting wide-ranging consultations. An interim report on these included a number of proposals to the Australian Government, including a proposal that the government "commit to the development of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT" (AHRC 2017, p. 15). Any consideration of the conditions of detention under a PDO should have regard for the progress of this and other ongoing work to implement OPCAT in Australia.

158 New section 13AZZM, Victorian TCPA as per section 9, Victorian JLATA.

159 New section 13AZZL, Victorian TCPA as per section 9, Victorian JLATA.

160 Section 33, Crime and Corruption Act.

161 Available at <www.ohchr.org/Documents/ProfessionalInterest/cat-one.pdf>.

Conclusion

The CCC conducted this review upon referral from the Police Minister, who is required to review the need for and effectiveness of the TPDA.

In terms of need, the CCC concluded that there is a small gap in counter-terrorism capabilities that necessitates preventative detention as provided for under the TPDA. No alternative means of addressing this gap were identified by or proposed to the CCC during the review. Notwithstanding its view that there is an overall need for the TPDA, the CCC found that some aspects of the TPDA should be amended to ensure the legislation better protects individual rights and achieves a more appropriate better balance between these and community safety. The CCC has made four recommendations to this end (Recommendations 1 to 4).

The fact that the TPDA has never been used in over 12 years of operation meant there was little objective evidence for the CCC to draw on to make a firm conclusion about the effectiveness of the legislation. The CCC therefore focused on identifying issues that may limit the effectiveness of the TPDA if it was to be used in the future. Issues identified by the CCC included:

- the inability of police to question a person detained under a PDO, which may limit the effectiveness of the TPDA in preventing and preserving evidence of terrorist acts
- some shortcomings in QPS, QCS and youth detention centre policies, procedures and training materials, which may undermine the ability of police to swiftly apply for, obtain and carry out a PDO when they need one
- aspects of Australia's preventative detention laws where inconsistencies are emerging between jurisdictions, which may limit interoperability
- safeguards that may not be adequate to ensure the general requirement in the TPDA for detainees to be treated with humanity and respect for human dignity is met in practice.

The CCC has made a further five recommendations to address these and related issues (Recommendations 5 to 9).

The CCC believes that the changes recommended in this report are necessary to ensure that the TPDA is appropriately balanced and as effective as possible. In conducting its review, however, the CCC has noted that the TPDA does not operate in isolation from Australia's other counter-terrorism laws. This legislative framework has undergone significant changes in recent years, and continues to do so. Clearly, these changes have implications for the ongoing need for and effectiveness of the TPDA, and therefore need to be monitored.

In the CCC's view, the nature of recent legislative changes also poses a risk to the goal of national consistency emphasised in the updated IGA signed in October 2017. Since 2016, significant changes to preventative detention and other pre-charge detention laws have occurred at a relatively rapid pace on a jurisdiction-by-jurisdiction basis. Some jurisdictions now have enhanced questioning powers, while others do not. Some preventative detention laws are due to expire in 2021, while others will remain in effect until 2025 (as in Queensland) or 2026. What once was a highly consistent regime is now markedly less consistent. The CCC considers that further coordination by COAG and a clear direction for Australia's preventative detention regime and other counter-terrorism laws is essential to optimising Australia's counter-terrorism efforts as intended by the IGA.

Appendix 1:
Organisations invited to make a written submission to the review

Queensland government stakeholders

Department of Child Safety, Youth and Women

Department of Communities, Disability Services and Seniors

Department of Justice and Attorney-General

Department of the Premier and Cabinet

Legal Aid Queensland

Office of the Public Advocate

Queensland Corrective Services

Queensland Health

Queensland Ombudsman

Queensland Police Service

Commonwealth and interstate government stakeholders

Australian Criminal Intelligence Commission

Australian Federal Police

Australian Security Intelligence Organisation

Commonwealth Attorney-General's Department

Department of Home Affairs

New South Wales Police Force

Northern Territory Police, Fire and Emergency Services

South Australia Police

Tasmania Police

Victoria Police

Western Australia Police Force

Non-government entities

Australian Human Rights Commission

Australian Lawyers Alliance

Australian Lawyers for Human Rights

Australian Strategic Policy Institute

Bar Association of Queensland

Civil Liberties Australia

Community Legal Centres Queensland

Human Rights Law Centre

Human Rights Watch Australia

Islamic Council of Queensland
Law Council of Australia
Public Interest Monitor (Queensland)
Queensland Advocacy Incorporated
Queensland Council for Civil Liberties
Queensland Law Society
Queensland Police Commissioned Officers' Union of Employees
Queensland Police Union of Employees
Youth Advocacy Centre

Appendix 2:
The definition of a terrorist act under the TPDA

In the Schedule of the TPDA, the definition of "terrorist act" refers to the definition in section 211 of the *Police Powers and Responsibilities Act 2000*.

211 Meaning of terrorist act and terrorism

(1) An action is a ***terrorist act*** if—

(a) it does any of the following—

(i) causes serious harm that is physical harm to a person;

(ii) causes serious damage to property;

(iii) causes a person's death;

(iv) endangers the life of someone other than the person taking the action;

(v) creates a serious risk to the health or safety of the public or a section of the public;

(vi) seriously interferes with, seriously disrupts, or destroys an electronic system; and

(b) it is done with the intention of advancing a political, religious or ideological cause; and

(c) it is done with the intention of—

(i) coercing, or influencing by intimidation, the government of the Commonwealth, a State or a foreign country, or of part of a State or a foreign country; or

(ii) intimidating the public or a section of the public.

(2) A threat of action is a ***terrorist act*** if—

(a) the threatened action is likely to do anything mentioned in subsection (1)(a)(i) to (vi); and

(b) the threat is made with the intentions mentioned in subsection (1)(b) and (c).

(3) However, an action or threat of action is not a ***terrorist act*** if the action or threatened action—

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended—

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

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All URLs correct at 4 September 2018.

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