Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Review of the Terrorism (Preventative Detention) Act 2005

Submission to the Crime and Corruption Commission Queensland

29 March 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of the Review of the *Terrorism (Preventative Detention) Act* 2005.

Overall need for the *Terrorism (Preventative Detention) Act* 2005

2. The ALA believes that one of the most important roles of government is to protect its population from threats to life and property. Counter-terrorism efforts are an important element of this responsibility. It is essential that human rights of potential perpetrators of terrorist acts are not protected at the expense of the potential victims of those acts. However, any limitation to human rights must be necessary and proportionate to the threat faced. Limiting human rights without ensuring that such limitations are necessary to reduce the threat, and are proportionate to the threat, can ultimately be counter-productive, with the potential to undermine counter-terrorism efforts.

3. The ALA does not believe that the provisions of the *Terrorism (Preventative Detention) Act* 2005 (TPDA) are necessary to prevent terrorism, or proportionate to the threat of terrorism. This legislation allows for preventative detention orders (PDOs) to be made in relation to people who are not charged with or suspected of having committed an offence or of posing a threat to public safety, and which can allow for detention for up to 14 days. Individuals are prevented from contacting others (except for specified exceptions) while they are subjected to PDOs pursuant to s55 and, where granted, prohibited contact orders, available under div.4, mean that individual subjects of PDOs can be prevented from contacting certain named individuals (which can include their lawyer or family members): ss58, 56. Given that the individual need not be suspected of having committed or posing the risk of committing a crime, these are extraordinary measures.

4. PDOs can be ordered where a police officer or issuing authority – which includes a senior police officer, a judge or a retired judge – is satisfied (a) that there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or has done an act in preparation for, or in planning, a

terrorist act; (b) that making the order would substantially assist in preventing a terrorist attack occurring; and (c) that detaining the person for the period of the order is reasonably necessary for the purposes of substantially assisting in preventing a terrorist act occurring: s8(3a) of the TPDA.

5. Alternatively, a PDO can be ordered if the police officer or issuing authority is satisfied on reasonable grounds that (a) a terrorist act has occurred within the last 28 days; (b) it is necessary to detain the person to preserve evidence of the terrorist act; and (c) detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence: s 8(5).

6. While it is possible that the individual in question is suspected of being involved in a terrorist act, this is not a requirement. Initial orders can be made *ex parte*, with the individual only having an opportunity to review it once the final order is made. It is possible that an individual who is suspected of no wrongdoing, and of posing no risk, could be detained under a PDO merely on the basis of the reasonable belief of a police officer. There is no standard of proof that that must be satisfied before the person can be detained, in contrast with usual criminal procedures where guilt must be proved beyond reasonable doubt.

7. Ramifications of detention can be devastating: this is why stringent safeguards have traditionally existed to ensure that individuals are not deprived of their liberty unless they have been found guilty of a crime. 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. Such ramifications should be available only where the individual concerned poses a genuine risk to the public, or has been found guilty of a criminal offence.

8. As will be seen below, these powers are more likely to be used by police where they suspect an individual has committed a terrorist offence, or poses a risk of doing so, but where there is insufficient evidence to lay criminal charges. Used in this way, PDOs give serious cause for concern, as they are effectively a means by which police can circumvent the safeguards that have deliberately been built into the criminal process, and thus undermine the integrity of the legal system as a whole.

9. The fact that no PDOs have been issued under Queensland's legislation is one indication that they are not necessary to prevent terrorist threats. This fact also flags a concern that these controversial laws could potentially fail a constitutional challenge.[2] Without the opportunity to test the validity of the laws, the threat of their use could be used to pressure individuals to provide information that they do not want, and should not be compelled, to provide. Used in this way, the law can be seen to be intended as a means of intimidating suspects or witnesses, rather than for its ostensible purpose of protecting the community from terrorism.

Legislation history

10. The TPDA was introduced pursuant to a Council of Australian Governments (COAG) agreement to introduce preventative detention in all Australian jurisdictions, following the passage of the Commonwealth's *Anti-Terrorism Act (No. 2)* 2005 (the Commonwealth Act).[3] The Commonwealth Act introduced PDOs and control orders into the *Criminal Code Act* 1995 (Cth), although Commonwealth PDOs are restricted to 48 hours detention.[4]

Constitutional concerns

11. At the federal level, detention is considered punitive in character: 'the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial powers of the Commonwealth'.[5] Detention ordered by the executive, without judicial involvement, is an exception to this rule, and is allowed only in strictly limited circumstances, such as protecting the detained individual or the public (in cases of mental illness or infectious disease, for example),

[2] On this point, see discussion of the Causevic case, below.

[3] *Terrorism (Preventative Detention) Bill 2005: Explanatory Notes*, https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2005-1180.

[4] For further details on ALA's concerns regarding the Commonwealth regime, see ALA, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime: Submission to the Parliamentary Joint Committee on Intelligence and Security* (2017), https://www.lawyersalliance.com.au/documents/item/994.

[5] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*Lim*), 28-29.

or for administrative purposes such as on remand pending trial.[6] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (*Lim*) expanded this exception to include detention pending the removal of a non-citizen without a valid visa.

12. Of course, the states are not generally bound by the provisions of the Commonwealth Constitution. Supreme Courts are, however, bound to respect the separation of powers, to the extent that they must not compromise their status as Constitutional courts.[7]

13. Final PDOs can be ordered by a judge or a retired judge, as an issuing authority under s7. Under Part 6, the Supreme Court can review PDOs and revoke or vary them on application by the subject of the order. These roles have the potential to give rise to challenge under the Commonwealth Constitution, given that Supreme Courts (and potentially judges of Supreme Courts) must adhere to the constitutional separation of powers.

14. According to a 2013 COAG report:

> 'The limited duration of the detention period, the use of judges in a retired or personal capacity and the emphasis on the "preventive" aspect of the detention highlight the concern – a legitimate one we consider – that the legislation might be considered punitive in nature and that this and other constitutional issues might be held to undermine its legitimacy.'[8]

15. To the knowledge of the ALA, the question of whether an individual can be detained on public security grounds, when there is no suggestion that that individual themselves poses any risk, has not been judicially considered in Australia. We share COAG's concern that these rules could be unconstitutional.

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[6] *Lim*, 28, 55.

[7] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Fardon v Qld* (2004) 223 CLR 575.

[8] Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), [261].

16. The High Court of Australia has permitted supreme courts to order the detention of individuals outside of the usual criminal process in selected circumstances.[9] Those cases can be distinguished from detention pursuant to PDOs, however.

17. *Lim* made it clear that detention is presumed to be punitive, and thus the exclusive purview of the judiciary, except where defined administrative exceptions applied. Those administrative exceptions related to the risk posed by the individual detained, to the health and safety of themselves or the community, for example.[10] While acknowledging that the Commonwealth Constitution does not generally bind state institutions, *Kable v Director of Public Prosecutions (NSW)* (*Kable*)[11] found that supreme courts are constitutional courts, meaning that they, too, must conform to the separation of powers. In *Kable*, the Supreme Court of NSW was prevented from implementing legislation that provided for continuing detention of a man following the expiration of his sentence, as it was considered that the legislation in question did not allow the court to engage in the reasoning that constituted the defining characteristic of the judicial function.[12] In *Fardon v Qld* (*Fardon*),[13] the limits of *Kable* were demonstrated where detention following the expiration of a sentence was permitted when the Supreme Court of Queensland was required to engage in judicial reasoning.

18. The authorities accordingly allow for detention outside of the criminal process in limited circumstances, which relate to the risk posed by the individual being detained.

19. Preventative detention orders can be distinguished from these cases, however, as they allow for the detention of individuals who themselves are not considered to pose a risk to public safety. Rather, detention is permitted if it is considered 'reasonably necessary for the purpose of substantially assisting in preventing a terrorist act occurring'.[14] It is not necessary to show that the detained person might be involved in that act, meaning that they could have no part in any plot, and still be

[9] See *Veen v the Queen (No. 2)* (1988) 164 CLR 465; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Fardon v Qld* (2004) 223 CLR 575 in relation to preventative detention of convicted criminals following the expiration of their sentences.

[10] *Lim*.

[11] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[12] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[13] *Fardon v Qld* (2004) 223 CLR 575.

[14] *Terrorism (Preventative Detention) Act* 2005 (Qld), s8(3)(c), 8(4).

detained pursuant to this provision. Alternatively, detention is permitted up to 28 days after a terrorist event has occurred, to preserve evidence.[15] Again, there is no requirement that the detained person be implicated in the event, or in any cover up.

20. As noted by the former Independent National Security Legislation Monitor (INSLM), Bret Walker SC:

> 'The detention of an innocent person who poses no risk of harm to society for the purpose of preserving evidence does not conform to the traditional notions of preventive detention. Preventive detention is traditionally limited to situations where there is reason to believe that an individual left free poses some serious danger…
>
> A person should not be detained solely on the basis of their having some evidence of a terrorist act. The PDO provisions do not even require that the evidence be material evidence, just that it be evidence. The situation where an innocent bystander with no guilty knowledge of or involvement in a terrorist act has such crucial evidence that their detention is necessary to preserve the evidence is an unlikely one, bordering on the fantastic. Such an unlikely situation could be dealt with by the normal police powers to search and seize evidence (search warrants are readily available to the police on a reasonable suspicion basis).'[16]

Overall effectiveness of the TPDA

21. In 2013, COAG recommended that the preventative detention regimes in Australian jurisdictions be repealed:

> 'three of the police submissions (Victoria, South Australia and Western Australia) have unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime…
>
> The view was expressed that, at a practical level, if there were sufficient material to found a detention order, there would be, more likely than not,

[15] *Terrorism (Preventative Detention) Act* 2005 (Qld), s8(5).

[16] INSLM *Independent National Security Legislation Monitor Annual Report*, (December 2012), 64-65.

> sufficient material to warrant conventional arrest and charge. State enforcement agencies, it might be said, were clearly more comfortable with this traditional procedure and much less comfortable with the complexities of the detention procedure.
>
> Where a suspected person had been arrested and charged, there would also be the opportunity to question the person while in custody. The high level – exceptional circumstances – for the grant of bail would ensure, in most cases, that the suspected person would remain in custody. Hence, the protective and preventative aspect of the legislation would be achieved by traditional methods of arrest, interrogation and charge.'[17]

22. Ultimately, COAG concluded that the preventative detention regime was neither effective nor necessary. The option of restructuring the regime was discounted, as the additional safeguards that COAG considered would be necessary to lend the scheme legitimacy would further decrease the likelihood that it would be used, even in emergencies.[18]

23. The ALA supports COAG's recommendation to repeal PDO provisions. PDOs contain limitations on questioning people detained under them, under s53, reflecting their extraordinary nature. This limitation, while an important safeguard given that the individual is not a suspect, has led to some absurd outcomes in other jurisdictions.[19] It also means that PDOs are not a particularly effective means of preventing terrorism, as they do not allow investigators to gather information that would be useful to achieve this end.

24. While it might be argued that removing these restrictions could increase the effectiveness of PDOs in achieving the aims identified for them, the ALA does not believe this is a solution. Rather, as the former INSLM noted, existing criminal

[17] Australian Government *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), [269]-[271].

[18] Australian Government *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), [272].

[19] In NSW for example, police refrained from documenting the injury of an individual detained pursuant to a PDO as they were concerned that this would fall foul of provisions that imposed a maximum two year prison sentence on any officer who unlawfully took identification material from a detainee: NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the* Terrorism (Police Powers) Act *2002: Review period 2014-16*, (March 2017), 11.

processes should be adequate to meet the aims of the TPDA of reducing or eliminating any terrorist threat.[20]

Use in other jurisdictions

25. It is difficult to assess how effective the TPDA is, given the fact that it has not been used in Queensland. Similar legislation has been used a handful of times in other jurisdictions, however, namely NSW and Victoria. These examples demonstrate that PDOs are used in relation to people suspected of wrongdoing but who, for whatever reason, are not charged. In view of these examples, the ALA is concerned that PDOs are in fact used as interim measures for law enforcement officials to circumvent established safeguards in the criminal investigation process, effectively undermining those safeguards and the human rights of people detained.

NSW

26. Following Operation Appleby in September 2014, NSW police officers detained three people under PDOs. A non-publication order was ordered by the NSW Supreme Court in relation to the orders, making scrutiny of the orders impossible.[21] The individuals were detained for two days and then released, with no charges being laid. The police did not seek to extend the interim orders, as this would have required revealing sensitive national security information.[22]

27. This account is consistent with that provided to COAG in the report referenced above, that the preventative detention regime is not user-friendly, making it ultimately ineffective and unnecessary. The fact that NSW police did not pursue detention suggests that detention was not necessary to prevent a terrorist act.

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[20] While clearly the aim of all counter-terrorism legislation is to eliminate the threat of terrorism, it is acknowledged that it is never possible to entirely achieve this aim.

[21] The orders were provided to the NSW Ombudsman pursuant to s26ZO(3)(a) of the *Terrorism (Police Powers) Act* 2002, but they are not available to the public: NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the* Terrorism (Police Powers) Act *2002: Review period 2014-16*, (March 2017), 10.

[22] NSW Ombudsman, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the* Terrorism (Police Powers) Act *2002: Review period 2014-16*, (March 2017), 10, 12.

Victoria

28. In April 2015 in Victoria, Harum Causevic was detained under a PDO. Immediately upon his release he was charged with terrorism-related offences and remanded pending trial. Charges against him were dropped in August of that year. The following month, Causevic was subjected to a control order.[23] This control order was confirmed, despite the fact that there was 'no direct evidence of any intention or plan… to carry out a terrorist act… [or] that the Respondent intended to assist in or knew of any plan to commit a terrorist act… The Applicant's case [was] entirely circumstantial.'[24]

29. Senior counsel for the controlee, Dr David Neal SC, argued that there did not appear to be any basis for the control order, but that Causevic did not have any appetite to appeal.[25]

30. This episode suggests that the use of the PDO was the beginning of a series of actions taken against Causevic without adequate evidence being available to demonstrate that he was guilty of any crime, but were based solely on his associations with other individuals of interest.

31. A number of concerns accordingly arise. Firstly, it appears that the PDO was initially used in place of charging Causevic in the traditional manner. The fact that the PDO was not extended, and that charges were laid instead, suggests that the PDO was not necessary to prevent a terrorist act. The fact that the charges were subsequently dropped also gives rise to concerns that they were not well-grounded. The findings in the control order matter – that ultimately all of the evidence against Causevic was circumstantial – illustrates the very crux of the concerns that these laws give rise to: namely, that lowering the standard of proof for anticipated crimes[26] means that individuals who have done no wrong, and present no risk, but find themselves in

[23] *Gaughan v Causevic (No. 2)* [2016] FCCA 1693.

[24] *Gaughan v Causevic (No. 2)* [2016] FCCA 1693 [63]-[64].

[25] Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders: Independent National Security Legislation Monitor*, (May 2017), Annexure A.

[26] With control orders, the civil standard of the balance of probabilities is used. As mentioned above, there is no standard that must be met with issuing PDOs, although the issuing authority, which can include a senior police officer, must be satisfied that reasonable grounds for suspicion that the reason for detaining the individual do in fact exist.

circumstances in which suspicions might arise, can suffer life-altering consequences that the criminal standards are designed to prevent.

Scope of preventative detention orders

32. The ALA is concerned about the significant ramifications that detention for 14 days could have on someone who is not suspected of committing any crime. Where this is combined with restrictions on communications, the risks become particularly serious.

33. Any employed person will be aware of the likely outcome of not attending their place of employment without notifying their employer in advance of their absence. Many employment contracts include clauses stating that unexplained absence from the place of employment can be a reason for instant dismissal. While the individual detained under the PDO could possibly explain their absence following their release, this reason is unlikely to result in the employer being forced to reinstate the individual. This could in turn have dire financial consequences for the person concerned. Given the possible stigma associated with being detained pursuant to a PDO, regardless of whether the detention related to suspected wrongdoing of the individual or not, finding new employment could be particularly challenging.

34. The detainee's entire family could suffer negative consequences as a result of their detention. Children could be teased at school, school fees might go unpaid if employment is lost, partners could be left without the financial or emotional support they rely on; the potential negative consequences are endless.

35. The ALA firmly believes that detention relating to terrorism matters should be restricted to individuals charged with or convicted of committing terrorism offences, which under the *Criminal Code Act* 1995 (Cth) includes individuals who might be planning a terrorist act or are engaged in other preparatory activities, including the catch-all s101.6(1): 'A person commits an offence if the person does any act in preparation for, or planning, a terrorist act', for which the maximum penalty is imprisonment for life.

36. We are also very concerned about applying PDOs to children of 16 or 17 years of age. Australia has agreed to be bound by the *UN Convention on the Rights of the Child*, which requires that any detention of children be a last resort, and for the shortest

possible period of time (article 37(b)). 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.

Seeking preventative detention orders

37. The ALA is concerned that the lack of oversight as to who can apply for PDOs means that PDOs could be misused. It is essential that there is accountability at all stages of the PDO application process, which must include oversight by senior officials prior to an application being made. As mentioned above, the involvement of the Supreme Court and potentially judges of the Supreme Court could also prove problematic. This is not a reason to remove judicial oversight. Rather, it is a reason to repeal the legislation.

Police powers in relation to detainees

38. Given our belief that PDOs are inappropriate, the ALA does not support removing current restrictions on questioning detainees. There are a number of alternative means by which police can question individuals which preserve important protections, relating to self-incrimination, for example.

39. We believe that existing detention and questioning procedures are adequate and that there is no need to expand questioning or evidence-gathering powers under the TPDA.

Safeguards against abuse

40. The ALA does not believe that the safeguards that exist around PDO are adequate, given the extraordinary nature of the detention that these orders facilitate. We believe that it is essential that communications with lawyers and family members can take place confidentially. While acknowledging the provision in s59A that permits confidential communications with security-cleared lawyers, s59A(2) means that this confidentiality is not absolute. Confidential communication with lawyers is

essential to ensuring that detainees are best placed to understand their rights and can trust that they will be dealt with fairly by the legal system. Lawyer-client privilege is fundamental to the integrity of our legal system.

41. Safeguards relating to the Public Interest Monitor (PIM) are also inadequate to protect the rights of detainees. While playing an oversight role, the PIM does not represent the interests of the individual concerned. In our adversarial system, it is essential that an individual who is deprived of their liberty has access to a lawyer who can represent them and ensure that their position is properly understood by decision-makers.