QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

The Chair
Crime and Corruption Commission

By email [redacted]

Dear Madam

Review of the Terrorism (Preventative Detention) Act 2005

I refer to your email dated 29 March 2018 and on behalf of the QCCL, thank you for the opportunity to makes submissions in relation to this review.

In the QCCL's view the preventative detention orders (PDOs) regime should be repealed as an unnecessary and unjustified encroachment on rights and liberties and rule of law principles.

We note that no comparable country has similar provisions to PDOs[1].

1. The principles

Behind the Act, and all of its detail, lie two scenarios that compete for our attention.

The first is acts of conspiracy and murder of the kind that have occurred too many times since 2001. The apparent intent of the Act is to interdict criminals before they perpetrate such terrorist acts.

The second is the incarceration of those who are not criminals and who do not intend to commit any crime. If the present criminal justice system, with all of its safeguards, cannot prevent miscarriages of justice, then a system of administrative detention is unlikely to prevent the detention of the innocent and misuse of power. The names Vivian Alvarez and Cornelia Rau remind us of the potential for zealous or incompetent officials to unlawfully deprive vulnerable citizens of their liberty. Of course, Ms. Alvarez and Ms. Rau were not incarcerated on the strength of intelligence that had been analysed by law enforcement

[1] Parliamentary Joint Committee on Security and Intelligence ("PJCIS) *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* February 2018 page 102

official. But this provides little comfort, since to ignore the prospect of error and misuse of power by officials would be to overlook the failings of law enforcement[2] and intelligence agencies[3] in the past.

Understandably, proponents of preventive detention are moved by the first scenario. Opponents, whilst recognizing the threat of terrorism, are haunted by the second scenario. They also see the measure as a system of administrative detention, which was foreign to our system of government and tradition of freedom under law. But which due to the existence of this type of legislation is being extended into other areas of our legal system. Such involuntary detention of a citizen in custody by the State is punitive in character and, should exist only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

Those who say we have nothing to fear from this ignore the precedent it has and will set for similar developments in other parts of our legal system, further weakening protections for individual liberty the product of 100s of years of struggle. Proponents also rely upon the good character and good will of present and future governments. We are not so sanguine about the future and prefer like Sir Thomas More in Bolt's "*A man for all seasons"* the shelter of a forest of laws. After all, Western society has spent most of the last 1000 years struggling for the rule of law to prevail over the rule of men. It would be a major victory for the terrorists to throw it away now. Anti-terrorist legislation enacted in South Africa during the apartheid era created a police state. Internment laws can prove to be counterproductive.[4]

The QCCL opposes preventative detention on the basis of the following principles and facts:

(a) The requirement that an individual can only be deprived of their liberty after they have been convicted by a Court of a specified offence is one of the fundamental bulwarks of liberty. To enable a person to be deprived of their liberty on the basis of what they might do or might know or with whom they might be associated represents a vast increase in the power of the state.

(b) The corollary of this principle is the presumption of innocence. To deprive a person of their liberty in circumstances where they have not been convicted of any offence is to create a major exception to the presumption of innocence.

(c) Furthermore it is our view that in a society committed to individual liberty, individuals are entitled to be presumed harmless.[5]

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2 This includes miscarriages of justice which have been well-documented: see for example Nobles and Schiff "Understanding Miscarriages of Justice" 2000 Oxford University Press; T Prenzler and J Ransley (eds) "Police Reform: Building Integrity". Miscarriages of justice have devastating effects on individuals, who face loss of their liberty, jobs, family and reputation. Often real perpetrators remain undetected. Miscarriages of justice undermine confidence in our system of government. A telling example of a miscarriage of justice in the context of alleged terrorist offences in Australia was the wrongful imprisonment of Tim Anderson and others.

3 The most notorious recent example of an intelligence failure was the assurance given by Australian intelligence agencies that there were WMDs in Iraq.

4 This was the experience with internment in Northern Ireland according to Brigadier Malcolm Mackenzie-Orr, the former head of the Protective Services Co-ordination Centre that was responsible for national counter-terrorism arrangements in Australia, who served in Northern Ireland from 1970 to 1974: ABC Radio Interview, Radio National 1.11.05.

5 Ashworth and Zedner *Preventive Justice* OUP 2015 pages 102-2.

(d) Fourthly, to deprive a person of their liberty on the basis of what they might do seriously undermines the possibility of fairness in our judicial system. It does so in two respects. Firstly, it reduces the capacity of persons to defend themselves. It is much harder for a person to defend themselves from the accusation that they might do something than to defend themselves from the accusation they have done something. Secondly, punishment really can only be imposed when it is measured against some conduct which it is established a person has undertaken.

(e) Fifthly, to deprive people of their liberty on the basis of what they might do increases significantly the risk of the innocent being incarcerated

(f) The precautionary principle should not be applied to the deprivation of a person's liberty, we are talking about a person who is of full capacity and who is assumed not to have committed a criminal offence and not to be dangerous

(g) The fact no other comparable country, has similar legislation, makes it extremely difficult to accept assertions by police and other agencies that these laws are essential to their ability to protect the community.

This position was expressed forcefully by Lord Hoffmann:

> "… Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: 'Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governors'.
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> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaida. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.
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> …
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> I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. **In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.**"[6]

2. The law in operation

According to the Parliamentary Joint Committee on Security and Intelligence ("PJCIS") review of the Commonwealth Preventative Detention System **(pg 87)** the Commonwealth has never used PDOs.

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[6] *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56 at [95]-[96]

New South Wales has used its legislation once for three individuals in 2014 and the Victorian equivalent was used once for one individual in 2015.

There have been a number of reviews of PDOs.

In 2012 the Independent National Security Legislation Monitor review found the PDOs to be unnecessary and recommended that they should be abolished. The key reasons for this finding were:

1. Lack of use of provisions.
2. Serious intrusion into liberty.
3. Gives no powers beyond other terrorism legislation.
4. Inability to question a detained person limits usefulness.
5. Did not believe that circumstances would exist where there was a large enough threat to justify a PDO where the police could not instead arrest and charge as per standard criminal law.

A majority of the members of the 2013 COAG review concluded that the PDOs were unnecessary and should be repealed.

The Parliamentary Joint Committee on Security and Intelligence in its review of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* 2014 which sought to extend the expiry of PDOs until 2025 supported the continuation of PDOs believing it was appropriate. However, they did not endorse the idea of allowing interviewing of suspects and recommended the PDO regime to sunset 24 months after the next federal election

A 2014 review by the Parliamentary Joint Committee on Human Rights of PDOs in the context of the *Foreign Fighters Bill* concluded that PDOs were incompatible with the human rights of security, freedom from arbitrary detention, communication, fair trial and freedom of movement, among others

In its review of the *Counter-Terrorism Legislation Amendment Bill (No1)* 2015 the PCJCIS recommended two amendments to PDOs:

1. Change the threshold from ‘imminent’ and ‘expected within 14 days’ to ‘capable of being carried out within 14 days.
2. Disallowing Family Court judges (and retired judges) from issuing PDOs.

The 2017 INSLM review:

1. Found that just because the PDOs had not been used did not mean that they were redundant.
2. However, they may be redundant given the State equivalent provisions are preferable (i.e. because they can give 14 days detention for example) and so the State equivalents may be continually used instead of PDOs.

3. Thought that PDOs should continue given the rise of lone attackers which may require rapid disruption with little lead up.

4. However did note that the use of PDOs would likely be restricted to circumstances where the AFP and State police disagreed about the need for an equivalent to the PDO.

In our view this review was an intellectually lazy puff piece which did little more than regurgitate the official line and endorse it. It should be ignored.

3. Amendments

It is clear from recent trends in the counter-terrorism debates that this regime will continue to operate for the foreseeable future and the provisions are likely to be further extended. We make the following proposals for changes to the Act:

A. Any preventative detention order should be limited to a period of no more than 24 hours.

B. Grounds for making an order

The test in section 8(3) requires too low a level of satisfaction.

Courts have found that the standard of proof of 'reasonable suspicion' is low.

It is much lower than reasonable belief – the High Court of Australia in *George v Rockett* (Rockett) held that the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief.[7]

In *Rockett,* the High Court also cited with approval Lord Devlin's definition of reasonable suspicion in *Hussein v Chong Fook Kam* as a 'state of conjecture or surmise where proof is lacking'. This is wholly inadequate to safeguard against police abuse.

The words "there are reasonable grounds to suspect" should be replaced with the words "there is a grievous risk". This should require a level of satisfaction above 50% and connotes a requirement that the likely harm is significant.

Section 8 should be amended to provide that one of the specific factors to be taken into account before an order is made is the impact of the making of the order on the human rights of the detainees.

C. Justification for converting an initial order into a final order

The Act does not require a police officer to have to justify the extension of an initial order by the making of a final order. It should be necessary for the applicant in each of those situations to demonstrate why the purpose of the initial order has not been achieved in that initial period of time.

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7 (1990) 170 CLR 104, 116.

D. Orders to be issued by a Judicial Officer only.

The Council 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.

We see no reason why arrangements cannot be made for the issuing of these Orders by a Judicial Officer on an urgent basis. The Court could be given the discretion in appropriate cases to issue the Orders, initially, on an ex parte basis.

The legislation also makes provision for retired judges to hear applications for final Orders. In our submission such a person does not have and cannot be seen to have the necessary independence to carry out this function. This is clearly inconsistent with the principles of the separation of powers.

E. A detainee's right of access to the case against them.

In the case of a final order the merits of the application can be determined before a court. In addition, judicial review will be available for both initial and final orders.

However, this right will be close to useless if the detainee or their lawyer is not fully apprised of the case which is made against them. Under the present legislation, all that the detainee will get is a summary of the case against them which is prepared by the Police.

It goes almost without saying that any summary involves a subjective assessment by the person preparing it of what is important and what is not. The QCCL agrees with the Grand Chamber of the European Court of Human Rights in *A v The United Kingdom* [2009] ECHR 301 which was subsequently followed by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 at paragraph 59 where Lord Phillips held that a "controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail of the sources of the evidence forming the basis of the allegation. Where, however, the open material consists purely of general assertions and the case against a controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

Section 29(4)(a) allows a Police officer to exclude from a summary any matters which may prejudice national security as defined in the NSI Act. The definition of a national security in the NSI Act is extremely broad. In our view it should cover any matters which would fall within the public interest immunity. The Council's Vice President Terry O'Gorman has noted on a number of occasions that the Police already make extensive unjustifiable use of public interest immunity. To avail them of both grounds for refusing

to release the information is more than likely in the Council's view to render the summaries even more useless than they have the potential to be.

The statute should be amended to require disclosure in the terms found to be necessary in *A v The United Kingdom*

F. The right to cross examine

Both the right to merits review and to access the case made against them will be compromised if the detainee cannot test that case. Sections 23(3) for final orders and 29(3) for extensions appear to provide for this. However they should be expanded along the lines provided for in the Victorian legislation to provide that the detainee *is entitled to appear and give evidence, call witnesses, examine and cross-examine witnesses, adduce material and make submissions.*

G. Legal Representation

The Act *requires* the monitoring of conversations between a detainee and their lawyer. The Council's view is that this is a most obnoxious provision.

The Act says that the monitoring does not take away legal professional privilege. In our view that is a mere solecism. Although the Police may be prohibited by the retention of the legal professional privilege from making direct reference to statements said by a detainee to their lawyer there is nothing to stop the police from making use of that information to conduct other investigations.

For centuries the law has made communications between a client and lawyer confidential so as to promote full and frank disclosure of all relevant information to a lawyer.[8] A citizen's right to keep communications with a lawyer confidential has been described as "a fundamental right long established in the common law".[9]

Although a police monitor is prohibited from disclosing the conversation, this does not provide any real protection. Other persons, including law enforcement officials, can access recordings of the monitored conversation and use them for all manner of purposes.

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.

H. Restrictions on contact with other persons

The requirements for making of a prohibition on contact order are vague and provide no objective criteria upon which the making of such orders can be based.

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8 *Grant v Downs* (1976) 135 CLR 674 at 685.

9 *R v Special Commissioner* [2002] UKHL 21 at [7].

The combined effect of the provisions of Division 2 Part 5 appears to be that a detainee is only ***entitled*** to contact the persons referred to in that part. It should be made clear that the officer can allow contact with other persons and provision should be made for a detainee to contact their own medical practitioner should they wish.

The Supreme Court review provisions in Section 71 do not apply to contact orders but only to final orders (see Section 71(1)). The Court would appear to be incapable of making an order which allowed for, for example, parental visits or visits by a spouse where a contact order applies to those people. It is not certain, even, that the Supreme Court will be entitled to have any information about the making of a prohibited contact order let alone any information or documents concerning the terms of or the basis of the making of that order.

A prohibited contact order should be treated in the same way as preventative detention orders and be open to challenge under the review provisions as is the case in the Victorian Legislation.

We also submit that the power of the Court on the hearing of an application in relation to a preventative detention order should extend to making such an order in relation to contact as it thinks fit, including permitting otherwise prohibited contact.

I. Onus of Proof

The legislation should make clear that at all times and in all applications the onus lies on the authorities and not on the detainee. This should be the case even where the formal applicant before the court is the detainee.

J. Standard of Proof

In our view the standard of proof, given the nature of the allegations, should be expressed to be the criminal standard i.e. beyond reasonable doubt.

K. Juveniles

It remains our view that preventative detention orders should not be imposed on persons under the age of 18.

A Police Officer can require the provision of a date of birth and failure to do so is an offence that attracts 20 penalty units. A Police Officer does not have to ask those details. The provisions of Section 9 place no positive obligation on the Police to enquire as to a person's age. A provision should be inserted requiring Police, pursuant to both Section 47 (initial order) and Section 48 (final order) to advise a person that an order cannot be made in respect of a person under the age of 16 years and that if they are under the age of 16 years they can contest the order.

L. Preservation of Evidence

The QCCL submits that detention of persons simply on the basis they may be able to provide evidence is inconsistent the basic principles of our legal system and respect for individual liberty. There is a in our view a serious risk that these powers will be abused, particularly on the basis of racial or other profiling.

M. Questioning of detainees

We would oppose any proposal to allow questioning of detainees. As noted above detaining people who may have committed no offence purely for questioning is an even graver failure to respect the fundamental right to liberty than to prevent the commission of an offence. This is particularly so when people are being held incommunicado without access to external assistance. A situation which must put pressure on them to comply with police demands. Furthermore, the idea is, as the PJCIS noted in its report on the *Foreign Fighters* Bill referred to above, inconsistent with the stated purpose of the legislation

4. Sunset

If the Act is to continue, the QCCL recommends that the legislation incorporate a sunset clause for no longer than 2 years to ensure regular review of the necessity and effectiveness of the provision and to ensure the powers continue to be recognised as targeted, extraordinary and temporary.

5. Conclusion

John Stuart Mill argued that the preventive power of the state is, "far more liable to be abused, to the prejudice of liberty, then the punitory function; for there is hardly any part of the legitimate freedom of action of a human being that would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency."[10] These strictures clearly apply to this type of legislation

The State not only has a duty to protect but also a duty to do justice, that is, to respect individual rights. It is often said, that these increased powers are justified on the basis that they are necessary to protect the liberty of individuals. It is argued that it is necessary that some individuals lose their liberty to protect that of others. This balancing argument is in our view unsatisfactory, because it fails to acknowledge the status of liberty as a fundamental right. And to recognise that the adverse impact of these types of powers falls disproportionately on minorities and other disadvantaged groups in the community. When passing legislation, the Parliament should ensure that the rights of all individuals in the community are preserved to the same extent so far as is possible. These laws fail this test.

We thank QCCL intern [redacted] for [redacted] contribution to this submission.

10 *Three Essays: On Liberty*, *Representative Government and the Subjection of Women* Oxford University Press 1911 at page 117

We trust this of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
3 April 2018