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Counter-Terrorism and Other Legislation Amendment Bill 2015

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Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

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Abbreviations

Bill	Counter-Terrorism and Other Legislation Amendment Bill 2015
FLP	fundamental legislative principle
FES Act	Fire and Emergency Services Act 1990
Minister	Minister for Police, Fire and Emergency Services and Minister for Corrective Services
PDO	Preventative Detention Order
PPRA	Police Powers and Responsibility Act 2000
PSAA	Police Service Administration Act 1990
PSPA	Public Safety Preservation Act 1986
QFES	Queensland Fire and Emergency Services
QPS	Queensland Police Service
TPDA	Terrorism (Preventative Detention) Act 2005

Chair’s foreword

This Report details the examination by the Legal Affairs and Community Safety Committee of the Counter-Terrorism and Other Legislation Amendment Bill 2015.

The committee’s task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament in accordance with section 4 of the *Legislative Standards Act 1991*.

The committee recommends that the Bill be passed, and recommends amendments in respect of reporting requirements and the proposed statutory review timeframe.

On behalf of the committee, I thank those who lodged written submissions on this Bill and participated in the committee’s hearings and meetings. I also thank the Public Safety Business Agency, Queensland Fire and Emergency Services and the Queensland Police Service for the support they have provided the committee during this inquiry.

In particular, I thank all members of the committee for the constructive approach they have taken to the inquiry, and to this report.

I would also like to thank the Parliamentary Library for research services provided, and Committee Office staff for the support they have provided us.

I commend this report to the House.

Mark Furner MP

Chair

Recommendations

Recommendation 1 **6**

The committee recommends that the Counter-Terrorism and Other Legislation Amendment Bill 2015 be passed.

Recommendation 2 **10**

That the Bill be amended to provide that the Minister must provide a stand-alone report to Parliament within six months of the use of powers under the *Terrorism (Preventative Detention) Act 2005*, including at a minimum details of:

- PDO applications made and the outcome of application
- whether a person was taken into custody under each PDO and for how long
- the number of persons subject to a PDO that were later charged with an offence of terrorism under the Criminal Code
- details of complaints made to the Ombudsman or the Crime and Corruption Commission
- any PDOs found by a court to have been invalid
- review timing.

Recommendation 3 **18**

The committee recommends the Act be amended to require an independent review to occur within two years of the Act's commencement, with a report required no later than within three years of the Act's commencement.

Recommendation 4 **20**

The committee recommends the Minister advise the House of whether the government is progressing further work with local government authorities in respect of improving fire safety regulation in budget accommodation.

1. Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police Service
- Fire and Emergency Services
- Training and Skills.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 17 September 2015, the Hon Jo-Ann Miller MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, introduced the Counter-Terrorism and Other Legislation Amendment Bill 2015 (Bill) into the House. In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the committee for detailed consideration. By motion of the Legislative Assembly the committee was required to report to the Parliament by 2 November 2015.

The committee invited written submissions from the public, as well as writing specifically to identified stakeholders, to be received by 4.00 pm on 6 October 2015.

The committee received three submissions (see Appendix A for a list of submitters).[2]

The committee received a public briefing on the Bill from the Public Safety Business Agency and its portfolio partners the Queensland Police Service (QPS) and Queensland Fire and Emergency Services (QFES) on 6 October 2015 at Parliament House in Brisbane.

The committee invited witnesses to give evidence and respond to questions on the Bill at a public hearing on 14 October 2015 (see Appendix B for a list of public hearing witnesses).

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 View Submissions: http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries

1.3 Policy objectives of the Counter-Terrorism and Other Legislation Amendment Bill 2015

Objectives of the Bill

As an omnibus Bill with a number of unrelated objectives, the Bill seeks to achieve the following:

Counter-Terrorism

- Extend the 'sunset' provision of the *Terrorism (Preventative Detention) Act 2005* (TPDA)
- Extend the extraterritorial application of the TPDA and *Public Safety Preservation Act 1986* (PSPA) from three nautical miles to 200 nautical miles consistent with the combined effect of the Queensland and Commonwealth Acts in respect of crimes at sea[3]
- Extend the various emergency powers under the TPDA and PSPA so that they may be exercised in other jurisdictions.

Fire Safety

- Amend the definition of 'occupier' in the *Fire and Emergency Services Act 1990* to help ensure all providers of accommodation provide a fire safe environment.

Civil liability protection for police service reviews

- Provide civil liability protection to a commissioner for police service reviews for an act done or omitted to be done in good faith and without negligence in the exercise of powers under section 9 of the *Police Service Administration Act 1990* (PSAA) and protection from civil liability for applying for or otherwise being involved in a review of a decision under this part.

Reflect changes in Australian government arrangements

- To reflect in the PSAA and in the *Weapons Act 1990* (Weapons Act) changes at the Australian government level in respect of the new Department of Immigration and Border Protection by defining an '*officer of customs in the Australian Border Force'*, in respect of the possession and use of weapons in the performance of his or her duty.

Reasons for the Bill

In introducing the Bill, the Minister explained that the Bill is a response to the ongoing and worsening threat of terrorism in Australia since the TPDA was enacted in 2005:

> *Unfortunately, Australia is now undergoing the most significant ongoing threat from terrorism that it has ever faced. Queensland, like other Australian jurisdictions, has residents who are considered a security concern and who are the subject of investigations. The number of persons travelling overseas to participate in the conflict, the number of residents prevented from participating in the conflict and known supporters are all increasing. While the threat of large scale mass casualty and infrastructure attacks remain, there is also an increasing threat of low-tech lone actor terrorist attacks.*[4]

The TPDA has a sunset clause of December 2015, ten years from the date it was introduced. The Bill would extend the TPDA for a further ten years, to December 2025, so that preventative detention can remain a '*tool to aid police response to an imminent or recent terrorist attack*'.[5]

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[3] Crimes at Sea Act 2001; Crimes at Sea Act 2000 (Cwlth)

[4] Hansard transcript, 17 September 2015, p 1876.

[5] Hansard transcript, 17 September 2015, p 1876.

Additionally, the Bill would extend the operation of the TPDA to a distance of 200 nautical miles from Queensland's coastline, to support its operation in the event of a suspect being on board a vessel; and to areas adjacent to Queensland.[6]

The extension of the PSPA would enable police to exercise their emergency powers including the intercepting of a boat or vehicle in the event of a terrorist emergency arising or being likely to arise.

In respect of fire safety, there have been issues in assigning responsibility for meeting fire safety obligations, particularly in respect of absent occupiers, rent-masters (lessees who sub-let to multiple persons) and managers of illegal unsafe rental accommodation.

Including protection from civil liability for police reviews in the PSAA, rather than in subordinate legislation as it is now, is consistent with other civil liabilities protections.[7]

Machinery of government changes at the Commonwealth level have led to the establishment of the Department of Immigration and Border Protection, which to ensure continuity of legislative provisions must be reflected in Queensland laws.

1.4 Background

The Explanatory Notes to the Bill (p 1) place terrorism laws in the context of a 2005 Council of Australian Governments (COAG) agreement after the London bombings, that the Australian Government, along with each state and territory would enact complementary legislation to better deter and prevent potential acts of terrorism and prosecute them when they occurred. COAG agreed that it would review the new laws after a period of time. In 2012 that review was undertaken by a committee chaired by the Hon Anthony Whealy QC, a retired NSW Court of Appeal judge.[8] Queensland's *Terrorism (Preventative Detention) Act 2005, Police Powers and Responsibilities Act 2000* and *Public Safety Preservation Act 1986* (terrorist emergency powers) were part of this review.[9]

The Review recommended that preventative detention legislation in all jurisdictions be repealed, noting:

> *Two broad points, perhaps irreconcilable, may be made: first, the prevention of an imminent and serious terrorist attack by means of executive detention, though an extreme measure, can, at least in an emergency, be seen as a genuinely valuable protective measure. Certainly, the community under threat might think it so. Secondly, the concept of police officers detaining persons 'incommunicado' without charge for up to 14 days, in other than the most extreme circumstances, might be thought to be unacceptable in a liberal democracy. There are many in the community who would regard detention of this kind as quite inappropriate. To some, it might call to mind the sudden and unexplained 'disappearances' of citizens last century during the fearful rule of discredited totalitarian regimes. It is not surprising therefore that, in these circumstances, the Committee has received forceful submissions suggesting that the preventative detention legislation should be repealed or that, at the very least, a wide range of additional safeguards should be included. On the other hand, recognising the force of the first point we have made, the Attorney-General's Department and the AFP, especially, see an important value in*

6 Hansard transcript, 17 September 2015, p 1876.
7 Hansard transcript, 6 October 2015, p 4.
8 http://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx
9 http://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF, p 96.

> *retaining Division 105, while accepting at the same time that improvements of various kinds could be made to the schemes at both Federal and State level.*[10]

That recommendation was not accepted by COAG. The communique from its 10 October 2014 meeting advised:

> *States agreed to introduce legislative amendments to their parliaments to safeguard the national laws underpinning our ability to arrest, monitor, investigate and prosecute domestic extremists and returning foreign fighters.*[11]

The current Bill implements that COAG agreement. However not all jurisdictions are seeking to extend their complementary legislation for ten years as discussed below.

The Bill is part of Queensland's response to the COAG agreement.

<u>History of the current legislation</u>

At the time the TPDA was implemented in Queensland in 2005, concerns were expressed about the extent of breaches to individual rights and freedoms and the rule of law. There was considerable community debate about the proposal. During the second reading debate for the Bill the then Opposition Leader, Mr Lawrence Springborg MP, said in indicating support for the Bill:

> *There are, however, issues that we need to be very cognisant of when it comes to passing through the parliament a bill such as this because potentially it can impact significantly on the rights and liberties of individuals. That always must be the supreme consideration of this parliament—that the action which we are taking to protect the broader community is more justifiable than any of the individual liberties which may be constrained as a consequence of the laws that we pass through this place.*[12]

He also noted that:

> *There is also a five-year review that is set down and a 10-year sunset. I have a personal feeling that the review should be inside of five years because we are stepping into new territory here. Whilst nobody wants to see advantage being given to potential terrorists or terrorists in this country, I think we need to be very concerned if we pass legislation which may seek to restrict the liberties of individuals and put in place a regime which we have never seen and not review it for five years. I do not know whether that is appropriate. I believe that the review should be inside of five years and perhaps take place in two or three years…..We have to keep it under very close scrutiny, and that is something the opposition certainly will be doing, because of the range of liberties that can potentially be affected.*[13]

A number of other Members noted the importance of the ten year sunset clause in their speeches on the Bill, for example: '*We want to remove these laws from our statute books after 10 years and restore in the future the full rights and liberties that individuals have in this state'.*[14]

Not all Members spoke in support of the Bill. One government Member pointed out that a large majority of experts in the field of intelligence, counter-terrorism and security policy believed the laws were ineffective and disproportionate. He said that this was important –

> *…because it erodes the argument that the intelligence exists to support increasing police powers. To increase police powers without this invites abuse... the surveyed experts noted*

[10] COAG Review of counter-terrorism legislation, 2013, p 68.

[11] COAG communique, 10 October 2014, p 1.

[12] Hansard, 2 December 2005, p 4673.

[13] Hansard, 2 December 2005, p 4675.

[14] Hansard, 2 December 2005, p 4677.

> *that such legislation could be counterproductive in generating further discord in sections of the community and that the increased powers may only be effective after the event. These criticisms just add weight to the need for further dialogue on the legislation and a coordinated approach to combating terrorism which is not born of political manoeuvring and point scoring but which has a strategic end state which addresses the antecedents for terrorism.*[15]

There is a view that the powers were rushed through (at the Commonwealth level) with insufficient debate and insufficient evidence that there was a need for such powers (the existing law being seen to be sufficient and in fact easier and more flexible in an operational sense).[16]

These concerns were expressed in the Queensland Parliamentary debate on the 2005 Bill, with Members noting that the Queensland Criminal Code could readily be amended to ensure such activities were illegal – and the Criminal Code operates within constitutional bounds, while preventative detention does not.[17]

Fundamental Legislative Principles

The former Scrutiny of Legislation Committee raised a number of issues in respect of the Act, when it was being considered in Bill form in 2005, including:

- the standard and onus of proof required for preventative detention orders
- why the Bill provides for a maximum period of detention without charge or trial under a final preventative order of 14 days, which is different to the 48 hours under the Commonwealth provision
- why a 10-year sunset period is appropriate - what is the basis for this time frame and how does it compare with the sunset period introduced by other states and territories;
- whether the 10-year clause accounts for what could well be an ever-changing security environment and whether advice has been sought from ASIO, Australian Federal Police and the Queensland Police Service;
- what checks are in place to ensure that, when the Act expires, existing orders that need to be maintained in Queensland would not cease immediately or be exposed to other such loopholes.

Review

The TPDA was, in the event, reviewed within one year of its commencement, and as a result a number of amendments were made through the *Terrorism Legislation Amendment Act 2007*. These changes were:

- changes to a person's access to legal representation once they have been detained under the Act, to allow unmonitored contact between a detained person and their lawyer - provided their lawyer holds a security clearance
- a security clearance is obtained only after a lawyer undergoes extensive criminal history checking and ASIO checks

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[15] Hansard, 2 December 2005, p 4682.
[16] Svetlana Tyulkina and George Williams, Preventative detention orders in Australia. UNSW Law Journal, 2015, 38(2), 738.
[17] Hansard, 2 December 2005, p 4683.

- the amendment also states that the Queensland Police Service can still obtain a monitoring order in relation to a security cleared lawyer where a judge is convinced that it is necessary to prevent a terrorist act
- the amendments also ensured that when a person held under an initial preventative detention order does not have legal representation, the judge must arrange for Legal Aid Queensland to represent the person for the period that the person is held in detention
- exempting activities done or records created under the Act from the Freedom of Information laws, to protect sensitive material regarding preventative detention
- allowing a police officer to search a person under preventative detention at the time they are taken into custody. This search can be done without a warrant and can involve the removal of clothing. Previously this search could only be conducted after the detainee is brought to the place of detention. A search in these circumstances is allowed only if the officer suspects that the person is carrying an item that may cause loss of life or serious physical harm: for example, if a police officer suspects that the detained person may be carrying a device used to detonate explosives.

1.5 Consultation on the Bill

The Explanatory Notes list the organisations consulted by the government as part of the development of the Bill. The committee is not aware of the outcome of that consultation, as it was a confidential process. However, it would appear from comments made by one witness, and in one written submission, that the consultation process has been satisfactory and extensive.[18] The committee contacted relevant stakeholders identified in the Explanatory Notes (among others) directly to invite a submission on the Bill, and just one of those listed (the Queensland Law Society) made a submission to the committee.

1.6 Outcome of committee considerations

Standing Order 132(1)(a) requires that the committee after examining the Bill determine whether to recommend that the Bill be passed.

The committee recommends that the Bill be passed. It also recommends reporting provisions be added to the Bill, bringing forward the proposed timeframe for review of the Act, and seeks additional advice about fire safety in budget accommodation.

Recommendation 1

The committee recommends that the Counter-Terrorism and Other Legislation Amendment Bill 2015 be passed.

[18] Hansard transcript, public hearing, 14 October, p 5; submission no. 3, p 4.

2. Examination of the Counter-Terrorism and Other Legislation Amendment Bill 2015

The committee's examination of the Bill is discussed in this section.

2.1 Preventative detention (clause 14)

The Bill would extend the TPDA for an additional ten years, enabling the continuation of current preventative detention powers.

How preventative detention works

Preventative Detention Orders (PDOs) are designed to prevent an imminent terrorist attack or to preserve evidence of a terrorist attack that has occurred.

A PDO can be made by an 'issuing authority' at the application of a member of the Queensland Police Service. The issuing authority for an initial order (up to 24 hours, with a possible extension of up to 48 hours in total) is a 'senior police officer'.[19] A senior police officer for this purpose is defined as an assistant commissioner, the deputy commissioner or the commissioner.[20] The issuing authority for a final order (up to 14 days, including any periods already held under an initial order) is a judge or a retired judge appointed by the Minister.[21] An initial or final PDO may be extended by the person who made the original initial or final order.[22]

A PDO may be made where the issuing authority is satisfied there are reasonable grounds to suspect that the person:

- will engage in a terrorist act, or
- 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, and
- making the order would substantially assist in preventing a terrorist act occurring, and
- detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act occurring
- the suspected terrorist act must be imminent and, in any event, be expected to occur at some time in the next 14 days.[23]

A PDO may also be issued where the issuing authority is satisfied on reasonable grounds that:

- A terrorist attack has occurred in the last 28 days, and
- It is necessary to detain the person to preserve evidence in Queensland or elsewhere of, or relating to the terrorist act, and

[19] TPDA 2005, s 7(1).
[20] TPDA 2005, schedule, p 81.
[21] TPDA 2005, s 7(2).
[22] TPDA 2005, s 7(3).
[23] TPDA 2005, s 8 (1)-(4).

- Detaining the person for the period for which the person is to be detained under the order is reasonably necessary for the purpose of preserving the evidence.[24]

Children under 16 years of age cannot be subject to preventative detention.[25]

While in preventative detention, contact with others is limited.[26] The person being detained is entitled to contact the Ombudsman and the Crime and Corruption Commission, and a lawyer.[27] The person cannot be questioned by police other than to ensure their health or safety or to otherwise comply with the Act.[28]

Other Australian jurisdictions

Other Australian jurisdictions have legislation complementary to that of Queensland. The 2013 COAG review noted that:

> *…there are differences between the jurisdictions, particularly in the area of safeguards.*
>
> *Preventative detention orders under the State and Territory provisions can be obtained by police officers following an application to an issuing authority. This can be a judicial officer or, in some cases, a senior police officer. The order is designed to prevent an imminent terrorist attack or to preserve evidence of a terrorist attack that has occurred. For example, in Tasmania and Victoria, urgent orders of up to 24 hours detention may be issued by senior police officers. In Queensland, South Australia, Western Australia and the Northern Territory, urgent orders allowing for up to 24 hours detention may be issued by senior police but further orders enabling up to 14 days detention must be issued by judges and, but for South Australia, retired judges appointed consensually to the role of issuing authority. In New South Wales and the ACT, interim orders of up to 48 hours may be issued by the Supreme Court ex parte, whereas orders extending detention up to 14 days may only be issued by the court following a full hearing.*
>
> *The State and Territory schemes also empower the relevant Supreme Court to make a prohibited contact order to prevent a detained person contacting specified persons. They also establish a system of monitoring client-lawyer communications.*
>
> *The use of the preventative detention powers are generally subject to reporting requirements and oversight by the Ombudsman in each State or Territory.*
>
> *In terms of safeguards, the New South Wales legislation, for example, requires the Supreme Court to confirm orders; detainees are entitled to give evidence before a hearing of the court and to apply to have an order revoked. The ACT legislation is suggested as being "model legislation". It contains more stringent requirements than do other legislative schemes for the issue of preventative detention orders. Where a person is sought to be detained it must be shown that the order is "the least restrictive way of preventing the terrorist act". Where an order is sought to preserve evidence, it must be shown that detaining the person is the "only effective way of preserving the evidence". In fact, the ACT legislation appears to reflect the obligation to adhere to human rights standards more rigorously than the legislation of the other States and Territories.*
>
> *Some jurisdictions (such as the ACT and Queensland) presently provide a role for a Public Interest Monitor ('PIM') to be present at the hearing of the application for a detention order, to ask questions of anyone giving evidence to the court and to make any*

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[24] TPDA 2005, s 8 (5).
[25] TPDA, s 9.
[26] TPDA, s 55-56.
[27] TPDA, s 57 – 58.
[28] TPDA, s 53.

> *submissions to the court. Victoria has recently appointed a Public Interest Monitor. Under the Victorian legislation, an applicant for a preventative detention order must notify the PIM of the application. As in the ACT and Queensland, the Victorian PIM is empowered to contest the order at the hearing of the application for a PDO.*[29]

At the time of writing this report, the Commonwealth Government had extended its corresponding legislation for two years, Tasmania for ten years, and on 20 October 2015 the Victorian government introduced a Bill to extend that state's corresponding legislation for a further five years.

The Tasmanian Parliament passed its extending legislation on 17 September 2015, and it contained a number of other amendments, including in respect of using known names, and allowing for police to make oral or electronic applications for PDOs in urgent situations.

The Victorian *Terrorism (Community Protection) Act 2003* (the Victorian Act) will also contain a statutory review provision, as is the case with the Queensland Bill, with a review to occur after four years and one year prior to the new expiry date of the legislation.

The Victorian Act is broader than the TPDA and deals with matters which in Queensland are included in the *Public Safety Preservation Act 1986* (PSPA).

The Victorian Bill was informed by the recommendations of a statutory review carried out in 2014, as was required under the current Victorian Act; and the Bill also makes several other amendments to the Victorian Act stemming from review recommendations. Notably, the Victorian Act contains a requirement that the Minister table an annual report on the operation of key elements of that Act each year.[30] In respect of preventative detention orders, the report must include details of:

- the number of PDOs made during the year and the number applied for
- whether a person was taken into custody under each PDO and for how long
- the number of persons subject to a PDO that were later charged with an offence of terrorism under the Criminal Code
- details of complaints made to the Ombudsman or IBAC
- the number of PDOs or contact orders found by a court to have been invalid.[31]

While Queensland's PSPA (which contains powers corresponding with much of the content of the Victorian Act) does have annual reporting provisions, the TPDA does not. However, s 743(2) of the *Police Powers and Responsibilities Act 2000* (PPRA) provides that the Public Interest Monitor (PIM) has a function to report annually on similar details to those required by the Victorian Act. The PPRA allows that the PIM's report may form part of another annual report the PIM is required to produce under another Act.[32]

Committee comment

Given the powers the TPDA provides to the executive in terms of detention without arrest or charge, it would seem appropriate that the Act itself detail reporting requirements to ensure Parliament is kept informed about when and how the powers are used, and to what effect (subject, of course, to the confidentiality of ongoing security operations). Preventative detention powers are of significant public interest. The committee questions whether an annual report is sufficiently timely to ensure Parliament is informed on the use of these powers, and suggests six months might be appropriate; and

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[29] COAG review, 2013, p 68.

[30] Terrorism (Community Protection) Act 2003, s 13.

[31] Victorian Review of Counter-Terrorism Legislation, Department of Justice (Vic), page 71.

[32] PPRA, Section 743(6).

that the report be a stand-alone report, and not part of another report which may be made to the Parliament on other matters.

On a related note, the committee queries whether national security mechanisms provide for the sharing of information between Australian jurisdictions about PDOs and those who have been detained, and invites the Minister to provide this information.

Recommendation 2

That the Bill be amended to provide that the Minister must provide a stand-alone report to Parliament within six months of the use of powers under the *Terrorism (Preventative Detention) Act 2005*, including at a minimum details of:

- PDO applications made and the outcome of application
- whether a person was taken into custody under each PDO and for how long
- the number of persons subject to a PDO that were later charged with an offence of terrorism under the Criminal Code
- details of complaints made to the Ombudsman or the Crime and Corruption Commission
- any PDOs found by a court to have been invalid
- review timing.

International jurisdictions

There are no other examples of a power of preventative detention without arrest or charge similar to Australian PDOs. Australia's PDOs do not fit into any known framework of preventive detention.[33] This view has been reiterated by other commentators, including the former Independent National Security Legislation Monitor, Mr Bret Walker SC who noted that the closest historical analogies were the internment of Japanese Americans by the United States (US) Government during World War II and the detention of suspected Irish Republican Army members by the United Kingdom (UK) Government in the 1970s.[34]

The UK preventative detention regime is not dissimilar to Australia's, though it is premised on quite different grounds: it is investigative, allowing police to arrest and question, take fingerprints and samples from detainees if they are reasonably suspected of being a terrorist, with subsequent charges then ultimately tested in a court of law. The Queensland (i.e. Australian) regime does not provide for arrest or for questioning of detainees and so is purely protective.[35]

Another difference between the UK and Queensland regimes lies in the protection of the rights of detainees. In the UK, rights are safeguarded by a Code of Practice specific to the detention, treatment and questioning by police officers of persons in police detention, which is a schedule to the *Terrorism Act 2000* (UK);[36] and European Human Rights treaties. The Queensland regime provides that the Public Interest Monitor is involved in all applications and may ask questions of any person giving information and may make representations to the issuing authority; and the Act provides for judicial review of final

[33] Stella Burch Elias, 'Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 Columbia Human Rights Law Review 99, 180.

[34] B Walker, Declassified Annual Report, Annual Report, independent National Security Legislation Monitor, 20 December 2012, p 67.

[35] Council of Australian Governments Review of Counter-Terrorism Legislation, 2013, p 64.

[36] *Terrorism Act 2000* (UK), s 41, schedule 8.

PDOs.[37] A judicial review is in respect to the administration of the PDO process, and does not test the 'reasonable suspicion' that underlies any PDO made.[38]

Preventative detention in the United States occurs on the basis of:

- The material witness statute, which is not designed for, but is used for this purpose. It allows the federal government to arrest and detain a witness where it can be established that the testimony of the witness is material to proceedings and that it may become impracticable to secure the presence of the witness by subpoena. There are no time limits on the period of detention and so a witness may be detained indefinitely. There are also no limits on the interrogation of witnesses, no requirement for legal representation, and witnesses do not have to be advised of the grounds for their detention before their first appearance.[39]

- The PATRIOT Act allows the US to detain any foreigners suspected of terrorist activity for up to seven days without filing charges or giving them an opportunity to ask a judge to release them. The Attorney-General also has the power to detain both legal and illegal immigrants until they are deported, as long as the Attorney-General has reasonable grounds to believe that they may be involved in terrorism.[40]

- Enemy combatant detention allows the Secretary of Defense to detain any non-US citizen who the President has reason to believe is a member of Al Qaeda; has engaged in planning for or acts of terrorism or acts which are designed to injure the US, its citizens, national security, foreign policy or economy, or has harboured any of the above. There are no time limits on detention and fewer guarantees of rights than under the material witness statute.

Issues in submissions

The issues raised by submitters in respect of the counter-terrorism measures contained in the Bill focus on extension of the preventative detention regime beyond the original ten year sunset clause, for a further ten years. The key questions raised are whether there are sufficient checks and balances in place, whether the balance between individual rights and liberties and community safety is appropriate under the TPDA; the utility of the legislation; when the TPDA should be reviewed, and associated with that, the length of time for which it should be extended.

Are there sufficient checks and balances in place?

The key point made by the Law and Justice Institute (Queensland) (LJIQ) and the Bar Association of Queensland (BAQ) is that the provisions of the TPDA are untested, and have not been reviewed – and that consequently, a ten year extension is not appropriate. Because they are untested, many of the comments made by both submitters are based on matters of principle and on application of experiences elsewhere and in 'like' circumstances, should the PDO regime be used in Queensland at any point.

The TPDA provides that applications for PDOs are decided by a senior police officer (initial orders) and by a judge or a retired judge appointed by the Minister (final orders). The LJIQ submitted that both initial and final PDOs should be issued by the Supreme Court. The argument is that the Supreme Court would test whether a suspicion is 'objectively reasonable', while the current arrangements provide

[37] PSBA response to submissions, p 4; TPDA, part 6.
[38] Judicial Review Act 1991, ss 4-5.
[39] 18 U.S.C.A. § 3144 Release or detention of a material witness.
[40] 8 USC § 1226.

that it is sufficient that the police officer seeking the order has a reasonable suspicion.[41] As the LJIQ pointed out at the public hearing:

> *Under this law, there is only a single objective test whether there are reasonable grounds. Under the criminal law, there is a subjective test and an objective test. Crucially, under the criminal law the decision maker needs to be reasonably satisfied that there are reasonable grounds. One of the major concerns about these laws is that the decision makers, either in respect of the initial order or in respect of the final order, do not themselves need to be satisfied that there are reasonable grounds, and it is a curious test. I would take issue.*[42]

In response to a committee question about whether there is any recourse such as compensation or legal action for a detained individual in the event of a PDO being considered by the detainee (after the fact) to have been wrongful, noting that the Act provides for judicial review of the issuing of final PDOs,[43] the QPS advised:

> *With any legislation, the onus always remains on the police officer or officers exercising any power to do so in good faith and lawfully. If a police officer or officers were to exercise these fairly extreme powers their actions would be subject to review and complaint. Should civil action be launched, they would be expected to be able to provide a suitable explanation of the factors that were weighing on their mind at the time they took this action.*
>
> *Everyone is accountable for what they do, even in extreme circumstances. The use of extreme powers does not lessen the responsibility on the person using those powers to do so in good faith and according to the law, as they understand it…..This law does not extinguish anyone's right to take civil action against the person who exercises the power.*[44]

Threshold test

The threshold for issuing of a PDO is that the police officer seeking the order has reasonable suspicion of imminent terrorist activity, or that the person needs to be detained to preserve evidence of a terrorist attack. The test of 'reasonable suspicion' is considered by the LJIQ and BAQ to be insufficient and further, may operate as a disincentive to police to use these powers:

> *I think one of the reasons why police do not find these powers useful—and it is a real balancing of the protection of people's rights and the desire to get something that is a simple way of dealing with a complex problem—is there is a minimum amount of information that has to be provided, and I think the perception by police is that that gives away too much about what we know and how our methods operate.*[45]

In other words, police officers may be concerned that providing the information a decision maker would require to determine whether the reasonable suspicion test is satisfied, could jeopardise operations on the matter. This goes to the practical utility of the legislation.

Applications for a PDO are heard in private, though the Public Interest Monitor, the potential detainee and his or her lawyer may be present at a hearing for a final PDO, and may ask questions of the applicant and make representations to the decision maker.[46] The LJIQ raises the concern that there should be a determination that the suspicion is objectively reasonable and that this could occur in the

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[41] TPDA, s 8.

[42] Hansard transcript, public hearing, p 9.

[43] TPDA, part 6.

[44] Hansard transcript, public briefing, p 1.

[45] Hansard transcript, public hearing, p 2.

[46] TPDA, s13, s23.

Supreme Court hearing applications. Further, it argues there should be a mechanism for the subject of any order to *'swiftly review it in a court'*:

> *Any statutory provision that effectively decimates the rules of natural justice should have, at the very least, these checks and balances.*[47]

A higher threshold test of the reasonableness of the suspicion, and an objective mechanism for testing it and for appealing decisions, are seen by the LJIQ as critical due to the:

> *Draconian power…to detain a person without charge and without a reasonable suspicion being formed of planned wrongdoing is an abhorrent concept and challenges the 'rule of law'.*[48]

The rule of law is enshrined in the Australian Constitution, with a fundamental purpose of providing a basis for the exercise of government power, as well as providing limits on that power. It has been a fundamental element of the system of governance Australia inherited from England, since the signing of the Magna Carta in 1215. It was designed to limit the unjust and arbitrary use of power by the King.

Key principles of the rule of law include:

- the law must be both readily known and available, and certain and clear
- the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds
- all people are entitled to the presumption of innocence and to a fair and public trial
- everyone should have access to competent and independent legal advice
- the judiciary should be independent of the executive and legislature
- the executive should be subject to the law and any action undertaken by the executive should be authorised by law
- no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being
- states must comply with their international legal obligations whether created by treaty or arising under customary international law.[49]

The relationship between the rule of law and national security has come under considerable scrutiny in the debate about balancing community protection with civil rights. For example:

> *The current political issues of anti-terrorism and border protection prompt us to ask whether the Australian government is totally restricted by the rule of law from exercising excessive and arbitrary power. May the government use arbitrary power against suspected terrorists and asylum seekers, or does the rule of law promise constitutional protection to these persons?*[50]

That question is fundamental to consideration of the Bill.

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47 Submission no. 2, p3.

48 Submission no. 2, p 3.

49 Law Council of Australia, http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law

50 Andrew Sykes, 2002. The 'Rule of Law' as an Australian Constitutionalist Promise. Deakin University School of Law, 9 (1) http://www.austlii.edu.au/au/journals/MurUEJL/2002/2.html

Utility of the legislation

The LJIQ and BAQ both question the utility of the TPDA provisions in respect of preventative detention. The BAQ cited the COAG review report as follows:

> *It should not be assumed that preventative detention could never be a proportionate response to the threat of terrorism, if it were a practical addition to powers deficient to prevent terrorism. Rather, in the case of Australia's PDO provisions, on analysis they yield very little if anything that adds to the capacity of ordinary arrest powers in this regard.*[51]

The BAQ went on to ask '*if you have got enough intelligence to apply for a PDO why not make an arrest?*' [52]

Similarly, the LJIQ argues that the fact that the preventative detention powers contained in the TPDA have never been used, in the ten years they have existed, suggests that they are not particularly useful:

> *… that they have not been used and the corollary that therefore they have not been abused, also, as I have said, demonstrates that our criminal laws are working well and our existing law is sufficient which raises the question of the need for the laws. The escalated terrorist threat and the tools that are available to meet that threat are something that should be the subject of a review, but as has been identified, there is a broad range of tools that are available to law enforcement to deal with those terrorist threats and I think that a lot of the police submissions on these things are that other tools are more effective for them, as Mr Keim also referred to: intelligence gathering, telephone interception. In fact, even questioning of people to add to the intelligence evidence base which law enforcement has available is arguably much more effective than pure preventative detention.*
>
> *It may be that the answer to why they have not been used is simply that they do not offer an effective tool in the arsenal available to our law enforcement authorities and, at the same time, they make these substantial incursions into civil liberties through the detention process. That is a long answer, but essentially whatever the current terrorist threat is there needs to be careful consideration about whether our existing criminal law provides sufficient police powers and our criminal law is sufficient to deal with them. A review could look at all of the instances in which perhaps applications have been made for an initial order, but that order has never been made. It may be that those safeguards are working, but we will never know that until a review is actually done.*[53]

The lack of use of the powers by states and territories was also noted as significant in the 2013 COAG review report recommending the repeal of this legislation.[54]

The BAQ made the additional point that police investigative work is the key to preventing terrorism, rather than preventative detention:

> *…simple solutions very seldom are an adequate substitute for hard work, for intelligent work, for providing proper resources and for doing the complex things that are required to deal with complex problems.*[55]

The BAQ also queried how useful the preventative detention provisions would actually be in an emergent situation and suggested a review could perhaps look at some specific examples, for example

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51 Independent National Security Legislation Monitor, Annual Report, 2012. http://www.dpmc.gov.au/sites/default/files/files/INSLM_Annual_Report_20121220.pdf

52 Hansard transcript, public hearing, 14 October 2015, p 5.

53 Hansard transcript, public hearing, 14 October 2015, p 8.

54 COAG Review of counter-terrorism legislation, p 68.

55 Hansard transcript, public hearing, 14 October 2015, p 3.

the Parramatta Police Station shooting, the Lindt Café siege, the Anzac Day matter in Melbourne and assess whether having PDO powers added any value, or could have added any value, to preventing those situations.[56] In respect of the Parramatta police station shooting, the BAQ noted that:

> *Subsequent raids were made. Subsequent arrests were made. But I do not think that a PDO would have assisted in detaining any of those people rather than arresting them.*[57]

Certainly, the 2013 COAG review of the Australian counter-terrorism legislation reported that police in several Australian jurisdictions found the TPDA legislation unwieldy in terms of the process that has to be gone through to obtain a PDO, and that the inability to question detainees limited police investigative powers in contrast to using powers available under other Acts.[58]

The QPS, explaining the government position, said that:

> *… it is a situation where it is better to have them and not need them, than to need them and not have them. We do not want to find ourselves in a situation in the middle of a crisis where we are looking for such an authority and not to have it, than the other way around.*[59]

Recognising that this is not a simple issue, and suggesting that counter-terrorism measures need to certainly go beyond measures such as preventative detention and to go beyond good police investigations, QPS advised:

> *There is no short-term solution to resolving the challenges that terrorism imposes on our society. Likewise, there is no panacea to eliminate the threat of terrorism. We must engage with the vulnerable to build resilience to the propaganda and grooming undertaken by terrorist groups and supporters. We must also assist vulnerable persons and those who have been radicalised to disengage and deradicalise from violent extremism.*[60]

Committee comment

The committee considers that although untested and unreviewed, the PDO regime should remain in place pending a review of what tools in the police arsenal are the best ones for Queensland to have in place, considering the balance between individual rights and liberties, community safety, and practical application.

Members note the advice that '*it is better to have them and not need them, than to need them and not have them*'.[61] However, the committee considers a review is required (see below); and in a more timely manner than is proposed by the Bill.

Extension and Review periods (clauses 13, 14)

The Bill would extend the TPDA for a further ten years, to December 2025.

As noted earlier, the Australian Government has extended its corresponding legislation for two years, Tasmania for ten, and Victoria intends to extend for five years.

Both the LJIQ and BAQ recommend that the TPDA be extended for two years, rather than ten; and a review commenced immediately or within six months of the Bill's extension, and tabled in advance of that two year TPDA expiry date.[62] The essential argument is that the Bill should not be extended for

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56 Hansard transcript, public hearing, 14 October 2015, p 4.
57 Hansard transcript, public hearing, 14 October 2015, p 4.
58 COAG Review of counter-terrorism legislation, 2013, pp 69-70.
59 Hansard transcript, public briefing, 6 October 2015, p 7.
60 Hansard transcript, public briefing, 6 October 2015, p 1.
61 Hansard transcript, public briefing, 6 October 2015, p 7.
62 Submission no. 3, p 4; Submission no. 2, p 2; and Hansard transcripts, public hearing, 14 October 2015, multiple references.

any longer than this, without being reviewed; and that a further extension should be subject to the outcomes of that review. The LJIQ submits that the Act should then be subject to ongoing reviews.

The rationale provided for the proposed ten-year extension is that Queensland, and Australia, is facing its highest ever level of threat from terrorism, and the security implications of the Syrian and Iraq conflicts for Australia are likely to continue for '*a number of years*':[63]

> *If you read all of the general expert analysis about our current serious and deteriorating situation it is generally accepted that the situation is unlikely to improve in the next five years, and people are saying that it is up to a decade or longer that we will be in this current state. That is the realistic and sad assessment of the situation we find ourselves in. If there were a lesser period proposed, in my view, I believe we would be coming back and asking for that to be extended in due course.*[64]

Further, the 2018 Commonwealth Games to be held on the Gold Coast presents known security issues:

> *In April 2018, Queensland will host the Commonwealth Games. These games will be the largest international sporting event staged in Australia for a decade, with more than 6,500 athletes and officials from 71 member countries and territories participating. There will also be international dignitaries in attendance along with a significant number of international tourists and a large international media presence. International events such as the Commonwealth Games are an attractive target for extremists due to the international media presence and the worldwide exposure that any terrorist attack would achieve.*[65]

The 2013 COAG review noted that both the Australian Attorney-General's Department and the Australian Federal Police see retention of PDOs as important, while accepting '*that improvements of various kinds could be made to the schemes at both Federal and State level*'.[66]

There have been no substantial amendments to Queensland's TPDA since implementation of the recommendations from the first review in 2007.[67] The committee notes that both the Australian and Victorian governments reviewed their counter-terrorism legislation before extending it.

For example the Victorian Bill proposes amendments to:

- require that where the police officer detaining a person is satisfied that the grounds on which the PDO was made have ceased to exist, the police officer must apply to the Supreme Court for a revocation of the PDO (or a variation, where the situation has changed)[68]
- allow police seeking a PDO to make the application using the name the officer knows the person by, rather than requiring the official name of the person[69]
- require a police officer detaining a person under a PDO to immediately release the person from detention is the officer is satisfied that the grounds for making the order no longer exist.[70]

Like Queensland's Bill, the Victorian Bill proposes a review period after four years (ie in 2020).[71]

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63 Hansard transcript, PSBA briefing, 6 October 2015, p 2.
64 Hansard transcript, PSBA briefing, 6 October 2015, p 10.
65 Hansard transcript, PSBA briefing, 6 October 2015, pp 2-3.
66 COAG Review of counter-terrorism legislation, 2013, p 68.
67 TPDA, Endnotes, pp 85-88.
68 Terrorism (Community Protection) Amendment Bill 2015 (Vic), cl 7.
69 Terrorism (Community Protection) Amendment Bill 2015 (Vic), cl 8.
70 Terrorism (Community Protection) Amendment Bill 2015 (Vic), cl 9.
71 Terrorism (Community Protection) Amendment Bill 2015 (Vic), cl 14.

The BAQ argued for a review because:

> *The continuation of such a regime requires a convincing justification on the basis of evidence that it is a necessary and proportionate response to the security issues which are said to make it necessary. A recognition of these factors may be seen as the explanation for the parliament's creation of the sunset provision of 10 years when the act was passed by the parliament. The association is of the view that a review should have already been conducted. It is unfortunate that that has not occurred, however, if the act is to be extended it should be for a minimum period necessary to allow a proper review to be conducted and for its report to be discussed and digested by the parliament and the populace. The association has suggested a two-year extension with a review to commence within six months.*

The LJIQ stresses the need for an independent review:

> *…the need for and the utility is at the heart of it, and whether it [the TPDA] strikes an appropriate balance of community safety and the incursion into civil liberties. The reason why an independent review has been proposed, rather than a review by the minister, is that it provides a robust and independent perspective for consideration by the executive and ultimate consideration by parliament. In that sense, it would remove the politics from the actual report, if it was independent.*[72]

The advice provided by the PSBA at the public briefing in respect of the proposed review period was that:

> *There is nothing preventing the minister asking for that to be done after three years if there were a significant change in the terrorist threat level. Nothing prevents a government from repealing an act. That could be done at any time. On the balance of it, it was decided that a review as to the need and effectiveness of the legislation would be conducted between the four- and five-year mark.*[73]

The Crime and Corruption Commission (CCC) expressed support for the legislative review provisions proposed in the Bill. It suggests it may be able to undertake that review in line with similar legislative reviews conducted on ministerial referral, such as its review of the *G20 Safety and Security Act 2013*.

Committee comment

While noting that there is nothing preventing a Minister deciding to review an Act earlier than the statutory time frame of four years, the committee respectfully points out that this has not occurred in the ten years of the Act's operation, including prior to proposing its extension, and introducing amendments. This has resulted in a lack of evidence to inform the extension and amendments proposed. In that context there is no reason to expect that a review would occur before it is required by law. For that reason the committee recommends the Act be amended to require an independent review to occur within two years of the Act's commencement, with a report required no later than three years of the Act's commencement. This timeframe would see the Act in operation over the Commonwealth Games period, offering the full extent of powers the Act currently provides should it be required over that time; and in the event those powers are required to be used, that would inform the review.

The committee suggests the review considers the provisions of the TPDA in connection with the powers contained in the PPRA and the PSPA – that is, the full suite of specific counter-terrorism legislation.

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72 Hansard transcript, public hearing, 14 October 2015, p 9.

73 Hansard transcript, public briefing, 6 October 2015, p 10.

In undertaking the review, the reviewer should specifically consider the recommendations of reviews undertaken in other Australian jurisdictions in respect of corresponding counter-terrorism legislation.

Recommendation 3

The committee recommends the Act be amended to require an independent review to occur within two years of the Act's commencement, with a report required no later than within three years of the Act's commencement.

2.2 Extension of TPDA and PSPA operation to waters and land adjacent to Queensland (clauses 9, 11, 12)

The Explanatory Notes to the Bill explain that the Bill would extend the PSPA and the TPDA from operating up to three nautical miles to a distance of 200 nautical miles seaward from the Territorial Sea Baseline.[74] This would mean that these two Acts were consistent with other Queensland and Commonwealth Acts in respect of crimes that occur at sea. Current legislative provisions allow the substantive criminal law to apply to that distance.[75] The TPDA and PSPA are not defined as being part of the substantive criminal law of Queensland.

In respect of this amendment, the QPS advised:

> *…it is very realistic to consider that a cruise liner operating up and down the Queensland coast coming in and out of Queensland ports, or any other private or commercial vessel, could be commandeered or used as a vehicle for a terrorist attack, either on board or using the vessel itself. In those circumstances our ability to be able to operate further away from the Queensland coast and take the necessary interdiction action I guess would be self-evident; the value of that to the Queensland Police Service. The current buffer of only a couple of miles out from the coast in our view is inadequate and extending our area of operation out to the 200-mile nautical mile limit we believe would significantly enhance our operations and therefore increase the safety of Queensland.*

Further, the PSPA does not have any extraterritorial application into another State or Territory:

> *This means that a declaration of a vehicle as a declared area for a terrorist emergency would cease once the vehicle left Queensland. Additionally, a declaration of a motor vehicle or vessel as a declared area for a terrorist emergency would not be able to be made prior to the vehicle or vessel entering Queensland from another State or Territory or entering Queensland's coastal waters.*[76]

The LJIQ queried the extension of the geographical reach of the TPDA and PSPA, suggesting that if there was a siege on a cruise ship within 200 nautical miles then a crime would have been committed and therefore, the substantive criminal law would apply.[77]

There appears to be no substantive and evidentiary base for the proposed amendment. No other state or territory extends their counter-terrorism powers to such a reach. The LJIQ considers this to be another area which could be covered in an independent review.[78]

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[74] Explanatory Notes, p 2.
[75] Crimes at Sea Act 2001; Crimes at Sea Act 2000 (Cwlth).
[76] Explanatory Notes, p 2.
[77] Hansard transcript, public hearing, 14 October, p 7.
[78] Hansard transcript, public hearing, 14 October, p 7.

2.3 Definition of occupier - Fire and Emergency Services (clause 4)

The Bill would amend the definition of 'occupier' in the *Fire and Emergency Services Act 1990* (FES Act) to help ensure all providers of accommodation provide a fire safe environment.

The QFES advised the committee that the context of this amendment was legal action taken recently in respect of budget accommodation, in which the QFES obtained an injunction to permanently close a building housing itinerant fruit pickers. The premises were found on inspection to have no smoke alarms and to have other features which would limit escape by residents in the event of a fire. Additionally, a case in Bundaberg was taken against an occupier of budget accommodation building and this identified a gap in the current legislation. While there was no question that there was inadequate fire safety in the premises, and there was overwhelming evidence that the defendant was directly involved in the management of the building, ultimately he was found not guilty because he was not the owner or the occupier of the building as defined under the QFES Act. The QFES explained:

> *The magistrate expressly stated that had a more extensive definition of occupier under section 230A of the Criminal Code been enacted in the Fire and Emergency Services Act the complainant would have proven beyond reasonable doubt that the defendant was, in fact, the occupier of the building because he had the care, management and supervision of the place. Therefore, the extended definition of the occupier is designed to address a gap in the legislation so that the occupiers cannot avoid prosecution for failing to maintain prescribed fire safety installations thus putting the safety and lives of their tenants at considerable risk to life and injury. The amendment will ensure the community is protected by providing a deterrent for unscrupulous occupiers who put financial gain over the safety of their occupants.*[79]

This Bill addresses situations where properties are sub-leased by employers or employer agents, clarifying who has the responsibility for ensuring fire safety requirements are met. Full responsibility in terms of fire safety would, under the Bill, rest with *'the owner, lessee or person apparently in charge of the premises, or a person who has the care, management or supervision of the premises or who is conducting a business at the premises'.*[80]

The committee was briefed by the Anti-Discrimination Commission Queensland (ADCQ) in September 2015, where the issue of fire safety for properties occupied by workers on 417 visas was raised by the ADCQ:

> *Sometimes contractors can be the accommodation provider and the employer, so they [*workers*] are quite captive and beholden in that situation. Sometimes they can be paying quite a significant amount of rent for substandard and quite overcrowded accommodation, and it is potentially quite a dangerous situation. About a month ago as a result of a lot of these issues we partnered with QFES to hold a forum around accommodation at our offices at 53 Albert Street. There were approximately 15 councils from right throughout Queensland.*[81]

The ADCQ went on to explain that QFES had expressed grave fears at these forums of *'finding that another Childers has occurred in rural Queensland'*. The human and economic loss was expanded upon:

> *That would be devastating for the local community with the loss of life but also for the reputation of the town. If it is seen as an area that does not look after rural workers and*

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79 Hansard transcript, public briefing, 6 October 2015, p 5.

80 Bill, clause 4.

81 Hansard transcript, ADCQ general briefing 16 September 2015, p 2.

> *rural residents, they will get a bad reputation and people will not be interested in coming to that area to assist with the very vital work of doing crop picking or rural work. It is very important that councils develop very strong relationships with the local fire service and that they work collaboratively.*[82]

Directly relevant to the committee's consideration of this Bill was the advice by the ADCQ that the QFES under the FES Act, and not councils, hold the strongest powers of entry to inspect the properties in question.

> *They need to work in partnership with each other, but they also need to pass local government laws in that area to regulate how those areas are used and to have good networks on the ground because often they are hidden away and people do not know where they are.*[83]

This matter was explored with the QFES at the briefing on this Bill, where in response to a committee question the QFES advised:

> *I believe that the state government and local authorities can do quite a bit more to protect the lives of itinerant workers and backpackers who visit our country. I think we would expect the same of authorities in other countries when our children visit those countries. Some of the examples that have been brought to my attention recently I presented at an itinerant workers' forum in Stanthorpe, which was organised by the Southern Downs council. It was attended by other partner agencies and local government authorities, such as the Bundaberg council, which have implemented a change in their planning regulations to allow the approval of more budget accommodation within the area. They have relaxed their planning scheme, basically, to allow more budget accommodation. By allowing the budget accommodation buildings to be approved, once they are approved they comply not only to the planning scheme but also to the fire service regulations.*
>
> *Another issue that was raised recently at the interagency work group organised by Workplace Health and Safety/Justice and Attorney-General, which fire services is a partner agency to, was that a lot of compliance officers within local government do not have power of entry to, basically, enter a building to identify whether or not they are budget accommodation. That is an area of improvement that local government can improve on.*[84]

Committee comment

The committee considers this an important amendment to the FES Act. Several committee members are well aware of the issues facing itinerant workers in Queensland. The committee believes that the government must do what it can to ensure the physical safety of that population, and all other residents of budget accommodation.

Recommendation 4

The committee recommends the Minister advise the House of whether the government is progressing further work with local government authorities in respect of improving fire safety regulation in budget accommodation.

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[82] Hansard transcript, ADCQ general briefing, 16 September 2015, p 2.

[83] Hansard transcript, ADCQ general briefing, 16 September 2015, p 2.

[84] Hansard transcript, PSBA briefing, 6 October 2015, p 6.

2.4 Immunity from proceedings – *Police Service Administration Act 1990* (clause 6)

The Bill would provide civil liability protection to a commissioner for police service reviews for an act done or omitted to be done in good faith and without negligence in the exercise of powers under section 9 of the *Police Service Administration Act 1990* (PSSA); and protection from civil liability for applying for or otherwise being involved in a review of a decision under this part.

These civil liability protection provisions are currently contained in regulation, and a government review recommended that they are more appropriately placed in the PSSA, which already contains other civil liability protection provisions.

The Crime and Corruption Commission (CCC) submitted on this provision of the Bill, noting that it was largely a procedural change, moving the protections from regulation to the PSAA, with little substantive impact on a commissioner's liability and protection from liability. The CCC points out that police service review commissioners are paid and administered by the CCC, which has chosen to indemnify them for civil liability arising from their official liabilities, including the legal costs of any judicial reviews. The CCC advises the committee that in its submission to the current Parliamentary Crime and Corruption Committee's (PCCC's) review of the CCC, it has requested legislative change that would:

> *…align the civil liability and protections of CCC officers and police service review commissioners with the new (since March 2014) more comprehensive protections for other public sector employees and police officers.*[85]

Committee comment

The committee supports the proposal to move civil liability protections for police service review commissioners from regulation to the PSSA, and notes the advice from the CCC in respect to its recommendations to the PCCC that there be legislative change to align protections for CCC officers and police review commissioners, with those applicable to police officers and the public sector more broadly.

2.5 Commonwealth machinery of government changes and Queensland legislation

To reflect changes by the Australian Government in respect of the new Department of Immigration and Border Protection, the Bill would amend the *Weapons Act 1990* and the *Police Service Administration Act 1990* to reflect the changes in agency names particularly with respect to the Australian Border Force. These are technical amendments.

Committee comment

The committee notes these technical amendments and considers they are appropriate.

[85] Submission no. 1, p 1.

3. Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

Preventative detention orders (Clause 13)

Clause 13 amends section 83(1) of the TPDA to change from 10 years to 20 years the expiry date of the TPDA. The Act would expire on 16 December 2025 rather than 16 December 2015.

Preventative detention orders by their very definition limit the rights and liberties of individuals. In extending the Act's operation for another 10 years, those provisions of the TPDA that potentially infringe upon the rights and liberties of individuals, such as the preventative detention order regime, will continue to do so for a further decade.

This is acknowledged in the Explanatory Notes:

> *The extension of the Act effectively extends the police powers currently contained in the Act. Many of these police powers infringe the rights and liberties of individuals. However, the infringement of civil liberties through the detention of a person, for the purpose of preventing an imminent terrorist act or securing evidence following a recent terrorist act, is regarded as necessary for the protection of the community and it is considered that the Act provides adequate safeguards for use of the police powers.*[86]

The Explanatory Notes advise that over the next two years preventative detention legislation in all jurisdictions is scheduled to expire and that only the Commonwealth has extended the operation of its legislation to date, albeit only to 7 September 2018. The Notes further advise that COAG recommended the extension of preventative detention legislation for a further 10 years.

The continuing need for preventative detention legislation to continue is outlined at page 2 of the Notes:

> *Queensland's TPDA contains a 'sunset' provision, which will see the Act expire at midnight on 16 December 2015. The TPDA remains a valuable tool for police to respond to an imminent or recent terrorist act. Due to the nature of terrorism, police may need to intervene early to prevent a terrorist act, or act on less information than would be the case in more traditional policing responses. For Queensland to retain the TPDA as part of its counter-terrorism legislative framework, the sunset provision needs to be extended.*

These issues are canvassed in more detail in section 2.1 of this report.

Fire and Emergency Services (clause 4)

Clause 4 of the Bill amends the definition of an 'occupier' for the purposes of the *Fire and Emergency Services Act 1990* from being "*used with reference to any premises, means the person in actual occupation, or, if there is no such person, the owner"* to:

occupier, of premises, means—

a) the owner, lessee or person apparently in charge of the premises; or

[86] Explanatory Notes, p 8.

b) a person who has the care, management or supervision of the premises or who is conducting a business at the premises.

The reasonableness and fairness of treatment of individuals are relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

The Explanatory Notes advise in respect of clause 4 that:

> *The Bill amends the Fire and Emergency Services Act 1990, extending the obligations on the occupier of a building or premises, including those related to maximum occupancy, maintenance of fire safety equipment and smoke alarms. The current definition of occupier does not capture absent occupiers, rent-masters (lessees who sub-let to multiple persons) and managers of illegal unsafe rental accommodation.*[87]
>
> *……*
>
> *Expanding the definition of an occupier of a building or premises under the FESA to mirror the definition of occupier under the Criminal Code will have the effect of increasing the number of persons who may be liable for offences under FESA. It may be argued that this amendment will impact upon fundamental legislative principles by adversely affecting the rights and liberties of the individuals who will then be liable for these offences. This concern is outweighed by the community interest in ensuring that persons who, as occupiers, engage in unsafe practices and endanger others do not avoid criminal liability.*[88]

Committee comment

The committee considers that, in light of the limited and legitimate public safety aims of the proposed amendment, the expansion of the definition of an occupier is, despite its impact on some accommodation providers, an acceptable departure from fundamental legislative principles that is being made in the public interest.

<u>Police – immunity from proceedings (Clause 6)</u>

The Bill inserts new sections 9.7 and 9.8 into the *Police Service Administration Act 1990* (PSAA).

Section 9.7 confers immunity on a (police service) review commissioner, or a person acting at the direction of a review commissioner, from an action, suit or proceeding in relation to an act done or omitted to be done, in good faith and without negligence, in the exercise or purported exercise of a function or power under Part 9 of the PSAA.

Section 9.8 provides for a civil liability protection for a person (who acts in good faith and without negligence) who applies for, or is otherwise involved in, a review of a Part 9 decision, or who gives oral, written or other matter to a review commissioner, or a person acting at his/her direction, for the purposes of a review of a Part 9 decision.

The Explanatory Notes advise that clause 6 relocates the civil liability protections found in section 16 of the *Police Service Administration (Review of Decisions) Regulation 1990* to the PSAA.

The Notes advise that:

> *It is considered appropriate to relocate these civil liability protections to the PSAA to ensure that reviews continue to be conducted in an open, independent and impartial way. There must be no fear of litigation for the review commissioner, decision-maker, applicant or any person presenting material or making submissions.*

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[87] Explanatory Notes, p 4.

[88] Explanatory Notes, p 6.

> *The provision of civil liability immunity to a person applying for a review, otherwise being involved in a review or giving oral, written or other matter to a review commissioner is consistent with the immunity provided at common law to witnesses in court proceedings to ensure the independence of court hearings. Similar immunities are also provided in section 238 'Protection from civil liability' of the Queensland Civil and Administrative Tribunal Act 2009, section 21 'Examination of witnesses by counsel etc' of the Commissions of Inquiry Act 1950 and section 203 'Protection of members, legal representatives and witnesses' of the Crime and Corruption Act 2001.*
>
> *The immunity does not alter the position that the State may be vicariously liable for the actions of its employees.*[89]

Legislation should not confer immunity from proceeding or prosecution without adequate justification.[90] The Office of the Queensland Parliamentary Counsel (OQPC) Notebook, a detailed and evolving examination of issues arising with respect to fundamental legislative principles in Queensland, states

> *…a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State.*[91]

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, conferral of immunity can be considered appropriate in certain situations.[92]

Committee comment

As acknowledged in the Explanatory Notes, the conferral of immunity from liability for acts done or omissions made honestly/in good faith and without negligence is fairly standard across legislation establishing Boards, Commissions, statutory authorities and for public officers. It is designed to ensure people serving in the public interest or in a public capacity do not feel unduly hampered in the exercise of their duties and powers by concerns that they may be held personally liable because of a decision they made in an official capacity.

In light of the public policy rationale for conferring immunity on public officials in the exercise of their official duties, the committee is satisfied that the conferrals of immunity in the Bill as outlined above are appropriate.

Australian Government changes and Police and Weapons Acts (clauses 7 and 17)

Clause 7 inserts a new s 11.16 into the PSSA to make transitional provision for the operation of the Bill if enacted.

Clause 17 inserts a new s 192 into the *Weapons Act 1990* to make transitional provision for the operation of the Bill if enacted.

These transitional provisions apply retrospectively, covering the interim period which is defined as the period starting on 1 July 2015 and ending on the commencement of the extended Act.

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[89] Explanatory Notes, p 6.

[90] Legislative Standards Act 1992, section 4(3)(h).

[91] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: The OQPC Notebook, page 64.

[92] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 64; Alert Digest 1998/1, page 5.

The Explanatory Notes advise that these retrospective transitional provisions are required due to machinery of government changes of the Australian Government, amalgamating the Australian Customs and Border Protection Service and the Department of Immigration and Border Protection into the new Department of Immigration and Border Protection, which incorporates the Australian Border Force, a single frontline operational and border control and enforcement entity. The Bill would allow the authority given to the former bodies under their Acts to continue to apply during an interim period between 1 July 2015 and the commencement of Queensland legislation.

> *The retrospective provisions do not extend or apply an authority which was not previously stated in legislation. The retrospective provision for the Police Service Administration Act 1990 will ensure information previously exchanged with the Australian Customs and Border Protection Service can continue to be exchanged with the new Department of Immigration and Border Protection during the interim period.*
>
> *Similarly, the retrospective provision which applies to the Weapons Act 1990 allows a person who is an Officer of Customs under section 4(1) of the Customs Act 1901 (Cwlth) to continue to be afforded an exemption under section 2(1)(c) of the Weapons Act 1990 with respect to that officer's possession or use of a weapon in the performance of duties as an Officer of Customs in the Australian Border Force.*[93]

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

Committee comment

In light of the explanation offered in the Explanatory Notes as to the federal changes that administratively required retrospective application of the Queensland provisions to customs officers, and the fact that, as stated, '*the retrospective provisions do not extend or apply an authority which was not previously stated in legislation*', the committee is satisfied that the retrospective operation of the transitional provisions will not operate to any person's detriment or retrospectively impose obligations on any person.

3.2 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a considerable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[93] Explanatory Notes, pp 7-8.

Appendix A – List of Submissions

001	Crime and Corruption Commission
002	Law and Justice Institute
003	Bar Association of Queensland

Appendix B – Witnesses at public hearing

Bar Association of Queensland

- Mr Stephen Keim SC

Law and Justice Institute

- Ms Emma Higgins, Solicitor
- Ms Louisa Pink, Solicitor