Crime and Corruption Commission Review of the *Terrorism (Preventative Detention) Act 2005*

Queensland Government response

I table this Government Response to the Crime and Corruption Commission's (CCC) report reviewing the *Terrorism (Preventative Detention) Act 2005* (the Act). The review was required under the Act to determine the need for, and effectiveness of the Act. The CCC's report on its review of the Act (hereinafter referred to as the CCC report) is also tabled (as an attachment to the Government response) in the Legislative Assembly in accordance with section 83A of the Act.

Current threat environment

Queensland, in partnership with Australian Government, state and territory agencies continues to prepare for, prevent and respond to evolving threats of terrorism utilising a suite of strategies and legislative tools designed to help ensure public safety. While Australia's National Terrorism Threat Level is at Probable, the volatile nature of the security environment, means that terrorism plots develop quickly and there is often less time for police and security agencies to detect and disrupt them.

The nature of terrorism has evolved from a centrally controlled and coordinated threat resulting in a large scale September 2001 type attack, to also include de-centralised and lone actor threats which result in attacks that can lack coordination, involving fewer offenders and less sophisticated means. Consequently, recent terrorist attacks on western societies have ranged from the November 2015 Paris terrorism attack involving three co-ordinated groups of armed criminals and suicide bombers, to the less co-ordinated 2017 London Bridge attack involving three offenders, a vehicle, explosive material and knives, and the 2017 Westminster vehicle attack involving one offender but still tragically resulting in four deaths.

Significantly, the terrorism threat is not limited to Europe or the Middle East. Our Asian neighbours, on Queensland's northern doorstep, have also been forced to confront and respond to extraordinary incidents of terrorism in their communities. Our Indonesian neighbours, in particular, have been subject to numerous attacks involving explosive devices and most recently in 2018 security concerns have been heightened by the desperate and extreme Islamic State of Iraq and Syria (ISIS) inspired tactics used in Surabaya, Indonesia. The use of families, including young children to conduct suicide bombings at places of worship, police stations and other crowded places represents another shift in behaviour, and another challenge for police and security agencies to contend with in their attempts to maintain community safety and democracy.

The volatile nature of the domestic and international geopolitical environment provides changing motivators for radicalised groups and individuals to undertake acts of violent extremism, both here and overseas. The complicated conflicts in Syria and Iraq, the associated humanitarian crisis and population displacement, has seen around 230 Australians, inspired by groups such as ISIS and Al-Qaida, travel to fight and support these groups. Further to this, around another 230 people are being investigated for providing support to the Syria/Iraq conflict, including through funding and facilitation, or are seeking to travel to join these groups. The overwhelming majority of these are young men and women.

As battlelines move and conclude in Syria and Iraq, new challenges present themselves with some Australians seeking to return home or move to other ISIS conflict zones such as the island of Mindanao in the Philippines. Returning foreign fighters represent a unique, long term security challenge to Australia, with many returning with new technical skills and agendas since leaving Australia and these risks need to be constantly managed.

Since 2001, nationally 55 people (including five who were juveniles when charged) have been convicted of terrorism related offences, 36 of these people are currently serving custodial sentences. There are 37 people currently before the courts for terrorism related offences, two of whom were juveniles when charged.

Since 12 September 2014, when Australia's National Terrorism Threat Level was raised, 90 people have been charged as a result of 40 counter-terrorism related operations around Australia. There have been six attacks with 14 major counter-terrorism disruption operations in response to potential attack planning in Australia. Clearly, the threat within Australia is real.

The types of attacks being seen in Australia and overseas has changed dramatically and as a result the type of security investigations, disruption and prevention strategies required to be undertaken has broadened. Threats have developed to range from large scale, well planned, technically complex attacks, to attacks using simple weapons coupled with rapid targeting of victims. The use of easily accessible instruments, such as knives and motor vehicles in attacks, highlights the difficulties faced by governments and law enforcement in detecting and preventing this type of conduct. The suspected terrorist attack in Melbourne on 9 November 2018 is another tragic reminder of the threat to community safety posed by individuals with both the intent and capability to carry out an attack in Australia's crowded places.

The national framework for preventative detention

The CCC report (page 5) sets out the background to Australia's national preventative detention regime starting with the 2002 Council of Australian Governments (COAG) Intergovernmental Agreement (IGA) on Australia's National Counter-Terrorism Arrangements. This IGA followed the United States of America attacks in 2001 and established a new national arrangement to enhance Australia's ability to combat terrorism.

The 2001 attacks were soon followed by numerous further large-scale tragedies including the 2002 Bali bombing resulting in 202 deaths, the bombing of transport networks in Madrid in 2003 with 191 killed and Mumbai in 2006 with 200 train commuters killed, and thousands of casualties resulting from these incidents. Disasters of this scale are unimaginable in Australia, but unfortunately possible in an ever-changing domestic security environment.

As indicated by the CCC it was the 7 July 2005 London terrorist attacks which resulted in 52 deaths which was the immediate precursor to the 27 September 2005 COAG agreement to establish complementary preventative detention legislation at the state, territory and Commonwealth levels.

Queensland and other states and territories moved quickly to implement this agreement with most jurisdictions' legislation commencing by the end of the same year.

An ongoing need for preventative detention powers

As prefaced above, the ongoing monitoring and scrutiny of the use of this legislation is important. The Act requires the Minister to table a report to the Parliament following a preventative detention application being made. The Act also requires the Minister to table a report to the Parliament about the use and effectiveness of the Act. In this instance the Police Minister requested the CCC, as the most suitable body, to conduct the independent review into the need for, and effectiveness of the Act. The CCC commenced its review in October of 2017 and has now completed its report and made nine recommendations for consideration. (Report Attached)

The Queensland government welcomes and supports the CCC's overarching finding that there is a narrow but ongoing need for the specific powers contained in the Act. The Government continues to be acutely aware of the delicate balance that exists and must be continually evaluating between the protection of individual liberties and the need to protect the community from the very real threat of terrorism. This type of preventative detention legislation must be carefully considered in light of Australia's highly valued individual rights and freedoms, which are the foundation of a democratic and free society. However, issue specific or politically motivated attacks also seek to threaten or undermine individual rights and freedoms.

Consequently, this type of legislation recognises that on rare occasions the emphasis must, for a limited period of time and in limited circumstances, be on community safety over some rights of the individual, with appropriate safeguards to preserve the democratic norms of our society. Thankfully, in Queensland an occasion has not yet occurred to cause this legislation to be used. However, it has been necessary to use this legislation in other jurisdictions, and on examination of the legislation the CCC accepted there "… *is the potential for situations to arise where other laws and powers cannot be relied upon to prevent a terrorist act or preserve evidence of a terrorist act."* (page 18)

It should also be noted this type of legislation does not sit in isolation. It is part of a suite of tools and strategies that police and security agencies use, cooperatively to keep Australia safe and free. In Queensland like other jurisdictions, there is a strong focus on prevention and preparedness. This type of legislation is a last resort option where other options are unlikely to be effective. To illustrate its last resort nature, in the 40 counter-terrorism operations undertaken nationally since 2014 alone, other strategies and tools were utilised instead of preventative detention in 38 of those operations.

An urgent need to reinvigorate a nationally consistent approach

In December 2017, COAG recommitted to a nationally consistent approach in our counter-terrorism efforts and First Ministers signed an updated version of the IGA. In doing so, COAG noted:

"*Terrorism is a threat we must combat together. Jurisdictional boundaries do not deter terrorists, so they should never limit our efforts to stop them.*

A nationally consistent approach to preventing and responding to terrorist threats underpins Australia's national security in a complex and evolving threat environment. ***Close cooperation and interoperability between Commonwealth and state agencies is critical to Australia's ability to counter terrorism.*** *It is the bedrock of our national counter-terrorism effort. And by strengthening legal frameworks, implementing new practices and programs and improving information sharing, we are better equipping our security and law enforcement agencies, strengthening protections for public places, and preventing radicalisation and violent extremism."*

The CCC found that the "existence of the TPDA performs an important function in ensuring Queensland remains in line with other jurisdictions and has the capability to support interoperability" (page 34). While the CCC found there was scope for jurisdictional differences which have occurred over time, the report identified "there are some aspects of preventative detention where national consistency … may be important for interoperability" (page 35).

Nevertheless, the passage of time has also resulted in differences which may have a detrimental impact on interoperability. The CCC noted, in particular, inconsistences in the minimum age limit and the duration of initial preventative detention orders (page 35). Recent amendments to Victoria's preventative detention laws, to introduce a limited questioning power and increased safeguards, mean Victoria's regime is now quite different from the regimes in the remaining states, territories and the Commonwealth.

Issues of national consistency and interoperability must also be considered in the context of the pre-charge detention laws of New South Wales and the Commonwealth.

In October 2017, New South Wales introduced a new investigative detention regime into its *Terrorism (Police Powers) Act 2002* allowing for the arrest of a terrorism suspect for the purposes of investigative detention, including a power to question for up to 16 hours per day, for up to 14 days. While New South Wales has retained its preventative detention order legislation it is assumed that it would preference its investigative detention powers in the future, particularly in circumstances where the threshold for arrest cannot be readily met under the Commonwealth's Part 1C of the *Crimes Act 1914* (the Crimes Act).

Part 1C of the Crimes Act provides for the formal arrest and questioning of persons suspected of committing terrorism offences. In December 2017 the Commonwealth committed to the enhancement of this regime, which is understood to include extending the total period of investigative detention to 14 days.

Clearly, the recommendations made by the CCC have come at a time of extensive review and change to Australia's counter-terrorism laws. The current state of affairs has introduced increased complexity and potential vulnerability for the nation, particularly if faced with an attack which crosses state and territory borders. To counter this risk the CCC, in concluding its review of the need for and effectiveness

of the Act, called for *"further coordination by COAG and a clear direction for Australia's preventative detention regime and other counter-terrorism laws"* as *"essential to optimising Australia's counter-terrorism efforts as intended by the IGA*" (page 41).

Queensland's response

The Queensland Government accepts the CCC's finding "that there is the potential for situations to arise where other laws and powers cannot be relied upon to prevent a terrorist act or preserve evidence of a terrorist act" and that there is a narrow but ongoing need for the specific powers contained in the Act.

The Queensland Government also notes that legislation is due to automatically expire under a sunset clause in 2025. While the CCC did not recommend a further legislative requirement to review the continuing need for the Act, the Government nevertheless commits to conducting a further review of whether there is a continuing need for the Act by 2024, and this will be a legislative requirement. As noted above, this recognises the extraordinary nature of this legislation in preferencing community safety over some rights of the individual.

The Government's response to the specific recommendations to allow questioning under the Act, with additional safeguards, is set out below.

Recommendations 1 – 3, 5 – Defer consideration

At the crux of the CCC's report, is its finding that the inability for police to question a person detained under a preventative detention order is a significant factor that may limit the effectiveness of Queensland's preventative detention order regime under the Act. Accordingly, the CCC has recommended (Recommendation 5) that the Act be amended to allow police to question a person detained under a preventative detention order in limited circumstances and where such questioning is related to the objectives for which the order was made. The proposed questioning power is accompanied by other legislative based recommendations including new evidence use limitations, increased contact and access freedoms for detainees, increased information access to enable a detained person to challenge their detention, and additional oversight. Queensland agrees with the CCC's finding that the inability to question is a significant drawback and is supportive of the need for an expanded power to question a detained person, with appropriate safeguards, to help prevent a terrorist attack or to preserve evidence of an attack.

However, noting the amendments pending to Part 1C of the Crimes Act (referred to above) and the CCC report's endorsement of the importance of national consistency, it is considered that the adoption of this (and other) recommendations would require Queensland to take a pathway that would further diverge from the notion of national consistency. Moreover, to adopt an approach that deferred consideration of the questioning power, but implemented other recommendations to enhance legislative safeguards, would risk weakening Queensland's regime and making Queensland potentially more vulnerable than other Australian jurisdictions in its ability to respond to terrorism.

For this reason, the Government's response to the CCC report declines to implement any of the report's recommendations requiring legislative amendment at the current time. Instead, the Queensland

government proposes to review the recommendations relating to the need for a questioning power and additional appropriate safeguards, having regard to the prevailing national framework of counter-terrorism laws, including progress of amendments to Part 1C of the Crimes Act, after 12 months of tabling this response (the 12 month review). The 12 month review will work towards achieving a legislative outcome that best ensures the safety of the Queensland community. The outcome of the 12 month review will also be publicly released.

Crucial to the Government's future deliberations in this regard will be the introduction and adequacy of the Federal government's planned amendments to Part 1C of the Crimes Act. Queensland will continue to advocate that the Federal Government should finalise their proposed amendments, under the commitment made at the last December 2017 Special COAG meeting. As part of this process Queensland will also highlight the issues raised in the CCC review regarding the need to consider the impact of different approaches adopted in different jurisdictions and the possible detrimental impact these may have on effective interoperability.

It should be noted that the Government (as detailed below) will implement certain recommended safeguards that do not affect the interoperability of Queensland's scheme, nor make Queensland more vulnerable, and where this can be achieved without legislative amendment.

Recommendation 4 – Not supported

Recommendation 4 proposes an expansion to the existing compensation scheme contained in the Act. The possibility of financial consequences because of detention is acknowledged, for example in the form of lost salary or income. The Act currently provides the Supreme Court may order compensation if satisfied a preventative detention order should not have been made or the treatment of a detained person contravened the Act.

The compensation scheme proposed by Recommendation 4 is broad and does not take into consideration the fact that failure to commence a prosecution for terrorism offences can mean for example, that the requisite level of criminal proof has not been reached at that time. Moreover, the proposed 14 day timeframe fails to acknowledge the complexity of terrorism investigations.

Consequently, the scope of the compensation scheme proposed by the recommendation scheme is not supported.

Recommendations 6 & 8 – Supported

Recommendation 6 relates to the development or amendment or review of policies, procedures and training materials to support the proper operationalisation of the Act in Queensland. Implementation of this recommendation does not alter the Act's existing provisions. Similarly, recommendation 8 requires the development of written guidelines detailing minimum conditions of detention and standards of treatment for people detained under preventative detention orders. Neither recommendation, if implemented, could be said to unduly impact on national consistency or interoperability and are therefore supported by the Queensland government for immediate implementation. Any legislative changes

ultimately progressed to the Act would be accommodated in resultant policies and procedures accordingly.

Recommendations 7 & 9 – Supported in principle

Recommendation 7 requires amendment of the Act to introduce additional safeguards for children, which the CCC considered would be particularly important if the minimum age for preventative detention regimes nationally is lowered to 14 years. Recommendation 9 relates to amendments to require the police to notify the Queensland Ombudsman and the CCC of a person's detention under a preventative detention order and to enable the Ombudsman to make representations in relation to a person's detention under an order. In line with the Government's approach to defer consideration of any legislative amendments to the Act at this time, it is not proposed to amend the Act to incorporate these additional safeguards at this time.

However, the implementation of recommendations 7 and 9 do not require divergence from the current legislated conditions under which detained persons are to be held under preventative detention orders but rather enhance the monitoring and oversight of this detention. Again, their implementation would not unduly impact upon national consistency, and particularly, the interoperability of Queensland's regime with those of other states and territories. Insofar as is possible, and in implementing recommendations 6 and 8, Queensland will therefore seek to substantially implement the policy intention of recommendations 7 and 9. The need for any legislative amendment to further support these recommendations will be considered alongside the Government's proposed 12 month review of the CCC's recommendations.