

**REPORT TO THE  
MINISTER**

**REVIEW OF THE  
*Terrorism (Preventative Detention) Act 2006***

Legal and Legislative Services  
Western Australia Police

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## **Executive Summary**

The *Terrorism (Preventative Detention) Act 2006* came into effect on 22 September 2006. The Act forms part of a national framework of counter terrorism legislation based on Part 5.3 of the *Criminal Code* (Cth). In 2005, all States and Territory leaders agreed to enact preventative detention legislation which, due to constitutional restraints, the Commonwealth could not.

The Act provides Western Australia Police with necessary powers to allow a person to be taken into custody and detained for a short period of time in order to prevent a terrorist act occurring in the near future, or preserve evidence of, or relating to, a recent terrorist attack. It was recognised at the 2005 Council of Australian Governments (COAG) meeting that the nature of a terrorist attack means police may need to intervene earlier to prevent a terrorist attack with less knowledge than they would have using traditional policing methods. These powers supplement the functions performed by Western Australia Police under the National Counter Terrorism Plan (NCTP).

As yet, the powers under the Act have not been exercised. As a consequence, it is difficult to gauge their efficacy. Counter terrorism exercises conducted both locally and nationally, however, allow certain conclusions to be drawn as to the likely effectiveness of the Act.

During the review period no circumstances have arisen which would have necessitated use of the Act. However, the fact that the powers can be regarded as a preventative deterrent to terrorism, as considered when Western Australia was required to mount an extensive police and security operation for the Commonwealth Heads of Government Meeting (CHOGM) in October 2011, evidences the need to retain these important powers to combat terrorism.

Consequently, despite there having been no use of the *Terrorism (Preventative Detention) Act 2006* since its enactment, this lack of use does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers.

## **Recommendations**

Given that the powers under the legislation have not yet been exercised, and there is little that may be drawn upon to assess the practical effectiveness of the Act, no substantial reforms of the Act are recommended at this time. It may be that by the time the next statutory review takes place issues of significance may have arisen which may warrant some substantive changes to the Act or, alternatively, lack of use or perceived utility may support the expiry of the Act in 2016.

Nevertheless, during the course of the Review a number of issues have been raised which warrant consideration in terms of the drafting of amendments to the Act to improve its effectiveness. These amendments pertain to:

- the need to amend the definition of "terrorist act";
- issuing preventative detention orders to unknown/unidentified persons;
- managing detainees who volunteer information;

- clarifying the use of powers provided for the Inspector of Custodial Services;
- substituting the term "intellectual impairment" for the term "incapable of managing his or her affairs";
- providing detainees with access to legal aid;
- making allowance for further authorised contacts (for example, a detainee contacting an authorised chaplain); and
- clarifying a number of minor matters to improve the operation of the Act.

Considerable concerns have arisen regarding the overall utility of the Act and corresponding legislation. With the COAG review of national counter terrorism legislation imminent, however, it is considered prudent to leave the Act as is rather than pre-empt deliberations by COAG.

Further information on these matters is detailed in Part 5 of this report.

## **1. Introduction**

### **1.1 Terms of reference for the review**

Section 59 of the *Terrorism (Preventative Detention) Act 2006* ('the Act') provides as follows:

#### **59. Review of Act**

- (1) In this section —

**first anniversary** means the day of the first anniversary of the day on which this Act receives Royal Assent.

- (2) The Minister must carry out a review of this Act as soon as is practicable after —

(a) the first anniversary; and

(b) the expiry of each 3 yearly interval after the first anniversary.

- (3) The review must review the operation and effectiveness of this Act, whether its provisions are appropriate having regard to its object, and whether it should continue in operation.

- (4) The Minister must prepare a report based on the review and, as soon as practicable after it is prepared, cause it to be tabled before each House of Parliament.

The Act was commenced on 22 September 2006 and, under section 59, was due for initial review in September 2007. Ministerial approval for a selective review was received in June 2008, with the concurrence of the then Premier and Attorney General. Following the prorogation of Parliament in August 2008, fresh approval was sought from the incoming Minister, which approval was granted on 2 December 2008.

In the absence of any preventative detention orders having been sought or issued under the Act, or any other exercise of the Act or its powers, it was agreed subsequently that the first anniversary review should be carried out as part of the review due after the first four years of the Act's operation, due in September 2010.

### **1.2 Conduct of the review**

The Review was conducted on behalf of the Minister for Police and Road Safety by the Legal and Legislative Services Directorate of Western Australia Police.

A selective review of the Act was authorised by the Minister on 2 December 2008. It was envisaged this would entail a general assessment of the current level of threat within Australia, consideration of reviews conducted elsewhere, such as in New South Wales, and amendments introduced into legislation as a result of those reviews. Additionally, exercises conducted under the umbrella of the anti-terrorism legislation would form the basis for fine tuning the Act.

The process has involved a detailed consideration of interstate legislation along with a general review of international counter-terrorism legislation and relevant

background information. Consultation was sought at an operational level within Western Australia Police, and the opinion of the State Solicitor's Office was canvassed in relation to a number of matters. External consultation was invited from a range of key stakeholders including the Department of the Attorney General, the Department of Corrective Services and the Law Society of Western Australia.

When next reviewed, a more detailed assessment of the Act may be warranted.

## **2. Background to the Introduction of the Act**

### **2.1 Background to the Act**

Following the terrorist attacks of September 2001 in the United States of America, COAG agreed to implement counter-terrorism legislation throughout Australia. Subsequently, in mid 2002, counter-terrorism legislation was introduced for the Commonwealth and all Australian States and Territories, designed to meet the emerging challenges of combating terrorism. Later, in 2003, the States and Territories enacted legislation to refer power in these matters to the Commonwealth under the Constitution.

The July 2005 bombings in London shifted the focus of terrorism from 'foreign nationals' to 'home grown' terrorists. Following the 27 September 2005 meeting of COAG to discuss national counter-terrorism arrangements:

*COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years....*

*State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.<sup>1</sup>*

The ongoing need for this legislation is made clear in the Australian Government's 2010 Counter-Terrorism White Paper<sup>2</sup> where it states:

*Terrorism has become a persistent and permanent feature of Australia's security environment. It threatens Australians and Australian interests both at*

<sup>1</sup> Council of Australian Governments' Communiqué. Special Meeting on Counter-Terrorism. 27 September 2005, 'Strengthening Counter-Terrorism Laws', page 3, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2005-09-27/docs/coag270905.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2005-09-27/docs/coag270905.pdf)

<sup>2</sup> Australian Government, Department of the Prime Minister and Cabinet, February 2010, [http://www.dpmc.gov.au/publications/counter\\_terrorism/2\\_the\\_threat.cfm](http://www.dpmc.gov.au/publications/counter_terrorism/2_the_threat.cfm)

*home and overseas. The Government's intelligence agencies assess that further terrorist attacks could occur at any time.*

Robert McClelland, the then Attorney General, further confirmed Australia's position when on 6 May 2011 he dismissed the recent death of al-Qaeda leader Osama bin Laden as reason to dilute Australia's counter-terrorism laws, saying:

*The threat of terrorism is ongoing and we must remain consistently vigilant.... The government has no plans to water down our counter-terrorism laws following the death of Osama bin Laden.*<sup>3</sup>

## **2.2 Objectives of the Act**

The primary objective of the *Terrorism (Preventative Detention) Act 2006* is to allow a person to be taken into custody and detained for a short period of time in order to prevent a terrorist act occurring in the near future, or preserve evidence of, or relating to, a recent terrorist attack. It was recognised by COAG that the nature of a terrorist attack means police may need to intervene earlier to prevent a terrorist attack with less knowledge than they would have using traditional policing methods.

## **2.3 Summary of the provisions of the Act**

In line with the COAG agreement to strengthen counter-terrorism laws<sup>4</sup>, preventative detention legislation has been enacted in all Australian States and Territories. Specifically, the *Terrorism (Preventative Detention) Act 2005* (SA), the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW), the *Terrorism (Community Protection) (Amendment) Act 2005* (Vic), the *Terrorism (Preventative Detention) Act 2005* (Qld) and the *Terrorism (Preventative Detention) Act 2005* (Tas). The provisions are based on Part 5.3 of the *Criminal Code* (Cth) which relies on referred legislative power from the States. As a result, the preventative detention legislation is uniform in nature and somewhat bound by national guidelines.

Under the Western Australian legislation, police officers are able to detain and search a person 16 years of age or older, prohibit contact between a detained person and specified others, obtain personal details of certain people, enter and search any place the officer reasonably suspects may harbour a target person, and/or seize things found that have been used to commit a terrorist act or may provide evidence of the commission of a terrorist act. The Act also allows for the issue of multiple preventative detention orders, however, the aggregated period of actual detention cannot exceed 14 days. Separate provisions are set down for the review of preventative detention orders before the Supreme Court, the treatment of persons in detention, including special contact rules for people under 18 or incapable of managing their own affairs, the searching of people, and the disclosure of confidential information.

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<sup>3</sup> Chris Merritt, 'Counter-terrorism laws won't be diluted', *The Australian*, 6 May 2011, <http://www.theaustralian.com.au/business/legal-affairs/counter-terrorism-laws-wont-be-diluted/story-e6frq97x-1226050756609>

<sup>4</sup> Council of Australian Governments' Communiqué. 27 September 2005, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2005-09-27/docs/coag270905.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2005-09-27/docs/coag270905.pdf)

Oversight of the powers conferred under the Act is provided via a timely review of the orders before the General Division of the Supreme Court and a quarterly report to be tabled by the Minister before each House of the Parliament within 14 sitting days of that House after the report is complete.

The Act expires after 10 years, that is September 2016.

## **2.4 The utilisation of the provisions of the Act**

The counter-terrorism powers introduced under the originating legislation have been critical to Australia's overseas allies in the fight against terrorism. The preventative detention powers available under the Act, however, have not yet been exercised. As a consequence, it is difficult to gauge their efficacy.

However, a number of desktop and practical exercises have been conducted whereby multiple agencies have had the opportunity to practise aspects of the legislation.

A 'real-time' desktop exercise conducted in September 2007 (Drill #707A) was followed up with a practical drill exercise (Drill #707B) which allowed agencies to practise in more detail the lodgement of a detainee into a custodial facility. Drill #707B was coordinated by the Department of the Premier and Cabinet in conjunction with Western Australia Police, the Department of Corrective Services and the Inspector of Custodial Services in November 2007.

One of the issues arising from these exercises was the difficulty of managing the confidentiality requirements of the detention procedure due to media interest. This resulted in a further exercise (Drill #209) being conducted in October 2009 to explore the media issues likely to arise from a detention case in Western Australia.

A further discussion exercise (Drill #309), facilitated by the Department of the Premier and Cabinet and the State Solicitor's Office, was conducted on 29 September 2010 to work through logistical and jurisdictional issues relating to the role of State agencies and the use of State facilities in managing the issuance of a Commonwealth preventative detention order.

These exercises indicate that the Act is somewhat unworkable from an operational perspective yet every effort is being made to overcome the difficulties. Despite there having been no use of the Act since its enactment, this does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers. The fact that the powers can be regarded as a preventative deterrent to terrorism, coupled with the fact that Western Australia was required to mount an extensive police and security operation for the Commonwealth Heads of Government Meeting ('CHOGM') in October 2011, evidences the need to retain these important powers in the fight against terrorism.



### 3. Reviews Conducted in Other Jurisdictions

New South Wales conducted its third statutory review of the *Terrorism (Police Powers) Act 2002* in late 2009, while the Australian Capital Territory tabled a review of its *Terrorism (Extraordinary Temporary Powers) Act 2006* in late 2010.<sup>5</sup>

Queensland and the Northern Territory have each previously reviewed their corresponding legislation and have been conducting further reviews in 2011/2012. South Australia has twice reviewed its legislation.

Victoria was due to table a review report by the end of June 2011, however, a last minute Bill was passed extending the review period until June 2013. Tasmania has no statutory requirement to review its terrorism legislation and, to date, has not done so.

Overseas, Canada and the United Kingdom have been actively reviewing their terrorism legislation with specific attention to preventative detention. The United Kingdom has considered significant reforms, while Canada is attempting to reinstate lapsed legislation. Meanwhile, in the United States of America, President Obama reauthorized the PATRIOT Act in May 2011, effectively guaranteeing its continued existence in its current form until June 1, 2015.<sup>6</sup> Despite attempts by key members of Congress, amendments to the PATRIOT Act since its implementation have been few.

#### 3.1 Australian Capital Territory

The Australian Capital Territory's review of the *Terrorism (Extraordinary Temporary Powers) Act 2006* resulted in eight recommendations, the principal of which was that the legislation be extended beyond the expiry date of November 2011. The remainder of the recommendations were of a purely administrative nature. The *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011*, commenced in November 2011, extended the expiry date to November 2016 and made provision for a second statutory review to be conducted in 2015. The only other amendment of note was the extension of options in the release of a detainee found to be a child.

#### 3.2 New South Wales

New South Wales has conducted three statutory reviews of the *Terrorism (Police Powers) Act 2002*. In addition, the NSW Ombudsman has twice reported on the use of powers under Parts 2A and Part 3 of the Act.

The third statutory review, conducted by the Department of Attorney General and Justice, found that the policy and objectives of the Act continue to remain valid. The review report was tabled in the NSW Parliament on 23 June 2010. It made 15 recommendations aimed at clarifying the operation of the Act. Of the 15 recommendations, 12 were implemented by the *Terrorism (Police Powers) Amendment Act 2010* and one by the *Terrorism (Police Powers) Regulation 2011*. The two remaining recommendations related to standard operating procedures.

<sup>5</sup> Media release, 'Terrorism laws to continue', ACT Government, 16 November 2010, <http://www.chiefminister.act.gov.au/media.php?v=10153>

<sup>6</sup> Tim Cohen, 'Obama approves extension of expiring Patriot Act provisions', CNN, 27 May 2011, [http://articles.cnn.com/2011-05-27/politics/congress.patriot.act\\_1\\_lone-wolf-provision-patriot-act-provisions-fisa-court?\\_s=PM:POLITICS](http://articles.cnn.com/2011-05-27/politics/congress.patriot.act_1_lone-wolf-provision-patriot-act-provisions-fisa-court?_s=PM:POLITICS)

Many of the 15 recommendations referred to above flowed from the NSW Ombudsman's report of 2008 and related to preventative detention provisions. The Ombudsman's subsequent report of August 2011 makes 19 recommendations, some reiterated from the 2008 report, mostly urging the completion of agreements, forms and standard operating procedures. Several of these recommendations refer to the detention of juveniles; two recommend amending the Act, and three urge consideration of whether there is an "ongoing utility" for preventative detention powers. As reported by the Ombudsman,

*The powers regarding preventative detention have not been used to date in NSW – and nor the have (sic) similar powers for preventative detention existing in other states and territories.<sup>7</sup>*

The NSW Police Commissioner, in response, dismissed lack of use as a reason for repealing the provisions and referred to "the significant deterrent effect" of preventative detention and associated terrorism powers as particularly relevant to the consideration of ongoing need. The Ombudsman suggested that information outlining the deterrent effect of the powers be provided for consideration during the next statutory review.<sup>8</sup>

### 3.3 Northern Territory

As was the case in New South Wales, the Northern Territory review of the *Terrorism (Emergency Powers) Act 2003* found that the objectives and scheme of the legislation remained valid. Participation in two major national counter-terrorism exercises in 2004/2005 identified some potential problems with the operation of the Act and a number of amendments were effected in 2006 to correct the inadequacies and maintain consistency with other jurisdictions. Issues identified in the 2006 review of the Northern Territory's legislation have been adequately covered in the Western Australian legislation and minor amendments made in 2011 are of no consequence. A subsequent review is due in 2011/2012.

### 3.4 Queensland

Following the enactment of the *Terrorism (Preventative Detention) Act 2005* (Qld), the Queensland Government promised to undertake a review of the State's counter-terrorism legislation, resulting in the *Terrorism Legislation Amendment Act 2007*.

The *Terrorism Legislation Amendment Act 2007* amended several earlier acts, including the *Public Safety Preservation Act 1986* to which was added substantial provisions relating to "terrorist emergency". These provisions brought the Queensland legislation into line with that of New South Wales and, consequently, Western Australia. The terrorist emergency provisions enacted in August 2007 become due for review in August 2012.

A review of the *Police Powers and Responsibilities Act 2000* conducted in 2010/2011 has been directed at areas unrelated to terrorism. As a result, the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2011*, introduced

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<sup>7</sup> NSW Ombudsman, 'Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, August 2011, Foreword, ([www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)).

<sup>8</sup> NSW Ombudsman, 'Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, August 2011, Recommendation 13, ([www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)).

on 25 August 2011, contained no amendments to terrorism-related powers.<sup>9</sup> It is therefore not relevant to this review. As the Act is required to be “regularly reviewed” (s.807), it is anticipated a review of relevant provisions will follow in the near future.

### **3.5 South Australia**

The *Terrorism (Preventative Detention) Act 2005* (SA), due to legislative timetables, was debated and passed one day before the final form of the Commonwealth Bill was debated and passed. As a result, some changes to the South Australian legislation were necessary to bring the Act into line with the corresponding Commonwealth legislation. These changes were effected by the *Terrorism (Preventative Detention) (Miscellaneous) Amendment Act 2007*. The Act is due to expire in 2015 and, in the interim, there is no statutory requirement for review.

### **3.6 Victoria**

The *Terrorism (Community Protection) Act 2003* was amended in 2006 to include preventative detention provisions. Originally due to expire on 1 December 2006, the Act was extended to 2016. A review of the Act and consequent report was due to be finalised by the end of June 2011, however, a last minute Bill was passed extending the review period until June 2013.<sup>10</sup> This extension of time was to allow the COAG review of national counter-terrorism legislation, delayed from 2011, to be conducted prior to the review of the Act.

### **3.7 Tasmania**

The *Terrorism (Preventative Detention) Act 2005* (Tas) commenced on 1 March 2007 and has had only a few minor amendments since. A sunset provision for preventative detention orders and prohibited contact orders applies, being the tenth anniversary of the day of commencement. The Act has no statutory requirement for review and, to date, no review has been conducted.

## **4. Discussion of Submissions**

Submissions were invited from a number of key stakeholders including the Director of Public Prosecutions, the Corruption and Crime Commission, and the Law Society of Western Australia. Additionally, correspondence previously received from the State Solicitor’s Office and the Inspector of Custodial Services were taken into account. Responses were received from:

- the Department of the Attorney General;
- the Department of the Premier and Cabinet;
- the Department of Corrective Services; and
- the Ombudsman Western Australia.

The Department of the Attorney General, the Department of Corrective Services, and the Ombudsman all indicated they were unable to offer any comment or proposals in relation to the review of the Act as no preventative detention orders had been issued. The Department of the Premier and Cabinet, however, outlined two

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<sup>9</sup> Personal communication, Queensland Police Service, 30 March 2011. The Bill, introduced on 25 August 2011, remains before the Legislative Assembly as at 1 December 2011.

<sup>10</sup> *Terrorism (Community Protection) Amendment Act 2011*

specific issues for consideration: identity requirements and volunteered information. These issues are addressed below.

## **5. Issues Identified during the Review**

During the course of the review, several issues were identified which give rise to a number of proposed discussions and amendments. These issues are:-

- the need to amend the definition of "terrorist act";
- issuing preventative detention orders to unknown/unidentified persons;
- managing detainees who volunteer information;
- clarifying the use of powers provided for the Inspector of Custodial Services;
- substituting the term "intellectual impairment" for the term "incapable of managing his or her affairs";
- providing detainees with access to legal aid; and
- making allowance for further authorised contacts; for example, a detainee contacting an authorised chaplain.

### **5.1 Amending the definition of "terrorist act"**

In February 2009 the Western Australian State Solicitor's Office provided advice in relation to certain difficulties with the definition of "terrorist act" and proposed a number of solutions, particularly with respect to the matter of 'intent'. Proposed solutions included:

- (1) specifying acts which are terrorist acts;
- (2) specifying the response required;
- (3) simplifying the intention requirements;
- (4) removing the requirement to show intention in specific circumstances.

These four suggestions are considered below:

- (1) There are specific acts commonly associated with terrorism. It is suggested the legislation could be amended so as to list specific acts without the need to show intention. The difficulty with listing specific acts is that such acts are not always associated with terrorism. Kidnapping may have the singular purpose of extracting a ransom, while hostage-taking may be merely a consequential act associated with bank robbery. To avoid capturing offences not relating to terrorism, an additional element would need to be included. State Solicitors' Office suggested an element relating to the level of response required, as explained in (2).
- (2) Specifying the response required would allow immediate action to be taken in situations where the public is put at high risk of sudden and significant harm, without the need to first establish political, religious or ideological intent. The approach here is to replace the 'twin intention' paragraphs, that is s.6(1)(b) and (c), with words indicating a terrorist act falling within subsection (1) "is an act which is of such a nature or magnitude that it requires a significant and co-ordinated response from 2 or more emergency response agencies". An "emergency response agency" could be then defined to include, for example, police, fire, ambulance, state emergency service, health, child protection, local government, and essential services

such as water, electricity and gas. The difficulty of determining intent in order to satisfy the definition of "terrorist act" and obtain a warrant would be consequently overcome and critical delays avoided.

Discussion: Similar to the additional element considered necessary if listing specific acts, it is considered, as part of this Review, that something more is required in addition to a significant and co-ordinated response from 2 or more emergency response agencies. At present, a chemical spill or suspected biological threat will provoke such a response from 2 or more agencies.

It is suggested therefore that the required additional element could be a modified intent. Rather than a political, religious or ideological intent designed to influence or intimidate, the intent could be simply defined as an act done knowingly (or that the person should have known) would cause mayhem - that is violent disorder, riotous confusion, havoc, or wanton destruction - or mass casualties. As such, a "terrorist act" would encompass events such as the mass shooting at Port Arthur and the indiscriminate use of explosives, even if the incident simply arose out of a personal grievance.

- (3) Alternatively, the 'twin intentions' could be simplified by deleting s.6(1)(b) (referring to "advancing a political, religious or ideological cause") and modifying s.6(1)(c) by inserting after the word "done" the phrase "or by its nature and context appears to be done", thus restricting the scope of intent to coercing or influencing by intimidation.

Discussion: This option seems the most simple amendment, however, it leaves the legislation wide open. For example, if an offender caused a person's death or caused serious physical harm to a person or damage to property with the apparent intention of intimidating a section of the public, the offender could be charged with a terrorism offence (under the *Criminal Code* (Cth)) rather than a criminal offence carrying a much lesser penalty. A fight outside a tavern or sports arena could result in a single act of bravado leading to a charge of terrorism. An amendment along these lines would significantly broaden the legislation and is not recommended.

- (4) The final suggestion was to remove the requirement to show intention in specific circumstances. The example given was that of an act falling within subsection (2) where the use of firearms or explosives, or the use of chemical, biological or radiological (CBR) substances, were involved against the public or a section of the public.<sup>11</sup> Such an act would constitute a "terrorist act" whether or not the intention provision was satisfied. The qualification that firearms, explosives or CBR substances must be used against the public or a section of the public purportedly limits the application of this proposed amendment.

Discussion: Failing any more effective amendment to the definition of "terrorist act", this proposed amendment would provide an immediate improvement for rapidly dealing with incidents where the public is significantly endangered but the motive is unclear. An example cited was the use of Sarin gas on the Tokyo subway in 1995.

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<sup>11</sup> Based on section 1(3) of the *Terrorism Act 2000* (UK).

Other suggestions for amending the definition of "terrorist act" have arisen in the course of desktop exercises and general discussion:

- The difficulty of satisfying the legal threshold of 'intent' raised the spectre of a senior police officer's experience, resulting in the suggestion that the question of political, religious or ideological intent be replaced with reasonable suspicion on the part of the police operations commander. A "terrorist act" would become:-

an act that falls within subsection (2) and that causes a Police Operations Commander to reasonably suspect there is or may be a serious risk to public safety, property or infrastructure as a result of extremist activity.

Extremist activity may be defined to include (without limitation) -

the use of bombs and/or other explosive devices;  
the use of firearms in public places or against members of the public;  
the taking of hostages;  
the oral or written declaration of any political, religious or ideological motivation for disturbing the peace or making threats,  
  
commonly associated with organisations or individuals who engage in unlawful, threatening or violent behavior in the interests of a cause or personal vendetta.

This approach follows (1) above in that it lists specific acts. At the same time it removes the 'twin intention' and instead relies on a standard of reasonable suspicion on the part of the senior police officer present at the scene.

- The final suggestion is that, rather than s.6(1)(b) being deleted, both s.6(1)(b) and s.6(1)(c) be amended as proposed at (3) above by inserting after the word "done" the words "or by its nature and context appears to be done". Simplifying the intent in this manner, or removing intent in specific circumstances as at (4) above, is considered the minimum level of amendment required to make the definition of "terrorist act" operationally workable.

While the definition of "terrorist act" has been identified as an issue, any amendment to the definition for preventative detention purposes would need to be made first to the Commonwealth definition at s.100.1 of the *Criminal Code* (Cth). The Act forms part of a national framework of counter terrorism legislation, based on Part 5.3 of the *Criminal Code* (Cth), which all State and Territory leaders agreed to enact due to constitutional restraints upon the Commonwealth. As such, any amendment to the definition would need to be made at Commonwealth level before it could be extended to State and Territory preventative detention legislation.

## **5.2 Preventative detention orders for unidentified persons**

An exercise scenario in 2010 raised the question of whether the identity requirements of the preventative detention order ('PDO') application process should be eased so that a PDO may be issued where the identity of the potential detainee is unknown and cannot be established.

During the exercise, a scenario developed in which a known person-of-interest, who was under surveillance, met with a group of unknown persons who then collectively engaged in behavior that raised the suspicion they were commissioning a terrorist act. In the context of the exercise, it became desirable to apply to have PDOs issued for all these persons. However, only the original person-of-interest could be targeted as s.13(4)(a) of the Act requires that a PDO must specify "the name of the person in relation to whom it is made". This provision is based on s.105.8(6) of the *Criminal Code* (Cth) which makes the same requirement.

In the *Criminal Procedure Act 2004*, (s.12 and Schedule 1, item 4), there is an alternative identification process for infringement and prosecution notices. A photograph or handprint may be attached to the notice; reference may be made to the accused's DNA profile; or an infringement notice may be addressed to "the responsible person for the vehicle". This provision for alternative identification was introduced with the aim of addressing difficulties experienced by courts and police where convictions were recorded against individuals for offences they did not commit. It is equally conceivable that a terrorist suspect may be incorrectly named in a PDO.

Given that the preventative detention provisions are based on Commonwealth legislation, this Review endorses the recommendation resulting from the 2010 exercise that this matter be referred to COAG for consideration during the COAG review which is due to be conducted in the second half of 2012.

### **5.3 Detainees who volunteer information**

Another matter arising out of exercise scenarios was that of volunteered information. The time that would be consumed by administrative processes if a detainee volunteered information was identified as a possible obstacle to a time-critical investigation.

A person subject to a preventative detention order ('PDO') may be released from detention while under the order for the purpose of dealing with specific legal matters (s.32(3)). During this period of release, the "permitted detention period" under the PDO continues to run. The period of release, however, does not extend the time that the PDO is in force (s.31(4)).

Provisions that apply to a person held in detention under a PDO are suspended during the period of release. Consequently, while a person in detention cannot be questioned beyond basic identification and safety and compliance issues (s.47), a person released from detention may be interviewed and may choose to volunteer information. How to manage this situation raised questions and some concern for the exercise participants.

A recommendation from the 2010 exercise was that the legal requirements for interviewing a detainee released while under a PDO be clarified, giving consideration to issues of:

- initial release from preventative detention and the potential of subsequent further detention, whether under a PDO, the *Crimes Act 1914* (Cth) or arrest;
- admissibility in court of information volunteered while under a PDO; and
- how/if the requirements can be met in a timely manner appropriate to the time-critical circumstances that would likely exist.

This Review endorses the recommendation for clarification of interviewing requirements and further recommends that advice on the above points be sought from the State Solicitor's Office.

#### **5.4 The Inspector of Custodial Services' powers**

In 2009, the then Inspector of Custodial Services ('the Inspector') raised the issue of delegation and the fact that if he were unavoidably delayed or unavailable, perhaps stranded in a remote part of Western Australia, there was no power of delegation provided in the Act.

The *Inspector of Custodial Services Act 2003* ('the OICS Act') provides for the appointment of a person to act in the office of the Inspector in the event of a vacancy or a temporary absence or incapacity (ss.11 and 12) or in specified circumstances (s.13). Consideration was also given to a specific appointment under the OICS Act versus the insertion of a provision in the Act similar to that made for the Commissioner of Police at s.51 of the Act.

Discussions with the current Inspector of Custodial Services indicate a need for legal advice on the part of the Inspector and, as such, the Review recommends that this issue be given further consideration at a later date.

#### **5.5 Defining incapacity**

Amendments have been made to the New South Wales legislation substituting the reference to "a person incapable of managing his or her own affairs" with the wording "a person with impaired intellectual functioning". This Review supports such an amendment as it is agreed "incapable of managing his or her own affairs" has a specific legal meaning relating to the financial management of a person's estate, as evidenced by s.31 of the *Public Trustee Act 1941* (WA).

This proposed amendment is consistent with s.105.5A of the *Criminal Code* (Cth), which reads as follows –

##### **105.5A Special assistance for person with inadequate knowledge of English language or disability**

If the police officer who is detaining a person under a preventative detention order has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language:

- (a) the police officer has an obligation under subsection 105.31(3) to arrange for the assistance of an interpreter in informing the person about:
  - (i) the effect of the order or any extension, or further extension, of the order; and
  - (ii) the person's rights in relation to the order; and
- (b) the police officer has an obligation under subsection 105.37(3A) to give the person reasonable assistance to:
  - (i) choose a lawyer to act for the person in relation to the order; and
  - (ii) contact the lawyer.



## **5.6 Access to legal aid**

The *Terrorism (Police Powers) Amendment Act 2010* (NSW) also inserted a provision allowing the Supreme Court of NSW to order that legal aid is to be provided to a detainee. Where such an order is made, an officer detaining the person is required to assist the detainee to contact the Legal Aid Commission.

The inclusion of this provision in the New South Wales legislation was a recommendation made by the NSW Ombudsman in his report of September 2008.

It is recommended that the merits of providing detainees with access to legal aid be given consideration prior to any amendments being made to the Act.

## **5.7 Further authorised contacts**

The NSW *Terrorism (Police Powers) Act 2002* has been further amended to extend the provisions relating to authorised contacts. Amendments have been effected to:-

- allow a detainee to receive visits from an authorised chaplain (s.26ZGA);
- ensure police provide reasonable assistance to detainees under 18 or with impaired intellectual functioning in exercising their entitlement to contact as set down in Division 5 "Treatment of person detained" (s.26ZH(7)); and
- allow a person (a police officer or interpreter) monitoring detainee/lawyer contact to consult a lawyer in order to seek advice regarding whether the information disclosed is within the scope of permitted purposes (s.26ZI(7)).

Contact with a chaplain seems a reasonable amendment, consistent with the duty to provide humane treatment to a detainee. An amendment to the Act allowing detainees contact with a duly accredited chaplain is supported by this Review.

Equally, a provision which aims to ensure that detainees under 18 or intellectually impaired receive whatever assistance is reasonably practicable in exercising their rights to make contact with a chaplain or a lawyer is commensurate with the duty of care implied in providing humane treatment to the detainee.

On the third point, it is agreed that allowing a monitor to seek legal advice as to the appropriateness of detainee/lawyer disclosures will assist in the execution of the monitoring function. However, it would appear that an additional disclosure provision is required to give protection to the monitor seeking the advice.

The aim of the above amendments is generally supported and, as such, it is recommended they be given due consideration when preparing amendments to the Western Australian Act.

# **6. Conclusion and Recommendations**

## **6.1 Conclusion**

The Review finds that the policy objectives of the *Terrorism (Preventative Detention) Act 2006* remain valid. While such powers cannot guarantee that Western Australia will not be the target of a terrorist attack in the future, they do provide the police and other agencies with the means to prevent and deter terrorist activity, to respond to threats, and to more expeditiously apprehend perpetrators.

Despite there having been no use of the *Terrorism (Preventative Detention) Act 2006* since its enactment, this does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers. The fact that the powers can be regarded as a preventative deterrent to terrorism, coupled with the fact that Western Australia was required to mount an extensive police and security operation for the Commonwealth Heads of Government Meeting in October 2011, evidences the need to retain these important powers to combat terrorism.

Accordingly, the Review finds that the provisions of the *Terrorism (Preventative Detention) Act 2006* are appropriate to prevent, deter and respond to terrorist threats, and should therefore continue in operation.

## **6.2 Recommendations**

The Review has identified a number of potential amendments to the *Terrorism (Preventative Detention) Act 2006* which will strengthen its provisions. These are detailed in Part 5 of this report and are recommended for further progression.