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Executive Summary

The Terrorism (Preventative Detention) Act 2006 (‘the Act’) 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). At a Council of Australian Governments (‘COAG’) meeting in 2005, all State and Territory leaders agreed to enact preventative detention legislation, with the States referring legislative power to the Commonwealth in order to overcome constitutional restraints. As a result, the preventative detention legislation is broadly consistent with that of all other States and Territories.

The Act provides Western Australia Police with 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 to preserve evidence of, or relating to, a recent terrorist act. The COAG meeting in 2005 recognised that the nature of a terrorist attack means police are likely to have less knowledge than traditional policing methods provide and, therefore, may need to intervene earlier to prevent a terrorist act occurring. Additionally, these preventative detention 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, making it difficult to gauge their efficacy. Preventative detention orders issued in other States, however, along with counter-terrorism exercises conducted both locally and nationally, do allow certain conclusions to be drawn as to the likely effectiveness of the Act.

During the review period there were no circumstances which necessitated use of the Act. The national threat environment, however, has changed significantly since September 2014 and the need for these powers in Western Australia may prove more necessary in the future than they have in the past. Terrorist acts seen and disrupted in New South Wales may just as easily occur in Western Australia in coming years. As the primary objective of the Act is the prevention of a terrorist act, the powers the Act provides gives Western Australia Police significant tools which may enable early intervention in the planning phase of a terrorist act.

A comprehensive review of Australian counter-terrorism legislation was undertaken in 2012/13 by a Committee tasked by COAG. The ‘COAG Review’ evaluated the operation, effectiveness and implications of key Commonwealth, State and Territory counter-terrorism laws. The Committee’s Report was tabled in Parliament on 14 May 2013.

Subsequently, COAG, at its meeting in December 2015, agreed to prioritise work to implement nationally consistent legislation providing for pre-charge investigative detention for terrorism suspects, consistent with the recommendations of the Australia-New Zealand Counter-Terrorism Committee (‘ANZCTC’).

Then, in April 2016, COAG agreed, in principle and with the Australian Capital Territory reserving its position, to legislation being finalised for consideration by the New South Wales Parliament as a model for the strengthened pre-charge detention scheme for terrorism suspects. The New South Wales legislation was passed on 11 May 2016. A key point of difference between that legislation and existing
preventative detention order ('PDO') legislation is that it allows for the questioning of detainees.

While such legislation may reduce the need for existing PDO powers, proposed legislation to implement measures based on the New South Wales model is yet to be developed for consideration in Western Australia. Accordingly, despite there having been no use of the Act 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. These powers provide the basis for significant law enforcement tools which it is planned will be strengthened in the near future.

A Bill to extend the sunset clause in the Act was passed by the Western Australian Parliament in September 2016 and the Act is now due to expire in September 2026.

In summary, the Review finds that the provisions of the Terrorism (Preventative Detention) Act 2006 are, in its current form, unwieldy from an operational perspective. However, with some amendment, the provisions of the Act will provide suitable mechanisms to more appropriately address the objectives of the Act to prevent terrorist activity in the current threat environment. Additionally, Western Australia has agreed in principle to the New South Wales model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects. Such amendments are required in order to ensure the availability of powers needed to prevent terrorist threats in the current threat environment.

**Recommendations**

During the course of this Review, a number of issues identified in previous statutory reviews were reinforced as being in need of attention. Only two new matters were identified as having merit for consideration in addition to those previously identified: the extension of the expiry date and the question of extraterritorial application.

In summary, the matters considered were:-

- the extension of the expiry date (now resolved);
- the question of extraterritorial application;
- the need to amend the definition of "terrorist act";
- issuing preventative detention orders to unknown/unidentified persons;
- managing detainees who volunteer information;
- 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.

Further information on these matters is detailed in Parts 4 and 5 of this report.

More than ten years has now elapsed since the introduction of the Act. In 2013, the COAG Review recommended the complete repeal of Commonwealth, State and Territory PDO legislation, however, this was not supported by COAG. Now that the expiry date of the Act has been extended, amendments addressing the concerns raised in this and previous Reviews, including the COAG Review, should be taken into consideration.
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 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.

The resulting review of the Act was tabled on 18 September 2012 (Tabled Paper No. 5235).

1.2 Conduct of the review

This Review was conducted on behalf of the Minister for Police by the Legislative Services Division of Western Australia Police.

A minimal review of the Act was authorised by the then Minister on 21 April 2015. The review was to 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.

The process has involved a detailed consideration of Commonwealth legislation, as well as legislation in the other States and Territories, 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
more broadly with the Office of State Security and Emergency Coordination at the Department of the Premier and Cabinet.

Additionally, the Council of Australian Governments Review of Counter-Terrorism Legislation¹ ('the COAG Review') and the Independent National Security Legislation Monitor's ('the INSLM') reports of 2012² and 2013³ were taken into consideration.

A comprehensive review of counter-terrorism legislation was undertaken by a Committee tasked by the Council of Australian Governments ('COAG') in 2012/13. The COAG Review was commenced on 6 August 2012 with the Committee's Report being finalised on 1 March 2013.

The COAG Review evaluated the operation, effectiveness and implications of key Commonwealth, State and Territory counter-terrorism laws. The Report was tabled in Parliament on 14 May 2013.

The Committee’s recommendation that all preventative detention legislation should be repealed was not supported by COAG. Specifically, rather than repeal the preventative detention legislation, COAG agreed to renew the preventative detention scheme, with reforms to improve the utility of the legislation while retaining necessary procedural safeguards, particularly those pertaining to arbitrary detention.

Consequently, when considering the need for the present review, the Minister agreed that it was unlikely given the legislation had not yet been utilised that a more extensive review would yield any greater insights than a minimal review. In future, a more detailed assessment 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, the Prime Minister and State and Territory leaders agreed to implement a new national framework for combatting terrorism. Subsequently, in mid 2002, new Commonwealth counter-terrorism legislation was introduced, designed to meet the emerging challenges. The States then 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. At 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.4

The ongoing need for this legislation is made clear in the Australian Security Intelligence Organisation's ('ASIO') report to Parliament tabled on 19 October 2015 where the Director-General's review states:

Since the alert level in Australia was elevated [in September 2014], the factors contributing to the assessment that we face an increased threat have persisted. ... In 2014, there were 13 000 terrorist attacks around the world, resulting in 32 727 fatalities— the highest rate of attacks since records were first kept 45 years ago. Locally we have seen actual and planned attacks, ongoing growth in the numbers attracted to the violent extremist cause, and active encouragement from overseas for attacks to be conducted in Australia. More than ever, violent extremist groups and individuals see Australia as a legitimate target for a terrorist attack.5

A new national terrorism threat advisory system came into force on 26 November 2015, replacing the 4-tier “Low”, “Medium”, “High” and “Extreme” levels with a 5-tier “Not Expected”, “Possible”, “Probable”, “Expected” and “Certain” regime. The threat level is currently set at “Probable”, meaning credible intelligence indicates that individuals or groups have developed both an intent and capability to conduct a terrorist attack in Australia.

2.2 Objectives of the Act

The primary objective of the Act 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 are likely to have less knowledge than traditional policing methods provide and, therefore, may need to intervene earlier to prevent a terrorist attack.

2.3 Summary of the provisions of the Act

In line with the 2005 COAG agreement to strengthen counter-terrorism laws6, preventative detention legislation has been enacted in all Australian States and Territories. Specifically, the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), the Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005

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(NSW), the Terrorism (Emergency Powers) Amendment Act 2006 (NT), the Terrorism (Preventative Detention) Act 2005 (SA), the Terrorism (Preventative Detention) Act 2005 (Qld), the Terrorism (Preventative Detention) Act 2005 (Tas), the Terrorism (Community Protection) (Amendment) Act 2005 (Vic), and the Terrorism (Preventative Detention) Act 2006 (WA).

The preventative detention provisions are based on Part 5.3 of the Criminal Code (Cth) which relies in part on referred legislative power from the States. As a result, the preventative detention legislation is broadly consistent 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 that 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.

Oversight of the powers conferred under the Act is provided via a timely review of the orders by the General Division of the Supreme Court and a quarterly report about the operation of the Act 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 was originally due to expire on 22 September 2016, however, it has now been amended to expire on 22 September 2026.

2.4 The utilisation of the provisions of the Act

The preventative detention powers available under the Act 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. These exercises have generally indicated that the Act, in its current form, is unwieldy from an operational perspective despite every effort having been made to overcome the difficulties. In its response to the COAG Review, COAG supported renewing the preventative detention scheme with amendments aimed at addressing limitations in its utility.

Further, on 1 April 2016, COAG agreed to further strengthen Australia’s national security legislation, with the Attorney-General saying:

*Given the changing security environment, the rapid nature in which terrorism plots can emerge, as well as the lengths individuals and groups go to to avoid*
detection, we must ensure that our law enforcement and security agencies have every tool they need.⁷

These reforms included an in-principle agreement to a strengthened, nationally consistent pre-charge detention scheme for terrorism suspects.

Although there has 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. As the Attorney-General stated above, law enforcement needs every tool available. The fact that the threat of terrorism in Australia has not abated but is increasing evidences the need to retain and amend these important powers in the fight against terrorism.

### 3. Reviews Conducted in Other Jurisdictions


A second statutory review of the Terrorism (Emergency Powers) Act 2003 (NT) was conducted in 2011/2012, however, due to an oversight, the report was never tabled. On enquiry, the overall policy objectives and scheme of the legislation were reported as remaining valid (see Northern Territory section below).

In Queensland, no further review of the preventative detention legislation has been undertaken since amendments were made to the Terrorism (Preventative Detention) Act 2005 in 2007. Amendments to the Act in November 2015 now require a statutory review of the Act to be commenced within 2 years and a review report to be tabled within 3 years, making the review report due in November 2018.

Victoria tabled a review report of its Terrorism (Community Protection) Act 2003 on 16 September 2014⁹ following a postponement of the review period from 2011 to 2013. A further statutory review of the Act is due by 31 December 2020.

South Australia has no statutory requirement for a review of its preventative detention legislation, only court reviews of preventative detention and prohibited contact orders. Tasmania also has no statutory requirement for review and, to date, no formal review of the legislation has been conducted outside of the COAG Review.

Overseas, Canada introduced new counter-terrorism legislation in 2013¹⁰ and 2015¹¹ strengthening prevention powers and protections, and reinstating preventative detention and investigative hearing legislation for a new 5-year term to May 2018. The United Kingdom also introduced new counter-terrorism legislation in 2015 and,

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notably, lowered the threshold for the imposition of terrorism prevention and investigation measures from ‘reasonable belief’ to satisfaction ‘on the balance of probabilities’. On 2 June 2015 the United States of America replaced the PATRIOT Act terror provisions, on the day after they expired, with the USA Freedom Act. The new Act renewed key aspects of the PATRIOT Act and introduced new measures in relation to the bulk collection of telephone data.

3.1 Australian Capital Territory

The Australian Capital Territory’s second review of the Terrorism (Extraordinary Temporary Powers) Act 2006 resulted in four recommendations, the principal of which was that the legislation be extended for a further five years. The remaining recommendations were of a supportive policy nature. The Terrorism (Extraordinary Temporary Powers) Amendment Act 2015 commenced in November 2015, extending the expiry date to 19 November 2021 and making provision for a third statutory review to be conducted in 2019.

3.2 New South Wales

New South Wales has conducted five statutory reviews of the Terrorism (Police Powers) Act 2002. The inaugural review tabled in 2006 considered only special police powers; the preventative detention powers commenced in June 2007 and were considered in the second review. Since then the Act has been reviewed in 2010, 2013, and 2015. In addition to the statutory reviews, the NSW Ombudsmen has issued four reports on the use of powers under Parts 2A and Part 3 of the Act, the most recent in September 2014.

The 2013 review report was tabled in the NSW Parliament on 28 August 2013. It made two recommendations: the first aimed at clarifying the operation of section 26Z1 of the Act to make it clear that non-disclosure obligations apply to lawyers who provide advice to persons monitoring contact between detainees and their legal representative; and the second aimed at deferring the decision on the repeal or retention of the preventative detention powers until after national discussion on recommendations made in two Commonwealth reviews.

The most recent statutory review, conducted by the Justice Strategy and Policy division of the NSW Department of Justice, found that the policy and objectives of the Act continue to remain valid. The review report was tabled in the NSW Parliament on 20 October 2015.

The 2015 review report recommended the preventative detention powers be extended by three years to 16 December 2018 to maintain consistency with Commonwealth amendments. The Terrorism (Police Powers) Amendment Act 2015 gave effect to that recommendation following assent on 5 November 2015. The remaining recommendations dealt with the ongoing assessment of operational issues

relating to preventative detention orders the subject of national discussions and minor administrative matters.

In May 2016, New South Wales was the first jurisdiction to enact legislation extending police powers to the questioning of detainees suspected of being involved in a recent or imminent terrorist act. The Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016 specifically addressed some of the operational issues broadly raised with the existing legislation. In the current, increasingly fluid terrorism environment, it is anticipated these enhanced powers will allow police to better respond to and prevent terrorist acts.

3.3 Northern Territory

Participation in two major national counter-terrorism exercises in 2004/2005 identified some potential problems with the operation of the Terrorism (Emergency Powers) Act 2003. A review of the Act was conducted in 2006 and significant amendments were effected to the Act with the introduction of Parts 2A, 2B and 3A, bringing the Act in line with other Australian jurisdictions.

A second review of the Act was conducted in 2011/2012, however, due to an oversight, the report was never tabled in Parliament. Northern Territory Police have reported the findings of the review as: there were no recommendations for change resulting from the review; it had not been necessary to invoke any of the provisions under the Act; and the overall policy objectives and scheme of the legislation remain valid.\(^\text{15}\)

The preventative detention provisions were due to expire on 30 June 2016. A Bill to amend the expiry date was introduced and passed in the Northern Territory Legislative Assembly in May/June 2016. The Bill was granted Royal Assent on 29 June 2016, extending Part 2B of the Act to 30 June 2026. A 10-year extension is in keeping with other jurisdictions.

3.4 Queensland

Following the enactment of the Terrorism (Preventative Detention) Act 2005, 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”. Amendments to the Terrorism (Preventative Detention) Act 2005 included safeguards in relation to legal aid, search and questioning along with a number of minor and consequential amendments.

Since 2007 no further review of the preventative detention legislation has been undertaken apart from submissions to the COAG Review and the reporting requirements of the Public Interest Monitor.

The 17th Annual Report of the Public Interest Monitor\(^\text{16}\), dated October 31 2015, reports that no applications have been made with respect to control or preventative detention orders since the anti-terrorism regime was introduced.

\(^{15}\) Personal communication, Northern Territory Police, 18 March 2014.

On 20 November 2015, the Counter-Terrorism and Other Legislation Amendment Act 2015 amended the Terrorism (Preventative Detention) Act 2005 to extend the sunset provision by 10 years to 16 December 2025. A new provision requiring a review of the Act was inserted, the review to be commenced within 2 years (November 2017) with a report tabled in Parliament within 3 years (November 2018). The purpose of the review is to assess "the need for, and effectiveness of," the Act.

Additionally, the extraterritorial application of the preventative detention legislation was amended to include the 'adjacent area' for Queensland as defined in the Crimes at Sea Act 2001 (Qld). This amendment allows for the establishment of a declared area around a vehicle (vessel) for a terrorist emergency to continue if the vehicle crosses over the state boundary.

Further amendments to the Terrorism (Preventative Detention) Act 2005 were proposed in the Counter-Terrorism and Other Legislation Amendment Bill 2016 introduced on 19 April 2016. The proposed amendments sought to extend police powers to obtain urgent preventative detention orders and clarify restrictions on the taking of identifying particulars. The Bill was passed on 17 August and received Royal Assent on 29 August 2016.

3.5 South Australia

The Terrorism (Preventative Detention) Act 2005, due to legislative timetables, was debated and passed one day before the final form of the principal 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 was further amended on 5 November 2015 by the Statutes Amendment (Terrorism) Act 2015 to extend the sunset clause by 10 years to 8 December 2025. There is no statutory requirement for a review of the Act, only court reviews of preventative detention and prohibited contact orders.

3.6 Victoria

The Terrorism (Community Protection) Act 2003 was amended in 2006 to include preventative detention provisions which commenced on 9 March 2006. The Act, originally due to expire on 1 December 2006, was amended in December 2015 to repeal the sunset clause specific to the preventative detention provisions (9 March 2016) and extend the expiry date of the Act to 1 December 2016.

A statutory review of the Act and consequent report was due to be finalised by 30 June 2011, however, a last minute Bill was passed extending the review period until June 2013. This extension of time was to allow the COAG Review, delayed from 2011, to be conducted prior to the statutory review of the Act. The Justice Legislation Amendment (Miscellaneous) Act 2012 further extended the review period from 30 June 2013 to 31 December 2013. The Courts and Other Justice Legislation Amendment Act 2013 then postponed the review report from December 2013 to 31 December 2014 to enable consideration of any recommendations arising from the national COAG Review.


Prior to 17 April 2015 no preventative detention order (‘PDO’) had been issued in Victoria. This changed when 18-year-old Harun Causevic was arrested and charged with conspiring to commit a terrorist act, due to be carried out during Anzac Day celebrations in Melbourne. To date, this remains the only PDO issued in Victoria.

### 3.7 Tasmania

The *Terrorism (Preventative Detention) Act 2005* was amended most recently by the *Terrorism Legislation (Miscellaneous Amendments) Act 2015* which received Royal Assent on 13 October 2015. The sunset provision for preventative detention orders and prohibited contact orders was extended by 10 years to 31 December 2025. The amending legislation also extended the sunset clause for the *Police Powers (Public Safety) Act 2005*, which contains emergency police powers, to 31 December 2025. The Act has no statutory requirement for review and, to date, no formal review has been conducted outside of that done as part of the COAG Review.

### 4. Issues Identified during the Previous Review

During the previous statutory review conducted on behalf of the Minister by WA Police, 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 received from the State Solicitor’s Office in February 2009 and correspondence received from 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.

During the course of the previous Review, several issues were identified which gave rise to a number of proposed discussions and amendments. These issues were:-

- 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.

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4.1 Amending the definition of “terrorist act”

Proposals for amendment to the definition of “terrorist act” were canvassed in the previous Review. 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 the Commonwealth level before it could be extended to State and Territory preventative detention legislation.

Update 2015/16: The COAG Review Committee endorsed earlier findings that the definition in the Criminal Code (Cth) is ambiguous “as to the requisite causal nexus between threats of action and the form of harm or damage specified in s.100.1(2).” COAG’s preferred action is to seek clarification of the relationship between threats and harm within the definition.19

Proposed amendments to the Emergency Management Act 2005, passed by the Legislative Assembly on 30 June 2016 and second read in the Legislative Council on 16 August 2016, address many of the issues canvassed in relation to the definition of “terrorist act”. However, the prorogation of Parliament in anticipation of the election on 11 March 2017 prevented the Bill being passed. The amendments sought would allow first responders to exercise movement and evacuation powers without the need of establishing that the incident is indeed terror related. The inclusion of “a terrorist act or an action, or threat of action, that is reasonably suspected to be a terrorist act” as a “hazard” would greatly assist in addressing the issues outlined in the previous Review.20 Reintroduction of those amendments or others will be a matter for consideration by the government.

4.2 Preventative detention orders for unidentified persons

An exercise scenario in 2010 raised the question of whether the identity requirements of the 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.

19 COAG Response to the COAG Review of Counter-Terrorism Legislation, February 2015, p1
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, the previous Review endorsed the recommendation resulting from the 2010 exercise that this matter be referred to COAG for consideration during the COAG Review.

**Update 2015/16:** The PDO regime was considered during the COAG Review. The Committee’s recommendation was that the whole of Division 105 of the *Criminal Code* (Cth), and all complementary State and Territory legislation dealing with preventative detention, be repealed.\(^{21}\) COAG did not support this recommendation, proposing instead a range of amendments to improve the operational effectiveness of the legislation.\(^{22}\)

Since then Queensland’s *Counter-Terrorism and Other Legislation Amendment Bill 2016*, introduced on 19 April 2016, has proposed an amendment designed to address the issue of unidentified persons. These provisions will be most likely adopted by other jurisdictions, including Western Australia, now that the Bill has been assented to on 29 August 2016.

### 4.3 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 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.

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\(^{22}\) *COAG Response to the COAG Review of Counter-Terrorism Legislation*, February 2015, pp 16-17.
The previous Review endorsed the recommendation for clarification of interviewing requirements and further recommended that advice on the above points be sought from the State Solicitor’s Office.

**Update 2015/16:** The COAG Review examined the PDO regime with the following response to the matter of questioning a person held in detention under a PDO:

> The Commonwealth will consult with the States and Territories on any proposed amendments ... Jurisdictions will also work collaboratively, via the Australia-New Zealand Counter-Terrorism Committee, to further investigate operational arrangements supporting the exercise of preventative detention powers, including mechanisms for the removal of a person from preventative detention in order to participate in questioning.23

As mentioned above, New South Wales was the first jurisdiction to enact legislation extending police powers to the questioning of detainees suspected of being involved in a recent or imminent terrorist act. The **Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016** (NSW)24 specifically addressed this issue and others raised with the existing legislation. COAG, at its April 2016 meeting, agreed in principle to the New South Wales model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects, with the Australian Capital Territory reserving its position.

### 4.4 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 succeeding Inspector of Custodial Services indicated a need for legal advice on the part of the Inspector and, as such, the Review recommended that this issue be given further consideration at a later date.

**Update 2015/16:** Resolved through administrative arrangements.

### 4.5 Defining incapacity

Amendments were made to the New South Wales legislation in 201025 substituting the reference to “a person incapable of managing his or her own affairs” with the wording “a person with impaired intellectual functioning”. The previous Review supported such an amendment to the WA Act as it was agreed “incapable of managing his or her own affairs” had 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).

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23 COAG Response to the COAG Review of Counter-Terrorism Legislation, February 2015, p17.
25 Terrorism (Police Powers) Amendment Act 2010 (NSW)
The amendment would be 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.

**Update 2015/16:** This remains an issue of concern which it is recommended be considered in the development of further amendments to the Act.

### 4.6 Access to legal aid

The *Terrorism (Police Powers) Amendment Act 2010* (NSW) 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 was recommended in the previous Review that the merits of providing detainees with access to legal aid be given consideration prior to any amendments being made to the Act.

**Update 2015/16:** This remains an issue of concern which it is recommended be considered in the development of further amendments to the Act.

### 4.7 Further authorised contacts

The *Terrorism (Police Powers) Act 2002* (NSW) 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 was supported by the previous 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 was agreed that allowing a monitor to seek legal advice as to the appropriateness of detainee/lawyer disclosures would assist in the execution of the monitoring function. However, it appeared that an additional disclosure provision was required to give protection to the monitor seeking the advice.

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

Update 2015/16: This remains an issue of concern which it is recommended be considered in the development of further amendments to the Act.

5. Issues Identified during the Current Review

During the course of this Review, several issues identified in the previous statutory review were reinforced as being in need of attention. Only two new matters were identified during this Review as having merit for consideration in addition to those previously identified:- the extension of the expiry date and the question of extraterritorial application.

5.1 Extension of the expiry date

A Bill to extend the expiry date of the Act by 10 years to 22 September 2026 was introduced in the Legislative Assembly on 11 May 2016. The Bill was debated and passed in the Legislative Assembly on 16 August 2016 and in the Legislative Council on 4 September 2016. Royal Assent was granted by the Governor on 12 September 2016.

5.2 Extraterritorial application of powers

The Crimes at Sea Act 2000 (Cth), together with an Intergovernmental Agreement, established a cooperative scheme between the Commonwealth and the States to apply the criminal law of the States extraterritorially in the areas adjacent to the coast of Australia. As the Preamble to that Act states:

Under the scheme, the criminal law of each State is to apply in the area adjacent to the State:

(a) for a distance of 12 nautical miles from the baseline for the State—by force of the law of the State; and
(b) beyond 12 nautical miles up to a distance of 200 nautical miles from the baseline for the State or the outer limit of the continental shelf (whichever is the greater distance)—by force of the law of the Commonwealth.26

Queensland has amended the extraterritorial application of its preventative detention legislation to include the ‘adjacent area’ for Queensland as defined in the corresponding legislation Crimes at Sea Act 2001 (Qld). This extension allows for the establishment of a declared area around a vehicle (vessel) for a terrorist emergency to continue if the vehicle crosses over the state boundary.

Western Australia’s ‘adjacent area’ is defined in the Crimes at Sea Act 2000 (WA) in accordance with the Commonwealth scheme. At present there is no extraterritoriality provision in the Western Australian preventative detention legislation. Given the steady increase in the diversity of terrorist activities worldwide, it is recommended that when drafting future amendments consideration be given to including an extraterritoriality provision in the Act.

6. Conclusion and Recommendations

6.1 Conclusion

This Review finds that the objectives of the Terrorism (Preventative Detention) Act 2006 remain valid and its provisions provide the basis for essential powers of detention to prevent a terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act. While such powers cannot guarantee that Western Australia will not be the target of a terrorist attack, they do provide Western Australia Police and other agencies with the means to intervene early to prevent a terrorist act.

Although the preventative detention powers available under the Act have not yet been exercised, a number of desktop and practical exercises have been conducted whereby multiple agencies have had the opportunity to practise aspects of the legislation. These exercises have generally indicated that the Act, in its current form, is unwieldy from an operational perspective despite every effort having been made to overcome the difficulties. COAG’s decision to renew the preventative detention scheme with reforms to improve the utility of the provisions is welcomed.

Although during the review period there were no circumstances which necessitated use of the Act, the national threat environment has changed significantly since September 2014.27 The need for these powers in Western Australia may prove more necessary in the future than they have in the past. Consequently, the lack of use of the Act does not, in the view of Western Australia Police, invite or provide a reason for any reduction or repeal of the present powers which should continue in operation pending legislative reform.

The Act has now been extended to 22 September 2026 and Western Australia has agreed in principle to the New South Wales model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects. Such amendments to the Act are required to more appropriately address the objectives of the Act to prevent terrorist activity in the current threat environment.

26 Crimes at Sea Act 2000 (Cth), Preamble, para (b).
6.2 Recommendations

The Review has identified a number of potential amendments to the Terrorism (Preventative Detention) Act 2006 which will strengthen its provisions. In summary, the matters recommended for consideration are:-

- the question of extraterritorial application;
- the need to amend the definition of “terrorist act”;
- issuing preventative detention orders to unknown/unidentified persons
- managing detainees who volunteer information;
- 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.

These are detailed in Parts 4 and 5 of this report and are recommended for further progression.