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BAR ASSOCIATION
OF QUEENSLAND

7 October 2015

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Research Director

Re: Bar Association of Queensland (“Association”): *Counter-Terrorism and Other Legislation Amendment Bill 2015* (“Bill”)

I refer to your letter of 18 September 2015. Thank you for extending the opportunity for the Association to make a written submission in relation to the Bill.

The Association has focussed its submission on the proposed amendments to the *Terrorism (Preventative Detention) Act 2005 (Qld)* (“TPDA”).

The TPDA

Objectives

Your letter of 18 September 2015 describes the Bill’s key counter-terrorism objectives as:

- to extend the sunset provision of the TPDA;
- to extend the TPDA’s extraterritorial application consistent with the combined effect of the Queensland and Commonwealth Acts in respect of crimes at sea; and
- to extend the TPDA’s emergency powers so that they may be exercised in other jurisdictions.

Clause 6: Extraterritorial application of Act

It is not clear to the Association that these objectives are fulfilled by s 6 of the TPDA. In particular it is not clear that the proposed substituted s. 6 will extend the TPDA’s emergency powers so that they may be exercised in other jurisdictions.¹ Nor is it clear that the section will allow the declaration of a stated area around a vehicle to continue if the vehicle [crosses into the Northern Territory].²

¹ Objectives of the Bill as expressed in the referral to the Committee

² Explanatory Notes, pages 2-3

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Proposed subsection 6(1) extends the application of the Act to the adjacent area as defined. This is an extended maritime area and picks up a definition from the *Crimes at Sea Act 2001 (Qld)*. The Association accepts the explanation for this extension, namely, that it allows Queensland law enforcement to respond to a maritime terrorist incident.

Proposed subsection 6(2) reproduces what is in the existing section 6. This allows the powers and functions bestowed by the Act to be exercised if the suspected or actual terrorist act is outside Queensland. This means, for example, that a person inside Queensland may be the subject of a preventive detention order because it is suspected that the person was planning or responsible for a terrorist offence in, say, Western Australia.

It does not allow a person just over the border in, say, the Northern Territory to be detained.

Absence of Review

The TPDA's extensive and broad-reaching preventative detention powers have the potential to significantly affect the rights and liberties of individuals. However, the TPDA has not, to date, undergone a legal or policy review, to assess the necessity and appropriateness of these powers.

The inclusion of the sunset clause in the original Act indicated the recognition by Parliament, at that time, of the extraordinary nature of the powers being granted and the continuing necessity of those powers to be reconsidered on the basis of experience.

The Explanatory Notes contain material intended to argue the case for the continuation of the Act and the powers it bestows on officials. However, extraordinary legislation of this kind should not be extended on the basis of a few paragraphs reciting a perceived terrorist threat.

In the 10 year period immediately following the Parliament's enactment of the TPDA, it is our understanding there has been no recourse to it. It appears that Queensland's law enforcement officers have in practice considered it unnecessary to use these powers since the TPDA's commencement in 2005. Rather it is our understanding that (arrest and questioning) powers under the *Police Powers and Responsibilities Act 2000 (Qld)* have been used in respect of any response to suspected terrorist offences. The apparent lack of use to date of preventative detention orders may indicate (a matter for the review to consider) that they are clumsy powers which provide no advantage over the power of arrest in the *Police Powers and Responsibilities Act 2000 (Qld)*.

The Association also notes the reference to TPDA testing being carried out "*in national and state counter-terrorism exercises*" on page 1 of the Explanatory Notes.

None of this suggests that the powers do not continue to be justified.

Ultimately, that is a matter for the judgment of Parliament. However, in the Association's view, the necessity and utility of the extensive powers in the TPDA should be the subject of a proper review addressing the legislation's continued necessity, its utility, and alternatives to the powers it presently bestows.

The review should invite submissions and participation should be encouraged from the general public and from experts in the fields of law enforcement, human rights, public policy and related disciplines. In the absence of such a review and until its results are known, the Association does not support a further 10 year extension of the legislation.

Clauses 13 and 14 of the Bill

It is for these reasons that the Association opposes the proposed 10 year extension of the TPDA's sunset provision as set out in clause 13 of the Bill.

The Association notes that the Commonwealth, being the only Australian jurisdiction to have extended its preventative detention legislation to date, has extended its regime by 4 years, to 7 September 2018, pursuant to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)*: see also section 105.53, Division 105 of the *Criminal Code Act 1995 (Cth)*.

The Association would support an extension of 2 years with a requirement that a review commence within 6 months of the current expiry date, that is, before 16 June 2016, and be completed before 16 June 2017.

That would allow the Parliament, and the public, to contemplate what legislative response to potential terrorist activity should be enacted in the six months before the new expiry date with the benefit of the report of the review.

(We also question whether proposed s. 83A is drafted to achieve its objective. It seems that the reference to "within 4 years of the commencement" should be expressly refer to "commencement of the [amending Act]".)

Whilst the Explanatory Notes provide on page 13: "*Nothing in this section prevents the Minister from undertaking the review and tabling the report in the Legislative Assembly earlier than the specified timeframes,*" the Association considers the need for a review is sufficiently pressing to warrant more than a discretionary ability for the Minister to conduct the review earlier than the proposed 4 year timeframe.

For the reasons set out above, the Association emphasises the need for a review to be undertaken as a matter of urgency, in order to determine whether, as the Explanatory Notes suggest, it is necessary for Queensland to retain preventative detention legislation "*for preventing or minimising the impacts and potential loss of life resulting from acts of terrorism,*" and to enable police "*to intervene early to prevent a terrorist act, or act on less information than would be the case in more traditional policy responses.*"

Accordingly, the Association suggests:

1. clause 13 of the Bill be amended to extend the TPDA for no more than 2 years initially, in order to allow a review to take place; and that any further extension be subject to the outcome of the review; and
2. clause 14 of the Bill be amended to require the review to commence within 6 months, and the report to be tabled within 1 year of that time.

The Association thanks the Committee for the opportunity to make a submission.

The Association also thanks Senior Sergeant Bob Utz of the Public Safety Business Agency for consulting with the Association on earlier versions of the policy issues raised in the Bill.

Yours faithfully



Shane Doyle QC
President