



## **Submission to the Council of Australian Governments Review of Counter-Terrorism Legislation**

### **Western Australia**

#### **Purpose**

This submission has been prepared to outline issues identified by Western Australian agencies relating to the Western Australian legislation subject to the Council of Australian Governments Review of Counter-Terrorism Legislation (the Review).

#### **Background**

The Western Australian Government believes that combating terrorism requires a national cooperative approach. The Australian Government and State and Territory Governments have consistently worked in partnership to keep Australia safe from terrorism. These efforts have been significantly supported by the suite of interoperable national and state terrorism legislation which are the tools that enable law enforcement and intelligence agencies to prevent, detect and respond to acts of terrorism.

The Western Australian legislation to be covered by the Review is the *Terrorism (Extraordinary Powers) Act 2005* (WA) (the *T(EP) Act*) and the *Terrorism (Preventative Detention) Act 2006* (WA) (the *T(PD) Act*).

To date, there has been no use of the preventative detention powers under the *T(PD) Act* or the covert search warrant powers under the *T(EP) Act*.<sup>1</sup>

It is noted that the Review's Terms of Reference state that the Review Committee should take into account the outcome of reviews or monitoring activities conducted in accordance with the legislation of individual jurisdictions.

To date, two reviews of the *T(EP) Act* have been conducted, the first in July 2008 and the second in January 2012. The inaugural review of the *T(PD) Act* was tabled in Parliament on 18 September 2012.

The reviews found that the policy objectives of the relevant Act remained valid, and that while there had been no use of the powers under either Act, it was the view of WA Police that this did not invite or provide a reason for any reduction or repeal of the present powers. WA Police considers that notwithstanding the lack of use, the powers and capabilities available under the *T(EP) Act* and the *T(PD) Act* continue to act as a valuable deterrent.

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<sup>1</sup> One application for a covert search warrant was made in 2009/10, but was never executed.

## Issues for Consideration

Western Australia suggests that the Review Committee consider the following issues:

### 1. Definition of 'terrorist act'

It is noted that the issue of the definition of 'terrorist act' was discussed in the National Security Legislation Discussion Paper on Proposed Amendments published in July 2009. That discussion, however, focussed solely on Commonwealth legislation.

The term is defined in a number of different pieces of Western Australian legislation under which Western Australian government employees hold responsibilities and can exercise powers, but the definitions are not identical. Both the *T(PD) Act* and the *Emergency Management Act 2005 (WA)* reference the definition in section 100.1 in the Schedule to the *Criminal Code Act 1995 (Cth)*, but while the *Emergency Management Act 2005 (WA)* simply references s100.1, the *T(PD) Act* reproduces the definition inexactly. The definition in the *T(EP) Act*, while similar to that in s100.1, omits reference to 'a threat of action' and thus is a more limited definition.

The reviews of the *T(EP) Act* and the *T(PD) Act* in 2012 both note that issues have been identified with the definition of 'terrorist act' in the respective statutes, particularly with regard to establishing the legal threshold of intents required by that definition, and recommend that consideration is given to amending the definition.

The immediate prevention and response powers and capacities under the *T(EP) Act* and the *T(PD) Act* are likely to be relevant in a situation where the public, or a section of the public, may be significantly endangered but the motive is unclear or unknown and unable to be ascertained within the time frames in which actions are needed to prevent or respond to an act. The Western Australian legislation does not create offences, as Western Australian law enforcement officers would act in relation to the acts criminalised in the Schedule to the *Criminal Code 1995 (Cth)*.

In the 2012 reviews, Western Australia considered a number of possible new approaches to the definition. The suggested approaches involve:

- Specifying certain acts as terrorist acts and removing the need to show intention;
- Specifying the level of response required (most helpfully as an element additional to other requirements);
- Including a modified intent, e.g. an act done with the knowledge that it would cause mayhem or mass casualties; or reasonable suspicion on the part of a police operations commander that there is or may be a serious risk as a result of extremist activity (which would then be non-exclusively defined); or
- Removing the need to show intention in specific circumstances.

Amendments to the definition which would significantly broaden the legislation's application would not be preferred, but the simplification of the intent elements would assist in making the definition operationally workable.

Another approach which may improve the operational workability of the *T(EP) Act* and the *T(PD) Act* would be to use a different definition to trigger availability of extraordinary powers and preventative detention orders than the definition which relates to criminalising acts, such as the definition contained in the Schedule to the *Criminal Code 1995* (Cth).

Western Australia submits that consideration should be given to amendments which would create both an operational definition and prosecutorial definition of a terrorist act. The operational definition would enable use of powers to prevent and/or respond to an act which appears to be a terrorist act, but in circumstances where there is an absence of, or insufficient evidence of, relevant intents. The prosecutorial definition would, for the purposes of laying charges and prosecuting offences, incorporate the current intent threshold. Two different definitions of terrorist act (and thus different legal thresholds) may be appropriate to more fully achieve the objectives of differently-focussed legislation.

As Western Australia's counter-terrorism legislation forms part of a national framework, there is value in consistency across jurisdictions for ease of use and avoidance of confusion. This may be particularly important in light of the likelihood of inter-jurisdictional involvement in the event of a situation in which such powers and capacities will need to be utilised. Western Australia would welcome debate at a national level when considering amending definitions of terrorist act.

## 2. *Operational difficulties with the Terrorism (Preventative Detention) Act 2006*

The conduct of practical and 'discussion' exercises in Western Australia have highlighted a number of operational difficulties with the *T(PD) Act*, particularly in relation to unidentified persons and detainees who volunteer information.

Section 13(4)(a) requires that a preventative detention order (PDO) must specify the name of the person in relation to whom it is made, with the consequence that a PDO could not be issued against someone whose identity is not known or cannot be ascertained. The inability to issue a PDO against a person whose identity is unknown could be considered as being contrary to the purpose of the *T(PD) Act*, "...to authorise temporary detention in order to prevent the occurrence of a terrorist act...". An exercise conducted in 2010 resulted in a recommendation that this issue be referred to the Review, which may wish to consider if the identity requirements for issuing a PDO under the *T(PD) Act* should be modified to better serve the purpose of the legislation.

Section 47 of the *T(PD) Act* provides that a person subject to a PDO is not to be questioned, aside from some prescribed exceptions, such as establishing if the detainee is the person specified in the PDO. The *T(PD) Act*, however, does not make any provision for the procedure to be followed if a detainee volunteers information. The restriction on questioning does not apply if the person is released from detention, but the time that would be consumed by administrative processes would be a possible obstacle in a time-critical situation.

The aforementioned 2010 exercise also resulted in a recommendation that the legal requirements for interviewing a detainee who is originally detained under a PDO, but wishes to volunteer information, 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 which is volunteered by a detainee 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.