

PREVENTATIVE DETENTION ORDERS IN AUSTRALIA

SVETLANA TYULKINA* AND GEORGE WILLIAMS**

I INTRODUCTION

Preventative detention orders ('PDOs') were introduced into the *Criminal Code Act 1995* (Cth) schedule 1 ('*Criminal Code*') by the *Anti-Terrorism Act (No 2) 2005* (Cth) after the terrorist attacks in London in July of 2005. They permit a person to be detained, without arrest or charge, by the Australian Federal Police ('AFP') for up to 48 hours. While in detention, the person's contact with the outside world, including family members, is strictly limited. The orders can be issued to prevent an imminent terrorist act from occurring or to preserve evidence relating to a recent terrorist act. Each state and territory has enacted legislation that extends the maximum length of detention under the PDO regime to 14 days.

PDOs are unusual among the many anti-terrorism laws enacted in Australia since the September 11 attacks.¹ Unlike other measures, which typically cover matters such as new criminal offences and special powers for enforcement and intelligence agencies, PDOs have no comparator in nations such as the United Kingdom, Canada and the United States. In addition, it is difficult to discern why the PDO regime was introduced, as the law at the time already contained a wide range of powers and offences that enabled police to arrest, charge and prosecute individuals involved in terrorism. Unsurprisingly, the PDO regime was not used for the first nine years after its enactment, and since then has been used only four times.

* Postdoctoral Research Fellow, Australian Research Council Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales.

** Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar. We thank Daniel Reynolds for his research assistance and Keiran Hardy for his comments on an earlier draft.

1 See generally Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Press, 2015); George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136.

The PDO regime is contentious and the subject of ongoing debate due to its potential impact upon a number of human rights, including the right to a fair trial and freedom from arbitrary detention. More broadly, it runs counter to the accepted principle in Australia and other liberal democracies that detention by the state should ordinarily only occur after a finding of criminal guilt by a court. The extraordinary nature of the scheme is reflected in the fact that it is subject to a sunset clause.² The legislation was originally set to expire on 15 December 2015.³ In the lead-up to that date, the PDO regime was reviewed by two major inquiries – the Council of Australian Governments (‘COAG’) Review of Counter-Terrorism Legislation,⁴ and a report by the Independent National Security Legislation Monitor (‘INSLM’).⁵ Both inquiries, the former by way of a majority of its members, recommended the abolition of the scheme.

Despite this, and without further review or response to these inquiries, the Abbott Government introduced the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) into Parliament to extend the scheme for a further 10 years until December 2025. It argued for an extension, with support from the AFP,⁶ on the basis that PDOs would play an ‘important role’ in addressing the threat of terrorism posed by Australian citizens returning home after taking part in the conflicts in Syria and Iraq.⁷ The idea of extending the regime for a decade was criticised in a report on the Bill by the Parliamentary Joint Committee on Intelligence and Security.⁸ As a result, a compromise position was reached with the Labor Opposition whereby the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) extended the PDO regime to 7 September 2018, approximately two years after the next federal election.⁹

This article examines Australia’s PDO regime and asks whether it should be retained beyond its revised expiry date, or indeed even repealed before then. Our initial aim is to determine why the regime was enacted. This is important because it is only when the underlying purpose of the regime (such as to remedy an

2 See generally Nicola McGarrity, Rishi Gulati and George Williams, ‘Sunset Clauses in Australian Anti-Terror Laws’ (2012) 33 *Adelaide Law Review* 307.

3 The *Criminal Code* s 105.53(2), as inserted by *Anti-Terrorism Act (No 2) 2005* (Cth), had provided: ‘A preventative detention order, and a prohibited contact order, cannot be applied for, or made, after the end of 10 years after the day on which this Division commences’.

4 Council of Australian Governments, ‘Council of Australian Governments Review of Counter-Terrorism Legislation’ (Report, 2013) (‘COAG Review’).

5 Bret Walker, ‘Declassified Annual Report’ (Annual Report, Independent National Security Legislation Monitor, 20 December 2012) (‘INSLM Report’).

6 See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 62 [2.239].

7 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 144 [855]–[856].

8 Parliamentary Joint Committee on Intelligence and Security, above n 6, 70–9.

9 *Criminal Code* s 105.53(2), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

identifiable gap in Australia's existing counter-terrorism laws) has been determined, that it is possible to assess whether the regime is effective and proportionate in meeting its goal. We begin in Part II with an overview of the origins of the regime, looking at why it was introduced and what it was directed to achieve. We examine this issue further in Part III by exploring whether the regime might have been adapted from other nations, and if so, whether it might have a purpose discernible on that basis. Part IV then explains how the PDO regime operates, while in Part V we set out the circumstances in which the scheme has been used and consider why this use has been so limited.

II ORIGINS OF THE PDO REGIME

The London terrorist attacks in July 2005 provoked debate not only in the United Kingdom, but also in Australia about whether new laws were needed to prevent terrorist attacks. At a COAG meeting on 27 September 2005, leaders from all levels of government in Australia agreed that changes were required, and the states and territories expressed their readiness to enact legislation to complement new Commonwealth measures. This was despite the fact that the Australian Government had already enacted significant counter-terrorism laws three years earlier in response to the September 11 attacks. The communiqué of the meeting stated:

[COAG] agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened ... COAG agreed to the Commonwealth *Criminal Code* being amended to enable Australia better to deter and prevent potential acts of terrorism and prosecute where these occur.¹⁰

Legislation to bring this about was drafted as the Anti-Terrorism Bill (No 2) 2005 (Cth). On 2 November 2005, Prime Minister John Howard explained to the public that this new law was needed to counter a potential terrorist threat, and that it should therefore be passed immediately by Parliament:

the Government has received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat. ... The Government is satisfied on the advice provided to it that the immediate passage of this amendment would strengthen the capacity of the law enforcement agencies to effectively respond to this threat.¹¹

The Bill was introduced into the House of Representatives the next day, with Attorney-General Philip Ruddock stating that 'the government would like all elements of the anti-terrorism legislation package to become law before

10 Council of Australian Governments, *Council of Australian Governments Communiqué: Special Meeting on Counter-Terrorism* (Communiqué, 27 September 2005) 3.

11 John Howard, 'Anti-Terrorism Bill' (Media Release, 2 November 2005) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=22013>>.

Christmas'.¹² Aside from PDOs, these elements included other contentious new anti-terrorism measures such as control orders, which enable restrictions to be imposed upon a person that can regulate almost every aspect of their life, ranging from where they work or live to with whom they can talk.¹³

The rationale for introducing PDOs was not made clear by the Government in its public statements on the Bill or in parliamentary debate. No attempt was made to identify what gap in the existing law would be filled by the PDO regime, nor why it was a necessary part of Australia's legislative response to the threat of terrorism. Instead, the new regime was usually only spoken of in descriptive terms. For example, the Explanatory Memorandum to the Bill stated that it included 'a new police preventative detention regime that will allow detention of a person without charge where it is reasonably necessary to prevent a terrorist act or to preserve evidence of such an act'.¹⁴

Where an argument was made in favour of introducing the regime, this was done only in general, rhetorical terms referring to the Bill as a whole. For example, Ruddock stated in his second reading speech that the '[B]ill contains the remaining provisions to ensure that we have the toughest laws possible to prosecute those responsible should a terrorist attack occur'.¹⁵

The PDO regime was thus justified as being part of the Government's 'tough' response to terrorism. Beyond that, no rationale for the regime can be found on the public record, whether it be in the second reading speech to the Bill, ministerial statements or debate in Parliament. In addition, no process or inquiry had identified the need for such a scheme prior to the introduction of the Bill. Nor had any person or organisation called publicly for the introduction of PDOs in Australia. The regime apparently emerged 'out of the blue' as part of the Government's wide-ranging response to the London terrorist attacks of 2005.

The Government might have argued that PDOs were required because existing police powers and traditional criminal procedures (such as arrest) were not sufficient to meet the threat of terrorism, and that these needed to be supplemented with a special new power of police detention. However, such an argument would have been highly contestable given the broad powers already available to police, and indeed this point was not put in public debate. All up, the evidence shows that no clear purpose for the PDO regime was ever articulated in public. Given the many opportunities to do this, the possibility exists that the Government pressed ahead with the regime in great haste without itself having identified such a purpose, or that the regime was necessary to fill a gap in the law.

12 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

13 See generally Lynch, McGarrity and Williams, above n 1, 171 ff.

14 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 1.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

The 137-page Bill went through each legislative stage promptly and was passed on 7 December 2005. The PDO regime itself was not subject to significant scrutiny or indeed to any meaningful debate in Parliament. In particular, parliamentary debate did not shed any further light on the necessity of the regime, or its underlying purpose. The Bill was subject to review by the Senate Legal and Constitutional Legislation Committee, but that Committee had only six days to call for submissions, three days of public hearings and then 10 days to write its report.¹⁶ Like each other step in the process, this provided an inadequate opportunity for considered debate on the many aspects of the Bill, including as to whether a PDO regime was needed in the first place.

III PREVENTATIVE DETENTION IN OTHER NATIONS

A possible justification for Australia's PDO regime might have been that other nations had adopted a like scheme as part of their response to the threat of terrorism, and so it was thought that the same type of measure needed to be introduced in Australia. This was certainly the case for other measures introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth) and earlier legislation. For example, the control orders regime introduced in the 2005 law was modelled upon legislation in the United Kingdom.¹⁷ The fact that United Kingdom authorities could impose control orders was used to explain why Australia needed a like measure.¹⁸

Detention as a method of preventing harm is not unusual in other countries, and can also be found in the Australian states and territories. For example, laws in New South Wales enable detention for individuals with a mental illness who are a danger to themselves or others,¹⁹ and convicted former sex offenders who still pose a risk to the community.²⁰ However, the use of these powers is based upon some evidence as to the person's past history, an element missing in the

16 Lynch, McGarrity and Williams, above n 1, 201. See also Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Legislation Committee, 18 November 2005, 1 (Marise Payne, Chair).

17 John Howard, 'Counter-Terrorism Laws Strengthened' (Media Release, 8 September 2005) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=21909>>; Bronwen Jagers, 'Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison' (Research Paper No 28, Parliamentary Library, Parliament of Australia, 29 April 2008); Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011) 299–340.

18 Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182, 186–8; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159, 174.

19 The detention of persons with mental illness dates back to more than a century ago: see, eg, *Lunacy Act 1867* (NSW) s 3.

20 See, eg, the *Crimes (High Risk Offenders) Act 2006* (NSW), which enables a 'high risk' sex or violent offender to be preventively detained or supervised in the community upon the completion of a custodial sentence.

federal PDO regime. Other regimes that may have inspired the Australian Government are those for immigration detention. For example, in Canada and New Zealand preventive detention falls largely within the administrative framework of immigration law, and as such is predicated upon the detainee's status as a non-citizen.²¹

Further analogies with the PDO regime might be found in pre-trial detention in a few overseas jurisdictions, including in the United Kingdom and Ireland.²² Under these schemes, pre-trial detention is used as a tool of criminal procedure to permit individuals to be held pending criminal charges and trial for terrorist acts.²³ Similar legislation authorising pre-trial detention for the purpose of investigation of terrorism was enacted in Australia in 2004.²⁴ However, each of these regimes is distinguishable on the basis that, unlike the PDO regime, they require an ongoing investigation into a suspected terrorist.

The closest comparator may be the United Kingdom's system of preventive arrest without a warrant, as introduced by the *Terrorism Act 2000* (UK).²⁵ But even this measure is very different from the Australian model – it is mostly investigative and allows the police to arrest and detain a person without a warrant if they are reasonably suspected of being a terrorist. By contrast, as the *COAG Review* pointed out, the PDO regime does not provide for questioning of the detainee during their detention and can be seen as 'purely protective', and so PDOs 'differ markedly from their counterpart in the UK legislation'.²⁶

The INSLM likewise stated that '[t]here are limited analogies in similar countries of a power to detain preventively without arrest or charge'.²⁷ It concluded that a power to detain preventively is virtually unknown in other democracies, even looking at their past experience.²⁸ The closest historical analogies were identified as being the internment of Japanese Americans by the United States Government during World War II²⁹ and the detention of suspected Irish Republican Army members by the United Kingdom Government in the 1970s.³⁰

21 Stella Burch Elias, 'Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 *Columbia Human Rights Law Review* 99, 159.

22 Other countries are Brazil, Colombia, Denmark, France, Germany, Greece, Italy, Norway, Spain, and Turkey: *ibid* 131.

23 *Ibid* 133.

24 *Crimes Act 1914* (Cth) pt IC div 2 sub-div B, as amended by *Anti-Terrorism Act 2004* (Cth).

25 *Terrorism Act 2000* (UK) c 11, s 41.

26 *COAG Review*, above n 4, 64.

27 *INSLM Report*, above n 5, 47.

28 *Ibid*.

29 See *Korematsu v United States*, 323 US 214 (1944), in which such detention was held to be constitutional.

30 See Brice Dickson, 'The Detention of Suspected Terrorists in Northern Ireland and Great Britain' (2009) 43 *University of Richmond Law Review* 927.

All this demonstrates both the exceptional nature of the Australian regime, and that the introduction PDOs in Australia could not have been justified by the presence of like schemes in other nations. There are simply no other examples of a power of preventative detention without arrest or charge similar to Australian PDOs. Indeed, one academic study found that Australia's PDOs do not fit into any known framework of preventive detention.³¹ It also concluded that the scheme falls under the category of the 'most rights-violative approach ... to the detention of terrorist suspects', along with the approaches adopted in other countries such as Israel, India, Pakistan, Singapore, Malaysia, Mozambique and Kenya.³²

IV PDOS EXPLAINED

A Issuing Authorities

Under division 105 of the *Criminal Code*, a PDO can be made by an 'issuing authority' at the application of a member of the AFP.³³ No preliminary consent is required from the Attorney-General. The issuing authority will differ depending on whether the AFP member is applying for an initial PDO (which allows detention for up to 24 hours) or a continued PDO (which extends that detention up to 48 hours). In the case of an initial PDO, the issuing authority can be a senior AFP member³⁴ who holds the rank of superintendent or higher.³⁵ In the case of a continued PDO, the issuing authority must be a person such as a serving or retired judge or the President or Deputy President of the Administrative Appeals Tribunal.³⁶

B Making a PDO

There are two grounds on which an issuing authority may make a PDO. First, an order may be made to prevent an imminent terrorist act from occurring,³⁷ meaning that the act is 'expected to occur ... at some time in the next 14 days'.³⁸ For an order to be made on this ground, the issuing authority must be satisfied there are reasonable grounds to suspect that the subject:

- 'will engage in a terrorist act';

31 Elias, above n 21. See also *INSLM Report*, above n 5, 47

32 Elias, above n 21, 180–1.

33 *Criminal Code* s 105.7(1).

34 *Criminal Code* s 105.7(1) note 1.

35 *Criminal Code* s 100.1(1).

36 *Criminal Code* s 105.2.

37 *Criminal Code* s 105.1(a).

38 *Criminal Code* s 105.4(5).

- ‘possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act’; or
- ‘has done an act in preparation for, or planning, a terrorist act’.³⁹

The issuing authority must also be satisfied that making the order would substantially assist in preventing a terrorist act from occurring,⁴⁰ and that detaining the subject is reasonably necessary for this purpose.⁴¹ The second ground for a PDO is when a terrorist act has occurred in the last 28 days and it is reasonably necessary to detain a person in order to preserve evidence relating to that terrorist act.⁴²

The PDO must set out the name, alias or description of the person affected, the period during which the person may be detained, the date and time the order is made and the date and time after which the person may no longer be taken into custody under the order.⁴³ Finally, it must set out a summary of the grounds on which the order was made.⁴⁴

The grounds for issuing a PDO are the same for both initial and continued PDOs,⁴⁵ although an extension of 24 hours can be granted in regard to an initial PDO if the issuing authority is satisfied that further detaining the person is reasonably necessary for the purpose for which the order was made.⁴⁶

C Effects of PDOs on Detainees

A police officer taking a person into custody or detaining a person under a PDO has the same powers and obligations as he or she would have if arresting or detaining the person for an ordinary offence.⁴⁷ Accordingly, the police officer can enter and search the premises where the subject of the order is believed to be.⁴⁸ The officer is obliged to explain to the person at the first practical opportunity the effect of the PDO,⁴⁹ and the person must be supplied with a copy of the order.⁵⁰ A person detained under a PDO may be held in a state or territory prison or remand centre.⁵¹

The *Criminal Code* places limits on detainees contacting people and disclosing the fact of their being subject to a PDO. A detainee may contact one of

39 *Criminal Code* s 105.4(4)(b).

40 *Criminal Code* s 105.4(4)(c).

41 *Criminal Code* s 105.4(4)(d).

42 *Criminal Code* s 105.4(6).

43 *Criminal Code* s 105.8(6)(a)–(d).

44 *Criminal Code* s 105.8(6)(e).

45 *Criminal Code* s 105.10(1).

46 *Criminal Code* s 105.10(3), (5).

47 *Criminal Code* s 105.19(2).

48 *Criminal Code* s 105.22(1).

49 *Criminal Code* s 105.29.

50 *Criminal Code* s 105.32(1).

51 *Criminal Code* s 105.27.

his or her family members; one housemate; his or her employer; one employee; one business partner; and any other person the police officer agrees to their contacting.⁵² Communication with these people must occur in a way that can be monitored by the AFP.⁵³ The right of the detainee to contact a person can also be removed by a prohibited contact order made by an issuing authority.⁵⁴ An application for such an order can be made on grounds such as that it is reasonably necessary to prevent serious harm to a person or to preserve evidence relating to a terrorist act.⁵⁵

What can be said by the detainee to these people is strictly limited. A person detained under a PDO may contact another person by telephone, fax or email 'solely for the purpose of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being'.⁵⁶ The detainee may not disclose that they are being detained under a PDO or the period for which they are being detained.⁵⁷ Disclosing the existence of the PDO is a crime punishable by up to five years' imprisonment. This prohibition applies to the detainee, the detainee's lawyer, the police officer and the interpreter.⁵⁸

D Human Rights Concerns and Safeguards

Australia's PDO regime can be characterised as extraordinary in its nature, in particular with respect to its potential impact upon fundamental human rights. Significant periods of detention without charge lie beyond the bounds of what would normally be considered reasonable in a liberal democracy. It is a power more commonly found in undemocratic regimes lacking basic rights. This is exemplified by the fact that a person subject to a PDO may contact one family member only to say that they are safe and unable to be contacted for the time being. Receiving such a call would no doubt confuse, and perhaps terrify, a spouse or parent.

The regime raises a number of other human rights concerns. These include that people can be jailed for up to five years for disclosing information about the regime; detention under an initial PDO can be facilitated entirely by the police; detention of children over 16 years of age is allowed; and review of decisions made under the regime is extremely limited in extending only to the Administrative Appeals Tribunal after a PDO has ceased to operate.⁵⁹ Factors such as these have also influenced the recommendations for repeal. The INSLM

52 *Criminal Code* ss 105.34–105.35.

53 *Criminal Code* s 105.38(1).

54 *Criminal Code* s 105.15.

55 *Criminal Code* s 105.14A.

56 *Criminal Code* s 105.35(1).

57 *Criminal Code* s 105.35(2).

58 *Criminal Code* s 105.41.

59 Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072, 1077–9.

described the PDO regime as being ‘at odds with our normal approach to even the most reprehensible crimes’,⁶⁰ while the *COAG Review* remarked that such powers ‘might be thought to be unacceptable in a liberal democracy’.⁶¹

To minimise the impact on individual rights and liberties of individuals detained under a PDO, the *Criminal Code* provides some safeguards. As mentioned above, an officer taking a person into detention must explain at the first practical opportunity the effect of the PDO, and the person must be supplied with a copy of the order.⁶² Further, section 105.33 amounts to a guarantee against torture by requiring that a person who is in custody or detained under a PDO be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment. A detainee also possesses the right to make a complaint to the Commonwealth Ombudsman or similar state or territory authority,⁶³ and may make contact with a lawyer to obtain advice about their legal rights in relation to the PDO and their treatment.⁶⁴

A person detained under a PDO who is under 18 years of age is entitled to additional safeguards. These include a requirement that they not be detained with people who are 18 years or older,⁶⁵ special contact rules which allow the person to contact both parents,⁶⁶ and a rule that police officers must not take identification material (other than hand prints, fingerprints, footprints or toeprints) from the person unless this is ordered by a judge of the Federal Circuit Court of Australia.⁶⁷

The making of a PDO can be reviewed by the Security Appeals Division of the Administrative Appeals Tribunal, which can declare that a decision by an issuing authority to make or extend a PDO is void.⁶⁸ However, this power cannot be exercised while the PDO is in force.⁶⁹ In addition, the legality of PDO decisions is exempted from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁷⁰

The stringent secrecy measures attached to PDOs mean that there is little opportunity for the public to become aware that such an order has been issued. Section 105.47 requires only that the Attorney-General prepare an annual report about the operation of division 105 of the *Criminal Code* and lay copies of the report before each House of Parliament within 15 sitting days of the completion of the report. The report must set out matters such as the number of initial and

60 *INSLM Report*, above n 5, 47.

61 *COAG Review*, above n 4, 68.

62 *Criminal Code* s 105.32(1).

63 *Criminal Code* s 105.36.

64 *Criminal Code* s 105.37.

65 *Criminal Code* s 105.33A(1).

66 *Criminal Code* s 105.39.

67 *Criminal Code* s 105.43(4).

68 *Criminal Code* s 105.51(5)–(7).

69 *Criminal Code* s 105.51(5).

70 *Criminal Code* s 105.51(4).

continued PDOs made, how long each person was detained for and whether any complaints were made to the Ombudsman.⁷¹

E State and Territory PDOs

Each state and territory has enacted legislation enabling the further detention of individuals under a PDO for up to a total of 14 days.⁷² This extended detention time is provided by these jurisdictions, rather than the Commonwealth Parliament, because of concerns that the longer period of executive-based detention would be inconsistent with the strict separation of judicial power under the *Constitution* that applies at the federal, but not the state and territory, level.

The grounds for making PDOs under the state and territory Acts, as well as many aspects of their operation, are the same as the provisions of division 105 of the *Criminal Code*.⁷³ Hence, a detained person has a right to contact a lawyer (although their choice of lawyer may be restricted by a prohibited contact order),⁷⁴ to lodge a complaint and to seek a remedy from a court relating to a particular PDO or to their treatment while subjected to a PDO.⁷⁵

In other respects, there is variation between the state and territory schemes. For example, Queensland legislation provides for the issuing of PDOs by a similar process to that in the *Criminal Code*. ‘Urgent’ or ‘interim’ PDOs allowing for up to 24 hours’ detention may be issued by Senior Police Officers.⁷⁶ PDOs enabling up to 14 days’ detention⁷⁷ must be issued by judges or retired judges.⁷⁸ The detainee has the right to make submissions to the issuing authority in respect of a final PDO,⁷⁹ and the Public Interest Monitor is to be informed at all stages of the process.⁸⁰ On the other hand, in New South Wales an interim order of up to 48 hours may be issued by the Supreme Court in *ex parte*

71 *Criminal Code* s 105.47(2).

72 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) pt 2 (‘ACT Act’); *Terrorism (Police Powers) Act 2002* (NSW) pt 2A (‘NSW Act’); *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B (‘NT Act’); *Terrorism (Preventative Detention) Act 2005* (Qld) (‘Qld Act’); *Terrorism (Preventative Detention) Act 2005* (SA) (‘SA Act’); *Terrorism (Preventative Detention) Act 2005* (Tas) (‘Tas Act’); *Terrorism (Community Protection) Act 2003* (Vic) pt 2A (‘Vic Act’); *Terrorism (Preventative Detention) Act 2006* (WA) (‘WA Act’).

73 The grounds for issue may be found in *ACT Act* s 18; *NSW Act* s 26D; *NT Act* s 21E; *Qld Act* s 8; *SA Act* s 6; *Tas Act* s 5; *Vic Act* s 13C; *WA Act* s 9. The restriction on questioning may be found in *ACT Act* s 58; *NSW Act* s 26ZK; *NT Act* s 21ZP; *Qld Act* s 53; *SA Act* s 42; *Tas Act* s 39; *Vic Act* s 13ZK; *WA Act* s 47.

74 See, eg, *Qld Act* s 58; *SA Act* s 37; *Tas Act* s 34; *WA Act* s 43.

75 See, eg, *Qld Act* s 48(2); *SA Act* s 29(2); *Tas Act* s 26(3); *WA Act* s 57.

76 *Qld Act* s 7(1).

77 *Qld Act* s 12(2). The limitation is 14 days inclusive of any period of detention issued on the same basis (that is, in respect of the same terrorist act) under any corresponding state or Commonwealth preventative detention order law.

78 *Qld Act* s 7.

79 *Qld Act* s 23.

80 *Qld Act* s 24.

proceedings, with no notice given to the potential detainee.⁸¹ The Australia Capital Territory scheme contains an additional, significant safeguard. It states that an applicant for a PDO must demonstrate that it is ‘the least restrictive way of preventing the terrorist act’ or that it is the ‘only effective way of preserving the evidence’.⁸²

V THE USE MADE OF PDOS

PDOS were introduced in Australia in 2005. The regime lay unused until 18 September 2014 when, in the wake of large-scale anti-terrorism raids in Sydney, PDOs were issued against three unnamed men by the Supreme Court of New South Wales. The men were released the next day.⁸³ No more can be determined about these PDOs, such as why it was thought necessary to use the regime after years of inactivity, or what specific circumstances required the use of a PDO. This is because the decision to issue the PDOs was the subject of a suppression order by the Supreme Court that covers every aspect of the orders – including the names of the parties, the evidence relied upon by the AFP and the reasons for which the PDOs were issued. The order is so broad that even the name of the Supreme Court spokesman who announced it could not be published. The non-publication order does not have an expiry date, and as a result will remain in place indefinitely unless the Court makes a further decision to rescind it.⁸⁴ More information has been released about a further PDO issued by the Supreme Court of Victoria on 18 April 2015 in regard to alleged plots to disrupt Anzac Day commemorations. That order was made against Harun Causevic, an 18-year-old man who was released from the PDO only to be immediately arrested and charged with planning a terrorist attack.

Prior to 18 September 2014, no application had been made to issue a PDO. The Government stated that this reflected the policy intent of the regime, as PDOs are ‘extraordinary measures which are to be used sparingly’.⁸⁵ The AFP also backed the ongoing importance of the scheme, despite this lack of use, arguing that ‘continued access to preventative detention orders [is] a critical

81 *NSW Act* ss 26H, 26L.

82 *ACT Act* s 18.

83 Australian Federal Police, ‘Clarification of Operation Appleby Numbers’ (Media Release, 20 September 2014). See also Paul Farrell, ‘Police Listened to Lawyer–Client Phone Call after Sydney Counter-Terrorism Raid’, *The Guardian* (online), 24 November 2014 <<http://www.theguardian.com/australia-news/2014/nov/24/police-listened-lawyer-client-phone-call-terrorism-raid>>.

84 Paul Farrell, ‘Indefinite Ban on Reporting of Counter-Terrorism Preventive Detention Order’, *The Guardian* (online), 23 September 2014 <<http://www.theguardian.com/world/2014/sep/23/indefinite-ban-reporting-counter-terrorism-preventative-detention-order>>.

85 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 138.

operational response of last resort, to ensure that the AFP can undertake action to quickly disrupt imminent threats'.⁸⁶

The views of the Australian Government and AFP run counter to the findings of the 2013 *COAG Review* and the 2012 *INSLM Report*, which both recommended that division 105 be repealed.⁸⁷ The *COAG Review* went further still by also recommending the repeal of the complementary state and territory legislation.⁸⁸

The recommendations for repeal reflected the view of those reviewers, as well as the NSW Ombudsman,⁸⁹ that the PDO regime was a 'dead law' because of a number of problems. One was the high and therefore impractical thresholds involved in applying for such an order.⁹⁰ PDOs were also overlooked in practice because other, more operationally effective means of detaining terrorism suspects were available. Indeed, the INSLM was provided with 'no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism'.⁹¹

Additionally, certain procedural rules – intended to act as strict guarantees for persons affected by PDOs – have led to concerns that police officers might be exposed to criminal sanctions when using PDOs.⁹² These practical and procedural constraints have led law enforcement practitioners (including the NSW Police Force Counter Terrorism and Special Tactics Command) to conclude that the regime is 'unworkable', 'impractical' and 'difficult ... to use operationally'.⁹³ Similarly, the South Australian Government and Police gave evidence to the *COAG Review* that existing law enforcement powers 'would almost certainly be used ahead of the preventative detention legislation'.⁹⁴ They described the PDO

86 AFP, Submission No 36 to Parliamentary Joint Committee on Intelligence and Security, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, 2.

87 *INSLM Report*, above n 5, 67; *COAG Review*, above n 4, 68.

88 *COAG Review*, above n 4, 68.

89 NSW Ombudsman, 'Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*', (Review, August 2011) 33 ('*NSW Ombudsman Review 2011*'). But see NSW Ombudsman, 'Preventative Detention and Covert Search Warrants: Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*' (Review, September 2014) 31 ('*NSW Ombudsman Review 2014*').

90 *INSLM Report*, above n 5, 45 ff; *COAG Review*, above n 4, 64.

91 *INSLM Report*, above n 5, 52.

92 *NSW Ombudsman Review 2011*, above n 89, 28. See also *NSW Act* ss 26Y, 26Z, 26ZC, 26ZK, 26ZL, 26ZM.

93 Correspondence from the National Counter Terrorism Committee Secretariat, 25 November 2010, quoted in *NSW Ombudsman Review 2011*, above n 89, 29. Nevertheless, the view of the NSW Commissioner of Police is that '[r]emoving preventative detention powers would create a gap in law enforcement capability to prevent a suspected terrorist attack. ... While it appears there is scope to improve the utility of these provisions ... it would be imprudent to repeal this legislation': *NSW Ombudsman Review 2014*, above n 89, 27.

94 Submission of the South Australian Government to the *COAG Review*, quoted in *COAG Review*, above n 4, 70.

regime as ‘complex’, ‘restrictive’ and ‘not usable in its current form’.⁹⁵ The most important of these impediments to using the PDO regime are examined in more detail below.

A Thresholds

To apply for and issue a PDO, a terrorist act must have occurred within the last 28 days or a terrorist act must be imminent and expected to occur at some time within the next 14 days.⁹⁶ The imminence requirement is designed to create a high threshold for applying for and issuing a PDO.⁹⁷ It is, however, questionable how this requirement can be met in practice. The INSLM, for example, argued that this provision limits the efficacy of the PDO regime because ‘[p]ractically, it is impossible to guarantee that an event will occur. A police officer simply cannot attest that a terrorist act is expected to occur within a fortnight irrespective of any intervening event’.⁹⁸ The AFP has expressed a similar concern:

Despite credible intelligence that a terrorist act is imminent, the ability to predict in advance the precise timeframe in which the act may happen may be particularly challenging. It is not clear what a court would expect in relation to evidence given by the AFP that the terrorist act is expected to occur within 14 days.⁹⁹

Like many aspects of the PDO regime, it is not clear why this threshold was imposed, nor why the particular time limits were selected. In evidence given to the INSLM, the federal Attorney-General’s Department acknowledged that the 14-day period was somewhat arbitrary, but was included as a requirement to ensure that the regime was preventive and not punitive.¹⁰⁰ It will only be in rare cases that the imminence threshold can be met, although the PDOs issued on 18 September 2014 suggest that it is possible to meet this threshold. Even in such rare circumstances, however, the imminence requirement requires police officers to confirm something they cannot know for certain.

For a PDO to be made to preserve evidence relating to a recent terrorist act, it must be ‘reasonably necessary to detain the subject to preserve evidence’, and the detention period must be ‘reasonably necessary for the purpose’.¹⁰¹ In other words, an issuing authority must be satisfied that if the person is not detained, there is a substantial risk that the evidence will not be preserved.¹⁰² This threshold will be easier to satisfy compared to the imminence requirement, although it still

95 Ibid.

96 *Criminal Code* s 105.4(5)–(6).

97 *INSLM Report*, above n 5, 51; *COAG Review*, above n 4, 64.

98 *INSLM Report*, above n 5, 51.

99 AFP Additional Submission to the INSLM, 16 August 2012, quoted in *INSLM Report*, above n 5, 51.

100 *INSLM Report*, above n 5, 57.

101 *Criminal Code* s 105.4(6)(b)–(c).

102 *INSLM Report*, above n 5, 52.

to some degree requires the issuing authority to be convinced of a person's future actions.

B Powers of Pre-Charge Detention and Arrest

When the Anti-Terrorism Bill (No 2) 2005 (Cth) was introduced into Parliament, no explanation was provided for why the criminal justice tools of arrest, charge and remand were inadequate. Indeed, the INSLM was unable to identify why such methods did not suffice for the investigation and prosecution of terrorist suspects.¹⁰³ The most obvious alternative to a PDO is the pre-charge detention regime in part 1C of the *Crimes Act 1914* (Cth). It allows the AFP to detain a suspect for questioning for up to 24 hours. This does not include any 'dead time', which may be excluded from the 24-hour limit for a range of administrative reasons, so the actual period of detention may extend up to more than one week.¹⁰⁴

In terms of the general power of arrest, the police do not need evidence to prove charges at that time, as a reasonable suspicion for the purposes of arrest is sufficient.¹⁰⁵ As the INSLM concluded:

If there are facts which can reasonably ground a suspicion that a person meets the threshold requirements for a PDO then in all likelihood there will be facts which can reasonably ground a belief that a person has committed a terrorist offence and is eligible for arrest.¹⁰⁶

In light of this, it is even less clear how the unwieldy PDO regime with its high thresholds enhances the AFP's ability to prevent acts of terrorism. The detention of a person through the traditional power of arrest can achieve the same preventive purpose as the PDO regime without needing to resort to measures outside the traditional criminal justice process.

In addition, in terms of practicality, the procedure to apply for and issue a PDO is a time-consuming activity within a complex statutory regime, whereas an arrest can be made by a single police officer with far greater ease and without need for formal paperwork or approvals. The INSLM referred to a discussion with AFP officers at a private hearing at which it was 'strongly suggested that "in a real, practical urgent sense" the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO'.¹⁰⁷

103 Ibid.

104 *Crimes Act 1914* (Cth) ss 23DB, 23DD.

105 *Crimes Act 1914* (Cth) ss 3W, 3WA.

106 *INSLM Report*, above n 5, 55.

107 Ibid 56.

C Prohibition on Questioning

A police officer is expressly prohibited from questioning a person detained under a PDO.¹⁰⁸ A complete ban applies even if the detained person wishes to cooperate and provide information that may assist in preventing a terrorist act. This prohibition is present in both the federal and state and territory PDO legislation. It was included because the Government believed that PDOs were not an appropriate vehicle for questioning suspects, and that more appropriate alternatives were available:

The rationale for this process is that detention in itself is a factor that can impact on the reliability of answers to questions. Given the purpose of the preventative detention regime is to prevent a terrorist act and to preserve evidence, and the police and ASIO questioning time was recently modified to extend questioning for terrorism investigations, it follows that the existing procedures for questioning should be used. These procedures contain safeguards in relation to the questioning of persons, including persons who are under arrest or are protected suspects.¹⁰⁹

As the *COAG Review* recounts, police at both the federal and state level characterise the inability to question as ‘operationally unsatisfactory’.¹¹⁰ Thus, in its submission to the INSLM, the AFP supported a move to allow questioning of a person detained under a PDO:

If questioning during detention was permitted, it could elicit important information which could better direct police resources in preventing a terrorist attack, or could assist police to determine whether the continued detention of the person is necessary (ensuring that persons are only detained for the minimum amount of time). The AFP suggests that consideration be given to allowing the questioning of detained persons on a voluntary basis, principally for intelligence purposes to allow response measures to mitigate risk to the public.¹¹¹

No change has been made to the PDO regime to allow questioning or the voluntary exchange of information between police and a detainee. Such a change would improve the practicality of the regime, although any questioning procedures would need to be balanced carefully against the accused’s right to silence and protections against self-incrimination.¹¹² This would not, in any case, overcome the difficulties in applying for PDOs, or the overlap with existing arrest and questioning powers. It therefore seems likely that police would continue to use more established methods for questioning terror suspects, even where there are grounds to suspect that a terrorist act is imminent.

108 *Criminal Code* s 105.42(1).

109 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 66.

110 *COAG Review*, above n 4, 68.

111 AFP Submission to the INSLM, 19 July 2012, quoted in *INSLM Report*, above n 5, 58.

112 *Ibid.*

VI CONCLUSION

Australia's PDO regime was due to expire on 15 December 2015. Well before this date was reached, the life of the scheme was extended for nearly three years until 7 September 2018. This was justified on the basis that PDOs would play an 'important role' in mitigating and responding to the threat posed by the Islamic State organisation operating in Syria and Iraq, and particularly the risk that Australian citizens fighting in those conflicts would return to Australia and engage in terrorism.¹¹³ The Government believes it 'vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts'.¹¹⁴

This general statement of support for the PDO regime belies the many problems evident in the legislation. It also fails once again to establish exactly why Australia needs a regime of this kind in the first place. As we established in Part II, no case has been advanced on the public record, including at the time of the enactment of the PDO regime, as to why it is a *necessary* component of Australia's legislative response to terrorism. No gap in the existing law has been identified as needing to be filled, nor has any explanation been provided as to why existing police powers and traditional criminal procedures are insufficient. This lack of justification is compounded by the fact that *Anti-Terrorism Act (No 2) 2005* (Cth) was rushed through Parliament without an adequate opportunity for public and parliamentary debate. As a result, the effectiveness and utility of the scheme has never been properly debated.

Analysis of preventative detention legislation in other nations also fails to establish a rationale for PDOs. The control order regime, introduced at the same time as PDOs, is clearly modelled on legislation in the United Kingdom. No such precedent exists for PDOs in the United Kingdom or in any comparable nation. Indeed, it has been found that PDOs do not fit into any known framework of preventative detention, and that they raise more significant human rights concerns than the detention regimes of other nations.

In the absence of a clear justification, the PDO regime cannot be described as being necessary and proportionate. If nothing else, a proportionate response requires that the law is well tailored to suit its purpose, something which cannot be made out in the absence of such a purpose. This highlights one of the most troubling aspects of Australia's PDO regime, especially given its significant impact upon fundamental human rights such as the right to a fair trial and freedom from arbitrary detention. The scheme was introduced at the time of heightened concern about terrorism, and has all the hallmarks of being an ill-thought-out legislative scheme designed more to demonstrate the Australian

113 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 144.

114 Ibid.

Government's 'tough' response to terrorism, rather than to equip police with appropriate powers to combat the threat to the community.

In addition to these problems of justification, the PDO regime suffers from a lack of utility. The thresholds to apply for a PDO can be high and impractical, and other schemes exist that offer an effective and more efficient means for police officers to detain terrorist suspects. Significantly, these other schemes allow police to question and otherwise gain information from detainees that may be of use not only in the process of criminal investigation but also in preventing terrorist attacks. The ban upon questioning, or even the voluntary sharing of information in the PDO regime, is a key reason why police are reluctant to seek such an order. These issues explain why the PDO regime was not used at all for the first nine years of its existence, and only for the first time on 18 September 2014.

All this demonstrates that in its PDO regime the Federal Parliament has legislated for a measure that is anything but an essential component of the laws required to protect the community from terrorism. In fact, the PDO regime is highly intrusive upon basic freedoms, yet has no apparent purpose and is of little practical use. It should be repealed.