

**JOINT BAR ASSOCIATION OF QUEENSLAND / QUEENSLAND LAW SOCIETY
SUBMISSION TO THE PREMIER AND THE MINISTER FOR JUSTICE AND
ATTORNEY-GENERAL CONCERNING**

TERRORISM (PREVENTATIVE DETENTION) BILL 2005

1. INTRODUCTION

1. The Bar Association of Queensland and the Queensland Law Society oppose, as a matter of principle, the contents of the *Terrorism (Preventative Detention) Bill 2005* (the **Bill**) introduced into the Queensland Parliament on 22 November 2005. Preventative detention is both unnecessary and an attack on the fragile rights, freedoms and liberties currently enjoyed by Queenslanders. The Bill provides insufficient safeguards to protect the Queensland public from abuse of the powers granted by the legislation.
2. This submission is provided in the context of advice from the Queensland Government that it has made a commitment through COAG to the introduction of preventative detention legislation which will allow for such detention for a period of up to 14 days and the advice that the Government will see through that commitment. The Bar Association of Queensland and the Queensland Law Society remain firmly of the view that the Bill should be withdrawn and subjected to substantial public scrutiny and debate¹. However, on the basis that the Bill is to proceed on a tight timetable, this submission makes constructive suggestions about how the most objectionable provisions of the Bill might be changed to minimise the impact of the Bill on the fundamental freedoms of Queenslanders.
3. The poignancy of the impact of this legislation on the rights and freedoms Queenslanders have hitherto enjoyed is sharpened by the understanding that we have imported the idea from Britain – but it has a Bill of Rights to provide some assurance of safety for its citizens. Hence the need for our political leaders to be vigilant and careful for the rights of the citizens they represent.

¹ Victoria's legislation is to be debated when its Parliament resumes in February 2006 to "allow the Victorian community time to examine the provisions" (per Premier Bracks, Second Reading Speech

4. Following a summary of the key points, this submission will first deal generally with the reasons for our opposition to the main provisions introduced by the Bill and then will deal more specifically with suggested amendments to the Bill.

2. EXECUTIVE SUMMARY

Monitoring of communications between lawyers and clients

5. Monitoring of communications between lawyers and clients is opposed and should be removed from section 59 of the Bill.
6. If the Government is determined to establish the intrusive, unconventional practice of monitoring lawyer/client communications, its purpose should be clearly stated and it should only occur:
 - (a) on order of the Supreme Court; and/or
 - (b) when carried out by a person independent from the investigation of the detained person and at a senior level in, preferably, the CMC or the Queensland Police; and
 - (c) on the basis that if the communication, and any information derived from the communication, is inadmissible in proceedings against the detained person or any other person; and
 - (d) on the basis that monitoring, disclosure of, and use of, the communication can only occur to prevent the furthering of a future terrorist act; and
 - (e) on the basis that if the electronic recording of any monitoring is permitted, that this be by order of the Supreme Court.
7. If monitoring is permitted under the Bill, it should not occur at all where a lawyer is a security cleared lawyer within the meaning of the Bill.

Issuing Authority

8. The proposed regime of persona designata should be abandoned in favour of a Court supervised system, as is proposed in Victoria and New South Wales. We refer to the words of Premier Bracks in the Second Reading Speech arguing the case for departure from the Commonwealth scheme. Surely the rights of Queenslanders are no less precious than those of Victorians or the citizens of New South Wales.

9. The issuing authority for initial and final preventative detention orders and prohibited contact orders should be the Supreme Court of Queensland, not a *persona designata*.
10. At the very least, the issuing authority for final preventative detention orders and prohibited contact orders should be the Supreme Court of Queensland.

Children

11. Section 9 should be amended so that the obligation to release a person under 16 years of age from preventative detention is immediate and it is clear that any preventative detention order of a person under 16 years of age is void *ab initio*.
12. Sections 47 and 48 should be amended to make it a requirement of a police officer to advise every person detained that an order cannot be made in respect of a person under the age of 16 and they can contest the order on that basis.

Preventative detention orders

13. Section 8 should be amended to provide greater clarity that preventative detention orders must only be issued if reasonable grounds exist for the matters listed and each application must be considered afresh on its merits.

Multiple detention orders

14. Applications for extension of preventative detention orders must be made to a Supreme Court judge and must demonstrate why the original duration of the order was insufficient and that all reasonable steps were taken to fulfil the purpose of the order within the original duration.
15. The Bill should be amended as it is still not clear that consecutive orders cannot be made for a cumulative period in excess of 24 hours, in the case of initial orders, and 14 days in the case of final orders.

Disclosure

16. The Bill should be amended to provide for the following:
 - (a) The Public Interest Monitor be given reasonable notice, in all of the circumstances, of the application;
 - (b) The Public Interest Monitor receive a copy of the application within a reasonable time, in all the circumstances, prior to the hearing of the application;

- (c) The applicant police officer must demonstrate to the issuing authority, before a hearing can proceed in the absence of the Public Interest Monitor, that all reasonable attempts have been made to advise the Public Interest Monitor of the application and hearing;
- (d) Notice be given to the subject of an application for an initial preventative detention order or, at a minimum, there be an additional requirement that the issuing authority be satisfied that the imminence of the threat justifies the making of the order without notice to the subject;
- (e) The subject of an application for a final preventative detention order must be provided with the application and all other material provided to the issuing authority within a reasonable time prior to the hearing;
- (f) The subject of a preventative detention order must be provided with substantive reasons for the making of the order;
- (g) Section 51(5) be amended to provide a conjunction of “and” between sub-paragraphs (a) and (b) so that lawyers have access to both documents that the client can access under the section;.
- (h) The concept of national security must be more clearly defined and must only be invoked to prevent disclosure to a person if absolutely necessary to protect national security;
- (i) Section 23(4)(b) and 29(4)(b) be deleted so as to remove the additional PPRA exclusion to disclosure of information to a person consistent with Section 51;
- (j) Section 73 be amended to clearly state that a person and his or her lawyer have access to the record of the application as defined in section 73(2);
- (k) Section 65 should be amended to add a sub-paragraph (e)(iii) establishing an additional purpose of contacting a lawyer to represent the detainee; and
- (l) Section 65 should be amended to add a sub-paragraph (e)(iv) establishing an additional purpose of contacting other family members (as defined in Section 56(3)) or, at least, certain family members such as a parent or spouse.

Prohibited contact orders

17. The test in section 32 of the Bill should be altered so that a prohibited contact order is only issued if the issuing authority is satisfied that the making of the order is reasonable and necessary to achieve the purpose for which the preventative detention order was made.
18. The Part should specifically state, in order to remove any doubt, that any order can only be made to prohibit contact with specified individuals to avoid the possibility of generic prohibitions (for example, “any lawyer”).
19. The Part should be amended so that a person who is the subject of a prohibited contact order is afforded all of the same rights to notice, representation and review as are provided for under a preventative detention order.

Contravening safeguards

20. Section 54 should be supplemented so that contravention of the following provisions also amount to an offence under the Act:
 - (a) Wilful failure of an applicant to disclose all relevant information in an application, particularly information adverse to the making of the order (Sections 15, 21, 22, 28, 32 and 33);
 - (b) Failure of an applicant to reasonably answer questions asked of him or her by the Public Interest Monitor or the subject’s legal representative [in the event that the persona designata regime is maintained] (Sections 14, 16, 20, 23, 24, 29, 30, 34, 36, 73);
 - (c) Failure to apply for revocation of the order under section 35 in a reasonable time from becoming aware that the grounds on which the order was made no longer exists, the person is under 16 years old, or the person is released;
 - (d) Failure to advise a person of his or her rights to a lawyer including the additional matters proposed in part 13 of this submission in relation to section 58.

Medical treatment

21. The Bill should include additional provisions which clearly allow a detained person to seek medical treatment and, where necessary, an interpreter to

properly access that medical treatment without either being subject to offences for disclosure.

Contact with lawyer

22. Section 64 should be amended so that it is clear and all doubt is removed that lawyers will not commit a disclosure offence if they communicate with other lawyers or with their staff in connection with representing or providing advice to a person.
23. Section 58 should be amended to clarify that:
 - (a) The detained person is entitled to be given names of lawyers who are not security-cleared lawyers;
 - (b) The police officer should advise the person of his or her entitlement to lawyers who are not security-cleared lawyers;
 - (c) The police officer should advise the person which of the lawyers recommended by them are security-cleared and which are not.

Contact with others

24. Section 56 should be reworded to make it plain that a person may communicate the fact that they are subject to a preventative detention order in similar terms as exist in section 60(3)(b).
25. It is recommended that Section 65(1)(e) be amended to allow one "family member" as defined in Section 56(3) to contact any other "family member" or, at least, certain close family members (for example, parent, spouse or child) and also to permit a lawyer to be contacted.

Interpreters

26. The Bill should provide for a positive obligation to be placed on the police officers involved to provide an interpreter to a person detained under the Act wherever necessary.

Release from detention

27. Section 35 should be amended to provide:
 - (a) That a police officer must apply for revocation under the section immediately upon becoming aware that the grounds on which the order was made no longer exist;

- (b) That a police officer must immediately apply for revocation under the section where a person is released under section 45, unless the release is for appearance in Court, for an ASIO warrant or for a *Crimes Act* purpose.

28. Section 53 should be amended to prohibit questioning while a person is subject to a preventative detention order (as opposed to while the person is being detained) to prevent statements being obtained by coercion or inducement.

Role of Magistrate

29. Section 69(4) and (5) as well as Section 78 require amendment so that only the Supreme Court of Queensland can require identifying particulars of children or persons with impaired capacity be taken.

Conditions of detention

30. We seek assurance that the arrangements proposed for detention and segregation of persons detained under this legislation from other prisoners is adequately funded so that detainees are not subject to improper treatment.

Conduct of proceedings

31. The Bill should be amended to allow for:
- (a) The subject or the legal representative of the person to give evidence, call witnesses, examine and cross examine witnesses, adduce material and make submissions at hearings for initial orders, final orders, or their extensions, and at review hearings under section 73;
 - (b) The Court to order the Legal Aid Office of Queensland to provide legal representation to a person;
 - (c) The Court, and issuing authority if the distinction remains, to order that a detainee be entitled to certain contact with family members etc.
 - (d) The Court to make orders varying an order or declaring an order void *ab initio*;
 - (e) The Court, and issuing authority if the distinction remains, to order that a detainee be entitled to certain contact with family members, etc.

Review of legislation

32. The Bill should provide for the following review mechanisms:
- (a) Supervision under section 38 be conducted by a person outside Queensland Police and by an independent body such as the CMC;
 - (b) The sunset clause in section 83 should be for a period of no longer than 5 years, with review of the legislation after 2 years;
 - (c) If the proposition at (b) is not accepted, there be a review at 5 years, honouring the terms of the COAG Agreement of 27 September 2005 and agreed to by the Queensland Government (see the NSW Bill Section 26ZO and the Victorian Bill Clause 9 where each of these States have acted in compliance with the COAG Agreement);
 - (d) The Commissioner of Police provide reports to the Attorney General and Minister for Police on a quarterly basis in terms similar to section 26ZN of the NSW *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* (the **NSW Bill**);
 - (e) Additional to any parliamentary review (see (b) and (c) above), the Parliamentary Commissioner scrutinise the exercise of powers conferred by the legislation for a period of 5 years in terms similar as provided for in Section 26ZO of the NSW Bill.

3. PRINCIPLED OPPOSITION TO BILL

33. **“The claim that if you want security you must give up liberty has become a mainstay of the revolt against freedom. But nothing is less true. There is, of course, no absolute security in life. But what security can be attained depends on our own watchfulness, enforced by institutions to help us watch – i.e. by *democratic institutions* which are devised to enable the herd to watch, and to *judge the watch dogs*”.**
(Karl Popper, *The Open Society and its Enemies*: Volume One, Routledge Publishers, London, page 355, ISBN 041523731).
34. The preservation of freedom does not depend on democracy itself, as a majority can be every bit as oppressive of minorities as the worst tyrant.

35. Individual freedom under Australian democracy (which alone in the Western World lacks a Bill of Rights) and the practice of that democracy in Queensland depends, instead, on respect for institutions which prevent the abuse of power under the guise of majority democratic rule.
36. In Australia, individual freedom is protected only by strict adherence to the necessary (but not necessarily sufficient) conditions for control of abuse of power by the majority, which include:
- (a) strict separation of powers
 - (b) independence of the judiciary
 - (c) respect for rights of belief, freedom of speech, association, movement, safety and property under the rule of law
 - (d) equality under the law
 - (e) no detention without arrest (freedom from arbitrary detention)
 - (f) presumption of innocence
 - (g) procedural fairness for all persons accused of crimes
 - (h) no conviction without proof beyond a reasonable doubt (which exists to ensure innocent persons are not convicted, and not to ensure that all guilty persons are convicted)
 - (i) open and transparent courts.
37. The sole function of these checks and balances is to maintain public confidence in the institutions of society to maximise individual freedom within a society of individuals.
38. Where that confidence is diminished, marginalised groups reject the institutions which they no longer trust, causing a break-down in the rule of law. That has occurred recently in Australia (Redfern race riots) and in France (riots in recent weeks by marginalised Arab communities, many of whom are second and third generation French citizens).

39. Laws such as those in the Bill infringe many of the necessary institutions Australian society has developed for the preservation of our free and tolerant society. This Bill represents a 'crossing the Rubicon' from which it will be difficult to retreat. The Bill, and the arbitrary conduct that it will permit, will further alienate minorities in this country and thereby aggravate the problems of security for all Australians, but still not solve them.
40. The Bill establishes a system of preventative detention by government officials:
- (a) detention is permitted of persons who have not been charged with any offence, and of people who are not even reasonably suspected of committing an offence; where
 - (b) justification for detention rests on "intelligence", rather than evidence the adequacy of which can be tested by the judicial process. One need not look far to identify examples of inaccurate "intelligence".
41. Involuntary detention of a citizen is typically penal or punitive in character which, under our system of government, is universally accepted as part of the exclusively judicial function of adjudging and punishing criminal guilt. This Bill seeks to create a form of detention contrary to our modern system of government. It is contrary to the fundamental legal principle of detention only with charge and trial, a principle upon which our entire criminal legal system is based.
42. The Bill removes the standard safeguards for the accused that form part of our justice system. These include:
- (a) The ability of an accused to have uninhibited communication with their lawyer; and
 - (b) The ability to have access to all of the information put before the issuing authority in order to properly defend the application for preventative detention; and
 - (c) The ability to have a full and fair opportunity to present a defence in Court.

43. Detainees are effectively precluded from challenging their detention because the Bill requires their communications with lawyers to be monitored by the investigating authorities. This has the effect of inhibiting communications with lawyers, and making any right to challenge detention illusory. We find the proposal unacceptable.
44. A detainee and a detainee's lawyer have no right to access the "evidence" upon which any order has been made. This renders any provision for review of decisions practically worthless.
45. The absence of safeguards renders the system of detention arbitrary. Arbitrary arrest and detention is contrary to freedoms enshrined in the Australian Constitution and under the common law. It is also contrary to international law.
46. The Bill creates a system of detention and control by government officials, based on information that cannot be effectively challenged. It is not a system based on evidence that is tested in judicial proceedings.
47. Preventative detention may be imposed on persons who are not suspected of committing any crime, who have not been charged with any crime, and who do not intend to commit any crime. Yet, detainees may be jailed in the same places and under the same system as convicted criminals and are afforded few of the protections afforded to convicted criminals.
48. A system of detention and control of this kind is punitive in character and contrary to principles and freedoms enshrined in the Australian Constitution and in the common law. Under our system, such a regime is part of the exclusively judicial function of adjudging and punishing criminal guilt.
49. Freedom from arbitrary detention is part of our common law inheritance and also enshrined in international law, including conventions to which Australia is a party.
50. As outlined in this paper, the Bill contains few safeguards of any practical value. Detainees cannot communicate in confidence with lawyers in order to provide proper instructions to challenge the making of orders or the review of those orders. Information upon which orders are made, confirmed and renewed is placed beyond effective scrutiny and challenge. Detainees who

challenge their detention and their lawyers are not entitled to access the information upon which an order was based.

51. Preventative detention by Government officials or by Courts that do not apply the procedures characteristic of Courts is offensive in point of principle.
52. People can be detained on the basis of flawed intelligence or false claims by malicious accusers or just plain human error or incompetence. Recent national episodes with immigration detainees demonstrate how easy it is for mistakes to destroy the lives of the innocent, the decent and the vulnerable, where there is no effective system of checks and balances.
53. There are inadequate safeguards in this legislation to prevent detention orders being made in such cases in the first place, and no realistic scope to challenge them once they have been made.
54. The proposed law has a potential for misuse by zealous officials against individuals who have not committed any crime and who do not intend to commit any crime.
55. The current laws, both old and new, adequately protect us against terrorist acts. No fewer than thirty-one Commonwealth acts have provisions which provide for the prevention and prosecution of terrorist acts. Queensland has been at the forefront in its legislation in this area.
56. Before the Parliament “strengthens” the existing laws by removing vital protections for human rights, there should be an assessment of whether the proposed measures are proportionate to the threats that the Government seeks to counter. Two Commonwealth reviews of the existing laws are ongoing and should be completed and considered before changes are made.
57. Reviews and analysis of the existing system should include an explanation of the following:
 - (a) how important the right affected is;
 - (b) how serious the interference with it is; and

- (c) if it is a right that can be limited, how strong the justification for the interference is, how many people are likely to be affected by it, and how vulnerable they are.
58. No major deficiency has been identified by the people exercising the powers. This raises the question as to why the powers need to be “strengthened” to the point that basic rights and protections are removed.
59. No statement of senior ASIO or police officials demonstrates the need for increased powers. In particular there is no explanation, given the broadly defined offences contained in the existing legislation, of why standard arrest procedure cannot be applied. Rather, the following has occurred:
- (a) The recent arrests and laying of charges against 17 people in Victoria and New South Wales with terrorist related offences was achieved under the existing laws by a joint task force of federal and state police with ASIO working with a high level of co-operation developed as a result of Police learning from the events of Bali, Madrid and London (see recent comments by NSW Police Commissioner Moroney).
- (b) It has been suggested that the small change of the indefinite article in the existing Federal anti-terrorist act allowed the Australian Federal Police and the State Police in New South Wales and Victoria to work with ASIO to make these arrests. The actions taken under current laws call into question the need for the substantial changes now proposed.
- (c) The Commissioner of the AFP has confirmed on the 7:30 Report that the police already have adequate powers to use firearms in appropriate circumstances.
- (d) In May 2005, Mr Richardson, former head of the Australian Security Intelligence Organisation, said, before a parliamentary all-party committee reviewing ASIO’s questioning and detention powers:

“I would note [the legislation] has worked very smoothly so far. To be frank, there was a concern [it] would be unduly complex and difficult to administer. [What] was initially

introduced into the Parliament, with our support and advice, was much simpler and, of course, tougher. We debated among ourselves whether the compromises [forced on the Government by a hostile Senate] would make it unduly complex. Our concerns were misplaced. We were wrong in worrying about it. The balance has so far been very workable..."

4. SUGGESTED AMENDMENTS

60. The Queensland Bar Association and the Queensland Law Society recognise that the Queensland Government has introduced additional safeguards to that proposed in the Commonwealth *Anti-Terrorism Bill (No.2) 2005* and commends the Queensland Government for those measures. If the Bill is to proceed, however, there are certain provisions which remain of extreme concern as our opinion. The safeguards do not go far enough.

5. MONITORING LAWYER CONTACT

61. One of the most abhorrent provisions in the Bill is the requirement that all contact between a person being detained under the law and his or her lawyer be monitored by a police authority.
62. Proposed section 59 of the Bill provides that contact with a lawyer, as provided for under section 58, may take place only if it is conducted in a way that ensures that the contact is monitored by a police authority.
63. Recognition of the privileged and confidential nature of communications between a client and his or her lawyer is a fundamental necessity for the exercise of the right to a fair trial. It is well recognised in Australian common law that access to a lawyer allows for the proper presentation of a client's case to a Court. The Courts in Queensland have held this to be a sacred aspect of our criminal justice system.² If the content of the communications with a lawyer are provided to the other side, then the person being represented will not be able to freely and completely seek the advice of the lawyer concerned. The ability of a lawyer to defend a detainee is therefore significantly hampered, if not neutralised.

² See for example *R v Lewis* [1987] 2 QdR 710

64. In *R v Lewis* (1987) 2 Qd.R. 710 at 715, the Supreme Court was confronted with a case in which police officers sought to justify their illegal monitoring of a conversation in which an accused had sought legal advice from his solicitor. Dowsett J, in rejecting the police officer's explanation, said in words that apply with equal force here:

*“These facts are shocking in their import to any person with even a passing familiarity with our system of law. To a lawyer, the confidentiality of his private discussions with his client is fundamental to his ability properly to advise and represent him. It has often been pointed out that a lawyer can only offer appropriate advice if he be apprised of all relevant facts. It is unlikely that a client will give full instructions, and in particular instructions as to adverse matters, unless he is sure that the contents of his instructions will be treated as confidential. That the solicitor should be in a position to give appropriate advice is, of course, critical to the client, but it is also of great importance to the community generally. If a solicitor be informed of the adverse aspects of the client's case as well as the strong points, he will form a balanced view of prospects and in appropriate cases, advise early settlement or, in criminal proceedings, an appropriate plea of “guilty”. Very many cases are so resolved, and in the criminal jurisdiction especially, this must result in great savings of judicial time and public money. Thus, contrary to what may be the view held by some, the confidentiality of communication between solicitor and client is not designed solely to assist those charged with offences to escape the rigours of the law. **The rule is based upon hundreds of years of judicial experience and is designed to serve wider needs as well as the needs of the individual client.**”*

65. In circumstances where detainees have not even been charged with an offence, it is unacceptable that they have fewer rights under this legislation than those who have been charged with offences enjoy under the existing criminal law system. The measure is extreme. Detainees under this Bill are not persons suspected of having committed an offence – the safeguards for such persons should be greater than those charged with offences not less.

66. The Queensland Bar Association and Queensland Law Society oppose the monitoring of communications between a detainee and lawyer under any circumstance. Section 59 should be amended so to exclude monitoring of contact between a detainee and his or her lawyer.
67. Sub-section (5) of Section 59 is not a sufficient safeguard. It only provides that communications between a detainee and lawyer are not admissible in evidence against the detainee in any proceedings in a Court. It does not prevent the use of evidence derived from a monitored communication – that is, it does not prevent officers using the information to search for other evidence aimed at implicating the detainee in matters communicated. The effect of the provision will be to discourage detainees from giving any information to their lawyer, who will then not be able to give sensible advice to or effectively represent their clients.
68. Further, section 59, as presently drafted, is far broader than is necessary to achieve the justification for it that the Government has advanced in the Explanatory Memorandum and in Section 3, namely that the object of the extreme provision of this Bill is to “prevent a terrorist act occurring in the near future” or to “preserve evidence of, or relating to, a recent terrorist act”.
69. Those objects would be achieved if a new sub-section 59(6) were added that made the operation of sub-sections 59(1) – (5) subject to the proviso that the monitoring is prohibited:
- (a) unless the monitoring officer believes on reasonable grounds that monitoring is necessary in order to prevent:
 - (i) a terrorist act occurring in the near future; or
 - (ii) the destruction of evidence of, or relating to, a recent terrorist act.
 - (b) unless the monitoring is first authorised by a warrant issued by order of a Supreme Court Judge, who is satisfied that there are reasonable grounds for believing that monitoring is necessary to prevent:

- (i) a terrorist act occurring in the near future; or
 - (ii) the destruction of evidence of, or relating to, a recent terrorist act
- (c) unless the person monitoring the communications is an inspector or officer of higher rank or a CMC official, and not involved in the investigation;
- (d) where the lawyer with whom the detainee has contact is a “security-cleared lawyer”, as defined in the Bill. (In such a case, the objects of the Bill would not require monitoring at all.)
70. If monitoring is to occur despite the fundamental objections to it, the following amendments to the Bill should also be made:
- (a) Section 59(5) should be amended so that:
 - (i) what is inadmissible in Court is both the communication and any evidence obtained as a result of the monitoring of the communication; and
 - (ii) such matter is inadmissible against any person;
 - (b) In addition to the offence created by Section 68, it should be an offence for a person who monitors a communication between lawyer and client to disclose or use any information arising out of the communication except:
 - (i) for the purpose of preventing:
 - (A) a terrorist act occurring in the near future; or
 - (B) the destruction of evidence of, or relating to, a recent terrorist act.
 - (ii) where the person believes on reasonable grounds that the disclosure or use is necessary for such a purpose.
71. In regard to extending the prohibition to any monitored communication other than of a terrorist nature, we have in mind that some unintended and

unfortunate consequences could arise. Say a Muslim woman blurts out an admission of an adulterous or religiously improper sexual relationship. Such a statement is most unlikely to be within a relevant purpose, freeing the monitors to repeat it. It is not difficult to imagine the catastrophic cultural and family results, not to mention the potential danger, that distribution of that information would cause.

72. It would lead to a more satisfactory and fairer result if the drafting approach maintained an eye to the prevention of terrorism purposes (Section 53(3) and 8(3)) and be influenced by the notion that, if the invasive monitoring is to take place, the reason it is taking place is to prevent a terrorist act.
73. Moreover, the Bill is not clear as to whether or not “monitoring” would allow the communication between lawyer and client to be electronically recorded. We oppose any such recording. If recording is to be permitted, it should only be permitted by order of the Supreme Court on similar grounds on which a covert listening device is permitted under the *Police Powers & Responsibilities Act 2000*. Further, there should be legislative requirements to strictly quarantine the recording, to limit the making of copies and to provide for supervised destruction when all proceedings are completed.

6. ISSUING AUTHORITY

74. Under the proposed Bill, in addition to the Federal scheme which allows for preventative detention decisions to be made, the persons in Queensland who have power to make decisions about preventative detention are as follows:
- (a) A senior police officer as the issuing authority for initial orders;³
 - (b) A judge or retired judge in their personal capacity as the issuing authority for final orders;⁴ and
 - (c) The Supreme Court as the court of review of any preventative detention order.

³ Section 7(1).

⁴ Sections 7(2) and 77(1).

75. The availability of review by the Supreme Court is applauded. However, the proposed Queensland system of issuing preventative detention orders remains of concern.
76. A person can be detained without charge for a period of up to 24 hours on the application of one police officer to a senior police officer. A person can be detained without charge for a period of up to 14 days on the application of a police officer to a Supreme Court judge or retired Supreme Court judge acting *persona designata*, that is, acting in their own capacity.
77. No person should be detained except by order of a superior court judge acting in their capacity as a court or a member of a court. The Bills introduced in NSW and Victoria provide for the preventative detention orders (apart from the initial 24 hour orders) to be issued by their Supreme Courts. There is no good reason why Queensland should not do the same.
78. The explanation of Premier Bracks for setting that course for his State is succinct and compelling: “These differences from the Commonwealth Bill, with additional safeguards, are justified because under State law preventative detention can be up to 14 days. The maximum detention under a preventative detention order under the Commonwealth legislation is 48 hours.” (Second Reading Speech). Surely the rights of Queenslanders are no less precious than the rights of Victorians or the citizens of New South Wales.
79. The Bill proposes that the Public Interest Monitor has power to question any person giving information to the issuing authority.⁵ The Bill also proposes that an application for a final order must be sworn. For these safeguards to have any effect, the process under which preventative detention orders are issued must be judicial and conducted by a Supreme Court judge acting as a court. A retired judge, as a private citizen, has no ability to punish for contempt or to force an applicant police officer to answer questions. This is a serious deficiency.
80. The drastic nature of these new powers requires the institution of safeguards against abuse. These safeguards can be best achieved by a twin approach of discouraging malicious conduct and sloppy investigations and

⁵ Section 14(3).

applications and by providing the subject of such applications with the rights to natural justice that would be expected to be afforded in the face of the repressive consequences of these measures.

81. For the Chapter 16 Code offences relating to the administration of justice (for example, s.123 perjury; s.126 fabricating evidence; s.128 deceiving witnesses; s.131 conspiracy to bring a false accusation) to have efficacy, a proceeding before an issuing authority must be a judicial proceeding within the meaning of s.119 of the *Criminal Code*.
82. The process that already exists in Queensland for in camera applications to the Supreme Court for covert search warrants and the like works effectively and is timely in its execution. We have that precedent for the effective and efficient operation of a Court based system under a comparable set of arrangements. There is no good reason to dispense with the role of the Courts in the way proposed in this Bill.

7. CHILDREN

83. The obligation to release a person from preventative detention when it is discovered that that person is under 16 years of age, pursuant to Section 9, should be an obligation to release forthwith, not “as soon as practicable”. Further, even though the section refers to a “purported order”, the section should make it clear that the order was void *ab initio*.
84. It is noted that a Police officer can require the provision of a person’s date of birth and failure to do so is an offence that attracts 20 penalty units⁶. A Police officer does not have to ask for those details. The provisions of Section 9 place no positive obligation on the police to enquire as to a person’s age. A provision should be inserted requiring police, pursuant to both Section 47 (initial order) and Section 48 (final order) to advise a person that an order cannot be made in respect of a person under the age of 16 years and that if they are under the age of 16 years they can contest the order.⁷

⁶ See Section 40(2)

⁷ This can be achieved by adding this further requirement at Section 47(2) [initial order], at Section 48(2) [final order] and creating a special provision for extensions of orders in Section 49.

8. APPLICATIONS FOR PREVENTATIVE DETENTION ORDERS

85. The basis for applying for, and making, a preventative detention order is set out in section 8 of the Bill. The section is poorly drafted and should be amended so that an issuing authority can only make a preventative detention order if it is reasonably satisfied that there are reasonable grounds to suspect the matters in subsections (3)(a), (b) and (c) and (4).
86. Further, a note in the text of section 25 of the Bill says that the effect of section 8 is that the issuing authority must consider afresh the merits of making the order if a previous preventative detention order has been made. Section 8 is not clearly in those terms. Section 8 and any other pertinent sections, should be amended to clearly state that the applicant police officer must prove, and the issuing authority must be reasonably satisfied, on every application for a preventative detention order or extension, of the merits afresh.

9. MULTIPLE PREVENTATIVE DETENTION ORDERS

87. The Bill provides for both initial orders and final orders to be extended and allows for multiple detention orders to be made.
88. In terms of the ability of an applicant police officer to apply for an extension of an order, any such application should be on the following conditions:
- (a) The application has to be made to a Supreme Court judge in their judicial capacity;
 - (b) The applicant must demonstrate the reasonable steps taken, or the new facts that have come to light, to justify why the original duration of the order was not sufficient and why it must be extended.
89. Secondly, it should be made abundantly clear in the Bill that the total period for which a person can be held in custody under preventative detention for one particular terrorist act, whether by grant of the original order, extension of the original order or grant of further orders is a total of 24 hours, in the case of initial orders or 14 days in the case of final orders. The operation of sections 12, 21 and 31 is not sufficiently clear and should be reworded. To allow otherwise would permit a system of indefinite detention in our State.

10. DISCLOSURE BY THE APPLICANT

90. The Bill provides for inadequate disclosure to the person being detained in several ways:
- (a) Firstly, by no requirement of notice of an application for an initial order or extension of an initial order;
 - (b) Secondly, by way of provision of only a written summary of the grounds of an application for a final order or extension of a final order;
 - (c) Thirdly, by providing only a copy of the preventative detention order and summary of the grounds for making of the order;
 - (d) Fourthly, by the restriction on even the above disclosure in (b) and (c) if it would prejudice national security;
 - (e) Fifthly, by an additional restriction preventing even the limited disclosure in (b) and (c) if it would prejudice Police methodology (Section 454 *PPRA 2000*);⁸ and
 - (f) Finally, by the lack of clarity that a detainee seeking to revoke an order is entitled to access to the record of the application.
91. Before dealing with those inadequacies, we note that the Bill does provide some commendable safeguards. Firstly, there is the provision that the Public Interest Monitor be given copies of the relevant applications and be entitled to appear at any hearing and question relevant officers. It also provides that an applicant must provide all relevant information in the application, both favourable and adverse to the making of the order.
92. However, for these safeguards to have any efficacy, the Bill must also provide for the following:
- (a) The Public Interest Monitor be given reasonable notice, in all of the circumstances, of the application;

⁸ We note the unexplained inconsistency with Section 51(2), which is the more appropriate of the two formulations, notwithstanding the problems with the concept of "national security". We would also venture to add that the drafting of Section 23(4) when read in conjunction with Section 454 *PPRA 2000* leads to a clumsy and difficult to apply result. Also, see Section 29(4).

- (b) The Public Interest Monitor receive a copy of the application within a reasonable time, in all the circumstances, prior to the hearing of the application;
 - (c) The applicant police officer must demonstrate to the issuing authority, before a hearing can proceed in the absence of the Public Interest Monitor, that all reasonable attempts have been made to advise the Public Interest Monitor of the application and hearing;
 - (d) Wilful failure of an applicant to disclose all relevant information, particularly information adverse to the making of the order, in the application is an offence and that this be listed under Section 54;
 - (e) Failure of an applicant to reasonably answer questions asked of him or her by the Public Interest Monitor or the subject's legal representative is an offence and that this be listed under Section 54.
93. We acknowledge the very positive measure that this Bill introduces by the requirement placed on an applicant to give the PIM a copy of the application. This is not, however, an adequate substitute for allowing the subject citizen or their legal representatives to appear at a hearing and have access to the same information in order that advice can be given and a defence can be prepared.
94. The fact that an initial order can be made without notice to a person or representation of the person is abhorrent and must be removed. The fact that the order is only to last 24 hours is insufficient justification. The plain fact is that this is a precursor to a 14 day order in circumstances where the applicant gains a head start and a significant advantage over the detainee. If the lack of notice is to remain in the Bill, it is submitted that a further ground on which an issuing authority must be satisfied before granting an initial order is that there are reasonable grounds that exist that the imminence of the threat requires the making of the order without delay and without notice given to the proposed detainee.
95. Further, a person who is the subject of an application for a final order (or extension of a final order) must be provided with all of the material that is relied upon by the applicant for the order.

96. But sections 23(1)(a) and 29(1)(a) of the Bill require only that the applicant give the person a summary of the grounds of the application. Most of the information in the application (see sections 22 and 28) is not of a sensitive or confidential character. No justification appears for withholding that information from the person whose liberty is at stake.
97. Failure to provide such information also makes a mockery of the fact that the subject of the order is represented. Without full knowledge of the facts relied upon to justify the order, a person cannot properly instruct his or her legal representative. A defence cannot be provided if the facts upon which the order is based cannot be challenged.
98. Similarly, if a person is not provided with substantive reasons for the making of the order, the person has limited ability to have the order reviewed and revoked. Proper reasons should be provided to a person who is the subject of a preventative detention order.
99. We note that sub-section 51(5) appears to be in error as it is contrary to section 51(1) and limits the ability of a person detained to request that a copy of the order or a summary of the grounds be provided to their legal representative. Quite clearly, the conjunction should be an “and”.
100. Further, the ability of the applicant/Police to invoke blanket secrecy on the grounds of “prejudicing national security” and the use of Section 454 of the *PPRA 2000* is also extremely concerning.⁹ The notion of “national security” is nebulous and susceptible to abuse. The concept must be more clearly defined and must only be invoked if absolutely necessary in protecting national security.
101. If an assertion of “national security” is said to justify keeping secret from the person the very information that the applicant relies upon to claim that the person should be detained or otherwise restricted by the State, then at the very least the applicant should be required to satisfy the issuing authority, after hearing the PIM, that there is a genuine “national security” issue that requires such an extreme approach.

⁹ We have already noted the inconsistency of Sections 23(4) and 51(2). The Section 51(2) formula is to be preferred.

102. Section 454 of the *PPRA 2000* contemplates that a Court will be satisfied that evidence which will tend to reveal police methodologies should not be disclosed. This Bill does not allow for any proper judicial consideration of this question. The issuing authorities for final orders are Supreme Court Judges and retired Judges acting in their own capacity. Therefore, it is not possible to say (as sections 23(4)(b) and (29(4)(b) intend) that the information would not have to be disclosed because of Section 454 *PPRA 2000*.
103. Section 23(4) (and Section 29(4) in relation to applications for extension) imposes, an additional secrecy impediment which is not present in the Commonwealth legislation. So far as the preventative detention provisions of the draft Commonwealth legislation go, they allow for an exclusion of disclosure of information in a summary of grounds “if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal & Civil Proceedings) Act 2004*)”. There is, as one would expect, no mention of the Queensland *PPRA* provision in the Federal Bill (see Section 105.32 of the Federal Bill concerning the copy of the preventative detention order and summary of grounds; also see Section 104.12 of the Federal Bill in relation to interim control orders which contains a similar national security exclusion in relation to a summary in respect of interim control orders).
104. Section 445 of the *PPRA 2000* provides for a statutorily extended public interest immunity restriction on provision of information to the defence in regard to Police methodologies and a range of other matters. The profession’s experience of the use of this provision in Court proceedings has been an unhappy one. As the intent behind this Bill is to facilitate the operation of Federal provisions, we can see no basis for importing a provision which the Federal Government has not seen fit to include in comparable provisions in its draft legislation.
105. We commend the Queensland Government for the inclusion of full merits review of any detention order under Part 6. It is also to be applauded that the record for the application is to include all material given to the issuing authority. However, for a person to have meaningful ability to challenge a preventative detention order by merits review under this part, it must be abundantly clear in the Bill that the person, and his or her legal

representative, have access to the record of the application. Section 73 should be amended to clearly demonstrate this is the case.

106. In addition, if the Supreme Court revokes or varies the preventative detention order under section 74 and the authorities wish to appeal and seek a stay pending appeal, then (as is the general rule in such cases) the appellant should be required to apply for and to justify a stay. There is even more reason under this Bill to apply that rule than there is in the usual case, given the very punitive nature of the orders justified by this Bill. Accordingly, subsection 74(2) should be amended by omitting the introductory words before paragraphs (a) and (b) and substituting the words: "If the Court is satisfied that it is appropriate to grant a stay, the Court may grant a stay of the revocation or variation, until-"

11. PROHIBITED CONTACT ORDERS

107. The Bill proposes the making of orders that prohibit the subject of a preventative detention order (**PDO**) from having contact with specified persons.¹⁰ The ground on which an issuing authority can issue a prohibited contact order is that they are satisfied that the making of the order will "assist in achieving the purpose for which the preventative detention order was made".
108. This threshold is extremely low and susceptible to abuse.
109. If the provision is to remain, the test should be, at least, that the making of the order "is reasonable and necessary in achieving the purpose for which the preventative detention order was made".
110. In addition, the drafting in Division 4 should make it abundantly clear that any order can only be made to prohibit contact with specified individuals and not to groups or generic titles (Example: "all lawyers"; "all attendees of a Southside mosque").
111. Of further concern is that the detained person has no right to notice of the application for a prohibited contact order, to be represented at such a hearing, to be informed of the order after it is made and to apply for its revocation.

¹⁰ Division 4 of Part 2, Sections 32 to 34

112. A prohibited contact order (**PCO**) can override the entitlement of the subject to contact a parent, guardian or lawyer¹¹. Only the PIM can be notified if a PCO is made. The parent, guardian, lawyer etc is not entitled to be informed. In fact, all that the subject is entitled to know is details of the permissions and restrictions applying to the people they can contact while they are being detained¹². It is unsatisfactory that only the PIM is aware of a prohibited contact order. There is no practical ability, because of the secrecy attaching to a PCO, for the PCO to be challenged. This leaves third parties who have an active interest in the welfare of the detainee with less rights of review than the detainee themselves.
113. The drafting is confusing because it fails to identify which of the issuing authorities can make a PCO. Some oddities result. Could it be that a PCO is obtained even though the application for a preventative detention order fails? Further, a persona designata and a review Court would seem to have to pretend that they do not know a PCO has been made even though this would be a reasonable inference if the initial order contained contact restrictions.
114. Even more curious, and, we would submit, absurd, is that a plain reading of the revocation provisions in Part 2 Division 5 allows a PCO to remain in force indefinitely despite the extinguishment of a PDO. Nothing requires the Police officer to seek simultaneous extinguishment of a PDO and associated PCO.
115. The Supreme Court review provisions in Section 71 do not apply to PCO's but only to final orders¹³. Further, because the legislation does not set out the manner in which the Supreme Court may vary a PDO, the Court would appear to be incapable of making a variation which allowed for, for example, parental visits or visits by a spouse where a PCO applied to those people. It is not certain, even, that the Supreme Court will be entitled to have any

¹¹ Section 63

¹² See Section 47(2)(c) for an initial order and Section 48(2)(c) for a final order

¹³ This arises from the combined effect of Section 71(1) which only allows application for review of a "final order", the Dictionary in the Schedule which defines "final order" by referring the reader to Section 22 and, finally, Section 22 itself which defines "final order" as "a preventative detention order for a person in relation to a terrorist act."

information about the making of a PCO let alone any information or documents concerning the terms of or the basis of the making of a PCO.¹⁴

116. PCO's should be treated in the same way as PDO's in every respect, including the right to notice of, and representation at, the hearing and the right to challenge the order under the review provisions¹⁵. The Part should be significantly amended to allow this to occur.

12. CONTRAVENING SAFEGUARDS

117. In order for the safeguards within the Bill to have any effect, contraventions of the following provisions should also be included in section 54 as offences under the proposed Act:

- (a) Wilful failure of an applicant to disclose all relevant information in an application, particularly information adverse to the making of the order (sections 15, 21, 22, 28, 32 and 33);
- (b) Failure of an applicant to reasonably answer questions asked of him or her by the Public Interest Monitor or the subject's legal representative (sections 14, 16, 20, 23, 24, 29, 30, 34, 36, 73);
- (c) Failure to apply for revocation of the order under section 35 in a reasonable time from becoming aware that the grounds on which the order was made no longer exists, the person is under 16 years old, or the person is released;
- (d) Failure to advise a person of his or her rights to a lawyer including the additional matters proposed in part 13 of this submission in relation to section 58.

13. MEDICAL TREATMENT

118. While we recognise that systems are in place for the provision of medical attention for persons detained in facilities, we would be concerned that all appropriate medical care be available to persons subject to preventative

¹⁴ As observed elsewhere, the persona designata and the Supreme Court will have to operate under the constructed fiction that a PCO does not exist even though contact restrictions in the order make it obvious a PCO has been made.

detention proceedings. Persons detained should have access to their own treating medical practitioners. For instance, a person with English as a second language may have difficulty in communicating their medical condition or requirements to the medical attendant provided through the detention facility. They may need their own doctor who is aware of their condition.

119. In that regard, special provisions should be inserted to cover this event.
120. Alternatively, the Notes at Section 55 should contain a provision that makes it clear that a person can request the authorities to contact their medical practitioner to attend.
121. There should also be special provisions in the disclosure offences to remove any doubt that a medical practitioner can disclose, for medical purposes, any information that is necessary for the effective medical treatment of a person in detention. For instance, a GP may need to consult a specialist.

14. LAWYER CONTACT

122. The disclosure offences for lawyers create practical problems in legal representation. For instance, it may be necessary for a lawyer to consult other lawyers and brief and instruct Counsel. To remove any doubt, the provisions of Section 64 should be redrafted to make it clear that:
 - (a) the purposes of disclosure include purposes relating to obtaining advice (as opposed to various types of proceedings or advocacy);
 - (b) a lawyer is permitted to talk to other lawyers (including solicitors and Counsel) in connection with advising and representing a subject in relation to the types of matters referred to in Section 64(d).
123. It is appropriate to remove any shadow of a doubt that lawyers can communicate to their staff the relevant information for the purpose of representing a detainee.

¹⁵ Both the Victorian provisions (proposed Section 13L) and the New South Wales provisions (proposed Section 26N) require the orders to be made by the Supreme Court on an inter partes hearing. The equivalents to PCO's in those jurisdictions are treated comparably with preventative detention orders.

124. A more appropriate wording for Section 64(d) would be to replace the words “the disclosure is not made for the purpose of” with the words “the disclosure is not made in connection with”. Further, to address the issue in respect of advice, one amendment that should be made is to add at the end of Section 64(d) a sub-paragraph (v) which provides that advice in relation to the preceding matters set out in (i) to (iv) is also permitted.
125. We are also concerned that section 58(4), which allows a police officer to “give priority to” security-cleared lawyers when recommending lawyers to the person being detained, is open to abuse. The section should be amended so that it is clear that:
- (a) The person is entitled to be given names of lawyers who are not security-cleared lawyers;
 - (b) The police officer should advise the person of his or her entitlement to lawyers who are not security-cleared lawyers;
 - (c) The police officer should advise the person which of the lawyers recommended by them are security-cleared and which are not.

15. CONTACT WITH OTHERS

126. Section 56 of the Bill allows contact with family members to let the family members know they are safe but are not able to be contacted for the time being while the person is being detained under a preventative detention order. While the section is intended to allow, reasonably, a person to advise a family member that they are subject to a preventative detention order, the section is in fact ambiguous. This is particularly so in light of the different wording of the section in relation to children where it is specifically stated in section 60(3)(b) that such facts can be communicated. Section 56 should be reworded to make it plain that a person may communicate the fact that they are subject to a preventative detention order in similar terms to section 60(3)(b).
127. Under Section 65(1)(c) it is an offence for one parent or guardian or family member to tell another parent or guardian or family member information about the PDO made in respect of one of their children or family member after they have been contacted by the detainee. It would also be an offence

for the parent or guardian to contact a lawyer or, in fact, any person with whom contact has been permitted to then contact a lawyer. It is recommended that Section 65(1)(e) be amended to allow one spouse or parent or guardian or “family member” (as defined in Section 56(3)) to contact any other spouse, parent or guardian or “family member”, and also to permit a lawyer to be contacted. This is both compassionate and sensible.

16. INTERPRETERS

128. There is insufficient provision in the Bill for the provision of interpreters to assist detained persons. The seriousness of the orders imposed on persons requires that a positive obligation should be placed on the police officers involved to provide an interpreter and ensure that a person properly understands what is happening. All of the sections requiring officers to advise persons of certain things will provide no safeguard if an interpreter is not made available. Interpreters will also be used by lawyers to communicate with their clients. This ability to represent the client should not be obstructed by restrictions on the use of an interpreter by the lawyer.

17. RELEASE FROM DETENTION

129. Section 35 provides that that an officer must apply for the revocation of an order if they become aware that the grounds on which it was based no longer exist. Time must be of the essence and the section should be amended to provide that an application must be made immediately.
130. Circumstances in relation to which release from detention by a Police Officer may occur are not enunciated in the legislation. If the release is not for purposes such as allowing the person to go to Court or for an ASIO warrant or for *Crimes Act* purposes but just a general release, that would overwhelmingly indicate that there is no basis for the PDO continuing. In those circumstances, there should be an obligation on a Police Officer to immediately make application to the issuing authority or the Supreme Court for revocation of a PDO. The current drafting of Section 35 requires amendment to spell out clearly that a general release must be accompanied by an immediate revocation application.

131. We are also concerned that the combined effect of Section 53, which prohibits questioning while a person under a PDO “is being detained”, and Section 45, which allows a person to be released from preventative detention (but still subject to the order) creates an opportunity to obtain a statement by coercion or inducement. For example, a person subject to a PDO might be told by the Police they can go home provided they make a statement to the Police. Such a person will be pressured into making a statement so that they can go home. Another scenario is that a person can be released and, on their way out, asked to give a statement. If they don't give a statement, they can then be threatened with being taken back into detention, and actually restored to detention. Again, such persons will be pressured into giving a statement.
132. We oppose the provisions that allow the order to remain on foot even after the person is released and submit, as stated above, that if a person is released, except to go to Court or for an ASIO warrant or for *Crimes Act* purposes, the police officer must immediately make an application for revocation of the PDO.

Further, section 53 should be amended so that questioning cannot take place while a person is under a PDO unless there is a relevant ASIO warrant in place that would allow questioning to take place under such a warrant. No other questioning should be permitted.

18. RIGHTS OF COMPENSATION

133. **We support the Government's inclusion of a comprehensive compensation scheme in the Bill as good and fair policy and congratulate the Government for including this measure.**

19. ROLE OF THE MAGISTRATE

134. A Magistrate can order, on application by a Police Officer, allowing identifying particulars to be taken from a child or a person of impaired capacity. Given the unique nature of these provisions and the vulnerability of the persons concerned, we are of the view that the sanction ought be that of the Supreme Court and not a Magistrates Court.

135. In that regard, Section 69(4) and (5) as well as Section 78 require amendment.

20. CONDITIONS OF DETENTION

136. It is a positive step that detainees are to be kept segregated from all other persons being detained in that place¹⁶. We raise the question as to whether there are adequate and suitable facilities for this to be carried out. The segregated detention of people subject to PDO's should not result in detention in what effectively might be solitary confinement circumstances with no access to facilities or recreation including outdoor exercise. In that regard, the prohibitions on inhumane treatment (Section 52) may not be adequate to guarantee, where resources are a problem, housing in appropriate and reasonable detention facilities with access to appropriate professional assistance.

21. CONDUCT OF PROCEEDINGS – NATURAL JUSTICE

137. The specific provision allowing for questioning on applications (Section 23(3) for final orders and Section 29(3) for extensions) do not go so far as to either effectively guarantee the right to legal representation or to allow the legal representative to properly carry out their functions by cross-examination.
138. The proposed Victorian provisions contain the following at Section 13E:

“(9) On the hearing by the Supreme Court of an application under section 13C (including a resumed hearing referred to in sub-section (5)) –

(a) the person in relation to whom a preventative detention order is being sought (including a person in relation to whom an interim preventative detention order or a preventative detention order made by a Senior Police Officer is in force) is entitled to appear and give evidence, call witnesses, examine and cross-examine witnesses, adduce material and make submissions; but

¹⁶ Section 46(10)

(b) *the absence of that person does not prevent the Supreme Court from determining, or finally determining, the application.*"

139. We commend the Victorian provision as a model and contend for its adoption.
140. Further, if a person is not legally represented, the Court should be empowered to order the Legal Aid Office of Queensland to provide legal representation.
141. In relation to Legal Aid, Section 13C of the proposed Victorian legislation provides as follows:
- “(12) *If the person who is the subject of an application to the Supreme Court under Section 13C is not legally represented on the hearing of the application (including a resumed hearing referred to in sub-section (5)), the Supreme Court may order Victoria Legal Aid to provide legal representation for that person on that hearing if satisfied that it is in the interests of justice to do so having regard to the financial circumstances of that person or any other circumstances.*
- (13) *Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must provide legal representation in accordance with an order under sub-section (12).”*
142. Further, the orders that the Supreme Court can make are limited to revoking or varying the order. The orders themselves are stark and inflexible in their terms.¹⁷ We would suggest that the Court be given a broader range of powers including:
- (a) in relation to varying an order, a power to allow a variation that permits certain persons to visit a detainee;
- (b) a power to order declaring the PDO void ab initio.

¹⁷ See Section 17(3)(a) and (b) where the orders are that the person be taken into custody and that the detention is to be for the period set.

- 134A. Underlying these proposed changes is the need to build more humane and flexible conditions into preventative detention orders. The issuing authority or the Court should be allowed to determine conditions concerning:
- (a) the place of detention (for example, medical matters may be a relevant consideration);
 - (b) accommodating special relaxations of the disclosure provisions;
 - (c) visits whilst in detention and the conditions under which those visits are to take place;
 - (d) the provision of medical attention including medication;
 - (e) any other condition which is necessary for the humane treatment of the detainee.
143. The Victorian provisions set out that a detainee is entitled to have contact with family members by way of visits from family members and communications by way of telephone, facsimile or email. The order itself can stipulate the period of contact on any day and the number of days on which contact may be made. We would suggest adoption of this model.

22. REVIEW OF LEGISLATION

144. There is insufficient oversight of the legislation and the powers used under the legislation.
145. The review provisions which the Queensland Government adopted as part of the COAG Agreement of 25 September 2005 have not been incorporated into this Bill. It is assumed that it is a drafting oversight as we have no doubt that the Queensland Government fully intends to observe the COAG Agreement in this important respect. We have understood the review at 5 years to be a key ingredient of the compact reached on 25 September 2005 in acknowledgement of a key counter-balance to the removal of the rights and freedoms proposed by this legislation.
146. It is suggested that the Bill be amended to provide that:
- (a) Supervision under section 38 be conducted by a person outside Queensland Police and by an independent body such as the CMC;

- (b) The sunset clause in section 83 should be for a period of no longer than 5 years, with review of the legislation after 2 years;
- (c) If the proposition at (b) is not accepted, there be a review at 5 years thereby honouring Queensland's commitment given at COAG on 25 September 2005;
- (d) The Commissioner of Police provide reports to the Attorney General and Minister for Police on a quarterly basis in terms similar to section 26ZN of the NSW *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* (the **NSW Bill**);
- (e) Additional to any Parliamentary review (see (b) and (c) above), the Parliamentary Commissioner scrutinise the exercise of powers conferred by the legislation for a period of 5 years in terms similar to section 26ZO of the NSW Bill.