

# Review of the *Terrorism (Community Protection) Act 2003*

Stage Two Report

August 2021





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## Glossary

Term	Description
The Act	<i>Terrorism (Community Protection) Act 2003</i>
Australia New Zealand Counter Terrorism Committee (ANZCTC)	An interjurisdictional body, comprised of representatives from Australian state, territory and Commonwealth jurisdictions and the New Zealand national government. It coordinates counter-terrorism policy, provides strategic advice to heads of government, and maintains the National Counter-Terrorism Plan and associated documentation.
Australian Federal Police (AFP)	Australia's national law enforcement agency, whose role is to enforce Commonwealth criminal law.
Australian Multicultural Foundation (AMF)	A national body that aims to cultivate a strong commitment to Australia as one people drawn from many cultures, and to advance social and economic wellbeing.
Australian Muslim Women's Centre for Human Rights (AMWCHR)	An independent organisation advocating for the rights of Muslim women through programs, legal casework, research, publications and consultancy.
Australian Security and Intelligence Organisation (ASIO)	An Australian intelligence agency and security service.
Authorised police officer	A police officer appointed by the Chief Commissioner of Police authorised to make police detention decisions.
Centre for Resilient and Inclusive Societies (CRIS)	A research body that delivers research and informs policies that advance community cohesion and resilience.
Charter of Human Rights and Responsibilities 2006 Act (Vic)	The instrument setting out the basic rights, freedoms, and responsibilities for all people in Victoria as well as the obligations of public authorities, such as government departments and Victoria Police.
Chief Commissioner of Police	The chief constable and chief executive officer of Victoria Police, who is responsible for management of Victoria Police.
Commission for Children and Young People (CCYP)	An independent statutory body advocating for the rights and wellbeing of children and young people in Victoria.
Counter-terrorism intelligence protection order	An order made under Part 5 of the Act to protect any information, document or other thing relating to a terrorist act in Victoria or elsewhere that could prejudice a criminal investigation, endanger a person's safety, threaten significant damage to property or prejudice national security.
Countering Violent Extremism (CVE)	CVE programs aim to prevent radicalisation leading to violent extremism, including terrorism, and where possible to help individuals disengage from preparedness to support or commit acts of violence to achieve political, social or ideological ends.
Covert search warrants	A warrant issued under Part 2 of the Act enabling search of premises where it is suspected that a terrorist act has been or is likely to be committed or where the premises are visited by or the residence of a person suspected of involvement in or preparation or planning of a terrorist act.



Term	Description
Department of Justice and Community Safety, Victoria (DJCS)	The Victorian government department responsible for managing and providing services related to Victoria's justice system.
Expert Advisory Group	An advisory group of three experts, Hon David Harper AM QC, Ms Lydia Khalil and Ms Leanne Close APM, convened to advise this review of the Act.
Harper-Lay Review	Also known as the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, an independent review of Victoria's counter-terrorism and countering violent extremism laws, policies and capabilities, convened following the 2017 Brighton Siege.
Independent Broad-based Anti-Corruption Commission (IBAC)	An agency responsible for the prevention and exposure of public sector corruption and misconduct with jurisdiction over state and local government, police, parliament, and the judiciary in Victoria.
Independent National Security Legislation Monitor (INSLM)	A Commonwealth independent statutory body that reviews the operation, effectiveness and implications of national security and counter-terrorism laws.
Involuntary celibate (Incel)	A disperse community of individuals, largely connecting through online forums, who espouse resentment toward the community and particularly toward women for perceived sexual inadequacies and failures. While not traditionally considered terrorism, incel culture is increasingly seen as an emergent trend in terrorism.
Monash Centre for Gender, Peace and Security	A research centre focused on issues of gender, peace and security.
Nominated Senior Police Officer (NSPO)	The Victoria Police officer nominated to oversee the exercise of Victoria Police powers, and the performance of obligations in relation to, preventative detention under the Act.
Parliamentary Joint Committee on Intelligence and Security (PJCIS)	A Commonwealth parliamentary committee responsible for oversight of Australia's national security and intelligence system.
Police detention decision (PDD) (also known as preventative police detention)	A detention decision made by a police officer under Part 2AA of the Act to prevent an imminent terrorist attack or to preserve evidence of a terrorist attack.
Preventative detention order (PDO)	A court order made under Part 2A of the Act to detain a person suspected of engaging in a terrorist themselves, engaging another person in a terrorist act or possessing a thing connected with preparation for a terrorist act.
Prohibited contact order (PCO)	An order made under Part 2A or Part 2AA of the Act that prohibits a person subject to a preventative detention order or preventative detention decision from contacting a specific person or class of persons. A PCO can be issued in conjunction with a preventative detention order or police detention decision to prevent serious harm, risk to operations or to preserve evidence.
Public Interest Monitor (PIM)	An independent monitor who represents the public interest in applications and decisions made under the Act.



Review clause	Statutory clause that requires that an Act is reviewed by a specified date.
Right Wing Extremism (RWE)	A broad category of groups unified by political agendas and narratives that promote an anti-democratic opposition to equality—often including elements of anti-immigration, racial/ethnic supremacy (in the Australian context, most often associated with white supremacy) and calls to carry out acts of violence in pursuit of these agendas.
Sovereign Citizen Movement (SCM)	A group that rejects the legal authority of central government and has been listed as a domestic terrorist movement in the United States.
Special police powers	A range of extraordinary powers available under the Act that can be exercised by Victoria Police in a terrorism emergency.
Sunset clause	A statutory clause that causes an Act to expire on a specified date.
Support and Engagement Order (SEO)	A new civil order in Victoria that will support proactive and early intervention with individuals at risk of radicalisation in the community.
Terrorist act	The meaning given in section 4 of the <i>Terrorism (Community Protection) Act 2003</i> .
Victoria Police	Victoria's primary law enforcement agency.
Victoria Legal Aid (VLA)	An organisation that provides legal information, education and advice for all Victorians and legal representation for people who meet eligibility criteria.
Victorian Inspectorate (VI)	A body that monitors, inspects and investigates complaints made about Victoria's integrity agencies.
Victorian Multicultural Commission (VMC)	A body that links Victorian government and the Victorian community to strengthen cultural diversity in the state.
Victorian Ombudsman	An independent officer whose role is to investigate complaints about any Victorian government department or public body.
Victorian Review of Counter Terrorism Legislation	A statutory review of the Act undertaken in 2014 (also known as the 'Jones Review').



## Executive summary

The Attorney-General asked the Department of Justice and Community Safety (DJCS) to review the *Terrorism (Community Protection) Act 2003* (the Act) to acquit a statutory review requirement and inform government decisions on its sunset clause, which would see the Act expire on 1 December 2021 (unless the clause is extended through legislative amendment).

The Act provides extraordinary powers to Victoria Police to prevent, respond to and help the community recover from terrorist acts. Due to the potential intrusion on individual rights, these powers are balanced by strong safeguards, including an extensive system of independent oversight and monitoring.

The review was completed in two stages due to the impact of the COVID-19 pandemic. Stage One of the review was completed and tabled in both houses of Parliament on 10 December 2020, acquitting the statutory review requirements in section 38 of the Act. It found no urgent or pressing issues with the operation of the Act and committed to a Stage Two review that would seek the views of the community.

Stage Two of the review commenced in early 2021 with terms of reference to assess the ongoing need, fairness, proportionality and effectiveness of the Act. DJCS undertook this work by seeking the views of the public, legal and community groups, law enforcement and security agencies and independent experts. This report presents the findings of the Stage Two review in relation to:

- the ongoing need for the Act (Chapter 2)
- the sunset and review clauses contained in the Act (Chapter 3)
- safeguards to and oversight of the powers contained in the Act (Chapter 4)
- safeguards to and oversight of the powers contained in the Act related to children and other vulnerable persons (Chapter 5)
- proposals to support Victoria Police's operational effectiveness in using the powers granted by the Act (Chapter 6).

An overview of the report's chapters and recommendations is set out below.

### Chapter 2: Ongoing need for the Act

Chapter 2 concludes that there is an ongoing need for the Act given the persistent and evolving terrorist threat and the Act's role in Australia's national counter-terrorism legislative framework. Advice from law enforcement and security agencies confirms that the terrorist threat remains at 'PROBABLE'. This means that credible intelligence, assessed by security agencies, indicates that individuals or groups have the intent and capability to conduct a terrorist attack in Australia. Evidence also suggests that the terrorist threat environment is evolving. While religiously motivated violent extremism remains a significant and enduring threat, ideologically motivated extremism is of increasing concern. Other emerging threats, the prospect of 'lone actor' attacks and the use of online, encrypted platforms by terrorist groups present further challenges for law enforcement. If the powers in the Act were to expire, it would leave a significant gap in the ability of law enforcement to prevent and respond to terrorist acts.

Chapter 2 also examines broader issues raised by stakeholders regarding the operation of the Act. Some stakeholders said that the definition of terrorism should be changed to remove its 'motive' element, and that the broader impacts of the language used to talk about terrorism need to be considered, including the potential for language to stigmatise particular communities. The review found that the definition of terrorism should remain as is, given the recent examination of this matter at the national level and advice that changes to the definition could negatively impact counter-terrorism operations and unintentionally broaden the Act's application. The review acknowledges that there are different perspectives on the definition of terrorism and that, while outside the review's terms of reference, language plays an important role in how the public perceives and understands terrorism. This is identified as an area for further consideration by government.



**Recommendation 1:** The *Terrorism (Community Protection) Act 2003* should continue in operation to provide the powers necessary to respond to the ongoing threat of terrorism.

**Recommendation 2:** The Department of Justice and Community Safety (DJCS), working with government partners and key stakeholders, should consider the need to update or develop material highlighting the importance of, and providing guidance on, the use of language and terminology around terrorism.

### Chapter 3: Sunset and review

Chapter 3 of the report concludes that the sunset and review clauses should be retained and extended in the Act. The provisions provide important safeguards that ensure the Act remains adapted to the evolving terrorism threat and protect against normalisation of the Act's extraordinary powers. The review found broad stakeholder support for retaining the sunset and review clauses on these grounds, and also noted the common use of sunset and review clauses in comparable legislation across Australia.

There was broad consensus among stakeholders that the Act's review clause is an important mechanism to monitor the ongoing need for the Act, as well as its effectiveness, fairness and proportionality. Consistent with stakeholder views, the review recommends a more structured review clause detailing the purposes of review and requiring the input of the community, relevant entities and independent experts. In determining appropriate timeframes for the sunset and review clauses, the review considered evidence about the current threat environment, which is both evolving and enduring. It also considered practice in Victoria and other jurisdictions, the benefits of review, the need for comprehensive and meaningful engagement to inform reviews, and the administrative burden placed on agencies, stakeholders and the community by participating in review processes. The recommended timeframes seek to balance these considerations.

Importantly, the review notes that a statutory review requirement does not diminish the need to continually monitor and assess the operation of the Act, to address concerns as they arise and to initiate review processes outside of statutory timelines where circumstances require it (as occurred with the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (the Harper-Lay Review) in 2017).

**Recommendation 3:** The operation of the sunset clause in the Act should be extended by 10 years, providing for the Act to expire on 1 December 2031.

**Recommendation 4:** The Act should require the Attorney-General to cause a review of the Act to:

- a. commence by 1 December 2028 (seven years from the date of the current sunset clause)
- b. be completed, and a report on the review tabled in both houses of Parliament, by 1 June 2030 (that is, 18 months after the review commences, and 18 months before the Act sunsets).

**Recommendation 5:** To provide greater structure around the scope, purpose and approach to the next statutory review of the Act, the review clause should:

- a. specify that the purpose of the review is to consider the ongoing need, fairness, proportionality and effectiveness of the Act
- b. require the review to consider the views of the community, relevant entities and independent experts.

### Chapter 4: Safeguards and oversight

Chapter 4 examines the safeguards and oversight mechanisms in the Act, and proposals for reform submitted by stakeholders. Most of these proposals relate to the functions of agencies with oversight of Victoria Police's use of powers under the Act.





DJCS is currently undertaking the Systemic Review of Police Oversight, which is considering the roles and responsibilities of agencies within Victoria's broader police oversight and integrity system. This review acquits a key recommendation made by the Royal Commission into the Management of Police Informants.

The review concludes that some proposals made by stakeholders are best considered as part of the Systemic Review of Police Oversight. This includes proposed changes to the Ombudsman's oversight powers in relation to preventative detention, improved information sharing between oversight agencies and a requirement for Victoria Police to respond to representations made by oversight agencies regarding preventative detention. Referring these proposals to the Systemic Review of Police Oversight will ensure that they are considered in the context of broader reform to the police integrity and oversight system, and that the Act aligns with these policy settings.

The review noted that there are significant, multi-layered safeguards and oversight mechanisms in the Act to counterbalance the extraordinary powers it provides. The sparing use of the Act by Victoria Police aligns with the intent that these powers are reserved for rare and grave situations, and also means that many safeguards in the Act have not been used operationally. The review found that regular scenario exercises will enable ongoing testing of powers and safeguards, and also support the readiness of agencies to discharge their functions under the Act.

The review also noted Victoria Police's cooperative approach to working with the Victorian Inspectorate (VI) to support the VI's inspection and compliance monitoring functions. The review found that there is an opportunity to formalise existing good practice by identifying in the Act the written records that Victoria Police must and does provide the VI.

**Recommendation 6:** Consider amending the Act to specify the written records Victoria Police is required to provide to the Victorian Inspectorate (VI), consistent with the VI's functions under Parts 2, 2AA and 3A of the Act. Victoria Police and the VI should be consulted on the development of amendments to ensure that they are operationally feasible and consistent with the role and function of the VI.

**Recommendation 7:** Victoria Police should conduct scenario exercises at least biennially to test the application of powers and safeguards in the Act. These exercises should be conducted jointly with the other agencies that hold legislative obligations under the Act and in consultation with relevant Commonwealth agencies.

## Chapter 5: Safeguards and oversight – Children and other vulnerable persons

Chapter 5 assesses safeguards and oversight mechanisms specific to children and other vulnerable persons. The particular needs and vulnerabilities of children and young people are recognised in the Act by additional safeguards and protections. The review received proposals from stakeholders on the adequacy of these protections, particularly in relation to preventative detention powers.

These included proposals that preventative detention should not apply to children; or, if it is retained, it should be by court order only and subject to additional safeguards including: a higher threshold for approval, the introduction of less restrictive alternative orders in line with the Harper-Lay Review recommendations, and more regular statutory reviews. Some stakeholders also proposed that additional safeguards should be in place to protect other vulnerable persons detained under the Act, such as those with a disability or mental illness.

The review found that children remain part of the current threat environment and that the preventative detention powers introduced by the Victorian Parliament in 2018 remain necessary. The review also noted the intent and practice that these powers are reserved for true emergency situations, and found that the significant safeguards and oversight mechanisms in relation to children are appropriately calibrated. The review noted that in response to the Harper-Lay Review, DJCS completed work to examine alternatives to preventative detention for children. That work concluded that the extraordinary



nature of preventative detention, the types of threats that would warrant its use, and the potential impacts on community safety if those threats eventuate, all make it difficult to identify an alternative order that could achieve the same objective in a less restrictive way. However, the impending introduction of support and engagement orders and related initiatives, along with the continued availability of Commonwealth control orders, will provide authorities with a spectrum of interventions tailored to different risk levels and allowing earlier intervention. While additional statutory review mechanisms are not considered necessary at this time, the review found that preventative detention of children raises particular concerns requiring ongoing and active monitoring and advice to government.

The review found that existing statutory safeguards, Victoria Police practices and the expertise of oversight bodies provide protections for vulnerable persons. However, there is an opportunity for DJCS to consider the adequacy of these protections for people with a disability, mental illness or other vulnerabilities in light of recent policy, practice and legislative reform in these areas.

**Recommendation 8:** The regular scenario exercises proposed in recommendation 7 should adopt a child-specific focus to consider the application of the Act's powers and safeguards to children, taking into account their special needs and vulnerabilities and any changes in the terrorist threat environment.

**Recommendation 9:** DJCS should monitor the outcomes of the scenario exercises proposed in recommendation 7 along with any changes in the terrorist threat environment, use of the Act in relation to children, policy and practical experience in other jurisdictions and the views of key stakeholders. If there are material changes to the threat environment as it relates to children, concerns identified with the operation of the Act or other relevant developments, DJCS should provide advice to the Attorney-General around potential changes to policy settings or, if necessary, the need to review relevant provisions of the Act ahead of the statutory review process.

**Recommendation 10:** DJCS should give further consideration to the adequacy of safeguards under the Act and in relevant organisational procedures for people with a disability, mental illness or other vulnerabilities. This should be undertaken in consultation with relevant stakeholders.

**Recommendation 11:** The regular scenario exercises proposed in recommendation 7 should adopt a specific focus on the application of the Act's powers and safeguards to people with a disability, mental illness or other vulnerabilities.

## Chapter 6: Proposals to support Victoria Police operational effectiveness

Chapter 6 outlines proposals from Victoria Police to support the operational effectiveness of the Act's powers. These proposals include the expansion of purposes for which Victoria Police can collect DNA from a person in preventative detention, the expansion of special police powers to protect prominent persons, and the introduction of a 'pause' provision to 'stop the clock' on preventative detention in certain circumstances. While the review does not recommend implementation of these proposals at this time, this will be kept under review. The review makes one recommendation related to the ability of protective services officers to exercise special police powers, and notes that further work is required between Victoria Police and Corrections Victoria to address operational issues regarding the application of special police powers to prisons.

**Recommendation 12:** Legislative amendments should be made to clarify that protective services officers may exercise special police powers anywhere within authorised areas, consistent with the broader role of protective services officers and subject to the provision of appropriate training.



# 1. Introduction

## 1.1. Purpose of the review

The *Terrorism (Community Protection) Act 2003* (the Act) came into full effect in Victoria in 2004 and contains a suite of powers designed to prevent, disrupt and respond to the threat of terrorism.

This review examined the operation and effectiveness of the legislation, further to the review requirement set out in section 38 of the Act.<sup>1</sup> Additionally, section 41 contains a sunset clause that will cause the Act to expire on 1 December 2021 if legislative action is not taken to extend its operation.<sup>2</sup> The review will inform decisions about whether to retain the Act, and whether to renew or repeal the sunset and review clauses. Finally, the review identifies potential reforms to improve the Act's operation and fairness, should the Victorian Parliament determine that its continued operation is justified.

The Act's review clause specifies that a review of the Act must be completed, and a report tabled in both houses of Parliament, before 31 December 2020. After the onset of the COVID-19 pandemic in 2020, the then Attorney-General decided that the review would be completed in two stages, due to the impact of the pandemic on the Victorian community and justice sector stakeholders.

A 'Stage One' review of the Act was completed and tabled in Parliament on 10 December 2020, satisfying the statutory review requirement. The 'Stage Two' review, which forms the basis of this report, involved a more in-depth evaluation of the Act in consultation with stakeholders and the community. The Department of Justice and Community Safety (DJCS) was responsible for undertaking both stages of the review.

## 1.2. Stage One of the review

During Stage One, DJCS sought feedback on the operation of the Act from agencies with statutory obligations or a significant role under the Act. Because of the limited time and resources available due to the COVID-19 pandemic, DJCS requested that these agencies focus on any urgent or pressing issues with the operation of the Act. No urgent or pressing issues were identified through this process.<sup>3</sup> A range of non-urgent reform proposals were raised by stakeholders, which have been considered as part of the Stage Two review. The Stage One report, tabled on 10 December 2020, is available for viewing [here](#).

## 1.3. Scope of the review

The terms of reference for Stage Two of the review, set out below, aimed to facilitate a comprehensive review of the Act and of its effectiveness in combatting the threat of terrorism.

### 1.3.1. Stage Two Terms of Reference

The review's terms of reference required the review to consider the operation of the Act in terms of its:

- **Ongoing need:** Determine whether the Act's 1 December 2021 expiry should be retained, repealed or extended.
- **Fairness and proportionality:** Having regard to the Act's objectives, necessity and 1 December 2021 expiry, assess whether the system of safeguards designed to ensure the proper exercise of powers set out in the Act is appropriate.
- **Effectiveness:** Review any other relevant issues that arise in relation to the operation of the Act, including the issues raised in the Stage One report.

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<sup>1</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 38.

<sup>2</sup> *Ibid* s 41.

<sup>3</sup> Department of Justice and Community Safety, *Statutory Review of the Terrorism Community Protection Act 2003: Stage One Report* (10 December 2020) 1.



In addressing these terms of reference, the review also considered the purposes of Act, previous reviews of the Act, and the relevant rights and freedoms set out in Victoria's *Charter of Human Rights and Responsibilities Act 2006* (the Charter) that are engaged by the Act. The terms of reference also recognised that the Act was reviewed in 2017 by the Expert Panel on Terrorism and Violent Extremism, comprising the Hon. David Harper AM QC and Mr Ken Lay APM (the Harper-Lay Review).<sup>4</sup> The current review does not revisit the policy settings implemented in 2018 arising out of the Harper-Lay Review, except to consider any refinements to improve the effectiveness of those reforms.

The review was empowered to make recommendations to the Attorney-General on the terms of reference and any related matters.

## 1.4. Review methodology

The Stage Two review commenced in early 2021. It involved a targeted consultation process to engage stakeholders with a particular interest in and knowledge of the review's subject matter, along with a broader process to seek the views and participation of the Victorian community. This included public release of an issues paper, meetings and roundtables with government and non-government stakeholders and engagement of an Expert Advisory Group. Together, these measures enabled the integration of a wide range of perspectives to assess whether the powers in the Act remain necessary, effective, and appropriately balanced by robust safeguards and oversight.

### 1.4.1. Issues Paper

Stage Two involved the public release of the *Terrorism (Community Protection) Act 2003 Stage Two Review Issues Paper* (Issues Paper) in May 2021. This paper sought responses to a range of issues related to the terms of reference. It can be viewed [here](#).

The Issues Paper was sent directly to over 50 stakeholders, including agencies and entities with a role under the Act, community organisations, legal and civil rights groups, faith groups and Commonwealth law enforcement and intelligence agencies. Additionally, the paper was published on 6 May 2021 on the Engage Victoria platform, to seek feedback from the Victorian community.

DJCS also posted the following three broad questions on the Engage Vic website, alongside the Issues Paper:<sup>5</sup>

- Does Victoria still need the Act?
- Does the Act still provide effective tools for preventing and responding to terrorist acts?
- Is the Act fair and proportionate?

DJCS received 13 written responses to the Issues Paper, 10 of which have been published on the Engage Victoria website and are listed at **Appendix A**. A small number of submissions were unable to be published, or only able to be published in redacted form, due to sensitive information including information related to national security.

### 1.4.2. Targeted consultation

The Issues Paper also formed the basis of discussions with a range of government and non-government stakeholders in roundtables and individual meetings throughout May and June 2021. This process provided a valuable and diverse range of perspectives that informed the review process and the development of this report. A list of the stakeholders consulted is provided at **Appendix B**.

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<sup>4</sup> Expert Panel on Terrorism and Violent Extremism and Response Powers, *Report 1* (2017); Expert Panel on Terrorism and Violent Extremism and Response Powers, *Report 2* (2017).

<sup>5</sup> 'Review of the Terrorism (Community Protection) Act 2003', *Engage Victoria* (Web Page, 28 July 2021) <<https://engage.vic.gov.au/review-terrorism-community-protection-act-2003>>.



### 1.4.3. Expert Advisory Group

An Expert Advisory Group was appointed to assist with the Stage Two review. The Expert Advisory Group members were:

- former Victorian Supreme Court Justice, Hon. David Harper AM QC
- former Deputy Commissioner of the Australian Federal Police, Ms Leanne Close APM
- Lowy Institute and Deakin University Research Fellow, Ms Lydia Khalil.

Members of the Expert Advisory Group provided valuable judicial, law enforcement and academic experience and expertise to assist the review process.

Justice Harper, Ms Close and Ms Khalil also participate in the DJCS Countering Violent Extremism (CVE) Expert Advisory Panel, ensuring consistency in expert advice on counterterrorism and CVE across government programs.

Victoria Police provided technical and operational advice to the review, nominating a strategic advisor at the rank of Superintendent, who provided focused feedback on behalf of police during the consultation and reporting phases of Stage Two.

## 1.5. Context

### 1.5.1. Key powers

Following introduction in 2003, the Act took full effect in 2004 and established a suite of extraordinary new powers and functions designed to prevent, disrupt and respond to terrorist threats and attacks. The Act has subsequently been amended to include preventative detention orders (PDOs), covert search warrants, powers for questioning terror suspects and a range of other complementary powers for Victoria Police. Despite some powers being significant and intrusive, there has been a focus on ensuring that any limitations on individuals' rights and freedoms are reasonable and justified and align with community expectations. A summary of key powers in the Act is provided in **Table 1** below.

**Table 1 – Key powers within the Act**

Power	Part of Act	Summary
Covert search warrants	Part 2	A <b>covert search warrant</b> empowers the police to enter premises and conduct a search without the knowledge of the occupier of that premises. Covert search warrants may be issued by the Supreme Court of Victoria, based on a reasonable suspicion or belief by Victoria Police of a terrorist act involving an individual living at or visiting that premises.
Police detention decisions	Part 2AA	<p><b>Police detention decisions (PDDs)</b>, also known as preventative police detention, empower an authorised Victorian police officer to detain and question a suspect for up to <b>four days for adults</b>, and up to <b>36 hours for children</b> aged 14 years and older:</p> <ul style="list-style-type: none"> <li>• if satisfied that there are reasonable grounds to suspect a person: will commit an act of terrorism, possesses a thing related to an act of terrorism, or has done an act to prepare or plan a terrorist act; and</li> <li>• making this decision would substantially help to prevent the terrorist act; and <ul style="list-style-type: none"> <li>– detaining the person is necessary for this purpose; and</li> <li>– the terrorist act is capable of being carried out and could occur within the next 14 days; or</li> </ul> </li> </ul>



Power	Part of Act	Summary
		<ul style="list-style-type: none"> <li>• if satisfied that a terrorist act has occurred in the last 28 days; and                             <ul style="list-style-type: none"> <li>– it is necessary to detain the person to preserve evidence of or relating to the terrorist act; and</li> <li>– it is reasonably necessary to detain the person for this purpose.</li> </ul> </li> </ul>
Preventative detention order	Part 2A	<p>A <b>Preventative Detention Order (PDO)</b>, issued by the Supreme Court, empowers Victoria Police to detain and question a suspect for up to <b>14 days</b>, if satisfied that:</p> <ul style="list-style-type: none"> <li>• there are reasonable grounds to suspect a person: will engage in a terrorist act, possesses a thing related to an act of terrorism, or has done an act to prepare or plan a terrorist act; and                             <ul style="list-style-type: none"> <li>– making the order would substantially assist in preventing a terrorist act occurring; and</li> <li>– detaining the subject for the period for which the applicant is seeking to have him or her detained under the order is reasonably necessary for the purpose referred to above; and</li> <li>– the terrorist act is capable of being carried out, and could occur, within the next 14 days; or</li> </ul> </li> <li>• if satisfied that a terrorist act has occurred in the last 28 days; and                             <ul style="list-style-type: none"> <li>– it is necessary to detain the person to preserve evidence of or relating to the terrorist act; and</li> <li>– it is reasonably necessary to detain the person for this purpose.</li> </ul> </li> </ul>
Power to detain and decontaminate	Part 3	To protect people from chemical, biological or radiological contamination where a terrorist attack may have occurred, Victoria Police may direct people away from any area and detain and direct a person to submit to a decontamination procedure.
Special police powers	Part 3A	<p><b>Special police powers (SPPs)</b> authorise Victoria Police to exercise a range of extraordinary powers.</p> <p>These include the power to obtain disclosure of the identity of a person and the power to detain a person for this purpose if they refuse a valid request to provide identification, the power to search persons, the power to search vehicles, the power to move vehicles, the power to enter and search premises, powers in respect of premises within the area targeted by the authorisation, the power to cordon around a target, and the power to seize, detain and use such force as is reasonably necessary to the exercise of these powers.</p> <p>The Chief Commissioner of Police may <b>apply to the Supreme Court for an order authorising the use of SPPs</b> where satisfied that:</p> <ul style="list-style-type: none"> <li>• an event is taking place or is likely to take place in Victoria in the near future;</li> <li>• prominent people or a large number of people are attending or likely to attend;</li> <li>• the event might be the subject of a terrorist act;</li> <li>• an authorisation targeting the area where the event is or is likely to take place, or any other area connected with the event, is necessary to help protect people attending the event from a terrorist act; and</li> <li>• using the powers will substantially help prevent the terrorist act or reduce its impact.</li> </ul>



Power	Part of Act	Summary
		<p>An <b>interim authorisation</b> may be given by the Chief Commissioner if satisfied on reasonable grounds that a terrorist act is occurring or is capable of occurring in the next 14 days and the Premier has given approval in writing. The Chief Commissioner may give an interim authorisation without the written approval of the Premier or their delegate, if either cannot reasonably be contacted at the time it is given.</p> <p>An interim authorisation can also be given where a terrorist act has recently taken place, and the Chief Commissioner is satisfied that the exercise of the powers will substantially assist in apprehending the persons responsible for the terrorist act; or the investigation of the terrorist act, including the preservation of evidence of, or relating to, the terrorist act; or the necessary recovery process for the community in the aftermath of the terrorist act.</p>
Prohibited Contact Order	Part 2A / 2AA	<p>An authorised police officer may apply for a <b>prohibited contact order</b> in conjunction with a PDO (Part 2A) or PDD (Part 2AA) if satisfied that making an order is reasonably necessary:</p> <ul style="list-style-type: none"> <li>• to avoid a risk to action being taken to prevent a terrorist act occurring;</li> <li>• to prevent serious harm to a person;</li> <li>• to preserve evidence of, or relating to, a terrorist act; or</li> <li>• to prevent interference with the gathering of information about: <ul style="list-style-type: none"> <li>– a terrorist act;</li> <li>– the preparation for, or the planning of, a terrorist act; or</li> <li>– to avoid a risk to: <ul style="list-style-type: none"> <li>▪ the arrest of a person;</li> <li>▪ the taking into custody of a person for whom a PDO is sought;</li> <li>▪ the taking into custody of a person for whom a PDD is sought; or</li> <li>▪ the service on a person of a Commonwealth control order.</li> </ul> </li> </ul> </li> </ul>
Protection of counter-terrorism intelligence	Part 5	<p>The court may excuse the disclosure of any information, document, or thing that would usually be required to be disclosed in a proceeding, on the basis that the information, document or thing is counter-terrorism intelligence, and that the public interest in preserving secrecy or confidentiality outweighs the public interest in disclosure.</p>

### 1.5.2. Key safeguards and oversight

Due to the extraordinary nature of the powers provided by the Act, a range of safeguards operate to ensure they are used appropriately. These include monitoring and oversight of Victoria Police's use of powers by independent agencies. The key responsibilities of these agencies under the Act are set out in **Table 2** below.

**Table 2 – Key oversight responsibilities within the Act**

Agency	Part of Act	Oversight role
Public Interest Monitor	Part 1A – Public Interest Monitor	To represent the public interest in applications for: <ul style="list-style-type: none"> <li>• PDOs (Part 2A)</li> <li>• covert search warrants (Part 2)</li> <li>• prohibited contact orders (both PDOs and PDDs)</li> <li>• counter-terrorism intelligence protection orders (Part 5).</li> </ul>
		To test the content and sufficiency of the information to be relied upon by Victoria Police in the making of a PDD (Part 2AA).
Commission for Children and Young People	Part 1B – Role of the Commission for Children and Young People	To monitor the treatment and promote the interests of children detained under PDDs (Part 2AA) and PDOs (Part 2A).
Victorian Inspectorate	Part 6 – Role of Victorian Inspectorate	To conduct a mandatory bi-annual inspection of the records of Victoria Police to ascertain compliance with Part 2 (covert search warrants), Part 2AA (PDDs) and Part 3A (SPPs).
		To conduct an inspection at any time to ascertain compliance with Part 2 (covert search warrants), Part 2AA (PDDs) and Part 3A (SPPs).
Victorian Ombudsman	Part 2AA / Part 2A / Part 6A – Preventative Detention	To be notified of the issuing of PDDs (Part 2AA), PDOs (Part 2A) and associated prohibited contact orders, and to make representations to the Victoria Police nominated senior police officer regarding the exercise of powers related to PDDs and PDOs.
		To be contacted by and investigate complaints from a detained person about the application for or their treatment under a PDD or PDO.
Independent Broad-based Anti-corruption Commission	Part 2AA / Part 2A / Part 6A – Preventative Detention	To be notified of the issuing of PDDs (Part 2AA), PDOs (Part 2A) and associated prohibited contact orders, and to make representations to the Victoria Police nominated senior police officer regarding the exercise of powers related to PDDs and PDOs.
		To be contacted by and investigate complaints from a detained person about the application for or their treatment under a PDD or PDO.





## 2. Ongoing need for the Act

### 2.1. Introduction

The Victorian Government introduced the Act in response to the heightened threat of terrorism following the 11 September 2001 attacks on the World Trade Centre and Pentagon in the United States (US) and the 2002 Bali bombings. The powers available under the Act were unprecedented at that time. The Victorian Government acknowledged this by including sunset and review clauses in the Act. The Government indicated that if the threat of terrorism abated, the Act could be allowed to sunset, but if the threat persisted or escalated, the sunset clause could be repealed.<sup>6</sup>

Other Australian jurisdictions have taken a similar approach to periodically assessing the ongoing need for counter-terrorism legislation. At the Commonwealth level, a central function of the Independent National Security Legislation Monitor (INSLM) is to consider whether national security legislation remains necessary.<sup>7</sup> The New South Wales (NSW) Department of Justice, in its recent review of the *Terrorism (Police Powers) Act 2002*, stated that ‘powers encroaching on liberties must be limited to what is genuinely necessary ... to avoid the legislation itself becoming a source of grievance leading to an increased terrorism risk’.<sup>8</sup> This is equally important in the Victorian context.

A critical function of this review was therefore to consider whether the Act remains necessary, considering both the extraordinary nature of its powers and the current terrorist threat environment. It is important to note that this threat environment is always changing. Social, economic, cultural and technological factors influence who engages in extremist ideology and the how these individuals and groups operate, communicate and organise. Confirming whether there is an ongoing need for the Act requires a clear understanding of current terrorist threats and the effectiveness and proportionality of the Act’s powers in responding to these threats.

This chapter briefly outlines the findings of previous reviews of the Act and discusses its changing role over time, how its powers have been used, the nature of the current terrorist threat, and stakeholder views about its ongoing need. The chapter concludes with a discussion about broader issues raised by stakeholders around the continued operation of the Act, including the definition of terrorism, the language used in counter-terrorism discourse, and the particular impact of terrorism on women in the Victorian community.

### 2.2. Findings of previous reviews

The Act has been the subject of two reviews since its 2003 passage. The 2014 *Victorian Review of Counter-Terrorism Legislation* (the Jones Review) acquitted the statutory review requirement contained in the Act. The Harper-Lay Review was conducted in 2017, in response to a siege and hostage situation in Brighton, Melbourne. Both reviews considered the need for the Act, relative to the threat of terrorism at the time.

#### 2.2.1. Victorian Review of Counter-Terrorism Legislation (the Jones Review) — 2014

The Jones Review evaluated the Act provision by provision and found that despite its powers being used sparingly, there was an ongoing need for the legislation, subject to some improvements. In reaching this conclusion, the Review detailed the findings of contemporaneous legislative reviews on counter-terrorism powers in other jurisdictions and threat assessments developed by intelligence and national security agencies.

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<sup>6</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 27 February 2003, 164, (Hon Steve Bracks MP).

<sup>7</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(b)(iii).

<sup>8</sup> New South Wales Department of Justice, *Statutory Review of the Terrorism (Police Powers) Act 2002* (Report, 7 June 2018) 6.



The Jones Review pointed to the evolution of the threat environment over time and the potential impact of events in Iraq;<sup>9</sup> namely, the emergence of the Islamic State in Iraq and the Levant (ISIL), which resulted in the national threat level being raised to 'PROBABLE' shortly after the completion of the Review in September 2014.

The Jones Review suggested that the risk of a terrorist attack was likely higher in 2014 than when the Act was originally passed in 2003.<sup>10</sup> While the powers in the Act had not been used between 2003 and 2014, the Jones Review concluded that, based on the advice provided by law enforcement and intelligence agencies at the time, the terrorist risk remained real and was likely to continue indefinitely.<sup>11</sup>

### 2.2.2. Expert Panel on Violent Extremism and Terrorism Prevention and Response Powers (Harper-Lay Review) — 2017

The Harper-Lay Review evaluated the operation of the Act in 2017 and observed that the terrorist threat had diversified and deepened in the three years since the completion of the Jones Review. During this time, several terrorism-related events occurred in Australia. These included the 2017 Brighton siege, when a lone gunman took a woman hostage and murdered an attendant in a hotel in Melbourne, and the 2015 Sydney siege, when a lone gunman took 18 people hostage in central Sydney's Lindt Café, causing the deaths of two hostages and the gunman.

The Harper-Lay Review confirmed that the threat of terrorism was evolving and would continue to exist in the foreseeable future.<sup>12</sup> It also observed that this threat is not 'owned' by a particular belief or ideology, or a particular side of the political spectrum. The Review identified that traditional, organised terrorist networks continued to pose a threat to Australian security, and that the emergence of ISIL had played a substantial role in promoting the cause of radical extremism in countries like Australia.<sup>13</sup>

The Harper-Lay Review also identified lone actor terrorism as a pronounced risk. This type of threat involves individuals leveraging unsophisticated methods, minimal planning and 'crude but deadly tactics and means' to undertake terrorist attacks.<sup>14</sup> The Review identified that younger individuals were increasingly involved in planned and actual terrorism attacks in Australia. It also located the evolving Australian threat environment within the broader international counter-terrorism context, noting the growth in terrorist violence in France, Germany, the United Kingdom, Belgium, the Philippines, Malaysia, Turkey, Denmark and elsewhere.<sup>15</sup> The Harper-Lay Review concluded that the Act remained necessary, subject to the continued operation of appropriate safeguards, and made a number of recommendations to strengthen the Act.

### 2.2.3. Other recent reviews relating to terrorism and violent extremism

Other reviews of counter-terrorism legislation have been conducted across Australian jurisdictions since the Harper-Lay Review. Earlier this year, the Australian Capital Territory Government concluded a statutory review of the *Terrorism (Extraordinary Temporary Powers) Act 2006*.<sup>16</sup> That review 'found that the policy objectives of the Act remain relevant' and outlined consideration of views around the adequacy of the Act's safeguards.<sup>17</sup>

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<sup>9</sup> Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (Report, September 2014) 22.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Expert Panel on Terrorism and Violent Extremism and Response Powers, *Report 1* (2017) 13.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid 14.

<sup>15</sup> Ibid.

<sup>16</sup> Australian Capital Territory Government Justice and Community Safety Directorate, Legislation, Policy and Programs, *Statutory Review of the Terrorism (Extraordinary Temporary Powers) Act 2006* (Report, April 2021).

<sup>17</sup> Ibid, 3.



In 2018, the NSW Government and Queensland Government concluded statutory reviews of counter-terrorism legislation.<sup>18</sup> These reviews focused primarily on operational considerations related to specific powers provided by the legislation; however, the NSW review noted that the terrorist threat has increased steadily and will continue to grow in scale and complexity over time.<sup>19</sup> Generally, both reviews underscored the continued importance of tailored counter-terrorism measures to law enforcement's ability to prevent and respond to terrorist threats.<sup>20</sup> The Queensland review, focused specifically on preventative detention, noted that this power fills a capability gap that cannot be addressed by any other tool or power available to law enforcement.<sup>21</sup>

The Commonwealth Parliamentary Joint Committee on Intelligence and Security (PJCIS) commenced an inquiry into extremist movements and radicalism in Australia in 2020.<sup>22</sup> The inquiry is yet to report its findings; however, its terms of reference focus on the evolving threat environment in Australia. The inquiry is examining, among other things, the motivations, objectives and capacity for violence of extremist groups, the geographic spread of extremist movements and persons in Australia, and their links to international extremist organisations.<sup>23</sup>

Published submissions to the PJCIS inquiry from Victoria Police and ASIO identify that religiously motivated violent extremism remains a significant and enduring terrorist threat in Australia. These submissions also discuss the threat posed by ideologically motivated violent extremism and the diversification of terrorist threats more broadly.<sup>24</sup> The Office of the E-Safety Commissioner highlighted the significant exposure of people to online videos or images promoting terrorism, particularly young people;<sup>25</sup> similarly, ASIO noted that the online environment enables unrestricted access to online propaganda, instructional material and extremist discussion, which may increase intent and capability to undertake terrorist acts.<sup>26</sup>

The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosque on 15 March 2019 (New Zealand) was commissioned to investigate how public sector agencies function to protect citizens from terrorist attacks. Its report, *Ko to tatou kainga tenei*,<sup>27</sup> was presented to the New Zealand Governor-General in November 2020. The report detailed the evolution of the threat posed by right-wing extremism (RWE) in recent years, asserting strongly that the Christchurch attack should act as a warning that terrorism can be perpetrated by a wide range of groups and must be tackled in a holistic way alongside counter-terrorism powers for law enforcement.<sup>28</sup>

These recent reviews point to the evolving and increasingly diverse threat of terrorism and the ongoing need for appropriate police powers to respond to this threat. They also point to the broad range of groups and individuals at risk of radicalisation towards extremism, and the need to ensure that counter

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<sup>18</sup> New South Wales Department of Justice, *Statutory Review of the Terrorism (Police Powers) Act 2002* (Report, 7 June 2018); Queensland Crime and Corruption Commission, *Review of the Terrorism (Preventative Detention) Act 2005*, (Report, September 2018).

<sup>19</sup> New South Wales Department of Justice, *Statutory Review of the Terrorism (Police Powers) Act 2002* (Report, 7 June 2018) 8.

<sup>20</sup> Ibid; Queensland Crime and Corruption Commission, *Review of the Terrorism (Preventative Detention) Act 2005* (Report, September 2018) 16.

<sup>21</sup> Ibid 17.

<sup>22</sup> Letter from Peter Dutton to Andrew Hastie, 9 December 2020.

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ExtremistMovements/Additional\\_Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ExtremistMovements/Additional_Documents)>.

<sup>23</sup> Ibid.

<sup>24</sup> Australian Security Intelligence Organisation, Submission No 2 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 2–6; Victoria Police, Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 2.

<sup>25</sup> Office of the E-Safety Commissioner, Submission No 1 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (12 February 2021) 4.

<sup>26</sup> Australian Security Intelligence Organisation, Submission No 2 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 4.

<sup>27</sup> *Ko to tatou kainga tenei: Report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch masjidain on 15 March 2019*, (Final Report, 26 November 2020).

<sup>28</sup> Ibid ch 5.



terrorism legislation and discourse does not function to unfairly stigmatise particular groups in the community. Additionally, they underline that effective counter-terrorism relies on utilising all available tools to tackle alienation and radicalisation in the community.

The threat environment has changed significantly in the seven years since the Jones Review. This emphasises the need for continued monitoring of the terrorist threat, and of the extent to which the Act's powers are necessary and effective in responding to identified threats and balanced by appropriate safeguards to protect individual rights.

## 2.3. Role of the Act

The powers provided by the Act are directed at preventing, responding to, and recovering from terrorism events. These powers provide unique capabilities to law enforcement, which are not easily replaced by the broader criminal law.

### 2.3.1. A national counter-terrorism framework

The Act was developed as part of a national counter-terrorism legislative framework. In 2002, Victoria, along with other Australian states and territories, agreed to refer power to legislate on terrorism to the Commonwealth as part of a national approach. This addressed concerns about potential gaps in the Commonwealth's power to legislate on terrorism where terrorist activity was entirely state-based and did not have a Commonwealth or foreign element.<sup>29</sup> State referral legislation ensured the constitutional basis for Commonwealth provisions inserted into the Criminal Code.<sup>30</sup> Victoria introduced the Act to provide complementary powers to the Commonwealth's legislation.

This national counter-terrorism legislative framework provides Victoria Police with a suite of capabilities to work collaboratively with Commonwealth law enforcement and security agencies to mitigate the risk of terrorism-related events. State and Commonwealth Joint Counter-Terrorism Teams (JCTTs) operate to investigate and respond to planned and actual acts of terrorism. These units are a partnership between members of the Australian Federal Police (AFP), state and territory police and ASIO, also enabling collaboration between domestic agencies and the international intelligence community to identify and investigate terrorist activity in Australia.<sup>31</sup> This supports a flexible and responsive approach to the prevention and investigation of terrorism events—the most appropriate law and the most appropriate power can be enlivened by either Commonwealth or state agencies to respond effectively to a given threat.

In this review, Victoria Police emphasised the important role of the Act in national efforts to prevent and respond to terrorist activity. The complementary powers provided by Commonwealth and state legislation support inter-jurisdictional cooperation and the conduct of complementary counter-terrorism operations.

The Australia-New Zealand Counter Terrorism Committee (ANZCTC) is an interjurisdictional body made up of representatives from Australian state and territory jurisdictions, the Commonwealth and New Zealand. The committee enables policy and operational collaboration and coordination across borders with regard to counter-terrorism matters. ANZCTC's 2017 'National Counter-Terrorism Plan' observes that Australia's counter-terrorism legislative framework is both cooperative and coherent, with intersecting responsibilities that require effective collaboration.<sup>32</sup> An example of this interoperability is the issuing of a PDO under the Act, initiated through Victoria's JCTT in 2015. The importance of this

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<sup>29</sup> Australian Parliament House, *Bills Digest (No 89 of 2002)* (Web Page, 17 July 2021), Criminal Code Amendment (Terrorism) Bill 2002, 12 December 2002, <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd0203/03bd089](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0203/03bd089)>.

<sup>30</sup> Ibid.

<sup>31</sup> Australian Federal Police, *National efforts* (Web Page) <[www.afp.gov.au/what-we-do/crime-types/fighting-terrorism/national-efforts](http://www.afp.gov.au/what-we-do/crime-types/fighting-terrorism/national-efforts)>.

<sup>32</sup> Australia and New Zealand Counter-Terrorism Committee, *National Counter-Terrorism Plan 4<sup>th</sup> edition* (2017) 3-4.



collaboration, and an effective legislative framework to support it, was consistently raised in consultations.

## 2.4. Recent reforms to the Act

Initial powers provided under the Act included covert search warrants, special police powers, and the power to detain or decontaminate, as well as a range of ancillary functions. The Victorian Government introduced preventative detention powers in 2005, in response to the London train bombings and other global terrorism events. Significant amendments were made to the Act and its operation through the *Terrorism (Community Protection) Amendment Act 2015*, which implemented the recommendations arising from the 2014 Jones Review.

The 2017 Harper-Lay Review resulted in the most significant expansion of the Act's powers since the introduction of preventative detention. This followed the increase in the national threat level to 'PROBABLE' in 2014 and the Brighton Siege terrorist attack in 2017. The revised scheme also provided enhanced protections to ensure the proper use of the Act's powers, particularly through the inclusion of the Victorian Inspectorate in the oversight system under the Act.

Across two reports, the Harper-Lay Review made 42 recommendations. All the recommendations from Report 1 and most of the recommendations from Report 2 have been fully implemented by the Victorian Government. Key initiatives include:

- police detention decisions (PDDs)
- Support and Engagement Orders (SEOs), which aim to pro-actively engage individuals at risk of radicalisation and reduce that risk through targeted interventions (legislation will soon be introduced into Parliament on this matter)
- strengthened parole and bail laws in respect of terrorism offenders
- expansion of programs to prevent violent extremism
- greater clarity regarding use of force requirements applicable to Victoria Police when responding to a terrorism-related incident
- greater information sharing between Victoria Police and other frontline agencies involved in CVE, as well as a series of ancillary measures
- formation of a CVE expert advisory panel to support policy development within the Victorian Government.

## 2.5. Use of the Act

Consistent with the findings of previous reviews, this review found that the powers provided by the Act have been used sparingly. Over its lifetime, six covert search warrants and one PDO have been issued.<sup>33</sup> Special police powers have been enlivened on one occasion, as a preventative measure at the 2006 Melbourne Commonwealth Games.<sup>34</sup>

Other reviews of counter-terrorism legislation have discussed whether such sparing use reflects a lack of need for such powers.<sup>35</sup> Victoria Police strongly rejects this view, stating that low rates of use demonstrate prudence in the exercise of extraordinary powers, consistent with the intention that they be used in emergency situations. In its submission, Victoria Police noted that terrorism events are low

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<sup>33</sup> Department of Justice and Community Safety, *Issues Paper: Review of the Terrorism (Community Protection) Act 2003: Stage Two* (4 May 2021) 9–10.

<sup>34</sup> Expert Panel on Terrorism and Violent Extremism and Response Powers, *Report 1* (2017) 67.

<sup>35</sup> Queensland Crime and Corruption Commission, *Review of the (Terrorism Prevention) Act 2005* (Report, September 2018) 38.



probability, high impact phenomena, and it should not be expected that the powers are used on a regular basis.<sup>36</sup> The Expert Advisory Group supported this view.

In its submission, the Centre for Resilient and Inclusive Societies (CRIS) noted that when the Act was introduced, the Victorian Government acknowledged that the powers were extraordinary and cautioned the Parliament against their normalisation. This was also reflected in Parliament's inclusion of sunset and review requirements in the Act. The CRIS was encouraged that the Act has been used sparingly, as intended.<sup>37</sup> This view was supported by several community groups at a roundtable held during the review's consultation process.<sup>38</sup>

## 2.6. Need for the Act: Current threat environment

Australia's current threat level, as assessed by national security and intelligence agencies, remains at 'PROBABLE'. This means that 'credible intelligence by our security agencies indicates that individuals or groups have the intent and capability to conduct a terrorist attack in Australia.'<sup>39</sup> The terrorist threat level has remained at this level since it was raised in 2014. Since that time in Victoria there have been:

- 30 individuals charged with terrorism offences
- six terror attacks and seven major counter-terrorism disruption operations.<sup>40</sup>

Victoria Police advised the review that current advice from national security and intelligence agencies indicates that the threat level is unlikely to be downgraded in the foreseeable future.<sup>41</sup>

In its submission to the 2020-21 PJCIS inquiry, the AFP noted that the operational tempo of counter-terrorism operations remains high despite the social disruption caused by COVID-19. The AFP indicated that extremists have exploited 'increased public fear, isolation, unemployment, family stress and financial hardship associated with the COVID-19 pandemic' and 'recruited new members online by promoting their ideology, spreading disinformation and in some cases inciting violence'.<sup>42</sup>

During consultations as part of this review, some stakeholders raised issues regarding current terminology used by government and law enforcement agencies to characterise the terrorist threat environment. ASIO has recently amended its terminology, with a greater emphasis on violence prevention and lesser emphasis on the specific group or category of radical groups. Practically, the new terminology creates a dichotomy between religiously motivated violent extremism and ideologically motivated violent extremism.<sup>43</sup> It is not within the scope of this review to recommend a general adoption of revised terrorism terminology; however, the review discusses issues related to terminology in counter-terrorism discourse in more depth later in this chapter.

### 2.6.1. Continuing and emerging threats

The terrorist threat environment consists of an evolving and expanding range of risks and threats. Victoria Police stated in its 2021 submission to PJCIS that 'politically and ideologically motivated violence has evolved in the recent past, influenced by events overseas, but restricted to some extent by

<sup>36</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 2.

<sup>37</sup> Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 5.

<sup>38</sup> Consultation with community groups, 17 June 2021.

<sup>39</sup> Australian National Security, *National Terrorism Threat Advisory System* (Web Page) <<https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>>.

<sup>40</sup> Email from Victoria Police to Department of Justice and Community Safety, 11 August 2021.

<sup>41</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 1.

<sup>42</sup> Australian Federal Police, Submission No 5 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 10.

<sup>43</sup> Australian Security Intelligence Organisation, *Counter-Terrorism Fact Sheet* (Web Page, 10 July 2021) <<https://www.asio.gov.au/counter-terrorism.html>>.



our unique circumstances'.<sup>44</sup> ASIO has recently noted that the most likely form of terrorism in Australia is 'an attack aimed at 'soft' targets—such as people in crowded places—using readily available weapons and simple tactics', though a more organised, larger scale attack is still possible.<sup>45</sup>

Advice from Commonwealth and Victorian law enforcement and intelligence agencies indicates that the religiously motivated violent extremism remains a significant and enduring threat.<sup>46</sup> Advice from Victoria Police indicates that religiously motivated violent extremism accounted for all six terrorist acts in Victoria from 2015 to the present, and six of seven major counter-terrorism operations during the same period. Sophisticated religiously motivated terrorist organisations such as ISIL and Al-Qaeda continue to pose a threat to the safety of Australians, although no major organised terror attack has taken place on Australian soil.<sup>47</sup>

The review also heard of an increasing threat posed by ideologically motivated violent extremism. The Director-General of ASIO stated at a Commonwealth Senate Estimates hearing in May 2021 that investigations into these groups now constitute approximately 50 per cent of ASIO's onshore counter-terrorism investigations.<sup>48</sup>

In its submission to this review, Victoria Police provided advice on other continuing and emerging terrorist threats, including foreign fighters returning to Australia after travelling overseas to join terrorist and violent extremist groups, and convicted terrorist offenders returning to the community following exit from prison. Victoria Police noted that the number of convicted terrorist offenders eligible for release in the next five years is expected to increase.<sup>49</sup>

The nature of the terrorist threat posed by children and young people was an issue raised during this review. The INSLM 2018 report, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism*, noted that since 2014, children's involvement in terrorism has emerged as a significant issue in Australia.<sup>50</sup> Between 2014 and 2018, eight individuals under the age of 18 were charged with terrorism offences in Australia (equivalent to 10 per cent of people charged with such offences).<sup>51</sup> This risk was also noted by ASIO in its submission to PJCIS, identifying that children as young as 13 and 14 are increasingly consuming terrorist propaganda and involved in onshore terrorism.<sup>52</sup> At a Commonwealth Senate Estimates hearing in October 2020, the AFP Deputy Commissioner for Investigations noted that a primary concern for the AFP is now RWE groups aggressively radicalising young people online.<sup>53</sup> Recognising the vulnerabilities of children and young people, a proportionate response to the identified threat requires finely balancing the powers of

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<sup>44</sup> Victoria Police Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 2.

<sup>45</sup> Australian Security Intelligence Organisation, Submission No 2 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 5.

<sup>46</sup> Ibid; Victoria Police Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 2.

<sup>47</sup> Email from Victoria Police to Department of Justice and Community Safety, 11 August 2021.

<sup>48</sup> Evidence to Senate Estimates, Parliament of Australia, 25 May 2021, 83 (Mike Burgess, Director General, Australian Security Intelligence Organisation).

<sup>49</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 1. The review notes that some convicted terrorist offenders are eligible for extended supervision orders and continuing detention orders under the *Criminal Code Act 1995* (Cth). These orders enable ongoing supervision and detention of offenders after the completion of their prison sentence.

<sup>50</sup> Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018) viii.

<sup>51</sup> Ibid 1.

<sup>52</sup> Australian Security Intelligence Organisation, Submission No 2 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 2.

<sup>53</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 20 October 2020, 48 (Ian McCartney, Deputy Commissioner, Australian Federal Police).



counter-terrorism legislation with appropriate safeguards, services and supports. This is discussed further in Chapter 4.

While advice from law enforcement suggests religiously motivated violent extremism continues to pose the greatest terrorism risk in Victoria,<sup>54</sup> ideologically motivated violent extremism has grown in prominence in recent years. Below, the review discusses RWE (one form of ideologically motivated violent extremism), in recognition that this phenomenon has not been addressed in detail in previous Victorian counter-terrorism reviews. The review also discusses lone actor attacks in more detail, given that such attacks are increasingly more likely than other types of terrorist acts, along with some specific emerging threats identified by the Expert Advisory Group. It is important to note, however, that these developing threats have not displaced the threat posed by other terrorist groups and movements, including religiously motivated violent extremism.

### Right wing extremism

RWE refers to a broad category of groups unified by political agendas and narratives that promote an anti-democratic opposition to equality—often including elements of anti-immigration, racial/ethnic supremacy (in the Australian context, most often associated with white supremacy) and calls to carry out acts of violence in pursuit of these agendas.<sup>55</sup> It is often associated with racism, xenophobia, exclusionary nationalism, conspiracy theories and authoritarianism.<sup>56</sup>

The AFP recently observed that small RWE groups typically retain a more informal structure than radical religious organisations.<sup>57</sup> Further, their leadership and membership may be more fluid and geographically dispersed, with organisational behaviour shifting quickly in unpredictable ways.<sup>58</sup> As such, these groups pose a potentially novel challenge for law enforcement and intelligence agencies, requiring a dedicated effort to adapt existing measures to the emerging threat. Examples of this type of RWE activity include the 2019 Christchurch Mosque shootings and a 2019 plot to attack left wing organisers at Melbourne's Trade Hall.<sup>59</sup> The recent Victorian Parliamentary Inquiry into Anti-Vilification Laws identified that RWE has driven a rise in extremist discourse in schools and online communities.<sup>60</sup> The AFP has identified that RWE groups have been shown to target young adults in their recruitment.<sup>61</sup> Media reporting on this issue has also identified that international RWE organisations have targeted young Australians through these forms of recruitment.<sup>62</sup>

Since the 2019 Christchurch attack, Victoria Police has stated that there has been an increased focus on the threat of RWE and Victoria Police's capability to respond to this emerging threat.<sup>63</sup> ASIO has also

<sup>54</sup> Victoria Police Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia*, 17 February 2021, 2.

<sup>55</sup> Anders Ravid and Iris Beau Segers, 'What is right-wing extremism?', *Centre for Research on Extremism* (Web page, 7 November 2020) <<https://www.sv.uio.no/c-rex/english/groups/compendium/what-is-right-wing-extremism.html>>.

<sup>56</sup> *Ibid.*

<sup>57</sup> Australian Federal Police, Submission No 5 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (February 2021) 6.

<sup>58</sup> *Ibid.*

<sup>59</sup> Danny Tran, 'Far-right terrorist Phillip Galea jailed for 12 years after plotting against 'Muslims and lefties' in Melbourne', *ABC News Online* (Web Page, 20 November 2020) <<https://www.abc.net.au/news/2020-11-20/far-right-terror-plotter-phillip-galea-sentenced-in-melbourne/12903588>>.

<sup>60</sup> Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into anti-vilification protections* (Report, March 2021) XV.

<sup>61</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Parliament of Australia, Canberra, 20 October 2020, 48 (Ian McCartney, Deputy Commissioner, Australian Federal Police).

<sup>62</sup> Alex Mann and Kevin Nguyen, 'The Base tapes: Secret recordings reveal how a global white supremacist terror group actively targeted young Australian men for recruitment, including One Nation candidate for federal parliament', *ABC News Online* (Web Page 26 March 2021), <<https://www.abc.net.au/news/2021-03-26/the-base-tapes-secret-recordings-australian-recruitment/13255994>>.

<sup>63</sup> Victoria Police, Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 2.





noted an increase in RWE activity, noting that these groups are becoming more organised, sophisticated and security conscious.<sup>64</sup>

### Lone actors

The term 'lone actor' generally refers to an individual planning and implementing a terrorist act without being explicitly affiliated with, or receiving support from, a specific terrorism network, group or organisation. However, the review's Expert Advisory Group noted that, while lone actor attacks are generally not explicitly linked with a specific organisation, they may occur within a broader ecosystem and tie in with broader movements.

Lone actor attacks are often undertaken using less advanced technology than methods adopted by other terrorist groups, and are rarely associated with using weapons of mass destruction or high quantity explosives (although this has occurred in certain lone actor attacks, such as the Oklahoma City bombing). They may involve simple methods of inflicting violence, such as driving a car into a crowded street, or using weapons such as knives or other easily purchased items.

For these reasons, lone actor attacks are difficult to detect and disrupt.<sup>65</sup> ASIO has stated that a lone actor attack is the most likely type of attack to occur in Australia in the current threat environment.<sup>66</sup> The two fatal terrorist attacks that have occurred in Victoria (the 2017 Brighton siege and 2018 Bourke Street attack) were both lone actor attacks. Outside of Australia, the 77 deaths caused by ISIL-inspired attacks in the US from 2014 to 2019 were lone actor attacks.<sup>67</sup>

### Additional threats

Other stakeholders identified some additional trends in the threat environment. The CRIS noted that at a general level, the threat of terrorism is undiminished and has in fact diversified over time.<sup>68</sup> Victoria Police similarly emphasised that 'the threat of terrorism can come from multiple sources and be inspired by a range of ideological or political causes'.<sup>69</sup> The Australian Multicultural Foundation (AMF) raised the potential effects of the COVID-19 pandemic on extremism and the activities of extremist groups.<sup>70</sup> The AMF also identified that targeted antagonism of far-right ideologies toward minority groups may drive further extremism, and highlighted potential gaps in efforts to prevent and counter ideologically driven extremism.<sup>71</sup> More generally, some stakeholders emphasised that counter-terrorism should be a tool that addresses all risks of extremist violence in the community, and that does not unfairly target or stigmatise a specific cohort.<sup>72</sup>

The Expert Advisory Group agreed with the general characterisation of the threat environment by stakeholders but also identified some additional movements, groups and ideologies that constitute novel threats to public safety in some jurisdictions.

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<sup>64</sup> Australian Security Intelligence Organisation, Submission No 2 to 2021 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 3.

<sup>65</sup> Australian Security Intelligence Organisation, *Counter-Terrorism Fact Sheet* (Web Page, 10 July 2021) <<https://www.asio.gov.au/counter-terrorism.html>>.

<sup>66</sup> Ibid.

<sup>67</sup> Institute for Economics and Peace, *Global Terrorism Index: Measuring the Impact of Terrorism*, November 2020, 57.

<sup>68</sup> Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 3.

<sup>69</sup> Victoria Police, Submission No 4 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (17 February 2021) 2.

<sup>70</sup> Australian Multicultural Foundation, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 2.

<sup>71</sup> Ibid.

<sup>72</sup> Consultation with community groups, 17 June 2021; Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 2.



The emergence of involuntary celibate ('incel') communities online has resulted in mass killings in North America and elsewhere. Incels are a disperse community of individuals, largely connecting through online forums, who espouse resentment toward the community and particularly toward women for perceived sexual inadequacies and failures. Recent research argues that incels present a national security issue in Australia, noting that since 2014, incel inspired violence in the US has resulted in approximately the same number of deaths as religiously motivated violent extremism, and that Australia should take a proactive approach to responding to this strand of violent extremism.<sup>73</sup> While incels are not universally militant, a more militant strain of incel culture has emerged in recent years, resulting in several shootings in the US and Canada.<sup>74</sup> While not traditionally characterised as terrorism, a recent evaluation of the phenomenon has argued that because 'its core ethos revolves around the subjugation and repression of a group and its violence is designed to have far-reaching societal effects, incel violence arguably conforms to an emergent trend in terrorism with a more salient hate crime dimension'.<sup>75</sup>

The Expert Advisory Group also identified the Sovereign Citizen Movement (SCM) as a potential novel threat. This group fundamentally rejects the authority of central government and law enforcement. In practice, this manifests as a disavowal of the legal system, and a rejection of any attempt by authorities to exercise legal powers. The movement emerged from a belief system linked with US-based group Posse Comitatus, a 'largely racist, xenophobic and anti-Semitic faction that dates back to the 1970s'.<sup>76</sup> The SCM is categorised as a domestic terrorist organisation by the FBI.<sup>77</sup> Although it is associated with the US, the Lowy Institute has noted that SCM has a presence in Australia and has grown during the COVID-19 pandemic.<sup>78</sup> While it has been noted that most activity among SCM-adherents has been non-violent, taking the form of litigation against government actions and other forms of protest focused on the legal system and public administration, US law enforcement has identified the movement as a potential source of future violence in the community.<sup>79</sup>

The Expert Advisory Group also noted the general emergence and growth of single-issue conspiracy theories and associated movements promoting violence. These movements, while also not traditionally associated with terrorism, may pose a significant public safety risk, with research demonstrating a correlation between conspiracy beliefs and violent extremist intention in certain contexts.<sup>80</sup> This is supported by ASIO's recent submission to the PJCIS inquiry, which stated that issue motivated groups, such as those promoting anti-5G, anti-vaccination and pro-conspiracy narratives, have been bolstered by the COVID-19 pandemic.<sup>81</sup>

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<sup>73</sup> Sian Tomkinson, Tael Harper and Katie Atwell, 'Confronting Incel: Exploring Possible Policy Responses to Misogynistic Violent Extremism' (2020) 55(2) *Australian Journal of Political Science* 152.

<sup>74</sup> Bruce Hoffman, Jacob Ware and Ezra Shapiro, 'Assessing the Threat of Incel Violence' (2020) 43(7) *Studies in Conflict and Terrorism* 566; 'Elliot Rodger: How misogynist killer became 'incel hero'', *BBC News Online* (Web Page, 26 April 2018) <<https://www.bbc.com/news/world-us-canada-43892189>>.

<sup>75</sup> Bruce Hoffman, Jacob Ware and Ezra Shapiro, 'Assessing the Threat of Incel Violence' (2020) (43(7) *Studies in Conflict and Terrorism* 566, 568.

<sup>76</sup> Daniel Baldino and Kosta Lucas, 'Anti-government rage understanding, identifying and responding to the sovereign citizen movement in Australia' (2019) 14(3), *Journal of Policing, Intelligence and Counter-Terrorism* 247.

<sup>77</sup> 'Domestic Terrorism: The Sovereign Citizen Movement', *Federal Bureau of Investigation*, (Web Page, 13 July 2010) <[https://archives.fbi.gov/archives/news/stories/2010/april/sovereigncitizens\\_041310/domestic-terrorism-the-sovereign-citizen-movement](https://archives.fbi.gov/archives/news/stories/2010/april/sovereigncitizens_041310/domestic-terrorism-the-sovereign-citizen-movement)>.

<sup>78</sup> Lydia Khalil, 'Alternative Platforms and Alternative Recommendation Systems: A Case of the Australian Sovereign Citizen Movement on Telegram', *Lowy Institute* (Web Page, 30 March 2021) <<https://www.lowyinstitute.org/publications/alternative-platforms-and-alternative-recommendation-systems-case-australian-sovereign>>.

<sup>79</sup> Daniel Baldino and Kosta Lucas, 'Anti-government rage understanding, identifying and responding to the sovereign citizen movement in Australia' (2019) 14(3), *Journal of Policing, Intelligence and Counter-Terrorism* 248–249.

<sup>80</sup> Bettina Rottweiler and Paul Gill, 'Conspiracy Beliefs and Violent Extremist Intentions: The Contingent Effects of Self-efficacy, Self-control and Law-related Morality' (2020) *Terrorism and Political Violence* 1.

<sup>81</sup> Australian Security Intelligence Organisation, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 4.



### 2.6.2. The impact of technology

There are also indications that the terrorist threat environment is becoming more complex. A central driver of this complexity is the increasing use of digital technology by radical groups and individuals. These platforms may be used to distribute propaganda, plan attacks, undertake training, organise financing and communicate more generally. ASIO submitted to the PJCIS inquiry that digital technology has enabled extremists to substantially broaden their platform to radicalise greater numbers of vulnerable people and manage terrorist activity in a more effective and clandestine manner. Specific technologies such as the dark web, end-to-end encryption and anonymising technologies allow identities to be concealed and communications to be protected, giving radicalised communities greater opportunities to promote their causes and plan violent actions.<sup>82</sup>

The cumulative impact of these technologies creates challenges for effective law enforcement intervention. The Director-General of ASIO recently noted that intelligence coverage in a large majority of terrorism investigations is affected by encrypted messaging technology.<sup>83</sup> Victoria Police advised the review of the challenges it faces in responding to the diverse range of technologies available to extremists to promote their ideologies.<sup>84</sup> The CRIS also noted the risk posed by the use of digital platforms by terrorist groups but suggested there may be other more appropriate vehicles than the Act to address the issue.<sup>85</sup> Noting both the expertise and jurisdictional responsibilities of Commonwealth agencies in regulating the digital environment, the review reinforces the importance of effective collaboration between jurisdictions in responding to terrorism risks. The review also notes the importance of ongoing work in Victoria to ensure that investigative powers, and the safeguards and protections applicable to those powers, keep pace with the challenges and opportunities presented by technological advancements.

### 2.6.3. Ongoing need for the Act and risks associated with its sunset

Through its research and consultation, and in light of evidence and advice about the current threat environment, the review sought to understand the risks to the community should the Act expire. There was strong feedback from law enforcement and security agencies that the expiry of the Act would cause a substantial community safety risk by removing emergency powers to prevent and respond to potential acts of terrorism. Victoria Police noted in its submission that the removal of the powers of the Act would limit the capability of law enforcement to mitigate the risk of terrorism and maintain the previous rates of successful risk management, resulting in a 'significant and unacceptable increased risk to public safety'.<sup>86</sup>

Some community stakeholders queried whether there is an ongoing need for the Act, noting that it has a negative impact on community safety because of its detrimental effects on particular communities; namely, Muslim communities.<sup>87</sup> The Australian Muslim Women's Centre for Human Rights (AMWCHR) also argued that there is a lack of transparency around how the national threat level is determined, which makes it difficult to objectively establish the ongoing need for the Act.<sup>88</sup>

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<sup>82</sup> Australian Security Intelligence Organisation, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 4.

<sup>83</sup> Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 7 August 2020 (Mike Burgess, Director-General, Australian Security Intelligence Organisation).

<sup>84</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 2.

<sup>85</sup> Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 4.

<sup>86</sup> Victoria Police, Submission to Stage 2 of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 3.

<sup>87</sup> Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021.

<sup>88</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 9.



A number of other stakeholders, including several community groups, supported the continued operation of the Act. The AMF, VMC and CRIS noted that the legislation remains an important and necessary mechanism to respond to the threat of terrorism.<sup>89</sup> Consistent with the submissions of law enforcement agencies, the CRIS also noted that the powers in the Act are not general policing powers and that the legislation provides several tools that would no longer be available to protect the community should the Act expire.<sup>90</sup>

The Expert Advisory Group similarly noted the unique role of the Act in mitigating the risk of terrorism, and that the general criminal law cannot fill this role. The Expert Advisory Group therefore took the view that repeal of the Act would likely result in a substantial and untenable gap in Victoria Police's ability to respond effectively to the threat of terrorism. However, members also noted that, while the threat environment is diversifying, caution must be exercised in categorising a group, movement, or activity as terrorism. Care must also be taken to avoid blurring the boundaries between criminal activity and terrorist acts, and any associated and inappropriate expansion in the use of counter-terrorism powers.

## 2.7. Broader issues relating to ongoing need

Some stakeholders raised additional issues related to the ongoing need for the Act, and its role as the primary tool for Victorian law enforcement to respond to terrorism. The review notes that these issues are broader than the practical operation of the Act or Victoria Police's use of powers. Rather, they pertain to the threat environment and the lived experience of both terrorism and counter-terrorism in the community.

The first issue relates to the element of 'motive' in the definition of a terrorist act, provided in section 4 of the Act. The second relates to the broader use of language by government in relation to the threat of, and response to, terrorism. The final issue raised highlights the impact of counter-terrorism powers on women in affected Victorian communities, and the importance of this consideration for future reform and operation of the Act.

### 2.7.1. Definition of a 'terrorist act'

Some community groups raised concerns about the definition of a 'terrorist act' set out in the Act, submitting that it has negative unintended consequences for particular communities.

Section 4 of the Act defines a terrorist act as follows:

- (1) In this Act, **terrorist act** means an action or threat of action where—
  - (a) the action falls within subsection (2) and does not fall within subsection (3);
  - (b) **the action is done or the threat is made with the intention of advancing a political, religious or ideological cause**; and
  - (c) the action is done or the threat is made with the intention of—
    - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
    - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it—
  - (a) causes serious harm that is physical harm to a person;
  - (b) causes serious damage to property;

<sup>89</sup> Australian Multicultural Foundation, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 1; Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 2; Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 3.

<sup>90</sup> Centre for Resilient and Inclusive Societies, Submission to Stage 2 of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 4.



- (c) causes a person's death;
  - (d) endangers a person's life, other than the life of the person taking the action;
  - (e) creates a serious risk to the health or safety of the public or a section of the public; or
  - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to—
    - (i) an information system;
    - (ii) a telecommunications system;
    - (iii) a financial system;
    - (iv) a system used for the delivery of essential government services by any entity (whether publicly or privately owned);
    - (v) a system used for, or by, an essential public utility (whether publicly or privately owned); or
    - (vi) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it—
- (a) is advocacy, protest, dissent or industrial action; and
  - (b) is not intended—
    - (i) to cause serious harm that is physical harm to a person;
    - (ii) to cause a person's death;
    - (iii) to endanger the life of a person, other than the person taking action; or
    - (iv) to create a serious risk to the health or safety of the public or a section of the public.

Section 4(1)(b) of the Act constitutes the 'motive' element of the definition. The AMWCHR submitted that the motive element should be removed, and that the definition be replaced with a requirement to demonstrate 'an intention to provoke a state of terror or terrorise'.<sup>91</sup> This position received broad support at a roundtable of community groups consulted by the review.<sup>92</sup>

The AMWCHR and other stakeholders submitted that identifying religion as a potential motive for a terrorist act causes stigmatisation of religious Victorians and contributes to a damaging public discourse that associates terrorism with Islam.<sup>93</sup> Some stakeholders also argued that the definition limits the scope of the Act where acts of violence may not have a clearly identifiable political, ideological or religious motive (or where such a motive may be difficult to prove). It was suggested that this could be the case in some instances of ideologically motivated violent extremist activity.

Some participants in the community group roundtable also noted that the framing and definition of terrorism has been instrumental in defining Muslim communities as a 'terror community'.<sup>94</sup> Some participants further noted that the religion of Islam is and has been depicted as monolithic and has not been contextualised. It was submitted that this same framing does not occur with violent extremist groups influenced by Christian religious ideology or any other culture, and consequently that the use of the word 'religion' has in practice resulted in terrorism becoming associated with Islam despite only a tiny minority of Muslims participating in extremist activity.

Finally, some stakeholders noted that the definition can result in motive being attributed to an individual of a particular religious, ideological or political persuasion in circumstances where the act in question was not, in substance, a terrorist act. In this way, stakeholders considered that, in practice, the definition

<sup>91</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 6.

<sup>92</sup> Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021.

<sup>93</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 7; Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021.

<sup>94</sup> Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021.



may lower the threshold for a terrorist act to any act of violence where an individual may adhere to a particular set of religious beliefs.<sup>95</sup>

A number of stakeholders who participated in the community roundtable also noted that commentary in the Harper-Lay Review supported removing the motive element from the definition of terrorism.<sup>96</sup>

### Harper-Lay recommendation regarding definition of a terrorist act

The Harper-Lay Review recommended that the Victorian Government refer to an appropriate inter-jurisdictional body consideration of amendments to the legal definition of a ‘terrorist act’ to remove the element of motive in section 4(1)(b) of the TCPA (recommendation 14 of Report 2).<sup>97</sup> The Harper-Lay Review argued that by restricting the legislative definition of a ‘terrorist act’ to an act motivated by a political, religious or ideological cause, the legislation exposes the community to the danger of a terrorist act motivated by something other than politics, religion or ideology.<sup>98</sup> The Harper-Lay Review also noted further risks, including the risk that an act may be erroneously classified as terrorism because the perpetrator is of a specific religious background, or that an act superficially done in the name of a religion (but ultimately unconnected in any meaningful way from the practice of that religion) may be labelled as a terrorist act despite being below the proper threshold. The Harper-Lay Review noted that the ‘damage to community cohesion in these circumstances could be significant’.<sup>99</sup>

Consistent with the Harper-Lay Review recommendation, the Victorian Government referred this matter to ANZCTC for discussion with other Australian jurisdictions. Through this process, the Victorian Government concluded that:

- the legal definition of a ‘terrorist act’ should not be amended to remove motive as an essential element
- the motive element assists in distinguishing a terrorist act from other criminal offences
- a change to the legal definition to remove motive would not address all the risks with the current definition identified by the Harper-Lay Review and could present unintended consequences in application and legal interpretation.

The reasons for reaching this conclusion were firstly, a concern that a broader definition may enable the expansion of extraordinary police powers to a greater scope of violent incidents. An amended definition could also cause an increase in public anxiety around terror, due to violent occurrences being classified as terrorism more regularly, and obscure what constitutes a terrorist act.

The proposed change to the definition would also create inconsistency across Commonwealth and Victorian legislation. This could raise issues for interoperability and collaboration between law enforcement and intelligence agencies, which could significantly impact the ability of these bodies to effectively respond to and mitigate the risk of terrorism.

The Expert Advisory Group noted the referral of the definition for consideration by ANZCTC, consistent with the Harper-Lay Review recommendation. The Expert Advisory Group also noted that it is important that the character of terrorism remains distinct from other crimes, while also recognising the continuing concerns about ‘religious’ cause forming part of the motive element for terrorist acts.

Submissions made to the review regarding the need to amend the definition of terrorism raise a number of complexities. Changes to the definition could negatively impact effective collaboration between jurisdictions, create inconsistencies across jurisdictions, and potentially have a net-widening effect where

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 12.

<sup>98</sup> Ibid 7.

<sup>99</sup> Ibid 66.



a broader category of activities could become subject to counter-terrorism powers. Further, the increased focus on ideologically motivated organisations by ASIO, Victoria Police and the AFP, based on recent submissions to the PJCIS, indicates that the motive element in the definition does not appear to be a barrier to these groups being the subject of counter-terrorism operations.

The review concluded that the definition should remain consistent with those operating in other Australian jurisdictions and supports the decision to retain a more limited definition of terrorism through requiring that a specific motive be proven. However, the review is also conscious of the need to ensure that the powers in the Act are applied fairly and consistently with threat assessments. The review also supports continued consultation and collaboration with affected communities on future reviews of and amendments to the Act. This is discussed further in Chapter 3.

### 2.7.2. Language around terrorism

Some stakeholders consulted by the review highlighted the language used within counter-terrorism and countering violent extremism discourse, emphasising that language is critical for engagement and inclusion. Stakeholders noted that the community is the greatest protection against acts of terror and that this in turn relies on trusting relationships between community and both government and law enforcement. That trust can be degraded when the community perceives government to misrepresent the community, particularly Muslim communities, in its use of language in public discourse about terrorism.<sup>100</sup>

In its submission to the PJCIS inquiry, the AMF noted that government partnerships with civil society hold the key to preventing the rise of violent extremism in Australia.<sup>101</sup> Further, the AMF emphasised that language is a key communication tool, which exerts a strong influence over attitudes, behaviour, relationships and government policy. Governments can use language in a way that deprives terrorists of the potential to use language to enhance their appeal and recruit to their cause.<sup>102</sup> This highlights that the use of language can itself be a driver of alienation and radicalisation and in so doing can exacerbate extremism and the threat of terrorism.

Some stakeholders consulted by the review raised ASIO's amended terrorism terminology, implemented in 2021. The AMF and some community stakeholders welcomed this acknowledgement of ideologically motivated violent extremism as a major concern, signalling a broadening of the focus of Australia's security apparatus to threats beyond one segment of the community.<sup>103</sup> It was submitted that the use of language around terrorism should reflect this broadened focus, and work to reduce the impact on communities that have been historically marginalised and targeted by the use of language surrounding terrorism.

The review acknowledges the central importance of language, and how it is used, to the experience of affected communities. Further, the review supports the AMF's assertion that government has the capacity to determine the use of language around classifying ideologies as extreme, which to a large extent determines what is defined as extremist thought and what distinguishes moderate from radical ideas.<sup>104</sup> The review recommends exploring opportunities to align counter-terrorism language across government and update associated communication materials, ensuring that the community has a strong voice in the development of revised terminology guidelines.

The review notes that ill-informed narratives linking specific religions with extremism are out of step with Victoria's place as a strong and vibrant multi-cultural society. The review also notes initiatives underway

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<sup>100</sup> Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021.

<sup>101</sup> Australian Multicultural Foundation Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalisation in Australia* (21 February 2021) 5.

<sup>102</sup> Ibid 6.

<sup>103</sup> Ibid 3; Consultation with community groups, 17 June 2021; Consultation with community groups, 28 June 2021

<sup>104</sup> Ibid 5.



in to support social inclusion and cohesion. The Victorian Government recently established an Anti-Racism Taskforce, which will help deliver a new state-wide Anti-Racism Strategy, to proactively prevent and address racism in Victoria.<sup>105</sup> The review also notes that the Victorian Parliamentary Inquiry into Anti-Vilification Protections handed down its report in March 2021, and its recommendations are currently being considered by the Government. Hate conduct and vilification challenges the very core of Victoria's social cohesion through its divisiveness. The inquiry's recommendations set out a range of practical measures to respond to vilification in the community.<sup>106</sup>

### 2.7.3. Impact of terrorism on women

The Review heard from some community organisations about the impact of terrorism and counter-terrorism efforts on women in affected communities.

Some stakeholders emphasised that Muslim women have been at the forefront of safeguarding the Victorian community from terrorism, while also receiving backlash from within and outside their communities about terrorism. Stakeholders noted that the Act and the discourse surrounding terrorism have at times has a profound and damaging effect on Muslim people's identity and motivation to engage in Australian society, along with their education and employment opportunities.<sup>107</sup>

Some stakeholders felt that the community has not been utilised effectively to develop preventative services and supports. Stakeholders also pointed to the need for government and law enforcement to give greater attention to crimes against and vilification of Muslim women, and a greater effort in collaboration with community organisations to increase awareness of the impact of terrorism and counter-terrorism on Muslim women.<sup>108</sup> The review acknowledges these experiences.

As noted above, the Government is considering the recommendations of the Victorian Parliamentary Inquiry into Anti-Vilification Protections. There are also several programs being implemented across government that seek to address some of the underlying causes of violent extremism, in partnership with community groups across Victoria. A notable example is the Komak Community Engagement Early Response program. Komak and similar programs, designed in close consultation with affected communities, focus on reducing isolation and connecting young people and families to programs, services and supports, disrupting the radicalisation process.

In addition, strengths-based CVE measures in development, such as the voluntary CVE case management scheme and the SEO scheme set to be introduced into Parliament, are crucial tools to support early intervention and social cohesion. In contrast to existing measures in the Act for preventing terrorist acts (such as PDOs and PDDs), the voluntary CVE case management scheme and the SEO scheme are intended to provide early intervention to assist individuals in the early stages of radicalisation. Acknowledging radicalisation may co-occur with mental ill-health, substance misuse, unemployment, social isolation, or other barriers to engagement, these schemes intend to provide a therapeutic intervention to support the individual to disengage from a pathway towards violent extremism and re-engage with pro-social activities and relationships, including family connections where appropriate. Both schemes also seek to address a target cohort that is at low to moderate risk of radicalising towards violent extremism. The implementation of these interventions will be informed by a diversity of voices from the community.

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<sup>105</sup> Victorian Government 'Anti-Racism Taskforce' (Web Page, 13 August 2021) < <https://www.vic.gov.au/anti-racism-taskforce>>.

<sup>106</sup> Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into Anti-vilification Protections* (Report, 3 March 2021).

<sup>107</sup> Consultation with community groups, 23 June 2021.

<sup>108</sup> Ibid.





The review notes the unique role played by misogyny and sexism in the radicalisation process. Research undertaken in a series of international jurisdictions suggests a correlation between violence against women and extremist views.<sup>109</sup> It has also been suggested that sexist views are an important recruitment tool on digital platforms. For example, the Monash Centre for Gender, Peace and Security noted in its submission to the review that Sonnekrieg Division, Australia's first listed far-right terrorist organisation, 'justifies and legitimises sexual assault, violence against women and rape in their propaganda'.<sup>110</sup> Although more associated with countering violent extremism policy than counter-terrorism powers granted to the police, ongoing work to address violence against women should help to inform future government responses to the threat of terrorism.

The review also notes that the implementation of recommendations of the Royal Commission into Family Violence has resulted in significant reforms across government to prevent family violence, improve support for victim survivors, and hold perpetrators to account. In addition, the *Gender Equality Act 2020* commenced 31 March 2021. Through this legislation, future reviews of the Act will be required to consider and promote gender equality. DJCS will continue to adopt inclusive approaches to future legislative reform in relation to preventing and responding to terrorism and countering violent extremism.

## 2.8. Conclusion

In 2020, the INSLM noted that 'the threat of terrorism in Australia is likely to remain elevated for the foreseeable future'.<sup>111</sup> Evidence available to the review indicates that the threat environment is evolving and diversifying. In addition to the growth in new extremist groups and movements, the ways that these groups operate and communicate is becoming more complex, making detection and investigation more challenging for law enforcement.

The review identified broad consensus that the powers provided by the Act have a clear ongoing role and function as a component of Australia's broader counter-terrorism legislative architecture. The current threat level, emergence of new threats and increased complexity in the threat environment underscore the need for clear counter-terrorism capabilities that respond to the diverse risks of violence that exist in the community. Were the Act to expire and its powers to become unavailable, this would create a significant public safety risk that would be difficult to mitigate through other tools available to law enforcement and government more broadly.

While the definition of terrorism and reference to religious cause in the Act is non-denominational, the review acknowledges that in practice the associations made between terrorism and particular religious beliefs and communities has had a detrimental impact on certain groups and individuals. The review also recognises the centrality of language and public representations of terrorism to the lived experience and shared understanding of terrorism among members of the community. A discriminatory or even passive approach to the use of language can marginalise communities, and potentially increase risks to community safety. The government has a key role to play in shaping the way the public understands terrorism, and this role extends to the management of the threat environment. It is important that government communications about terrorism are conscious of these issues and that future reform is informed by evidence and community engagement.

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<sup>109</sup> Melissa Johnston, Jacqui True and Zineb Benalla, *Gender Equality and Violent Extremism: A Research Agenda for Libya*. Monash Gender, Peace and Security Centre and UN Women (2019) <<https://arabstates.unwomen.org/en/digital-library/publications/2019/11/gender-equality-and-violent-extremism-in-libya>>; Melissa Johnston and Jacqui True, *Misogyny & Violent Extremism: Implications for Preventing Violent Extremism. Research Brief*. UN Women (2019) <<https://asiapacific.unwomen.org/en/digital-library/publications/2019/10/misogyny-violent-extremism>>.

<sup>110</sup> Monash Centre for Gender, Peace and Security, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (31 May 2021) 10.

<sup>111</sup> Independent National Security Legislation Monitor, *Annual Report 2019–20*, (Report, 21 October 2020) 7.



**Recommendation 1**

The *Terrorism (Community Protection) Act 2003* should continue in operation to provide the powers necessary to respond to the ongoing threat of terrorism.

**Recommendation 2**

The Department of Justice and Community Safety, working with government partners and key stakeholders, should consider the need to update or develop material highlighting the importance of, and providing guidance on, the use of language and terminology around terrorism.



### 3. Sunset and review

When the Act was introduced into Parliament, the then Premier noted that the review and sunset clauses were included in the Act to preserve the balance between community safety and individual rights:

Part 7 of the bill requires the government to review the operation of the bill in three years' time to see whether it is still justified and backs this up with an automatic termination date of 1 December 2006. This is a key safeguard to ensure that the powers are removed from the statute book should the current terrorist threat recede. If the review finds that the legislation is still necessary, is working well and has not been abused, Parliament can repeal the sunset clause.<sup>112</sup>

The Act's sunset and review clauses have been renewed on multiple occasions since initial passage, in response to the evolving threat environment. Extensions of the sunset and review clauses over time are outlined in Table 3 below.

**Table 3 – Extension of the Act's review and sunset clauses**

Extension of Act	Review clause	Sunset clause
<b>2003 (commencement)</b> <sup>113</sup>	30 June 2006	1 December 2006
<b>5/2006</b> <sup>114</sup>	30 June 2011	1 December 2016
<b>33/2011</b> <sup>115</sup>	30 June 2013	Unchanged
<b>68/2012</b> <sup>116</sup>	31 December 2013	Unchanged
<b>68/2013</b> <sup>117</sup>	31 December 2014	Unchanged
<b>70/2015</b> <sup>118</sup>	31 December 2020	1 December 2021

This chapter considers whether the sunset and review clauses should be retained, the length of their extensions and any further amendments that may support their effectiveness.

#### 3.1. Use and benefits of sunset and review clauses

Sunset clauses are commonly used in Australian counter-terrorism legislation to require reassessment of the need for extraordinary powers. Relevant literature has attributed the following benefits to the inclusion of sunset clauses in counter-terrorism legislation:

- To act as a safeguard against 'legislative panic'. The passage of emergency legislation in a situation of uncertainty may cause legislative over-correction—a sunset clause allows for re-examination of relevant powers outside an emergency setting.<sup>119</sup>

<sup>112</sup> Parliament of Victoria, Parliamentary Debates, Legislative Assembly, 27 February 2003, 164 (Hon. Steve Bracks MP).

<sup>113</sup> *Terrorism (Community Protection) Act 2003* (Vic), ss 38, 41, as at 16 April 2003.

<sup>114</sup> *Ibid* as at 9 March 2006.

<sup>115</sup> *Ibid* as at 6 July 2011.

<sup>116</sup> *Ibid* as at 27 June 2012.

<sup>117</sup> *Ibid* as at 19 November 2013.

<sup>118</sup> *Ibid* as at 16 December 2015.

<sup>119</sup> John Ip, 'Sunset Clauses and Counter-terrorism Legislation' (2013) 74 *Public Law* 12.



- To provide a trigger for reconsidering the efficacy of and ongoing need for legislative powers, taking into account any changes in the threat environment and evidence regarding use of the powers, including whether they are operating as intended.<sup>120</sup>
- To act as a safeguard against the normalisation of extraordinary powers. This is achieved by keeping the issue on the legislative agenda and driving political interest.<sup>121</sup>
- To provide a balance against the provision of extraordinary powers to the executive at a given point in time.<sup>122</sup>

Review clauses in similar legislation across Australia vary substantially in terms of their length and substance. The review clause in the Act requires only that a review of the operation of the Act be presented to Parliament by a certain date. Review clauses in some other jurisdictions specify the purposes and principles that must inform a review. Clauses can include a range of other requirements, such as requiring that a review be completed by an independent body, or that reviews focus on a specific contentious power or provision.

The purpose of review clauses is generally to determine if legislation is effective, and if any reforms are required to remedy identified deficiencies.<sup>123</sup> Review clauses offer the opportunity to extract lessons learned in the implementation of legislation, ensure remediation in cases where legislation is ineffective or inadequate, and address unintended consequences. According to the United Kingdom Law Commission, the ultimate benefits of review are that 'it has the potential to improve the accountability of governments for legislation and lead to better and more effective law'.<sup>124</sup>

When evaluating different review clause models, the United Kingdom Law Commission noted the following characteristics may be considered when developing review provisions:

- Whether the Act should specify a particular body (departmental, Parliamentary, external or a combination) to provide certainty and encourage sustained corporate knowledge of the review process.<sup>125</sup>
- Whether the review clause would benefit from clarification of the objectives of the Act (for example, through an objects clause) or other forms of guidance, such as the creation of mandatory terms of reference.<sup>126</sup>
- Other issues such as regularity of a review, the attachment of a review to a sunset clause, or the use of a review to explicitly gather data and publish information of legislative effectiveness.<sup>127</sup>

### 3.1.1. Jurisdictional comparison

The key features of sunset and review clauses in counter-terrorism legislation among Australian jurisdictions are outlined in Table 4 below.

<sup>120</sup> Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Counter-terrorism Laws' (2012) 33 *Adelaide Law Review* 32.

<sup>121</sup> John Ip, 'Sunset Clauses and Counter-terrorism Legislation' (2013) 74 *Public Law* 12.

<sup>122</sup> *Ibid.*

<sup>123</sup> United Kingdom Law Commission, *Post-Legislative Scrutiny*, Consultation Paper No 178 (2006) 30.

<sup>124</sup> *Ibid* 32.

<sup>125</sup> *Ibid* 13–17.

<sup>126</sup> *Ibid* 36, 39.

<sup>127</sup> *Ibid* 41.

**Table 4 – Use of sunset and review clauses in Australian counter-terrorism legislation**

Jurisdiction	Legislation	Powers	Current sunset period*	Current review period*
Victoria	<i>Terrorism (Community Protection) Act 2003</i>	All powers	6 years	5 years
New South Wales	<i>Terrorism (Police Powers) Act 2002</i>	All powers	3 years (preventative detention only)	Every 3 years
Queensland	<i>Terrorism (Preventative Detention) Act 2005</i>	Preventative detention	10 years	Nil
	<i>Public Safety Preservation Act 1986</i>	Special police powers	Nil	Nil
South Australia	<i>Terrorism (Preventative Detention) Act 2005</i>	Preventative detention	10 years	Nil
	<i>Terrorism (Police Powers) Act 2005</i>	All powers	10 years	The 2 <sup>nd</sup> , 5 <sup>th</sup> , 12 <sup>th</sup> , 14 <sup>th</sup> , 16 <sup>th</sup> , 18 <sup>th</sup> anniversaries of commencement (2005)
Western Australia	<i>Terrorism (Preventative Detention) Act 2006</i>	Preventative detention	10 years	Every 3 years
	<i>Terrorism (Extraordinary Powers) Act 2005</i>	All powers	10 years	Every 3 years
Tasmania	<i>Terrorism (Preventative Detention) Act 2005</i>	Preventative detention	10 years	Nil
	<i>Police Powers (Public Safety) Act 2005</i>	All powers (special police powers)	10 years	Nil
Australian Capital Territory	<i>Terrorism (Extraordinary Temporary Powers) Act 2006</i>	All powers	6 years <sup>128</sup>	Nil <sup>129</sup>
Northern Territory	<i>Terrorism (Emergency Powers) Act 2003</i>	All powers	10 years	Nil

\* Current sunset and review period determined from date that period was last amended. Review clauses that are no longer operative because a one off review has been completed and the provision not subsequently amended to require any further review are not included in Table 4.

<sup>128</sup> Section 17 of the *Crimes Legislation Amendment Act 2021 (No 2)* (ACT) extended the sunset period for the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) by an additional year after the review period for the latter Act was also extended by the *COVID-19 Emergency Response Legislation Amendment Act 2020* (ACT) due to the impact of the COVID-19 pandemic.

<sup>129</sup> The latest review of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) was tabled in the ACT Legislative Assembly on 13 May 2021.



### 3.2. Retention of sunset and review clauses

There was broad agreement among stakeholders that the sunset and review clauses should be retained. The CRIS supported the renewal of both clauses on the basis that they act as critical safeguards and oblige future governments to undertake transparent and systematic reviews of the Act's powers.<sup>130</sup> The Victorian Ombudsman also stated that it considers sunset and review clauses are appropriate and important safeguards, demonstrated by the reforms effected through previous reviews.<sup>131</sup>

Victoria Police submitted that the sunset and review clauses have been important and effective safeguards to the Act's powers. It noted that while not opposed to a sunset clause, this safeguard may no longer be necessary in view of the well-recognised ongoing need for the Act, and that a regular review mechanism may be sufficient to support ongoing monitoring.<sup>132</sup> In view of this position, Victoria Police indicated its support for a strengthened review mechanism to monitor the operation of the Act.<sup>133</sup>

The Expert Advisory Group supported the retention of both clauses. Members highlighted that the sunset sends an important signal to the Victorian public that the government will guard against normalisation of the Act's extraordinary powers. It also strongly supported expansion of the review clause and suggested that it be linked with the sunset clause to create a cohesive system for ongoing monitoring and oversight of the Act.

### 3.3. Scope of sunset and review clauses

The review did not receive specific feedback about whether future reviews should address specific elements of the Act or assess the Act as a whole. As outlined above, the review clauses of other jurisdictions have at times been addressed to one specific part of counter-terrorism legislation. The Commission for Children and Young People (CCYP) proposed that a review of the preventative detention of children should occur every three years.<sup>134</sup> This issue is considered in more detail in Chapter 5.

### 3.4. Sunset and review periods

Taking into account stakeholder and Expert Advisory Group feedback on the need for both the sunset and review clauses, the review determined that it is important to link the review period to the sunset clause and consider options for extending the two clauses in a cohesive way. This recognises the importance of the review clause in supporting a decision on whether the Act should continue or sunset. In developing options, the review considered previous iterations of the sunset and review clauses in the Act, similar clauses in other Australian jurisdictions, stakeholder feedback, the benefits of regular and comprehensive review and the administrative burden associated with the conduct of reviews.

The review prioritised two central principles in its evaluation of options for the length of the review and sunset clauses. First, the review period should provide time to complete a comprehensive and meaningful assessment of the Act and the operation of its powers. If the review period follows too closely after a previous review, there may be insufficient data available to support analysis of the Act's operation and any provisions that require improvement. This is a particular issue given how rarely the Act's powers have been used to date. The experience of the present review underlines this consideration, where the

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<sup>130</sup> Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 5.

<sup>131</sup> Consultation with Victorian Ombudsman, 2 June 2021.

<sup>132</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 3.

<sup>133</sup> Ibid.

<sup>134</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 2.



recency of the Harper-Lay Review (conducted in 2017) meant that significant parts of the Act had been implemented too recently to undertake comprehensive evaluation of their effectiveness.

Second, there should be sufficient time between the conclusion of a review process and the Act's expiry to enable in-depth consideration and response to any findings of the review by both the government and the Parliament. In particular, once a review is completed, the government will require time to consider the findings and, if necessary, develop amendments to the Act in response. Parliament must also have sufficient time to consider the review report once tabled in each house, as well as any resulting amendments introduced by the government.

Only a small number of stakeholders commented on the length of the sunset and review clauses. The CRIS and VMC supported a 10-year sunset clause and a three-year or five-year review clause respectively.<sup>135</sup> Victoria Police supported a sunset clause of either five or 10 years, noting that the longer the period in between, the more evidence can be collected to inform potential amendments to the Act.<sup>136</sup> Some stakeholders also commented on the administrative and resourcing burden associated with undertaking reviews. The review heard that for small organisations operating with limited resources, frequent reviews and associated consultation can be challenging.<sup>137</sup>

The Expert Advisory Group supported a 10-year sunset clause and a seven-year review clause. In supporting this option, members cited the benefits of gathering more evidence prior to evaluating the Act. It also noted that providing 18 months to complete the review would support a thorough review process with extensive community and stakeholder consultation to inform the review's recommendations.

### 3.4.1. Non-statutory reviews and supplementary monitoring measures

The Expert Advisory Group also emphasised the necessity and benefits of government having the flexibility to undertake review and monitoring of the Act outside the statutory review requirement. Members noted that *ad hoc* reviews may be required to respond to a significant change in the threat environment, an increase in the frequency of use of the Act, a significant terrorism event, or a clear operational issue with the Act. This occurred in 2017, when the Harper-Lay Review was convened in response to the Brighton siege. The substantial reforms that followed the Harper-Lay Review demonstrate the importance of government being responsive to the need for legislative improvement outside the formal review process.

Ongoing monitoring of the Act can also be achieved through means other than a statutory review. In Chapter 4, the review proposes that scenario exercises should be convened by Victoria Police every two years, to provide a practical assessment of the operation of the Act's powers and safeguards. If these exercises identify a clear issue that requires resolution to ensure the Act is working effectively, this provides an additional opportunity to consider legislative improvement. The review considers that this combination of measures will provide a strong system of ongoing monitoring and review while also ensuring sufficient flexibility in the conduct of reviews.

## 3.5. Additional review clause requirements

The review also examined whether any changes to the content of the review clause are necessary to improve its operation. This was considered in light of the differences between the review clause in the Act and those in similar laws across Australia. The current review clause requires only that a review of the operation of the Act is tabled in both houses of Parliament prior to a specified date.<sup>138</sup> In contrast,

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<sup>135</sup> Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 5; Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 2.

<sup>136</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 3.

<sup>137</sup> Consultation with community groups, 17 June 2021.

<sup>138</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 38.



some review clauses in other Australian jurisdictions specify the purposes of review, the issues that a review must consider, and who is responsible for undertaking reviews.

### 3.5.1. Review purposes

The review considered whether the review clause should include a broad statement of the review's purposes or objects, noting that this type of provision exists in other jurisdictions. The NSW *Terrorism (Police Powers) Act 2002* provides that reviews should determine whether 'the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives'.<sup>139</sup> Similarly, WA general counter-terrorism powers legislation states that a review should evaluate the 'operation and effectiveness, whether its provisions are appropriate having regard to its object, and whether it should continue in operation'.<sup>140</sup>

This emphasis on purpose is also reflected in the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act). The INSLM Act provides broad principles for conducting reviews, without limiting the scope of future reviews. Specifically, it provides that reviews of national security legislation are to consider whether the legislation:

- contains appropriate safeguards for protecting the rights of individuals
- remains proportionate to any threat of terrorism or threat to national security, or both
- remains necessary.<sup>141</sup>

The review discussed with stakeholders the possibility of incorporating a similarly broad, principles-based review clause into the Act. Victoria Police supported the inclusion of such a clause.<sup>142</sup> Community organisations and the CRIS also noted the potential benefits of this approach.<sup>143</sup> Stakeholders suggested that specifying the purposes of review would carry benefits such as increased certainty and transparency for stakeholders and the public when responding to and providing feedback to a review. The Expert Advisory Group also supported the inclusion of broad principles similar to those in the INSLM Act.

### 3.5.2. Independence, consultation and expert advice

The review also sought feedback from stakeholders about any other necessary amendments to support the conduct of future reviews. Issues raised included the independence and transparency of the review process, the need for specialist and expert input, and the need to consult with the community. Some stakeholders also noted the importance of ensuring that any proposed changes do not mandate onerous requirements or unduly limit the conduct of future reviews.

During consultations, a number of stakeholders commented on the benefits of broad consultation, independence and expertise in the review process. Victoria Police specifically raised the need to ensure future reviews retain sufficient expertise in the subject matter of terrorism.<sup>144</sup> Some stakeholders identified the importance of specialist input. For example, the CCYP and AMWCHR submitted that a guarantee of independence and expertise in the review process would provide significant benefits.<sup>145</sup>

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<sup>139</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 36.

<sup>140</sup> *Terrorism (Extraordinary Powers) Act 2005* (WA) s 34.

<sup>141</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b).

<sup>142</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 4.

<sup>143</sup> Consultation with community groups, 17 June 2021; Centre for Resilient and Inclusive Societies, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 3.

<sup>144</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 4.

<sup>145</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 4; Australian Muslim Women's Centre for Human Rights Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 12.





The importance of broad consultation with community representatives and the public was also raised by the VMC and supported by other stakeholders.<sup>146</sup>

The Expert Advisory Group supported the inclusion of requirements to provide that future reviews be informed by independent, expert advice and public consultation, while noting that the clause should still provide flexibility in the design and implementation of the review process. As noted later in this report, the Expert Advisory Group also noted the benefits of drawing on expert advice regarding the wellbeing of children and young people as part of future reviews.

### 3.6. Conclusion

Stakeholders and the Expert Advisory Group consistently identified that the review and sunset clauses remain appropriate and necessary safeguards to balance the extraordinary powers in the Act. The review recommends that both clauses are extended, consistent with the ongoing use of sunset and review clauses in counter-terrorism legislation across Australian jurisdictions.

Taking into account stakeholder and Expert Advisory Group feedback, along with advice from law enforcement and intelligence agencies about the ongoing threat of terrorism, the review concluded that the sunset clause should be extended for 10 years. This reflects that the persistent and diversifying threat environment suggests an ongoing need for the Act in the short to medium term. It also reflects stakeholder advice that a 10-year sunset clause is sufficient to achieve its goal of safeguarding the Act and is consistent with the length of sunset clauses in counter-terrorism legislation across jurisdictions.

The review concluded that the review clause should be amended to require that the next review commences within seven years and is completed within 18 months. This will provide government with a further 18-month period to consider and respond to the recommendations of the review before addressing the Act's sunset clause.

The review notes that a seven-year review clause is longer than equivalent review clauses in some other Australian jurisdictions. However, noting the discussion earlier in this chapter, the review considers that this period is appropriate for several reasons. First, the review period provides an interval between reviews that is sufficient to build an evidence base and conduct a meaningful assessment of the use of all powers in the Act. This is important given the infrequent use of the powers. Second, the review period minimises the consultation burden on stakeholders, by mandating one, substantive evaluation of the Act rather than more regular reviews that may be narrower in focus yet still impose a resource burden.

Further, the review notes that recommendation 7 provides an additional tool to oversee the operation of powers in the Act, including biennial exercises to evaluate the performance and effectiveness of the Act in practice. This will support the sunset and review clauses and provide an agile and responsive approach to ensuring legislative fairness and effectiveness. Finally, *ad hoc* reviews may be convened by government outside statutory review periods; for example, in response to use of the powers in the Act, a terrorist incident, or identification of a problem with the Act's provisions.

Consistent with the feedback of stakeholders and the Expert Advisory Group, the review proposes that the Act is amended to specify the purposes of review. It is recommended that this provision requires that future reviews consider the ongoing need, fairness, proportionality and effectiveness of the Act. This approach will give flexibility to decision-makers to implement future reviews in a dynamic policy context, under the umbrella of widely supported and proven review principles.

The review also recommends an amendment to require that future reviews consider the views of the community and relevant agencies, organisations and independent experts. This reflects stakeholder feedback about the importance of a robust review process informed by specialist advice and diverse perspectives, while also retaining a degree of flexibility in the conduct of future reviews.

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<sup>146</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 2; Consultation with Community Groups, 17 June 2021.



### **Recommendation 3**

The operation of the sunset clause in the Act should be extended by 10 years, providing for the Act to expire on 1 December 2031.

### **Recommendation 4**

The Act should require the Attorney-General to cause a review of the Act to:

- a. commence by 1 December 2028 (seven years from the date of the current sunset clause)
- b. be completed, and a report on the review tabled in both houses of Parliament, by 1 June 2030 (that is, 18 months after the review commences, and 18 months before the Act sunsets).

### **Recommendation 5**

To provide greater structure around the scope, purpose and approach to the next statutory review of the Act, the review clause should:

- a. specify that the purpose of the review is to consider the ongoing need, fairness, proportionality and effectiveness of the Act
- b. require the review to consider the views of the community, relevant entities and independent experts.



## 4. Safeguards and oversight

### 4.1. Introduction

The Act contains extensive safeguards and oversight mechanisms intended to balance its extraordinary powers while preserving fundamental rights and liberties. These safeguards work to ensure that there is proportionality between the powers in the Act and the need to protect community safety from threats posed by terrorism and violent extremism.<sup>147</sup>

The Charter provides an overarching safeguard. It requires public authorities, such as Victoria Police, to consider and act compatibly with human rights in their actions and when making decisions, including in relation to the use of powers in the Act.<sup>148</sup> The Charter also requires that, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'<sup>149</sup>

As noted by the Harper-Lay Review, counter-terrorism powers contained in the Act raise difficult civil liberties and human rights questions.<sup>150</sup> The Charter provides that 'a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' and taking into account a range of factors.<sup>151</sup> The significant threat to community safety posed by terrorism, and the range of safeguards and oversight mechanisms in the Act, have been central to previous assessments that the powers in the Act are compatible with the Charter.<sup>152</sup>

As noted in Chapter 1, many of the powers available under the Act must be approved by a court before they can be used by police. In addition, the Act sets out an extensive oversight system, with independent monitoring of the exercise of powers under the Act by the Victorian Ombudsman, Independent Broad-based Anti-corruption Commission (IBAC), the Public Interest Monitor (PIM), the Victorian Inspectorate (VI) and CCYP. There are also a range of legislative provisions that aim to ensure specific powers are used appropriately; for example, requirements that people detained under the Act's preventative detention regimes are treated humanely and their human rights are observed.<sup>153</sup>

The review sought comment about the impact of the Act on individual rights, and the adequacy and workability of the current safeguards and oversight mechanisms. Due to the limited use of the Act's powers, there has also been limited use of the oversight functions in the Act. However, stakeholders generally indicated that where the oversight functions have been exercised, they are working as intended and have not given rise to practical problems. Stakeholders generally emphasised the importance of the safeguards in the Act and some suggested amendments to improve their effectiveness. Specific proposals examined by the review, and discussed in this chapter, relate to:

- the Ombudsman's jurisdiction to investigate police in relation to preventative detention
- oversight agency access to places of detention
- oversight agency information-sharing

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<sup>147</sup> Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, 1325 (Martin Pakula MP).

<sup>148</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 38(1).

<sup>149</sup> *Ibid* s 32(1).

<sup>150</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1* (2017) 27.

<sup>151</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7(2).

<sup>152</sup> The Jones Review in 2014 undertook a detailed analysis of the application of the Charter to the Act. It found that the powers in the Act were reasonable and justified interferences with the rights contained in the Charter (see Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (Report, September 2014) 51). Reforms to the Act since 2014 have also been assessed as compatible with human rights, in light of the threats to human rights associated with terrorist acts.

<sup>153</sup> *Terrorism (Community Protection) Act 2003 (Vic)* s 13ZB.



- the VI receiving complaints about the Ombudsman and IBAC
- Victoria Police responding to representations from IBAC or the Ombudsman in relation to preventative detention
- Victoria Police's provision of written records to the VI for inspection
- readiness of oversight agencies to exercise their functions under the Act.

Safeguards specific to children and other vulnerable persons are discussed in Chapter 5.

## 4.2. The Ombudsman's jurisdiction under the Act and access to places of detention

The Ombudsman raised several matters regarding its functions under the Act and its ability to:

- enquire into and investigate complaints made about Victoria Police by people in preventative detention
- conduct inspections relevant to preventative detention complaints or notifications
- access police cells where a person may be detained.<sup>154</sup>

### 4.2.1. The role of the Ombudsman and IBAC under the Act

The Ombudsman receives and investigates individual and systemic complaints about administrative actions taken by Victorian Government departments and bodies. It can also consider whether a government action is compatible with the Charter.<sup>155</sup>

The Ombudsman has specific oversight functions with respect to preventative detention under the Act. The Act requires Victoria Police to notify the Ombudsman of the making of a PDD under Part 2AA of the Act<sup>156</sup> or a PDO under Part 2A<sup>157</sup> and when a person is taken into preventative detention under either Part.<sup>158</sup> A detained person must be informed of their right to make a complaint to the Ombudsman when taken into preventative detention,<sup>159</sup> may contact the Ombudsman<sup>160</sup> or may contact a lawyer for the purpose of making a complaint to the Ombudsman.<sup>161</sup> The Act specifies that its provisions relating to preventative detention do not affect a power or a function of the Ombudsman under the *Ombudsman Act 1973* (Ombudsman Act).<sup>162</sup>

IBAC is responsible for preventing and exposing public sector corruption and police misconduct.<sup>163</sup> IBAC has a similar legislative role under the Act to that of the Ombudsman, with equivalent requirements for notification regarding preventative detention and the ability of detained persons to make a complaint to IBAC.<sup>164</sup>

As IBAC has statutory responsibility for investigating police misconduct and corruption in Victoria, including receiving complaints about police conduct, Victoria Police is specifically exempted from the

<sup>154</sup> Letter from the Victorian Ombudsman to Department of Justice and Community Safety, 6 October 2020.

<sup>155</sup> *Ombudsman Act 1973* (Vic), s 13(2).

<sup>156</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13AZZM.

<sup>157</sup> *Ibid* s 13F(10)(a).

<sup>158</sup> *Ibid* ss 13AZZM(1)(a), 13F(10)(c).

<sup>159</sup> *Ibid* ss 13AW(2)(k), 13X(2)(e).

<sup>160</sup> *Ibid* ss 13AZR, 13ZE.

<sup>161</sup> *Ibid* ss 13AZV(2)(d), 13ZF(1)(c).

<sup>162</sup> *Ibid* ss 13AZZZ, 13ZS.

<sup>163</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) pt 1.

<sup>164</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13F(10)(a), 13AZZM(1)(b), 13F(10)(c), 13AW(2)(k), 13X(2)(e), 13AZR, 13ZE, 13AZV(2)(d), 13ZF(1)(c).



Ombudsman's general jurisdiction under the Ombudsman Act.<sup>165</sup> As a result, the Ombudsman is constrained in its ability to investigate complaints received from or on behalf of detained persons about the actions of Victoria Police members under the Act. In contrast, the Ombudsman can enquire into and investigate the actions of a contractor managing a police gaol or departmental officers managing a correctional facility or youth justice centre where a person may be detained.<sup>166</sup>

The Ombudsman also noted that its powers of inspection under the Ombudsman Act can only be used in relation to an investigation being conducted under that Act.<sup>167</sup> Due to its inability to investigate Victoria Police (as outlined above), the Ombudsman is unable to undertake inspections in respect of persons detained by Victoria Police.

Finally, the Ombudsman noted that it is unable to access police cells where persons may be detained, with the exception of those that are operated by contractors. The Ombudsman noted that this 'limits [its] ability to identify issues with the treatment of persons in detention and to make effective representations.'<sup>168</sup>

#### 4.2.2. Expanding the Ombudsman's jurisdiction and providing access to places of detention

The Ombudsman submitted that expanding its jurisdiction under the Act to enable it to investigate Victoria Police is necessary for the performance of its function under the Act.<sup>169</sup> The Ombudsman noted that it has a legislated role to monitor administrative actions to determine compliance with the Charter, and that its function under the Act is consistent with this role.<sup>170</sup>

In relation to places of detention, the Ombudsman submitted that, in order to make meaningful comments on conditions for detained persons, the Ombudsman, IBAC and the CCYP (all of whom have a monitoring role under the Act) should have immediate access to places of detention once notified of their detention, in order to attend at the place and check that the minimum entitlements for the detained person are being met.<sup>171</sup> The Ombudsman suggested that this would assist agencies in making representations to Victoria Police in respect of the treatment of a person in preventative detention and enable the resolution of any immediate issues regarding the conditions in which a person is being detained.<sup>172</sup>

In its advice to the review, IBAC noted that part of its function in investigating police personnel misconduct involves ensuring that Victoria Police members have regard to human rights under the Charter.<sup>173</sup> The Ombudsman noted that its functions with respect to the Charter are broader, as they include enquiring into or investigating whether an administrative action is incompatible with a human right and whether a decision related to an administrative action involved a failure to give proper consideration to human rights.<sup>174</sup>

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<sup>165</sup> Victoria Police and members of Victoria Police personnel are exempt bodies: *Ombudsman Act 1973* (Vic) sch 2. The Ombudsman is not authorised to enquire into or investigate anything done or omitted to be done by an exempt body or person: *Ombudsman Act 1973* (Vic) s 13(3).

<sup>166</sup> Section 13AD of the *Terrorism (Community Protection) Act 2003* (Vic) provides that children subject to a police detention decision will be detained in a youth justice facility unless it is reasonably necessary for them to be detained at another place. Similarly, ss 13W and 13WA of that Act make provision for the detention of a person subject to a preventative detention order in a prison or youth justice facility.

<sup>167</sup> Letter from the Victorian Ombudsman to Department of Justice and Community Safety, 6 October 2020.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> Consultation with Victorian Ombudsman, 2 June 2021.

<sup>173</sup> Email from Independent Broad-based Anti-corruption Commission to Department of Justice and Community Safety, 9 July 2021; *Independent Broad-based Anti-corruption Act 2011* (Vic) s 15(3)(b)(iii).

<sup>174</sup> *Ombudsman Act 1973* (Vic) s 13(2).



With respect to obtaining access to places of detention, IBAC noted that it is able to enter police premises during an IBAC investigation.<sup>175</sup> As this power of entry is not available for its role under the Act, IBAC shared the Ombudsman's view that clear provisions providing access to places of detention would assist with the effective exercise of oversight obligations.<sup>176</sup>

DJCS is undertaking a systemic review of police oversight in response to the findings of the 2018 Parliamentary IBAC Committee report, *Inquiry into the external oversight of police corruption and misconduct in Victoria* and recommendation 61 of the Royal Commission into the Management of Police Informants (Systemic Review of Police Oversight). The Systemic Review of Police Oversight is expected to conclude this calendar year and will examine several matters relating to the Victorian police integrity and oversight system, including:

- the clarity and effectiveness of the roles and responsibilities of all agencies within the police oversight system
- the extent to which agencies have the powers to perform their legislated functions effectively
- the clarity, consistency and accessibility of the police oversight legislation and policy framework
- the extent to which exercise of police powers, decisions and actions are subject to appropriate monitoring.

The Expert Advisory Group observed that the powers and functions of oversight agencies with a role under the Act should have as much clarity and certainty as possible, and the functions of those agencies should be supported by necessary and appropriate powers. However, members also noted that the oversight regime under the Act and should align with the roles, responsibilities and functions of the broader police oversight system. Consequently, the Expert Advisory Group took the view that the matters raised by the Ombudsman should be referred to the Systemic Review of Police Oversight, to ensure that any changes to oversight roles and responsibilities under the Act are considered in the context of any broader reforms to the police oversight system.

#### 4.2.3. Conclusion

The review agrees with the Expert Advisory Group's observations about the need for clarity and certainty in the oversight functions, roles and responsibilities under the Act, and for these functions to be supported by necessary and appropriate powers. At present, the Ombudsman and IBAC have similar functions under the Act, but only IBAC has the powers to enquire into and investigate complaints about Victoria Police with respect to preventative detention.

However, it is also important that the oversight functions, roles and responsibilities under the Act are consistent with the operation of the broader police oversight and integrity system. Within that system, Victoria Police is exempted from the Ombudsman's general jurisdiction, due to IBAC's role in investigating police conduct. The issues raised by the Ombudsman will be examined further as part of the Systemic Review of Police Oversight. This will ensure any reforms can be assessed in the context of broader considerations about and reforms to the operation of the Victorian police integrity and oversight system.

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<sup>175</sup> Email from Independent Broad-based Anti-corruption Commission to Department of Justice and Community Safety, 9 July 2021; *Independent Broad-based Anti-corruption Act 2011* (Vic) s 86.

<sup>176</sup> *Ibid.*



### 4.3. Information sharing between oversight agencies

Several oversight agencies saw merit in strengthening information sharing provisions between agencies with oversight functions under the Act, including referral of complaints between agencies.

#### 4.3.1. Current information sharing arrangements

Oversight agencies with a role under the Act each operate under their own legislation, which contain various general provisions enabling agencies to share relevant information with, or refer relevant information to, other oversight agencies in certain circumstances.<sup>177</sup> However, there are no express provisions that enable such information sharing under the Act.

As noted above, the Ombudsman and IBAC have similar functions under the Act and a person in preventative detention can elect to make a complaint to either agency. In circumstances where IBAC or the Ombudsman received a complaint and considered that it would be better dealt with by the other agency due to that agency's specific experience and expertise, there are no clear provisions in the Act to permit the referral of information or a complaint to the other agency.

The nature of information created under or relevant to the Act (for example, information related to a person's preventative detention) will often be highly sensitive and classified as 'protected' or higher. Consequently, oversight agencies with access to such information are required to have a number of security measures in place to ensure appropriate storage and management of the information.

#### 4.3.2. Enhancing information sharing provisions

The Ombudsman submitted that improved information sharing arrangements would support agencies to fulfil their functions under the Act. It advocated for a 'no wrong door' approach to complaint handling, enabling the Ombudsman and IBAC to refer a complaint or part of a complaint to each other if it could be more appropriately dealt with by the other agency. The Ombudsman emphasised that detained persons receive a large amount of information from police and may not know which agency is better equipped to deal with their specific complaint.<sup>178</sup>

IBAC advised the review that it supports efforts to ensure there are no legislative barriers to the sharing of information should there be a need for an oversight agency to refer a complaint to another.<sup>179</sup> The VI indicated that it would be helpful to include express provisions enabling the Ombudsman and IBAC to share information with the VI, in light of its role in investigating complaints about the Ombudsman or IBAC.<sup>180</sup>

Victoria Police indicated it does not oppose the inclusion of express information sharing provisions enabling oversight agencies to share information, but considers that this should be confined to the purposes of fulfilling the agencies' complaint functions and is otherwise compliant with the requirements for lawful disclosure under the *Privacy and Data Protection Act 2014* (Vic).<sup>181</sup>

Victoria Police emphasised the importance of oversight agencies having strict information sharing protocols and procedures to ensure appropriate management of classified information. It said this should include security clearance processes, appropriate IT systems and other measures to ensure information is appropriately secure.

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<sup>177</sup> *Ombudsman Act 1973* (Vic), pt VAB; *Independent Broad-based Anti-corruption Act 2011* (Vic) pt 2, div 2; *Commission for Children and Young People Act 2012* (Vic) pt 5, div 7; *Victorian Inspectorate Act 2011* (Vic) pt 2, div 2.

<sup>178</sup> Consultation with Victorian Ombudsman, 2 June 2021.

<sup>179</sup> Email from Independent Broad-based Anti-corruption Commission to Department of Justice and Community Safety, 9 July 2021.

<sup>180</sup> Consultation with Victorian Inspectorate, 2 June 2021.

<sup>181</sup> Victoria Police, Review of the *Terrorism (Community Protection) Act 2003* – Additional questions: Victoria Police Response (12 July 2021) 7.



The Expert Advisory Group noted the importance of clear and effective information sharing arrangements and supported the introduction of express provisions limited to each agency's functions under the Act. The members also emphasised the importance of protecting a detained person's privacy rights, noting that this must be considered as part of the development of any information sharing provisions.

#### 4.3.3. Conclusion

The review considers that clear information sharing provisions would support oversight agencies to fulfil their functions under the Act and provide greater certainty about the types of information that can be shared and under which circumstances. This clarity and certainty is particularly important in light of the sensitivity of information that may be shared under the Act. The review agrees with the Expert Advisory Group and Victoria Police that any legislative amendments to support information sharing under the Act would need to ensure the protection of individual privacy rights and be accompanied by robust security arrangements, to the extent that they are not already in place.

The Systemic Review of Police Oversight is considering information sharing as part of its assessment of the police integrity and oversight system. To ensure a consistent approach, the review considers it appropriate that the issues related to information sharing under the Act are considered as part of that review. This should take into account the outcomes of the Systemic Review of Police Oversight in relation to the Ombudsman's jurisdiction under the Act, as discussed earlier in this chapter, and include consultation with relevant stakeholders, such as the Office of the Victorian Information Commissioner.

## 4.4. Information sharing by a detained person with the Victorian Inspectorate

The VI proposed that a person subject to preventative detention under the Act should be able to share information with the VI about the Ombudsman and IBAC, in light of the VI's role in investigating complaints about these agencies.<sup>182</sup>

A scenario where this might be necessary could include where, for example, a person is dissatisfied with their treatment in preventative detention by Victoria Police, has made a complaint to the Ombudsman or IBAC, and considers that the Ombudsman or IBAC has not satisfactorily addressed their concerns.

### 4.4.1. Current provisions regarding information sharing with the Victorian Inspectorate

The VI can receive, assess and investigate complaints about the conduct of both the Ombudsman and IBAC.<sup>183</sup> This includes the actions of the Ombudsman and IBAC under the Act.

Currently, the Act provides that a detainee commits an offence if they disclose to another person that they are in preventative detention.<sup>184</sup> This means that a person cannot share information with the VI about their preventive detention while detained. There is no restriction on a person sharing information with the VI once preventative detention has ceased.

### 4.4.2. Enabling a detained person to share information with the Victorian Inspectorate

The VI submitted that the Act should be amended to permit a detained person to share information with it about the actions of the Ombudsman or IBAC during a period of detention, to assist it in fulfilling its functions.<sup>185</sup>

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<sup>182</sup> Consultation with Victorian Inspectorate, 2 June 2021.

<sup>183</sup> *Victorian Inspectorate Act 2011* (Vic) s 11.

<sup>184</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AZP, 13ZJ(1).

<sup>185</sup> Consultation with Victorian Inspectorate, 2 June 2021.





As a person can complain and disclose information to the VI once detention ceases, Victoria Police queried the need for and the value of permitting a person to complain to VI about the IBAC and the Ombudsman during detention.<sup>186</sup>

The Expert Advisory Group acknowledged the issue raised by the VI but considered that the proposed change is not necessary, given that a detained person can lawfully disclose information about the Ombudsman or IBAC to the VI once the period of preventative detention ends. The Expert Advisory Group also took the view that the addition of a further oversight mechanism could increase risks of individuals seeking to 'game' the system, and that the practical benefit of the change for a detained person may be limited, given that the VI's role would be confined to investigating the response of IBAC and/or the Ombudsman rather than the substance of the detainee's original complaint (for instance, their treatment by police while in preventative detention).

#### 4.4.3. Conclusion

The review does not consider that change is necessary at this time, noting that a person can lawfully complain to the Ombudsman and IBAC during detention, and to the VI once preventative detention ceases. The review also notes that there is an extensive oversight regime under the Act, and a detained person is already provided with a significant amount of information, including their right to complain to the Ombudsman or IBAC. It is unlikely that the ability to make contemporaneous complaints to the VI would result in any immediate benefits for the detained person.

### 4.5. Victoria Police response to representations made by IBAC and the Ombudsman

IBAC proposed that Victoria Police should be required to respond when IBAC makes representations under the Act in relation to police actions regarding preventative detention.<sup>187</sup>

#### 4.5.1. Current arrangements for representations made by IBAC and the Ombudsman

During preventative detention of a person under the Act, a Victoria Police nominated senior police officer (NSPO) is appointed. The NSPO is responsible for overseeing the exercise of powers and performance of obligations under the Act, including reviewing and receiving representations from a number of persons and agencies regarding the exercise of preventative detention.<sup>188</sup>

The Act enables the Ombudsman and IBAC to make representations to the NSPO about:

- the exercise of powers and performance of obligations under Part 2AA (PDDs) and Part 2A (PDOs)
- compliance with requirements for release from preventative detention
- the treatment of a detained person.<sup>189</sup>

There are no requirements for the NSPO to respond to representations made by IBAC or the Ombudsman.

#### 4.5.2. Requiring Victoria Police to respond to IBAC and Ombudsman representations

IBAC submitted that Victoria Police should be required to respond to representations made under the Act, similar to the requirements contained in Part 7 of the *Independent Broad-based Anti-corruption*

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<sup>186</sup> Victoria Police, Review of the *Terrorism (Community Protection) Act 2003* – Additional questions: Victoria Police Response, (12 July 2021) 6.

<sup>187</sup> Letter from Independent Broad-based Anti-corruption Commission to Attorney-General, the Hon. Jaclyn Symes MP, 4 June 2021.

<sup>188</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AZZJ, 13AZZK, 13AZZL.

<sup>189</sup> *Ibid.*, ss 13AZZL, 13P(7).



*Commission Act 2011* (Vic). Under Part 7, IBAC may make recommendations or requests to the Chief Commissioner of Police. The Chief Commissioner is required to adopt the recommendation, take the recommended action,<sup>190</sup> or report to IBAC the reason why Victoria Police does not intend to do so.<sup>191</sup>

IBAC considers that the safeguard of making representations to an NSPO would be more effective if Victoria Police had to report back to IBAC on the representation made.<sup>192</sup> As the Ombudsman and IBAC hold similar functions under the Act, the introduction of this requirement in respect of IBAC representations would likely also need to apply to representations made to Victoria Police by the Ombudsman.

Victoria Police advised the review that it does not support the introduction of such a requirement, on the basis that it would further complicate the NSPO's already complex monitoring and oversight role.<sup>193</sup> It noted that preventative detention is designed to be utilised in dynamic and time-sensitive situations where a terrorist attack is imminent or has occurred. During this time, the NSPO has a range of responsibilities, including overseeing the exercise of powers and the performance of obligations under the Act while also undertaking reviews and receiving representations from a range of stakeholders. This could involve representations from the detained person, IBAC, the Ombudsman, the PIM and the CCYP, along with a lawyer acting for the detained person, a person with whom the detainee has contact, or a person exercising authority under a PDD.

Victoria Police noted that the IBAC legislation appears to contemplate a situation different to preventative detention and does not involve the same dynamic and time-pressured circumstances.<sup>194</sup> Victoria Police also submitted that the PIM is the primary safeguard in relation to preventative detention and has access to information not available to other oversight bodies that may make representations. Victoria Police submitted that, given the PIM's broad powers to test the sufficiency of information, ask questions of the NSPO and other Victoria Police officers, make submissions and access all relevant documents, and given that IBAC does not have access to the full suite of information available to the PIM, 'it would not be workable or appropriate to require a formal response to representations from IBAC in the context of these decisions.'<sup>195</sup>

The Expert Advisory Group saw merit in IBAC's proposal. It noted that the purpose of IBAC and the Ombudsman making representations is to protect the rights of detained persons and support police accountability in the treatment of detained persons, and that the proposed change is consistent with this purpose. Acknowledging the dynamic nature of preventative detention, the Expert Advisory Group concluded that it may be appropriate for the NSPO to provide a contemporaneous response to IBAC or the Ombudsman verbally where operationally feasible, with a written response following within a reasonable period after the end of preventative detention. The Expert Advisory Group considered that this would help to inform IBAC's or the Ombudsman's understanding of the issues raised, enhance accountability and support the maintenance of comprehensive records related to preventative detention and associated operational decisions.

### 4.5.3. Conclusion

The review considers that requiring Victoria Police to respond to IBAC's and the Ombudsman's representations may assist with the effective discharge of each agency's oversight function. However, as the issue relates to the oversight functions of IBAC and the Ombudsman and may overlap with issues

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<sup>190</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 161(a).

<sup>191</sup> *Ibid* s 161(b).

<sup>192</sup> Letter from Independent Broad-based Anti-corruption Commission to Attorney-General, the Hon. Jaclyn Symes MP, 4 June 2021.

<sup>193</sup> Victoria Police, Review of the *Terrorism (Community Protection) Act 2003* – Additional questions: Victoria Police Response (12 July 2021) 6.

<sup>194</sup> *Ibid*, 6.

<sup>195</sup> *Ibid*, 6.



under consideration by the Systemic Review of Police Oversight, it is appropriate that it be considered as part of that broader review.

The review notes that in considering this issue further, it will be important to recognise the dynamic and time-critical circumstances involved in preventative detention, the range of requirements that the Act currently places on the NSPO, and the already extensive oversight and monitoring arrangements in place. The introduction of any requirement for the NSPO to respond to representations by IBAC or the Ombudsman must be practical and operationally feasible, taking these factors into account. For example, as suggested by the Expert Advisory Group, consideration might be given to requiring Victoria Police to respond verbally during preventative detention, subject to operational circumstances, and to provide a formal written response within a reasonable period following the end of detention.

#### **4.6. Victorian Inspectorate inspection of written records of Victoria Police**

The VI proposed the introduction of legislative requirements for Victoria Police to maintain relevant records and provide them to the VI, to assist the VI in discharging its inspection functions under the Act.<sup>196</sup>

##### **4.6.1. Current requirements for written records**

The VI has a function under the Act to inspect the records of Victoria Police to ascertain its compliance with the Act's provisions related to covert search warrants, preventative detention and special police powers.<sup>197</sup> Consequently, the VI's ability to fulfil its role under the Act depends on the creation and provision of relevant written records.

Currently, some of the powers afforded to Victoria Police under the Act are accompanied by requirements to create written records or to provide such records to the relevant oversight agency. However, this is not consistent across the Act. For example, Victoria Police is required to fulfil a range of obligations when taking actions and making decisions under Part 2AA of the Act, related to PDDs, and to make records of these decisions and actions. However, there is no statutory requirement for Victoria Police to provide these records to the VI.

##### **4.6.2. Formalising requirements for providing written records to the Victorian Inspectorate**

The VI advised the review that it has not encountered any practical issues to date in obtaining access to relevant Victoria Police records. The VI noted that Victoria Police has developed comprehensive internal operating procedures related to record-keeping and has cooperated fully with the VI in the performance of its functions.<sup>198</sup>

The VI submitted that the introduction of legislative provisions specifying the records that Victoria Police must keep and provide, rather than relying on internal procedures, would offer more certainty and convenience for both Victoria Police and the VI. The VI noted that other legislation dealing with the use of coercive powers specifies a range of documents and records that an agency must keep and make available for inspection.<sup>199</sup>

The VI indicated that it would be assisted in discharging its functions under Parts 2, 2AA and 3A if the Act imposed a requirement on Victoria Police to provide the VI with the records listed in **Table 5** below.

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<sup>196</sup> Consultation with Victorian Inspectorate, 2 June 2021.

<sup>197</sup> *Terrorism (Community Protection) Act 2003 (Vic)* s 37B.

<sup>198</sup> Email from the Victorian Inspectorate to Department of Justice and Community Safety, 12 July 2021; Consultation with Victorian Inspectorate, 2 June 2021.

<sup>199</sup> Email from the Victorian Inspectorate to Department of Justice and Community Safety, 12 July 2021.

**Table 5 – Victoria Police records relevant to Victorian Inspectorate functions**

Part 2 – Covert search warrants	Part 2AA – Police detention decisions (PDDs)	Part 3A – Special police powers (SPPs)
A copy of the warrant issued (along with any report under s 11)	Record of PDD – s 13AE	Copies of authorisations and/or interim authorisations of SPPs together with copies of the applications
	Records about the process for release of a person – s 13AZZH	Copies of any revocation or variation of an interim authorisation
	Summary explaining PDD given to detained person – s 13AK	A copy of any instrument of delegation – s 21IB
	Records about the transfer of a detained child into the legal custody of the Chief Commissioner for questioning (as applicable) – s 13AT	
	Records relating to the detention of children (as applicable) – s 13AZ	
	Records relating to the notification of integrity and children oversight bodies about PDDs and persons being taken into custody – s 13AZZM	
	Records relating to an NSPO's conclusions relating to a review of a PDD – s13AZZN(7)	
	Records relating to decision to nominate an NSPO – s 13AZZJ	
	Records relating to the destruction of identification material – s 13AZZF	

Victoria Police advised the review that it does not consider the proposed amendments necessary. It submitted that the record-keeping requirements for decisions and actions under the Act are varied due to the distinct methods of applying for and making decisions across different powers and functions. In its view, this does not lend itself to a 'one-size' approach to record-keeping across the Act.<sup>200</sup>

The Expert Advisory Group supported the VI proposal. While it did not support the imposition of substantive additional requirements on Victoria Police, it considered that formalising existing requirements for the creation and provision of records already maintained by Victoria Police and relevant to the discharge of the VI's inspection functions would increase the clarity, consistency and transparency of decisions and actions made under the Act.

<sup>200</sup> Victoria Police, Review of the *Terrorism (Community Protection) Act 2003* – Additional questions: Victoria Police Response (12 July 2021) 5.



### 4.6.3. Conclusion

The review notes that the co-operative approach between Victoria Police and the VI, combined with the administrative procedures developed by Victoria Police, have meant that the VI has had access to all relevant records in fulfilling its inspection functions. However, the review also agrees with the Expert Advisory Group that setting out record-keeping requirements within the legislation would support greater certainty and transparency, provided that the statutory provisions are consistent with the role and function of the VI under the Act, are operationally feasible, and do not impose an appreciable further administrative burden on Victoria Police.

#### Recommendation 6

Consider amending the Act to specify the written records Victoria Police is required to provide to the Victorian Inspectorate (VI), consistent with the VI's functions under Parts 2, 2AA and 3A of the Act. Victoria Police and the VI should be consulted on the development of amendments to ensure that they are operationally feasible and consistent with the role and function of the VI.

## 4.7. Oversight agency readiness

The role of the PIM is to represent the public interest by testing the content and sufficiency of information in applications by Victorian law enforcement and integrity agencies for the use of covert and coercive powers.<sup>201</sup> Under the Act, the PIM represents the public interest in applications for PDOs, covert search warrants, prohibited contact orders and counter-terrorism intelligence protection orders, and in periodic reviews of PDDs.<sup>202</sup>

While noting the necessity for the oversight mechanisms in the Act, the PIM noted that the infrequency with which the Act's powers and safeguards are used, combined with the extensive roles and responsibilities of oversight agencies, makes it difficult for agencies to develop familiarity with the relevant procedures.<sup>203</sup> The PIM emphasised the importance of agency readiness, given that agencies must be prepared to spring into action and exercise their powers and functions in a highly dynamic and operationally sensitive environment. The PIM also noted that the current numbering in the Act makes navigation difficult, which potentially adds to its complexity and the challenges of maintaining agency readiness.<sup>204</sup>

### 4.7.1. Scenario exercises

In 2020, Victoria Police undertook a desktop scenario exercise to test the exercise of powers and safeguards in the Act. This exercise, conducted jointly with relevant oversight agencies (the PIM, IBAC, Ombudsman and CCYP), involved the development of hypothetical scenarios and testing of relevant legislative and procedural requirements in the context of those scenarios.

### 4.7.2. Improving agency readiness

Oversight agencies that participated in the 2020 desktop scenario exercise told the review they found it to be very beneficial, particularly as the powers and safeguards in the Act are used so infrequently. The Ombudsman noted that the desktop exercise demonstrated the differences in processes for PDDs for adults compared to those for children and allowed participants to understand how these differences operate in practice.<sup>205</sup>

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<sup>201</sup> *Public Interest Monitor Act 2011* (Vic) pt 3.

<sup>202</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 4F.

<sup>203</sup> Consultation with Public Interest Monitor, 2 June 2021.

<sup>204</sup> *Ibid.*

<sup>205</sup> Consultation with Victorian Ombudsman, 2 June 2021.



The Expert Advisory Group noted that scenario exercises provide a useful and practical way to test the Act's powers and safeguards and supported them being conducted biennially, to take into account any changes in the terrorist threat level or threat environment. The Expert Advisory Group also noted that, while renumbering the Act may reduce difficulty in navigating the Act, it would likely also require extensive changes to Victoria Police's and other agencies' procedures, along with associated retraining, in the absence of any substantive changes to the Act.

#### 4.7.3. Conclusion

As noted throughout this report, the powers in the Act are extraordinary and targeted towards emergency situations. As a result, they are used rarely. Where these powers do need to be used, it will typically be in a highly dynamic operational context and agencies must be prepared to respond quickly and consistently with their legislative obligations.

The review considers that scenario exercises are an important and beneficial way both to assess the operation of the powers and safeguards in the Act, and to ensure Victoria Police and oversight agencies maintain a comprehensive understanding of, and readiness to operationalise, the relevant legislative and procedural requirements.

The review considers that regular scenario exercises should occur both at a Victorian level and, consistent with current practice, in cooperation with ASIO and the AFP. In the next chapter, the review also proposes that it would be beneficial for scenario exercises to adopt a specific focus on children and other vulnerable persons, given the different considerations and safeguards applicable to these groups.

While renumbering the Act would potentially reduce complexity, the review considers that this benefit could be outweighed by the resulting administrative burden for affected agencies. However, this could be considered at a later time, if substantive changes are being made to the Act.

#### **Recommendation 7**

Victoria Police should conduct scenario exercises at least biennially to test the application of powers and safeguards in the Act. These exercises should be conducted jointly with the other agencies that hold legislative obligations under the Act and in consultation with the Commonwealth.



## 5. Safeguards and oversight – Children and other vulnerable persons

### 5.1. Introduction

Children and young people have particular vulnerabilities, making it critical that the powers available under the Act are balanced by robust protections and safeguards. The same is true for other vulnerable persons. Special provisions in the Act apply to the preventative detention of children, people who have difficulties communicating in the English language and people with a disability. Additionally, the CCYP's role under the Act is to monitor the treatment, and promote the interests of, children detained under PDDs (Part 2AA) and PDOs (Part 2A).

The review received feedback about the adequacy of safeguards protecting the treatment of children and other vulnerable persons under the preventative detention schemes in the Act.

The CCYP submitted that the Act should be amended to repeal all preventative detention provisions applicable to children aged 14 and 15, and further that children aged 16 and 17 should only be subject to the PDO provisions under Part 2A, and not PDD provisions under Part 2A.<sup>206</sup> If preventative detention is retained for children, the CCYP submitted that the following additional safeguards should apply:

- preventative detention should only be available where the court is satisfied that it is the least restrictive means of preventing an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act<sup>207</sup>
- a differentiated test should apply to preventative detention of children compared with adults<sup>208</sup>
- a child's developmental needs should be catered for while in preventative detention<sup>209</sup>
- preventative detention should be subject to regular statutory review and a sunset of a period not exceeding three years.<sup>210</sup>

The CCYP also submitted that an appropriately qualified person with expertise in child and adolescent development and welfare should be part of future reviews of the Act.<sup>211</sup> This was echoed by the VMC.<sup>212</sup> Finally, the CCYP questioned whether its oversight and monitoring function would apply in circumstances where a child is detained under the Act by a Commonwealth agency or in a Commonwealth facility, such as an AFP building.<sup>213</sup>

Some stakeholders also raised concerns about safeguards applicable to preventative detention of other vulnerable persons. In particular, the AMWCHR proposed that a statutory oversight function should be created to monitor the treatment, and promote the interests of, persons with disabilities detained under the Act.<sup>214</sup>

<sup>206</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 5.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid 6.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid 4.

<sup>212</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 2.

<sup>213</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021), 6.

<sup>214</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 13.



## 5.2. Application of preventative detention to children

The CCYP submitted that it does not consider that preventative detention under either Part 2AA (PDDs) or Part 2A (PDOs) should apply to children aged 14 or 15. Further, the CCYP submitted that police preventative detention decisions (Part 2AA) should not apply to anyone under 18 years of age at all (that is, for those aged 16 or 17, only PDOs under Part 2A should apply).

### 5.2.1. Current provisions related to preventative detention for children

When first introduced in 2005, preventative detention (under a court-ordered PDO) was only available for children aged 16 and older. In accordance with recommendations 18 and 19 of Report 2 of the Harper-Lay Review, in 2018, the Victorian Government expanded the PDO provisions under Part 2A of the Act to apply to children aged 14 and 15.<sup>215</sup> The 2018 reforms also included the introduction of PDDs under Part 2AA, which can be applied to both adults and children.

In making its recommendations, the Harper-Lay Review expressed 'significant misgivings' about extending the scheme to children aged 14 and 15, given the potential for even a short period of detention to cause irreparable harm.<sup>216</sup>

The Harper-Lay Review's decision arose out of the national agreement on strengthened preventative detention laws, which is based on the NSW model that permits detention of children aged 14 and older. Ultimately, the Harper-Lay Review was persuaded by evidence that minors as young as 14 or 15 can pose a terrorist threat.<sup>217</sup> It referred to the observations of the PJCIS that '... it is conduct that threatens the safety of the Australian community which guides the development of counter-terrorism policy and legislative reform, irrespective of the age, ethnic or religious affiliation of individuals.'<sup>218</sup>

The Harper-Lay Review concluded that extension of preventative detention to this age group required additional and exceptional safeguards and protections, to ensure that minors detained under the scheme are protected to the greatest extent practicable without rendering the scheme inoperable from a law enforcement perspective.<sup>219</sup>

### 5.2.2. Repealing preventative detention provisions for children

The CCYP questioned the need and evidence base for continuation of preventative detention provisions (under both Part 2A and Part 2AA) to children aged 14 and 15, noting that the powers are yet to be used in relation to a child. It submitted that the 'significant restrictions on children's rights under the Charter cannot be demonstratively justified as necessary to achieve a legitimate purpose.'<sup>220</sup>

The CCYP also submitted that, for children aged 16 and 17, preventative detention should only occur under by way of a PDO under Part 2A and not a PDD under Part 2AA, on the basis that 'the gravity of the decision ... to order preventative detention of minors' means that it should be vested exclusively in the Supreme Court.<sup>221</sup>

The Expert Advisory Group noted that the Harper-Lay Review carefully considered the application of preventative detention to children in 2017, resulting in the Parliament's decision to introduce the relevant provisions in 2018. Members also noted reluctantly that the current terrorist threat environment, including

<sup>215</sup> *Justice Legislation Amendment (Terrorism) Act 2018* (Vic).

<sup>216</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 100.

<sup>217</sup> *Ibid.*

<sup>218</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 100, quoting the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2014* (February 2016).

<sup>219</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 100-101.

<sup>220</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 3-4.

<sup>221</sup> *Ibid.*





the increasing and diversifying risk of radicalisation among children and young people, requires the continued availability of preventative detention. However, observing the tension between the extraordinary nature of the Act's powers and the vulnerability of children, the Expert Advisory Group emphasised the finely balanced nature of the preventative detention scheme and the critical need to ensure the safeguards remain appropriate, effective and proportionate.

### 5.2.3. Conclusion

As noted in Chapter 2, advice from law enforcement and intelligence agencies suggests that children and young people continue to form part of an expanding and diversifying terrorist threat environment. This threat environment has not changed so significantly as to warrant departure from the 2018 amendments to the Act, which were the result of careful consideration by the Harper-Lay Review and the Victorian Parliament. The preventative detention provisions were introduced with the intention that they be utilised only as a last resort to prevent a terrorist attack or preserve evidence of a terrorist attack. The fact that the provisions have not been used in respect of children is consistent with this intention.

While the current threat environment suggests a continued need for the availability of preventative detention for children, the review also notes the critical need for adequate and proportionate safeguards. This is discussed further throughout this chapter.

## 5.3. Less restrictive alternatives to preventative detention

In its submission, the CCYP noted that a range of safeguards and protections for detained children were implemented through the 2018 amendments, including its own monitoring role under Part 1B of the Act.<sup>222</sup> While recognising these measures, the CCYP submitted that additional safeguards are necessary if the preventative detention provisions remain, including the implementation of recommendations 22 and 23 of the Harper-Lay Review, which relate to less restrictive alternatives to preventative detention.

### 5.3.1. Harper-Lay Review recommendations regarding less restrictive alternatives to preventative detention

Recommendation 22, Report 2 of the Harper-Lay Review proposed that the power to make a PDO in respect of a minor should only be available to the Supreme Court if it is satisfied:

- that there are no other less restrictive means available to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act; and
- that the particular requirements in relation to the preventative detention of a minor, including any conditions imposed on that detention by the court, can be met.<sup>223</sup>

Recommendation 23 proposed that if the Supreme Court is satisfied that an order other than a PDO would be a less restrictive means of preventing an imminent terrorist act occurring or preserving evidence of, or relating to, a recent terrorist act:

- the court should be empowered to make alternative orders and impose appropriate conditions in response to an application for a PDO in respect of a minor; and
- the court should be required, in making such orders or imposing such conditions, to consider a range of specific matters with respect to the minor, including their physical and mental health and vulnerability.<sup>224</sup>

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<sup>222</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 4.

<sup>223</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 97.

<sup>224</sup> *Ibid* 98.



### 5.3.2. Consideration of less restrictive alternatives

DJCS undertook work in 2017–18 to identify ways to implement recommendations 22 and 23. Two orders were considered as potential alternatives to a PDO for a child but were ultimately deemed unsuitable.

The first alternative considered was the Commonwealth control order. This order provides for a variety of obligations, prohibitions and restrictions that can be imposed on a person to protect the public from a terrorist act.<sup>225</sup> A person can be subject to an order if it substantially helps to prevent a terrorist act,<sup>226</sup> or the person has:

- trained or participated in training with a listed terrorist organisation;<sup>227</sup>
- engaged in a hostile activity in a foreign country;<sup>228</sup>
- been convicted in Australia of an offence relating to terrorism, a terrorist organisation or terrorist act,<sup>229</sup> or
- been convicted overseas for an offence that would, if occurred in Australia, be a terrorism offence within the definition of the *Crimes Act 1914* (Cth).<sup>230</sup>

A control order can prohibit or restrict a person from doing a range of activities, including being in certain areas,<sup>231</sup> leaving Australia,<sup>232</sup> communicating or associating with certain people<sup>233</sup> or accessing certain forms of technology, including the internet.<sup>234</sup>

A control order can also require a person to remain at specified premises for a maximum of 12 hours within any 24-hour period,<sup>235</sup> wear a tracking device,<sup>236</sup> report to someone at a certain time and place,<sup>237</sup> or allow themselves to be photographed<sup>238</sup> and fingerprinted.<sup>239</sup> For persons aged 18 and older, a control order cannot last longer than 12 months.<sup>240</sup> Control orders can apply to persons aged 14 to 17 but cannot last longer than three months.<sup>241</sup> Control orders must be issued by a Commonwealth court on application of the AFP and with the consent of the Minister for Home Affairs.<sup>242</sup>

While it is not possible for the Act to empower the Supreme Court to make a control order, there may be circumstances where control orders provide an option for law enforcement agencies to intervene to address risk earlier, alleviating the need for preventative detention. The Act requires that an application

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<sup>225</sup> *Criminal Code Act 1995* (Cth), div 104.

<sup>226</sup> *Ibid* s 104.1.

<sup>227</sup> *Ibid* s 104.2(2)(a)(b)(i).

<sup>228</sup> *Ibid* s 104.2(2)(a)(b)(ii).

<sup>229</sup> *Ibid* s 104.2(2)(a)(b)(iii).

<sup>230</sup> *Ibid* s 104.2(2)(a)(b)(iv).

<sup>231</sup> *Ibid* s 104.5(3)(a).

<sup>232</sup> *Ibid* s 104.5(3)(b).

<sup>233</sup> *Ibid* s 104.5(3)(e).

<sup>234</sup> *Ibid* s 104.5(3)(f).

<sup>235</sup> *Ibid* s 104.5(3)(c).

<sup>236</sup> *Ibid* s 104.5(3)(d).

<sup>237</sup> *Ibid* s 104.5(3)(i).

<sup>238</sup> *Ibid* s 104.5(3)(j).

<sup>239</sup> *Ibid* s 104.5(3)(k).

<sup>240</sup> *Ibid* s 104.5(1)(f).

<sup>241</sup> *Ibid* s 104.28(2).

<sup>242</sup> *Ibid* s 104.4.



for a PDO must disclose the outcomes and particulars of all previous requests for control orders to ensure this information is before the Supreme Court.<sup>243</sup>

DJCS also considered whether SEOs recommended by the Harper-Lay Review, and currently being developed, could constitute an alternative to preventative detention for children.<sup>244</sup> However, SEOs are not suitable for higher-risk individuals and are not intended or designed to prevent a terrorist act capable of being carried out within 14 days or to preserve evidence of a recent terrorist act. As noted earlier in this report, SEOs are a therapeutic measure designed to enable early intervention to address the underlying causes of radicalisation.

Finally, DJCS considered the feasibility and appropriateness of creating a new type of order to acquit this recommendation, which was deemed unsuitable due to Victoria's referral of counter terrorism legislative power to the Commonwealth. A new type of order would raise complex legal and constitutional issues and could duplicate the existing Commonwealth control order scheme.

The Expert Advisory Group noted the work undertaken by DJCS to examine options for the implementation of recommendations 22 and 23 and that no suitable alternatives were identified. Members also noted the suite of interventions available under state and Commonwealth counter-terrorism legislation; namely, preventative detention, Commonwealth control orders, and the SEOs in development. The Expert Advisory Group considered that further work may be needed to fully address this issue.

### 5.3.3. Conclusion

Preventative detention exists as a last resort measure to prevent a terrorist act capable of being carried out within 14 days or to preserve evidence relating to a terrorist act. The extraordinary nature of this measure, the types of threats that would warrant its use, and the potential impacts on community safety if those threats eventuate all make it difficult to identify an alternative order that could achieve the same objective in a less restrictive way.

SEOs, while not providing an alternative to preventative detention, are designed to intervene early and prevent a person's radicalisation towards violent extremism. In so doing, SEOs add to the spectrum of interventions available and should reduce the likelihood that preventative detention will need to be used—though this may still remain necessary in rare circumstances.

Later in this chapter, the review proposes that regular scenario exercises run by Victoria Police and oversight agencies should include a child-specific focus to test the application of powers and safeguards in the Act relating to children. This process could also consider any impacts arising from the introduction of SEOs and may help to confirm whether a gap exists within the current spectrum of available orders.

## 5.4. Differentiated preventative detention thresholds for children

The CCYP submitted that decisions to subject a child to preventative detention should be subject to a higher threshold test compared with the test that applies in respect of adults. The CCYP expressed concerns that if a higher threshold does not apply, children could be targeted as an easier means of obtaining information or evidence compared with adults.<sup>245</sup>

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<sup>243</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13D(1)(e)(ii).

<sup>244</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) Recommendation 15.

<sup>245</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 5.



### 5.4.1. Current threshold for preventative detention

Table 1 above summarises when PDDs and PDOs may be made. Different thresholds apply depending on whether preventative detention is sought to prevent a terrorist act or to respond to a terrorist act that has recently occurred.

With respect to the use of preventative detention to prevent a terrorist act, the thresholds for both PDDs and PDOs require that:

- there are reasonable grounds to suspect that a person will commit an act of terrorism, possesses a thing related to an act of terrorism, or has done an act to prepare or plan a terrorist act where the terrorist act is capable of being carried out and could occur within the next 14 days;
- the making of the PDD or PDO would substantially help to prevent the terrorist act; and
- detaining the person is necessary for this purpose.<sup>246</sup>

Where preventative detention is being considered in response to a recent terrorist act, the thresholds require that:

- a terrorist attack has occurred in the last 28 days;
- it is necessary to detain the person to preserve evidence of or relating to the terrorist act; and
- it is reasonably necessary to detain the person for this purpose.<sup>247</sup>

These thresholds apply consistently regardless of the age of the person in relation to whom preventative detention is being sought. However, a range of specific safeguards apply to children, including:

- the Supreme Court may make a PDO subject to conditions<sup>248</sup>
- shorter maximum periods of detention apply under a PDD<sup>249</sup>
- a child must not be detained with persons aged 18 years or older<sup>250</sup>
- a child must have a parent, guardian or independent person present when questioned<sup>251</sup>
- legal representation must be arranged for a child.<sup>252</sup>

### 5.4.2. Introducing differentiated thresholds

The CCYP raised this proposal with the Harper-Lay Review in 2017 and then with DJCS at the time of developing of the 2018 reforms. The proposal was not adopted, due to the threshold for preventative detention already being high.

The Expert Advisory Group did not support the CCYP's proposal for amending the Act to differentiate preventative detention thresholds for children. In forming its conclusion, the Expert Advisory Group noted that both the Supreme Court and Victoria Police are required to consider the age of a child in the process of exercising their discretion to detain a person in preventative detention.<sup>253</sup> The Expert Advisory

<sup>246</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AC(1)(a), 13E(1)(a).

<sup>247</sup> *Ibid*, ss 13AC(1)(b), 13E(1)(b).

<sup>248</sup> *Ibid*, s 13E(2C),(3).

<sup>249</sup> *Ibid*, ss 3(1) (see definition of 'maximum police detention period'), 13AZZG(1)(a).

<sup>250</sup> *Ibid*, ss 13AZ(1), 13ZBA(1).

<sup>251</sup> *Ibid*, ss 13AZG(2), 13ZNF(2).

<sup>252</sup> *Ibid*, ss 13AZG(3), 13ZNF(3).

<sup>253</sup> See, eg, *ibid*, ss 13AD(2), 13E(2C), 13F(4)(c), 13F(8).



Group envisaged circumstances where the Court or Victoria Police might determine not to place a child in preventative detention due to a child's age.

While the Expert Advisory Group did not support amending the Act, it considered that Victoria Police's standard operating procedures should clearly and comprehensively set out requirements for the NSPO to consider the age of the child and their associated vulnerabilities when evaluating the appropriateness of police actions under the Act. The Expert Advisory Group also noted that the relevant legislative and procedural requirements could be tested through the regular scenario exercises run by Victoria Police.

### 5.4.3. Conclusion

As noted above, the Supreme Court and Victoria Police are required to consider the age of a child in the process of determining whether to detain a person in preventative detention. The review agrees with the Expert Advisory Group's observation that this requirement would be reinforced by ensuring that Victoria Police's standard operating procedures reflect legislative obligations and require that the Victoria Police NSPO must consider the age and vulnerabilities of a child when evaluating the appropriateness of police actions under the Act. Regular scenario exercises that adopt a specific focus on children could be utilised to test the efficacy of these requirements.

## 5.5. Regular review of the application of preventative detention to children

The CCYP submitted that if the Act's provisions enabling the preventative detention of children remain, they should be subject to regular statutory review along with a sunset clause. Specifically, the CCYP proposed that the regime should be reviewed at least every three years, and that reviews must:

- consider whether preventative detention of children remains demonstrably justified
- consider whether there are less restrictive alternatives to preventative detention available
- include an appropriately qualified person with expertise in child and adolescent development and welfare.<sup>254</sup>

Similarly, the VMC proposed that the CCYP, PIM, Victorian Equal Opportunity and Human Rights Commission, and where appropriate a special community advocate should be engaged in the design, application and review of legislation and the protective measures applicable to children.<sup>255</sup>

### 5.5.1. Current requirements related to review

The current review clause requires that preventative detention be evaluated as part of the broader statutory review of the Act. This includes the application of the Act's provisions to children and young people. The review has, however, proposed some amendments to the review clause. These are explained in detail in Chapter 3 of the report.

In summary, the review proposes a seven-year statutory review clause for the Act, in light of the current threat environment, the sparing use of the Act's powers, and the need for the Act to be operating for a sufficient period to develop an evidence base and support a meaningful review. The review clause will also be strengthened, requiring future reviews to consider the ongoing need, fairness, proportionality and effectiveness of the Act, and to be completed having regard to the views of the community, relevant entities and independent experts.

As noted in Chapter 3, while the review recommends a seven-year statutory review clause, other supplementary monitoring measures are proposed to support the review provision and strengthen overall

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<sup>254</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 4.

<sup>255</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 2.



oversight of the Act. Specifically, these measures include biennial scenario exercises, undertaken by Victoria Police and other agencies with a role under the Act, to test the effectiveness of powers and safeguards contained in the Act; along with the ability for government to undertake *ad hoc* reviews outside the statutory review period should unforeseen circumstances arise that justify revisiting the Act's powers (as occurred with the Harper-Lay Review in 2017).

### 5.5.2. Ongoing review of preventative detention applicable to children

The Expert Advisory Group considered that there is merit in conducting more frequent reviews of the application of preventative detention provisions to children, noting their particular vulnerabilities. Members noted that adopting a child-specific focus in scenario exercises, potentially combined with an additional review mechanism, would be an appropriate way to address these risks.

### 5.5.3. Conclusion

The review has proposed at recommendation 5 that future reviews of the Act should be informed by expert advice and public consultation. It would be beneficial if this included expert advice regarding the development and wellbeing of children and young people, and consultation with advocates from community organisations with an interest or expertise in the specific needs of young people.

As noted earlier in this report, while the preventative detention powers have not been used in relation to children, advice from law enforcement and security agencies, the research community and the Expert Advisory Group confirms that young people remain an element of the threat environment and these emergency powers therefore remain necessary. The application of preventative detention to children is subject to strong safeguards and statutory oversight, including reduced periods of detention compared with adults, the Supreme Court's role in granting PDOs, and the CCYP's active monitoring role.

However, the review considers that there is merit in ongoing review of these powers, given the dynamic nature of the threat environment and the particular risk of harm that preventative detention poses for children. The review considers that the scenario exercises proposed in recommendation 7 should include a child-specific component to test the practical application of the Act's powers and safeguards to children. This process should also include a report to the Attorney-General on outcomes.

In addition, DJCS will monitor these outcomes along with any changes in the threat environment, relevant operational experience, developments in counter-terrorism policy in other jurisdictions and stakeholder views on preventative detention of children and young people. If material changes emerge that warrant reassessment of these powers, a specific review may be initiated or changes recommended to government outside the general statutory review period in the Act. The review considers that this would complement the statutory review process and provide the public and stakeholders with assurance about the appropriateness of the preventative detention regime in the context of the evolving threat environment.

#### Recommendation 8

The regular scenario exercises proposed in recommendation 7 should adopt a child-specific focus to consider the application of the Act's powers and safeguards to children, taking into account their special needs and vulnerabilities and any changes in the terrorist threat environment.

#### Recommendation 9

DJCS should monitor the outcomes of the scenario exercises proposed in recommendation 7 along with any changes in the terrorist threat environment, use of the Act in relation to children, policy and practical experience in other jurisdictions and the views of key stakeholders. If there are material changes to the threat environment as it relates to children, concerns identified with the operation of the Act or other relevant developments, DJCS should provide advice to the Attorney-General around potential changes to policy settings or, if necessary, the need to review relevant provisions of the Act ahead of the statutory review process.



## 5.6. Children’s developmental needs while in preventative detention

The CCYP submitted that, consistent with recommendation 24, Report 2, of the Harper-Lay Review, the Act should be amended to provide that all detained minors are entitled to have their developmental needs catered for.<sup>256</sup> In making this submission, the CCYP stated that it would be ‘most inappropriate for a government to detain a child without charge for up to 14 days, without attending to their developmental needs.’<sup>257</sup>

Recommendation 24 provided for five safeguards for children, four of which were implemented in the 2018 reforms. The Act now gives the Supreme Court discretion to make PDOs for a child, subject to conditions, if it is satisfied on reasonable grounds that in all the circumstances it is appropriate to do so;<sup>258</sup> requires Victoria Police to satisfy the Court that those conditions can be met;<sup>259</sup> requires that any questioning of a child is recorded<sup>260</sup> and that a lawyer is present;<sup>261</sup> and gives the CCYP an active monitoring role.<sup>262</sup> The review also notes that the issue of the intersection between the Act and provisions governing youth justice custody is being given specific consideration.

### 5.6.1. Conclusion

While consideration of a child’s developmental needs is not expressly specified in the Act, it may be considered by the Supreme Court when making a PDO and imposing associated conditions. The review therefore considers that this element of recommendation 24 has been acquitted, while noting that further consideration will be given to this matter in the context of youth justice legislative reforms.

## 5.7. Monitoring of children in Commonwealth places of detention

The CCYP’s oversight and monitoring function under the Act is an essential safeguard. As outlined in Table 2 above, its functions in relation to preventative detention include:

- to monitor the treatment of a child subject to preventative detention
- to promote the interests of such a child
- to access any document or information relating to a child’s treatment while in preventative detention
- to provide advice to the Attorney-General and other relevant Ministers or the Chief Commissioner about a child’s treatment while in preventative detention.<sup>263</sup>

The CCYP’s powers to monitor the treatment of a detained child include having access to the child at the detention facility to inspect conditions,<sup>264</sup> and to relevant information (including audio and audio-visual recordings).<sup>265</sup> The Chief Commissioner of Police and the Secretary of DJCS must ensure that the CCYP is given any assistance that the Commission reasonably requires in performing its functions or exercising its functions.<sup>266</sup>

<sup>256</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 6.

<sup>257</sup> Ibid.

<sup>258</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13E(2C).

<sup>259</sup> Ibid s 13E(3)(b).

<sup>260</sup> Ibid s 13ZNJ(2).

<sup>261</sup> Ibid s 13ZNF(4).

<sup>262</sup> Ibid pt 1B.

<sup>263</sup> Ibid s 4O.

<sup>264</sup> Ibid s 4P.

<sup>265</sup> Ibid s 4Q.

<sup>266</sup> Ibid s 4R.



The CCYP raised concern about whether its monitoring powers under the Act would apply to the AFP or other Commonwealth agencies. It believes its monitoring could be limited if, for example, a child is detained at an AFP location, or documents are prepared jointly between the AFP and Victoria Police, or located at an AFP facility. The CCYP also raised the possibility of a child informing it of concerns about the conduct of a Commonwealth employee they encountered during the preventative detention period.<sup>267</sup>

The Act provides that a child subject to preventative detention will generally be detained in a youth justice facility, in which the CCYP's rights of access are clear.<sup>268</sup> This presumption can only be displaced where the authorised police officer or Supreme Court is satisfied that it is reasonably necessary for the person to be detained at a place other than a youth justice facility, having regard to the specified factors including the child's age and vulnerability, the likely impact that detention in a place other than a youth justice facility will have on the child, the risks posed by the child and the availability of a place in a youth justice facility.<sup>269</sup>

If a child is detained in another location, further requirements ensure the CCYP continues to have access to the child. As noted earlier in this report, where a PDD or PDO is made, the Chief Commissioner is required to appoint an NSPO to oversee the exercise of powers under, and the performance of obligations in relation to the PDD or PDO.<sup>270</sup> The NSPO's role and functions apply throughout the period of preventative detention, regardless of the place of detention. Further, the Act does not provide any mechanism for the transfer of custody of a detainee to a Commonwealth agency (in contrast to the arrangements for the transfer of custody between Victoria Police and Corrections Victoria or Youth Justice.)<sup>271</sup> In the absence of such a provision, a detainee would therefore remain in the lawful custody of Victoria Police if being detained anywhere other than a prison or youth justice facility and Victoria Police's obligation to ensure the CCYP can access the detained person would continue to apply.

Further, the Act only authorises police officers to take a person into custody and detain the person under a PDD or PDO,<sup>272</sup> or to question a person subject to preventative detention.<sup>273</sup> A 'police officer' is defined in the Act to have the same meaning as in the *Victoria Police Act 2013* (Victoria Police Act).<sup>274</sup> The Act does not authorise Commonwealth officers or employees to exercise powers under a PDD or PDO.<sup>275</sup> The only exception would be where a Commonwealth officer has also been sworn in as a special constable under the Victoria Police Act; however, in that situation the officer would be authorised to perform the function in their capacity as a Victorian special constable and not as a Commonwealth officer.<sup>276</sup>

<sup>267</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 6.

<sup>268</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AD(1), 13F(8).

<sup>269</sup> *Ibid* ss 13AD(1), 13AD(2), 13F(8).

<sup>270</sup> *Ibid* ss 13AZZJ, 13AZZK, d 13P(4).

<sup>271</sup> *Ibid* ss 13AR, 13AT, 13AU, 13W, 13WA, 13WB.

<sup>272</sup> *Ibid* ss 13AH(2), 13P(1).

<sup>273</sup> *Ibid* ss 13AZC(1), 13ZNB(1).

<sup>274</sup> *Ibid* s 3(1).

<sup>275</sup> The only references to Commonwealth officials in the *Terrorism (Community Protection) Act 2003* (Vic) are in relation to an order of a corresponding preventative detention law of another Australian jurisdiction. Sections 13W(10), and 13WA(8) of the Act provide that nothing in ss 13W or 13WA prevents an Australian Federal Police member from entering a prison or youth justice facility and visiting a person in connection with the exercise of powers under, and the performance of obligations in relation to, an order for the person's detention made under a corresponding preventative detention law. These provisions do not authorise Australian Federal Police members to exercise powers under police detention decisions or preventative detention orders made under the *Terrorism (Community Protection) Act 2003* (Vic).

<sup>276</sup> Section 193 of the *Victoria Police Act 2013* (Vic) provides that a special constable is taken to be a police officer under the Act and has any duties and powers imposed or conferred on a police officer by or under that Act or any other Act (including the *Terrorism (Community Protection) Act 2003* (Vic)) or by or under any subordinate instrument.





### 5.7.1. Conclusion

If a child is held in preventative detention by Victoria Police, the CCYP is able to exercise its monitoring functions under the Act and access the place of detention,<sup>277</sup> irrespective of whether it is a Victorian or Commonwealth facility. It should also be noted that the default position under the Act is that a child will be held in a youth justice facility, unless the authorised officer is satisfied that it is reasonably necessary for the child to be detained elsewhere.<sup>278</sup> Further, a PDD or PDO only authorises police officers to exercise powers and functions related to a person's preventative detention.

## 5.8. Safeguards for other vulnerable persons

The AMWCHR suggested that a statutory oversight function, similar to the CCYP's monitoring role with respect to children, is necessary to 'monitor the treatment and promotion of interests of persons with disabilities.'<sup>279</sup> In roundtable discussions, some stakeholders also said there should be specific safeguards and oversight in place for people in preventative detention who have a mental illness.<sup>280</sup>

### 5.8.1. Current safeguards for other vulnerable persons

The Act currently contains a number of safeguards for vulnerable persons, including for persons with a disability. These include:

- requiring an interpreter where a person is unable, because of disability or difficulties communicating in English, to communicate with reasonable fluency in that language while informing the person of the effect of preventative detention<sup>281</sup> and during questioning<sup>282</sup>
- informing a person of their right to an interpreter in the above circumstances<sup>283</sup>
- providing reasonable assistance to choose and contact a lawyer<sup>284</sup>
- requiring a court order to take identification material from a person who is incapable of managing their own affairs<sup>285</sup>
- where a court order is granted, requiring that the taking of identification material must be in the presence of a parent or guardian, or if that person is not acceptable to the detained person, another appropriate person.<sup>286</sup>

The protections in the Act are supplemented by Victoria Police procedures relating to vulnerable persons in custody. If a person in Victoria Police custody, whether under the Act or otherwise, is identified as having a mental illness, Victoria Police must refer the person to a Forensic Medical Officer, to attend custody and determine if the person is fit to be interviewed. In undertaking this assessment, with the person's consent, the Forensic Medical Officer may consult with the person's mental health service provider to form a view on the person's fitness to be interviewed.<sup>287</sup>

<sup>277</sup> *Terrorism (Community Protection) Act 2003* (Vic) pt 1B.

<sup>278</sup> *Ibid* s 13AE.

<sup>279</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 3.

<sup>280</sup> Consultation with community groups, 28 June 2021.

<sup>281</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AX(3), 13AZB(b), 13Z(3), 13JA(a).

<sup>282</sup> *Ibid* ss13AZD, 13ZNC.

<sup>283</sup> *Ibid* ss13AZC(2)(d), 13ZF(4), 13NZ(2)(b).

<sup>284</sup> *Ibid* ss13AZW(2), 13AZB(b), 13ZF(4), 13JA(b).

<sup>285</sup> *Ibid* ss13AZZD(4), 13ZF(4).

<sup>286</sup> *Ibid* ss 13AZZD(6), 13AZZC, 13ZL(6), 13ZL(10).

<sup>287</sup> Email from Victoria Police to Department of Justice and Community Safety, 25 August 2021.



If a person in Victoria Police custody, whether under the Act or otherwise, is identified as having a cognitive impairment, an Independent Third Person (ITP) to be present for an interview or the taking of a statement as a suspect, an accused, a victim or a witness.<sup>288</sup> The ITP can be a person trained for the role,<sup>289</sup> or a parent, guardian, relative or close friend. The role of the ITP is to facilitate communication between police and the person with a cognitive impairment during the interview or the giving of a statement and ensure that the person understands their caution and rights (if a suspect).<sup>290</sup> A person being interviewed may also have a support person to provide emotional support.<sup>291</sup>

### 5.8.2. Increasing safeguards for persons with a disability or mental illness

IBAC and the Ombudsman advised the review that their functions include ensuring that Victoria Police complies with the Charter in the treatment of detained persons, including people with a disability or other vulnerabilities.<sup>292</sup> The Ombudsman in particular emphasised its experience and knowledge in dealing with complaints from, and monitoring the treatment of, people with a disability.<sup>293</sup>

The Expert Advisory Group considered that it may be beneficial to examine the adequacy of safeguards for persons with disabilities or mental illness in light of recent developments and inquiries such as the Royal Commission into Victoria's Mental Health System, and the Royal Commission in Violence, Abuse, Neglect and Exploitation of People with Disability.

### 5.8.3. Conclusion

The review considers that the Act's existing safeguards, combined with the role and experience of IBAC and the Ombudsman and Victoria Police's operating procedures obviate the need for specialist monitoring in respect of people with a disability, people with mental illness or other vulnerable persons. However, the review also notes that in light of recent inquiries and developments focused on protecting the rights and wellbeing of these groups, it may be timely to revisit existing legislative requirements and operating procedures to ensure that they remain appropriate and adequately address the needs of vulnerable persons. This process should include direct engagement with people with disability and people with mental illness, as well as relevant stakeholder groups.

The review also considers that it would be beneficial for the future scenario exercises proposed in recommendation 7 to include a specific focus on the safeguards and other procedural requirements applicable to those with disability, mental illness or other vulnerabilities, and to ensure that those safeguards are adequate and appropriate.

#### Recommendation 10

DJCS should give further consideration to the adequacy of safeguards under the Act and in relevant organisational procedures for people with a disability, mental illness or other vulnerabilities. This should be undertaken in consultation with relevant stakeholders.

#### Recommendation 11

The regular scenario exercises proposed in recommendation 7 should adopt a specific focus on the application of the Act's powers and safeguards to people with a disability, mental illness or other vulnerabilities.

<sup>288</sup> Victoria Police, *Victoria Police Manual – Interview and Statements* 13.

<sup>289</sup> The service is provided by the Office of the Public Advocate Victoria: 'Independent Third Persons', *Office of the Public Advocate* (Web Page, 13 August 2021) <<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/65-breaking-the-cycle-summary-report?path=>>>.

<sup>290</sup> Victoria Police, *Victoria Police Manual – Interview and Statements* 15.

<sup>291</sup> *Ibid.*

<sup>292</sup> Email from Independent Broad-based Anti-corruption Commission to Department of Justice and Community Safety, 9 July 2021; Consultation with Victorian Ombudsman, 2 June 2021.

<sup>293</sup> Consultation with Victorian Ombudsman, 2 June 2021.



## 6. Proposals to support Victoria Police operational effectiveness

Due to the significant threat that terrorism and violent extremism pose to community safety, it is necessary for police to have at their disposal effective powers to prevent, disrupt and respond to the terrorist threat. As noted by the Harper-Lay Review, while these powers are necessary, 'it is important that our response to this threat is not disproportionate, as there is a risk that action of this nature may divide our community and undermine fundamental rights and institutional safeguards'.<sup>294</sup>

Victoria Police raised several proposals aimed at improving its operational response to the threat of terrorism. Of these, the review sought public comment on the following Victoria Police proposals:

- expanding the circumstances in which identification material (including DNA) can be obtained from a person in preventative detention<sup>295</sup>
- introducing a pause mechanism that would stop the clock running on periods of preventative detention where extraordinary circumstances prevent police from being able to question the detained person<sup>296</sup>
- expanding SPPs to 'follow' a prominent person, rather than being limited to a specified event attended by the prominent person.<sup>297</sup>

Other issues raised by Victoria Police and considered by the review were:

- clarifying where protective services officers (PSOs) can exercise SPPs<sup>298</sup>
- clarifying the application of SPPs to prisons and correctional facilities<sup>299</sup>
- protection of counter-terrorism intelligence in legal proceedings.<sup>300</sup>

Victoria Police also submitted that a new offence should be created for the possession of objectionable extremist material.<sup>301</sup> The review did not consider this issue, as it is being considered at the national level.

### 6.1. Collection of DNA for investigative purposes

Victoria Police requested that consideration be given to expanding the range of purposes for which DNA samples may be obtained from detained persons to include the purpose of establishing any evidentiary link between a detainee and a terrorist act.<sup>302</sup>

<sup>294</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1* (2017) 12.

<sup>295</sup> Department of Justice and Community Safety, *Issues Paper – Review of the Terrorism Community Protection Act 2003: Stage Two* (4 May 2021)15.

<sup>296</sup> *Ibid* 17.

<sup>297</sup> *Ibid* 8.

<sup>298</sup> Victoria Police, *Statutory review of the Terrorism (Community Protection) Act 2003: Victoria Police Response* (1 October 2020) 3.

<sup>299</sup> *Ibid* 1.

<sup>300</sup> *Ibid* 4.

<sup>301</sup> *Ibid* 4.

<sup>302</sup> *Ibid* 7.



### 6.1.1. Current DNA collection purposes under the *Terrorism (Community Protection) Act 2003*

Currently, collection of identification material under the Act, including collection of a DNA sample, may occur in the following circumstances:

- where a detained person provides written consent<sup>303</sup>
- where consent is not provided, and a police officer of or above the rank of sergeant believes on reasonable grounds that it is necessary to do so:
  - to confirm the person's identity as the person in relation to whom the PDD/PDO is made<sup>304</sup>
  - for the purpose of documenting an injury or illness suffered by the person while being detained<sup>305</sup>
- where the detained person is a child or is incapable of managing their affairs, and the Magistrates' Court, or in the case of a child the Children's Court, orders that the material be taken.<sup>306</sup>

### 6.1.2. DNA collection under the *Crimes Act 1958*

Under the *Crimes Act 1958* (Crimes Act), a DNA sample may be collected from a person suspected on reasonable grounds of having committed an indictable offence (adult) or DNA sample offence (child aged 15 to 17).<sup>307</sup> DNA may also be collected from a person (whether an adult or a child aged 15–17 years) who has been charged with, or summonsed to answer a charge for, such an offence.<sup>308</sup>

A DNA sample may be collected with informed consent from:

- child suspects aged 15 to 17 years, where the child is believed on reasonable grounds of having committed a DNA sample offence, the carrying out of the procedure is justified in all of the circumstances, and both the child and their parent or guardian consents<sup>309</sup>
- adult suspects, where the adult is suspected on reasonable grounds of having committed the indictable offence, and carrying out the procedure is justified in all the circumstances.<sup>310</sup>

If a suspect does not consent, a police officer of or above the rank of senior sergeant who is independent of the investigation may authorise the taking of a DNA sample where:

- the suspect is in lawful custody;
- the suspect is not incapable of giving informed consent by reason of mental impairment;
- the suspect (and, in the case of a child, their parent or guardian) has refused to consent;
- the suspect is believed on reasonable grounds to have committed a particular indictable offence (adult) or DNA sample offence (child); and
- taking the sample without the consent of the person is justified in all the circumstances.<sup>311</sup>

<sup>303</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AZZD(2)(a), 13ZL(2)(a).

<sup>304</sup> *Ibid* ss 13AZZD(2)(b), 13ZL(2)(b).

<sup>305</sup> *Ibid* ss 13AZZD(2)(c), 13ZL(2)(c).

<sup>306</sup> *Ibid* ss 13AZZD(4), 13ZL(4).

<sup>307</sup> *Ibid* ss 464SC, 464SE. Section 464 of the *Crimes Act 1958* (Vic) defines a DNA sample offence to mean 'any indictable offence specified in Schedule 9' to that Act.

<sup>308</sup> *Crimes Act 1958* (Vic), ss 464SC, 464SE.

<sup>309</sup> *Ibid* ss 464SC(2) and (3)(b)(i).

<sup>310</sup> *Ibid* ss 464SC(1) and (3)(a)(i).

<sup>311</sup> *Ibid* ss 464SC(3) and 464SE.



### 6.1.3. Jurisdictional comparison

With the exception of NSW, collection of DNA from a person in preventative detention is limited to identification purposes in all other Australian jurisdictions.

In NSW, suspects arrested and detained in investigative detention under the *Terrorism (Police Powers) Act 2002* may have DNA collected<sup>312</sup> for the purposes of assisting in responding to or preventing a terrorist attack.<sup>313</sup> Persons detained under a preventative detention order<sup>314</sup> may have identification material other than DNA<sup>315</sup> taken only for the purposes of identification.<sup>316</sup>

### 6.1.4. Expanding DNA collection purposes

Victoria Police submitted that its limited ability to take DNA under the Act may hinder an investigation into possible terrorism offending.<sup>317</sup> It proposed that expanding DNA collection purposes could assist police to establish an evidentiary link between a person and a terrorist act, eliminate an evidentiary link<sup>318</sup> or exonerate a person in preventative detention (and thus potentially expedite the conclusion of the period of detention).<sup>319</sup> Victoria Police also submitted that:

It would be incongruous that a person, including a child, can on the one hand, be detained without charge by police but DNA from that detained person could not be used to assist in proving or disproving that person's possible linkage to a planned terrorist act or a recent terrorist act.<sup>320</sup>

Victoria's preventative detention regime has a clear preventative purpose that distinguishes it from other investigatory regimes and powers. The Harper-Lay Review described preventative detention as 'a measure of last resort [that] is not a substitute for the more ordinary police investigative and arrest powers.' The Review emphasised that preventative detention is intended to be used:

[W]here there is a credible threat of an imminent terrorist act occurring, or where a terrorist act has taken place and the order is necessary to preserve evidence of or relating to that act, but there is insufficient information or evidence for police to arrest and charge the individual(s) involved. It is intended to serve as a means of pre-emptive disruption or dislocation.<sup>321</sup>

When recommending that questioning should be permitted under the Act, the Harper-Law Review observed that while 'a questioning power may suggest an investigative focus,'<sup>322</sup> the preventative detention scheme would nonetheless remain 'intrinsically preventative in nature.'<sup>323</sup>

No stakeholders other than Victoria Police supported the proposal to expand the circumstances in which DNA can be taken under the Act.

<sup>312</sup> *Terrorism (Police Powers) Act 2002* (NSW), s 25O(2). The collection of DNA is governed by the *Crimes (Forensic Procedures) Act 2000* (NSW).

<sup>313</sup> *Ibid* s 25C(1).

<sup>314</sup> *Ibid* pt 2A.

<sup>315</sup> *Ibid* s 26ZL. Identification material means prints of a person's hands, fingers, feet or toes, recording of a person's voice, samples of a person's handwriting or photograph's or video recordings of a person: s 26ZL(1).

<sup>316</sup> *Ibid* s 26ZM(2).

<sup>317</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 6.

<sup>318</sup> *Ibid* 7.

<sup>319</sup> *Ibid* 8.

<sup>320</sup> *Ibid* 7.

<sup>321</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017) 102.

<sup>322</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1* (2017) 36.

<sup>323</sup> *Ibid*.



The CCYP advised that it is strongly opposed to the expansion of Victoria Police's powers to collect DNA without oversight by the Children's Court. It indicated that if the proposed changes were to proceed, strict safeguards would be required to minimise the potential harm to children.<sup>324</sup> The VI similarly noted that any expansion of powers would require appropriate oversight and safeguards, including in relation to the creation and maintenance of records by Victoria Police and the inspection of records by the VI.<sup>325</sup>

The Expert Advisory Group did not support implementation of Victoria Police's proposal, taking the view that the Crimes Act is the appropriate mechanism for governing the taking and use of DNA samples for investigative purposes. It noted a lack of clear evidence supporting the need for the proposal and expressed concerns that it may shift the Act's preventative detention regime from being 'intrinsically preventative' to one that is investigative in nature.

### 6.1.5. Conclusion

Despite the introduction of questioning powers, the Act has remained fundamentally preventative in nature.<sup>326</sup> Expanding powers to take DNA samples from detainees for investigative purposes has the potential to displace this fundamental purpose.

Having regard to the reasons advanced by Victoria Police and the views of stakeholders and the Expert Advisory Group, the review does not consider that this change is warranted at this time. The review considers that the Crimes Act remains the appropriate instrument for governing the collection and use of DNA for investigative purposes. The preventative detention of a person is reviewed at frequent intervals during the period of detention. If the threshold for taking a person into custody under the Crimes Act is reached, preventative detention will cease and the ordinary investigative procedures will apply, including in respect of the collection of DNA material.

This position will be kept under review, given the evolving nature of both the terrorist threat and investigative tools such as the use of DNA.

## 6.2. Pause mechanism for preventative detention

Victoria Police considers that there would be merit in introducing a 'pause' mechanism (or 'stop the clock' provision) for preventative detention. It suggested that this mechanism could be engaged when a person has been taken into preventative detention and is unable to be questioned due to 'exceptional circumstances'.<sup>327</sup>

### 6.2.1. Current preventative detention periods

Preventative detention is subject to maximum periods and runs uninterrupted without pause. Different lengths of time apply for PDDs and PDOs:

- The maximum duration of preventative detention under a PDD (Part 2AA) is four days for adults and 36 hours for a child (aged 14 to 17).<sup>328</sup>
- The maximum duration of an interim PDO (Part 2A) is 48 hours.<sup>329</sup>

<sup>324</sup> Commission for Children and Young People, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (9 June 2021) 8.

<sup>325</sup> Consultation with Victorian Inspectorate, 2 June 2021.

<sup>326</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13AA, 13A.

<sup>327</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 8.

<sup>328</sup> *Terrorism (Community Protection) Act 2003* (Vic), ss 3(1) (see definition of 'maximum police detention period'), 13AZZG(1)(a).

<sup>329</sup> *Ibid* s 13G(2).



- The maximum duration of a PDO (Part 2A) is 14 days, less any time for which a person has been detained under a corresponding order of another jurisdiction or in preventative detention under a PDD on the same basis.<sup>330</sup>

Victoria Police can apply to extend a PDO under Part 2A if the Supreme Court initially specifies a period of less than 14 days.<sup>331</sup>

A person in preventative detention may be questioned by Victoria Police about a terrorist act.<sup>332</sup> Before questioning commences, Victoria Police must inform the person of, among other things, their right to remain silent.<sup>333</sup> The person must also be informed that they can communicate with a lawyer,<sup>334</sup> request an interpreter,<sup>335</sup> and if the person is a foreign national, that they can communicate with a consular office of the country of which the person is a citizen.<sup>336</sup> The duration of any period of questioning must be reasonable<sup>337</sup> and a person must be given a rest from questioning for a continuous period of eight hours in any 24 hour period of detention<sup>338</sup> along with reasonable breaks during any period of questioning.<sup>339</sup>

### 6.2.2. Jurisdictional comparison

No Australian jurisdiction, including the Commonwealth, has a preventative detention scheme that includes a pause mechanism.

The Commonwealth's pre-charge investigative detention scheme enables detention to be paused when calculating the total investigative period before which a person arrested on a terrorism offence has to be either released or brought before a judicial officer.<sup>340</sup> Circumstances in which detention can be paused, and time disregarded, include where this is necessary to allow for:

- a person to be conveyed from a place of arrest to a place of questioning<sup>341</sup>
- a person to communicate with a lawyer, friend or family member<sup>342</sup>
- a person to receive medical attention<sup>343</sup>
- a person's intoxication<sup>344</sup>
- a person's requirement to rest or recuperate.<sup>345</sup>

Under the Commonwealth scheme, the initial pre-charge investigation period is up to four hours,<sup>346</sup> which may be extended by a magistrate up to 24 hours.<sup>347</sup> A court order can also be sought to disregard up to

<sup>330</sup> Ibid s 13G(1).

<sup>331</sup> Ibid s 13I.

<sup>332</sup> Ibid ss 13AZC(1), 13ZNB(1).

<sup>333</sup> Ibid ss 13AZC(2)(a), 13ZNB(2)(a).

<sup>334</sup> Ibid ss 13AZC(2)(b), 13ZNB(2)(b).

<sup>335</sup> Ibid ss 13AZC(2)(d), 13ZNB(2)(d).

<sup>336</sup> Ibid ss 13AZC(2)(c), 13ZNB(2)(c).

<sup>337</sup> Ibid ss 13AZC(4), 13ZNB(4).

<sup>338</sup> Ibid ss 13AZC(5)(a), 13ZNB(5)(a).

<sup>339</sup> Ibid ss 13AZC(5)(b), 13ZNB(4)(5)(b).

<sup>340</sup> *Crimes Act 1914* (Cth) s 23DB.

<sup>341</sup> Ibid s 23DB(9)(a).

<sup>342</sup> Ibid s 23DB(9)(b).

<sup>343</sup> Ibid s 23DB(9)(d).

<sup>344</sup> Ibid s 23DB(9)(e).

<sup>345</sup> Ibid s 23DB(9)(j). See *Crimes Act 1914* (Cth), s 23DB(9) for a full list of circumstances where time can be disregarded.

<sup>346</sup> Ibid s 23DB(5)(b).

<sup>347</sup> Ibid s 23DF(7).



seven days of time during which questioning is suspended or delayed.<sup>348</sup> Reasons that can be relied on in an application for suspending or delaying questioning include:

- the need to collate and analyse information relevant to the investigation;<sup>349</sup>
- the need to allow authorities (in or outside Australia) time to collect information;<sup>350</sup>
- the impact of time zones on a request for information from a place outside of Australia;<sup>351</sup> or
- the need to use translation services to obtain information from outside of Australia.<sup>352</sup>

### 6.2.3. Introducing a pause mechanism

Victoria Police submitted that the current preventative detention provisions create 'a risk that an investigation may be compromised due to there being insufficient time to question' a detained person before their period of detention ends.<sup>353</sup> While this issue has not arisen in practice, Victoria Police submitted that detention could be paused in the following circumstances:

- while conveying a detained person from place of arrest to place of questioning
- while a detained person is receiving hospital and/or other medical treatment
- where a person is temporarily incapacitated and unable to answer questions due to being affected by drugs or alcohol
- where a detainee is temporarily removed from Victoria Police control
- while a detainee is contacting family members, or an oversight agency
- where a detainee is resting or recuperating.<sup>354</sup>

In consultations, Victoria Police advised the review that a pause mechanism could be applied to a narrower set of extraordinary circumstances, such as hospitalisation. Victoria Police submitted that the ability to 'pause' the preventative detention period would improve the effectiveness of the Act by:

- affording detainees the opportunity to seek treatment or other support without potentially compromising the investigative process
- overcoming the potential for a detainee to 'game' the detention process
- creating a greater likelihood of Victoria Police being able to deduce critical information in order to prevent or mitigate the likely threat of terrorist acts.<sup>355</sup>

To ensure that the detention period does not continue any longer than justified, Victoria Police proposed that the following safeguards could accompany a pause mechanism:

- an upper limit on the time that may be disregarded due to a pause
- requiring the NSPO to ensure that the pause is for lawful reasons and a justifiable period
- giving the PIM an oversight role.<sup>356</sup>

<sup>348</sup> Ibid s 23DD.

<sup>349</sup> Ibid s 23DC(4)(e)(i).

<sup>350</sup> Ibid s 23DC(4)(e)(ii).

<sup>351</sup> Ibid s 23DC(4)(e)(iii).

<sup>352</sup> *Crimes Act 1914* (Cth) s 23DC(4)(e)(iv).

<sup>353</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 8.

<sup>354</sup> Ibid 8-9.

<sup>355</sup> Ibid 8.

<sup>356</sup> Ibid 8-9.





No stakeholder other than Victoria Police expressed outright support for the introduction of a pause mechanism. Some stakeholders suggested that if introduced, it should only be only available in narrow and extraordinary circumstances with strong oversight and monitoring.

Victoria Legal Aid submitted that pausing preventative detention without court oversight should not occur for any reason.<sup>357</sup> The VMC submitted that a pause should only be exercised under exceptional circumstances, with strong and appropriate safeguards.<sup>358</sup>

The Ombudsman said that a pause mechanism should only be engaged in exceptional circumstances and after considering the human rights of the detained person. The Ombudsman expressed concerns that a pause mechanism could deter a detainee from exercising their rights under the Act, such as the right to contact an oversight agency, as doing so would prolong their period of detention.<sup>359</sup>

The PIM submitted that a pause should only be available in genuinely exceptional circumstances, noting that the maximum periods of preventative detention for children and adults under the Act are already significant, given that individuals are being detained without charge.<sup>360</sup>

IBAC advised the review that any introduction of a pause mechanism must be accompanied by safeguards, such as requiring Victoria Police to notify IBAC each time a period of detention is paused. IBAC also noted that a detained person must be notified of their rights if detention is paused and of their right to contact IBAC.<sup>361</sup>

The Expert Advisory Group was not persuaded of the need for a pause mechanism. Members noted that, currently, Victoria Police can detain an adult for up to four days by way of a PDD under Part 2AA of the Act. If necessary, it may seek a PDO under Part 2A of the Act, enabling a period of detention up to a maximum period 14 days. If the court initially sets a PDO period of fewer than 14 days, Victoria Police may apply to the court to extend the detention up to the maximum period. The Expert Advisory Group took the view that the existing periods are substantial and should be sufficient.

#### 6.2.4. Conclusion

Preventative detention periods of 14 days under a PDO are significant and involve substantial loss of liberty without criminal charge. Preventative detention under a PDD, while of shorter duration, is not subject to judicial oversight.

Consistent with the Expert Advisory Group's observations, the review notes that Victoria Police can seek a court order to detain a person for up to 14 days, which is a significant period of time to hold a person without charge. The introduction of a pause mechanism could arguably also shift the character of preventative detention from fundamentally preventative to investigative, which departs from the policy underpinning the Act and may give rise to Charter and constitutional concerns. While Commonwealth pre-charge detention has a pause mechanism, its circumstances are not comparable, as the threshold for detention is higher and the period of detention shorter. The introduction of a pause mechanism may also act as a disincentive for detained persons to exercise their rights (for example, to seek medical attention) where this could extend the period of detention.

Having regard to the reasons advanced by Victoria Police, and the views of stakeholders and the Expert Advisory Group, the review does not consider that the introduction of a pause mechanism is warranted at this time. However, operational need will continue to be monitored.

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<sup>357</sup> Victoria Legal Aid, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 1.

<sup>358</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 2.

<sup>359</sup> Consultation with Victorian Ombudsman, 2 June 2021.

<sup>360</sup> Consultation with Public Interest Monitor, 2 June 2021.

<sup>361</sup> Letter from Independent Broad-based Anti-corruption Commission to Attorney-General, the Hon. Jaclyn Symes MP, 4 June 2021.



### 6.3. Special police powers: Amendments to enable powers to ‘follow the person’

Victoria Police requested that consideration be given to expanding SPPs to protect a prominent person who police believe might be the target of a terrorist act, such that the powers ‘follow the person’ and can be used wherever the person travels in Victoria.<sup>362</sup>

#### 6.3.1. Current requirements for use of special police powers

Victoria Police can be authorised by the Supreme Court to use SPPs where:

- an event is or is likely to take place;<sup>363</sup>
- the event will involve the attendance of prominent persons or a large number of people;<sup>364</sup> and
- the Chief Commissioner of Police believes on reasonable grounds that the event might be the subject of a terrorist act.<sup>365</sup>

An application for the authorisation of SPPs must be made with the written approval of the Premier.<sup>366</sup>

An authorisation for SPPs can be given over the area in which the event is taking place or any other area in which an activity connected with the event is taking place or is likely to take place, where this is necessary to assist in protecting any person attending the event from a terrorist act.<sup>367</sup>

Other reasons for which SPPs can be authorised include:

- to prevent or reduce the impact of a terrorist act that is occurring or is capable of being carried out, and could occur, within the next 14 days;<sup>368</sup>
- for the investigation of, or recovery from, a terrorist act;<sup>369</sup> or
- to protect essential services from or mitigate effects of a terrorist act.<sup>370</sup>

Authorisation of SPPs give Victoria Police a broad range of powers, including:

- power to give directions to public entities<sup>371</sup>
- search and entry powers<sup>372</sup>
- powers in respect of premises within a target area, including powers to enter premises, direct a person to leave or not leave premises and a power to exclude a person from premises<sup>373</sup>
- powers in respect of things within a target area.<sup>374</sup>

<sup>362</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (Vic) 10.

<sup>363</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 21B(1)(a).

<sup>364</sup> *Ibid* s 21B(1)(b).

<sup>365</sup> *Ibid* s 21B(1)(c).

<sup>366</sup> *Ibid* s 21B(2).

<sup>367</sup> *Ibid* s 21B(1)(d).

<sup>368</sup> *Ibid* s 21D.

<sup>369</sup> *Ibid* s 21E.

<sup>370</sup> *Ibid* s 21F.

<sup>371</sup> *Ibid* s 21L.

<sup>372</sup> *Ibid* s 21S.

<sup>373</sup> *Ibid* s 21SA.

<sup>374</sup> *Ibid* s 21SB.



Victoria Police submitted that a potential shortcoming it has identified is that SPPs are aimed at protecting prominent persons attending specified events and are not able to be used when a person is in transit. Victoria Police submitted that if a prominent person is the target of a potential terrorist attack, this risk will follow the individual beyond any event. This issue has not arisen in practice but has been identified by Victoria Police as a potential risk.

Apart from Tasmania's *Police Powers (Public Safety) Act 2005*,<sup>375</sup> special police powers in other Australian jurisdictions do not have specific provisions addressing visiting prominent persons. Similar to the Act, special powers can be authorised in Tasmania to ensure the safety of person attending a specified event from a terrorist act.<sup>376</sup>

### 6.3.2. Amending special police powers to 'follow the person'

Victoria Police noted that during a visit of a prominent person, police are only be able to access normal police powers in response to a possible threat, such as the ability to request identification, search of a person and arrest powers as provided under other legislation such as the Crimes Act and *Control of Weapons Act 1990* (Vic).<sup>377</sup>

Victoria Police submitted that that SPPs should be extended to provide for their authorisation for the safety and protection of a visiting prominent person at all times they are in Victoria. It proposed that SPPs could be authorised to 'follow' a prominent person's movement by way of a specified radius defined in the authorisation. Victoria Police believes this would enhance its ability to protect the safety of visiting prominent persons and mitigate terrorist threats.<sup>378</sup>

Stakeholders consulted by the review generally queried the need for the amended provision and how it would operate in practice. The VMC submitted that protocols already exist for the protection of prominent persons, and that any expansion would have the potential to impact on the public's rights within a democratic society.<sup>379</sup> In the community roundtable, stakeholders echoed this concern and noted the potential limitations on rights to peaceful protest.<sup>380</sup> The VMC also noted that any expansion of powers would need clear articulation of the activities covered and who may be defined as a prominent person, along with the application of independent safeguards.<sup>381</sup>

The AMWCHR submitted that the SPPs conferred on police by the Act are extensive and intrude on individual rights. It submitted that the rationale for the proposal is not made out and that the risks posed to the public by extending the powers would exceed the benefits.<sup>382</sup>

The Expert Advisory Group noted that visits to Victoria by prominent persons require a high level of state and often Commonwealth planning and coordination and expressed a number of concerns about the proposal. Members noted that expansion may result in SPPs being used to respond to a fixated person threat, rather than a terrorism threat. While this may be a legitimate operational concern, the review notes that the powers in the Act are conferred only in relation to terrorist acts.

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<sup>375</sup> *Police Powers (Public Safety) Act 2005* (Tas) pt 2.

<sup>376</sup> *Ibid* s 5(1).

<sup>377</sup> Victoria Police, Review of the *Terrorism (Community Protection) Act 2003* – Further questions for Victoria Police regarding Stage One issues: Victoria Police Response (undated) 1.

<sup>378</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 10.

<sup>379</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 3.

<sup>380</sup> Consultation with community groups, 23 June 2021.

<sup>381</sup> Victorian Multicultural Commission, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (4 June 2021) 3.

<sup>382</sup> Australian Muslim Women's Centre for Human Rights, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (11 June 2021) 14.



Focusing SPP authorisations on prominent persons rather than events would arguably change the character of the scheme. While authorisations are currently targeted and limited in scope and duration, the change could see them become broad and uncertain in their coverage in both time and place, could substantially enlarge a target area and potentially impact human rights in unforeseen ways that result in unfairness. As there is potential for prominent persons to travel across state borders, the Expert Advisory Group took the view that the adequacy of the legislative framework for SPPs should be considered at a national level.

### 6.3.3. Conclusion

Having regard to the reasons advanced by Victoria Police, other stakeholders and the Expert Advisory Group, the review does not consider this change is warranted at this time.

However, DJCS will continue to work with Victoria Police to examine potential gaps in protections of prominent persons, and if necessary, raise for consideration by an appropriate Commonwealth body or national forum. It will also consider whether the Act needs amendment to clarify or streamline SPP applications to address the operational concerns raised, while retaining the nexus between SPPs and specified events.

## 6.4. Special police powers: Application to prisons and correctional facilities

Victoria Police requested clarification about whether the Act permits the application of SPPs to a prison or correctional facility falling within an authorisation area.

### 6.4.1. Current provisions and application to prisons and correctional facilities

As noted above, SPPs may be authorised for use in an area in which an event is taking place or is likely to take place, or any other area in which an activity connected with the event is taking place or is likely to take place and where the authorisation is necessary to assist in protecting persons from a terrorist act.<sup>383</sup>

Victoria Police submitted that a potentially important source of information during a planned or imminent terrorist attack may come from an offender detained in a Victorian prison. It submitted that it is unclear whether an SPP authorisation permits the use of SPPs to search a person or their possessions if that person is held in a prison that falls within the target area of an authorisation.<sup>384</sup>

As noted earlier in this report, SPPs provide for a broad range of powers, such as search and entry powers,<sup>385</sup> and to direct public entities.<sup>386</sup> The Act provides that an authorisation may authorise exercise of SPPs in relation to a particular person, area or vehicle described in the authorisation.<sup>387</sup> However, the Act is silent as to the application of SPPs in prisons.

### 6.4.2. Using special police powers in prisons and correctional facilities

The review has not identified any provisions of the *Corrections Act 1986* (Corrections Act) or other legislation that would limit the application of SPPs to prisons. This leaves open the possibility for the Chief Commissioner of Police to apply for authorisation for SPPs to be exercised in a prison to question a person believed to have information that could prevent or assist in the investigation of a terrorist act.

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<sup>383</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 21B(1)(d), 21D, 21E.

<sup>384</sup> Victoria Police, Submission to Stage Two of the Review of the *Terrorism (Community Protection) Act 2003* (2 June 2021) 12.

<sup>385</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 21S.

<sup>386</sup> *Ibid* s 21L.

<sup>387</sup> *Ibid* s 21G.



There are complex operational issues related to the use of SPPs in a custodial setting, including potential consequences for Corrections Victoria's ability to fulfil its duties under the Corrections Act for the management, security and good order of the prison and safe custody and welfare of the prisoners.<sup>388</sup>

The Expert Advisory Group noted the need for clarity and certainty regarding the locations in which SPPs can be used. Noting that there does not appear to be a legislative impediment to the use of the powers in prisons, the Expert Advisory Group considered that Victoria Police and DJCS, including Corrections Victoria, should work through the relevant operational issues and address any areas of uncertainty.

### 6.4.3. Conclusion

As noted above, using SPPs in prisons is likely to involve operational issues that intersect with Corrections Victoria's obligations to ensure the safe custody and welfare of prisoners and the safe and secure operation of correctional facilities.<sup>389</sup>

Having regard to these operational issues, it is important that applications for SPPs are clear where Victoria Police proposes their use in a prison or in respect of a specific prisoner. This will require significant coordination and engagement between Victoria Police and Corrections Victoria to manage risks associated with maintaining prison security, recognising that exercising SPPs in a prison is materially different to their use in a residential or commercial location.

As such, DJCS and Victoria Police are working together to develop an appropriate agreement and operating procedures related to the application of SPPs to prisons and correctional facilities. These procedures should be carefully monitored and regularly reviewed to assess whether they are adequately managing the risks. In addition, this work will identify whether clarificatory legislative reforms are required.

## 6.5. Special police powers: protective services officers

Victoria Police requested clarification about whether SPPs can be exercised by PSOs within an authorisation area or only in their usual 'designated places' of work.

### 6.5.1. Current provisions regarding the role of protective services officers

The role of PSOs is set out the Victoria Police Act, and is to provide services for the protection of:

- persons holding certain official or public offices<sup>390</sup>
- the general public in certain places or, in an emergency, throughout the whole or a part of Victoria<sup>391</sup>
- certain places of public importance.<sup>392</sup>

When performing their functions, PSOs have the following powers:

- when on duty at a designated area of operation, the duties and powers imposed or conferred on the PSO under the Victoria Police Act or any other Act<sup>393</sup>

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<sup>388</sup> *Corrections Act 1986* (Vic) s 21(1).

<sup>389</sup> *Ibid* s 8A(3).

<sup>390</sup> *Victoria Police Act 2013* (Vic) s 37(a).

<sup>391</sup> *Ibid* s 37(b).

<sup>392</sup> *Ibid* s 37(c).

<sup>393</sup> *Ibid* s 52(2).



- the duties and powers of a constable at common law<sup>394</sup>
- when on duty in an emergency and in the emergency area, all the duties and powers imposed or conferred on a PSO under the *Victoria Police Act* or any other Act.<sup>395</sup>

### 6.5.2. Ability of protective services officers to exercise special police powers

Prior to 2018, PSOs could only exercise SPPs when acting under the direction and control of a police officer. At the time, Victoria Police viewed this as limiting its ability to use PSOs to respond to a terrorist event. The Harper-Lay Review recommended amendments enabling PSOs to exercise SPPs, which are now reflected in the Act.<sup>396</sup> However, these amendments do not specify where PSOs can exercise SPPs. Victoria Police has submitted that it is not clear whether SPPs can be exercised by PSOs anywhere within an authorised target area or only in an area that overlaps with their designated place of operation. It requested that the Act is clarified so that PSOs can lawfully exercise SPPs at any target location or against any target person or vehicle covered by an SPP interim authorisation or authorisation, regardless of the PSO's designated place of deployment.

### 6.5.3. Enabling protective services officers to use special police powers in any location

Victoria Police submitted that limiting PSOs to exercising SPPs in their usual designated place would seriously detract from, complicate and delay any decision in relation to their use during an incident. Victoria Police noted that deploying PSOs to anywhere within a target area would be consistent with recent amendments permitting PSOs to exercise powers in any area declared as an emergency area following a state of disaster under the *Emergency Management Act 1986 (Vic)*<sup>397</sup> or declaration of a state of emergency under the *Public Health and Wellbeing Act 2008 (Vic)*.<sup>398</sup>

The Expert Advisory Group formed the view that the Act should enable PSOs to exercise SPPs regardless of location. Consistent with the views of the Harper-Lay Review, the Expert Advisory Group agreed that PSOs should be deployed when they have been appropriately trained and where there is an operational advantage in doing so.

### 6.5.4. Conclusion

The review considers that PSOs should be able to exercise SPPs in authorisation areas, provided this can be achieved fairly, safely and with proper regard to the nature of the powers and capabilities of PSOs. Further consultation with Victoria Police and other relevant stakeholders will be required to develop the requisite amendments to the Act and/or the *Victoria Police Act*.

#### Recommendation 12

Legislative amendments should be made to clarify that protective services officers may exercise special police powers anywhere within authorised areas, consistent with the broader role of protective services officers and subject to the provision of appropriate training.

<sup>394</sup> *Ibid* s 52(1).

<sup>395</sup> *Ibid* s 52(4).

<sup>396</sup> *Terrorism (Community Protection) Act 2003 (Vic)* s 21K.

<sup>397</sup> *Emergency Management Act 1986 (Vic)* pt 5.

<sup>398</sup> *Public Health and Wellbeing Act 2008 (Vic)* pt 10, div 3.



## 6.6. Protection of counter-terrorism intelligence

Victoria Police proposed extending the process in Divisions 2–4 of Part 5 of the Act for protecting counter-terrorism intelligence to any legal proceedings where there is a need to protect such intelligence.

### 6.6.1. Current provisions regarding protection of counter-terrorism intelligence

Part 5 of the Act provides for a general protection of counter-terrorism intelligence in any legal proceeding<sup>399</sup> and a protection for applications made under the Act.<sup>400</sup>

Under Division 1 of Part 5, a court<sup>401</sup> may excuse a person from disclosing information, documents or things if satisfied that:

- the information, document or thing is counter-terrorism intelligence;<sup>402</sup> and
- the public interest in preserving secrecy or confidentiality outweighs the public interest in disclosure.<sup>403</sup>

In deciding to excuse a person, the court may inform itself in any way it thinks fit.<sup>404</sup>

Under Divisions 2–4 of Part 5, Victoria Police can apply to the Supreme Court for a counter-terrorism intelligence protection order to protect information, documents or things related to an application for a PDO or a prohibited contact order (substantive application).

The Supreme Court may make a counter-terrorism intelligence protection order<sup>405</sup> if satisfied that:

- the information, document or thing is counter-terrorism intelligence;<sup>406</sup> and
- the reason for maintaining the confidentiality of the counter-terrorism intelligence outweighs any prejudice or unfairness to the subject of the substantive application.<sup>407</sup>

Divisions 2–4 of Part 5 were introduced in 2018 and implement recommendation 16 of Report 1 of the Harper-Lay Review. This recommendation called for the creation of ‘a single process for the protection of criminal intelligence, applicable to relevant applications under the [Act] (not criminal prosecutions).’<sup>408</sup>

### 6.6.2. Expanding protection of counter-terrorism intelligence

Victoria Police sought expansion of the protections in Divisions 2–4 of Part 5 to any legal proceedings where there is a need to protect such intelligence, so that Victoria Police is not required to disclose the intelligence to the defendant, but the court is able to take the intelligence into account in making its decision. This would address the current situation, where Victoria Police must choose to either not disclose the information and potentially compromise a case outcome; or disclose the information in open court, which may reveal Victoria Police’s intelligence-gathering methods to the defendant or another person.

The Expert Advisory Group considered that the proposal to expand protections is not warranted at this time, noting that the Harper-Lay Review did not wish to apply the provisions more broadly to criminal or

<sup>399</sup> *Terrorism (Community Protection) Act 2003* (Vic) pt 5, div 1.

<sup>400</sup> *Ibid*, pt 5, div 2.

<sup>401</sup> For the purpose of this section ‘court’ is taken to mean ‘any person acting judicially’: *Ibid* s 23(4).

<sup>402</sup> *Ibid* s 23(1)(a).

<sup>403</sup> *Ibid* s 23(1)(b).

<sup>404</sup> *Ibid* s 23(3).

<sup>405</sup> *Ibid* s 25(1).

<sup>406</sup> *Ibid* s 25(1)(a).

<sup>407</sup> *Ibid* s 25(1)(b).

<sup>408</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1* (2017) 11.



civil proceedings without consideration of the particular issues and complexities involved. It noted the Harper-Lay Review's view that different considerations may arise in relation to protection of intelligence in criminal or civil proceedings compared with those that may arise in proceedings under the Act.

### 6.6.3. Conclusion

The protection of counter-terrorism intelligence raises complex legal, human rights and fairness issues, in addition to operational efficacy and public safety considerations. Noting that the Harper-Lay Review recommended protections limited to applications and proceedings under the Act and not applying to criminal prosecutions, the review does not consider this change is warranted at this time.





## 7. Conclusion

The current terrorist threat level remains at 'PROBABLE' and the nature of the threat environment is becoming more diverse and complex. Consistent with the views of law enforcement, the Expert Advisory Group and other stakeholders, the review considers that the current threat environment continues to justify the ongoing operation of the Act, and that its removal would severely limit law enforcement's ability to mitigate the risk of terrorism.

The review also found broad support for retaining the sunset and review clauses, with stakeholders generally viewing these provisions as important safeguards that ensure the Act's extraordinary powers remain necessary and tailored to the evolving threat environment. The review found that extending the sunset clause for a further 10 years is appropriate, given the evidence that the terrorist threat is unlikely to recede in the foreseeable future. It also found that requiring the next review to commence in seven years and be completed within 18 months will allow a sufficient period to consider the operation of the Act, noting its powers are rarely used, while also enabling a comprehensive review process. Finally, the review recommends that future reviews be informed by the views of the community, relevant entities and independent experts, recognising the importance of a transparent review process informed by diverse perspectives.

The review recognises the centrality of language and public representations of terrorism to the lived experience and shared understanding of terrorism among members of the community. The review does not propose any amendment to the current definition of terrorism in the Act, but emphasises that government has an important role to play in shaping broader counter-terrorism discourse to prevent unfair stigmatisation of or discrimination against particular communities.

The Act contains an extensive system of independent oversight and monitoring of Victoria Police's exercise of powers. While the infrequent use of these powers has meant there has also been limited use of the oversight mechanisms, some stakeholders raised proposals to expand and strengthen these safeguards. A number of these proposals will be dealt with as part of the Systemic Review of Police Oversight being conducted by DJCS, ensuring that the need for and appropriateness of the reforms are considered in the context of Victoria's broader police oversight and integrity framework. Any changes proposed through this process will consider the breadth of safeguards and oversight mechanisms already contained in the Act, the need to ensure that safeguards do not compromise Victoria Police's operational effectiveness, and the need for consistency with the broader police oversight system. The review also found that regular scenario exercises are an important mechanism to test the practical operation of the Act's powers and safeguards and to support agency readiness, and recommends they be conducted on a regular basis.

The review acknowledges that the application of the Act's powers to children and vulnerable persons raises particular concerns. While the Act contains a range of safeguards in recognition of these vulnerabilities, the review considers that continued monitoring is necessary to assess the appropriateness of the powers and safeguards in light of the evolving threat environment. The review proposes that scenario exercises should adopt a specific focus on children and other vulnerable persons. In addition, DJCS will monitor the threat environment, any operational experience, developments in other jurisdictions and the views of stakeholders relevant to the application of preventative detention powers to children. Where material changes are identified that require action, this may prompt an administrative review or changes recommended to government outside the statutory review period in the Act. The review also proposes further work to examine the adequacy of safeguards under the Act and in relevant organisational procedures for people with a disability, mental illness or other vulnerabilities.



The review received proposals from Victoria Police to expand and amend its powers under the Act. Recognising the importance of operational flexibility in the response to terrorist threats, the review recommends amendments to enable PSOs to exercise SPPs in any authorised area. While the other proposals are not recommended for implementation at this time, this will be subject to ongoing monitoring and consideration.

This review has focused specifically on the operation of the Act, consistent with the statutory review requirement. However, it is important to note that the legislation forms only one part of the response to terrorism. An effective response to the terrorist threat requires a broad and multi-faceted suite of interventions and supports, including prevention, early intervention and disengagement measures, operating alongside the extraordinary law enforcement powers provided by the Act.



## Appendix A — Written submissions in response to Issues Paper

The review received 13 submissions, 10 of which were published and are listed below. The remaining submissions could not be published because they contained sensitive information.

Published submissions
Australian Multicultural Foundation
Australian Muslim Women's Centre for Human Rights
Centre for Resilient and Inclusive Societies
Children's Court of Victoria
Commission for Children and Young People
Monash Gender Peace and Security Centre
Supreme Court of Victoria
Victoria Legal Aid
Victoria Police
Victorian Multicultural Commission



## Appendix B — Stakeholders consulted

The review invited a range of organisations and individuals to participate in the review. The table below lists the agencies that participated in meetings and roundtables as part of the consultation process.

Stakeholders consulted
Attorney-General's Department (Cth)
Australian Federal Police
Australian Intercultural Society
Australian Multicultural Foundation
Australian Muslim Women's Centre for Human Rights
Australian Security Intelligence Organisation
Benevolence Australia
Board of Imams Victoria
Commission for Children and Young People
Department of Home Affairs (Cth)
Ethnic Communities Council of Victoria
Faith Communities Council of Victoria
Islamic Council of Victoria
Islamophobia Register Australia
Public Interest Monitor
The Huddle
Victoria Police
Victorian Inspectorate
Victorian Ombudsman