

## **Response of the Children's Court of Victoria to DJCS' Issues Paper: *Review of the Terrorism (Community Protection) Act 2003: Stage Two***

The Children's Court of Victoria (CCV) refers to DJCS' Issues Paper titled *Review of the Terrorism (Community Protection) Act 2003: Stage Two*. DJCS are undertaking a Stage Two Review of the *Terrorism (Community Protection) Act 2003* (TPCA). Appendix B of the Issues Paper contains a detailed list of questions for consultation.

As the CCV largely does not exercise jurisdiction under the TCPA, and some of the questions are matters of policy for the Government, the CCV's responses are limited to the following aspects:

### **6.1.1 Expanding the purposes identification material (DNA) can be collected for under the Act**

The Issues Paper refers to TCPA provisions that allow a DNA sample to be obtained by police, absent consent, where a police officer has reasonable grounds to believe it is necessary to do a certain thing, namely:

- Taking identification material from a person who is being detained under a preventative detention order (PDO); and
- Taking identification material from a person being detained under Part 2AA TCPA (preventative police detention).

On page 15 of the Issues Paper, DJCS note:

"Victoria Police has requested that consideration be given to expanding the range purposes DNA samples may be obtained from detained persons, such as for investigatory and evidentiary purposes relating to contravention of a terrorist offence either under the Act or the *Criminal Code Act 1995* (Cth)."

The Issues Paper overviews the circumstances in which Victoria Police can take a DNA sample under the *Crimes Act 1958* (CA).

On page 16, DJCS note:

"Victoria Police considers that there is a high likelihood that the threshold of reasonable belief of a DNA sample offence being committed will be met when a person is detained in accordance with a police detention decision or a preventative detention order. Nevertheless, it is possible that this will not always be the case. Consequently, any reforms to the Act permitting the taking of DNA for investigative purposes may lower the current Crimes Act thresholds.

In such cases, Victoria Police considers that the imminence and seriousness of the terrorism act in respect of which the police detention decision or preventative detention order has been made should be sufficient to justify the need to take a DNA sample for evidentiary or investigative purposes."

The CCV seeks more clarification on the reasons for why Victoria Police are seeking to expand the bases for obtaining DNA material. Can examples be given to clarify the reasons for this request?

The CCV notes that:

- “reasonable grounds” is not a high threshold for the police to prove; and
- police may request a DNA sample for children believed on reasonable grounds to have committed a DNA sample offence under the CA.

The provisions enabling identification material to be taken from a detained person under the TCPA were specifically limited to the current purposes. They should also be considered in context of the preventative detention framework in the TCPA, in which they operate. In 2014, the (then) Department of Justice conducted a *Victorian Review of Counter-Terrorism Legislation* and stated (on pages 60-61):

### **“8.1.2 Purpose of the provisions**

The starting point for the PDO scheme was Division 105 of the Criminal Code, which came into force in December 2005. In agreeing to the additions to the Criminal Code, made by the *Anti-Terrorism (No.2) Act 2005* (Cth), the States and Territories also agreed to enact complementary legislation so as to extend the permissible detention time under an order from 48 hours to 14 days.

As referred to above, a key characteristic of a PDO is that a person detained can be subjected only to very minor, limited questioning during his or her detention.<sup>125</sup> This reflects the general policy position taken that detention under these provisions is purely preventative in nature, not investigative. Thus, the police are prohibited from questioning a detainee under a PDO, or under an order made under other corresponding Australian legislation, unless it is to establish the identity of the person or to ensure his or her health and wellbeing. Unless it is impracticable to do so due to the seriousness or urgency of the situation, video or audio recording of any questioning must occur in order to ensure that this basic rule is complied with. Interrogation may only occur if the detainee is released; even if the PDO is still in force, questioning may then be undertaken.

By the same token, restrictions are placed under these provisions on the taking and use of identification material. Such material may only be taken, or caused to be taken, by a police officer of or above the rank of sergeant with the person’s consent in writing. Alternatively, it may be taken if the police officer reasonably believes the evidence is necessary for the purposes of confirming that the person is the subject of the PDO, or it is necessary in connection with documenting an illness or injury suffered whilst in detention.

The identification evidence must then only be used to confirm the person’s identity. It may be handed to the Department of Human Services (DHS) or the DOJ, depending on whether the person is being detained in a youth justice facility or a prison, but only for the purpose of assisting in this confirmation of identity. If no court proceedings have been commenced in connection with the PDO within 12 months, all identification evidence must be destroyed.” (citations omitted)

Victoria Police are given certain powers over individuals in the CA where there is a reasonable belief that the child has committed a DNA sample offence. The CCV’s view is that there is insufficient justification in the Issues Paper for why the thresholds applicable in the CA (in a criminal context) should be bypassed by expanding police powers under the TCPA (in a civil context) to take DNA evidence for investigatory and evidentiary purposes.

The CCV highlights this proposal is of particular concern for children. On the limited information contained in the Issues Paper, the CCV does not support expanding the purposes for taking DNA under the TCPA.