VICTORIA POLICE

2 June 2021

Review of the Terrorism (Community Protection) Act 2003 – Stage Two
Victoria Police response

Victoria Police (VP) welcomes the opportunity to comment on the questions raised in the Issues Paper *Review of the Terrorism (Community Protection) Act 2003: Stage Two*.

VP acknowledges that the powers in the *Terrorism (Community Protection) Act 2003* (the Act) are exceptional in nature and infringe on human rights. However, we consider the limit on human rights to be justifiable and proportionate to the serious, dynamic and evolving threat posed to community safety by terrorism and other ideologically motivated violence. VP considers that the Act strikes an appropriate balance between ensuring police have the necessary powers to prevent and respond quickly and effectively to ongoing threats of terrorism and violent extremism while retaining suitable safeguards to protect fundamental human rights.

We strongly advocate that the Act is re-made, with a mechanism included to provide for the periodic review of the legislation. This will trigger the regular assessment of the ongoing need for, and effectiveness of, the legislation as well as the opportunity to consider any necessary reforms to improve the workability of the Act. This is important to ensure that the legislation adapts in response to the changing and evolving threat.

VP welcomes further discussion with the Department of Justice and Community Safety about the content of the enclosed response to the Issues Paper.

The current threat environment

1. Does this accurately characterise the current terrorism threat environment, including emerging risks?

VP considers that the Issues Paper accurately conveys the current terrorism threat environment, including emerging risks. Other emerging risks to note include:

- returning foreign fighter families – Australians who have travelled overseas to join terrorist and violent extremist groups could create a security threat if they return to Australia. Some may have had combat training and/or have contact with extremist groups, and as such could pose a threat in terms of their capacity to commit or assist in committing a terrorist act or in the promotion of extremist ideology and radicalisation of others
- high risk terrorist offenders (HRTO) and convicted terrorists arriving at the end of their prison sentences with no grounds for ongoing detention or supervision – as the number of terrorist prisoners eligible for release is expected to increase in the next 5 years, there is a risk that the enduring nature of extremist ideology could create security challenges.

Another emerging risk is the increased availability and more sophisticated use of online technology such as the dark web and encrypted communications, which provide extremists with an increasingly diverse range of resources to promote their extremist ideology, develop extremist networks, conceal their identities and impede law enforcement investigations. The increasing use of the online environment, including social media, enables the recruitment and radicalisation of individuals remotely, across borders and anonymously.

This reflects the increasingly complex and evolving nature of the terrorist threat in recent years and demonstrates the ongoing need for legislative powers that equip law enforcement agencies with the necessary tools to prevent and respond to this threat and continue to protect the community.

2. Does the threat level warrant the continued operation of the Act?

As noted in the Issues Paper, Australia's current terrorist threat level remains at PROBABLE, which 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*."[1]

VP is of the view that the current threat environment, and the sustained period for which the national terrorism threat level has remained at PROBABLE, justifies the continued operation of the Act. We note also that advice from national intelligence agencies and law enforcement partners indicates that the threat level is unlikely to be downgraded for the foreseeable future.

In this threat environment and noting the potentially catastrophic consequences of a terrorist attack, it is critical that the Act continues to operate to ensure that VP has the necessary powers to prevent and respond to terrorist activity quickly and effectively.

VP also emphasises the importance of the Act as a component of the national approach to combat terrorist activity in Australia. The national effort to prevent and respond to terrorist activity depends significantly on the complementary operation of the powers in state and Commonwealth legislation and collaboration between agencies.

Legislative framework: necessity and effectiveness

3. What does the sparing use of the powers in the Act indicate about the ongoing need for the Act?

The infrequent use of the powers contained in the Act demonstrates VP's measured and proportionate response to the threat of terrorism, which is a low frequency but high impact phenomenon. VP stresses that the sparing use of the powers should not be taken as a reflection of the value and utility of the provisions. Rather, the fact that these powers have only been used in the rarest of circumstances demonstrates VP's appreciation of the exceptional and intrusive nature of the powers and that they will only ever be used as a last resort to prevent or respond to serious threats to public safety.

Notwithstanding this, debriefs from significant terrorism incidents such as the Brighton siege and Bourke Street attack have demonstrated missed opportunities to effectively apply the powers in the Act in the response and immediate recovery phases of both incidents. This issue has been addressed through a multi-agency exercise and specific training conducted by VP's Counter-Terrorism Command (CTC), with a dedicated group of Senior Police Commanders and legal advisors to ensure the timely request and activation of such powers in the event of another serious terrorism incident.

4. What is the best way to assess the ongoing necessity of the Act and the powers contained within?

The ongoing necessity of the Act can be assessed by taking into consideration:

- the severe and lasting impact of acts of terrorism on free and democratic societies throughout the world which has included loss of life
- the infrequent use of the powers contained in the Act, commensurate with the frequency of terrorism threats, attacks, and planned attacks in Victoria
- intelligence holdings from federal and state agencies which indicate that the threat of terrorism in Australia remains at a sufficiently alarming level and is continuing to diversify and evolve.

The persisting threat, increasingly complex nature and potentially catastrophic consequences of acts of terrorism emphasise the ongoing necessity of the Act and the maintenance of a full range of powers to prevent, disrupt and respond quickly and effectively to protect the Victorian public.

[1] https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx

5. **Are all the powers in the Act still necessary and appropriately tailored to current and emerging terrorist threats including right-wing extremists, lone actors, and emerging technologies?**

   VP considers that the existing powers are both necessary and proportionately tailored to address current and emerging terrorist threats.

   The modus operandi of terrorist actors (lone actors or groups) across the ideological spectrum remain sufficiently similar to be adequately addressed by the powers contained in the Act.

   VP cautions against an approach to reform which considers additional provisions designed to address specific forms of violent extremism. Rather, the powers should remain sufficiently broad and flexible enough to be able to apply to all terrorist threats.

6. **What would be the risks if some or all of the powers in the Act expired? How else could these risks be addressed?**

   VP notes that the 2014 Victorian Review of Counter-Terrorism Legislation considered the removal of preventative detention powers under Part 2A due to their non-deployment since introduction in 2006. Ultimately, the powers remained in the Act and were deployed in 2015 as part of Operation Rising to thwart an imminent terrorist attack during ANZAC Day commemorations. Subsequent reviews saw the introduction of additional preventative detention powers under Part 2AA in recognition of the evolution, escalation and enduring nature of the threat of terrorism.

   The removal of powers contained within the Act would severely limit the capability of law enforcement agencies to mitigate the risk of terrorism and maintain previous rates of successful risk management. Ultimately, this would result in a significant and unacceptable increased risk to public safety. The high thresholds required to exercise the powers, and the sparsity with which they have been used, demonstrate their importance as a last resort option to limit individual liberties in order to manage serious and often imminent terrorism risks. Simply put, there is nothing that has occurred since the powers were introduced to suggest that the threat or terrorism has subsided or that the powers are ineffective or are no longer required. Removal of the powers without sufficient justification will place the community at an unnecessary and avoidable risk.

   Further, there is a risk that the collaborative approach between state and Commonwealth law enforcement agencies to combat terrorism would be put at risk if some or all the powers in the Act expired. Joint Counter Terrorism Teams (JCTTs) are in each jurisdiction of Australia and comprise Australia Federal Police, state and territory police, and members drawn from security and law enforcement partners. These teams conduct investigations to prevent, respond to, and investigate terrorist threats and attacks. State and Commonwealth legislative powers are complementary and are relied on together to safeguard national security.

Role and effectiveness of sunset and review clauses as safeguards

7. **Are the review and sunset mechanisms relevant and effective safeguards on the powers in the Act?**

   VP considers that the review and sunset mechanisms have been important and effective safeguards on the exceptional powers in the Act.

   In particular, VP supports the continuation of a provision requiring a periodic review of the legislation. A periodic review provides the opportunity to consider the ongoing need and effectiveness of the legislation as well as the need for any potential improvements and refinement of the thresholds and processes for exercising these powers.

   VP welcomes the opportunity to regularly review the powers contained within the Act and present evidence to support their ongoing utility and any reform needed to ensure the powers remain fit for purpose and reflect the level of threat.

8. **Is the original purpose of the sunset clause still relevant given the ongoing threat posed by terrorism?**

   VP notes that the sunset clause was included in the Act as a safeguard to ensure that the powers are removed from the statue book should the current terrorist threat recede.

VP considers that the original purpose of the sunset clause is not as relevant given the ongoing threat posed by terrorism, and indication that this threat is likely to persist for the foreseeable future. Further, advice from our national intelligence partners indicates that not only are terrorist threats likely to persist, but that they are increasingly diversifying and evolving (including for example, via the use of encrypted communication and social media platforms).

While not opposed to a sunset clause, we consider that a review mechanism provides an appropriate safeguard against the normalisation of exceptional powers and allows for the same consideration as a sunset clause of whether the legislation is still justified. Should the current terrorist threat recede, and it is determined on review that the legislation is no longer necessary, then the Act (or particular powers in the Act) could be repealed.

Removing the sunset clause in favour of a requirement for regular review of the legislation would also address the resource burden and timing pressures that often accompany an inflexible sunset clause.

9. If a sunset clause is retained, when should the Act next expire?

If a sunset clause is retained, VP advocates for a sunset period of 5 to 10 years to enable adequate time to establish an evidence base to inform the use, effectiveness and potential reform of the Act.

10. Would the Act benefit from a more prescriptive review mechanism that contains, for example, explicit review criteria or a clarification of review objectives?

VP considers that a more prescriptive review mechanism that clarifies the review objectives would be beneficial, particularly in the absence of a sunset clause. Specifically, consideration could be given to criteria/objectives that are focused on:

- measuring the effectiveness of the provisions in preventing and deterring the threat posed by terrorism and violent extremism
- the use of the various powers in counter-terrorism exercises and/or actual operations
- comparisons with legislative schemes and innovations in similar jurisdictions
- whether the provisions are or remain consistent with internal human rights obligations
- whether the safeguards remain appropriate and effective to balance the use of the powers in the legislation with the protection of human rights
- potential enhancements or reforms to improve the effectiveness of the provisions in the Act.

VP emphasises that if an individual or body external to Government is tasked to conduct a review of the legislation, it is important that the review panel has the appropriate subject matter expertise and security clearance.

Charter of Human Rights and Responsibilities

11. Do the changes to the threat environment over time impact the justifications previously used for the limitation of rights under the Act?

VP considers that the changing nature of the threat environment does not necessarily impact previous justifications for the limitation of rights under the Act. The powers and provisions which limit Charter rights are accompanied by proportionately high evidentiary thresholds and burdensome application processes. This ensures that the powers are used only in circumstances where an act of terrorism has occurred or is likely to occur.

This framework operates independently of the threat environment and terrorism threat levels set by federal intelligence agencies. Changes to the threat level have no bearing on whether the thresholds are met in a particular set of circumstances to justify the use of powers under the Act and consequent limitation on Charter rights.

Adequacy of safeguards and oversight

12. Are the safeguards and oversight mechanisms contained in the Act adequate and workable? If not, how could they be improved?

VP considers the current safeguard and oversight mechanisms in the Act to be robust and workable.

For example, both the preventative detention order (PDO) and preventative police detention (PDD) schemes contain safeguards that apply when a person is detained. These include:

- an obligation on police to notify the following parties of a person being taken into custody: the Public Interest Monitor (PIM), the Victorian Ombudsman and Independent Board-based Anti-corruption Commission (IBAC)
- keeping, and providing to the person and those parties, a written record of the order endorsed with the time and date the person is taken into custody, as well as details of the detention location
- a requirement for the person to have access to legal advice and, if they wish, legal representation during questioning.
- regular review (at least every 12 hours) of the continued basis for the detention by the nominated senior police officer (NSPO).

At any time while they are detained, a person may also complain to either the Victorian Ombudsman or IBAC.

The Victorian Inspectorate also plays a role in the systemic oversight of PDDs and PDOs, in line with their oversight of other police powers not subject to review by a court.

In relation to covert search warrants (CSW), VP notes that in making an application to the Supreme Court for a CSW, VP must notify the PIM of the application and provide it with a copy of the proposed form of CSW. The PIM is able to make submissions to the Supreme Court about the need for the CSW in protecting the interests and privacy of the occupiers of premises that are subject of a CSW. In deciding whether to make a CSW order, the SC must consider the extent to which the privacy of any person is likely to be affected.

Further, VP must provide the Victorian Inspectorate with a report on the execution of CSW within 7 days after the CSW expires. The reports must include, among other matters, information about what powers were exercised, who entered the premises, and details of what items were seized, copied or recorded.

In relation to the authorisation of Special Police Powers (SPPs) under the Act, VP notes that a SPP interim authorisation can only be made with the prior written approval of the Premier (except in circumstances where the Premier cannot be reasonably cannot be contacted at the time). An interim authorisation is only valid for 48 hours after which time VP must apply to the Supreme Court if VP wishes for the SPP authorisation to continue longer than 48 hours.

VP notes that each of the powers under the Act are only authorised subject to strict oversight either by the Premier of Victoria or an independent government agency. We consider that this is a relatively onerous oversight and reporting regime, which is appropriate in light of the exceptional powers provided to VP under the Act. Accordingly, we consider that the safeguards and oversight mechanisms currently provided for in the Act are adequate and do not need to be improved.

13. Are the safeguards and oversight mechanisms adequate and workable for children and young people?

VP notes that the Act provides additional safeguards for children aged 14 years and over who are subject to a PDD or PDO in addition to the safeguards that apply to adults. These include (but are not limited to) requiring that:

- a child may only be detained in police detention for a maximum period of 36 hours before being brought before a court (rather than the four-day maximum for an adult)

- the child is entitled to contact a lawyer or arrange for a lawyer to be present during questioning. If the child does not exercise that entitlement, police must arrange for the presence of a lawyer provided by Victoria Legal Aid
- any questioning to be recorded by audio-visual means and the child's parent or guardian be present (or an independent person if the parent or guardian is not available)
- additional rest breaks be afforded to children, and a presumption in favour of detention in a youth justice facility rather than police gaol
- the Commissioner for Children and Young People (CCYP) has a monitoring role, including the power to visit a child in detention and make representations on their behalf
- the CCYP and DJCS be notified upon the child being taken into custody.

VP considers that these are important and effective safeguards that ensure that there is proportionality between police use of powers under the Act and the need for additional protections for children and young people in recognition of their vulnerability.

14. Are there safeguards and oversight mechanisms from other jurisdictions that could be incorporated into the Act?

As outlined above, there are currently five different agencies (PIM, Victorian Inspectorate, IBAC, Victorian Ombudsman and the CCYP) with monitoring and oversight responsibilities for the use of police powers under the Act, as well as judicial oversight. We consider this to be a very robust system of oversight.

While supportive of the current oversight mechanisms, VP cautions against introducing additional layers of oversight. We are of the view that any new proposals should be considered in light of the overall burden and with a view to their cumulative impact.

Further, unlike many other jurisdictions, we note that Victoria also has a Charter of Human Rights and Responsibilities, and as such, all proposed legislation since 2006 has been subject to an assessment of its impact on fundamental human rights. This ensures that human rights are identified and protected in the compatibility statements that accompany bills and that restrictions on these rights must be justified.

Specific issues raised in Stage One

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

15. Is expanding the purposes for taking DNA under the Act reasonable and necessary? Are the general provisions in the Crimes Act provisions sufficient in the context of terrorism investigations?

VP is of the view that expanding the purpose for taking DNA under the Act is reasonable and necessary. The current ability to take DNA under Part 2AA is very limited and does not helpfully further an investigation into possible terrorism offending.

Sections 13AZZD and 13ZL of the Act provide that a police officer must not take identification material from a person who is being detained under a PDD and PDO respectively except in accordance with those sections.

In Part 2AA of the Act, in a PDD and PDO scenario, police officers are authorised to take 'identification material' (which includes DNA under section 3 of the Act) pursuant to sections 13AZZD and 13ZL of the Act if:

- the person consents in writing
- the police officer believes, on reasonable grounds, that it is necessary to do so for the purpose of confirming the person's identity as the person in relation to whom the police detention decision is made, or
- the police officer, believes on reasonable grounds, that it is necessary to do so for the purpose of documenting an illness or injury suffered by the person while being detained under this Part.

VP's view is that these provisions strictly limit the circumstances for the taking of DNA from a detained person subject to PDD or a PDO, such that the *Crimes Act 1958* (Crimes Act) provisions are not applicable. Accordingly, in order to obtain DNA for a purpose other than confirming a person's identity or documenting an illness or injury, and to use the section 464 Crimes Act power, we consider that the person would need to be removed from the PDD or PDO under the Act. Removing a person in and out of detention would be impractical, complicated and potentially protracted given the various oversight mechanisms built into the PDD and PDO systems.

This can similarly be compared to the previous prohibition on questioning of a detained person subject to a PDO except for very specific limited purposes such as determining identity, prior to the amendments to the Act in 2018 to give effect to a recommendation of the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (Expert Panel).

In addition, there may be circumstances where a detained person under the Act does not meet the threshold for the taking of DNA under the Crimes Act; for example, where a person is detained on the basis there are reasonable grounds to suspect that the person will engage in an terrorist act and that detaining the person is necessary to prevent the terrorist act occurring (section13AC). In these circumstances, the person may not meet the section 459 Crimes Act threshold that requires reasonable belief that the person has committed an indictable offence.

In this respect, we note that detention ends under a PDD in circumstances that include if the person is taken into custody in relation to the commission of an indictable offence under the Crimes Act (section 13AZZG). This reflects the intention that preventative detention does not replace other powers that allow a person to be taken into custody; that is, if there is reasonable belief that a person has committed an indictable offence, then they should be released from the PDD and charged.

For clarity and to assist to further terrorism investigations, VP's preference is for the inclusion of an express authority within Part 2AA of the Act to enable DNA to be taken from a person detained under a PDD or PDO for the purpose of establishing any evidentiary link between the detainee and the terrorist act.

16. Will it assist with the prevention of a terrorist act or preservation of evidence relating to a recent terrorist act?

The ability to take DNA from a detained person could greatly assist in preventing a terrorist act or in preserving evidence of a terrorist act by potentially providing an evidentiary link between the person's DNA to evidence of a planned terrorist act or evidence remaining following a terrorist act or eliminating that linkage. This will significantly assist in the investigation of and eventual prosecution of a terrorist offence of the person detained. The evidentiary benefits will also extend to assisting police in identifying potential co-offenders using the detained person's DNA.

17. Would the corresponding impacts on human rights from any changes to the Act be reasonable and justified? Would additional safeguards be required? Is this of particular concern for children?

The impact on human rights would be reasonable and justified because of the significant implications and consequences of a terrorist act that is planned or has occurred. Determining whether the detained person has any linkage to evidence as to the preparation of a terrorist act or evidence of a recent terrorist act is of paramount importance to the community in terms of either preventing the act or in apprehending the offender(s).

Further, the human rights limitations have already been considered and found justified in the sense that VP has been given the ability to detain a person under a PDD or PDO without charge in order to prevent or investigate a possible terrorist act. 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.

[redacted] Victoria Police notes that the current proposed DNA amendments were raised at the time of the Expert Panel review in 2017 and that these amendments remain outstanding given that the DNA Review has still not been finalised. Accordingly, timely consideration and progression of these amendments is preferred.

While acknowledging that the PDD and PDO provisions have not been utilised since the 2017 amendments to the Act, given DNA evidence could potentially help exonerate a person who is detained under a PDD or PDO, we consider this to be an important gap in the current scheme that should be addressed.

Inserting a pause mechanism for detention decisions

18. Should a pause mechanism be inserted into Parts 2AA and 2A of the Act?

Parts 2AA (PDD) and 2A (PDO) of the Act provide for the detention of persons in order to prevent a terrorist act (or to preserve evidence relating to a terrorist attack) for a period of 4 days (36 hours for a child) for a PDD or for 14 days for a PDO.

For PDDs, the detention commences at the time when the person is first taken into custody (section 13AF) and must conclude at the end of the maximum police detention period (section 13AZZG(1)(a)), noting that it may end earlier under certain circumstances subject to section 13AZZG(1)(b).

For PDOs, detention commences when the person is first taken into custody and must conclude, subject to any extension or a requirement to release earlier, after 14 days.

During detention, police have the authority to question the person of interest (POI) in relation to terrorist offending (Div 6 of Part 2AA for PDDs and Div 5A of Part 2A for PDOs). Notwithstanding this authority, there may be circumstances where police are not able to question the POI. Under the current scheme, once the detention commences, there is no mechanism to pause the detention time. The 'detention clock' continues to run regardless of the inability of VP to interview the POI.

VP has identified a risk that an investigation may be compromised due to there being insufficient available time to question a POI during detention. Consequently, we have recommended that a "pause mechanism" be introduced that is applicable to both Parts 2AA and 2A of the Act. A "pause mechanism" would be relied on where, during a PDD or PDO, the POI is not able to be questioned for specified and authorised reasons.

A provision to stop the detention clock in specified circumstances has been implemented in the United Kingdom (section 41(8A) of the *Terrorism Act 2000* UK (the UK Act)).

Similarly, subsection 23DB(9) of the *Crimes Act 1914* (Cwth) also provides for a pause where a person is detained to enable investigation of whether they committed a terrorism offence they were arrested for; and/or whether they committed another Commonwealth offence. Examples of circumstances which are disregarded for the purposes of calculating the investigation period includes (but is not limited to):

- travel from place person is arrested to nearest premises for questioning
- communicate with lawyer, friend, relative, parent, guardian, interpreter
- allow above people to attend place where the questioning is to take place
- to allow the person to receive medical attention
- because of the person's intoxication
- to allow the person to rest or recuperate

VP submits that the time taken to engage in a range of activities should not be included in the calculation of time in detention, noting that should the POI be able to be questioned during any of these periods, the "pause mechanism" would not apply.

We suggest the circumstances when the detention clock would be paused could include:

- while a detained POI is being conveyed from a place of arrest to a place of questioning[2]

[2] *Crimes Act 1914* (Cth) s 23DB(9)(a).

- while a detained POI is receiving hospital (and/or other medical) treatment (including time spent travelling to or from hospital (and/or the facility))—see s 41(8A) UK Act[3]
- if the POI is temporarily incapacitated and therefore unable to properly answer questions, such as due to intoxication or being under the influence of drugs[4]
- while a detainee is temporarily removed from the control of VP, for example during an ASIO warrant[5]
- while a detainee is contacting family members, the Ombudsman or IBAC, the CCYP, a consular office, special counsel or a lawyer[6]
- when the POI is resting or recuperating.

Further, VP notes that the Expert Panel in Report 1, at page 34, states:

"The addition of a power for police to question a detainee is of particular significance. The Panel accepts that such a power is necessary to enable police to progress investigations while a person is under preventative detention. A person detained on that basis will almost inevitably possess information that will be of great relevance to any police investigation of the terrorist act in connection with which the person was detained. It is well established that the absence of this power is one of the most significant deficiencies, from a law enforcement perspective, of the current preventative detention laws."

This recommendation led to legislative reform in 2018 to include a power to question a person during preventative detention. VP intends, through this proposed reform, to give proper force and value to the legislative power to question a POI during a PDD or PDO. A pause mechanism will help to ensure that the power to question is available and effective to law enforcement in the manner contemplated by the legislature.

19. How would this improve the effectiveness of the Act?

Pursuant to section 3AZZZC of the Act, a detained person must not be prevented from being taken to a place for medical, dental, psychiatric, psychological, or pharmaceutical services. The ability to pause time during these (and other exceptional) circumstances will afford detained persons the opportunity to seek treatment or other support without potentially compromising the investigative process**,** which is already subject to tight legislated timeframes.

Further, it will overcome any potential for "gaming" the process by the POI to prevent police from questioning the person.

By enabling police to pause periods of preventative detention where a person is unable to be questioned, there is a greater likelihood of investigators being able to deduce critical information in order to prevent or mitigate the likely threat of a terrorist act/s. This is turn enhances the effectiveness of the Act to meet its primary purpose and contribute to public safety in Victoria.

VP notes that notwithstanding the ability of police to restrict communication with the POI's lawyer, the consular office or parent/guardian (if the POI is a child) (refer section 13AZH), the pause mechanism would only be available in very limited and specified circumstances.

20. What safeguards and oversights will be required to ensure the proper exercise of a pause mechanism and to protect a persons' rights? Is this of particular concern for children?

VP considers there are safeguards that could be put in place to ensure that the detention period is not any longer than is justified because of a pause in the detention. For example, a limit on the time that may be paused could be included in the Act. We note in this respect that both the *Crimes Act 2014* (Cwth) and the UK Act provide a limit on the time that may be disregarded for the purpose of a pause in detention.

[3] Ibid. s23DB(9)(d).
[4] Ibid. s23DB(9)(e).
[5] TCPA s 13AZZI.
[6] *Crimes Act 1914* (Cth) s 23DB(9)(b) and TCPA ss 13AZQ-13AZV.

Further, the NSPO currently provides oversight and independent monitoring of police detention and one of the functions of the NSPO could be to ensure that the detention period is only paused for lawful reasons and justifiable time periods.

The legislation could also provide for the specific involvement of the PIM in conjunction with the NSPO to oversight the detention period including the pausing of the detention clock.

Expanding circumstances in which special police powers may be enlivened

21. Should special police powers be extended in this fashion?

VP considers that SPPs should be extended to provide the ability to authorise the exercise of SPPs directed specifically at the safety and protection of visiting prominent persons.

Section 21B of the Act currently enables the Chief Commissioner of Police to apply to the Supreme Court for an order authorising the exercise of SPPs to protect prominent persons, or a large number of persons, attending events from a terrorist act.

The issue or shortcoming identified with section 21B is that it is aimed at protecting prominent persons attending a *specified* event. It is not a mechanism or power that enables VP to protect prominent persons *per se*, wherever that person might be travelling in Victoria.

Currently a section 21B authorisation would allow the SPPs to be used in the target area of the specific event and any other activity associated with the event. However, unless the movements of the prominent persons are associated with the event, then the section 21B power cannot be used to protect the prominent person/s.

For example, if the President of the United States of America was to attend the President's Cup Golf tournament in Victoria, then VP could apply for a Supreme Court order for authorisation of SPP to protect the attendance of the President while at the golf tournament. However, if the President's itinerary included, for example, attending Government House to visit the Victorian Governor-General during the golf event and perhaps Crown Casino after the event, the section 21B power would not extend to protecting the President in an activity unconnected to the President's Cup event. Separate section 21B applications would need to be made to the Supreme Court for each event.

If prominent persons are the targets of terrorist acts, it follows that the safety of those persons should be protected at all times he/she remains within the jurisdiction regardless of whether they attending a particular event or not.

VP considers that the use of SPPs to protect prominent persons should be able to be utilised wherever the persons are within Victoria, not just at the locations associated with specific events. The person is no less a terrorist target just because they are not in attendance at a specified event. That is, the proposed SPPs would follow the person, and be exercisable in the vicinity of the person at all times, to protect the person from a terrorist act.

Maximum protection involves having SPPs from the time the prominent persons arrive through to the time that they leave the State of Victoria. This is the only way that the safety of the person can be ensured. This would include for example, travel to and from the airport to venues and wherever else the prominent person/s travel.

22. How would this improve the effectiveness of the Act?

Section 21B of the Act is generally aimed at protecting prominent persons and the community at large from a terrorist act, especially those gathering around prominent persons by attending the same event. Protecting prominent persons who may be the target of a terrorist act, and in turn persons who gather around the prominent persons, fits within the objective and scope of the Act of protecting the safety of persons and the community.

Greater flexibility in utilising these powers will increase the likelihood of successful terrorism threat mitigation and consequently improve the effectiveness of the Act.

23. If this extension were adopted, what safeguards or protections would be required to ensure the powers are exercised fairly and proportionately (eg. to minimise the risk of inadvertent non-compliance)?

VP does not consider that the proposal, if adopted, would require any additional safeguards or protections to ensure that the powers are exercised fairly or proportionately.

A section 21B authorisation is created by order of the Supreme Court of Victoria. The Supreme Court may give a section 21B authorisation if reasonably satisfied that the granting of the authorisation is reasonably necessary to ensure the safety of any persons attending the event (section 21B(6)).

The same consideration and standard of proof can apply where the authorisation is required to protect the person from a terrorist act. That is, the court can order an authorisation where it is satisfied that it is reasonably necessary to ensure the safety of the person.

In applying for the order, VP would be required to satisfy the court that the person is or may be the target of a terrorist act based on credible information that VP would submit to the court in support of its application. The decision in relation to being reasonably satisfied that the authorisation is reasonably necessary to ensure the safety of the person(s) rests with the judgement and discretion of the Court. As such, VP does not believe that additional safeguards are required.

Other general comments/feedback

Proposed new offence - possession of objectionable material

VP supports the creation of a new offence based on possession of objectionable terrorist material. This issue was raised in the VP submission to the Expert Panel.

Currently, the Australia-New Zealand Counter-Terrorism Committee (ANZCTC) and its sub-committee, the Legal Issues Working Group (LIWG) are developing a proposed new Commonwealth offence of 'possession of instructional material'. However, this proposal is narrower than the offence proposed by VP in its submission to the Expert Panel.

VP considers that the proposed new Commonwealth offence should include any violent extremist material, *not just instructional material*. This would include, but is not limited to, propaganda, instructional videos and material, beheading videos and images and bombing videos in terrorist conflict areas.

The Commonwealth offence is currently being progressed, however, if the Commonwealth offence is not expanded to include any violent extremism material, VP requests that consideration be given to creating a new offence in the Act that includes the possession of material that is broader than instructional material.

Further, VP recommends that any definition of 'possession' include reference to multiple pieces of material that, when aggregated, provide instructions for committing a terrorist act.

Protection of Counter-Terrorism Intelligence

Part 5, Division 2-4 of the Act provides a mechanism for the protection of counter-terrorism intelligence in respect of PDO or PCO proceedings only (section 3 meaning of 'substantive application'). VP requests that the application of these Divisions of Part 5 be extended to include any legal proceedings in which there is a need to protect counter-terrorism intelligence.

There may be occasions where VP is involved in legal proceedings, both civil and criminal, in which part of its submissions to a court or tribunal will require the reliance on sensitive counter-terrorism intelligence. Disclosure could reasonably be expected to reveal such matters as intelligence gathering methodologies, investigative techniques, or covert practices, and other matters (refer section 3 of the Act) to the defendant/respondent and perhaps others. VP would be reluctant and constrained in disclosing such information in open court including to the defendant/respondent. However, not disclosing such information to the court might be prejudicial to VP's case and the overall efficacy of the proceeding and outcome.

Extending these Divisions would enable VP to present its full case to the court without the concern of the disclosure of sensitive counter-terrorism intelligence. Further, under the operation of these Divisions, the court would be able to take account of and rely on such information in forming and making its decision.

The protection of counter-terrorism intelligence is of paramount importance to VP. Section 23 of the Act and claims of public interest immunity under that provision apply to any legal proceeding. However, it does not allow the court to consider the protected information. It simply provides a mechanism for VP to not be required to disclose the sensitive information. In doing so however, it removes such information from consideration by the court. An expansion of Divisions 2-4 of Part 5 to include any legal proceeding would allow VP counter-intelligence information to be protected but at the same time considered by the court as part of its deliberations.

Divisions 2-4 provide a safeguard in that a defendant/respondent would have access to a court appointed Special Counsel who is tasked with representing the defendant/respondent in the application for the protection of the information. In this manner, although the information is not directly disclosed to the defendant/respondent, the interests of that person are protected through the role of the Special Counsel.

The occasions for the use of Divisions 2-4 of Part 5 by VP would be infrequent. However, when the occasion does arise in a proceeding, the issues of national security interest and/or the protection of sensitive operational policing matters become paramount. Applications for protection of information would be made in the Supreme Court, as is currently the case. All the safeguards and procedures that currently apply under the Divisions, would apply to all other proceedings.

[redacted]

Matters for clarification

VP considers there are aspects the Act that would benefit from legislative clarification to remove any doubt concerning the operation and effect of certain provisions.

SPP – search of prisons

In the event of a terrorist act that is imminent or occurring, a potentially important source of information is from an offender currently detained in a Victorian prison. However, it unclear whether an SPP authorisation under Part 3A of the TCPA would apply to the search of an offender or the possessions of an offender being held in a prison where a prison falls within the target area of an authorisation.

VP requests that consideration is given to amending the Act to clarify that the SPPs apply to any area falling within a target area unless expressly excluded by statute from a SPP authorisation. This would clarify that Victorian prisons that fall within the target area of an authorisation are covered by SPP.

SPP - deployment of protective services officers under an authorisation

The Act provides that Protective Services Officers (PSOs) can exercise SPPs once an authorisation is in place (section 21K(1)). The Act is unclear as to whether the SPPs can be exercised by PSOs anywhere within Victoria (within the target area and against target person and vehicles) or whether PSOs are only able to exercise SPPs in their usual PSO ‘designated places’.

VP requests the Act is clarified to make clear that PSOs can lawfully exercise SPPs at any target location or against any target person or target vehicle covered by an interim authorisation or authorisation, regardless of whether the PSO is inside or outside of a PSO designated place.