



CHIEF JUSTICE'S CHAMBERS  
SUPREME COURT  
MELBOURNE 3000

10 June 2021

Ms Rebecca Falkingham  
Secretary  
Department of Justice and Community Safety  
Level 26, 121 Exhibition Street  
MELBOURNE VIC 3000

**By email**

Dear Ms Falkingham

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

Thank you for the opportunity to contribute to stage two of the above Review.

The following comments are confined to those aspects of the issues paper that concern applications that may be made to the Court under the *Terrorism (Community Protection) Act 2003* (the Act). Whether the Act should be retained, and if so whether it should continue to include sunset and review provisions, are policy matters on which the Court does not offer a view.

*Pause mechanism and applications for 'dead time'*

In relation to the pause mechanism discussed in the paper, the Court notes the following matters.

The *Crimes Act 1914* (Cth) provisions to which the paper refers concern post-arrest detention and the limits of the investigation period. If considering introducing a pause mechanism modelled on the Commonwealth provisions, the Court suggests that consideration be given to:

- whether any differences in the purposes of detention under those provisions and the purposes of detention under the Act should be reflected in the bases for pausing time; and
- the differences between the investigation period under the Commonwealth provisions and the preventative detention periods under the Act. The maximum period of detention under a preventative detention order (PDO) is significantly longer than

the investigation period and the difference may be even greater if a pause mechanism were introduced into the Act.

The Act affords a person subject to preventative detention certain protections, including requirements for reasonable breaks and to defer questioning while the person communicates with a lawyer. The Court suggests that consideration be given to the effect a pause mechanism may have on the protections under the Act. If the mechanism could be used to 'pause' detention for the amount of time taken for a break or to speak to a lawyer, it may create a disincentive to engaging those protections.

The Court considers that if an application for 'dead time' is related to a PDO it would be appropriate for the application to be made to the Court given that PDOs are made by the Court and extensions under s 13I are also by order of the Court. If the PDO were for a period of less than 14 days, and Victoria Police sought a longer period of preventative detention, a question would arise as to the relationship between an extension application and a 'dead time' application, and which type of application should be made in the first instance.

Different issues would arise if 'dead time' were available in relation to detention under a police detention decision. Police detention decisions do not involve a process of applying to the Court for an order, and the Act does not provide for extensions of police detention decisions. The Act does, however, contemplate that while a person is detained under a police detention decision, Victoria Police may apply to the Court for a PDO, which would permit a longer period of preventative detention (see for example ss 13AZZG(3) and 13F(1)(a)(ii)). If 'dead time' were available without having to apply to a court, it may effectively become an alternative to seeking a PDO, as it would allow for a longer period of preventative detention without having to meet the higher threshold in s 13E.

If the issue of 'dead time' were to be determined by the Court, the question arises as to whether the Court's function at that point would be limited to the question of the relevant circumstances for 'dead time' being established or whether the basis for detention is to be established. That then raises the interface with a substantive application to the Court for a PDO.

There is a policy question for government about the point at which court scrutiny is a necessary or desirable safeguard for continuing detention and then a further question about whether at that point it is more efficient and effective for that scrutiny to be directed to substantive issues.

*Special powers*

The paper discusses a proposal to expand the scope of special powers under s 21B of the Act so that they may follow a prominent person regardless of what events they attend and where they travel within Victoria.

The paper states that the exercise of special powers is currently limited to the event the subject of the authorisation. The Court notes that under s 21B(1)(d) and (3)(d), when the Chief Commissioner applies for a special powers authorisation they may specify not only the area in which an event is taking place or is likely to take place, but also any other area in which an activity connected with the event is taking place or is likely to take place.

If s 21B were to be amended to allow for a ‘follow the person’ authorisation, the Court suggests that consideration be given to how orders would be framed to provide clarity and certainty. For instance, would the authorisation be limited to the person’s location from time to time, or would it apply in advance of and after planned visits? A special powers authorisation ends no later than 24 hours after the scheduled completion time of the relevant event, subject to extension under s 21C for a period reasonably necessary to ensure the achievement of the objective of the authorisation. Would there also be a default end time for a ‘follow the person’ authorisation, subject to extension?

I trust that this information will assist the Review.

Yours sincerely

[08.09.21 ORIGINAL SIGNATURE REDACTED]

**ANNE FERGUSON**  
*Chief Justice*