COMMISSION FOR CHILDREN AND YOUNG PEOPLE

Submission to the Department of Justice and Community Safety

Review of the *Terrorism (Community Protection) Act 2003*: Stage Two

CCYPD/21/8302

1. Introduction

The Commission for Children and Young People (the Commission) welcomes the opportunity to contribute to Stage Two of the Department of Justice and Community Safety's Review of the *Terrorism (Community Protection) Act 2003* (the Terrorism Act).

The Commission has an important oversight role under the Terrorism Act when a child is detained under preventative police detention or a preventative detention order. Our functions include:

- monitoring the child's treatment in detention, including having access to the child and documents and information
- promoting the child's interests
- providing advice to government and the Chief Commissioner of Police about a child's treatment while in detention.[1]

The Commission received these powers on 1 October 2018, as part of the changes to the preventative detention scheme recommended by the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (Expert Panel) and enacted by the *Justice Legislation Amendment (Terrorism) Act 2018* (2018 Amendment Act).

To date the Commission has not been required to exercise these functions, as the powers to preventatively detain children have not been used.

The Commission was consulted during Expert Panel's 2017 review of the preventative detention scheme and during development of the 2018 Amendment Act. We provided detailed feedback to government on the draft Justice Legislation Amendment (Terrorism) Bill and made a submission on the Bill to the Scrutiny of Acts and Regulation Committee. These previous submissions are relevant to this Review and are attached as **Attachments A to D** (we ask that Attachment A to C are kept confidential, as the Commission has not published these).

The Commission also made a submission for Stage One of the current Review and we welcome the opportunity to comment on the issues raised in the Stage Two issues paper.

1.1 About the Commission

The Commission is an independent statutory body that promotes improvement in policies and practices affecting the safety and wellbeing of Victorian children and young people. We have a particular focus on vulnerable children and young people.

The Commission's statutory functions include:

- providing independent oversight of Victoria's child protection, out-of-home care and youth justice systems including monitoring reports of serious incidents
- conducting inquiries into services provided to any child or young person who has died and who was involved with child protection in the 12 months before their death
- conducting individual, group and systemic inquiries into services provided to children and young people
- regulating and supporting organisations that work with children and young people to prevent abuse and ensure organisations have child-safe practices, including by administering the Child Safe Standards and Reportable Conduct Scheme.

1.2 About this submission

This submission focuses on aspects of the preventative detention legislation introduced by the 2018 Amendment Act. In this submission, we:

- suggest that there continues to be a lack of evidence demonstrating the need for the powers to preventatively detain children aged 14 and 15 and these powers should be repealed
- call for the legislation to be returned to its prior form, in which only the Supreme Court could order preventative detention of a minor; and no child under 16 years of age could be preventatively detained.

In the event that current provisions for preventative detention of minors remain, we:

- submit that preventative detention of children should be subject to review and sunset clauses
- urge the Victorian Government to implement safeguards recommended by the Expert Panel that were not enacted in 2018
- draw the department's attention to a potential risk to the effective exercise of the Commission's oversight and monitoring powers, relating to the involvement of Commonwealth agencies in the preventative detention of children.

We also express our opposition to the proposed 'pause mechanism' for preventative detention and proposed changes to the laws around the taking of DNA samples.

2. Preventative detention of children

Preventative detention of children aged 14 and 15 should be repealed

The 2018 Amendment Act extended the preventative detention scheme to children aged 14 and 15 years and introduced preventative police detention.

In 2017 and 2018, the Commission expressed significant concern to the Expert Panel and to government about the impact of any form of preventative detention on minors. Further, the Commission was not persuaded that the need to extend the scheme to children aged 14 and 15 years had been demonstrated (see **Attachment A**).

The Expert Panel itself expressed 'significant misgivings' about extending the preventative detention scheme to children aged 14 and 15 years, stating:

> Preventative detention is an extraordinary power and its application to children is of particular concern given the potential for even a short period of detention to cause irreparable harm to a child as young as 14 or 15.[2]

Given the Expert Panel's own reservations and recognition of the potential harm to young children, it is necessary to consider – more than three years on – whether the continuation of the extraordinary powers to preventatively detain children aged 14 and 15 years is justified. For the following reasons, we suggest that the evidence base for retaining the powers is not strong.

Since the new powers to preventatively detain children have been in force, there has not been any need to use them, further illustrating the view the Commission expressed in 2017 and 2018. Further, New South Wales aside, no other state or territory has seen it necessary to lower its minimum age for preventative detention from 18 (ACT) or 16 (all other jurisdictions) – or to introduce police preventative detention.[3]

We also note that DJCS's Stage One Report and the recently released Issues Paper notes that lone-actor attacks present the main threat and there is limited capacity to predict, detect and prevent these acts.[4] This suggests that the preventative detention powers may not be applicable in the circumstances of the most likely form of terrorist act – and therefore that the significant restrictions on children's rights under the *Charter of Human Rights and*

Responsibilities cannot be demonstrably justified as necessary to achieve a legitimate purpose.[5]

For these reasons, while acknowledging previously expressed concerns about the risk of children being involved in terrorism,[6] the Commission does not consider that the need for preventative detention of children aged 14 and 15 has been demonstrated. This part of the legislation should be repealed.

The law that existed before the 2018 changes is preferable

While the Commission continues to have significant concerns about preventative detention of children under 18 years, we consider that – if preventative detention of children aged 16 and 17 years is retained – the law that existed before the 2018 changes is more appropriate. Under that legislation, only the Supreme Court could order preventative detention and no child under 16 years could be detained preventatively. In our view, due to the gravity of the decision, the power to order preventative detention of minors should sit exclusively with the Supreme Court.

We therefore suggest that, if preventative detention of children aged 16 and 17 years is retained, police preventative detention of children should be removed. This would make Victoria's legislation more consistent with the laws in most other jurisdictions.

Preventative detention of children should be subject to review and sunset clauses

Should preventative detention of children remain in the Terrorism Act (in any form), the powers should be subject to regular statutory review and sunset clauses, to ensure the need for the extraordinary powers to preventatively detain children is reviewed no longer than every three years. This is a necessary safeguard for such an 'exceptional and powerful' legislative instrument.[7]

We suggest that the review clause specify that:

- a key purpose of the review would be to consider whether preventative detention of children remains demonstrably justified
- the review consider whether there are less restrictive alternatives to preventatively detaining children in order to achieve the objective of preventing a terrorist act, or preserving evidence of, or relating to, a recent terrorist act
- those conducting the review include an appropriately qualified person with expertise in child and adolescent development and welfare.[8]

3. Safeguards and oversight

If preventative detention of children continues, safeguards should be further strengthened.

3.1 Implementation of additional safeguards for children, as recommended by the Expert Panel

The Expert Panel was acutely aware of the 'particular vulnerability of children'[9] and recommended a number of 'additional and exceptional safeguards and protections' for detained children.[10] The Panel identified that this was 'necessary… to ensure that minors detained under the scheme are protected to the greatest extent practicable without rendering the scheme inoperable or unusable, from a law enforcement perspective'.[11]

Many of the recommended safeguards and protections (including the Commission's monitoring role) were implemented through the 2018 Amendment Act. Some critical recommendations, however, were not enacted.

Recommendations 22 and 23

One of the most significant safeguards for children recommended by the Expert Panel, but not currently enacted, was set out in recommendations 22 and 23. These recommended that the Supreme Court:

- be empowered to make a preventative detention orders only if there are no other less restrictive means available to prevent a terrorist act or to preserve evidence
- have the power to make alternative orders if less restrictive means are available.[12]

The Expert Panel concluded that the Supreme Court needed to be given 'sufficient powers' to make an alternative order, 'short of a preventative detention order', that could be appropriately tailored to address particular risk posed by a child the subject of the application.[13] The Expert Panel indicated that they envisaged orders imposing conditions on such things as a child's residency, movements, the people with whom they may associate or their access to the internet as alternative options for the court to consider.

The Commission strongly supported the Expert Panel's recommendations and raised the omission of these safeguards from the 2018 Amendment Bill with the Attorney-General and other Ministers, the Department of Justice and Regulation and SARC (see **Attachments B, C and D**).

The Commission continues to strongly support the implementation of these critical safeguards. Preventative detention of children should only be available as a last resort, in accordance with Article 37 of the United Nations Convention on the Rights of the Child. We urge the Victorian Government to legislate recommendations 22 and 23 to achieve a greater balance between the 'significant and intrusive powers'[14] and protection of children's fundamental rights.

Related to this issue, the Commission remains concerned that there is no differentiated threshold test for the preventative detention of children. In 2017 and 2018, the Commission argued that a differential, higher threshold test should apply when preventative detention of children is being considered (see **Attachments A, B and C**).

The undifferentiated tests under current legislation could allow a child to be:

- detained and questioned in situations where they are peripheral to, or unaware of, planning for a terrorist attack – for example, a child could be subject to a preventative detention order if they have been given items connected with a terrorist attack by an older family member, whether or not the child is aware of or involved in the planning of such an attack
- subject to a preventative detention order where they have not been directly involved in a recent terrorist attack but, because of the involvement of older family members or associates, the child's detention is considered necessary to preserve evidence.

The Commission was concerned that this could result in law enforcement agencies relying on the preventative detention and questioning of children or, at worst, to a situation where children are targeted as an easier means of obtaining information or evidence.

These concerns remain. Given the potential harm caused to children subject to preventative detention, the Commission continues to consider that the scheme should apply to children in a narrower range of circumstances than to adults. It is not appropriate that children can be preventatively detained on the same basis as adults.

We encourage the Department to reconsider the Commission's previous suggestions for a differentiated test for preventative detention of children.

Recommendation 24

The Expert Panel noted that 'all detained minors should be entitled to have their developmental needs catered for'.[15] It recommended (as part of recommendation 24) that the additional protections for children include requirements for catering for a child's developmental needs, as the *Children, Youth and Families Act* requires for children detained in remand centres, youth residential centres and youth detention centres.[16]

This recommended safeguard was not implemented. The Terrorism Act, in fact, expressly excludes the relevant *Children, Youth and Families Act* provision[17] (while incorporating other *Children, Youth and Families Act* protections).[18] The Commission raised this issue in its previous submissions (see **Attachments B and D**) and urges the Victorian Government to legislate the recommended safeguard. 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.

We also note that the Expert Panel stated that the *Children, Youth and Families Act* protections that apply under the Terrorism Act, should apply to a detained child regardless of whether they are detained in a youth justice facility or elsewhere (except where a particular condition would have no relevance or be inappropriate in the alternative detention facility).[19] This is not reflected in the Terrorism Act. The *Children, Youth and Families Act* protections only apply to children detained in youth justice facilities.[20] This gap should be addressed, given the possibility that a child could be detained at a place other than a youth justice facility (such as Victoria Police premises).

The Commission would welcome further discussions with the department and Victoria Police to explore options on how children's developmental needs could be met during preventative detention.

3.2 Commission's oversight function and Commonwealth agencies

The Commission's oversight and monitoring function under the Terrorism Act is an essential safeguard. The Commission's powers to monitor the treatment of a detained child include having access to the child at the detention facility to inspect conditions, and access to documents and information (including audio recording and audio-visual recordings).[21]

Our ongoing work to develop operational agreements with Victoria Police as to the Commission's functions has identified a potential risk to the Commission being able to exercise of its functions fully and effectively. This relates to the potential involvement of Commonwealth agencies in the management of detained children, referred to in the Stage One report.[22]

The Commission is concerned about whether its monitoring powers under the Victorian Terrorism Act would apply to the Australian Federal Police (AFP) or other Commonwealth agencies. Our operational 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. It is possible that a child may advise the Commission of concerns about the conduct of a Commonwealth employee they encountered during the preventative detention period.

Victoria Police has indicated that the Commission would receive their support and co-operation in these scenarios, which we welcome. The Commission's legal position should be considered and any legal ambiguity clarified in legislation, where possible.

4. Specific issues raised in Stage One

The Commission strongly opposes two changes proposed by Victoria Police, as indicated in the Issues Paper.

4.1 Introducing a 'pause mechanism' for preventative detention

Victoria Police has requested that consideration be given to introducing a 'pause mechanism' for preventative police detention and preventative detention orders.

The Commission strongly opposes this proposal. The capacity to detain a child without charge for up to 36 hours – or 14 days with a court order – is already a significant deviation from Victoria's usual policing practices and its impact on any child is likely be significant. The proposed change would involve further restrictions on children's Charter rights – including their rights to protection in their best interests.[23] There is no evidence that these further restrictions are reasonable or demonstrably justified.[24]

The Expert Panel was clear that a child should be brought to court as soon as practicable and certainly no later than 36 hours after being taken into custody.[25] This formed part of the additional safeguards the Panel considered necessary to protect children:

> A requirement for a court order to be sought as soon as reasonably practicable and no later than 36 hours after the minor has been taken into custody is, in the Panel's view, a reasonable compromise between enabling police to take prompt and effective action to address a real threat while also respecting the foundational human rights engaged by preventative detention.[26]

In addition, there is no need for a pause mechanism for preventative detention orders given that police already have the capacity to apply to the Supreme Court for an extension, or a further extension, of a preventative detention order.[27]

Extending the preventative detention period for children beyond the current timeframes would create a risk of severe impact on a child's wellbeing. The Commission does not support Victoria Police's proposal to include a 'pause mechanism' for any child. We also consider there should be no capacity for a pause mechanism to apply to younger adults aged 18 to 25 years, given the evidence about this distinct stage of psychobiological development and associated vulnerability.

4.2 Proposed changes to DNA sampling laws

The Commission also has significant concerns about the proposed changes to the laws regarding DNA samples, particularly given the limited detail about what is proposed.

We understand that Victoria Police is seeking the power to take DNA samples from detained people, including children, for additional investigatory and evidentiary purposes, without being required to meet the threshold tests under the *Crimes Act 1958*.[28] For children, we understand this may involve removing the Children's Court oversight over the taking of DNA samples from children under the Terrorism Act.[29] Currently police cannot take identification material from a child (other than hand prints, finger prints, foot prints or toe prints) unless the Children's Court orders that the material be taken, or the child and their parent or guardian or another appropriate person agree in writing.[30]

The Commission would strongly oppose the removal of the Children's Court role in these decisions. As the Commission has previously submitted – when the DNA profile sampling laws in the *Crimes Act* introduced in 2019[31] were proposed[32] – the use of powers to use an invasive procedure to take DNA samples from children (which can include use of reasonable force) should remain exclusively a court decision. We note that the proposed changes would apply when children are being preventatively detained without charge and, in some cases, without there being any suspicion the child has been involved an offence.

If the proposed changes were to proceed, strict safeguards would be needed to minimise the potential harm to children. Safeguards must be at least as strong as those that exist for children under the DNA profile sampling provisions in *Crimes Act*, and consistent with the current safeguards and protections for children in the Terrorism Act. This is consistent with the views expressed by the Expert Panel.[33]

Further discussion

The Commission would be pleased to discuss any aspect of this submission further and welcome further consultation on any proposed changes to the Terrorism Act affecting children.

Endnotes

[1] *Terrorism (Community Protection) Act 2003* (TCPA), Part 1B.
[2] *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers – Report 2* 2017 (Expert Panel Report 2), page 100.
[3] See *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 11; *Terrorism (Emergency Powers) Act 2003* (NT), s 21M; *Terrorism (Preventative Detention) Act 2005* (Qld), s 9; *Terrorism (Preventative Detention) Act 2005* (SA), s 7; *Terrorism (Preventative Detention) Act 2005* (Tas), s 12; Terrorism (Preventative Detention) Act 2006 (WA), s 16.
[4] Department of Justice and Community Safety, *Review of the Terrorism (Community Protection) Act 2003 – Stage One Report*, December 2020, page 6; Department of Justice and Community Safety, *Issues Paper: Review of the Terrorism (Community Protection) Act 2003 – Stage Two* (Stage Two Issues Paper), page 8
[5] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).
[6] Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* 2018.
[7] Expert Panel Report 2, page 109.
[8] Similar to the requirement in s 442 of the *Children, Youth and Families Act 2005* relating to the composition of the Youth Parole Board.
[9] Expert Panel Report 2, page 99.
[10] Expert Panel Report 2, pages 99, 100, 109.
[11] Expert Panel Report 2, pages 100, 101, 109.
[12] Expert Panel Report 2, pages 103-104.
[13] Expert Panel Report 2, pages 103-104.
[14] Stage Two Issues Paper, page 13.
[15] Expert Panel Report 2, page 107.
[16] *Children, Youth and Families Act 2005* (Vic), s 482(2)(a).
[17] TCPA, ss 13AS(1)(c) and 13WA(5).
[18] Such as certain entitlements under s 482(2) of the *Children, Youth and Families Act* (e.g. entitlement that reasonable efforts be made to meet medical, religious and cultural needs) and almost all the prohibitions on certain actions under s 487.
[19] Expert Panel Report 2, page 107.
[20] TCPA, ss 13AS and 13WA(5).
[21] TCPA, ss 4P, 4Q.
[22] The Stage 1 Report, page 8, noted the collaboration between state and territory counter-terrorism teams with AFP and the Australian Security Intelligence Organisation in joint counter-terrorism taskforces.
[23] *Charter of Human Rights and Responsibilities Act 2006*, s 17(2)
[24] *Charter of Human Rights and Responsibilities Act 2006*, s 7(2).
[25] Expert Panel Report 2, pages 102-103 and recommendation 20.
[26] Expert Panel Report 2, page 103.
[27] TCPA, s 13I.
[28] Under the *Crimes Act 1958*, a police officer may request a DNA person who is a child aged 15 to 17 years to give a DNA profile sample only if the police officer is satisfied that the taking of the sample is justified in all of the circumstances, and the DNA person is believed on reasonable grounds of having committed the DNA sample offence; or has been charged with the DNA sample offence; or has been summonsed to answer to a charge for the DNA sample offence (s 464SC(2)). A DNA profile sample may be taken from the child if the child and a parent or guardian of the child give informed consent; or a senior police officer gives an authorisation under s 464SE (s 464SC(3)(b)). A senior police officer may authorise the taking of a DNA profile sample if satisfied of certain matters under s 464E.
[29] TCPA, ss 13AZZD(4) and 13ZL(4).
[30] TCPA, ss 13AZZD(4), (7)-(10) and 13ZL(4), (7)-(10).
[31] By the Justice Legislation Amendment (Police and Others Matters) Act 2019.
[32] Commission's letter to Minister for Police and Emergency Services regarding the Justice Legislation Amendment (Police and Other Matters) Bill 2019, 19 February 2019 and letter to Mr Joe Angel, (then) DJR, regarding the Justice Legislation Amendment (Police and Other Matters) Bill 2018, 8 June 2018.
[33] The Expert Panel considered that 'all of the protections for minors set out in Part III of the Crimes Act… should operate (in so far as they are applicable)': Expert Panel Report 2, page 104. While the DNA sampling provisions in Part III of the Crimes Act were enacted after the Expert Panel reported, the general principle expressed by the Expert Panel should apply.