Victorian Review of Counter-Terrorism Legislation

Department of Justice

State Government Victoria

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1 Introduction

1.1 Members of the committee

A Review Committee, chaired by His Honour David Jones AM, conducted the Review. The committee members have a broad range of relevant experience. The members are:

His Honour David Jones AM

Mr David Jones was a Judge of the Victorian County Court from 1986 to 2002 and a Reserve Judge from 2002 to 2004. He is a lawyer with over forty years experience. He contributed to the establishment of the Victorian Office of Special Investigations Monitor (SIM) and served as Victoria's SIM from 2004 to 2009. Mr Jones has also served as Chairman of both the Accident Compensation and the Australian Broadcasting Tribunals. Mr Jones was President of the Administrative Appeals Tribunal in 1998-1999. He was a member of the Adult Parole Board for 12 years and is a part time Commissioner of the Victorian Law Reform Commission.

Lieutenant General (Retd) Mark Evans AO DSC

Lieutenant General Mark Evans retired from the Australian Defence Force (ADF) in 2011. Most of General Evans's career in the Australian Army has been spent primarily in command, operational and joint deployment. His last appointment in the ADF was as Chief of Joint Operations during which he commanded all operationally deployed ADF forces. Since retirement, General Evans continues to mentor senior military officers in their preparation for operational commands. He is the current chair of the Australian Defence College Advisory Board, and was until recently the Chair of the Advisory Committee to the Queensland Premier regarding the Commemoration of the ANZAC Centenary. In addition, he has conducted a number of reviews for Federal and State Government Departments.

Kieran Walshe APM

Kieran Walshe is a retired Deputy Commissioner with Victoria Police, retiring in 2012 after 44 years of service. His service was primarily focused around command and control of operational and emergency management activities. Prior to retirement, he was active in counter-terrorism activities representing Victoria Police at both State and National level. Additionally he attended international counter-terrorism training programs run by the Australian Federal Police and the Federal Bureau of Investigation. Since his retirement he has been appointed to the Adult Parole Board, and a number of other boards of not for profit organisations.

1.2 Terms of reference

The terms of reference are set out in **Appendix A** of this report.

1.3 Conduct of the Review

The Review commenced at the end of January 2014. A website for the Review was established. The Review Committee publicly advertised the Review and sought comments or submissions from interested persons or organisations and asked them to indicate whether they would like to attend a public hearing.

Consultations were held with a number of organisations relevant to the Review, namely, Victoria Police, Australian Federal Police (AFP), Australian Security Intelligence Organisation (ASIO), Public Interest Monitor (PIM), Victorian Inspectorate (VI), Department of Justice (DOJ), WorkSafe Victoria (WorkSafe) and Department of Premier and Cabinet (DPC). Some of the information provided was private and some public. Some agencies were provided with a list of relevant issues which the Review Committee considered arose from the Review and asked for their views. These were provided.

The information provided by the agencies has been of critical importance to the conduct of the Review. The Committee is appreciative of the co-operation and assistance provided by these agencies.

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) has been enacted since the *Terrorism (Community Protection) Act 2003* (TCPA) was passed. Consequently, the compatibility of the TCPA with the Charter was not considered when the legislation was enacted. It has been necessary for this to be done as part of the Review. The Committee engaged Counsel, Joanna Davidson, to assist in the consideration of the Charter issues which are an important part of the Review. Her advice and assistance on these issues has been invaluable and much appreciated.

In the light of constitutional issues that arose in the Review the advice of the Solicitor-General was obtained by the Review Committee. Further reference is made to this advice later in the Report. The Review Committee are appreciative of the advice and assistance provided by the Solicitor-General.

In conducting the Review and preparing this Report the Review Committee have been assisted by Lisa Farrell, Senior Strategic Adviser, Criminal Justice Division, Department of Justice and Stephen Brockway, Legislative Adviser. Their assistance has been of great value to the Review Committee and is very much appreciated.

1.3.1 COAG Review

A review of Commonwealth and State and Territory counter-terrorism legislation was carried out by a Council of Australian Governments (COAG) appointed Committee in 2012 and 2013. The report *COAG Review of Counter-Terrorism Legislation Report 2013* (COAG Report) was tabled in the Federal Parliament on 14 May 2013. David Jones, who is the Chair of this Review Committee, was also a member of the COAG Committee.

The COAG Report has been important to the Review Committee's conduct of this review of the Victorian legislation as it covers areas the subject of this Review. Reference is made to it when reviewing the various Victorian legislative provisions. In addition, the Review Committee have had access to the submissions to the COAG Review and the transcript of the public hearings. This has been of assistance to the

Review Committee and the preparedness of the Commonwealth Attorney-General's Office to provide the material is appreciated.

1.3.2 INSLM Reports

In the conduct of the Review, the Review Committee have been conscious of the important role played by the Independent National Security Legislation Monitor (INSLM).

The INSLM is appointed by the Governor-General on the recommendation of the Prime Minister under the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act).

The duty of the INLSM is to assist Commonwealth ministers to review Australia's counter-terrorism and national security legislation so as to ensure that it:

- Is effective in deterring and preventing terrorist activity and responsive in dealing with it;
- Is consistent with Australia's international counter-terrorism and security obligations; and
- Contains appropriate safeguards for protecting the rights of individuals.

The INSLM's functions, set out at section 6 of the INSLM Act, can be summarised as considering whether the legislation remains appropriate, proportionate and necessary. He or she must report annually to the Prime Minister.

The INSLM's reviews are not only of Commonwealth legislation:

> " *… but also with regard to arrangements between the Commonwealth, the States and Territories for a national approach to countering terrorism*."[1]

Consideration has been given to the INSLM's reports where they are relevant to issues arising in this Review and, where appropriate, reference is made to them when reviewing the legislative provisions.

1.3.3 Submissions

Written submissions were received from Victoria Police, the Human Rights Law Centre (the Centre) and His Honour Judge Maidment, a Judge of the County Court. The AFP referred the Review Committee to sections of their written submission to the COAG Committee. Further reference is made to the Victoria Police and AFP submissions later in this Report. The Human Rights Law Centre submission addresses human rights issues including the application of the Charter to the legislation under review. The views expressed by the Centre have been taken into account by the Review Committee when considering the impact of the Charter on the legislation. General matters relating to counter-terrorism powers have also been raised by the Centre and have been taken into account by the Review Committee where relevant to the review. The Centre made a submission to the COAG Review. His Honour Judge Maidment in his submission adapted the submission he provided to the COAG Committee. His views have been taken into account. The Review Committee appreciates the assistance provided by the Centre and Judge Maidment to the review.

1 Independent National Security Legislation Monitor, Annual Report, 16 December 2011 at page 4. (INSLM Report, 2011).

1.3.4 Hearing

A public hearing was advertised. However, as only a few submissions were received and those who provided submissions did not wish to present at a public hearing, the Review Committee decided not to proceed.

1.3.5 List of acronyms

Acronym	Definition
ASIO	Australian Security Intelligence Organisation
COAG	Council of Australian Governments
DHS	Department of Human Services
DOJ	Department of Justice
HCDG	High Consequence Dangerous Goods
IBAC	Independent Broad-Based Anti-Corruption Commission
INSLM	Independent National Security Legislation Monitor
PACIA	Plastics and Chemicals Industries Association
PDO	Preventative Detention Order
PIM	Public Interest Monitor
RIS	Regulatory Impact Statement
SARC	Scrutiny of Acts and Regulations Committee
SSAN	Security Sensitive Ammonium Nitrate

2 Background to the *Terrorism (Community Protection) Act 2003*

2.1 The legislative imperative

The tightened security environment around the world following, in particular, the terrorist attacks on the World Trade Centre and the Pentagon in September 2001 led Australian governments to review their own counter-terrorism measures. Those events had clearly demonstrated that previous assumptions regarding the potential nature, form and immediacy of terrorist threats against Australia were no longer valid.

In April 2002, the Prime Minister, State Premiers and Chief Ministers met at the National Summit on Terrorism and Multi-jurisdictional Crime, where a stronger framework to meet the emerging challenge of combating terrorism was discussed. Six key elements with regard to counter-terrorism were agreed upon:

> *"1. The Commonwealth to have responsibility for "national terrorist situations", to include attacks on Commonwealth targets, multi-jurisdictional attacks, threats against civil aviation and those including chemical, biological radiological and nuclear material;*
>
> *2. The Commonwealth will consult and seek the agreement of affected States and Territories before a national terrorist situation is declared, and States and Territories agree not to withhold unreasonably such agreement;*
>
> *3. To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation;*
>
> *4. All jurisdictions will review their legislation and counter-terrorism arrangements to make sure they are sufficiently strong;*
>
> *5. The Commonwealth and States and Territories will continue to:*
>
> *a. improve Australia's anti-terrorist intelligence capacity and to develop effective means for sharing intelligence; and*
>
> *b. respond rapidly and effectively;*
>
> *6. The existing Standing Advisory Committee on Commonwealth/ State Cooperation for Protection Against Violence (SAC-PAV) will be reconstituted as the National Counter-Terrorism Committee with a broader mandate to cover protection and consequence management issues with Ministerial oversight arrangements."*[2]

This new national framework, and the establishment of the National Counter-Terrorism Committee, took effect in the Intergovernmental Agreement on Australia's National Counter-Terrorism Arrangements, signed by all the Heads of Government on 24 October 2002. Whilst this agreement reflected the Commonwealth's enhanced

2 The Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime, 5 April 2002.

role in a "national terrorist situation", it also made clear the role that State agencies would continue to have, reinforcing the need to enhance Victoria Police's counter-terrorism capabilities.

As part of its side of the agreement of April 2002, the Commonwealth Parliament enacted a series of statutes[3] creating new terrorism offences and making amendments to Part 5.3 of the *Criminal Code Act 1995* (Cth) (Criminal Code)[4] which relates to terrorism. In 2003, the Commonwealth Parliament re-enacted Part 5.3[5] of the Criminal Code, so as to put its constitutional validity beyond doubt, based on powers referred to it by States under section 51 (xxxvii) of the Constitution.[6] In Victoria, that referral of powers was effected by the *Terrorism (Commonwealth Powers) Act 2003.*

The fourth head of agreement mentioned earlier, however, said that States and Territories would review their legislation and counter-terrorism arrangements to ensure they were sufficiently strong. Moreover, it had been agreed that each would enact their own legislation in order to fill any gaps in the overall counter-terrorism framework caused by Commonwealth inability to legislate for constitutional reasons. In Victoria, the result was the *Terrorism (Community Protection) Act 2003* (TCPA) now under review. A document setting out the equivalent Commonwealth, State and Territory provisions for covert search warrants, preventative detention and special police powers can be found at **Appendix B** to this Report.

2.2 Policy development in Victoria

The Standing Advisory Committee for Protection Against Violence, of which the Victorian Government was a part, was formed to consider national counter-terrorism arrangements in the aftermath of the bombing of the Sydney Hilton Hotel in February 1978. Victorian arrangements were incrementally developed further over time, as part of a common set of emergency management provisions, influenced by a number of incidents, including the:

1. Ash Wednesday bushfires of February 1983;
2. Russell Street Police Headquarters bombing in March 1986;
3. Bombing of the Turkish Consulate in South Yarra in November 1986;
4. Port Arthur massacre in April 1996;
5. Explosion at the Esso gas processing plant at Longford in September 1998; and
6. Large scale anti-globalisation protests at the World Economic Forum Asia Pacific Economic Summit in Melbourne in September 2000.

Victoria's arrangements were based on the "all hazards, all agencies" principle, to deal with all emergencies, natural as well as potentially criminal. The Major Incidents Committee of Cabinet had been established in 1999, to ensure close co-operation between all relevant State agencies.

3 The *Security Legislation Amendment (Terrorism) Act 2002* (Cth)*;* the *Suppression of the Financing of Terrorism Act 2002* (Cth)*;* the Criminal Code *Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth)*.*

4 The *Criminal Code Act 1995* (Cth) (Criminal Code).

5 The *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

6 Section 51 states "The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to… (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law". Effectively, the States by referral lend power to the Commonwealth (in the sense that a referral can be withdrawn by a State) so that its ability to legislate on matters covered by the referral is beyond constitutional challenge.

In November 2002, following the National Summit in April of that year and the signing of the Intergovernmental Agreement in October, the Victorian Government released its counter-terrorism policy statement *"Enhancing Victoria's Domestic Security: New measures for the fight against terrorism".* In it, the Government acknowledged that co-operation between Commonwealth and State agencies could and should be increased. Prevention of terrorist acts could be improved, and there was a need to strengthen the law to ensure that any person engaging in terrorist activities could be appropriately prosecuted.

This policy statement described a range of major reviews that had been undertaken in Victoria, including the establishment of strengthened relationships with private-sector utility providers and enhanced agency-wide risk management procedures. The Premier continued to stress, however, that Victoria's approach to the threat of terrorism as being a part of the wider "all hazards, all agencies" approach, would continue. He said:

> *"Victoria has deliberately avoided establishing dedicated counter-terrorist structures. The framework and protocols for responding to all State and national emergency situations should be broadly consistent to avoid operational confusion during an emergency. Victorians rely on the same people to protect them through natural disasters and civil catastrophes."*[7]

Nevertheless, a package of new measures and funding commitments was announced in that policy statement, amongst them the creation of a Risk Assessment and Counter-Terrorism Co-ordination Group within Victoria Police and a new high level Security Policy Unit within the Department of Premier and Cabinet, together with the establishment of a new State Crisis Centre and the funding of new surveillance, communications and forensic equipment.

2.3 The *Terrorism (Community Protection) Act 2003*

The Terrorism (Community Protection) Bill (the Bill) was introduced into Parliament by the Premier in February 2003. The Premier explained that the intent of the legislation was not to comprehensively cover all terrorist activities in Victoria, but to complement existing Commonwealth counter-terrorism measures, plugging the gaps in areas over which Victoria would retain responsibility.

In the course of the second reading speech, the Premier stated:

> *"The bill proposes important new powers and obligations to ensure that there is in Victoria an adequate framework to prevent, and in a worst-case scenario respond to, a terrorist act. While the new measures are robust, they are also finely balanced to ensure that important civil liberties are not unduly infringed."*[8]

With bipartisan support, the Bill moved swiftly through both Houses of the Parliament, passing without amendment, and was granted Royal Assent on 15 April 2003.

7 "*Enhancing Victoria's Domestic Security: New measures for the fight against terrorism"* at page 7.

8 *Victorian Parliament Hansard* (Thursday 27 February 2003) at page 164.

The key aspects of the Bill as originally passed and assented to, which will be outlined more comprehensively later in this report, are as follows:

1. Covert Search Warrants – providing for a Supreme Court judge to issue a covert search warrant to the police where he or she is satisfied that an act of terrorism has occurred or is likely to occur, and that the covert entry and search would substantially assist the police in their investigations;
2. Powers to Detain and Decontaminate – granting special powers to the police to deal with actual or suspected chemical, biological or radiological attack in order to contain or prevent contamination;
3. Mandatory reporting of the theft or loss of prescribed chemicals or other substances – occupiers of premises from which chemicals that could be used to make bombs had gone missing were now compelled to report the loss to police;
4. Protection of Information – allowing courts and tribunals to protect information about sensitive counter-terrorism activities from disclosure.

The Parts of the TCPA dealing with Powers to Detain and Decontaminate and Protection of Information came into force on the day after Royal Assent, 16 April 2003. Part 2, dealing with covert search warrants, came into force on 16 October 2003, but that relating to the loss of chemicals, etc. (Part 4) was not proclaimed to come into force until 1 July 2004.

The TCPA contains, at Part 6, measures dealing with the risk management of essential services infrastructure. This Part is outside the scope of this Review, and was reviewed in a separate report[9] by Lieutenant General Mark Evans, AO DSC, who is also a member of this Review Committee.

The TCPA also made provision (at Part 8) for amending the *Freedom of Information Act 1982* (FOI Act) and the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act), reflecting provisions in Commonwealth legislation of even date.

As a result of the amendments made, section 29A of the FOI Act exempts from disclosure documents that, if disclosed, would or could reasonably be expected to cause damage to national or State/Territory security, the defence of the Commonwealth or international relations. A Department Head or the Chief Commissioner of Police may certify that such a document is exempt from disclosure. The Victorian Civil and Administrative Tribunal (VCAT) is able to investigate whether there are reasonable grounds for the claimed exemption and, if it finds in the negative, can notify the responsible minister. The minister is entitled to ignore that finding, however, and refuse to revoke the certificate, providing that he or she tables the reasons for the refusal and the VCAT finding in Parliament.

The provisions added to Part 8 of Schedule 1 to the VCAT Act provide, amongst other things, for hearings to be held in private when considering challenges to the validity of a certificate exempting such security sensitive documents.

The TCPA was significantly amended in 2006,as discussed below.

9 *Review of the role of the Department of Premier and Cabinet in supporting the Premier in the administration of "Part 6 – Essential Services Infrastructure Risk Management" of the Terrorism (Community Protection) Act 2003*, July 2012.

2.4 A changing legislative landscape

A special meeting of COAG was held on 27 September 2005. The meeting had been called to consider the evolving terrorism threat and security environment in Australia following the attacks on the London public transport system in July 2005, in which 52 people had died. A range of legislative measures were discussed including the strengthening of existing powers and the creation of new ones, such as preventative detention orders, control orders, special stop and search powers at transport hubs or mass gatherings and access to airline information.

COAG was briefed on the security situation both domestically and overseas by the Office of National Assessments and ASIO. Whilst the national counter-terrorism alert remained at medium, as it had since its introduction in 2003, an attack on Australia continued to be feasible and could occur.

It was agreed at the meeting that there was a clear case for counter-terrorism laws to be strengthened. It was further agreed between the leaders, however, that any new laws should be based on a set of fundamental principles that had been expounded by the Victorian Government.[10]

Just prior to that special COAG meeting, the Victorian Government had released, on 21 September 2005, a further policy paper, *"Protecting Our Community: Attacking the Causes of Terrorism."* The Government reaffirmed its commitment to the 'all hazards, all agencies' approach to emergency management as the foundation of its security arrangements. However, with a view to addressing continuing security concerns, and with an eye to the Commonwealth Games scheduled for 2006 in Melbourne, the Government signalled its intention to bring to COAG proposals for new legislation to enhance Australia's security capability, whilst ensuring at the same time that any new laws should:

- Be necessary;
- Be effective;
- Contain appropriate safeguards against abuse, such as parliamentary and judicial review;
- Be exercised in a way that was evidence-based, intelligence-led and proportionate; and
- Be subject to a legislative sunset.

The policy paper stated:

> *"All proposals to change our national legislative approach to terrorism must be considered carefully, as they raise complex legal and constitutional issues, as well as civil liberty and human rights issues. Australian Governments will need to work cooperatively and purposefully through these issues, with advice from their respective Solicitors-General and other agencies, before reaching any agreed outcomes. There should also be provision for a joint Commonwealth-State review mechanism to ensure regular assessment of the necessity and effectiveness of counter-terrorism legislative measures."*[11]

10 Council of Australian Governments' Communiqué, Special Meeting on Counter-Terrorism, 27 September 2005 at page 3.

11 *Protecting Our Community: Attacking the Causes of Terrorism; Victorian Policy Paper 2005* at page 9.

Following the special COAG meeting, additions and amendments were made to the Criminal Code, including provision for control orders, restricting the movements and ability to communicate of people who were thought to pose a terrorism threat, and preventative detention orders (PDOs), to enable the preventative detention of persons for up to 48 hours to prevent a terrorist act or to preserve evidence of an act that had occurred.[12]

As well as agreeing to these amendments to the Criminal Code,[13] State and Territory leaders agreed to enact legislation which, because of constitutional constraints, the Commonwealth was unable to make. This included preventative detention for up to 14 days (rather than the 48 hours provided for above) and stop and search powers in areas such as transport hubs and places of mass gathering. Victoria's contribution to this national statutory framework of counter-terrorism laws was the *Terrorism (Community Protection) Amendment Act 2006* (TCPA Amendment Act).

2.5 The *Terrorism (Community Protection) Amendment Act 2006*

The TCPA Amendment Act, which made substantial and important amendments to the TCPA, was introduced into Parliament in November 2005. Its objects were to:

- Prevent a terrorist act from occurring;
- Preserve the evidence related to a terrorist act; and
- Assist the community to recover from an attack.

It gave Victoria Police a number of substantial new powers with which to meet these objectives.

During his second reading speech on 16 November 2005, the Premier justified the new provisions as follows:

> *"The consequences of terrorist acts place police under great pressure to intervene earlier to prevent a terrorist act with less knowledge than they would have had using traditional policing methods. In our society, individual liberties must always be balanced against the needs of the community, in particular community safety. We already have laws that restrict individual liberty for the benefit of the community. This bill strikes that balance between empowering police to undertake their functions for the benefit of the community without unnecessarily interfering with personal freedoms."*[14]

He confirmed that, in his view, the proposals met the criteria set out in the *Protecting Our Community: Attacking the Causes of Terrorism* policy paper.

12 The *Anti-Terrorism Act 2005* (Cth) amended existing offences in the Criminal Code regarding the giving or receiving of training connected to a terrorist act, possessing things connected to a terrorist act, collecting or making documents likely to facilitate terrorist acts, other acts done in preparation for a terrorist act and the financing of terrorism. *The Anti-Terrorism (No.2) Act 2005* (Cth) contained new provisions relating to the definition and proscription of terrorist organisations and the funding of terrorists or terrorist organisations, as well as the control order and preventative detention order provisions.

13 The amendments made by the *Anti-Terrorism (No. 2) Act 2005* (Cth) required the agreement of a majority of States and Territories, because they were express amendments to Part 5.3 of the Criminal Code, which relied on constitutionally referred legislative powers.

14 *Victorian Parliament Hansard* (Wednesday 16 November 2005) at page 2177.

The Premier also indicated that the Bill would not be brought back to the Assembly for debate until February 2006, to allow for further consultation and discussion of the proposals, and also to await the Senate's public inquiry into the provisions of the draft Commonwealth legislation (the Anti-Terrorism (No.2) Bill) and the final form of that legislation.

During that period, an inquiry into the provisions of the Bill was held by the Scrutiny of Acts and Regulations Committee of Parliament (SARC). It received written submissions from 10 organisations or individuals, and held a public hearing on 31 January 2006. Their report was tabled on 7 February 2006,[15] and they wrote to the Premier the same day, seeking advice or clarification. The Premier replied two days later.[16]

When the Bill returned to the Assembly on 9 February 2006, some 206 house amendments had been tabled (though many were merely consequential). Many of the amendments dealt with issues debated and raised by the SARC.

Due to the Government's pre-briefing of the shadow Attorney-General and the Leader of the National Party, support for the Bill and the tabled amendments had been obtained.

The most significant effect of the TCPA Amendment Act was to add to the police's armoury:

- PDOs and prohibited contact orders (contact orders) (Part 2A of the TCPA, inserted by section 4); both pro-active and re-active powers allowing the police to detain in custody persons where an imminent terrorist act is suspected, or following an act for the purposes of preserving evidence; and
- Special Police Powers (Part 3A, inserted by section 5); particularly stop, search and seizure powers to protect mass gatherings, or prevent a suspected imminent terrorist act, or to recover from an act that has occurred and apprehend those responsible or to protect essential services infrastructure.

These provisions will be considered in depth later in this Report.

The TCPA Amendment Act also provided some refinement of the covert search warrant powers in Part 2 of the TCPA, enhancing the grounds on which a warrant may be sought by the police.[17] In this regard, during his second reading speech, the Premier said:

> *"The current power of police to obtain covert search warrants does not allow a warrant unless the target is known and the terrorist attack is imminent. This power is too limited. The bill extends the power to obtain a warrant to prevent the planning of a terrorist act at some time in the future or the prevention of an imminent terrorist act where the target is unknown."*[18]

15 Scrutiny of Acts and Regulations Committee Alert Digest No 1 of 2006 ("SARC Alert Digest No 1 of 2006").

16 Scrutiny of Acts and Regulations Committee Alert Digest No 2 of 2006 ("SARC Alert Digest No 2 of 2006").

17 TCPA Amendment Act at section 8(1).

18 *Victorian Parliament Hansard* (Wednesday 16 November 2005) at page 2178.

During the course of the second reading debate, a number of contributors commented on the potentially oppressive nature of some of the measures proposed. The shadow Attorney-General described the Bill as "*very serious and draconian*"[19] and continued:

> *"My own view is that it may be the most draconian bill I will ever have to deal with as shadow Attorney-General – hopefully in Government I would not have to deal with such a bill".*[20]

In fact, most of the house amendments tabled that day had provided additional safeguards against the abuse of the new proposed powers, or were to make it more difficult to obtain authorisation to use those powers at all. For example:

- Clause 13C had originally provided for PDOs to be issued by a senior police officer (ie. of or above the rank of Assistant Commissioner) in circumstances where the application was urgent and it was impracticable to go to the Supreme Court for an order. This proposal was abandoned by February 2006;
- A significant number of amendments were made to the proposals as they related to minors, making special provision for persons aged between 16 and 18 years of age held under a PDO, such as detention in a youth justice facility, etc. These will be outlined in detail in Chapter 8;
- Clause 13F(4)(f)(iii) of the Bill provided that the Court may, as part of an order, ban a detainee from informing a person with whom he or she was having contact to tell that other person the length of detention ordered. This was now expressly permitted in all cases (section 13ZD(3)(c));
- Clause 13F(6) was added in the interim period, whereby the Court may order that a detainee's contact with his or her lawyer may not be monitored;
- The possibility of more and earlier involvement of the Victorian Ombudsman and the Director, Police Integrity was now in the Bill;
- Provisions for special assistance to be given to people with an inadequate knowledge of the English language or a disability were added (for example, what are now sections 13JA and 13ZF(4) – (6)); and
- What is now section 13KA(4) was added, setting more onerous grounds to be satisfied before the granting of a contact order.

The Bill again passed through both Houses with bipartisan support, and was assented to on 7 March 2006. The relevant provisions came into force on 9 March 2006. It also extended, by 10 years, the operation of the TCPA, which had been due to sunset on 1 December 2006.[21]

19 *Victorian Parliament Hansard* (Thursday 9 February 2006) at page 185.
20 Ibid also at page 185.
21 TCPA at section 41.

2.6 The *Terrorism (Community Protection) Further Amendment Act 2006*

One month after the TCPA Amendment Act was made, the *Terrorism (Community Protection) Further Amendment Act 2006* (TCPA Further Amendment Act) was said by the Attorney-General, to "*reflect further consideration*" of the TCPA.[22] He was quick to point out however that no additions were being made to the powers so recently introduced and enacted.

Of interest for the purposes of this report, the TCPA Further Amendment Act included some enhancements to the powers regarding detention and decontamination in Part 3, and to the provisions which impose reporting duties in respect of missing chemicals in Part 4. These amendments are described further in Chapters 9 and 11 below.

The TCPA Further Amendment Act also made amendments to the definition of "terrorist act" in section 4 of the TCPA, so that it now includes the serious interference with, serious disruption to or the destruction of an electronic system for the delivery of essential government services by any entity (public or private) or a system used for, or by, an essential public utility, whether or not that utility is publicly or privately owned. This amendment was for clarificatory purposes, there having been some debate about whether the terrorism provisions generally applied to attacks against such essential public services infrastructure.

Again, the parts of this Bill with which this Review is concerned achieved cross-party support, and came into force on 7 June 2006.

2.7 Legislative developments since 2006

Recent years have seen the enactment of the Charter and the *Public Interest Monitor Act 2011* (PIM Act) in Victoria which have had, or will have, a significant impact on the exercise of police powers under the counter-terrorism legislation, adding to the statutory safeguards available to prevent any abuse of those powers. These will be discussed in Chapters 5 and 6 of this Report.

22 *Victorian Parliament Hansard* (Thursday 6 April 2006) at page 1030.

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3 The Terrorist Risk

3.1 Introduction

As outlined at Chapter 2 of this Report, terrorist incidents around the world, including the attacks on the World Trade Centre and Pentagon in the United States in September 2001, led Australian governments to review counter-terrorism measures.

It was against this background and the perceived terrorist risk to Australia that Commonwealth, State and Territory legislation was enacted in 2003, including the Victorian legislation under review.

Following the London bombings in 2005, governments decided to strengthen the existing counter-terrorism legislation and consequently further legislation was enacted by the Commonwealth, States and Territories in 2005 and 2006, including the Victorian legislation under review. Again this further legislation was enacted having regard to the perceived terrorist risk at the time.

Some review of the perceived terrorist risk in 2002-2003 and 2006, when the legislation was enacted, is contained in Chapter 2 of this Report. Parliaments, in enacting the Australian counter-terrorism legislation, considered that the risk posed to the Australian community by terrorist acts warranted such legislation. There was a need for it notwithstanding that the rights of citizens might be affected by it. The protection of the community from terrorist acts was the overriding consideration.

The Review Committee in conducting this Review have to assess, inter alia, the continuing need for the legislation and whether there is a need for the legislation to be amended or additional powers provided to mitigate and prevent the risk of terrorist acts.

Thus, the Review Committee in conducting the Review must make some assessment of the current risk and likely future risk of terrorist acts to the Australian community. It is that risk that provides the background and context to the Review, including an assessment of the TCPA in light of the Charter provisions

3.2 COAG Report

The terrorist risk was evaluated by the COAG Committee in its Report.[23] It was made against an unclassified submission by ASIO which stated, inter alia:

- The threat to Australia, domestically and offshore, from those committed to terrorist activity endures.

23 *Council of Australian Government Review of Counter-Terrorism Legislation 2013* ("COAG Report") at paragraphs 19-21.

- Terrorist planning and activities have occurred in Australia, and terrorists have attacked Australians and Australian interests overseas. Over 100 Australians have been killed in terrorist attacks in Bali, Jakarta, Mumbai, Istanbul, London and New York.
- Threats of terrorism can come from extremist groups or from an individual. In particular, individuals committed to a violent jihad ideology continue to regard Australia and Australian interests abroad as legitimate targets. The threat posed by this form of extremism is ongoing, pervasive and persistent.

The COAG Committee was informed that, at that time, ASIO was conducting over 200 counter-terrorism investigations and was, on an ongoing basis, responding to a large number of counter-terrorism leads. Concern was expressed as to the rise in the numbers of Australians wishing to support acts in Australia or travel overseas to obtain training to undertake their own form of jihad, ASIO stating:

> *"This is not an abstract or offshore threat; it is real and it is amongst the community."* [24]

The COAG Committee in its Report also referred to the following:

- AFP and ASIO had pointed out since 2001, four potentially serious attacks intended to produce mass casualties had been prevented.
- Following trial and conviction of terrorism offences, a number of persons are serving lengthy prison sentences.
- Other investigations had disrupted the activities of individuals who had been intent on committing terrorist acts.

The COAG Committee concluded:

> *"The AFP and ASIO submissions leave us in no doubt that Australia remains a target for a small range of individuals and groups who would promote their belief systems and seek to destroy our democratic way of life in a violent and irreversible way."* [25]

They added:

> *"Of course, we accept, at the same time, that the threat of terrorist attack in Australia should not be overstated or exaggerated ... The fact that there has not as yet been an attack on Australian soil should not … give its citizens any great comfort. Nor should it allow complacency and inertia to dilute the nation's vigilance".* [26]

The COAG Committee acknowledged that they needed to take into account submissions challenging the need for counter-terrorism laws when examining the legislation under review, but concluded with the following strong statement:

24 ASIO Submission to the COAG Review at paragraph 7.
25 COAG Report at page19.
26 Ibid at page 20.

"The Committee wishes to stress, however, that a factor of the utmost importance in our considerations is our acceptance of the assurance we have received that terrorism remains at the present time a genuine threat to the safety and well-being of the Australian community."[27]

There have been a number of other reports in recent years that have considered the terrorist risk to the Australian community. A brief summary follows in the sections below.

3.3 The Independent National Security Legislation Monitor Reports

In his first report to the Prime Minister, written just after the tenth anniversary of the "9/11" attacks on the USA, the INSLM stated:

"Nothing in the material available to the INSLM suggests that the risk of terrorist attacks internationally including in Australia has diminished so as to render the CT [counter-terrorism] laws mere relics of an unhappy past."[28]

In light of that he continued:

"No legislation can be regarded as permanent, but the CT laws in substance if not in form ought to be seen as a regime of intended indefinite duration. Their effectiveness and appropriateness should be assessed on the basis that they or any improvements of them will be in force for a long time to come."[29]

The INSLM's second report, of 20 December 2012, made no reference to or analysis of the prevalent terrorist threat.

His report of 7 November 2013, however, made reference to the "continued level of terrorist threat" by reference to the ASIO *Report to Parliament 2012/2013* and in particular the relatively new terrorist phenomenon emerging from the crisis in Syria, given the reported number of Australians travelling there to take part. In their submission to the INSLM, the AFP stated:

"There has never been an international civil conflict that has prompted as many Australians to travel to a warzone as the Syria crisis has, other than perhaps the Balkans war.

Of significant security threat to Australia is the growing trend of Australians travelling offshore to engage in, or support, terrorist activities or conflict. These individuals not only potentially commit criminal offences, but upon their return to Australia they potentially pose a significant national security risk in terms of their ability to conduct an attack on Australian soil, radicalise others and impart knowledge and skills gained offshore."[30]

The INSLM also made reference to the Government's official assessment of the threat in order to draw attention to the recommendations he had made for improving counter-terrorism legislation in his second report, and the lack of official response to those recommendations.

27 Ibid at page 21.
28 INSLM Report 2011 at page 5.
29 Ibid also at page 5.
30 AFP Submission to the INSLM, 14 October 2013.

3.4 Government White Paper

In 2010, the Federal Government published a Counter-Terrorism White Paper *"Securing Australia – Protecting Our Community".*

In Chapter 2, headed "*The Threat*", the paper states:

> *"The threat of terrorism to Australia and our interests is real. Terrorism has become a persistent and permanent feature of Australia's security environment. It threatens Australians and Australian interests both at home and overseas. The Government's intelligence agencies assess that further terrorist attacks could occur at any time.*
>
> *Over the past century, the world has seen a succession of terrorist campaigns supporting various ideological or nationalist causes. Methods of attack have evolved and terrorists have proved innovative, adaptive and ruthless in pursuing their goals.*
>
> *Terrorism affected Australia before the 11 September attacks against the United States. Various overseas terrorist groups have long had a presence in Australia – focussed largely on fundraising and procurement, occasionally escalating to violence. But prior to the rise of self-styled jihadist terrorism fostered by al-Qa'ida, Australia itself was not a specific target. We now are."*[31]

The paper goes on to assess the continued threat from:

> *" …people who follow a distorted and militant interpretation of Islam that calls for violence as the answer to perceived grievances"*[32]

consisting of al-Qa'ida, groups associated with it and others inspired by a similar worldview. It goes on to explore the threats arising in South-East Asia, the Arabian Gulf and parts of Africa.

It continues:

> *"Australia is a terrorist target. Public statements by prominent terrorist leaders and other extremist propagandists have singled Australia out for criticism and encouraged attacks against us both before and after 11 September 2001. Although al-Qa'ida has not itself launched a direct attack on Australia, it has shown an operational interest in doing so.*
>
> *We continue to see terrorist planning within Australia by terrorists inspired by al-Qa'ida."*[33]

The paper further states:

> *"So far, terrorist attempts in Australia have been disrupted by the coordinated and highly professional efforts of Australia's security agencies and police services, with support from international partners. But this success should not give us any false confidence that all plots here can be discovered and disrupted."*[34]

31 Federal Government White Paper "*Securing Australia – Protecting our Community*" 2010 at page 7.
32 Ibid at page 8.
33 Ibid at page 13.
34 Ibid at page 14.

It concludes:

> *"Terrorism will continue to pose a serious challenge to Australia and to international security. Terrorist networks will continue to aspire to conduct further attacks, and to alter their methods to defeat counter-terrorism measures. We must remain ready to meet this challenge and work productively with the international community and the governments of Australia to thwart terrorist groups and lessen the appeal of their extreme views."*[35]

3.5 Australian Security Intelligence Organisation Report to Parliament 2012-2013

A more recent assessment of the risk comes from the 2012-2013 ASIO Report to Parliament. The Director-General's foreword states:

> *"Terrorism remains the most immediate threat to the security of Australians and Australian interests."*[36]

In *Part 1, The Security Environment 2012-2013 and Outlook-Terrorism* the Report continues:

> *"The threat to Australia from terrorism remains real, ongoing and evolving."*[37]

The domestic threat as described in the ASIO Report is threefold:

1. Self-radicalising lone actors, motivated by an extreme ideology which advocates "stand-alone, stay at home" attacks as well as participation in extreme violence overseas. As illustrated by the bombing of the Boston Marathon in April 2013 and the murder of a British soldier in London in May 2013, these attacks may be carried out by disenfranchised individuals using everyday items without any training being necessary. The difficulty of identifying such individuals quickly enough to disrupt an attack is a significant challenge.
2. The threat still posed by more organised and directed extremist groups, which aspire to conduct large-scale, mass-casualty attacks against the West, and are easily able to spread their ideology online. References to such published material reveal that groups such as al-Qa'ida continue to regard Australia as a legitimate target.
3. The ongoing situation in Syria.

On the third point, the Director-General of ASIO states:

> *"There has been an increase in Australians travelling overseas to participate in terrorist training or engage in foreign disputes—Syria is the primary destination. The concern is not only for Australians who risk their lives overseas, but also the likelihood of radicalised Australians returning home with an increased commitment and capability to pursue violent acts on our shores."*[38]

35 Ibid at page 15.
36 2012-2013 ASIO Report to Parliament at Director-General's foreword.
37 Ibid at page 2.
38 Ibid at page viii.

The report continues in the same vein:

> *"Ongoing conflicts overseas present a range of security challenges for Australia. The Syrian conflict has resonated strongly in Australia, partly because of deep familial ties to Lebanon that exist here. Many Australians—a significantly greater number than we have seen for any comparable conflict—have travelled to the region, including several to participate directly in combat or to provide support to those involved. As at 30 June 2013, four Australians were known to have been killed in Syria.*
>
> *ASIO is concerned about the potential for Australians in Syria to be exposed further to extremist groups and their ideology. Such groups include the recently proscribed terrorist organisation Jabhat al-Nusra. An individual who becomes involved in the conflict and who holds, or develops, an extremist ideology could return to Australia not only with the intent to facilitate attacks onshore but also with experience and skills in facilitating attacks. In addition, the individual's social connections with international fighters could make such attacks easier to carry out. Alternatively, such an individual could become involved in terrorist activity elsewhere, exploiting the relative travel advantages Australian citizenship brings.*
>
> *We expect these challenges to play out over several years and have a medium-to long-term influence on the extremist environment in Australia, beyond any immediate resolution to the Syrian civil war."*[39]

The report also warns of significant threats to Australians abroad, such as kidnap-for-ransom in parts of Africa, the Middle East and South Asia.

Finally, the report points out, *"the terrorism threat in Indonesia is enduring."*[40] A spike of releases of terrorist detainees in 2014, many of whom have undergone terrorist training and/or have participated in bombings against Western or local targets, is likely to increase this threat.[41]

3.6 The Lowy Institute

One of the most recent analyses of the international situation, and how it may impact upon Australia, is to be found in the Lowy Institute for International Policy report *"Next-gen jihad in the Middle East",* published in March 2014. In its executive summary, it states:

> *"The current turmoil in the Middle East is incubating a new generation of jihadists. Syria has become a magnet for foreign fighters, including Australians. The political crisis in Egypt is being exploited by extremists and could result in a lengthy period of political conflict. New spaces are opening up across the region that can be used by jihadists for training. Power struggles between regional powers are exacerbating the instability.*

39 Ibid at page 3.

40 Ibid at page 4.

41 The Herald Sun reported on 2 May 2014 that 36 of the people convicted of involvement in the Bali bombings had already been released, with up to 100 more involved in other attacks on local and western interests in Indonesia scheduled for release in the forthcoming 12 months. This report was taken up by numerous websites.

In many respects the conditions for the creation of extremist movements and ideas in the Middle East are worse today than they were before 9/11. And while the current focus of jihadist groups is on the Middle East, this can, and probably will, change. For Australia the immediate focus is, and should be, on individuals returning from Syria. But the government should be keeping a weather eye on other parts of the Middle East as well."[42]

Significantly for the purposes of this Review, the report states:

"The Australian Government will need to sustain counter-terrorism efforts in the years to come. And it must not lose sight of developments in the broader Middle East even as it focuses more intensely on strategic developments in East Asia and the Indo-Pacific."[43]

3.7 Official assessment of terrorist threat

The Government's official current assessment of the terrorism threat at any given time can be found on the Australian National Security website at www.nationalsecurity.gov.au. The assessment level is continuously monitored and evaluated by Government. There are four tiers of threat, being:

Low – terrorist attack is not expected.

Medium – terrorist attack could occur.

High – terrorist attack is likely.

Extreme – terrorist attack is imminent or has happened.

At the time of writing, the assessed threat for Australia is "medium".

3.8 Briefings on the current risk

In addition to the official assessment of terrorism risk described, the Review Committee have been provided with briefings (both classified and unclassified) on the current risk by ASIO, AFP and Victoria Police. Those briefings have been very helpful to the Review Committee in assessing the current risk.

It is not necessary or appropriate to set out the details of those briefings. The Review Committee accept the assurances that have been given to them in the briefings that the concerns that have previously been expressed and are reflected in the reports referred to remain. A genuine risk to the safety of the Australian community continues. Although the nature of the risk has changed in recent years, it remains a real one.

The risk continues to be linked to global events, particularly in the Middle East, and most particularly to the ongoing conflict in Syria. That conflict has been in progress for a number of years with no sign of resolution. It continues to attract young Muslim men who are travelling from Australia in increasing numbers. Many wishing to travel have had their passports cancelled because of security concerns.

42 Lowy Institute for International Policy Report *"Next-gen jihad in the Middle East", March 2014* at page 1.

43 Ibid at page 3.

Law enforcement and intelligence agencies are concerned about the training, experience and radicalisation that can result from involvement in armed conflicts such as in Syria. On return to Australia these young men could have the capability and motivation to be involved in terrorist activities and constitute a real risk to the Australian community through, for example, the creation of terrorist cells or the launching of domestic attacks. Skills acquired, inter alia, could be in the making of improvised explosive devices or performing the role of a sniper. The Review Committee were given, on a classified basis, an overview of some actual case studies to illustrate the risk.

Law enforcement and intelligence agencies are concerned at the challenge they face managing this risk and protecting the Australian community, particularly as on current trends, over the next five years, there will be a substantial resulting increase in the domestic terrorist capability. It is felt that there may have to be a much greater use of the control order process under the Commonwealth legislation, as has occurred in the United Kingdom, in order to manage this risk.

3.9 Discussion and conclusion

As already stated, the Review Committee accept the assurances they have been given by law enforcement and intelligence agencies as to the current and likely continuing terrorist risk. The Review Committee accept that Australia continues to be a terrorist target notwithstanding that there has not been a terrorist attack in this country. We cannot afford to be complacent and there is a continuing need for all to be vigilant.

The Review Committee accept that the risk should not be overstated but do not believe law enforcement and intelligence agencies are doing so. They have an unenviable and heavy responsibility to protect the Australian community.

In conducting the review of the legislation, the Review Committee do so against the background of the material and assessments that have already been referred to. It is done on the basis that the risk of a terrorist attack remains a real one and such risk is likely to continue indefinitely. It is apparent that the nature of the risk has changed over the years and is likely to continue to do so, which represents a challenge for law enforcement and intelligence agencies. Although different, the Review Committee accept the assessment of law enforcement and intelligence agencies that the risk is probably higher now than when the legislation was enacted.

To sum up, the Review Committee, as did the COAG Committee, accept that terrorist acts remain and will continue indefinitely to remain a genuine risk to the safety and way of life of the Australian community.

At the time of finalising this Report there have been recent developments in Iraq. These developments and their implications add to the terrorist risk to the Australian community.

4 Definition of a Terrorist Act

4.1 Statutory definition

The concept of a "terrorist act" is fundamental to Commonwealth, State and Territory counter-terrorism legislation. The definition inserted in the Commonwealth legislation in 2002 reflected agreement between the various Australian Governments to achieve a consistency across all jurisdictions and take account of definitions in other countries such as the United Kingdom and Canada.

The definition of a "terrorist act" in Victoria is as follows. The definition is the same (with a few exceptions) in other Australian legislation:

*"(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); and

(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; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(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; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services by any entity (whether publicly or privately owned); or

(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; or

(ii) to cause a person's death; or

(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."[44]

4.2 COAG Review

The definition was comprehensively considered by the COAG Committee in their review,[45] including its history. A number of submissions were made to the review recommending changes to the definition.

The COAG Committee identified two principal arguments by submitters. First, that the Australian definition of a "terrorist act" should coincide with, or at least not substantially extend beyond, international definitions. Second, where there was division among submitters, should the "cause" mentioned in section 100.1(b) of the Commonwealth Act (section 4(1)(b) of the TCPA) be retained?

With respect to the first matter, the COAG Committee noted that the Australian definition was "*among the most tightly drafted and human rights respecting definitions in the domestic laws of any country*".[46] The COAG Committee saw no justification for limiting the range of actions and harm likely to be caused by such actions as they are set out in the definition. In particular, the COAG Committee saw no justification to restrict the notion of harm to death or serious physical harm to a person or persons as urged by some submitters.

With respect to the second, the COAG Committee was firmly of the view that "*intention of advancing a political, religious or ideological cause*"[47] should be retained. It was influenced by a number of considerations.

1. The definition, as part of Australian legislation, has been considered by appellate courts in its current form on a number of occasions. Its meaning and application are relatively clear.
2. The presence of this motivation distinguishes terrorism offences from other criminal offences.
3. It is part of the United Kingdom legislation and has been extensively scrutinized by courts in that jurisdiction.
4. The three forms of motivation will commonly run together and evidence of one will illuminate a state of mind that reflects the presence of the others.
5. No acceptable justification in the tenets of any religion can exist that warrants the unjustified killing of innocent civilians.

44 TCPA at section 4.
45 COAG Report at paragraphs 22-45.
46 COAG Report at paragraph 31.
47 COAG Report at paragraph 32.

6. The need to prove this motivation appropriately makes the task of the prosecution more difficult and reflects the special nature of a terrorism offence, distinguishing it from other crime.

However, the COAG Committee considered some changes to the definition were warranted and made the following recommendations:

> **"RECOMMENDATION 1: Criminal Code - *Section 100.1 – Definition of a terrorist act – 'threat of action'***
>
> *The Committee recommends that 'threat of action' be removed from the definition and a separate offence of 'threatening to commit a terrorist act' be created."*

Also, the COAG Committee noted that NSW and SA (in "police powers" legislation) have also removed "threat of action" from their definitions.

> ***"RECOMMENDATION 2:* Criminal Code - *Section 100.1 – Definition of a terrorist act – 'hoax threat'***
>
> *The Committee recommends that an additional offence be inserted into Part 5.3 of the Criminal Code to provide for a 'hoax threat' to commit an act of terrorism."*
>
> ***"RECOMMENDATION 3:* Criminal Code - *Section 100.1 – Definition of a terrorist act – meaning of 'harm'***
>
> *The Committee recommends that 'harm' in subsection 100.1(2) be amended to allow the harm contemplated by the Act to extend to psychological harm, together with any consequential amendment, for example, to subsection 100.1(3)(b)(i)."*

The COAG Committee's intention was to extend "harm" to "psychological harm", which is well recognised medically.

> ***"RECOMMENDATION 4:* Criminal Code - *Section 100.1 – Definition of a terrorist act – 'hostage taking'***
>
> *The Committee recommends that 'hostage-taking' be included in subsection 100.1(2)."*

The COAG Committee was concerned that "hostage taking" might not fit precisely into the current definition and that it should be included as a specific example of a terrorist act.

> ***"RECOMMENDATION 5:* Criminal Code - *Section 100.1 – Definition of a terrorist act – United Nations and its agencies***
>
> *The Committee recommends that subsection 100.1(1)(c)(i) extend to include reference to the United Nations, a body of the United Nations, or a specialised agency of the United Nations."*

The COAG Committee accepted that this was a desirable change, reflecting Australia's broader role in international efforts to control terrorism.

> ***"RECOMMENDATION 6:* Criminal Code - *Section 100.1 – Definition of a terrorist act – Interaction with the law of armed conflict***
>
> *The Committee recommends that consideration be given to incorporating in the legislation an amendment to the effect that Part 5.3 of the Criminal Code will not apply to acts committed by parties regulated by the law of armed conflict."*

The COAG Committee noted that following a 2006 review the government had not supported this change but nevertheless felt it should be made.

> ***"RECOMMENDATION 7:*** **Criminal Code -** ***Section 100.1 – Definition of a terrorist act – Exemption for Australian forces***
>
> *The Committee recommends that consideration be given to excluding from the definition an act done by a person in the course of, and as part of, his or her service in any capacity with the Australian armed forces."*

To ensure certainty the COAG Committee considered this change should be made.

4.3 INSLM Reports

The INSLM's most detailed analysis of the Commonwealth definition (and consequently of the Victorian definition) was undertaken in the 2012 Report.[48]

Three recommendations are relevant:

1. *Motivation should be removed as an element of the definition of a terrorist act.*

In essence this was because (i) it is too difficult to prove by the prosecution and (ii) it would remove an accused's ability to glamourise the 'cause'. Intimidation should be enough in the definition without the need for motivation.

On this issue the INSLM took the opposite position to the COAG Committee.

2. *Hostage taking should be included in the definition.*

The INSLM took a similar position to that taken by the COAG Committee.

3. *Acts committed in an armed conflict (as recognised by international law) should be excluded from the definition of terrorist act*.

Again, the INSLM took a similar position to the COAG Committee.

The 2013 Annual Report of the INSLM does not take his position any further except to note that the views expressed in recommendation 3 were supported by his counterpart in the United Kingdom and had been noted as an issue for serious consideration by the United Kingdom Supreme Court.

4.4 Discussion and conclusion

The Human Rights Law Centre raised issues concerning the breadth of the definition. These and other issues relating to the definition were raised with the COAG Committee. However, they in essence related to the Commonwealth legislation and the offences created under that legislation which are based on the definition. The role of the definition in the TCPA relates to when the various powers may be exercised, a terrorist act being a key ingredient.

Having regard to the role the definition plays in counter-terrorism legislation in Australia, it is clearly desirable that as far as possible the definition be uniform in all legislation and particularly consistent with the Commonwealth legislation.

48 INSLM Report 2012 at Chapter VI.

As far as the Review Committee are aware, the recommendations of the COAG Review are still under consideration by the various Australian Governments. They also have the reports of the INSLM.

The Review Committee are of the view that the definition does not give rise to any issue under the Charter. Like the COAG Committee, the Review Committee agree with the view of Professor Ben Saul in his submission to the COAG Review that the Australian definition is:

> *" … amongst the most tightly-drafted and human rights-respecting definitions in the domestic laws of any country…."*[49]

Reference has been made to the views expressed in the COAG Report and the INSLM Report 2012 about the retention of the "cause" mentioned in the definition. The COAG Committee was firmly of the view that it should be retained. The INSLM was of the view that it should be abolished. The reasons for their respective views have been summarised earlier.

Essentially for the reasons expressed by the COAG Committee[50] and which have already been referred to, the Review Committee are of the view that the reference to "cause" should be retained in the definition of terrorist act in the Victorian legislation. As Professor Saul stated, its retention is necessary to distinguish terrorism from other kinds of political or common crime.[51]

With respect to the COAG Committee's Recommendation 3 "meaning of harm", Recommendation 4 "hostage taking" and Recommendation 5 "United Nations and its agencies", the Review Committee agree that the changes recommended should be made to the definition of "terrorist act" for the reasons expressed by the COAG Committee.

The COAG Committee's Recommendations 1, 2, 6 and 7 although, in the Review Committee's view, of merit, essentially relate to the offences in the Commonwealth legislation and do not bear upon the definition in the TCPA. This legislation has a different purpose, relating to the exercise of particular powers, not the creation of offences. Consequently, it does not appear to the Review Committee that implementation of those recommendations would require amendment to the definition in the Victorian legislation.

4.5 Recommendation

Recommendation 1

That the definition of "terrorist act" in the Terrorism (Community Protection) Act 2003 be amended as recommended in Recommendations 3, 4 and 5 of the COAG Report.

49 Submission of Professor Ben Saul to COAG Review dated 4 December 2012, at page 2.
50 COAG Report at paragraphs 32 - 34.
51 Submission of Professor Ben Saul to the COAG Review dated 4 December 2012.

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5 The Charter of Human Rights and Responsibilities

5.1 Overview of the legislation

5.1.1 Origin

The Charter of Human Rights and Responsibilities Bill 2006 was introduced into the legislative assembly by the Attorney-General on 4 May 2006. This followed an extensive consultation process in the previous year, and because:

> *"…Australia is the last major common-law based country that does not have a comprehensive human rights instrument that ensures that fundamental human rights are observed and that the corresponding obligations and responsibilities are recognised."*[52]

He reminded members that other common-law countries such as the United Kingdom and New Zealand had recently enacted charters, and informed them that the Victorian laws had been developed using guidance obtained from those countries.

The Charter commenced on 1 January 2007. Part 2 of the Charter lists the human rights to be respected and protected by the legislation, based on those civil and political rights recognised in the International Covenant on Civil and Political Rights, ratified by Australia in 1980. However, this Part (in section 7) does go on to reflect that these rights are not absolute:

> *"… but must be balanced against each other and against other competing public interests."*[53]

The Attorney-General said of what is now section 7:

> *"The general limitations clause embodies what is known as the 'proportionality test'. The weight to be attached to each of the factors in clause 7 will vary depending on the particular rights and circumstances that are being considered. Laws which are necessary in order to protect security, public order, public safety or public health which limit human rights are examples of laws which can be demonstrably justified in a free and democratic society."*[54]

He continued:

> *"This bill will not stop the government from taking strong action to protect the community from terrorist threats or criminal activity."*[55]

52 *Victorian Parliament Hansard* (Thursday 4 May 2006) at page 1290.
53 Ibid at page 1291.
54 Ibid.
55 Ibid.

5.1.2 Application to the *Terrorism (Community Protection) Act 2003*

As the Charter came into force on 1 January 2007, after the enactment of the TCPA, the TCPA Amendment Act and TCPA Further Amendment Act, it had no relevance to the terrorism provisions as they were made. However, the Charter is in force now, and its provisions have had a considerable effect on the way laws are made in Victoria. It was therefore necessary for the Review Committee to consider the provisions currently in force as if they were being made at the present time and within the statutory framework as now provided by the Charter.

Moreover, the TCPA is due to expire on 1 December 2016. If the provisions of the TCPA are to be re-enacted or remade with amendments before that date, the Charter considerations will need to be taken into account. The Review Committee understand that a statutory amendment having the effect of repealing or extending that expiry date would also have the legislative effect of re-enacting these provisions, so the Charter considerations again apply. They are set out briefly below, and the Review Committee consider each set of provisions currently contained in the TCPA, taking into account the appropriate human rights considerations, in the chapters that follow.

The Charter may require a court in a particular case to perform a delicate balancing task when considering legislation. As Lord Hope of Craighead said, in a United Kingdom decision on its laws relating to executive detention orders and their compatibility with the European Convention on Human Rights, given domestic effect in the United Kingdom by the *Human Rights Act 1998*;

> *"It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual's right to liberty."*[56]

5.1.3 Provisions of the Charter Act

The main purpose of the Charter is to protect and promote human rights by:

- Setting out the human rights that Parliament specifically seeks to protect and promote;
- Ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights;
- Imposing an obligation on all public authorities to act in a way that is compatible with human rights;
- Requiring statements of compatibility with human rights to be prepared in respect of all bills introduced into Parliament and enabling the SARC to report on such compatibility;
- Conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant minister to respond to that declaration; and
- Enabling Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision.[57]

56 A v Secretary of State for the Home Department [2005] AC 68, at page 132.

57 The Charter at sections 1(2) and (3)(a).

Expanding on this, Part 3 of the Charter makes provision for this preferred Parliamentary model for giving effect to these human rights. It operates in the following way:

- Every bill introduced into Parliament must be accompanied by a "statement of compatibility,"[58] describing how the legislation is compatible with the Charter, and if there are limitations on any human rights in the proposed legislation, how those limitations are justified, balancing the factors in section 7(2);
- The SARC is given a role in scrutinising each bill introduced into Parliament, and reporting back to Parliament as to whether the bill is consistent with the Charter or not;[59]
- Courts are not entitled to strike down legislation, but the Charter does provide for the courts to interpret laws in such a way as to make them compatible so far as is possible. Statutory provisions remain valid notwithstanding any inconsistency with the Charter;[60]
- The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission (the Commission) must be notified by a party to proceedings in which a Charter point arises, or where there is a referral to the Supreme Court (courts and tribunals may refer any issue arising under the Charter to the Supreme Court), and have a right to intervene in those proceedings;[61]
- If the Supreme Court decides that a statutory provision cannot be interpreted consistently with the Charter, as described above, it may make a "declaration of inconsistent interpretation."[62] Before making such a declaration, the Court must notify the Attorney-General and the Commission and give them the opportunity to intervene or make submissions;
- Within six months of receiving a declaration of inconsistent interpretation, the minister responsible for the legislation must prepare a response, which is then tabled in Parliament and gazetted, along with the declaration, so that Parliament may consider the provision anew in the light of the Court's opinion.[63]

So that human rights are observed by the administration, and in the development of policy, the Charter makes it unlawful for any public authority to act in a way that is inconsistent with the human rights protected by the Charter. "Public authority" is given a wide interpretation by section 4, so that it includes entities whose functions "include functions of a public nature" whilst they are exercising those functions. It provides for the seeking of a remedy, and by whom, but does not make provision for new causes of action. A claim for a remedy or relief under the Charter may only be "piggy-backed" onto a legal proceeding for relief or remedy already extant. Moreover, there is no provision for a claim that results in an award of damages for a breach of a human right.[64] The Attorney General stated:

> *"This reflects the government's intention that any available remedies should focus on practical outcomes rather than monetary compensation."*[65]

58 Ibid at section 28.
59 Ibid at section 30.
60 Ibid at section 32.
61 Ibid at sections 34 and 35.
62 Ibid at section 36.
63 Ibid at section 37.
64 Ibid at section 39.
65 *Victorian Parliament Hansard* (Thursday 4 May 2006) at page 1294.

The following human rights are protected and promoted:[66]

- Right to recognition and equality before the law;
- Right to life;
- Right to protection from torture and cruel, inhuman or degrading treatment;
- Right to freedom from forced work;
- Right to freedom of movement;
- Right to privacy and reputation;
- Right to freedom of thought, conscience, religion and belief;
- Right to freedom of expression;
- Right of peaceful assembly and freedom of association;
- Right to protection of families and children;
- Right to take part in public life;
- Cultural rights;
- Property rights;
- Right to liberty and security of the person;
- Right to humane treatment when deprived of liberty;
- Rights of children in the criminal process;
- Right to a fair hearing; and
- Rights in criminal proceedings.

However, it is possible to lawfully limit a person's human rights under the Charter in certain circumstances. Those rights may be limited under law, but subject only to "such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom",[67] and taking into account all relevant factors including:

- The nature of the right;
- The importance of the purpose of the limitation;
- The nature and extent of the limitation;
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Finally, and in a deliberate statement of intent in terms of protecting the sovereignty of Parliament, section 31 provides that, in "exceptional circumstances", Parliament may make an express declaration in a statute, or in a provision within it, that the statute or provision will operate notwithstanding that it is inconsistent with the rights set out in the Charter. In the words of the Attorney-General, "exceptional circumstances" may include:

> *"threats to national security or a state of emergency which threatens the safety, security and welfare of people in Victoria."*[68]

66 The Charter at sections 8 – 25.
67 Ibid at section 7(2).
68 *Victorian Parliament Hansard* (Thursday 4 May 2006) at page 1291.

The effect of such an override declaration is that for five years thereafter, the Supreme Court may not make a declaration that it is unable to interpret an act consistently with the Charter, in other words the Charter has no effect on the legislation in question. That override may be extended by Parliament wherever the exceptional circumstances continue to exist.

5.1.4 Review of the Charter

Part 5 of the Charter provides for it to be reviewed after four and eight years of operation. The first part of this duty was comprehensively carried out by the SARC, which tabled its report in September 2011. On many issues, such as weakening or strengthening the Charter, the SARC was divided.

The Government responded in March 2012. Amongst other things, it agreed to repeal the override provision mentioned above, as it had never been used and was regarded as unnecessary. Parliament has always had the ability to overrule or override its own previous legislation. This repeal has yet to be carried out.

It also reinforced its earlier conviction that the Charter should not provide for monetary compensation for its breach. It should retain its emphasis on engagement with issues relating to rights.

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6 The Public Interest Monitor

6.1 Overview of the *Public Interest Monitor Act 2011*

6.1.1 Origin

The second statutory safeguard to take effect after the revision of the TCPA and after the enactment of the Charter, was the creation of the Public Interest Monitor (PIM) and the insertion of Part 1A into the TCPA, with effect from 10 February 2013, by section 44 of the *Public Interest Monitor Act 2011* (PIM Act).

The main purposes of the PIM Act are to establish the offices of Principal Public Interest Monitor and Deputy Public Interest Monitors and to confer functions on them in respect of *ex parte* applications made under four statutes, being the *Major Crime (Investigative Powers) Act 2004,* the *Surveillance Devices Act 1999,* the *Telecommunications (Interception) (State Provisions) Act 1988* and the TCPA.

During debate on the TCPA Amendment Act, various members of Parliament raised the existence of a PIM in Queensland, asking why such an office could not be created in Victoria. That office had been established by section 157 of the *Police Powers and Responsibilities Act 2000* (Qld) to oversee applications for covert search warrants or permission to use surveillance devices. His or her functions are now found at section 742 of that Act, though they have been supplemented to cover applications for preventative detention orders by the *Terrorism (Preventative Detention) Act 2005* (Qld). In November 2006, the Australian Capital Territory legislated for the creation of a panel of public interest monitors to be appointed, for the purpose of application hearings for preventative detention orders, under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

The establishment of a PIM for Victoria was an issue that had also been debated by the SARC, in 2003 and again in 2006, and the issue was referred by its members to the Premier.[69]

In his response to the SARC, the Premier stated:

> *"As all applications must be made before a Supreme Court justice, all of whom are highly experienced in considering ex parte applications, creating a new statutory position such as a PIM is not necessary under the preventative detention order scheme. The PIM could only review the process at the interim hearing without the benefit of obtaining the affected person's response to the evidence. In any case, the person has a right to contest the application at the resumed hearing to confirm, vary or revoke the order and the conditions attaching to it."*[70]

69 SARC Alert Digest No 1 of 2006.
70 SARC Alert Digest No 2 of 2006.

By 2011, however, concerns had been raised by the Victorian Ombudsman in a report concerning the Office of Police Integrity,[71] and in particular, the oversight of telephone intercept powers. The introduction of the PIM formed part of the Government's reform of Victoria's integrity regime generally. The first parts of the PIM Act came into force on 18 September 2012, and Mr Brendan Murphy QC was appointed as the first Principal PIM by the Governor in Council. An accompanying media release stated:

> *"The Principal Public Interest Monitor will be responsible for independently testing the evidence used by crime fighting and integrity bodies to apply for covert and coercive investigative powers, in the public interest."*[72]

6.1.2 Purpose

As the media release indicated, the purpose of the PIM is to provide checks and balances on the use of significant covert and coercive investigative powers in Victoria. The PIM has a role in applications for the use of covert and coercive powers, representing the public interest by testing the content and sufficiency of material supplied in support of such applications and the circumstances of those applications.

The provisions of Part 1A of the TCPA apply whenever an application is made for:

- A covert search warrant;
- A PDO, or an extension, variation or revocation of such an order; or
- A contact order, or a variation or revocation of such an order.[73]

All information that is supplied to the Supreme Court in support of an application for any of the above, whether it be contained in a written application, an affidavit or is conveyed during a telephone application, must also be supplied to the PIM by the applicant. Importantly, as the applications are often made *ex parte* (always so in the case of covert warrants, by definition) the applicant is also under a duty to supply the PIM with any information of which he or she is aware which may be adverse to the application.

Following receipt of this information, the PIM is entitled to:

- Appear at the hearing;
- Ask questions of any person giving the information; and
- Make submissions to the Court about the appropriateness of granting the application. The submissions may be in person, or by telephone, fax, email or in any other way that is reasonable.[74]

Except in the case of an application for a covert search warrant, if it has not been reasonably possible to contact the PIM, the hearing may proceed without him or her being notified, so long as he or she is contacted as soon as possible thereafter and supplied with the information that would have otherwise been supplied before or during the hearing.

71 *Investigation into the Office of Police Integrity's handling of a complaint,* October 2011.

72 Media Release by the Hon. Andrew McIntosh MP, Minister for Corrections, Minister for Crime Prevention and Minister responsible for the establishment of an anti-corruption commission, dated 18 September 2012.

73 TCPA at section 4C.

74 Ibid at section 4F.

All documentary evidence supplied to the PIM before, during or after the application must be returned to the police as soon as practicable afterwards.

Detailed provisions regarding the notifications that must be given to the PIM, the documents and other information to be submitted to the PIM and the circumstances in which the PIM may be regarded as not reasonably contactable are contained in regulations made under section 21.[75]

6.2 Public Interest Monitor operations

The PIM and two Deputy PIMs met with the Review Committee and explained their modus operandi.

They pointed out that they had yet to be involved with any applications under the TCPA, though they had gained a good deal of experience in dealing with applications under the *Major Crime (Investigative Powers) Act 2004,* the *Surveillance Devices Act 1999* and the *Telecommunications (Interception) (State Provisions) Act 1988.*

To accommodate urgent applications, the PIM works on a 24-hour, 7 days a week roster, and is contactable at all times should an urgent application arise.

The PIM advised that he is well aware of the need to keep information secure and confidential and adequate arrangements are in place at all times.

6.3 Discussion and conclusions

Whilst the PIM has yet to be involved in matters under the TCPA, the Review Committee are satisfied that his existence and operations provide an important safeguard in respect to similar applications under other crime fighting and integrity legislation.

Victoria Police, in its written submission, raised an issue of concern with the provisions of Part 1A. Generally, applications may be made in the absence of the PIM where the PIM is not reasonably able to be contacted, providing that the PIM is notified as soon as possible thereafter and supplied with all of the evidence and information. This does not apply, however, in the case of an application for a covert search warrant under Part 2.[76]

The Review Committee discussed this with the PIM. In response, the PIM advised that this had never been an issue with regard to applications under other legislation (of which there were some 67 between 10 February and 30 June 2013), because the 24-hour roster operates.

On that basis, the Review Committee does not consider Victoria Police's concern regarding the availability of the PIM is justified.

75 The Public Interest Monitor Regulations 2013, S.R. No. 8/2013.

76 TCPA at section 4F(3).

The COAG Committee reviewed the use of a PIM in the context of Commonwealth control orders, and took submissions from the Queensland PIM in Brisbane. In seeking to find a balance between fairness to the subject of a control order and the security implications attaching to some evidence, the COAG Committee gave consideration to a nationwide system of PIMs. It was felt that such a system would be a more difficult, expensive and less effective system to implement on a practical level than the use of a Special Advocate system, along the lines of that utilised in the United Kingdom.[77] Such a Special Advocate system would allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary.[78]

In terms of the Victorian legislation, the Review Committee find the provisions of Part 1A of the TCPA to be adequate, effective and necessary. The Review Committee do not consider that any issue arises under the Charter with respect to Part 1A and do not consider there is any need for amendment to these provisions.

77 COAG Report at paragraph 238.

78 Ibid at Recommendation 30.

7 Part 2 – Covert Search Warrants

7.1 Summary of the legislation

7.1.1 Origin

Part 2 of the TCPA remains largely unchanged since 2003, save for an important extension to the circumstances in which the police may apply for covert search warrants, made by an amendment to the Act in 2006.[79] As discussed in Chapter 6 of this Report, provision for the involvement of the PIM in the application process was added in 2013.[80]

7.1.2 Purpose of the provisions

A judge of the Supreme Court may issue a covert search warrant to a police officer where that judge believes that a terrorist act has happened or is likely to happen, and the issue of the warrant will assist the police in responding to it or preventing it. In urgent circumstances, the warrant may be issued on the basis of a telephone application. The warrant is covert in the sense that the occupier of the premises in question knows nothing about its issue, or the subsequent entry and search carried out under its authority. For the purposes of the TCPA, "premises" includes a vehicle or part of a vehicle.[81]

7.1.3 Applications for a covert search warrant

A police officer may apply to the Court for a covert search warrant at any time if he or she reasonably suspects or believes:

- That an act of terrorism has been committed, is being committed or is likely to be committed in the future; or
- That a person who resides at the premises which are the subject of the application, or who visits those premises, has done something indicating that he or she is preparing for or planning an act of terrorism, or has participated in training provided by a terrorist organisation[82] connected with involvement in an act of terrorism; or
- There has been in the past, or there is ongoing, some activity on those premises connected with an involvement in an act of terrorism.[83]

79 TCPA Amendment Act at section 8.
80 PIM Act at sections 45 and 46.
81 TCPA at section 3.
82 As defined by Division 102 of the Criminal Code.
83 TCPA at section 6(1)(a).

The officer seeking a warrant under this Part must also reasonably believe that the entry and search of the premises will substantially assist in preventing or responding to an act or suspected act of terrorism, and that it is necessary for the success of the warrant's execution that it be carried out without the knowledge of the occupier. Before applying for a warrant, the police officer must seek the authorisation of the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner.

An important addition to the police powers in this regard, provided by virtue of the TCPA Amendment Act, is that an application can be made for a warrant of this kind where the police officer's suspicions relate to terrorist activity generally, and not to a particular and specific act. In other words, the warrant may be used to prevent the planning of a terrorist act at some unknown time or place, or where the actual target of the attack is unknown.[84]

Generally, an application for a warrant must be made in Court, be in writing and be supported by an affidavit.[85] Provision for such applications is made by Order 11 of the Supreme Court (Criminal Procedure) Rules 2008, and a standard form with which an application may be made is attached to those Rules.[86] The applicant must inform the PIM of the application.[87]

The judge hearing an application under this Part must first be satisfied that:

- The written application sets out the grounds for seeking the warrant;
- The police officer making the application has provided such additional information as the judge requires in support of those grounds (this information may be provided orally);
- The information provided by the officer is verified by affidavit or on oath before the judge; and
- There are reasonable grounds for the police officer's suspicion or belief.[88]

Once satisfied with the above matters, the judge must take into account the following:

- The gravity and nature of the act of terrorism (or suspected act);
- Whether, and to what extent, the powers sought under the warrant would assist in the prevention of an act or suspected act, or in the response to an act or suspected act that had already occurred;
- The effect that the grant of the warrant sought might have on the privacy of the occupier of the relevant premises;
- Any conditions (or restrictions) that might be placed on the warrant if granted; and
- Any submissions made by the PIM.[89]

84 Ibid at section 6(1A).
85 Ibid at section 7(1).
86 Supreme Court (Criminal Procedure) Rules 2008 Rule No 12/2008 – Order11, Rule 11.03, Form 6-11A.
87 TCPA at section 7A.
88 Ibid at sections 7(2) and 8(1).
89 Ibid at section 8(2).

Applications for covert search warrants are heard in camera. Ordinarily, members of the public are entitled to attend court hearings, and the media may report on them. However, in this instance, the Court remains closed to ensure that any information that could jeopardise the successful execution of the warrant is not made public. It is an offence to publish a report of an application hearing or of any information derived from it, unless the Court allows it.[90]

However, applications for a warrant may be made by telephone in circumstances where, in the police officer's view, urgency requires it.[91] An affidavit in support of the application must still be prepared. In these circumstances it can be faxed to the Court, sworn or unsworn. The final sworn affidavit must be provided to the Court no later than the day after the telephone application.

The preconditions set out above, and the matters to be taken into account by the judge, apply equally to telephone applications as they do to those made in person.

If a telephone application is granted and a warrant issued, it is faxed to the applicant, where the means to do so are available. In any event, the applicant must be informed of the terms of the warrant and the reasons for its issue, as well as the date and time of its issue. If a copy has not been faxed to the applicant, then he or she must prepare the warrant in the terms described over the telephone, and send it to the Court no later than the day after its execution or expiry, whichever is the sooner.

7.1.4 Grant of a covert search warrant

More than one warrant may be issued in respect of any particular premises. In any event, each warrant must contain the following information:

- Clear confirmation that its purpose is to assist in the prevention of an act or suspected act of terrorism, or to assist in the investigation of such an act or suspected act;
- The address or location of the relevant premises; as mentioned above, "premises" in this context includes a vehicle or a part of a vehicle that will not, generally speaking, have an address;
- The name of the applicant, and the name (or a description) of anyone else who will take part in enforcing the warrant;
- The date of issue of the warrant, and the period for which it will remain in force (not being more than 30 days);
- The name(s) of the occupier(s) of the relevant land, place, building or vehicle, if known;
- Whether the warrant authorises more than one search and entry;
- The name of, or a description of, the sort of thing that is being searched for, or that may be seized, or photographed, etc; and
- Any conditions placed on the warrant by the issuing judge.[92]

A standard form of warrant is also attached to the above-mentioned Supreme Court Rules.[93]

90 Ibid at section 12.
91 Ibid at section 10.
92 Ibid at section 8(3).
93 Supreme Court Rules Order 11, Rule 11.05, Form 6-11B.

In terms of the conditions which the Court may impose on a warrant, the Explanatory Memorandum to the Bill envisaged, as one example, that if the purpose of a warrant was short-lived, a condition might require the owner of premises to be informed that a search had occurred, after a suitable period of time. This, it was argued, would provide an additional safeguard on the issuing of a covert search warrant, intended to ensure that the power to obtain such a warrant is not abused. This intention was reiterated by the Premier in his response to the consideration of the Bill by the SARC, and its subsequent comments.[94]

7.1.5 What is authorised by a covert search warrant?

Under section 9(1)(a) of the TCPA, a warrant authorises the applicant police officer, together with any other person that is named or described in the warrant, and with any necessary equipment, to enter the land, place, building or vehicle named or described in the warrant. Entry to any specified adjoining premises, or to specified premises which provide an access route to those which are the subject of the warrant, is also permitted. Entry by force, or by the impersonation of someone else, is permitted where necessary. It should be noted that a warrant can only authorise *entry* by impersonation and not, for example, questioning whilst continuing the impersonation.

Once inside, where authorised by the warrant, the officer(s) may:

- Search for whatever items were named or described in the warrant;
- Seize those items;
- Replace any item so seized, so as to outwardly cover-up its seizure;
- Copy, photograph or describe in writing or sketches the thing named or described;
- Use any electronic equipment that happens to be on the premises for the purposes of such copying, etc; and
- Test or keep a sample of anything found as named or described.[95]

If the Court believes that an item seized in the execution of a warrant may be returned to its owner "consistently with the interests of justice", or in other words because the Court feels it would be right to do so, it may order the return of that item.

7.1.6 Reporting requirements to the Court

No later than seven days after the expiration of the warrant, the officer to whom the warrant was granted must report back to the Court. Failure to do so may result in the commission of an offence under the TCPA.[96] That report must state:

- Which powers were exercised;
- Which conditions on the warrant were complied with, and how;
- The period during which the entry and search were conducted;
- The name of, or a description of, any person who entered the premises in accordance with the warrant;
- The name(s) of the occupier(s) of the premises entered, if known; and

94 SARC Alert Digest No 1 of 2003.
95 TCPA at section 9(1)(b)-(g).
96 Ibid at section 11.

- Details of any activity undertaken in the execution of, and as authorised by, the warrant (such as any seizure, item replacement, photographing, etc).

Additionally, the applicant police officer must provide, as part of the above-mentioned report to the issuing Court, an analysis of any benefit that was derived from the issue and exercise of the warrant, in terms of any act or suspected act of terrorism prevented or investigated.

7.1.7 Reporting requirements to the Attorney-General and Parliament

As soon as is practicable, but in any event within 3 months of the end of each financial year,[97] the Chief Commissioner must submit a report to the Attorney-General describing the exercise (if any) by Victoria Police of the powers contained in Part 2 during that year.[98] The report must record:

- The number of applications made to the Court and the number of warrants granted;
- The number of telephone applications made;
- The number of applications refused;
- The number of premises covertly entered, and an itemised list of the occasions when any powers were exercised in accordance with those warrants; and
- Any other information that the Attorney-General considers appropriate.

The Attorney-General must lay that report before both Houses of Parliament within 12 sitting days of its receipt, to enable public scrutiny and debate about the use of warrants granted under this Part of the TCPA.

7.1.8 Further safeguards

Reporting requirements apply to the use of these powers to allow for judicial, ministerial, parliamentary and ultimately public oversight of how the powers are exercised and how regularly. Additionally, a number of other safeguards have been built into this Part of the TCPA to ensure as far as possible that the powers are exercised correctly and accountably. For example:

- Warrants may only be issued by the Supreme Court; this contrasts with the use of the AFP warrantless search powers contained in section 3UEA of the Crimes Act 1914 (Cth);
- Applications for a warrant, whether in person or by telephone, cannot be made until the applicant has obtained the internal approval of a senior police officer;
- The Supreme Court judge hearing the application may seek such additional information as he or she sees fit, and must be satisfied that there are reasonable grounds for the belief or suspicion held by the officer;
- The judge is specifically directed in section 8(2)(c) of the TCPA to consider the effect of the issue of a warrant on the privacy of the occupier of the premises in question, expressly providing for the type of balancing exercise required by the Charter;
- The judge, in granting the application, may place such conditions on the warrant as he or she sees fit;

97 3 months limit added by section 53, *Justice Legislation Amendment Act 2009.*

98 TCPA at section 13.

- The PIM will always be involved, unlike other applications to the Court that may be made under the TCPA;
- The Court has the power to order the return of seized items;
- The fact that, in any subsequent court proceedings of any kind, if the police are unable to produce the warrant authorising any entry, search or seizure, then that entry, search or seizure must be deemed by that court to have been conducted unlawfully, with the legal and evidential consequences that may flow from that;[99]
- The fact that the Part is the subject of further and regular Parliamentary scrutiny through the use of a sunset provision (originally December 2006 under section 41, now December 2016) and provision for reviews, such as this Review (section 38).

7.2 Operation of the legislation

To date the powers granted under this Part have had limited use in Victoria.

The annual reports submitted to the Attorney-General and tabled in Parliament reveal that the covert search warrant powers under this Part of the TCPA have been used on just one occasion, during the financial year 2004-2005. Six applications for warrants were made, and all were granted by the Supreme Court on appearance. Under those warrants, six premises were entered and searched, and under the terms of five of them, items were seized from those premises and electronic equipment was operated.

Those warrants were issued in the course of an investigation known as "Operation Pendennis". This was a lengthy cross-border multi-agency operation which led to the conviction of a number of men in Victoria and New South Wales for various terrorist offences under the Criminal Code, based partially on a substantial amount of "extremist and jihadi" literature and violent videos seized from computers under the search warrants. This material was said in court to have been used to energise, motivate and simultaneously desensitise members of the group. In Melbourne, 13 men were charged. One pleaded guilty, seven were found guilty of knowingly being a member of a terrorist organisation (one of those also being concerned with directing or managing a terrorist organisation), four were acquitted and no verdict was reached on one person.[100] In NSW, nine men were charged with conspiracy to do acts in preparation for a terrorist act. Following a lengthy trial, five were convicted. Four had pleaded guilty to lesser offences.[101]

For the years 2003-2004 through to 2011-2012, the appropriate annual reports were tabled.

With regard to the 2012-2013 period, Victoria Police informed the Review Committee that six covert search warrants were applied for and issued, but not executed. They provided information relating to the six warrants and the reasons they were not executed. There was no annual report tabled for the year 2012-2013.

99 Ibid at section 10(8).

100 Benbrika & Ors. v The Queen [2010] VSCA 281.

101 R (Commonwealth) v Elomar & Ors [2010] NSWSC 10.

7.3 COAG Report

The COAG Report did not review, or comment upon, Part 2 of the TCPA.

The COAG Committee did however inquire into federal police powers in relation to terrorist acts and terrorist offences. In particular, for the purposes of this chapter, that Committee discussed section 3UEA of the *Crimes Act 1914* (Cth),[102] which reads:

> *"(1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that –*
>
> *(a) it is necessary to exercise a power under subsection (2) in order to prevent a thing that is on the premises from being used in connection with a terrorist offence; and*
>
> *(b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.*
>
> *(2) The police officer may –*
>
> *(a) search the premises for the thing; and*
>
> *(b) seize the thing if he or she finds it there."*

Predictably, such provision for warrantless searches came under considerable criticism before the COAG Committee. However, in its response, the COAG Committee placed particular emphasis on the fact that these powers are intended for use in only genuine emergency situations. Its report stated:

> *"In the context of terrorism, we do not consider that there is a need for evidence to justify the conclusion that emergency situations may arise where it is simply impossible or impracticable to obtain a warrant before seizing material that is to be used in connection with a terrorist offence. One only has to contemplate intelligence suggesting the presence of explosives in a house to realise that this is so."*[103]

It is notable, as mentioned, that this is a power to enter premises without a warrant which requires no prior judicial authorisation, in contrast to the Victorian power under Part 2. Moreover, as terrorism operations are more often than not joint operations with federal investigation agencies, this is a power that would be available in urgent circumstances, where Victoria Police have concerns about time factors.

7.4 Submissions

7.4.1 Victoria Police

In its first written submission to the Review Committee, expanded upon in meetings with officers, Victoria Police stated that the availability of covert search warrants remains a critical investigative power. However, they raised three issues for the Review Committee to consider :

102 Inserted by section 3 and schedule 4 to the *National Security Legislation Amendment Act 2010* (Cth).

103 COAG Report at paragraph 335.

7.4.1.1 Obtaining a warrant in circumstances where the PIM cannot be contacted

This issue is dealt with at Section 6.3 of this Report. The requirement to notify the PIM in this instance does not reduce the effectiveness of the provisions As already stated, the Review Committee do not consider the concern of Victoria Police is justified.

7.4.1.2 Telephone applications in urgent circumstances

As set out above, section 10 of the TCPA allows the police to apply to the Supreme Court for a covert search warrant by telephone in urgent circumstances. Section 10(2) requires the applicant to prepare an affidavit setting out the grounds on which the warrant is sought, though the application can proceed without it being sworn in advance of the telephone hearing in order to provide for the urgency. Victoria Police's written submission made the point that this is a time consuming exercise, and given the purpose of the provision is to allow for action to be taken quickly, requiring an affidavit in urgent circumstances is an unnecessary risk to the public.

An alternative approach suggested by Victoria Police is the one provided for in respect of the installation of covert surveillance devices under the *Surveillance Devices Act 1999*, where there is a suspected risk of serious personal violence or substantial property damage. Section 26 of that Act reads:

> *"(1) A law enforcement officer of a law enforcement agency may apply to a senior officer of the agency for an emergency authorisation for the use of a surveillance device if the law enforcement officer on reasonable grounds suspects or believes that—*
>
> *(a) an imminent threat of serious violence to a person or substantial damage to property exists; and*
>
> *(b) the use of a surveillance device is immediately necessary for the purpose of dealing with that threat; and*
>
> *(c) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and*
>
> *(d) it is not practicable in the circumstances to apply for a surveillance device warrant.*
>
> *(2) An application may be made orally, in writing or by telephone, fax, e-mail or any other means of communication.*
>
> *(3) A senior officer may give an emergency authorisation for the use of a surveillance device on an application under subsection (1) if satisfied that there are reasonable grounds for the suspicion or belief founding the application.*
>
> *(4) An emergency authorisation given under this section may authorise the law enforcement officer to whom it is given to do anything that a surveillance device warrant may authorise them to do."*

Within two business days of the emergency approval being given, approval must be sought from the Supreme Court. The Court may then confirm the approval, allowing for continued surveillance, or may refuse to confirm it, ordering the cessation of the surveillance and/or the retrieval of the device.[104]

Stressing the urgency of the situation that Victoria Police said would or ought to have been a concern of Parliament when enacting the TCPA, officers expressed the view

104 *Surveillance Devices Act 1999* at section 30.

that provision should be made for interim authorisations for covert search warrants to be given by a senior police officer.

7.4.1.3 Remote entry

Victoria Police expanded upon their first written submission and explained that given the developments in technology since the TCPA came into force, "remote entry" to a person's computer was now possible without the need to be physically present in the premises which are the subject of the covert search warrant.

The benefits of obtaining access to a computer in this way, without achieving physical entry, were explained:

- It is a much safer option for officers, avoiding the possibly of a high-risk encounter with the occupier(s) of the premises; it may also mitigate any risks of compromising the investigation though such an encounter;
- It is a less intrusive process in terms of the occupier(s) right to privacy under the Charter provisions than a physical "break-in";
- It is also a less intrusive process in terms of the occupier(s)' Charter rights in that physical evidence does not come into the police's possession by chance that may be used against the person derivatively, as may be the case in a physical entry and search of premises; and
- A search of a person's computer through such a remote entry may negate the need for a physical search under the terms of the warrant, if that search reveals nothing of concern.

However, there are currently doubts about the legality of such access, as discussed below.

7.4.2 Australian Federal Police

Members of the AFP, who also met with the Review Committee, re-iterated the evidence that they had put before the COAG Review. They stressed their belief that covert search warrant powers are an integral part of the "toolkit" available to law enforcement agencies investigating terrorism offences. They also pointed out that the execution of an "ordinary" search warrant requires that the occupier of the premises be given a copy, allowing for possible interference with evidence or notification of accomplices who, at that stage, may not be aware of the police interest in them. The use of the section 3UEA warrantless search power is only available in emergency situations, not for use in an investigative sense. The ability to gather evidence, whilst keeping the existence of the investigation confidential in terrorism matters is, in the view of AFP, essential. "Operation Pendennis" was cited as a prime example of this.

7.5 Impact of the Charter of Human Rights

Given their very nature, the use of covert search warrants would engage the occupier's right to privacy under section 13(a) of the Charter.[105] Their use is lawful, as it is provided for by this Part of the TCPA. However, the Review Committee also needs to consider whether their use may be arbitrary, and whether the limitation on the right to privacy brought about by their use is reasonable and proportionate taking into account the factors set out at section 7(2) of the Charter.

The Review Committee considered that three issues should be taken into account in this regard:

- Whether the test for issuing search warrants is sufficiently constrained to circumstances in which the purpose is sufficiently important to justify interference with privacy;
- Whether there is a way of achieving the purpose of the covert search warrant that provides less interference with privacy, particularly by reference to delayed notice warrants available in other jurisdictions; and
- Whether the procedure provides sufficient safeguards against abuse of the power or improper execution of a warrant.

7.6 Discussion and conclusions

The Review Committee were informed by Victoria Police and the AFP that the use of covert search warrants had been invaluable in investigations into possible terrorist offences in the past, and were regarded generally as an essential part of the investigation agencies' toolkit. They regard the covert search warrant provisions as being necessary and effective. There were no submissions to the Review Committee to the effect that the provisions of Part 2 were unnecessary.

With regard to the following matters raised by Victoria Police in their submissions, written and oral the Review Committee's views are as follows.

7.6.1 Telephone applications in urgent circumstances

The Review Committee are of the view that the suggested abolition of the requirement for affidavit evidence as part of the application for a warrant is not justified. Victoria Police officers are trained to provide such evidence in writing, and the fact that the evidence may be provided unsworn at the time of the telephone application means that the process should not be unduly burdensome or time consuming. In the Review Committee's opinion, the requirements of the legislation in this regard should not impact on the effectiveness of the powers. In urgent circumstances, during joint operations, the AFP power to search premises without a warrant or any prior judicial authority, as discussed above, may be used.

However, for the purposes of the TCPA, the Review Committee are of the view that the need to obtain prior authorisation from the Supreme Court for the use of a power as intrusive as the covert search warrant power is a necessary and justifiable safeguard. Authorisation of a senior police officer would not be sufficient or appropriate.

105 Section 13(a) states that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

7.6.2 Remote entry

In respect of the submissions regarding remote entry, the utility of using this method of gaining intelligence is clear. The Review Committee have been provided with advice obtained by Victoria Police from the Victorian Government Solicitor's Office (VGSO) which inclines to the view that the provisions are aimed at authorising a physical *entry* to *premises*. This view is supported by the list of things that a warrant may authorise under section 9 of the TCPA, all of which are predicated upon there being a physical presence on the premises. The advice compares the provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), which more clearly authorise the use of a computer or other device for accessing data held in a target computer under a "Computer Access Warrant".

The Review Committee are in agreement with the VGSO's advice. The Review Committee also agree with police that the legislation ought to be modified in order to keep up with technological developments that may not have been foreseen when the TCPA was last substantively amended in 2006.

In order to clarify this legal issue, it would be possible for Victoria Police to apply for a warrant under this Part for the purposes of a remote search, and thereby enable a Court to take into account all of the circumstances. If the Court ruled that there was no power to issue a warrant on that basis, a statutory amendment could then be considered.

However, the Review Committee are of the view that it is unlikely a warrant would be issued in these circumstances. Having regard to the nature of the powers, a judge is likely to be cautious and to construe the legislation narrowly. Considering the provisions as a whole, the Review Committee do not believe that a search of this kind was contemplated at the time they were made.

Consequently, the Review Committee are of the view that this opportunity should be taken to put the matter beyond doubt. A clear power, along the lines of that available to ASIO, but suitably adapted so that the authority of the Supreme Court would again be required, should be included in the TCPA. The relevant ASIO provision reads:

> *"Issue of Computer access warrant*
>
> *(1) If the Director-General requests the Minister to do so, and the Minister is satisfied as mentioned in subsection (2), the Minister may issue a warrant in accordance with this section.*
>
> *Test for issue of warrant*
>
> *(2) The Minister is only to issue the warrant if he or she is satisfied that there are reasonable grounds for believing that access by the Organisation to data held in a particular computer (the **target computer**) will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the **security matter**) that is important in relation to security.*
>
> *Authorisation in warrant*
>
> *(3) The warrant must be signed by the Minister and must authorise the Organisation to do specified things, subject to any restrictions or conditions specified in the warrant, in relation to the target computer, which must also be specified in the warrant.*

Things that may be authorised in warrant

(4) The things that may be specified are any of the following that the Minister considers appropriate in the circumstances:

(aa) entering specified premises for the purposes of doing the things mentioned in this subsection;

(a) using:

(i) a computer; or

(ii) a telecommunications facility operated or provided by the Commonwealth or a carrier; or

(iii) any other electronic equipment; or

(iv) a data storage device;

for the purpose of obtaining access to data that is relevant to the security matter and is held in the target computer at any time while the warrant is in force and, if necessary to achieve that purpose, adding, deleting or altering other data in the target computer;

(b) copying any data to which access has been obtained, that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act;

(c) any thing reasonably necessary to conceal the fact that any thing has been done under the warrant;

(d) any other thing reasonably incidental to any of the above.

Note: As a result of the warrant, an ASIO officer who, by means of a telecommunications facility, obtains access to data stored in the target computer etc. will not commit an offence under Part 10-7 of the Criminal Code or equivalent State or Territory laws (provided that the ASIO officer acts within the authority of the warrant).

Certain acts not authorised

(5) Subsection (4) does not authorise the addition, deletion or alteration of data, or the doing of any thing, that interferes with, interrupts or obstructs the lawful use of the target computer by other persons, or that causes any loss or damage to other persons lawfully using the target computer.

Authorisation of entry measures

(5A) The warrant must:

(a) authorise the use of any force that is necessary and reasonable to do the things specified in the warrant; and

(b) state whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night.

Duration of warrant

(6) The warrant must specify the period during which it is to remain in force. The period must not be more than 6 months, although the Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented

(7) Subsection (6) does not prevent the issue of any further warrant.[106]

106 *Australian Security Intelligence Organisation Act 1979* (Cth) at section 25A.

7.6.3 Right to privacy

As already stated, the Charter contains a right to privacy. In the Review Committee's opinion, the power to issue a covert search warrant is sufficiently constrained to circumstances where the search would be a reasonable and justifiable interference with the right to privacy. A warrant may only be issued by the Supreme Court where it is satisfied that there are reasonable grounds for the suspicion or belief of the applicant that a terrorist act has been, is being or is likely to be committed, or there has been other terrorist activity,[107] that the entry and search would assist in preventing the terrorist act or responding to it[108] and that it is necessary for the achievement of the operation that the entry and search be carried out without the knowledge of the occupier.[109]

Moreover, the tests to be applied by the Court in considering the application in section 8(2) provide a guide as to the balancing act to be undertaken as between the breach of privacy of the person affected and the nature and gravity (and thus possible consequences) of the offences, and the effectiveness of the intended exercise of the power.

Taking all of the above into account, in so far as the exercise of the power would engage the person's right to privacy, the Review Committee are of the view that the entry and search authorised by the warrant would be a reasonable and proportionate interference with that right. It would be neither unlawful nor arbitrary.

The Review Committee considered whether there may be a means to reduce the interference with a person's right to privacy under the Charter but still achieve the object of the warrant. Advice received from Counsel drew attention to the use of delayed notice warrants in the United States.

Search warrants under this Part are carried out without the knowledge of any occupier(s). Specific provision is made for removing items and replacing them to conceal their removal.[110] Unlike similar provisions that operate in the United States, there is no need to notify the subject of the warrant of the entry and search at some point in time after the event. Section 3103 of the United States Code for Crime and Criminal Procedure provides that notification of the existence of the warrant and its execution may be delayed for up to 30 days after the event (or longer where the Court believes that giving immediate notification could result in an "adverse result").

In NSW, under section 27U of the *Terrorism (Police Powers) Act 2002* (NSW),[111] the officer who executed a covert search warrant must provide to the issuing Court, within 6 months, an "occupier's notice", containing information relating to the warrant and its execution.[112] After the approval of the judge has been granted, notice must be given to the person who occupied the premises at the time of the execution of the warrant who was suspected in connection with the terrorist offences. If there was no such suspected person, then any person over 18 years of age who occupied the premises at the time of execution must be given the notice. The giving of the notice may be

107 TCPA at section 8(1) together with section 6(1)(a).

108 Ibid at section 8(1) together with section 6(1)(b).

109 Ibid at section 8(1) together with Section 6(1)(c).

110 Ibid at section 9(1)(d).

111 These provisions, along with all of the other provisions relating to covert search warrants, were added to the Act by the *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW).

112 The occupier's notice must contain the names of the applicant and judge, the date of application and execution, the address, the number of personnel involved in the execution, the powers contained in the warrant and anything seized, placed, retrieved, etc. If the occupier was not, at the time of the execution, believed to be knowingly concerned in the commission of the terrorist act, the notice must say so.

postponed by the judge if there are reasonable grounds, but only up to a total period of 18 months, unless the judge is satisfied that there are exceptional circumstances justifying the further postponement. Moreover, if adjoining premises are entered in the execution of the warrant in order to gain access to the subject premises, a notice in the same terms must be given to the occupier of those adjoining premises.[113]

In 2005, the NSW Police applied for, and were issued with, five warrants under these provisions. Three were executed (one could not be executed covertly; the other contained the wrong address). No arrests resulted from the use of these warrants, although some people were charged as a result of ongoing related investigations. Occupier's notices were served in relation to all three executed warrants, although the service of two notices was postponed for some 30 months. There was no need to postpone service of the third, because the subject of the warrant had been charged with an offence, and the warrant was included in the brief of evidence. The "exceptional circumstances" justifying postponement beyond 18 months in the other two instances were that no charges had then been brought against the suspects. The disclosure of the fact that police had conducted covert searches would be likely to result in the suspects modifying their behaviour, to act in a more clandestine manner that would adversely affect ongoing operations.[114]

During a meeting with Victoria Police and the AFP, the Review Committee raised the possibility of introducing delayed notice provisions. Officers were strongly opposed to the introduction of such a measure in Victoria for the following reasons:

- Revealing the fact that a person has been of interest to police may place in jeopardy ongoing investigations, whereby the person of interest may "tip-off" an accomplice at that time unknown to the investigation or intelligence agencies. Some operations are years in the gestation;
- Revealing the same may also have the effect of revealing the police methodology. The AFP said that minor terrorist investigations have been abandoned in the past rather than expose those methodologies;
- Revelation may lead to retribution, with the subject of the warrant seeking out whoever may have informed on them to the police;
- There are no such delayed notice provisions in legislation governing covert intercepts and the like;
- There are already sufficient built-in safeguards.

In weighing the various arguments in the balance, the Review Committee consider there is merit in the introduction of delayed notice provisions into Part 2 of the Act. This requirement was in the mind of the Premier when he introduced the legislation in 2003, as mentioned in Section 7.1.4 of this Report. However, it was considered at the time that a delayed notice requirement imposed by the Court as a condition on the warrant under section 8(2)(d) would suffice, rather than making specific provision for it. Whilst delayed notice warrant provisions would not provide a complete answer to concerns about breaches of privacy rights, they would have the effect of reducing the impact of covert warrants, and be viewed as more reconcilable with Charter rights. Such provisions would also provide an additional safeguard.

113 *Terrorism (Police Powers) Act 2002* (NSW) at section 27V.

114 NSW Ombudsman Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, September 2008.

Taking into account the concerns of Victoria Police, the Review Committee consider that an in-built ability for the Court to delay the giving of such a notice indefinitely could be desirable, where it is satisfied that revealing the existence of the warrant or its execution might have the consequences feared. Additionally, the Review Committee see no need to include the name of the person applying for the warrant or the judge who issued it, or the people who executed the warrant. To do so could potentially invite retribution against those persons.

In the "*Review of the Terrorism (Police Powers) Act 2002*" carried out in 2007, the NSW Attorney-General's Department considered calls for the repeal of the delayed notice provisions. The review concluded:

> *"In a democratic society, it is vitally important that the exercising of law enforcement powers is transparent and accountable. While there is a public interest in permitting covert search powers in exceptional circumstances, the exercise of those powers should remain covert for only so long as is required for legitimate law enforcement purposes."* [115]

The Review Committee consider that the introduction of such provisions would lessen the interference with a person's right to privacy. The existence of an ability to delay the giving of the notice indefinitely would ensure that the effectiveness of the existing provisions was not reduced.

7.6.4 Further safeguards

Set out above are the reporting requirements and the numerous safeguards built into the provisions relating to covert search warrants.

Section 11 of the TCPA provides for reporting back to the issuing Court, within seven days of the expiry of the warrant, on its execution. Whilst the need for this may concentrate the minds of those officers carrying out the execution, the requirement appears to the Review Committee to serve little purpose. It is not within the remit of the Supreme Court to carry out routine oversight of the exercise of police powers. It is difficult to envisage what action the Court could take after receipt of the information.

The Victorian Inspectorate (VI) has been formed under the *Victorian Inspectorate Act 2011* (VI Act) to be the key oversight body within Victoria's integrity system. Its remit generally is to enhance and monitor compliance by, and provide oversight of the activities of, other integrity, accountability or investigatory bodies, particularly the Independent Broad-Based Anti-Corruption Agency (IBAC), the PIM, the Victorian Auditor-General's Office (VAGO), the Chief Examiner and the Ombudsman.

The Review Committee consider the option of creating an oversight role for the VI in respect of Victoria Police use of covert search warrants should be explored, in lieu of or in addition to the obligation to report to the Court.

The creation of such a role would require appropriate amendments to the *Victorian Inspectorate Act 2011* and the TCPA.

115 NSW Attorney-General's Department "Review of *Terrorism (Police Powers) Act 2002"* at page 46.

In their second written submission, Victoria Police stated that the current requirement to report to the Court is appropriate. The Review Committee have not viewed the report to the Court following the execution of the warrants in the Pendennis matter. If, however, the Review Committee were to recommend the creation of an oversight role, Victoria Police is of the view that the *Surveillance Devices Act 1999* provides an appropriate model.

The Review Committee do not share that view. The role of the VI in relation to those surveillance powers concentrates on the keeping of the records required by that legislation from a compliance perspective. The Review Committee do not consider this to be adequate if section 11 of the TCPA is to be replaced. A more extensive role for the VI would be necessary.

In addition, the requirement for an annual report to the Attorney-General under section 13 of the TCPA would not be necessary in its current form if there was a requirement to report to the VI in lieu of a report to the Court. Such a report would be referred to in the VI report to Parliament. However, in these circumstances, it may still be desirable that some form of reporting to the Attorney-General continue.

7.6.5 Meaning of the word "vehicle"

The meaning of the word "vehicle" was raised by Victoria Police in connection with the mandatory reporting of prescribed chemicals and other substances (at Chapter 11 of this Report). However, the Review Committee consider that an issue also arises with respect to this meaning for the purposes of Part 2 of the TCPA.

A warrant granted under section 9 provides for the entry and search of "premises". The definition of "premises" for the purposes of the TCPA includes:

(a) land; and

(b) a building or vehicle; and

(c) a part of a building or vehicle; and

(d) any place, whether built on or not.[116]

"Vehicle" is not specifically defined for the purposes of the TCPA generally, only in respect of special police powers under Part 3A of the Act,[117] where "a vessel and an aircraft" are included. The inclusion of these modes of transport in the definition for one part of the legislation only would tend to exclude them from the definition in respect of other parts. However, as has been seen from the terrorist actions in the USA in September 2001 and in Mumbai in 2008, attacks may just as easily be effected by air or sea as by any form of land-based transportation, and the full range of powers should be available to Victoria Police in those circumstances.

116 TCPA at section 4.

117 Ibid at section 21A.

For the purposes of the use of Commonwealth police powers generally, "vehicle" is defined as including:

> *"…any means of transport (and, without limitation, includes a vessel and an aircraft)."*[118]

Every other State in Australia has a specific definition of "vehicle" in its respective legislation which applies for the purposes of all of the terrorism powers. Without setting out the terms of each of them in full, they all include aircraft or vessels, or modes of transport over water or in the air.[119]

For the purposes of the TCPA, the Review Committee are of the view that the definition of "vehicle" in section 21A should be included in section 3, so that:

- Aircraft and vessels may be searched under a covert search warrant granted under this Part; and
- Aircraft and vessels may be entered for the purpose of executing a PDO under section 13S; and
- The duty to report the theft, attempted theft or unexplained loss of prescribed chemicals or other substances applies to incidents where such materials have become lost during some form of transportation by air or water.

In sum, the Review Committee are satisfied that the covert search warrant power as provided for in Part 2 is adequate, effective and necessary. In the Review Committee's view, however, the effectiveness of the power would be enhanced by the adoption and implementation of Recommendations 2 and 3.

As already stated, the Review Committee consider that the power to issue a covert search warrant is sufficiently constrained so that the search would be a reasonable and justifiable interference with the right to privacy.

However, the Review Committee are also of the view that additional safeguards should be included in Part 2 as already discussed and as set out in Recommendations 4 and 5. Such additional safeguards would bring the TCPA more in line with the requirements of the Charter whilst, in the Review Committee's view, not reducing the effectiveness or adequacy of the covert search warrant power. Consequently, the Review Committee consider the introduction of these additional safeguards to be justified and appropriate.

118 *Crimes Act 1914* (Cth) at section 3UA.

119 Section 4, *Terrorism (Police Powers) Act 2002* (NSW); section 3 and schedule 6, *Police Powers and Responsibilities Act 2000* (Qld); section 63, *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); section 2, *Terrorism (Police Powers) Act 2005* (SA); section 3, *Police Powers (Public Safety) Act 2002* (Tas); section 3, *Terrorism (Extraordinary Powers) Act 2005* (WA); section 4, *Terrorism (Emergency Powers) Act 2006* (NT).

7.7 Recommendations

Recommendation 2

That amendment be made to Part 2 of the Terrorism (Community Protection) Act 2003 to clearly provide for "remote entry" or "remote access" to data held on a "target" computer.

Comment: *This provision should allow the Supreme Court to issue a search warrant where it is satisfied that there are reasonable grounds for suspecting or believing that access to data held on a particular computer, or on a computer within a particular address, would substantially assist in the collection of evidence or intelligence necessary to prevent a terrorist act or suspected terrorist act from occurring, or would assist in the response to or the investigation of such an act or suspected act. Section 25A of the Australian Security Intelligence Organisation Act 1979 (Cth) could be considered as a possible precedent with appropriate modifications.*

Recommendation 3

That the definition of "vehicle" in section 21A of the Terrorism (Community Protection) Act 2003 be included in section 3, so that it applies to all police powers and other provisions in respect of premise(s).

Recommendation 4

That provision be made for the giving of a delayed notice to an occupier of premise(s) and any adjoining premise(s) which are the subject of an executed covert search warrant.

Comment: *The notice should provide the date and time of execution and the grounds for the issue of the warrant. It should be given to the occupier, after its contents have been agreed with the Court, within 6 months. However, the Court, on the application of an authorised member of the police force, should be empowered to delay the giving of the notice, for a defined period of time or indefinitely, where the Court is satisfied that there are reasonable grounds to believe that the giving of the notice to the occupier may:*

- *jeopardise any ongoing terrorist investigations by any State or Commonwealth agency;*
- *have the effect of revealing any counter-terrorism information as defined in section 3 of the Terrorism (Community Protection) Act 2003; or*
- *lead to retribution by persons targeted under a warrant against any person.*

Section 27U and 27V of the Terrorism (Police Powers) Act 2002 (NSW) could be considered as a possible precedent with appropriate modifications.

Recommendation 5

That consideration be given to the creation of an oversight role for the Victorian Inspectorate with respect to the use of the covert search warrant power under Part 2 of the Terrorism (Community Protection) Act 2003.

Comment: *Such a role could be in lieu of or additional to the obligation to report to the Court or to the Attorney-General. The nature and scope of the role to be performed by the Victorian Inspectorate would need to be determined in consultation with the Victorian Inspectorate. The role may be analogous to that undertaken with regard to IBAC, the Auditor-General, the Chief Examiner and the Ombudsman with appropriate reporting requirements to Parliament.*

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8 Part 2A – Preventative Detention Orders

8.1 Summary of the legislation

8.1.1 Origin

This Part of the Act, comprising sections 13A to 13ZV, was inserted by section 4 of the TCPA Amendment Act, and came into force on 9 March 2006.

These provisions were designed to provide a mechanism whereby an authorised police officer could apply to the Supreme Court for a PDO, allowing for someone to be taken into custody and detained for up to 14 days, as opposed to the 48 hours permitted under the equivalent Commonwealth provisions. A key feature of a PDO is its preventative, not investigative nature, and thus no interrogation is permitted during that detention.

In its submission to the INSLM of July 2012, the AFP described the objects of these provisions as:

> *"Preventative measures, aimed at protecting the public from potentially catastrophic harm by removing a person (or persons) from the prospect of supporting or participating in a terrorist attack. Preventative detention orders can also prevent persons from destroying evidence following a terrorist incident, evidence which may be crucial to ensuring that the perpetrators are brought to justice."*[120]

As noted in Chapter 2 of this Report, the original draft of the Bill presented to the Assembly provided for a senior police officer, in urgent circumstances, to make an initial order. If such an order was made, but the Court later found it to have been wrongly made, compensation was payable to the detainee. However, this particular provision was removed before the Bill left the Assembly in February 2006.

As also described in Chapter 2, the result of the scrutiny accorded to the Bill between November 2005 and February 2006 was the tabling of 206 amendments. Some 183 of those amendments related to this Part of the Bill (though many were consequential). Amongst the new safeguards thereby provided were:

- An ability for the Court to place a condition on a PDO that the contact between a detainee and his or her lawyer should not be monitored;
- Provision for persons aged between 16 and 18 years of age to be detained in a youth justice facility, and not be detained with persons aged 18 years and over;
- More detailed criteria that had to be met for the granting of a contact order; and
- Provision for assistance for people whose first language is not English.

120 INSLM Report 2012 at Part III.2.

Over time, further legislative changes to strengthen the safeguards under this Part of the TCPA have been made. Some minor amendments to the youth custody provisions were enacted later in 2006,[121] and provisions reflecting the involvement in the application process of the newly established PIM were inserted in 2013.[122]

Minor amendments to Part 2A, relating to access to the Ombudsman and to IBAC, were also made in 2008, 2009 and 2012.[123]

The standard of proof to be applied to Part 2A matters is the civil standard, that is, the balance of probabilities.[124]

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.[125] 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.[126] 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.

121 Section 6, *Terrorism (Community Protection) Further Amendment Act 2006* and section 42 and Schedule Item 35, *Children, Youth and Families (Consequential and Other Amendments) Act 2006.*

122 Part 8, PIM Act.

123 Section 143 and Schedule 2, item 13, *Police Integrity Act 2008;* section 54 and Schedule Item 55, *Statute Law Amendment(Evidence Consequential Provisions) Act 2009;* section 167, *Integrity and Accountability Legislation Amendment Act 2012.*

124 TCPA at section 13ZO.

125 Ibid at section 13ZK.

126 Ibid at sections 13ZL and 13ZM. "Identification material" is defined at length in section 13B, but includes DNA profiling samples, handwriting samples or photographs.

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.

8.1.3 Application for a preventative detention order

The use of a PDO may be proactive or reactive. First of all, with respect to a suspected future terrorist act, a member of the police force who has been authorised by the Chief Commissioner (the applicant)[127] may apply to the Supreme Court for a PDO against a person if that applicant is satisfied:

- That there are reasonable grounds for suspecting that the person will carry out an imminent act of terrorism (sometime within the next 14 days); or
- That there are reasonable grounds for suspecting that the person is in possession or control of something connected with the preparation for such an act, or to the engagement of someone else to carry out the act, or has done something in preparation for the carrying out or the planning of such an act; and
- That the making of the order would substantially assist in preventing that act, and the detention of the person in question for the period sought is a reasonably necessary part of this prevention.[128]

Alternatively, a PDO may be sought in respect of a terrorist act that has already occurred (within the last 28 days). In those circumstances, the applicant needs to be satisfied that it is necessary to detain the person for a given, justifiable period of time in order to preserve evidence.[129]

Applications cannot be made speculatively or spuriously. A substantial amount of detailed information is required under section 13D of the TCPA and the application must be made in writing, be sworn and must set out:

- The facts, and the grounds, justifying the application;
- The period of detention sought, and the justification for that period;
- Any information available relating to the person's age and mental capacity;
- The details of any previous applications for a PDO against the person in question;
- The details of any applications for control orders under the Commonwealth law[130] against the person, including any applications for variations to or revocation of any such orders that were made;[131]

127 That is members of the force who, by name or class, have been authorised to make applications for a PDO or a prohibited contact order, ibid at section 13B(2).

128 Ibid at section 13C(1)(a).

129 Ibid at section 13C(1)(b).

130 Division 104 of the Criminal Code.

131 TCPA at section 13D.

- The details of any periods in detention under any corresponding laws (i.e. under the Commonwealth provisions[132] or like provisions in another State or Territory);[133]
- (Where the person has already been in detention for the purpose of preventing a different terrorist attack, either under a different PDO in Victoria or elsewhere in Australia) the fact that the evidence in support of this application only became available after the earlier PDO was made; a second or subsequent PDO for preventing a different terrorist act cannot be granted without this confirmation;[134] and
- A summary of the grounds for seeking the order. Certain information may be left out if it is believed to be likely to prejudice national security.[135]

The application can be made without notice to the person concerned, unless he or she is already in preventative custody under a corresponding law under another Australian jurisdiction.[136] This is most likely to be the case where a person has been detained under the Commonwealth provisions, which provide for just 48 hours detention, and then a subsequent application is made by Victoria Police, which allows for up to 14 days detention, less any time already detained. However, the PIM must be informed of the application, as well as, in the case of someone under the age of 18 years, the DHS (though a failure to inform the latter does not invalidate the application).

8.1.4 The making of a preventative detention order

A PDO may be granted if the judge is reasonably satisfied that the grounds for the application as described above are made out. Any submissions made by the PIM must be taken into account. If further information is required by the Court, or if the Court wishes to hear from the person concerned (where the application was made *ex parte*), then an interim PDO may be made, allowing for a maximum detention of 48 hours, or until the final determination of the application, whichever is the later.[137] The person and his or her lawyer (if known) must be given notice of the resumption date. The PIM must also be notified of the date of any resumed hearing.

At the substantive hearing of the application following the interim order, the person who is the subject of the application is entitled to appear to give evidence, call witnesses, make submissions, adduce material and cross-examine police witnesses. If the person is not represented, then the Court may order Victoria Legal Aid to provide legal representation.[138] However, whilst the person is entitled to all of this, a failure by him or her to appear does not prevent the Court from dealing with the application.

If an interim order was made by the Court, that order may be confirmed, varied or revoked.

132 Division 105 of the Criminal Code.

133 For the sake of certainty, regulations may be made listing the laws of other States and territories to which these provisions apply. No such regulations have been made a the time of writing this report.

134 TCPA at section 13K. Note that whilst another PDO cannot be granted for the purposes of preventing another terrorist attack unless the information came to light after the application for the first, this does not prevent the granting of a further PDO for the purposes of preserving evidence, if the attack takes place.

135 That is information that relates to national security, or the disclosure of which is likely to prejudice national security – section 7, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

136 TCPA at section 13D(6).

137 Ibid at section 13E(4) and (6).

138 Ibid at section 13E(10) and (11).

8.1.5 The nature of a preventative detention order

The scope and limitations of a PDO are set out in section 13F of the TCPA.

A substantive PDO (rather than an interim one) allows the subject of the order to be taken into custody, or further custody, for a specified period not exceeding 14 days. As well as the person's name, and a summary of the grounds on which the order is made (again excluding anything likely to prejudice national security), the order must contain:

- The period of detention;
- The place(s) where the person may or may not be detained;
- The date and time of the order;
- The date and time after which the PDO cannot be enforced – if the person has not been taken into custody within 48 hours, the order lapses;[139] and
- Any provisions regarding the person's permissible contact or otherwise with the outside world under a contact order.[140]

A PDO may contain a provision directing that contact between a person subject to the order and his or her lawyer must not be monitored, if the court is satisfied that such an order is appropriate.

Under section 13F(10), added in December 2008 and amended in February 2013, the Victorian Ombudsman and IBAC must be informed of the making of any PDO, given a copy of it and informed when the subject is taken into custody under it. If the police have reason to believe that a person detained is unable to communicate fluently in English, the assistance of an interpreter must be obtained, and reasonable assistance must be given to choose and engage a lawyer.

If the person to be detained is under the age of 18 years, special rules apply. The order will be for the person to be detained in a youth justice facility unless, in the opinion of the Court, and having taken into account submissions made by the DHS, it is reasonably necessary to detain the person elsewhere, having regard to:

- The age and vulnerability of the person, and the likely impact that detention elsewhere would have;
- The grounds for the PDO;
- The availability of a place in a youth justice facility; and
- The risk posed by the person to the security of the country, to other inmates and to the maintenance of good order in the facility.[141]

No detention of a person under 16 years of age is permitted.[142] If a detainee is subsequently found to be under 16 years of age, he or she must be released as soon as is practicable.

139 Ibid at section 13H(2).
140 Ibid at section 13F(4).
141 Ibid at section 13F(8).
142 Ibid at section 13J.

8.1.6 Executing a preventative detention order

Any police officer may take a person into custody under a PDO, exercising the same powers as if apprehending someone suspected of an indictable offence, or of attempting to escape police or prison custody.[143] Details of the apprehension and detention are endorsed on the order.

Officers may use reasonable force at any time to search premises for and take custody of the subject of the PDO. However, they must not enter residential premises between the hours of 9pm and 6am unless they reasonably believe that:

- It would not be practicable to take the person into custody at another time; or
- It is necessary to do so to prevent the loss, destruction or concealment of evidence.[144]

An officer may also seek assistance from others in the execution of a PDO and, in doing so, may request their names and addresses. Refusal or failure to provide these when requested, without a reasonable excuse, is an offence, as is supplying false details.[145] If requested, the officer must supply his or her name, rank, number and the address of his or her place of duty. Failure without reasonable excuse to do so is also an offence.[146]

The police officer detaining a person under a PDO is required to inform the subject of the particulars of the order, including the reasons for it, the period of it and details of who may or may not be contacted. The person must also be informed at this stage of their rights under these provisions, being:

- The right to seek a variation or revocation of the order;
- The right to speak to the "nominated senior police officer" assigned to the case (see below), and the name and work telephone number of that officer;
- Any rights to complain to the Ombudsman or IBAC about the application for the PDO or contact order, or about his or her treatment in detention, or the right to seek relief from the court regarding the same; and
- The right to contact a lawyer.[147]

A failure to notify the detainee as to these rights could result in the apprehending officer being guilty of an offence, unless the behaviour of the detainee makes it impracticable to comply. The detainee must also be informed, as soon as is practicable, of any extension to the order.[148] However, the obligation to inform the detainee can be satisfied by informing him or her of the substance of the above, without the need for precise or technical language. If the detainee's use of English is not fluent, the assistance of an interpreter must be provided, in person or by telephone.

A failure by the detaining officer to comply with any of these requirements does not affect the lawfulness of the detention.[149]

143 Ibid at section 13P.
144 Ibid at section 13S.
145 Ibid at section 13R(2).
146 Ibid at section 13R(4).
147 Ibid at section 13X.
148 Ibid at section 13Y.
149 Ibid at section 13Z(5).

On taking a person into custody under a PDO, an officer is expressly empowered to carry out a search of the person apprehended.[150] This may be done to ascertain whether the person is carrying evidence of or relating to a terrorist act, or an item that presents a danger to a person, or which could be used to assist them to escape custody, to contact another person or which could remotely activate a device (collectively referred to as "seizable items").[151]

The apprehending police officer must also provide the detainee, as soon as is practicable, with a copy of the PDO and any contact order in force, as well as a summary of the grounds on which the latter was made (excluding any information likely to affect national security). If requested, these documents must also be delivered to the detainee's lawyer.

Section 13W makes provision for the administration of the detention. If a person is received into custody under a PDO in a police gaol, then the police officer can seek the detainee's transfer to prison by application to the DOJ. The duty to treat the detainee humanely applies to the Governor of the prison and any prison officers involved in the detention. It continues to apply to the detaining police officer, though the police officer requesting the transfer remains responsible for the general obligations under the TCPA as to giving information to the detainee. Where the person is under 18 years of age, and the PDO requires the person to be detained in a youth justice facility, the request to transfer from police custody must be made to the DHS.

8.1.7 Nominated senior police officer

Section 13P(4) provides that, where a PDO is made, the Chief Commissioner must nominate an independent member of the force of or above the rank of Superintendent, known as the "nominated senior police officer", to oversee the exercise of powers under the PDO and the performance of the obligations on police officers under it. This officer serves as an official, designated "contact point" for the subject of the PDO and his or her lawyer and family members, independent from those police officers involved in applying for and carrying out the order.

Thus, this officer may be contacted by the subject of a PDO with a view to varying or revoking that PDO or a contact order. The nominated officer also has a role in receiving representations from a detainee or his or her lawyer, the Ombudsman or IBAC or a family member or permitted contact person in connection with the detainee's treatment, the performance of the obligations placed on the police by virtue of the order and the obligations placed on the police to seek revocation or variation of an order when appropriate.[152]

150 Ibid at section 13T.
151 Ibid at section 13B.
152 Ibid at section 13P(7).

8.1.8 Prohibited contact orders

If the Supreme Court makes a PDO, and is satisfied as to the criteria set out in the paragraph below, it may also make a contact order, which means that the person who is the subject of the PDO must not, whilst being detained under the PDO, contact a person specified in that order.

An application for a contact order may be made by an authorised officer, sworn and in writing. The Supreme Court may grant such an order if both the applicant and the Court are satisfied that such an order is reasonably necessary to:

- Avoid any risk to any preventative actions that are being taken;
- Prevent serious harm to anyone;
- Preserve evidence or to prevent interference with evidence gathering; or
- Avoid any risk to any imminent arrest under the terrorism provisions of the Criminal Code, the detention of someone under a PDO or the service on someone of a Commonwealth control order.[153]

The person against whom the application is made must be notified, and is entitled to appear before the Court. The PIM is notified of the application and may appear or make submissions. The Ombudsman and IBAC are notified and provided with a copy of the contact order.

Section 13M allows for a contact order to be applied for and made where a person is already detained under a PDO, as well as when the PDO is in force but yet to be executed. The same requirements as to the application, the service of notice and the notification to the PIM, the Ombudsman and IBAC apply.

8.1.9 Restrictions on contact generally

The PDO may allow for some contact with the outside world.[154] However, generally speaking, and subject to some exceptions, a person in detention has no entitlement to contact another person, and may be prevented from so doing.[155] Any letter that the detainee wishes to send to anyone except the Victorian Ombudsman, IBAC or the Commonwealth Ombudsman must be given first to a member of the police force. Any correspondence with a person detained in a prison or a youth justice facility must also be handed to the police by the prison staff. This provision applies to documents passed between the detainee and his or her lawyer. The exceptions to this general rule, unless the person to be contacted is mentioned in a contact order, are as follows:

- A family member, co-habitee or work colleague may be contacted once by the detainee solely for the purpose of letting them know that that he or she is safe and is being detained. The detainee may only disclose the fact that the PDO has been made, the fact that he or she is in detention and the length of the detention.[156] Further contact with these people may be permitted, as detailed in the order itself;

153 Ibid at section 13KA.

154 Ibid at section 13F(4)(e).

155 Ibid at section 13ZC.

156 Ibid at section 13ZD(3). The draft Bill first submitted to the legislative assembly specifically prevented a detainee from informing the contacted person that they were being detained under a PDO or the duration of the detention during the initial permitted contact – this had been only permitted during any further contact provided for by the order: clause 13ZD(3)-(5).

- A lawyer may be contacted, but solely to obtain advice or to instruct in any proceedings connected to the PDO or contact order or in any other proceedings unrelated to the PDO in which a hearing is due to take place during the detention, or in connection with any contact with the Ombudsman or IBAC.[157] If the chosen lawyer is the subject of a contact order, or cannot be contacted, then assistance must be given (including the assistance of an interpreter where necessary) in choosing another;
- Contact with the Victorian Ombudsman or IBAC is permitted.[158]

Any contact that the detainee has with a family member, etc, or a lawyer is only permitted where it can be effectively monitored by the police officer responsible for the detention, with the assistance of an interpreter if necessary, unless (in the case of a lawyer) the PDO made by the Court provides otherwise under section 13F(6). Legal professional privilege is preserved in the case of communications with a lawyer by section 13KG(5), which provides that evidence of such communications is not admissible in any proceedings against the detainee.

There is a prohibition on the disclosure of facts and information other than as outlined above, or as permitted in the case of a minor or a person incapable of managing their own affairs. Section 13ZJ makes it an offence for:

- Subject to the above, the detainee, during the detention, to intentionally disclose the fact that he or she is the subject of a PDO or a contact order or has been detained;
- The detainee's lawyer to disclose any of the above during the detention, unless that disclosure is for the purposes of any proceedings connected to the PDO or any contact with the Ombudsman, IBAC or the above-mentioned nominated senior police officer;
- A parent or guardian contacted under the special arrangements for minors or persons with limited mental capacity (see below) to disclose any of that information unless, again, the disclosure is for the purposes of dealing with the Ombudsman, IBAC or the nominated senior police officer; or
- An officer or interpreter who assists with the monitoring of a detainee's contact with his or her lawyer, or an interpreter who monitors the detainee's contact generally, to intentionally disclose any of the above information.

A lawyer, parent or guardian may simply inform another person that the detainee is safe but cannot be contacted for a specified period. A breach of any of the prohibitions on disclosure set out above is an offence. Similarly, it is also an offence for a police officer or interpreter who monitors contact between a detainee and another person to disclose any information derived from that monitoring.

A secondary non-disclosure offence is created by section 13ZJ(9). That is, anyone who receives prohibited information about the PDO must not pass on that information except to a person in authority under the order, or to someone with responsibility for the well-being of the detainee.

157 Ibid at section 13ZF.
158 Ibid at section 13ZE.

Some special rules on contact and disclosure apply in the case of minors, or persons incapable of managing their own affairs. (See Section 8.1.11 of this Report).

8.1.10 Treatment of person detained

Division 5 of Part 2A begins with the overriding consideration that a person taken into detention must be treated with humanity and dignity, and must not be subjected to cruel, inhuman or degrading treatment.[159] A breach of this provision is an offence .[160]

8.1.11 Treatment of minors and persons incapable of managing their own affairs

A PDO may not be applied for or made in respect of a person under the age of 16 years.

For persons between the age of 16 and 18 years, a number of special rules apply:

1. He or she must not be detained with persons of 18 years and above unless there are exceptional circumstances that dictate otherwise, and that detention is authorised in writing by a senior police officer;[161]
2. The detention shall take place in a juvenile justice facility, unless there are reasons why the detention should take place elsewhere;[162]
3. Provision is made throughout this Part of the TCPA for communication to be held with the Secretary of the DHS with regard to the person;[163]
4. Special contact rules apply so that 2 hours a day (or more if allowed by he supervising police officer) of contact with parents or guardians, etc. (or each of them) is permitted;[164]
5. Special rules apply to the taking and use of identification material.[165]

The fourth and fifth of these special provisions apply in the case of persons incapable of managing their own affairs as they apply to minors.

8.1.12 Revocation or variation of preventative detention order or prohibited contact order

A person who is the subject of a PDO may apply at any time for the leave of the Supreme Court to make an application to vary or revoke a PDO or a contact order. Leave will not be granted, however, unless new facts or circumstances have arisen since the making of the order in question.[166] If leave is granted, and on the full application the Court is satisfied that new facts or circumstances have arisen that make it appropriate to vary or revoke the order, the Court *must* do so. As soon as is practicable, the DHS or DOJ must be informed of any variation or revocation of any PDO or contact order.

159 Ibid at section 13ZB.
160 Ibid at section 13ZN.
161 Ibid at section 13ZBA.
162 Ibid at section 13F(8).
163 Ibid at sections 13D(7), 13E(8), 13I(8), 13N(6) and (8), 13O(5), 13P(8) and 13WA.
164 Ibid at section 13ZH.
165 Ibid at section 13ZL(4) to (10).
166 Ibid at section 13N(2).

Alternatively, the police are *required* to return to the Court to seek a variation or revocation of a PDO in respect of a person in detention, or of a contact order in respect of that person, on the following bases;

- If the detaining officer is satisfied that the grounds on which the PDO was sought have ceased to exist, a revocation must be sought; or
- If the detaining officer is satisfied that new facts or circumstances have arisen which make a variation to the PDO appropriate, then a variation must be applied for; or
- If the detaining officer is satisfied that new facts or circumstances have arisen (including that the grounds on which the contact order was made have ceased to exist) which make it appropriate for the contact order to be revoked or varied, then a revocation or a variation must be applied for.[167]

If the Court is similarly satisfied as to the above, it *must* make the requested revocation or variation. As with other applications by police, the PIM is notified and may appear or make submissions. Any variation or revocation is again reported as soon as is practicable to the DHS or DOJ.

The person who is subject to a PDO may, at any time, make representations to the nominated senior police officer (see section 8.1.7 of this Report) with a view to seeking a variation to or the revocation of a PDO or contact order.

8.1.13 Extension of a preventative detention order

A substantive PDO may be extended by the court on the application of an authorised police officer, and the application must contain the reasons for seeking the extension as well as details of all previous applications and orders. The person can appear and contest the application, and the PIM is informed, as is DHS (in the case of a minor in a youth justice facility) or DOJ. However, any extension or extensions granted must not take the total period of detention beyond 14 days.[168]

Any extension or further extension must be notified to the detainee as soon as practicable thereafter by the police officer responsible for the detention and failure to do so could result in the commission of an offence.[169] The lawfulness of the continued detention is not affected by a failure to do so.[170]

8.1.14 Release from detention

Section 13V provides for the release from detention of a person held under a PDO, though nothing prevents the person being re-apprehended and detained again as long as the PDO remains in force.

Whilst questioning of a detainee is prohibited whilst the person is in detention, a detainee may be released from detention under a PDO to be delivered into the hands of others for the purpose of such questioning. For example, this may be:

167 Ibid at section 13P(6)(b). The nominated senior police officer referred to previously is charged with ensuring that these obligations on the police are complied with.

168 Ibid at sections 13G and 13I.

169 Ibid at section 13ZN.

170 Ibid at section 13Z(5).

- Into the custody of Victoria Police for questioning in the usual way in connection with a suspected offence; or
- In accordance with a warrant issued at the request of the Director-General of ASIO for the investigation of terrorism under section 34D of the ASIO Act. If the detaining police officer is handed a copy of such a warrant, he or she must take such steps as are necessary to allow the detainee to be dealt with under that warrant;[171] or
- Into the custody of the Australian Federal Police for questioning in accordance with the *Crimes Act 1914* (Cth).

8.1.15 Offences by police

As mentioned in a number of circumstances above, the requirement that the police use these powers lawfully and that the detention is in accordance with the legislative provisions is reinforced by offence provisions.

Section 13ZN provides that a breach of any of the following obligations to the subject of a PDO by a member or members of the police force may (unless exceptions apply) constitute an offence:

- The duty to explain the details of the PDO and the rights of the detainee under it on apprehension;[172]
- The duty to inform a detainee that a PDO has been extended;[173]
- The duty to provide a detainee with a copy of the PDO, any contact order or any extension order, or to provide on request a copy of the order or a summary of it to the detainee's lawyer;[174]
- The duty to endorse a copy of the order given to the detainee or his or her lawyer with the date and time of apprehension or detention;[175]
- The duty to treat a detainee with humanity and dignity, and not to subject the person to cruel, inhuman or degrading treatment;[176]
- The duty to ensure that a person under 18 years of age is not detained with a person over 18 years of age;[177]
- The duty to assist the detainee in finding another lawyer when the chosen one cannot be contacted or is the subject of a contact order;[178]
- The duty not to monitor contact between a detainee and another person if the PDO so provides;[179]

171 Ibid at section 13U.
172 Ibid at section 13X(1).
173 Ibid at section 13Y.
174 Ibid at sections 13ZA(1), (4) and (6).
175 Ibid at section 13ZA(9).
176 Ibid at section 13ZB.
177 Ibid at section 13ZBA(1).
178 Ibid at section 13ZF(3).
179 Ibid at section 13ZG(6).

- The duty to inform a parent or guardian with whom a minor or a person incapable of managing their own affairs has contact not to disclose to another parent or guardian who is the subject of a contact order the fact of the PDO, the fact that the detainee is in detention or any other information gleaned from the detainee during the contact session;[180]
- The duty not to question a detainee other than as permitted, or the failure to record any questioning;[181]
- The duty not to take identification evidence except as permitted;[182] or
- The duty not to use identification evidence other than to establish the identity of the detainee.[183]

8.1.16 Reporting requirements

By way of public and parliamentary oversight of the use of the police powers under this Part of the TCPA, the Attorney-General must cause to be prepared an annual report as soon as practicable after the end of each financial year, and must lay that report before both Houses of Parliament.[184] The report must outline:

- The number of PDOs made during the year and the number applied for;
- Whether a person was taken into custody under each PDO and for how long;
- The number of persons subject to a PDO that were later charged with an offence of terrorism under the Criminal Code;
- Details of complaints made to the Ombudsman or IBAC;
- The number of contact orders made; and
- The number of PDOs or contact orders found by a court to have been invalid.

Annual Reports have been tabled in Parliament in respect of each financial year since 2006-2007. Each report has included a nil return in respect of each of the categories listed above. At the time of writing, the Review Committee understand that no PDO has been applied for in Australia.

8.1.17 Other safeguards

A number of other safeguards have been built in to this Part to prevent abuse of the powers or to provide protections for those detained. Some have been referred to above, many were added by way of amendments tabled at the end of the second reading debate on the TCPA Amendment Bill in the Assembly.

180 Ibid at section 13ZH(11).
181 Ibid at section 13ZK(1), (2) and (3).
182 Ibid at section 13ZL(1), (4) and (6).
183 Ibid at section 13ZM(2).
184 Ibid at section 13ZR.

A PDO can only be made by the Supreme Court. It can only be made following an application process, generally in the presence of a PIM, and the application must be approved by the Chief Commissioner. This is in contrast to the position envisaged in the first draft of the Bill, whereby a senior police officer could make an interim PDO. Indeed, it contrasts with the position under the Criminal Code,[185] whereby an initial order lasting up to 24 hours may be made by a senior AFP member, and a substantive order may be made by a range of issuing authorities (being judges or retired judges). Senior police officers are also entitled to make a PDO, under varying sets of circumstances, in Queensland, South Australia and Tasmania.

Moreover, on an *ex parte* application for a PDO, it is open to the Court to make an interim order, allowing for the subject of the application to appear and be represented at the substantive hearing.

Other safeguards already referred to in this Chapter include:

- The fact that a detainee may not be interrogated during the detention;
- The special provisions relating to minors and persons with limited mental capabilities;
- The availability of the nominated senior police officer, and the involvement of a PIM in the Court processes and the Ombudsman and/or IBAC thereafter;
- The duty on the detaining police officer to inform a detainee of his or her rights regarding the Ombudsman, IBAC, lawyers, etc;
- The obligation on the officer to seek a revocation of the PDO if satisfied that the grounds on which the order was made have ceased to exist, or a variation of the order if new facts or circumstances come to light;
- The list of offence provisions that may apply to police officers who fail to act in strict accordance with these provisions;
- The assistance where necessary of interpreters, and assistance in identifying and engaging a lawyer;
- The availability of legal aid;
- The restricted permitted use of any identification materials; and
- The express statutory obligation on anyone involved in administering the PDO to treat the subject of the order humanely and with dignity when being taken into custody and in detention, and not to subject the person to cruel, inhuman or degrading treatment, under penalty of a criminal sanction for non-compliance.

Finally, a sunset provision was made to apply to this Part,[186] so that it expires on 9 March 2016 (the remainder of the TCPA expires on 1 December 2016).

185 Sections 105.2 and 105.8.

186 TCPA at section 13ZV.

8.2 COAG Report

The COAG Committee reviewed the State and Territory legislation introduced as a result of the 2005 COAG agreement as part of its terms of reference.[187] At paragraphs 261-276, the COAG Committee commented on the State and Territory provisions regarding preventative detention.

The COAG Committee stated that, generally, the schemes shared many common features, though there were some differences between the jurisdictions on the extent of the safeguards available under those schemes. In that regard, it was recognised that the Australian Capital Territory legislation was seen to be the "model" scheme; in particular, on an application for a PDO on the grounds of preventing an attack, the Court must be satisfied on reasonable grounds:

> *"that detaining the person under the order is the least restrictive way of preventing the terrorist act …"*

before it can grant the order.[188]

If the PDO is intended to assist in the protection of evidence, following an attack, the Court has to be satisfied on reasonable grounds:

> *"that detaining the person under the order is the only effective way of preserving the evidence…".*[189]

However, in respect of the PDO provisions in their entirety, the COAG Committee had only one recommendation:

> *"Recommendation 39: The Committee recommends, by majority, that the Commonwealth, State and Territory 'preventative detention' legislation be repealed. If any form of preventative detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which, in the view of the Committee, may further reduce its operational effectiveness."*[190]

The COAG Committee recognised the force of the arguments put forward at police and government level for retaining as many lawful measures against terrorism as possible in the current unstable climate. Where reliable intelligence points to an individual preparing to make an attack, for example, but there is not yet enough evidence to make an arrest, it is easy to see the value in keeping that person off the scene for a limited period of time in an attempt to avert the feared terrorist act.

The question for the COAG Committee to consider, however, was not whether the laws were desirable, but whether they were "necessary and effective". The majority of members concluded they were not.

187 Paragraph 6 of the COAG Report. The purpose and scope of the review had been agreed at the COAG meeting of 10 February 2006.

188 Section 18(4)(c), *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

189 Ibid at section 18(6)(c).

190 COAG Report at Recommendation 39.

Whilst it was noted as being of interest that the powers had never been exercised at Commonwealth or at State or Territory level, this was not a defining factor. Of more persuasive value was the evidence given in submissions by a number of police forces that they could not see circumstances in which they would actually wish to use the powers.

A number of shortfalls in the operational usefulness of a PDO were identified in written and oral submissions made to the COAG Committee by enforcement agencies:

- The lack of ability to interrogate a detainee was the most common complaint. The temporary release of a detainee still subject to a PDO simply to allow for questioning may lead to a vital loss of time. Western Australia Police suggested that vital evidence could not be accepted during the detention, even if proffered voluntarily. The South Australia Police approach in these circumstances would be to accept the evidence (and put it to use in protecting the public) even though it could not subsequently be used at any trial. The Queensland Police agreed, choosing to treat the same as "intelligence" rather than "evidence";
- The complexities involved in preparing an application for a PDO impede its efficient use in an urgent situation;
- Some of the thresholds are impractical. For example, the requirement that a terrorist attack must be threatened "imminently" or within 14 days does not take into account suspicions and concerns, based on reliable intelligence, of an attack at an unknown time in the future;
- The fact that a suspect must be named in the application or in the body of the order rules out applying for the detention of a suspect whose true identity is unknown.

The COAG Committee considered that possibly the most persuasive point made in submissions by some of the enforcement agencies was that, at a practical, operational level, if they had enough evidence to apply for a PDO, they would more likely than not have enough evidence to arrest and charge. Not only were police forces more comfortable using traditional policing methods, but detention under those circumstances also permitted interrogation to occur. Moreover, the preventative and protective elements of the PDO scheme would be achieved by the detention of the individual in this way in any event, given that there would be a presumption against bail being granted in these circumstances.

As indicated in the recommendation, the COAG Committee did give consideration to the question of whether worthwhile amendments to the Commonwealth and State and Territory schemes could be made to make them "necessary and effective". The conclusion was that any modifications would only result in the introduction of even greater safeguards, perhaps based on the Australian Capital Territory "model", with the result that the law enforcement agencies would be even more reluctant to use the powers, even in an emergency.

Looking at the four issues identified above as they apply to the TCPA they are:

- Questioning of a person in detention under a PDO is prohibited;[191]
- The requirements for an application are detailed and time consuming;[192]

191 TCPA at section 13ZK.

192 Ibid at section 13D.

- There is a requirement that a terrorist act be "imminent", or in any event "some time in the next 14 days";[193] and
- A preventative detention order must set out "the name of the person in relation to whom it is made."[194]

8.3 INSLM comments

In the first report delivered by the INSLM in 2011, an initial unease with the PDO provisions was evident, questioning why such draconian laws should be created to deal with just one of the threats to the lives of Australians and not others. The INSLM also considered whether the laws had effectively been "cabined" ie. so confined by the necessity to have human rights safeguards built-in as to render them ineffective, through overly strict threshold requirements.

However, the second INSLM Report[195] contained a more detailed review of the PDO provisions. The forensic analysis of the provisions is in respect of Division 105 of the Criminal Code, but most of the observations and recommendations can be directly read across to the Victorian statute.

The INSLM commented that:

> *"…these provisions are fairly ugly legislation, with no real utility and a proven lack of users."*[196]

The INSLM paid fuller regard to the fact that no agency, Commonwealth or State/Territory, had yet seen fit to use the powers available. This lack of use, he opined, questioned their very effectiveness, appropriateness and necessity. Moreover, he stressed the complicated nature of the provisions and of the application process, saying:

> *"While it is admirable that the legislation includes such a high threshold for the grant of a PDO, the complexity of the provisions dealing with PDOs brings into question the efficacy of these laws."*[197]

He points out that:

> *"The significant safeguards and formality surrounding PDOs would engage police manpower at the very time of imminent threat. Drafting an application for a PDO is a resource intensive activity that may divert police resources during a time critical period of investigative activity. It could be impractical for police who are intimately involved in an operation to be drafting an application for a PDO instead of arresting suspects and gathering evidence for a prosecution."*[198]

The fact that, in the INSLM's view, the use of arrest powers would be preferable to the use of PDO powers in virtually every circumstance is his main criticism of this particular suite of powers:

193 Ibid at section 13C(2).
194 Ibid at section 13F(4)(a).
195 INSLM Report, 2012.
196 Ibid at Chapter 3, section III.1.
197 Ibid at section III.4.
198 Ibid at section III.7.

- Unlike a PDO, an arrest can be made by a single officer without the need for formal approval or paperwork. There is no reason to suggest that a power of arrest could not be used to prevent a terrorism offence in the same way as it is used to prevent the commission of other serious offences;
- The criteria for an arrest, that an officer must believe on reasonable grounds that a person has committed or is committing an offence, is so similar to the criteria for a PDO (reasonable grounds to suspect) that the PDO provisions are not needed; and
- Crucially, detention following a straightforward arrest would allow interrogation of the suspect. As there is a presumption against bail in terrorist matters, continued detention is unlikely to be an issue.

In the view of the INSLM, it is this lack of ability to question a suspect that is the most powerful argument against the continued retention of PDO powers. If someone is in detention under a PDO, he or she will doubtless hold information of great interest to the police and intelligence agencies. In fact, the INSLM concludes, this restriction goes further than being of no assistance to the investigation agencies, it actually serves as an impediment to the proper investigation of threats and occurrences.

Thus, as a police officer may arrest someone who he or she believes on reasonable grounds to have committed a terrorist offence, it is difficult to see a circumstance where an officer could meet the threshold for applying for a PDO and yet not meet the threshold for arresting the person. As the INSLM points out there is nothing in the Explanatory Memorandum for the Anti-Terrorism (No.2) (Cth) Bill or in the ensuing parliamentary debates, that explains why existing powers of arrest were insufficient. The need for a PDO was not demonstrated at the time, he suggests, and it remains unclear now.

The INSLM's overall conclusion, therefore, and indeed the final recommendation on the matter (Recommendation III/4) is that Division 105 of the Criminal Code be repealed. In particular, with regard to his statutory duties he said:

> *"There is no demonstrated necessity for these extraordinary powers."*[199]

If the powers were to be retained, however, the INSLM did go on, in his second annual report, to make three recommendations for amendment:

- The threshold test for a PDO should not be a mere single objective requirement (as in "there are reasonable grounds to suspect") but a dual subjective and objective requirement (in that the issuing authority itself should have a reasonable belief as well as there being reasonable grounds) – Recommendation III/1. This is in relation to the Criminal Code provisions. In the Victorian Act, the Court must "be satisfied on reasonable grounds";[200]

199 Ibid at Paragraph III.13.

200 TCPA at section 13E(1)(a).

- The degree of precision required in the "imminence test", ie. that something is expected to occur at some time in the next 14 days,[201] provides its own problems. Practically, it is virtually impossible to predict when an event may occur, and it may be that agencies wish to act based on intelligence that something is planned that may or will occur outside of that timescale. Thus, in Recommendation III/2, this requirement should be replaced with a need for the applicant and the issuing authority to be satisfied as to the possibility of a terrorist act occurring sufficiently soon as to justify the action being taken;
- The "necessity" requirement in a PDO to preserve evidence is too strict ie. it has to be proved that it is "necessary" to detain the person to preserve the evidence.[202] This requires the applicant to prove that destruction or loss of the evidence will inevitably occur without the detention, which is an extremely difficult threshold to meet. Thus, Recommendation III/3 is that, if PDOs are to be retained, the requirement should be that it is "reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act".

The INSLM Report 2013, concentrates on other aspects of terrorism legislation, such as the financing of terrorist organisations, and provides no further analysis of the PDO provisions. In the introductory chapter, however, he does draw the Prime Minister's attention to the fact that his reports are intended to be cumulative in nature, yet he has received no official or governmental response to the 21 recommendations made in the 2012 Annual Report.

8.4 Operation of the legislation

At the time of writing, no application has been made for a PDO.

8.5 Submissions

8.5.1 Victoria Police

Victoria Police, in its first written submission and during meetings with the Review Committee, strongly supported the retention of the PDO provisions. They stated that whilst they acknowledged the limitations and practical difficulties inherent in the scheme as it currently stands, they would rather see amendments made to improve it than see it repealed. With appropriate functional improvements, a PDO would remain a useful tool available for use in relevant, urgent circumstances.

The improvements put forward for consideration by the Review Committee are:

8.5.1.1 Meaning of "imminent"

A modification of the pre-condition for an application for, and the grant of, a PDO, that the officer (and the Court) must be satisfied that a terrorist attack is imminent, and is expected to occur sometime within the next 14 days.[203] This should be replaced with a different, less rigid, definition of "imminent". Predicting the precise point in time when a terrorist act may occur is difficult. This, of course, echoes one of the concerns of the INSLM. Note that the same issue arises in connection with special police powers (see Chapter 10 of this Report).

201 TCPA at section 13C(2) provides the Victorian equivalent.
202 Ibid at section 13E(1)(b)(ii) provides the Victorian equivalent.
203 TCPA at sections 13C(2) and 13E(2).

8.5.1.2 Object of a preventative detention order

An amendment regarding the requirement that the name of the subject of the PDO must be on the order.[204] As a result, a PDO cannot be made in respect of a person known only to police by one name, or by an alias, or by a description.

8.5.1.3 Urgent applications to be made by electronic means

An amendment allowing urgent applications to be made by electronic means.

8.5.1.4 Prohibition on questioning

Clarification of the prohibition on the questioning of a detainee under a PDO, and the potential for police to be subject to prosecution should they use information obtained voluntarily which is critical to the prevention of a terrorist act. An exemption should be made to the general prohibition where an officer questions a detainee on purely factual matters following a voluntary disclosure, where the questioning is carried out in the reasonable belief that the information sought is likely to assist in the prevention of an imminent terrorist act.

8.5.1.5 *Ex parte* applications

An amendment providing for all applications for a PDO to be held *ex parte*, utilising the services of the PIM. It is likely that much of the information on which an application is based is subject to public interest immunity or national security considerations. The revelation of it in the presence of the subject of the application may compromise ongoing investigations. Conversely, the withholding of the information from the Court on those grounds, because of the presence of the subject, may result in the refusal of an application.

8.5.1.6 Responsibility for detainee welfare

Victoria Police also raised an issue regarding their own obligations under the TCPA. This centres in particular around section 13W(5)(c), which states that where the officer detaining the subject under a PDO requests a transfer of the subject from police custody to a prison, the member of the force who made the request is still responsible for the detainee whilst in prison. This is notwithstanding the fact that the police officer has no control over the prison detention and, therefore, no influence over decisions as to how that detention is carried out.

A failure to observe these duties by the officer may be a criminal offence. Victoria Police suggested these provisions should be amended to provide that they do not apply to an officer administering a PDO who has taken all reasonable steps to discharge his or her legal obligations, particularly with regard to continuing humane treatment of the detainee.

8.5.2 Australian Federal Police

AFP officers also present at meetings with the Review Committee, in supporting the arguments put forward by their State colleagues, re-emphasised the submission they made to the COAG Review, and drew the Committee's attention to it.

204 Ibid at section 13F(4)(a).

Of PDOs, the submission stated:

> *"Despite their lack of application, the AFP considers that preventative detention orders remain relevant within the suite of preventative measures to counter the terrorist threat. The removal of the preventative detention order regime would create a substantial gap in counter terrorism options to thwart an impending terrorist attack where disruption by arrest is not viable. The AFP considers this void in pre-emptive action would present an unacceptable risk to community safety without any alternative offered to replace preventative detention measures."*[205]

At paragraphs 114 to 116 of the submission, the AFP stated:

> *"Since the introduction of the preventative detention order regime in 2005, neither the AFP nor another Australian police force has applied for a preventative detention order. There are a number of reasons for the AFP not pursuing detention orders.*
>
> *Firstly and fortunately, there have been no circumstances necessitating the use of this particular preventative power because it is restricted to the most extraordinary of circumstances and there has existed comprehensive law enforcement and intelligence coverage of planned terrorist operations domestically. This should not be an ongoing expectation as the evolving terrorist threat and trends may require law enforcement to enact these powers.*
>
> *Secondly, the AFP has adopted a prudent and cautious approach to preventative detention order applications – balancing risk to the community against successful preventative action by interdiction, underpinned by the strength of evidence to support a prosecution. The fact that, after due consideration, preventative detention orders have not been necessary does not support the argument that the need for such orders will not arise in the future. The trends of terrorism and the challenges for law enforcement, as previously described, attach greater relevance to the importance and utility of these tools in emergency situations."*

In respect of perceived weaknesses in the PDO regime, the AFP officers re-iterated the points they had made in respect of the Commonwealth PDO provisions in so far as they apply to the Victorian model:

1. They agreed that the "14 day" issue was seen as problematical;
2. An interim PDO should be possible for use in urgent circumstances, granted by the Chief Commissioner or other senior police officer, consistent with other State and Territory provisions;
3. The issue of questioning in detention should be revisited. Consideration should be given to permitting the questioning of detainees on a voluntary basis, principally for intelligence purposes, to allow for the use of responses to mitigate risks to the public. The questioning would, the AFP stressed, be voluntary, and the right to silence preserved.

205 AFP Submission to the COAG Review at paragraph 117.

Despite these perceived limitations, the AFP wholly supported the retention of a PDO as a tool for the possible disruption of a planned terrorist act. It is not a substitute for prosecution, but a preventative measure. All counter-terrorism work, to which the majority of these legislative provisions are aimed, is preventative in nature and this should be regarded as a separate phase in the 3 stage process, often strategised and undertaken between the agencies, being:

- Intelligence;
- Prevention; and
- Investigation.

AFP officers were asked for their views on the different thresholds for taking action, ie. an arrest under both Commonwealth and Victorian law requires an officer to have a reasonable *belief* that a person has done, or is about to do something. An application for a PDO requires a reasonable *suspicion*. They explained that the difference was corroboration; a PDO could be sought on the basis of intelligence supplied indicating that someone is planning to do something, whilst an arrest, based on a belief, would require some evidence that corroborated that suspicion. For instance, in the age of "global" primary and secondary attacks facilitated by modern communication techniques, intelligence from abroad may support the swift detention of a potential perpetrator in Australia, thus disrupting a planned secondary attack, whilst the police sought evidence to corroborate that suspicion which would justify an arrest.

The AFP stressed the importance, or potential importance, of the second ground for seeking a PDO, that is, to preserve evidence following a terrorist attack. In the immediate aftermath of such an incident, sufficient corroborative evidence to justify an arrest and detention might be difficult to obtain. There may be enough facts however to justify a suspicion that could lead to the seeking of a PDO.

The AFP and Victoria Police officers were asked by the Review Committee what alternative actions they might take in the event that the PDO provisions were repealed. The officers provided some examples of such actions. However, in their view, it is the element of disruption of a potential act of terrorism that a PDO potentially offers that makes the retention desirable.

8.6 Impact of the Charter of Human Rights

The Review Committee, with the assistance of advice from Counsel, identified five features of the preventative detention regime that raised Charter issues:

8.6.1 The circumstances in which a PDO can be made

The test for the granting of an order is whether it is reasonably necessary for either the prevention of an imminent terrorist act, or to preserve evidence of an act that has already occurred. This in itself raises three questions for consideration by the Review Committee:

1. Are the purposes for which an order can be made sufficiently important to justify detention (and possibly solitary detention)?

The making of a PDO engages the right to liberty, under section 21(1) of the Charter, which protects against arbitrary detention, ie. the detention must be for a proper reason. It is likely that detention for the prevention of harm to others would be regarded as a proper reason for that detention, and thus be justifiable and reasonable for the purpose of limiting the right to liberty. This is recognised in laws relating to the detention of mentally-ill persons and sex offenders.

However, the PDO scheme also authorises preventative detention for the purposes of the protection of property from a terrorist attack and for the preservation of evidence.

2. Is the test of "reasonable necessity" sufficient to restrict the making of orders to circumstances in which preventative detention is compatible with Charter rights?

Arguably, the detention of a person for preventative purposes should only occur if the purposes of the order cannot be achieved by other means. Thus, the Court should consider whether the purposes could be achieved by a less restrictive means than detention. Indeed, in the Australian Capital Territory's equivalent legislation, in the case of a PDO for preventing a terrorist attack, the applicant police officer and the Court are required to satisfy themselves on reasonable grounds that the detention is the least restrictive way of achieving the purposes of a PDO.[206]

3. In light of the preventative purposes of the detention, are there sufficient safeguards, including review mechanisms, to ensure that detention occurs for no longer than is necessary for those purposes?

Detention for protective or preventative reasons is only justified for so long as the protective or preventative purposes continue to exist. If a person is detained beyond that time the detention becomes arbitrary, in breach of section 21(2) of the Charter. Therefore, the detention should be subject to regular review to ensure that the justification for detention continues to exist.

Section 13N of the TCPA provides that a person in relation to whom a preventative detention order has been made may apply for revocation or variation. However, the leave of the Court is required to make an application, and the burden is on the detainee to satisfy the Court that new facts or circumstances have arisen since the making of the order. This burden may be problematic, due to the contact restrictions on the detainee. He or she may not be aware of the new facts or circumstances that have arisen in the outside world.

Section 13O of the TCPA requires the detaining officer to apply for the revocation of the order where he or she is "satisfied that the grounds on which the order was made have ceased to exist." However, the duty on the detaining officer to bring the matter back before the court where the facts and circumstances on which the order has been based have changed is only for the purpose of seeking a variation to the order, not the revocation of it.[207]

206 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) at Sections 16(3)(b)(ii) and 18(4)(c).
207 TCPA at section 13O(1) and (2).

8.6.2 The adequacy of existing safeguards to protect against the adverse consequences of incommunicado detention

By virtue of section 13ZC of the TCPA, a person who is detained is not entitled to contact other persons except as provided in sections 13ZD, 13ZE, 13ZF and 13ZH. Therefore, contact is generally restricted to:

- Once with certain persons who, otherwise, may be concerned about the whereabouts of the person (family members, persons they live with, employers or employees and business partners) solely for the purpose of letting the person know they are being detained and are safe;
- The Victorian Ombudsman or IBAC;
- Lawyers, for legal representation purposes; and
- (For a person under 18 years of age or who is incapable of managing his/her affairs), a parent or guardian or other person able to represent that person's interests.

Additional contact with a family member or other person may be authorised by a member of Victoria Police, once and for the sole purpose of advising that person that the detainee is safe.

However, even the limited contacts in the above provisions can be subject to a contact order.

Incommunicado detention is not unlawful per se. Nevertheless, it is clearly one of the most oppressive types of detention and should not occur other than in the most exceptional circumstances, and with adequate safeguards. The restrictions imposed on contact with others, even for those detainees who are not subject to contact orders, means that detention is likely to involve solitary confinement.

8.6.3 Monitoring of communication, including with lawyers

All contact by the detainee is monitored. This includes contact with lawyers, although there is an ability for the Court to order that such contact is not monitored.[208] The content of any communication between a detainee and his/her lawyer is not itself admissible in evidence against a person in any proceedings in a court or tribunal. There may be an issue about the derivative use of any such content by the police.

This provision not only affects the right to privacy, but also:

- The right to a fair hearing under section 24 of the Charter, in that the police are privy to all communications between the detainee and his or her lawyer relating to the proceedings; and
- The privilege against self-incrimination under section 25(2)(k) of the Charter in respect of any criminal charges arising out of the investigation and any derivative evidence obtained as a result of information gleaned from the monitoring. Section 13ZG(5) of the TCPA does not specifically provide for a restriction on the use of derivative information in respect of monitored communications.

208 Ibid at section 13ZF(6).

8.6.4 The use of evidence that is not disclosed to the detainee

Section 13D sets out the form and content of a written application for a PDO. Section (1)(b) requires:

> *"…the facts and other grounds on which the applicant considers that the preventative detention order should be made."*

Subsection (1)(g) then requires:

> *"…a summary of the grounds on which the applicant considers that the order should be made."*

Finally, Section 13D(2) states:

> *"To avoid doubt, subsection (1)(g) does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 of the Commonwealth)."*

The Review Committee found this to be a rather unusual provision, in that it allows for the withholding of information on security grounds from the summary required by subsection (1)(g), but provides for no similar limitation on the full suite of information required by subsection (1)(b).

On the face of it, the withholding of evidence from the subject of the application engages the right to a fair hearing under section 24 of the Charter.

However, as the power to grant a PDO is vested in the Supreme Court under the TCPA, the Review Committee were concerned that section 13D(2) also raised constitutional issues (see Section 8.7.5.4 of this Report).

8.6.5 The application of the PDO regime to young people

The application of the PDO regime to young persons (aged 16 and 17 years of age) is particularly problematic from a human rights perspective. Such a person is defined as a child for the purposes of the Charter:

> *"Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child."* [209]

The current PDO regime, in potentially going so far as to authorise solitary confinement and incommunicado detention of a child, clearly engages this human right. There are some special safeguards for young people, including the requirement that they not be detained with persons 18 years of age or older. However, that particular safeguard can be overruled by a senior police officer in exceptional circumstances.[210]

209 Charter at section 17.

210 TCPA at section 13ZBA.

8.7 Discussion and conclusions

8.7.1 Arrest powers as an alternative

This Report sets out the view of the INSLM that the PDO powers are unnecessary in the Commonwealth context because the same objective can be achieved through the use of more traditional pre-charge, arrest and questioning powers of the police.

The INSLM concludes his 2012 Annual Report with the words:

> *"It should not be assumed that preventative detention could never be a proportionate response to the threat of terrorism, if it were a practical addition to powers deficient to prevent terrorism. Rather, in the case of Australia's PDO provisions, on analysis they yield very little if anything that adds to the capacity of ordinary arrest powers in this regard."*[211]

The Review Committee have questioned the necessity for PDO powers, given their perceived inadequacies, and given that general powers of arrest had been used successfully in the past in terrorism cases and would allow for questioning during detention.

Victoria Police explained that they would prefer to see PDO powers retained as a "safety net".

AFP officers carefully explained to the Review Committee why the disruptive nature of PDO powers and the possible later use of arrest powers should be viewed as separate tools for use in separate sets of circumstances. The former, they said, is seen as a *preventative* measure, allowing the detention of a person on the basis of credible intelligence that an attack is imminent, and thus disrupting the performance of that terrorist act. It is not a substitute for prosecution, which can occur once the intelligence has been corroborated in some way. They explained that gathering the evidence necessary to support an arrest and charge can be done at a later stage, perhaps when the urgency has passed, but should be seen as a separate stage in the overall operation.

AFP officers explained that a major issue revolved around the arrest threshold for Commonwealth offences as opposed to the threshold for applying for a PDO. As discussed above, the INSLM does not consider this to be a reason for retaining PDO provisions. The INSLM stated:

> *"The criteria for arresting a person are so similar to the criteria for a PDO as to doubt the usefulness of PDOs at all. While belief and suspicion are different states of mind, the difference between suspecting on reasonable grounds (PDO threshold) and believing on reasonable grounds (Commonwealth arrest threshold) is not very great."*[212]

He goes on to quote from the often cited judgement of the High Court in George v Rockett [1990] HCA 26, which compared the two threshold tests:

> *"When a statute prescribes that there must be reasonable grounds for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."*

211 INSLM 2012 Report at section III.9.

212 Ibid at section III.7.

There are however other authorities. In R v Rondo [2001],[213] for example, Smart AJ said:

> *"A reasonable suspicion involves less than a reasonable belief but more than a possibility."*

He had reviewed authorities such as the judgement of the United Kingdom House of Lords in O'Hara v Chief Constable of the Ulster Constabulary [1996],[214] where Lord Steyn said:

> *"In order to have a reasonable suspicion, the constable need not have evidence amounting to a prima facie case. Ex hypothesi, one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough."*

This is the threshold test in the United Kingdom, and also in various States and Territories in Australia.[215] Such a state of mind could not however lead to a lawful arrest in Victoria or under Commonwealth law.

In meetings with the AFP, officers gave the Review Committee examples, which they considered real and foreseeable, of where the immediate and disruptive nature of a PDO, obtained purely on the grounds of intelligence which leads to a suspicion that a terrorist act might occur, could be essential for the safety of the public, where there has been no time to corroborate that intelligence.

Conclusions of the Review Committee concerning the use of arrest powers as an alternative to a PDO are set out at Section 8.8 of this Report.

8.7.2 Use of ASIO powers as an alternative

In terms of joint terrorism operations between ASIO, AFP and Victoria Police, and having considered the arrest powers of the police forces, the Review Committee also reviewed the powers available to ASIO, in particular the use of "questioning warrants" or "questioning and detention warrants". Those powers are set out in the ASIO Act. The statute was amended in 2003 in relation to terrorism offences.[216]

Division 3 of Part III of that Act grants ASIO the following coercive and compulsory questioning powers in a terrorism context:

1. Section 34E provides for the issuing of a "questioning warrant" by an "issuing authority" (a judge), on the application of the Director-General, with the consent of the Attorney-General. Before giving such consent, the Attorney-General must be satisfied that:

- There are reasonable grounds for believing that the issue of the warrant will substantially assist the collection of intelligence that is important to the investigation; and that
- Reliance on other methods of collecting that intelligence would be ineffective; and that

213 [2012] NSWCCA 540 at [53].

214 [1996] UKHL 6.

215 See for example, section 99, *Law Enforcement (Powers and Responsibilities) Act 2002 (*NSW*);* section 356, *Police Powers and Responsibilities Act 2000 (*QLD*);* section 128, *Criminal Investigation Act 2006 (*WA*);* section 75, *Summary Offences Act 1953 (*SA*);* section 212, *Crimes Act 1900 (*ACT*).*

216 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

- A written statement of procedures to be followed in the exercise of authority under a warrant issued under this division of the Act is in place, having been prepared by the Director-General in consultation with the Inspector-General of Intelligence and Security and the Commissioner of the AFP, and having been approved by the Attorney-General as a legislative instrument, and upon which the Director-General has briefed the Parliamentary Joint Committee on Intelligence and Security.

The warrant requires a person to appear before a "prescribed authority" (generally a retired judge) for questioning, either immediately or at a specified time and place.

2. Section 34G provides for the issuing of a "questioning and detention warrant", following the same procedure as above. The Attorney-General, in consenting to the Director-General making a request for a warrant under this section, must be satisfied as to the three criteria set out above, but must also be satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, that person:

- May alert someone else involved in a terrorism offence that an investigation is taking place; or
- May not appear before the prescribed authority for questioning; or
- May destroy, damage or alter a record or thing that he or she might be requested to produce under the warrant.

This warrant authorises the immediate detention of a person, to be brought immediately before a prescribed authority for questioning, followed by detention for up to 168 hours (seven days). Contact with the outside world is generally prohibited, though it may be provided for in a limited and specified way in the warrant, or by order of the prescribed authority. The warrant specifically authorises ASIO to question the detainee before the prescribed authority, and seek documentary evidence from him or her.

Subdivision D of Division 3 of this Part of the ASIO Act sets out a number of safeguards and protections, in addition to the layers of authority required under the application process. For example, the information to be given to the subject of a warrant by the prescribed authority is set out at length, and there are limits on the length of permissible questioning time. Specific provision is made for the humane treatment of the person specified in the warrant.

As mentioned above, contact is generally prohibited[217] for persons who are 18 years of age and over. This does not prevent the subject of the warrant from contacting a lawyer of his or her choice. In fact, provision for such contact must be specifically permitted in the warrant itself.[218] However, if ASIO is satisfied that contact with the chosen lawyer might prejudice terrorism investigations against someone else, or lead to the destruction of evidence, the prescribed authority may prevent such contact. Another lawyer may then be chosen by the person specified in the warrant. On the other hand, questioning before the prescribed authority in the absence of a lawyer is permissible[219] and contact with the lawyer is specifically monitored.[220]

217 Ibid at section 34K(10).
218 Ibid at sections 34E(3) and 34G(6).
219 Ibid at section 34ZP.
220 Ibid at section 34ZQ.

Section 34U provides for a police officer to enter a property for the exercise of a questioning and detention warrant under these provisions, and to use necessary and reasonable force. A person detained may be searched, including a strip search. A person against whom a warrant has been issued under either of these provisions must immediately surrender his/her passport(s), and must not leave Australia without the written permission of the Director-General.

The use of these provisions is not permissible for persons under 16 years of age. Special rules apply to persons aged between 16 and 18 years of age.[221]

All actions taken under this Division of the ASIO Act must be reported to the Attorney-General and to the Inspector-General of Intelligence and Security. This Division of the ASIO Act is due to sunset on 22 July 2016.

The INSLM Report 2012 indicates that up to and including the financial year 2011-2012, the "questioning and detention warrant" under section 34G has never been used by ASIO.[222]

It occurred to the Review Committee that, where the powers set out in section 34G of the ASIO Act were used by ASIO and the police in the context of a joint operation, there could be incommunicado detention for up to 7 days but with questioning specifically permitted, and this could be a viable alternative to the use of a PDO. By the time an investigation reaches a stage where the use of a PDO is under active consideration, it would be expected that the operation would be multi-jurisdictional, and the use of the ASIO power available.

However, the Review Committee was informed of a number of perceived limitations to the use of these powers as an alternative to a PDO, particularly in the disruptive sense of securing someone's detention:

- The detention aspect of the "questioning and detention" warrant requires a belief in one of three criteria, which are:
    - that the subject of the warrant may alert someone else involved in a terrorism offence that an investigation is taking place; or
    - that he or she may not appear before the prescribed authority for questioning; or
    - that he or she may destroy or alter a record or thing that he or she might be requested to produce under the warrant.

It can therefore be said that the intention supporting these powers is not "preventative", and to solely detain someone under them in order to prevent that person from undertaking a terrorist act would be beyond power. Those powers were granted to ASIO for its use as an intelligence agency.

- In any event, the duration of any detention under such a warrant cannot be confidently predicted or guaranteed. The maximum allowable detention is seven days. However, once questioning under the warrant has been completed (even where the subject of the warrant has answered each question untruthfully, but the veracity of the testimony is yet to be verified), the person must be released from custody; and

221 Ibid at section 34ZE.

222 INSLM Report, 2012 at Appendix G.

- As the two types of warrants described result in coercive questioning by a prescribed authority (ie. the subject of the warrant has no right to silence), evidence gained as a result of the questioning cannot be used in court.

The COAG Committee were not specifically asked to comment on the ASIO legislation. However, they were aware of the availability of the above-mentioned questioning and detention warrant provisions, and stated:

> *"The presence of those extensive powers suggests, should they remain in force, a further reason why the preventative detention legislation is, in its current format, not presently needed."*[223]

However, the Review Committee consider that while the prevention of an act could clearly be a consequence of a person being detained under a questioning and detention warrant, possibly for up to 7 days, the preventative aspect of the warrant could not be a primary ground for the granting of such a warrant.

Conclusions of the Review Committee concerning the use of ASIO powers as an alternative to a PDO are set out at Section 8.8 of this Report.

8.7.3 Victoria Police submission

The Review Committee conclude as follows:

8.7.3.1 Meaning of "imminent"

The Review Committee consider that there is merit in making an amendment to the TCPA so that, in making an application, or in making an order, the police applicant and the Court do not have to satisfy themselves that a terrorist attack is expected to occur imminently, and in any event within the next 14 days.

The terrorist legislation in every other State has the same restriction in its application provision,[224] as does the Criminal Code.[225] Whilst the equivalent measure in NSW also has the same pre-condition, in the case of applications to use special police powers under the same statute, reasonable belief that a terrorist act is suspected to be taking place "in the near future" is sufficient.[226]

The INSLM stated that (in respect of the Commonwealth equivalent) provision should be made for the imposition of a duty on the Court simply to be satisfied as to the possibility of a terrorist act occurring sufficiently soon as to justify the action being taken rather than retain the requirement that the act is expected to occur within 14 days.

The Review Committee are of the view that the INSLM's formulation, in recommendation III/2 in the INSLM Report 2012 has merit, and consider that the TCPA should be amended accordingly.

223 COAG Report at paragraph 274.

224 Section 16(4), *Terrorism (Extraordinary Temporary Powers)* Act 2006 (ACT); section 6(4)(a), *Terrorism (Preventative Detention) Act 2005* (SA); section 8(4), *Terrorism (Preventative Detention) Act 2005* (Qld); section 21E(2), *Terrorism (Emergency Powers) Act* (NT); section 5(2)(b), *Terrorism (Preventative Detention) Act 2005* (Tas); section 9(2)(b), *Terrorism (Preventative Detention) Act 2006* (WA).

225 Section 105.4(5)(b) of the Criminal Code.

226 Sections 5(a) and 26D(1), *Terrorism (Police Powers) Act 2002* (NSW), amended by section 5 and Schedule 3, *Crimes Legislation Amendment (Terrorism) Act 2004* (NSW).

8.7.3.2 Object of a preventative detention order

Whilst recognising the difficulty that police face in dealing with a person known only by a single name or a mere description, the severity of the consequences of a PDO require a degree of certainty in terms of the individual targeted before an order ought be made.

However, it is not uncommon for terrorists, as with other criminals, to use false names or aliases. Both can be identified with more certainty because such aliases will usually appear on official, though false, documents such as passports or drivers licences.

In such circumstances, a PDO made by the Court should not be invalid merely because it subsequently transpires that the wrong name appears on the order. It should be possible for an order to be made against "the person going by the name of …" or some other such formulation. The Review Committee therefore recommend an amendment to the provisions to deal with this situation (See Recommendation 7 of this Report).

8.7.3.3 Urgent applications by electronic means

In the context of an application for a PDO being made by electronic means, enquiries were made with the Supreme Court. It was explained that there are in place special procedures and protocols for the handling of applications filed under the TCPA, and other such Acts where the utmost security is necessary. Under Practice Note No 4 of 2007, applications of this type are dealt with or allocated by the Principal Judge of the Criminal Division. Early contact with the Judge's Associate is encouraged, and provision is made for the filing of urgent applications outside of office hours. Filing by hand is the standard practice in order to preserve security. It was also advised that investigation agencies have used this method of filing applications efficiently in the past.

In the circumstances, the Review Committee do not consider an amendment to the TCPA as sought by Victoria Police is necessary.

8.7.3.4 Prohibition on questioning

Victoria Police maintained a strong position to the Review Committee that there should be a power to question a person whilst in preventative detention. Reference has already been made to this position. It is a position that Victoria Police and other police forces took with the COAG Committee.

The Review Committee pointed out during its meetings with Victoria Police and AFP officers that the provisions provide for a person subject to a PDO to be released from detention to allow for interrogation, not just under an ASIO warrant, but by the AFP or Victoria Police. The officers explained that whilst this procedure was good in theory, there were significant problems for a Superintendent administering a detainee in determining whether someone was lawfully in or out of detention at any given time.

It is the clear policy of all preventative detention legislation in Australia that the detention is to be solely preventative and not investigative or punitive. Allowing police to question a detainee whilst in detention would be contrary to this policy and is not supported by the Review Committee. Law enforcement agencies have to accept that if a preventative detention power is to remain available to them such power cannot permit questioning of the person whilst in detention. Following lengthy consultations with law enforcement and intelligence officers, the Review Committee believe that they accept that this should remain the position under a PDO, and that to permit questioning would inevitably mean that the power was no longer preventative.

Further, it can be said that subjecting a detainee to alternate periods in or out of detention for the purpose of interrogation goes against the spirit in which the Court originally makes an order ie. preventative purposes. Bearing that in mind, the Review Committee consider there is merit in requiring that an application be made to the issuing Court for its approval to the detainee being removed from detention for the purpose of questioning by law enforcement or intelligence officers. Having regard to the nature and effect of a PDO and the pivotal position of the issuing Court, the Review Committee consider that such an amendment to the TCPA is necessary and recommend accordingly. It is not considered that such an amendment would reduce the effectiveness of the PDO provisions.

8.7.3.5 *Ex parte* applications

The Review Committee do not support the hearing of all PDO applications *ex parte* as submitted by Victoria Police. A person who is at liberty, with insufficient evidence against him or her to warrant arrest but facing incommunicado detention for up to 14 days, should have the right to appear and contest any application to the Court.

8.7.3.6 Responsibility for detainee welfare

Turning to the issue raised by the Victorian officers regarding continued responsibility for the subject of a PDO following detention in a prison, the Review Committee understand the concerns expressed about the position of a detaining officer in these circumstances, in particular, their concern where, following a request for a transfer from a police gaol to a prison, the person is detained in solitary confinement. Such confinement may be necessary for a person whose contact with others is to be deliberately restricted. Such detention may also need to be in a high security prison.

In light of these considerations, the Review Committee are of the view that section 13W(5) and any other related provisions should be amended and clarified, so that the responsibility for a detainee's welfare, in terms of section 13ZB in particular (the duty to treat humanely, etc.), transfers with the detainee. The responsibility under section 13ZB should move from the detaining police officer to the relevant prison authority. As part of the Review process this issue was discussed with the DOJ. It is noted that a person being detained in a prison under the *Serious Sex Offender (Detention and Supervision) Act 2009* is managed in accordance with the provisions contained in Part 9 and subject to the Part managed under the *Corrections Act 1986*. Such a person is not subject to a charge or sentence the detention, as in the case of a PDO, being preventative.

8.7.4 Australian Federal Police submission

The Review Committee conclude as follows:

1. The requirement in sections 13C(1)(a) and (2) 13E(1)(a) and (2) of the TCPA that the Chief Commissioner and the Court need to be satisfied of the threat of a terrorist act occurring in the next 14 days should be replaced with a provision requiring the Chief Commissioner and the Court to be satisfied as to the possibility of a terrorist act occurring sufficiently soon as to justify the application for and the making of a PDO.
2. With respect to the submission that an interim order should be granted by a senior police officer and not the Court, the original draft of the Terrorism (Community Protection) Amendment Bill 2006 made provision for a senior police officer to make an interim PDO in urgent circumstances. In the course of the consultations that followed, this particular provision was withdrawn. Parliament required a greater degree of judicial oversight in the use of such powers.

The Review Committee acknowledge that it is not uncommon in equivalent legislation in other jurisdictions to have an interim PDO made by a senior police officer. Nor is it uncommon, however, to not have such provision. The Review Committee are firmly of the view that it is necessary and appropriate that an interim order be made by the Court, as judicial oversight is imperative. Therefore the Review Committee do not consider that the TCPA should be amended as submitted.

3. With respect to the questioning of a detainee whilst in detention the Review Committee reiterate the views already expressed when considering the submission of Victoria Police.

8.7.5 Charter issues

In considering each of the Charter issues identified above, the Review Committee conclude as follows:

8.7.5.1 The circumstances in which a PDO can be made

The Review Committee are in no doubt that, in the circumstances in which a PDO can be made, detention for the prevention of harm to other persons is justifiable. In terms of harm or potential damage to property, the Review Committee are of the view that such preventative detention is reasonable and any distinction between intended harm to persons or property in the context of terrorist acts is not justified. As the COAG Committee stated, serious damage to property and the destruction or disruption of systems that are fundamental to the proper functioning of society can be as catastrophic in certain circumstances as the loss of life.[227]

The Review Committee are of the view, in the context of counter-terrorism, that preventative detention of a person for either purpose is a proportionate and justifiable limitation on the right to liberty, as is detention to preserve evidence of a terrorist act in these circumstances.

The Review Committee acknowledge that the consideration of whether or not the purposes of a PDO could be achieved in a different, less restrictive way is a test that should be applied in deciding whether or not a PDO should be granted. However, it is not necessary in the view of the Review Committee to legislate to make express provision for this consideration, as the Australian Capital Territory has done. The availability of any less restrictive means to achieve the purposes of the provision is already built into the Court's considerations by virtue of section 7(2) of the Charter. The Court, in the view of the Review Committee, would be a public authority acting in an administrative capacity for the purpose of section 38 of the Charter, and as such it would be required to take into account this consideration.

The basic objective of this and other parts of the terrorism legislation is the protection of the community from the acts or potential acts of others. The same objective applies to other legislative provisions whereby a person can be deprived of liberty without conviction (or further conviction), such as the ongoing detention of serious sex offenders who have served their sentence, but in the view of the Supreme Court, continue to pose an unacceptable risk to the community.[228] The involuntary detention of patients with mental health problems who may be a risk to the public, under section 8 of the *Mental Health Act 1986,* is another example. Such detention, and the

227 COAG Report at paragraph 31.

228 Part 3, *Serious Sex Offenders (Detention and Supervision) Act 2009.*

concomitant limitation on the individual's right to liberty, in circumstances where it is reasonably considered by the Supreme Court to be necessary to discharge the State's responsibility to protect the community, is proportionate.

In general, the Review Committee are satisfied that there are appropriate safeguards built into these provisions, as can be seen from sections 8.1.16 and 8.1.17 of this Report, with two reservations.

As explained previously, section 13O of the TCPA requires the police to apply to the Court for a revocation of a PDO where satisfied that the grounds on which the order was made have ceased to exist. If the Court is also satisfied, revocation must be ordered. However:

- Whilst the detaining officer is under a duty to apply to the Court seeking a revocation of the order, the detainee remains in detention. This matter was considered by the New South Wales Ombudsman in a report tabled in 2008, and again during a statutory review into the NSW legislation carried out in 2010.[229] Both recommended that the *Terrorist (Police Powers) Act 2002* (NSW) be amended to provide that, as soon as is practicable after the officer becomes satisfied that the grounds on which the order was made have ceased to exist, the person must be released from detention. That amendment was made in 2010.[230] The Review Committee are of the view that a similar amendment is necessary and should be made to the TCPA;
- If the officer is satisfied that the facts and circumstances leading to the making of the order have changed, the application may only be for a variation of the order, not the revocation of it. The Court would appear to have no power to order a revocation in this situation. However, where the subject of a PDO brings new facts and circumstances before the Court, then either revocation or variation is permitted.[231] The Review Committee see no basis for this distinction. Under section 31 of the *Terrorism (Extraordinary Powers) Act 2006* (ACT) for example, the Supreme Court is able to set aside a PDO on the application of either party on the grounds of new facts and circumstances having arisen. The Review Committee consider that an amendment along the lines of the Australian Capital Territory legislation is necessary and recommend accordingly.

With respect to the position under the Charter, with these amendments, the Review Committee consider the provisions to be reasonable and proportionate, and a justifiable limitation on the right to liberty of the detainee in the circumstances.

8.7.5.2 The adequacy of existing safeguards to protect against the adverse consequences of incommunicado detention

The Review Committee recognise that incommunicado detention may be detrimental to the health and well-being of the subject of the order, particularly where that person is under 18 years of age or of limited intellectual capability. However, in the circumstances in which a PDO would be made, it is difficult to envisage how the detention could be otherwise than solitary with appropriately restricted contact. The purpose of the preventative detention would be prejudiced otherwise.

229 Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002, NSW Ombudsman,* September 2008 and *Review of the Terrorism (Police Powers) Act 2002, Department of Justice and Attorney General, 2010.*

230 Paragraph 4 of Schedule 1 to the *Terrorism (Police Powers) Amendment Act 2010* (NSW).

231 TCPA at section 13N.

In terms of any additional safeguards, however, the Review Committee are not of the view that there should be a statutory obligation on a judge to consider the potential adverse consequences on the health and wellbeing of the subject before making an order.

In making a PDO, the Court must be satisfied, on reasonable grounds, that the detention of the person for the period of time for which he or she is to be detained is reasonably necessary for the purposes of the order. The Court must therefore consider what period of detention is necessary and make the order in light of all relevant considerations.

With that, and other safeguards, and taking into account the seriousness of the situation and the permissible purposes of a PDO, the Review Committee consider the safeguards provided under the TCPA are adequate.

8.7.5.3 Monitoring of communication, including with lawyers

Having regard to the purposes of the provisions and of the limitations on rights resulting, the Review Committee consider the limitations to the right to privacy with respect to contact with friends and relatives, etc., to be justifiable and proportionate.

However, the possible prejudice to the right to a fair hearing and the right not to self-incriminate arise in respect of the monitoring of contact between the detainee and his or her legal representative(s). Section 13ZG(5) provides a restriction on the use that can be made of any communication between a detainee and a lawyer in any proceedings arising out of the circumstances that led to the detention.

That section clearly provides for a "direct use immunity". That is, the contents of the communication between the detainee and his or her lawyer cannot be adduced in evidence by the prosecution in a subsequent proceeding against the detainee.

In the case of Re: an application under the *Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, the Supreme Court of Victoria considered whether a provision similar to section 13ZG(5), this time relating to evidence obtained as a result of coercive questioning, could be regarded as also containing a "derivative-use immunity", that is, a restriction on the use of evidence which was obtained as a result of the information provided by the person under coercive questioning.

Warren CJ found that the relevant provision should be read in the light of section 32(1) of the Charter, which states:

> *"So far as is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights".*

Her Honour provided a comprehensive analysis of the way in which legislation should be interpreted in the light of the Charter obligation, and in doing so, found that the immunity provided by the statute in that case should be read as extending to a derivative-use immunity, thus ensuring that the right to a fair hearing and the right against self-incrimination was protected. The decision of the Supreme Court was not appealed.

In light of that judgment, the Review Committee are of the view that the provisions of the TCPA that provide for the monitoring of communications between a detainee and his or her lawyer do not unreasonably limit the detainee's rights under the Charter.

8.7.5.4 The use of evidence that is not disclosed to the detainee

As referred to at Section 8.6.4 of this Report, the procedure for applying for a PDO provides for the withholding of information by the applicant from the written application. That is, some information, in the interests of national security, is not available to the Court through the written application and consequently not available to the subject of the application. This potentially raises an issue under the Charter, in that such withholding may engage the right to a fair hearing. It also potentially raises a constitutional issue, which was drawn to the attention of the Review Committee by Counsel. That issue is whether the manner in which an application is to be made impugns the institutional integrity of the Supreme Court so as to be invalid for inconsistency with Chapter III of the Constitution (pursuant to the principle derived from the line of cases commencing with Kable v Director of Public Prosecutions [1996] HCA 24).

Turning first to the constitutional issue, the Review Committee sought the advice of the Solicitor-General for Victoria. His advice is attached at **Appendix C**. At paragraph 25 of his advice, the Solicitor-General concluded as follows:

> *"1. Section 13D(1)(g), read with s 13D(2), operates to require an applicant for a preventative detention order to set out a summary of the grounds on which the order should be made, other than to state information the disclosure of which is likely to prejudice national security in the sense described. Section 13(D)(2) does not permit or direct the Supreme Court to have regard to such information in the absence of evidence. It does not purport to interfere in any way in the manner in which the Court conducts its proceeding, including the manner in which it applies the rules of evidence and evaluates the evidence once admitted, or the manner in which it affords procedural fairness after the application has been made.*
>
> *2. In light of the limited operation of s 13(D)(2), that provision is valid and does not give rise to constitutional invalidity of Pt 2A of the Act."*

In light of the advice from the Solicitor-General, the Review Committee are of the view that no constitutional issue arises from the PDO provisions in the TCPA.

Further, the Review Committee do not consider that the operation of section 13D(2) prevents the subject of the application from receiving a fair hearing as provided for in section 24 of the Charter.

8.7.5.5 The application of the PDO regime to young people

It can be said in terms of the Charter rights of persons between 16 and 18 years of age, who are legally classified as children, that it is difficult to justify the use of legislative provisions which would lead almost inevitably to solitary confinement and limited contact with a parent(s) or a guardian(s), even taking into account the special provisions that apply.

Section 13J of the TCPA provides that a PDO may only be applied for, or made, in respect of a person who is 16 years of age or over. By contrast, the equivalent Australian Capital Territory legislation provides that a PDO cannot be applied for, or made, for a child (defined as an individual under 18 years of age).[232] Every other jurisdiction in Australia, including the Commonwealth, limits the use of the powers to

232 Section 10, *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) and section 2 and Dictionary, *Legislation Act 2001* (ACT).

those who are 16 years of age and over. However, the Australian Capital Territory is the only other jurisdiction whose laws are subject to specific human rights legislation.

The Review Committee found this to be one of the most difficult issues to address in conducting the Review. Victorian law regards persons who are 16 and 17 years of age to be children. However, there is evidence internationally that such young persons have been involved in acts of terrorism, and that they are more likely to be influenced by terrorist propaganda. Arguably, the police need to be in a position to be able to respond to such situations.

The Review Committee considered the conditions in which persons under 18 years of age might be detained, bearing in mind that such detention might take place in an adult prison. Section 13F(8) provides that such a person must be detained in a youth justice facility unless the Supreme Court is satisfied that it is reasonably necessary for him or her to be detained elsewhere, having regard to:

- The person's age and vulnerability;
- The likely impact that detention in a place other than a youth justice facility would have on the person;
- The grounds on which the order is made;
- The risk posed by the person to the security of Australia, to other persons detained in the youth justice facility or to the good order and safe operation of that facility;
- The availability of a place in the youth justice system capable of holding the detainee in accordance with the terms of the PDO; and
- Any other factors that the Supreme Court considers relevant.

Moreover, it is not only the Supreme Court that may order a juvenile to be detained in an adult prison. Under section 13ZBA, the detaining officer is under a duty to ensure that a person under 18 years of age is not detained with persons who are above that age. However, a senior police officer (of or above the rank of Assistant Commissioner) may approve detention with adults if there are "exceptional circumstances".

Victoria Police provided the Review Committee with a Memorandum of Understanding (MOU) between DHS, DOJ and Victoria Police which relates to the operation of a PDO. The contents of this MOU are confidential.

In December 2013, the Victorian Ombudsman published a report entitled "*Investigation into children transferred from the youth justice system to the adult prison system*."[233] The Ombudsman concluded that, in his view:

> *"…there are no circumstances that justify the placement of a child in the adult prison system."*[234]

The Review Committee considered that there were three options for dealing with the conflict of provisions, that is the PDO legislation as against the Charter rights of children. The options are:

233 TCPA at sections 13F and 13ZBA.

234 Victorian Ombudsman Report "*Investigation into children transferred from the youth justice system to the adult prison system*" 2013 at paragraph 184.

1. Not change the TCPA provisions. In deciding whether to make a PDO, the Court must be satisfied under section 13E(1) that detention is reasonably necessary for the achievement of the objective of the PDO, and the Court may thus take the subject's age and experience into account;
2. Remove such persons from the ambit of the provisions. Application to persons who are 18 years of age and over would satisfy the Charter consideration; or
3. By way of compromise, refine the test in section 13E so that the age, experience and the extent of the person's involvement in the terrorist activity is expressly to be considered by the Supreme Court in determining an application for a PDO.

This is a difficult issue in the light of the provisions of the Charter. After giving the matter careful consideration, the Review Committee, by majority, are not of the view that an amendment is necessary to the current provisions relating to young persons. Having regard to the importance of the purpose of the TCPA (that is, protection of the community), whilst the rights of children are limited through the making of a PDO, on balance, the Review Committee, by majority, conclude that the limitation is reasonable, proportionate and justified in all the circumstances.

Put briefly, the view of the minority is that the preventative detention scheme as contained in the TCPA, in the event that it continues, should be amended to provide that only persons of 18 years of age and over may be detained under a PDO. That is the position in the Australian Capital Territory legislation, which Territory has human rights legislation. The minority is not persuaded that the limitation on the rights of children is proportionate, justified or reasonable in all the circumstances. Under the current provisions, in the view of the minority, a person of the age of 16 or 17 years in detention under a PDO, where there are exceptional circumstances, might be detained in solitary confinement, with very restricted ability to communicate, and in a high security adult facility such as the Barwon prison. In the view of the minority, such a situation would be unacceptable. It is noted that only a person of 18 years of age and over, who is an unacceptable risk of committing a sexual offence, can be detained under the *Serious Sex Offenders (Detention and Supervision) Act 2009*. Consequently, a person of 16 or 17 years of age who is an unacceptable risk to the community could not be preventatively detained under that legislation in order to eliminate the risk. Such risk would have to be managed by other means. The minority is not persuaded that the need to have the power to preventatively detain a person of 16 or 17 years of age, in order to adequately protect the community from the risk of a terrorist act, outweighs the need to protect the rights of such a person as a child under the Charter.

8.8 Summing up

It is not necessary to repeat conclusions that have already been expressed in relation to the PDO provisions. The various issues that arise have been carefully considered, including issues under the Charter.

The Review Committee have considered whether amendments should be made to the provisions and are of the view that some amendments are necessary and would be appropriate. The fundamental question is whether the power to detain a person as provided for in the TCPA is necessary and effective.

The submissions and information provided to the Review Committee by law enforcement and intelligence agencies have been comprehensive, cogent and persuasive as to the continuing need for the power, notwithstanding that to date it has not been used. They strongly maintained that even though the questioning of a

detainee is not permitted there was still a need to have a power to detain. The power is preventative and not investigative. The Review Committee explored at length with the agencies whether there is a continuing need, having regard to the arrest powers of police and the detention and questioning powers of ASIO. The COAG Committee considered the existence of these powers to be an important factor in concluding that the detention power was not necessary.

After reflecting on the information before the Review Committee, a majority of the Review Committee are persuaded that such powers of arrest and detention and questioning do not necessarily protect the community from all potential risks of a terrorist act. The Review Committee, by majority, are persuaded that the detention power is necessary in order for law enforcement agencies to be able to protect the community from a terrorist act to the maximum extent possible. There is a continuing need for the power.

It will be clear from the comprehensive review of these provisions that they are complex. There are many and varied steps that have to be taken before a PDO can be obtained and a range of requirements that have to be met. These requirements are necessary safeguards having regard to the consequences of a PDO for the person the subject of the order. Realistically, do they in essence render the power ineffective for operational use by police?

The Review Committee had robust discussions with law enforcement and intelligence agencies about this issue of effectiveness. The agencies frankly acknowledged the operational difficulties and limitations they faced. They were strong in their view that, in effect, as a last resort, the process could be effectively employed in order to protect the community from a terrorist act where no other means was available.

After careful consideration the Review Committee, by majority, are persuaded that, notwithstanding the operational difficulties the legislation presents to police, the preventative detention power as provided for in the TCPA is effective. In other words, in protecting the community from a terrorist act, the power could be used effectively, even though with some difficulty.

It follows that the Review Committee, by majority, consider that the preventative detention power is necessary, adequate and effective and should continue to be available to Victoria Police. Recommendations are made as to amendments that are felt appropriate and necessary.

Notwithstanding the force of submissions made to the Review Committee by law enforcement and intelligence agencies, a minority of the Review Committee does not consider that the preventative detention power is necessary or effective. It is understandable that such agencies would wish to have as extensive a range of powers as possible. They carry a heavy and onerous responsibility to protect the Australian Community from a terrorist act. However, it has always been a fundamental requirement that any counter-terrorism powers be necessary and effective.

The reasons of the minority are in essence similar to those expressed by the majority of the COAG Committee and the INSLM. In the minority's view, the preventative detention power is not necessary to adequately protect the community from a terrorist act having regard to the range of other powers available to law enforcement and intelligence agencies. Apart from police arrest and ASIO questioning and detention powers, these powers include the power to have a person subject to a control order under Commonwealth provisions and surveillance and telephone intercept powers.

It is noted that there is no preventative detention power in the United Kingdom. However, considerable use is made of control orders to adequately protect the community from a terrorist act. Such orders have been used sparingly in Australia, but the changing terrorist risk could mean that more extensive use is made of them.

The complexity of the provisions and the operational difficulties they present to police have already been referred to. To date, no application has been made in Australia for a PDO. The COAG Report referred to the South Australian submission where the operational difficulties were stressed. The minority of the Review Committee is of the view, as were the majority of the COAG Committee, that from a realistic practical perspective the PDO provisions are incapable of operational use by police. In their current form they are ineffective. However, the safeguards built into the legislation cannot be reduced in order to achieve effectiveness. Those safeguards are necessary having regard to the nature and effect of the preventative detention involved under a PDO and the requirements of the Charter.

In the event of it being decided that the PDO regime should continue, and be re-enacted, the minority supports the following recommendations as to amendment of the TCPA.

8.9 Recommendations

Recommendation 6

That the provisions in the Terrorism (Community Protection) Act 2003, relating to the requirement that a terrorist act be imminent and expected to occur, in any event, at some time in the next 14 days, be amended along the lines recommended by the INSLM.

Recommendation 7

That section 13F(4)(a) of the Terrorism (Community Protection) Act 2003 be amended to provide that the order must contain the name of the person in relation to whom it is made, or the name by which the person is known to police.

Recommendation 8

That section 13V of the Terrorism (Community Protection) Act 2003 be amended to provide that, where an investigation or intelligence agency seeks to have a person released from detention for the purpose of questioning, the authorised officer must return to the Supreme Court for a variation of the order, or for permission to interrogate, at any time whilst the order is still in force.

Recommendation 9

That the provisions of Part 2A of the Terrorism (Community Protection) Act 2003 be amended, as necessary, to provide that the responsibility for the welfare of a detainee transfers from the police to the prison authorities at the same time as the detainee transfers from the custody of one to the other.

Recommendation 10

That the Terrorism (Community Protection) Act 2003 be amended to provide that, as soon as is practicable after the detaining officer becomes satisfied that the grounds on which a PDO was made have ceased to exist, the detainee must be released from detention.

Recommendation 11

Section 13O of the Terrorism (Community Protection) Act 2003 be amended so that if the detaining officer is satisfied that either:

- ***the grounds on which a PDO was made have ceased to exist; or***
- ***the facts and circumstances on which the order was based have changed,***

the officer must apply to the Court for a variation or a revocation depending on the circumstances.

Comment: *Regardless of the type of application made by the officer, the Court should be empowered to order the revocation of, or such variation to, the order, as it sees fit.*

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9 Part 3 – Police Powers to Detain and Decontaminate

9.1 Summary of the legislation

9.1.1 Origin

The provisions set out in this Part came into force on 16 April 2003, but the powers were enhanced in a number of ways in 2006.[235] They have been subjected to only minor changes and technical amendments since that time.[236]

9.1.2 Purpose of the provisions

This Part provides Victoria Police with special powers for use in the event of a chemical, biological or radiological attack, in order to protect members of the public from contamination.

The powers were created recognising that in the event of such an attack, the police are likely to be the first agency on the scene. The provisions allow them to make urgent decisions to at least contain and identify the problem before the usual emergency procedures and protocols commence.[237]

Section 14 of the TCPA expresses the intention of Parliament which, in the words of the Premier in his second reading speech, set out the guiding principle for the powers contained in this Part. It states:

> *"In giving an authorisation or exercising powers under this Part, it is the intention of the Parliament that no unnecessary restrictions on personal liberty or privacy should be imposed."*[238]

Thus, persons in detention should always, unless practicably impossible, have the right to contact friends and relatives by telephone, for example, and the police are required to facilitate such contact. This was provided for in section 18(4) as originally enacted. However, that provision was substituted by the TCPA Further Amendment Act[239] with section 18A, which requires the police to facilitate any reasonable request for communication or medical treatment.

235 TCPA Further Amendment Act.

236 Section 3 and Schedule Item 65, *Statute Law Revision Act 2007;* section 32, *Emergency Management Legislation Amendment Act 2011;* section 3 and Schedule Item 15, *Statute Law Revision Act 2012.*

237 Part 7 of the Emergency Management Manual Victoria made under Part 3 of the *Emergency Management Act 1986,* nominates agencies to be "control agencies" or "support agencies" for different types of emergencies in the State.

238 *Victorian Parliament Hansard* (Thursday 27 February 2003) at page 165.

239 TCPA Further Amendment Act at section 9.

9.1.3 Authorisation

If a senior police officer[240] reasonably believes that a terrorist act has occurred, or may have occurred, and that the area or the people in it will be or may have been exposed to contamination by substances released as part of the act, then he or she may give an authorisation to another police officer to exercise the powers set out in this Part.

The authorisation given by the senior officer may be given orally or in writing, if orally, it must later be confirmed in writing. The authorisation must be clear that it is being given under this Part of the Act, and describe the act or suspected act and the geographical area to which it relates. The name or a description of the officer being authorised and the time it is given must also be recorded.

If the senior officer later believes that a terrorist act, or suspected act, has not in fact occurred, and that no contamination has occurred, then he or she must immediately inform the Chief Commissioner. At that point in time, the authorisation ceases to have effect.

Alternatively, the authorisation lapses:

- On the advice to the Chief Commissioner of the Control Agency responsible under the Emergency Management Manual Victoria (the Manual), where that agency has assumed control under the administrative protocols (usually one of the fire services), that the authorisation should lapse; or
- In any event, 8 hours after the authorisation was given.

The Chief Commissioner, a Deputy Chief Commissioner or an Assistant Chief Commissioner may extend or renew the authorisation for another 8 hours if it is felt necessary for the protection of public health, but only with the agreement of the aforementioned Control Agency. Section 18(2) states that the extended period of authorisation must not be for more than 16 hours duration in total, whether that total is a continuous period or a cumulative amount of separate periods. Clarification of this provision was provided to the SARC by the Premier in his response to the committee's comments,[241] being that the total permissible duration of an authorisation would be 16 hours, and not 24 hours (the maximum 8 hours original authorisation, plus an extension of 16 hours).

Where an authorisation lapses for a reason other than the effluxion of time, the Chief Commissioner must immediately notify the authorised officer of that fact.

9.1.4 What is authorised?

With a view to preventing or limiting the spread of any contamination caused by the terrorist act, or suspected terrorist act,[242] the police officer authorised may take all or any of the following actions, or may direct another member of the police force to do so:

- Direct persons out of, away from or into a given area;
- Detain a person or persons; and

240 That is, an officer of or above the rank of Inspector; section 15.
241 SARC Alert Digest No 1 of 2003.
242 TCPA at section 18(3).

- Direct a person to subject him or herself to decontamination treatment, usually provided by the fire services, such as being sprayed with water or a de-contaminant.[243]

By virtue of an amendment made by the TCPA Further Amendment Act,[244] the officer (or another authorised member of the force) may enter a place within the suspected contaminated area, without the consent of the occupier, in order to carry out any of the above. There is a proviso, where the premises are residential, that the consent of the occupier must be obtained unless the authorised officer reasonably believes that immediate entry is necessary to ensure someone's safety, or to prevent or limit the spread of any contamination.[245]

The authorised officer is also empowered to dispose of, destroy or seize anything that has been contaminated, or the source of that contamination or potential contamination.[246] This particular power is not delegable to another police officer in the way that the powers above are. On the other hand, in exercising any of the powers, he or she may accept any assistance that he or she believes is reasonably necessary in the circumstances from any person.[247]

What is more, the authorised officer, or another member of the police force acting under his or her direction, is entitled to use reasonable or necessary force against any person who refuses or fails to comply with any direction to move out of, away from or into a particular area, or a direction to subject themselves to decontamination treatment.[248] These powers are now supported by offence provisions.

Given that, a potentially important deeming provision is included at section 18(2) of the TCPA. If an authorised officer gives an oral direction to a group of people in a manner likely to have been heard by all of those people, or as many of those people as is reasonable in the circumstances, then the direction is deemed to have been given to everyone in that group.

9.1.5 Offences

The TCPA Further Amendment Act, at section 8(4), created offence provisions to support the use of the police powers. Thus:

- It is an offence for any person to refuse or fail to comply with any direction to move away from or into a particular area, or to refuse or fail to comply with an order to undergo decontamination treatment, unless that person has a reasonable excuse;[249]
- An offence may also be committed if an authorised police officer is hindered, obstructed or delayed in carrying out his or her powers.[250]

243 Ibid at section 18(1).
244 Ibid at section 8(3).
245 Ibid at section 18(5).
246 Ibid at section 18(1)(ca), added by section 8(1) of the TCPA Further Amendment Act.
247 Ibid at section 18(6).
248 Ibid at section 21.
249 Ibid at section 18(7).
250 Ibid at section 18(8).

9.2 Operation of the legislation

The powers under this Part have yet to be tested, as the occasion has yet to arise where they have been required.

9.3 COAG Report

These provisions were not reviewed by the COAG Committee.

9.4 Submissions

At a meeting with Victoria Police, officers drew attention to the equivalent powers applicable in terrorist emergencies in Queensland, whereby the use of force is authorised for the purpose of rendering medical treatment as well as decontamination.

These provisions may be found in sections 29 and 30 of the *Public Safety Preservation Act 1986* (Qld), as amended by the *Chemical, Biological and Radiological Emergency Powers Amendment Act 2003* (Qld). There, a duly authorised ambulance officer or health officer is entitled to examine, undertake tests, take samples and provide any reasonably necessary medical treatment to someone affected by such an emergency, and any refusal to accept such treatment may be ignored by those officers if they are reasonably of the view that allowing the patient to leave their care would cause danger to others, ie. in terms of cross-contamination.

Victoria Police support for the adoption of such powers was reiterated in written submissions to the Review Committee. They pointed out that the Queensland provisions allowed for the continued detention of a person for an extended period of time where a risk of contamination remains constant.

The powers that are available under the Northern Territory terrorism provisions are less intrusive.[251] A police officer may quarantine a person by directing him or her to remain in a particular place, or go to a particular place and stay there, for up to 48 hours, so as to undergo decontamination treatment or prevent the spread of a contaminant.

9.5 Impact of the Charter of Human Rights

Given that these powers potentially involve the detention and compulsory decontamination of persons, amongst other supplementary powers, five of the Charter rights are potentially engaged:

1. The right to liberty and security of the person under section 21 of the Charter (particularly through the detention powers in section 18(1)(c) of the TCPA);
2. The right to freedom of movement in section 12 of the Charter (particularly through the direction powers in sections 18(1)(b) and (d));
3. The right to property in section 20 of the Charter (particularly through the disposal, destruction and seizure powers in section 18(1)(ca));
4. The right to privacy under section 13(a) of the Charter (particularly through the powers to enter property without consent in section 18(1)(e) and to forcibly decontaminate a person (sections 18(1)(d) and 21).

251 *Terrorism (Emergency Powers) Act 2003* (Qld) at sections 24 and 25.

5. The right not to be subject to medical treatment without full free and informed consent under section 10(c) of the Charter.

9.6 Discussion and conclusions

To date, the powers in this Part have not been utilised. Anticipating the type of situation in which the police might consider making an authorisation, the Review Committee regard the powers as likely to be adequate and effective. The Review Committee consider there is a continuing need for them.

The Review Committee considered the submission of Victoria Police regarding the powers available in Queensland, and considered that they were not necessary in the context of this Part, nor is the Northern Territory provision.

As pointed out in Section 9.1.2 of this Report, these powers are given to the police as likely first responders to an incident. The powers under this Part are exercisable for a maximum of 16 hours. However, at some point during that period, most likely very early during it and particularly as "response" transitions into "relief and recovery", operational control of the situation will pass to the Department of Health under the Emergency Management Manual. Under Chapter 7 of that Manual, the Department is responsible for, amongst other things:

- Co-ordinating all aspects of the relief and recovery, including State/Commonwealth departments, local government, NGOs and agencies; and
- Co-ordinating the provision of personal support at the incident site.

The current provisions provide sufficient community protection in the event of the type of incident occurring that was envisioned.

Turning to the Charter considerations, the Review Committee are of the view that any limitations on a person's rights are properly constrained by the TCPA. Most importantly, section 16 makes it clear that an authorised police officer may only exercise a power conferred by these provisions for the purpose of protecting people from chemical, biological or radiological contamination. Section 18(3) emphasises the limitation by stating that the powers under this Part may be exercised for the purpose of preventing or limiting the spread of contamination caused by the terrorist act or suspected act. Any extension to an authorisation to use these powers can only be on the grounds of protecting public health under section 20.

Additionally:

- The authorisation operates for a limited period, and only for so long as the preconditions are met (see sections 16(2) and 19). The power to extend can only be exercised by the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner and with the agreement of the agency responsible under the state emergency response plan (section 20);
- The power to enter residential premises, in which there is a higher expectation of privacy, is limited to the important and urgent circumstances set out in s 18(5);
- There are safeguards for communication and obtaining medical treatment (section 18A); and
- In light of the importance of the powers and the urgency with which they must be exercised in order to protect the public, it would not be practicable to seek court authorisation of the powers.

The Review Committee are of the view that any limitation on the rights referred to is reasonable and justified in all the circumstances.

In particular, with respect to any potential limitation of a person's right not to be subject to medical treatment without full free and informed consent under section 10 of the Charter, the Review Committee are of the view that the decontamination procedures would not amount to medical treatment. On a proper construction of the decontamination powers, including in light of the right to request medical treatment in section 18A, the powers would not extend to matters such as requiring a person to take antibiotics or other medical treatment. Further consideration would be necessary if the Review Committee were to recommend the type of powers available in Queensland, but it is the view of the Review Committee that there is no need for such powers.

The Review Committee are of the view that this Part of the TCPA should continue. The provisions are adequate, necessary and effective.

10 Part 3A – Special Police Powers

10.1 Summary of the legislation

10.1.1 Origin

As well as Part 2A, dealing with preventative detention orders, this Part of the TCPA was inserted by the TCPA Amendment Act,[252] and came into force on 9 March 2006. No substantive amendments to these provisions have been made since that time.

10.1.2 Purpose of the provisions

This Part allows for the authorisation of the police to exercise special powers in limited circumstances. The provisions were modelled on those in the New South Wales *Terrorism (Police Powers) Act 2002*, which came into force in December of that year. An important difference, however, is that in NSW the powers are exercisable following the authorisation of the Commissioner or Deputy Commissioner of Police, with the concurrence of the Police Minister. In Victoria, in respect of a substantive authorisation, the police must satisfy a judge of the Supreme Court that the use of the special powers is necessary before that authorisation will be given.

The circumstances that allow an authorisation to be given for the use of special police powers are:

1. To secure an event that is likely to be attended by a large number of people, or a gathering of "prominent persons", that could be the target of a terrorist act, where usual police resources cannot guarantee the security of the event or the safety of those attending it;[253]
2. Where an act is occurring, or is expected to occur within the next 14 days, to prevent that act, reduce the threat of it or to reduce the potential impact of it;[254]
3. To recover following a terrorist act, to assist in the apprehension of those responsible and to preserve evidence;[255] or
4. To protect essential services infrastructure from a terrorist act, to mitigate the effect of such an act on the service or on people in the vicinity or to assist in the recovery of an essential service.[256]

Each of these situations are discussed at Section 10.3 of this Report. In the fourth set of circumstances, unlike the first three, the authorisation must be given by Order of the Governor in Council, on the recommendation of the minister responsible for the service, made with the approval of the Premier and in accordance with advice received from the Chief Commissioner.

252 TCPA Amendment Act at section 5.
253 TCPA at section 21B.
254 Ibid at section 21C.
255 Ibid at section 21E.
256 Ibid at section 21F.

Following the deliberations that took place between the second reading of the Bill and the second reading debate (see Chapter 2 of this Report), some concessions were made by the Government, particularly regarding the rules governing strip-searches of children. However, it is perhaps surprising that of the 206 amendments to the initial Bill, only seven substantive amendments related to this Part.

10.1.3 Use of the special police powers

In the second and third sets of circumstances described in Section 10.1.2 of this Report, that is where a terrorist act is occurring, is imminent or has already occurred, the Chief Commissioner is able to make an interim authorisation, with the written approval of the Premier, to use the special powers. However, that interim authorisation is subject to confirmation on application to the Supreme Court within 24 hours (if the authorisation is expected to be necessary for longer than 24 hours), as described below.

Such an interim authorisation is not subject to legal challenge. Section 21J provides that the granting of an interim authorisation may not be challenged in any court or tribunal. No proceedings seeking relief (for example, for an order of certiorari or mandamus) may be commenced, with respect to the granting of the interim authorisation, against the Chief Commissioner or the Premier. This measure was seen as necessary in order to prevent the urgent exercise of the special powers being delayed or frustrated by court proceedings.

The manner in which an interim authorisation is given is set out in section 21H. It may initially be given orally, though it must be confirmed in writing as soon as is practicable. It must describe the general nature of the terrorist act or threatened act, the person, vehicle or area which is the subject of the authorisation and the date and time of its commencement and expiration.

An authorisation is given with respect to a particular "target", in the words of the legislation. That is, it may authorise the use of special powers as against a particular person, as named or described (including a description using a photograph or drawing), a vehicle or a particular type of vehicle or a particular geographical area.

A substantive authorisation to use special powers (as opposed to an interim one) may be granted by a judge of the Supreme Court on the application of the Chief Commissioner, again with the approval of the Premier. The application must be made by the Chief Commissioner personally. It is not delegable to any other officer in this instance.[257] A substantive authorisation (ie. not an interim one) may be of up to 14 days duration.

In the exercise of any of the powers set out below, the use of reasonable force is expressly permitted by section 21V. The special powers may be exercised by any police officer or (with the exception of strip searches) by a person assisting the officer. The officer need not be issued with a copy of the authorisation.

If requested to do so, an officer exercising any of these powers must provide his or her name and place of duty and evidence that he or she is an officer (unless that person is in uniform at the time) to the person against whom the power is being exercised. This must be done at the time or as soon as is reasonably practicable afterwards.[258]

257 TCPA at section 21A(3).
258 Ibid at section 21X(1).

In order to facilitate the exercise of any of the special police powers, the Chief Commissioner is expressly entitled to call upon any public entity (government department or agency) for assistance.[259] This might be, for example, a road or rail transport authority.

10.2 The special police powers

For the purposes of achieving the objective of the authorisation, the powers that may be exercised by the police (but only if they are specifically mentioned in the authorisation)[260] are as follows.

10.2.1 Power to obtain disclosure of identity

If a police officer believes a person to be:

- The subject of the authorisation; or
- In the company of a person who is the subject of the authorisation; or
- In or on a vehicle which the officer believes to be the subject of the authorisation; or
- In an area which is the subject of an authorisation[261]

then the officer may request proof of that person's identity, and may detain the person for as long as is necessary for the purpose of doing so.

It is an offence to fail or refuse to comply with a request from a police officer under this provision, or to give a false name or address.

10.2.2 Power to search persons

If an officer believes that a person meets the criteria at Section 10.2.1 of this Report, then that officer may, without a warrant, stop and search the person and anything in the possession or control of that person (a bag, rucksack, etc.), and in doing so, may:

- Request the person to empty the contents of the bag, etc., and search through the bag or any of the contents of it; or
- Turn out his or her pockets, and search through those contents.[262]

For the purposes of such a search, the officer may detain the person for as long as is necessary to conduct it. The officer may also order a person or group of people not to leave an area that is the subject of the authorisation.

The power to search a person includes the power to carry out an ordinary search, a frisk search or, where someone is suspected to be the target, a strip search may be undertaken. Limits and rules on the conduct of searches, and safeguards for the protection of a person's privacy and dignity during a search, are contained in the TCPA.[263]

In particular, no strip search may be carried out on a child under the age of 10 years, and special rules apply to minors between the age of 10 and 18 years or persons of

259 Ibid at section 21L.
260 Ibid at section 21N.
261 Ibid at section 21O.
262 Ibid at section 21P.
263 Ibid at Schedule 1.

limited intellectual ability. Generally speaking, such a person may not be strip searched unless in the presence of a parent or guardian.

Paragraph 6(4) of Schedule 1 to the TCPA provides that the limitation on strip searches of minors aged between 10 and 18 years of age, that requires a parent or guardian to be present, does not apply if such a person is not present, and the seriousness and urgency of the circumstances require the strip search to occur immediately.

10.2.3 Power to search vehicles

An officer may, again without a warrant, stop and search a vehicle, or anything in or on a vehicle, if:

- He or she reasonably suspects the vehicle to be the target named or described in the authorisation; or
- He or she reasonably suspects that a person in or on the vehicle is the target; or
- The vehicle is in the area which is the subject of the authorisation.[264]

Again, the vehicle may be detained for as long as is necessary to enable the search to be conducted, and the officer may order the driver or rider of the vehicle to remove it from, or to keep it within, the relevant area.

10.2.4 Power to move vehicles

Where a particular geographical area is the subject of the authorisation, an officer may move or have moved to the nearest convenient place any vehicle parked or left standing in the area if, in his or her opinion, it is a danger to other persons or vehicles, is causing or likely to cause congestion or is hindering the exercise of the special powers authorised under this Part. Reasonable force may be used to enter the vehicle for this purpose. Any reasonable costs incurred by the police in moving the vehicle may be recovered from the owner.[265]

10.2.5 Power to enter and search premises

If the subject or "target" of the authorisation is a person or vehicle, and a police officer reasonably suspects that the person or vehicle is on certain premises, then he or she may enter and search those premises. Further, any premises which are themselves in an area which is the "target" of the authorisation may similarly be searched. The officer may order any person or group of people to leave, or not to leave, the premises entered and searched.

The provision reiterates the usual consideration that the officer must cause as little damage as possible in conducting the search.[266]

264 Ibid at section 21Q.
265 Ibid at section 21R.
266 Ibid at section 21S.

10.2.6 Power to place a cordon around a target area

For the purpose of conducting searches of people, vehicles or premises under powers set out in this Part, an officer is empowered to set up a cordon around any area which is the subject of the authorisation, or any part of it, including by means of a barrier or roadblock in or around the area. Persons or groups of people may be ordered to leave, or not to leave, the cordoned-off area.[267]

10.2.7 Power to seize and detain things

In connection with a search carried out under this Part, a police officer may seize and detain (including removing a thing or guarding against its removal):

- Anything that the officer reasonably suspects may be used, or may have been used, to commit an act of terrorism; or
- Anything that the officer reasonably believes may provide evidence of the commission of a serious indictable offence (meaning an offence for which the maximum punishment is life imprisonment or for a term of five years or more), whether or not that offence is related to the commission of a terrorist act or not.[268]

Provision for the return or disposal of anything seized is made in the section.

10.3 Application for, and grant of, an authorisation

10.3.1 Authorisation to protect persons attending events

These provisions[269] come into consideration where a significant event is taking place or is planned for Victoria, and the Chief Commissioner has reason to believe that the event could be the target of a terrorist act. An application may be made on the basis that the Chief Commissioner is satisfied that:

- An event in Victoria is taking place, or is likely to be taking place shortly, which involves or is likely to involve the attendance of either a large gathering of people or a number of "prominent persons"; and
- There are reasonable grounds for believing that an act of terrorism might occur during that event; and
- The giving of an authorisation covering the relevant venue or any other area connected with the event is necessary for the protection of those attending the event.

He or she must obtain the written approval of the Premier and must make a sworn application in writing to the Supreme Court which:

- Describes the event;
- Sets out the facts and reasons why it is considered there is a risk of a terrorist act;
- Explains why the giving of the authorisation sought is considered necessary for the protection of attendees;

267 Ibid at section 21T.
268 Ibid at section 21U.
269 Ibid at sections 21B and 21C.

- Sets out the specific special powers under this Part of the TCPA which he or she considers reasonably necessary for that purpose; and
- Describes any area which is to be the subject of the authorisation sought.[270]

The judge hearing the application may seek such further information as he or she requires, and in that regard, may adjourn consideration of the application, or may make an interim order giving an authorisation pending the final determination of the application. If an interim order is granted, then a date and time must be set for the resumption of the hearing.[271]

If the judge is satisfied on reasonable grounds that the authorisation sought is reasonably necessary for the protection of attendees at the event, that authorisation may be granted. It must:

- State that it was granted under this Part of the TCPA; and
- Describe the general nature of the event and any area targeted by the authorisation;
- Specify which of the powers described at Section 10.2 of this Report, may be used; and
- State its commencement date and time and the date and time it ceases to have effect.

The expiry time must be no later than 24 hours after the event's scheduled completion time. Extensions may be granted on application to the Court by the Chief Commissioner, with the approval of the Premier, if the judge reasonably believes that the extension or extensions are reasonably necessary for the achievement of the original objective of the application and authorisation.[272]

If an interim order has been granted, then on the resumption of the hearing of the application, the judge may either confirm the authorisation as made, or may grant the authorisation with variations as to the area covered by it, the special powers that may be exercised under it or the time or date when the authorisation ceases to have effect. Alternatively, if he or she is not satisfied that the continuation is reasonably necessary for the protection of people attending the event, the order may be revoked.[273]

10.3.2 Authorisation to prevent, or to reduce the impact of, a terrorist act

The Chief Commissioner, with the written approval of the Premier, may make an interim authorisation under this provision if:[274]

- He or she is satisfied on reasonable grounds that an act of terrorism is occurring, or there is a threat of one occurring in the next 14 days; and
- He or she is satisfied that the use of the special powers will substantially assist in preventing the act, or reduce the impact or threat of the act on the health and safety of people or on property.

270 Ibid at section 21B(1) – (4).
271 Ibid at section 21B(8) and (9).
272 Ibid at section 21B(7).
273 Ibid at section 21B(10).
274 Ibid at section 21D.

As soon as possible after that, the Chief Commissioner must make an application to the Court if it is expected that the authorisation would be needed for more than 24 hours.[275] Alternatively, without an interim authorisation having been given, an application may be made for a substantive authorisation. In either event, the application must again be made in writing and the evidence sworn. It must set out the facts and grounds relied on, and explain how the use of special powers would assist.[276]

The judge may, at that time, grant a substantive authorisation for the exercise of the special powers, thereby revoking the Chief Commissioner's interim authorisation, if satisfied as to the two criteria above, or may revoke that interim authorisation if not so satisfied. The terms of the Court's authorisation need not, however, be in the same terms as the interim one given by the Chief Commissioner.

The judge may seek further information, and again may make an interim order pending the determination of the substantive application, a time for the hearing of which must be set. At that hearing, the judge may confirm or revoke the Court's interim order, depending on whether the two criteria mentioned above are established.

10.3.3 Authorisation relating to the investigation of, or recovery from, an act of terrorism

These provisions also allow for the making of an interim authorisation by the Chief Commissioner to use special powers, with the prior written approval of the Premier. This time, he or she must be satisfied that there are reasonable grounds for believing that an act of terrorism is occurring or has occurred, and be satisfied that the exercise of special powers would substantially assist in:

- The apprehension of the terrorist; or
- The investigation of the terrorist act; or
- The recovery process of people affected by the act.[277]

Thereafter, the provisions regarding this application for and granting of this type of authorisation are as set out at Section 10.3.2 of this Report.

Where the Chief Commissioner makes an interim authorisation, pending a hearing before the court, of the type described under Sections 10.3.2 and 10.3.3 of this Report, the authorisation cannot exceed 24 hours in duration. An authorisation granted by the court cannot exceed 14 days.[278]

10.3.4 Authorisations to protect essential services

In this category of circumstance, the authorisation is given by the Governor in Council, by Order published in the Government Gazette.[279] It is made on the recommendation of the responsible minister, with the approval of the Premier and on the advice of the Chief Commissioner, where the minister is satisfied that the authorisation is necessary for the protection of infrastructure assets necessary for delivering an essential service, or persons in the vicinity of the assets, or to aid the recovery of the service from a terrorist act.

275 Ibid at section 21D(2).
276 Ibid at section 21D(4).
277 Ibid at section 21E(1).
278 Ibid at section 21I(2).
279 Ibid at section 21F.

This type of authorisation is designed to be given in advance as part of emergency management planning processes, rather than in response to an emergency, hence the number of necessary approvals before an authorisation is given.

The Order published in the Government Gazette must:

- Clearly state the effect of the Order;
- Describe the area which is the subject of the authorisation, and name or describe any person or vehicle targeted;
- Specify which special powers are authorised; and
- Specify the duration of the Order, which cannot exceed one year.[280]

So far as the Review Committee is aware, no authorisation under section 21F has been given to date.

10.4 Safeguards

10.4.1 Reporting requirements

Under section 21M of the TCPA, the Premier is required to lay before Parliament an annual report concerning the operation of this Part 3A during the course of the previous financial year. The report is broken down into authorisations given or granted, outlining:

- The terms of each authorisation and its period of effect;
- A summary of the grounds relied upon for the granting of the authorisation;
- A general description of the powers exercised; and
- The results of the exercise of those powers.

The report is prepared by Victoria Police. Each of the reports tabled to date show no use of the special powers. The Review Committee has been advised by Victoria Police that the power has been used on one occasion. However, an annual report for the period 2005-2006, which would have encompassed that use of the power, was not tabled.

10.4.2 Other safeguards

As well as the reporting powers, which allow for a level of ministerial, parliamentary and public scrutiny, a number of checks and balances are built into the provisions to prevent misuse of the powers, most of which have been described above. They include:

- The oversight of the Supreme Court;
- Only the Chief Commissioner may apply for an authorisation;
- The application has to be made in each instance with the prior approval of the Premier;
- An interim authorisation made by the Chief Commissioner in urgent circumstances must be confirmed by the Supreme Court within 24 hours;

280 Ibid at sections 21F(3) and 21I(3).

- A police officer conducting a search must, on request, provide evidence of identity and the reasons for conducting the search;
- The safeguards contained in Schedule 1 assist in the maintenance of dignity and privacy during searches, particularly strip searches;
- If a person who has been searched, or whose vehicle or premises has been searched, requests the same within 12 months, the Chief Commissioner must provide a written report on the reasons for the search; and[281]
- In respect of anticipatory authorisations for the protection, etc., of critical infrastructure under section 21F, the hierarchy of approvals needed for the use of special powers and the requirement to Gazette the authorisation.

10.5 Operation of the legislation

The powers in this Part have been used by Victoria Police on one occasion, in 2006. Most of the venues for the events forming the Commonwealth Games in Melbourne in March of that year were the subject of special events legislation specifically formulated for the Games. However, a luncheon event scheduled for the Royal Exhibition Building was not covered. An authorisation was obtained from the Court under section 21B to allow for the setting up of an exclusion zone for the duration of the event.

More recently, Victoria Police gave consideration to the seeking of an authorisation to use special powers based on intelligence which suggested a major public event was under serious threat on that occasion. However, the matter was successfully dealt with by other means.

10.6 COAG Report

As referred to in Chapter 8 of this Report on preventative detention, the COAG Committee reviewed the State and Territory legislation introduced as a result of the 2005 COAG agreement as part of its terms of reference. At paragraph 343-361 they commented on the provisions regarding what they called the “stop, search and seize” powers.

They noted that the powers across the States and Territories were broadly similar, though they had been rarely used. They noted however, that despite this lack of use, all of the jurisdictions had expressed the desire to retain the powers “on the books”, given the current terrorism climate. Statutory reviews in a number of States have concluded that the powers are necessary and warranted in the circumstances.

The COAG Committee considered a number of criticisms of the powers:

1. That there was a risk that the powers could be used arbitrarily;
2. That there was a lack of judicial oversight in some instances;
3. That the use of privative clauses should be abolished; and
4. That the review and oversight mechanisms should be strengthened.

281 Ibid at section 21X(2).

As to the first point, the COAG Committee accepted that there would always be a risk, in the execution of the powers, that a police officer might conduct an "arbitrary" search of a person. However, the legislation itself was not arbitrary. Rather, each provision was confined to operate in appropriately circumscribed locations, and the reasons for such searches were clearly articulated.[282]

As to the other three criticisms, however, the COAG Committee recommended as follows:

> *"Recommendation 45 – The Committee recommends that the various jurisdictions amend their legislation to reflect a greater degree of judicial oversight. The legislation in each State or Territory should be based on the current ACT, Tasmanian or Victorian model, requiring authorisation or final authorisation by a judge of the State or Territory Supreme Court."*[283]

Whilst recognising that seeking prior judicial approval for the use of powers was administratively cumbersome and time-consuming, the COAG Committee were of the view that authorisation by way of judicial sanction:

- Gives the community more confidence in the process, particularly where the use of the powers can be invasive; but also,
- Provides greater legitimacy and confidence to the individual police officers charged with exercising the powers.

The COAG Committee were prepared to accept a reasonable compromise, however, whereby decisions were taken by senior police officers in urgent circumstances, provided that they were given judicial sanction shortly afterwards. The provisions in the Victorian and South Australian legislation in this regard were particularly approved.

The COAG Committee recommended:

> *"Recommendation 46 – The Committee recommends that the various privative clauses in the current legislation be removed."*

It was felt that privative clauses, whereby Parliament purports to restrict the administrative law jurisdiction of a court, were inappropriate in legislation such as that under consideration. Indeed, the COAG Committee felt, such clauses would be unnecessary should a nationally agreed system of judicial oversight, as recommended above, be introduced.

The COAG Committee recommended:

> *"Recommendation 47 – The Committee recommends that there should be a regular reporting function incorporated into each 'special powers' statute."*

The COAG Committee took as templates the provisions in the Northern Territory legislation[284] and the equivalent Australian Capital Territory statute.[285]

In the former, an authorisation may be given by the Chief Commissioner or another authorised police officer, with the approval of the Police Minister. However, as soon as practicable after the authorisation ceases to have effect, the Commissioner must

282 COAG Report at paragraph 355.
283 COAG Report at Recommendation 45.
284 Section 13, *Terrorism (Emergency Powers) Act 2006* (NT).
285 Section 95, *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

provide a written report to the Attorney-General and the Police Minister, describing the reasons for the authorisation, etc., and the results of the exercise of the powers. The report must then be laid before Parliament within 6 months.

In the Australian Capital Territory, authorisations may be "investigative" or "preventative". Both are granted by the Supreme Court or Magistrates Court. There is no scope for urgent, interim executive orders in this legislation. As soon as possible after the authorisation ends, the Chief Police Officer must report to the Minister, including an analysis of the results of the exercise of the powers. The report has to be laid before Parliament within 6 months.

With regard to the COAG Committee's recommendations, the position in Victoria is as follows:

- On judicial oversight, the legislative provisions in Victoria fall within the range of acceptable compromises;
- The TCPA contains a privative clause, at section 21J, in respect of interim authorisations given by the Chief Commissioner;
- Section 21M provides for a report to Parliament annually. However, there is no provision for reporting elsewhere on the exercise of special powers. This contrasts with section 11, whereby the details of, and the results of, the use of covert search warrants must be reported back to the Court that granted them within 7 days of their expiration.

10.7 Submissions

In their first written submission to the Review Committee, elaborated upon by officers at the first meeting, Victoria Police stressed their view that the provisions remain a relevant and vital counter-terrorism policing tool. They pointed out that Victoria is the only State (at the time of writing) to have used them. In terms of effectiveness, however, two concerns were raised:

1. Firstly, in giving an interim authorisation for the use of special powers to prevent or reduce the impact of a terrorist act under section 21D, or in seeking a substantive authorisation from the Court under that provision, the Chief Commissioner must be satisfied on reasonable grounds that a terrorist act is occurring, or that there is a threat of a terrorist act occurring in the next 14 days.[286] Officers explained that it is sometimes difficult to determine an exact date when a terrorist act is likely to occur. Intelligence may suggest a preparedness to commit an act without a precise time, which may be dependant on variables and circumstances.

The same issue arises in respect of a PDO, and is discussed at Chapter 8 of this Report.

2. Secondly, where the Chief Commissioner is minded to grant an interim authorisation due to the urgency of the situation, the approval of the Premier in writing must first be obtained. This requirement, in the opinion of Victoria Police, may cause administrative delays, which could limit their ability to take quick and effective action to protect the community.

286 TCPA at section 21D(1)(a) and (4)(d).

Officers stressed that it is not the fact of the Premier's prior approval being necessary that concerns them, rather the potential for delays whilst he or she seeks advice and considers whether approval should be granted.

The Review Committee also received submissions from members of the AFP. They endorsed the representations made to the COAG Committee in respect of the equivalent powers in Commonwealth legislation[287] (which are exercisable only in Commonwealth places) in supporting the continued retention of the equivalent legislation in Victoria. Their submission to the COAG Review stated:

> *"The fact that the powers in Division 3A have not yet been used does not support any argument for their repeal. The trends of terrorism and the challenges for law enforcement attach greater importance to the utility of these tools in emergency situations. To date, because of the efforts of law enforcement and intelligence agencies, such situations have not eventuated."*

10.8 Impact of the Charter of Human Rights

The range of special powers available to police where an authorisation has been given under this Part potentially engages a number of Charter rights:

1. Requiring a person to disclose their identity (section 21O of the TCPA) engages the right to privacy in section 13 of the Charter;
2. Stopping and searching of persons (section 21P). This power engages the right to freedom of movement under section 12 (and, if the stopping occurs for long enough, the right to liberty in section 21) as well as the right to privacy in section 13 of the Charter;
3. Entering a vehicle for the purpose of moving it under section 21R, thereby engaging the right to privacy in section 13;
4. Entering and searching premises (section 21S) engages the right to privacy in section 13;
5. Cordoning off areas, and directing persons not to enter or leave such an area (section 21T) engages the right to freedom of movement in section 12 and, arguably, the right to liberty in section 21; and
6. Seizing and detaining items (section 21U). Although this involves an interference with property, the right to property in the Charter is a very limited one.

Additionally, the power to stop and search vehicles (section 21Q) potentially engages the right to freedom of movement in section 12 of the Charter and the right to privacy in section 13. It should be noted that the right of police to stop a vehicle without suspicion of the committal of an offence is currently the subject of proceedings in the Victorian Supreme Court (DPP v Kaba – judgment awaited). The extent to which the right to freedom of movement is limited by stopping a vehicle as opposed to a person is, so far as the Review Committee understand, untested.

287 Division 3A of Part1AA of the *Crimes Act 1914.*

10.9 Discussion and conclusions

Overall, the Review Committee are of the view that these powers are not so far removed from the powers available to police on other occasions as to render them remarkable. Having regard to the circumstances for which they were designed, the Review Committee consider the provisions to be necessary. In terms of the relevant Charter rights, the Review Committee are of the view that generally any limitations arising from the exercise of the special powers would be reasonable and proportionate, given the circumstances. The position with respect to Charter rights is discussed further below.

In light of the paucity of evidence available on the use of these provisions, it is difficult to judge their effectiveness. The Review Committee are of the view that they are effective and adequate, although they believe that their effectiveness, as well as their transparency, could be improved as a result of the recommendations set out below.

As with the reporting requirements for the use of covert search warrants dealt with in Chapter 7 of this Report, the Review Committee are of the view that there is scope for increased accountability and transparency in this Part. At present, the statute (at section 21M, see Section 10.4.1 of this Report) requires an outline of the reasons for the authorisation, the powers that were exercised and the result of that exercise of powers in the report provided by the Premier to Parliament. In this regard, the provision is preferable to that relating to covert search warrants, where only statistics are necessary. However, as mentioned earlier, there was no report tabled for the 2005-2006 period.

The Review Committee refer to the comments and recommendation previously made about the possible involvement of the Victorian Inspectorate in the oversight of the covert search warrant powers. Those comments have application to the oversight of the special powers given to police. The Review Committee are of the view that the involvement of the Victorian Inspectorate should be considered for these powers as well as the covert search warrant powers and recommend accordingly.

Of the two matters of concern raised by Victoria Police, reference is made to the Review Committee's conclusions concerning the "14 day" issue in Chapter 8 of this Report regarding a PDO, and the Review Committee's Recommendation 6 in that regard. It follows that the Review Committee are of the view that a similar amendment should be made to the special powers provisions and recommend accordingly.

The second issue raised by Victoria Police concerns the need for prior approval in writing of the Premier when an interim (urgent) authorisation is being sought. The Department of Premier and Cabinet (DPC) explained to the Review Committee that the Premier's involvement was included in 2006 as an additional safeguard given the extraordinary nature of the powers being granted by Parliament. This safeguard was also imposed in light of the Government's stated principles that these new powers would only be exercised where their use was necessary and effective.

The Review Committee understand the concern of Victoria Police and raise four possible alternatives:

1. The removal of the need for such consent completely; such an approval would then only be given by the Chief Commissioner, who is required to meet a high evidential threshold in any event. Moreover, if authorisation is required beyond 24 hours, the confirmation of the Supreme Court has to be obtained. This would, however, remove the only existing measure of externality in the process for giving an interim authorisation;
2. To allow for the approval to be given orally. This however would not alleviate any delays caused by the necessity for the Premier to seek his or her own advice, etc.;
3. To replace the requirement for the Premier's prior approval with that of another minister, such as the Minister for Police or the Attorney-General. That again, however, does not make allowance, for the need, for that alternative minister to seek advice, etc.;
4. To make allowance for the fact that the Premier might not always be immediately or reasonably available, so that an interim authorisation may be given by the Chief Commissioner alone, but that it must be reported to the Premier within 24 hours, whilst the Premier's approval would remain a pre-requisite for seeking a substantive authorisation from the Court.[288]

After careful consideration of the matters raised and the possible alternatives, the Review Committee are satisfied that the Premier should retain an involvement in this process. The principles upon which the TCPA and the 2006 amendments are based have not changed. The powers may not now be considered extraordinary (although this is debatable). However, the circumstances requiring an authorisation for their use should remain so. It should take the occurrence of, or the anticipation of, an extraordinary event in Victoria to trigger an authorisation or an application, and thus in the view of the Review Committee, the Premier should remain involved. It remains an important and effective safeguard.

However, there could be more scope for practical and meaningful rehearsal of the application for and the use of these powers. The Review Committee were advised of exercises being carried out in this regard, but often in circumstances where key players, such as the Premier, were portrayed by other persons. Including the Premier, other ministers, the Chief Commissioner and other senior officers in the exercise would, in the view of the Review Committee, assist in the future, should an actual event occur.

In order to address the concerns of Victoria Police about possible delays arising from the need for the Premier's approval, DPC has informed the Review Committee that it would arrange workshops with Victoria Police in order to agree to a set of standard protocols, which could include more efficient communication through electronic means. The Review Committee consider this would be a worthwhile initiative and support it.

288 Under section 9 of the *Terrorism (Police Powers) Act 2002* (NSW), for example, an authorisation by a senior police officer requires the concurrence of the Police Minister. If the Minister is not able to be contacted, however, the authorisation may still be given. The Minister must be notified as soon as possible. If he or she is not so notified within 48 hours, in the case of an authorisation to prevent a terrorist attack, the authorisation lapses. There are similar post-notification provisions in the equivalent South Australia and Northern Territory legislation.

With regard to the possible engagement of human rights through the exercise of the special powers contained in this Part, generally speaking, the detention and search of persons, vehicles and property is compatible with the rights to privacy, movement and liberty where the search is authorised by the Court or where there are reasonable grounds to suspect a criminal offence and it is not practicable to seek a warrant. Accordingly, having regard to the processes for authorisation, the Review Committee are of the view that the special powers in respect of particular persons named or described in the authorisation are compatible with the rights in the Charter. Similarly, the exercise of those powers with respect to a particular vehicle, and even a vehicle of a particular kind, are likely to be compatible with those rights.

More problematic is the ability to exercise the special powers in relation to any person, any vehicle and any premises in an area described in the authorisation, where that area is the "target". A statement of compatibility was made to Parliament in respect of the Summary Offences and Control of Weapons Acts Amendment Bill 2009. This amounted to a statement of only partial compatibility with Charter rights in respect of proposed new stop, search and seize powers in designated areas, which would be exercisable without the prior need for a reasonable suspicion on the part of officers that the person is carrying a weapon. The Government proceeded with the provisions, notwithstanding that section 13 of the Charter (the right to privacy) would be engaged. The justification was public protection from increasing weapons crimes. The provisions came into effect as an amendment to the *Control of Weapons Act 1990*.

In contrast to those provisions, however, Part 3A of the TCPA does contain a number of authorisation processes:

- The authorisation of the Supreme Court is ordinarily obtained;
- Interim authorisation can only be given by the Chief Commissioner in circumstances where it would not be reasonably practicable to obtain the authorisation of the Court (though the power is not expressly constrained in those terms). In any event, the Chief Commissioner is a public authority and required to give proper consideration to relevant human rights and exercise his or her powers compatibly with them;
- An authorisation is subject to the written approval of the Premier, a pre-condition which, as mentioned above, the Review Committee recommend be retained;
- The circumstances in which an authorisation can be sought and given are carefully constrained.

The Review Committee are of the view that where the statutory test is met, and where it is considered appropriate to make an authorisation in relation to a specified area, it is reasonable and justifiable to exercise special powers in respect of any person, vehicle or premises in that area.

The powers have been used on just one occasion and this involved an extraordinary set of circumstances. The Review Committee are of the view that the statutory safeguards are effective in limiting the circumstances in which the powers are exercised.

10.10 Recommendations

Recommendation 12

That the requirement in sections 21D(1)(a) and 21D(4)(b) that the Chief Commissioner needs to be satisfied of the threat of a terrorist act occurring in the next 14 days, and that the Supreme Court also needs to be so satisfied under section 21D(7)(a), be amended along the lines recommended by the INSLM with respect to the preventative detention power requirement.

Recommendation 13

That consideration be given to the possible creation of an oversight role for the Victorian Inspectorate with respect to the use of the special powers under Part 3A of the Terrorism (Community Protection) Act 2003.

Comment: *Such a role could be in lieu of or additional to the obligation to report to the Parliament. The nature and scope of the role to be performed by the Victorian Inspectorate would need to be determined in consultation with the Victorian Inspectorate. The role may be analogous to that undertaken with regard to IBAC, the Auditor-General, the Chief Examiner and the Ombudsman with appropriate reporting requirements to Parliament.*

11 Part 4 – Mandatory reporting about prescribed chemicals and other substances

11.1 Summary of the legislation

11.1.1 Origin

This Part, comprising just one section, was included in the provisions as originally enacted in 2003. It was substantially added to, however, by section 17 of the *Dangerous Goods Legislation (Amendment) Act 2004,* and then the breadth of the circumstances in which the duty applies was clarified in 2006.[289]

Originally, the TCPA provided for the mandatory reporting of any theft or loss of any prescribed chemicals and substances to the police. The provision was intended to assist the police with any information that could assist in preventing a terrorist act, by alerting them to the disappearance of chemicals such as those used in the October 2002 Bali bombings. The first chemical to be prescribed was ammonium nitrate (along with calcium ammonium nitrate and mixtures and emulsions containing more than 45 percent ammonium nitrate), known as "security sensitive ammonium nitrate", or SSAN.[290]

In the meantime, however, on 25 June 2004, COAG had agreed to a national set of principles to regulate access to, in particular, ammonium nitrate**.** This chemical has a legitimate use in agriculture as a fertiliser. However, it is also known to have been used as an ingredient in explosive devices in several terrorist incidents around the world, most notably by the Irish Republican Army in various atrocities and in the terrorist attack in Oklahoma City in 1995.

The result was the enactment of the statute and the development of dangerous goods regulations, to be administered in Victoria by WorkSafe Victoria (WorkSafe).

These two sets of statutory provisions and regulations still co-exist in Victoria, but since that time, important policy and regulatory developments with regard to chemicals and other substances that may be used to make explosives (explosive precursors) have come into effect at a national level.

Therefore, as well as setting out the terms and purpose of section 22, in order to form a view as to whether the provision (and the accompanying terrorism regulations) are adequate, effective and necessary, consideration of developments at a national level needs to be undertaken.

289 TCPA Further Amendment Act at section 10(2).

290 Terrorism (Community Protection) (Chemicals and Substances) Regulations 2005, remade in 2006.

11.1.2 Purpose of the provision

Section 22 makes it mandatory for the occupier of any premises to immediately report any:

- Theft;
- Attempted theft; or
- Unexplained loss[291]

of regulated chemicals or substances to a member of the police force. If requested to do so by the police, the person must also provide a written report detailing the circumstances of the incident in question. As mentioned previously, the definition of "premises" for the purposes of the TCPA includes a vehicle, or part of a vehicle. For example, the disappearance of prescribed chemicals from a truck in which they were being transported would be reportable.[292]

Where the chemicals or substances have also been listed in regulations as being "high consequence dangerous goods" (HCDGs), then the occupier of the building, vehicle, etc., must also report the incident without delay to WorkSafe., A written report detailing the circumstances of the incident or occurrence must be produced by the occupier should WorkSafe request one.

The chemicals or substances that are covered by the reporting duties to the police or to WorkSafe are the same, SSAN.

Failure to report a theft, attempted theft or unexplained loss, without delay, or to produce a written report when requested to do so by the police or WorkSafe is an offence.

11.2 The National Position

In December 2002, in the aftermath of the Bali bombings, COAG agreed to a national review of the regulation, reporting and security surrounding the storage, sale and handling of hazardous materials, with the aim of assisting counter-terrorism efforts by limiting opportunities for, and enhancing the detection of, the illegal or unauthorised use of such materials (the COAG Review of Hazardous Material). The review was divided into four parts:

- Radiological materials;
- Harmful biological materials;
- Ammonium nitrate; and
- Chemicals of security concern.

This chapter relates to the latter two parts and the subsequent action taken.

291 TCPA Further Amendment Act at section 10(1). Refined in 2006 from straightforward "loss"; the reporting duty now is restricted to covering any losses or discrepancies which cannot otherwise be explained by spillages, changes in density, evaporation or such like.

292 See Chapter 7 of this Report for meaning of the world "vehicle".

11.2.1 Security Sensitive Ammonium Nitrate

Ammonium nitrate and ammonium nitrate products are in common usage across Australia as an explosive in the mining industry (mixed with fuel oil) or, less so, as a fertilizer in the agriculture industry. It had become clear from a number of terrorist incidents around the world that the availability of SSAN as a terrorist tool posed a serious risk to national security. However, it was equally clear that an outright ban would not only have a detrimental effect on the farming sector but would probably be not feasible for the mining sector. Consideration shifted therefore to the possible regulation of the importation, sale, storage and transportation of these products.

The issue was considered by COAG on 25 June 2004, and the relevant part of the communiqué for the meeting reads:

> *"COAG agreed on a national approach to ban access to ammonium nitrate for other than specifically authorised users. The agreement will result in the establishment in each jurisdiction of a licensing regime for the use, manufacture, storage, transport, supply, import and export of ammonium nitrate. The licensing regime will ensure that ammonium nitrate is only accessible to persons who have a demonstrated legitimate need for the product, are not of security concern and will store and handle the product safely and securely. This arrangement will balance security considerations with the legitimate needs of industry and farmers.*
>
> *COAG agreed that the States and Territories would use their best endeavours to ensure the legislative arrangements for the licensing regime would be in place by 1 November 2004, with administrative arrangements to be finalised as soon as possible thereafter. COAG also noted that the Australian Government would continue to undertake investigations on the viability of completely banning ammonium nitrate fertilizers of security concern as a matter of priority, taking into account whether effective, non-detonable, alternatives can be developed, and provide information on any alternatives to the States and Territories."*[293]

State and Territory governments were required to administer the new system because they have responsibility for matters concerning dangerous goods and explosives. However, a national set of principles for regulating ammonium nitrate was agreed and appended to the communiqué.

This agreement was given effect in Victoria with the enactment of the *Dangerous Goods Legislation (Amendment) Act 2004* which amended the TCPA to provide for notifications about HCDGs to WorkSafe, but was particularly enacted to amend the *Dangerous Goods Act 1985* and, to a lesser extent, the *Road Transport (Dangerous Goods) Act 1995.* The amendments, together with the accompanying Dangerous Goods (HCDG) Regulations 2005, ensured compliance with the national principles.

The *Dangerous Goods Act 1985* as amended established a licensing scheme, administered by WorkSafe, for anyone involved in the import, export, manufacture, storage, supply, use, handling, transfer, transportation or disposal of HCDGs. The details of the scheme are set out in the 2005 Regulations.

293 COAG Communiqué 25 June 2004 at pages 4-5.

For the purposes of this Chapter, the relevant provision of these regulations is that licences are only granted to those who can demonstrate a legitimate need for ammonium nitrate and are not considered a security concern. Employees of persons granted such a licence need to obtain a permit if they handle the product unsupervised. Both licence applicants and permit applicants need to undergo national security and police checks. The licensing scheme came into effect on 1 October 2005. Most other States and Territories adopted a similar regime to Victoria, though Tasmania simply introduced an outright ban on the use of SSAN for agricultural purposes.

Over time, concerns were raised about variations in the regulatory approach across jurisdictions, with different licensing coverage and different approaches to investigating the probity of applicants. Farmers groups had also complained to government that the regulations had unnecessarily reduced the availability of ammonium nitrate for legitimate use. In 2008, the Productivity Commission published a lengthy report into "Chemicals and Plastics Regulation", calling for a unified national approach to the regulation of chemicals of security concern (the fourth of the concerns identified in 2002), and recommending a subsequent re-examination of the SSAN control framework thereafter.[294]

Part of the communiqué from the COAG meeting of 30 April 2009 reads:

> *"COAG agreed to reforms of the regulation of security-sensitive ammonium nitrate that will reduce the regulatory burden on legitimate users, while maintaining effective safeguards to prevent access for potential terrorist purposes. This includes the establishment of a system of recognition between the States for licences, permits and authorisations."*[295]

11.2.2 Chemicals of security concern

In the meantime, after a lengthy consultation process, the Report on the Control of Chemicals of Security Concern, commissioned by COAG in 2002, was published in 2008.

The report noted that some 40,000 chemicals were in use in Australia, many of which were already the subject of controls imposed through national or state governments or were self-regulated for the purposes of health, occupational safety or environmental risk. Of those 40,000, 96 chemicals were identified by COAG as requiring further attention because of their potential for misuse by terrorists, including 11 that could be used as explosive precursors (not including SSAN, which was by then already being regulated in States and Territories through the above licensing scheme). The 96 substances listed comprise the "chemicals of security concern".

That report was considered by COAG on 2 October 2008, which agreed to establish a:

> *"Chemical Security Management Framework that will reflect an agreed approach to minimising the potential of chemicals to harm the Australian community, industry and infrastructure."*[296]

294 *Productivity Commission Report into Chemicals and Plastics Regulation*, 7 August 2008 at Chapter 10, Recommendation 10.4, page 293.

295 COAG Communiqué, 30 April 2009 at page 12.

296 COAG Communiqué, 2 October 2008 at page 8.

The parties signed an inter-governmental agreement to facilitate implementation of the *Chemical Security Management Framework* (the Framework) and the Commonwealth Government agreed to establish and chair a National Government Advisory Group.

At the same time, however, COAG again had to balance security concerns surrounding these chemicals with the need to allow relatively unhindered access to them for legitimate users. It had identified chemicals and plastics regulation as a "hotspot" in the National Reform Agenda, and had established a Ministerial Taskforce to look into the issue. It was also called upon to consider the Productivity Commission report referred to above. At Recommendation 10.3, the Commission had stated that:

> *"…any regulation of other [chemicals of security concern] should not be based on the current inefficient and cumbersome SSAN regime."* [297]

This was based on complaints received about the availability of fertilizers, the cost of compliance and the ability of regulatory agencies to administer any expanded licensing arrangements, given delays faced in some jurisdictions. It went on to say:

> *"State and territory governments should not add any additional security sensitive chemicals to the current security sensitive ammonium nitrate regulations."* [298]

At its next meeting, on 29 November 2008, and under the agenda item "Seamless National Economy", COAG discussed the matter again, and the relevant part of the communiqué reads:

> *"Recognising the need for greater coordination and oversight in chemicals and plastics regulation, COAG agreed to a new governance structure for chemicals and plastics reform."* [299]

A "Memorandum of Understanding for Chemicals and Plastics Regulatory Reform" was signed by the Commonwealth, State and Territory governments on 7 December 2009, "to reduce the regulatory burden on business." [300] This established a Standing Committee on Chemicals as part of the new governance Framework.

The agreement "*Australia's National Arrangements for the Management of Security Risks Associated with Chemicals Inter-Government Agreement*" (the Agreement) had been signed at the COAG meeting of 2 October 2008 and had the following objective:

> *"To establish an effective, coordinated and collaborative national approach to the management of chemical security that seeks to prevent the use of chemicals for terrorist purposes."* [301]

The Agreement established the aforementioned Framework, which has as its core aims the education of the community, industry and government agencies to be vigilant in deterring or detecting the use of chemicals for terrorist purposes. It sets out the roles and responsibilities of each level of government, and also announces the development of a program of up to date risk-assessments of the chemicals considered to be a security risk. It states that the development of strategies will be based on the following guiding principles (COAG emphasis retained):

297 *Productivity Commission Report into Chemicals and Plastics Regulation*, 7 August 2008.
298 Ibid.
299 COAG Communiqué 29 November 2008 at page 10.
300 COAG Communiqué 7 December 2009 at page 10.
301 COAG Communiqué 2 October 2008 at page 8.

- Control measures should be *proportionate to the assessed risk* of the use of chemicals for terrorist purposes;
- The development of strategies for control measures should be *nationally coordinated* and agreed outcomes *nationally consistent*;
- Control measures should, where possible, be *built on existing industry and/or* government *arrangements*;
- Proposed control measures should be *cost effective* and subject to a cost benefit analysis;
- Control measures should be *developed in partnership between government and industry* so that appropriate knowledge and needs can be effectively and efficiently integrated; and
- Australia should *take account of arrangements applied in other countries* that do not restrict industry competitiveness and the trade of chemicals.[302]

The two basic objectives of the proposed regulatory regime were to be education and testing. In the context of that second objective, it also agreed to jointly develop methodology for conducting assessments of the risk posed by the 96 individual chemicals as terrorist weapons, targeting first those classified as being of security concern.

11.2.3 The current position

11.2.3.1 Security Sensitive Ammonium Nitrate

On the issue of SSAN, and through the Framework, the National Government Advisory Group has published an implementation plan for the harmonisation of State and Territory regulations, utilising the offices of a National Industry Reference Group (also established under the Framework). The plan promises that:

> *"Proportionate and harmonised risk treatment measures will be developed and agreed, including having regard to the chemical security risk assessment for SSAN, the Productivity Commission's recommendations and COAG's responses."*[303]

Work on the harmonisation was ongoing at a national level. However, in a recent development, the Federal Attorney-General's Department has decided to pass the regulation of SSAN to Safe Work Australia, to include in a separate harmonisation scheme for the regulation of explosives, part of a suite of workplace health and safety regulations. Victoria did not adopt the wider model workplace regulations, however, and thus the harmonised explosives regulations will not apply in this jurisdiction. As a result, Victoria will need to remake the HCDG regulations, due to sunset in 2015.

302 Schedule 1 to the Agreement.

303 National Government Advisory Group on Chemicals Security – Implementation Plan for Productivity Commission Recommendations Chemicals and Plastics Regulatory Reform – Security Sensitive Ammonium Nitrate (SSAN) Reform, at page 1.

11.2.3.2 Chemicals of security concern

The 11 explosive precursors mentioned above have been the subject of a regulatory impact statement (RIS), which looked into the options for regulation. They were considered for inclusion in the licensing regulations, putting them on a par with SSAN, but there has been significant resistance from industry concerned at the regulatory burden that such inclusion would impose. Those chemicals are very much in common, legitimate use, and the compliance cost of such regulation was judged to far outweigh the benefits that would be derived.

Instead, a voluntary National Code of Practice was developed, following the publication of and consultation on the RIS, aimed at encouraging cooperation between businesses and law enforcement agencies, and asking businesses to train staff to be vigilant to suspicious behaviours. It is aimed at producers and importers of chemicals, as well as retailers and members of the general public. The Code can be found on the dedicated website www.chemicalsecurity.gov.au, created in 2009 as part of a larger public awareness campaign. The existence of that website was publicised in May 2013, with the Federal Attorney-General launching a "Chemicals of Security Concern" campaign, listing the 96 chemicals of concern, where those chemicals may be found in domestic products and calling on the public to recognise and report suspicious behaviour to the National Security Hotline.

In the meantime, risk assessments of the 96 chemicals of security concern have been completed, where they were tested against such criteria as availability, useability and practicality of threat. A RIS will be produced in the near future as to the options for their future regulation .

11.3 Operation of the legislation

A significant number of reports have been made and investigated since 2003 involving thefts from motor vehicles, shop thefts and burglaries where SSAN of such quantities as to raise concerns has been stolen. The provision is regarded as a useful intelligence tool by both Victoria Police and WorkSafe, whose relationship has developed well in terms of information sharing and investigations.

Under the parallel dangerous goods provisions, WorkSafe has issued (at the time of writing), 305 "Licences to Access High Consequence Dangerous Goods", which are renewable every five years. Four applications have been refused. In the same period, 821 "Permits for Unsupervised Access" have been granted, with 24 refusals.

Turning to the arrangements for the other 96 chemicals, WorkSafe continue to monitor the usefulness of the Code of Practice. Its voluntary nature might be re-considered. There would appear to be a general feeling that the "message' has yet to get through to smaller businesses in particular. However, the option of adding any of the 96 chemicals to the licensing regulations remains open.

A review of the efficacy, amongst other things, of the National Security Hotline was carried out in 2010 by the Commonwealth Auditor-General (ANAO).[304] The Review reported that agencies including ASIO, the AFP and the State and Territory police forces placed "significant value" on the information they received through the hotline. Since its inception in December 2002 until the end of 2009, some 140,000 calls had been received. The ANAO was satisfied:

304 Audit Report No 4 2010-11.

"…that both Australian Government and State/Territory stakeholder agencies have in place effective liaison arrangements to co-ordinate necessary response to [National Security Hotline] calls."[305]

The ANAO analysis was supported by a classified ASIO / AFP joint paper of 2009, quoted in the report, stating that approximately 30 per cent of calls received are assessed as containing sufficient indicators to warrant further investigation and that, of those, around 4 per cent were considered to be "significant leads" containing specific and apparently credible threats or strong indicators of potential security related activity.

Of course, not all of these calls relate to chemicals of security concern. However, the ANAO report provides some reassurance that the system of public education and provision for reporting suspicious behaviour is working.

11.4 Submissions

In their first written submission to the review, Victoria Police supported the retention of section 22, and of the continued inclusion of SSAN in the regulations. The Review Committee's attention was drawn however to a number of perceived limitations:

1. The requirement that the substance is stolen or lost from "premises" may exclude loss of chemicals being transported by road or rail;
2. It is unclear who bears the reporting onus where the theft or loss has occurred from a place with multiple occupants. It is suggested that this ambiguity could be cleared up with the inclusion of the words "or any person in possession or control," after the words "An occupier of any premises" in section 22(1);
3. The provision does not extend to the acquisition of prescribed substances through wholly lawful means. As mentioned, most chemicals that have been found to have been used in the manufacture of explosives by terrorists in the past are available for purchase from many legitimate retail and wholesale businesses with limited or no restrictions. The substances used in the London transport bombings of 2005 and the Oslo bombings carried out by Anders Breivik in 2011, for example, were obtained through seemingly legitimate commercial transactions.[306]

Victoria Police drew the Review Committee's attention to recent regulations made by the European Union relating to the sale and use of so called "explosive precursors."[307]

305 Ibid at paragraph 3.47.

306 Breivik's device was made from ammonium nitrate fuel oil (or ANFO) – the ammonium nitrate was obtained through the renting of a farm and the setting up of a fake agricultural business, and it was mixed with fuel. Unbeknownst to Breivik, he need not have gone to so much trouble – Norway had not yet adopted a 2009 EU regulation on the sale of explosive precursors (whilst not an EU member, Norway is bound to adopt such measures as a member of the European Economic Area, which has an agreement with the EU on such matters), and would not do so until 2011, after the Oslo bombing and subsequent events. Thus, the company that supplied the fertilizer would have carried out no checks on Breivik personally in any event because he was buying standard products that were entirely unregulated and that were lawfully available to anyone.

307 Regulation (EU) No. 98/2013 on the marketing and use of explosives precursors.

11.5 Impact of the Charter of Human Rights

The Review Committee have not identified any Charter issues with regard to Part 4 of the TCPA.

11.6 Discussion and conclusions

The Review Committee are of the view that section 22 is a necessary provision in the context of the counter-terrorism provisions as a whole and is effective and adequate for that purpose.

With respect to the submissions made by Victoria Police:

1. As mentioned in Chapter 7 of this Report, the definition of "premises" for the purposes of the TCPA includes a vehicle or part of a vehicle.[308]

Whilst "vehicle" is not currently defined for the purposes of the TCPA as a whole, most common dictionary based definitions include land-based forms of transport. The Review Committee are of the view that chemicals stolen or lost whilst being transported by road or rail would be covered by this duty. If Recommendation 3 is accepted, theft or loss during transportation by air or water would also be specifically included.

2. The Review Committee is satisfied that the wording of section 22(1) would cover any occupier of premises who becomes aware of the theft, etc., of the substance. The onus is on all such occupiers, not just one who owns or controls the substances.
3. The lack of provision for dealing in explosive precursors is discussed below.

The European Union Regulation referred to above by Victoria Police was adopted on 15 January 2013, but will not come into effect across member countries until 2 September 2014. It was formulated to give a legislative framework to the EU Action Plan on Enhancing the Security of Explosives, created in 2008 and reviewed in 2012, to harmonise divergent laws and administrative procedures across EU member states to provide a high level of protection for the public whilst removing possible free trade distortions. Moreover, it:

> *"…establishes a tighter regulatory regime for high-risk chemical explosives precursors to reduce their accessibility to the general public (private individuals)".*[309]

The Regulation lists seven "restricted explosive precursors" which shall not be made available to members of the public above a certain concentration limit except, at the discretion of each member state, where they are subject to a licensing or (in the case of three of the chemicals) a registration scheme. It then lists a further eight substances which, together with the first seven, must be subject to national reporting systems for suspicious transactions or attempted transactions, where the sales outlet has concerns, having regard to all of the circumstances. Draft guidance produced under Article 9(5) gives some indicators of suspicious behaviour, much like the above-mentioned National Code of Practice in Australia.

308 TCPA at section 3.

309 European Commission website ec.europa.eu – Home Affairs – "What We Do".

The Regulation includes a so-called "safeguard clause", at Article 13. Where a member state has reasonable concerns that a substance not listed may be used to create explosives, or a listed substance in different quantities or solutions to those listed may be so used, that state may legislate further on its own account, and must immediately inform the European Commission and all other member states that it is doing so, and the reasons why.

Like Australia, the EU has clearly wrestled with the difficulty of balancing the threat posed by the availability of these chemicals with the desire not to unfairly fetter lawful businesses that use them. There is of course, in that context, the need not to restrict trade as across member states.

The Review Committee consider that there are two issues within the overall regime relating to explosive precursors in Victoria that warrant further consideration.

Firstly, the fact that the reporting duty in this Part of the TCPA does not apply to legitimate, or seemingly legitimate, transactions.

The Review Committee consider that the existence of the licensing regime for SSAN is of assistance. It requires police and ASIO checks for persons seeking licences or permits to sell, purchase or otherwise deal in SSAN, and requires such dealings to be recorded by the vendor, with the objective that all SSAN products be accounted for. It is intended that the licensing provisions be regularised soon across Australia. However, the purpose of this regularisation appears not to be concerned with increasing the security of access to SSAN, but rather the harmonisation of provisions to decrease the "red tape" for those requiring licences to deal with SSAN across jurisdictions. This in itself is of no assistance to the investigation agencies as an alert mechanism where large or otherwise unusual trades in SSAN take place.

The Review Committee share the overall concerns of Victoria Police with regard to dealing in SSAN. The purchase or sale of SSAN in circumstances where a person may have a licence, but there are circumstances surrounding the transaction that cause a concern on the part of the vendor, should be reported to the police, not just recorded for future reference.

However, the Review Committee found difficulty in resolving how such a duty on retailers, etc., to report might be enforced by way of amendment to Part 4 of the TCPA. The difficulty with this option is defining the circumstances in which a failure to report a transaction might make it a criminal offence. The mere description of a transaction, behaviour or question as "suspicious" is too subjective a test in the view of the Review Committee. This same definitional problem would also apply to the imposition of stronger licensing conditions on legitimate dealers that could result in the loss of the license.

The Review Committee are of the view that the current position should continue. However, the Review Committee request the Commonwealth and State authorities not to lose sight of the primary purpose of this regulatory regime, namely the safety of the public, rather than the facilitation of transactions in a potentially fatal substance.

The second issue, relates to the fact that the current reporting duty under the terrorism provisions applies only to ammonium nitrate. All debates regarding other chemicals of security concern have concentrated on whether they should be added to the HCDG licensing scheme – the answer has generally been in the negative due to cost or compliance difficulties.

The Review Committee appreciate the difficult balancing exercise that has been performed, and will need to continue to be performed, with regard to each of the 96 chemicals identified. By way of example, hydrogen peroxide is an efficient rocket propellant. It is also very commonly used in hairdressing. The compliance cost of requiring all hairdressers in Victoria to hold a license under the dangerous goods regulations would be considerable.

The National Code of Practice, allied to the National Security Hotline, appears to be an efficient compromise. However, compliance is voluntary. Both the terrorism provisions and the HCDG regulations are designed to allow for further chemicals to be added without difficulty. They would then join SSAN in being reportable under the terrorism laws, or at least subject to the licensing regime under the latter provisions. The Review Committee note the importance of the need for the components of this regulatory regime to be kept under review to ensure their continued effectiveness.

It follows that the Review Committee consider that these provisions should continue and there is no need for them to be amended.

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12 Part 5 – Protection of counter-terrorism information

12.1 Summary of the legislation

12.1.1 Origin

These provisions formed part of the original TCPA and came into force on 16 April 2003. They have been the subject of only technical or consequential amendments since then.[310]

12.1.2 Purpose of the provisions

This Part of the TCPA, comprising sections 23 and 24, contains measures to protect the confidentiality of sensitive police investigative methods where appropriate.

The provisions allow for the exemption from disclosure in legal proceedings of "counter-terrorism information". This is defined in section 3 of the TCPA as information that relates to the covert methods of investigation used in relation to a terrorist act, or a suspected act.

During the second reading debate on the Bill, the shadow Attorney-General said:

> *"It is a pretty dramatic step to prevent a court from examining any sort of issue, or limiting that right, but again I think in the interests of national security and the fight against terrorism, it is an appropriate step. It is a balancing act between two different evils but in this circumstance it is an appropriate step."*[311]

The Leader of the National Party, added:

> *"…the times dictate that we have to have this sort of material before us."*[312]

As the shadow Attorney-General pointed out, the TCPA does not provide a blanket protection from disclosure of such information. A case by case decision must be made by the Court, balancing the competing public interests of protecting the information relating to the covert methods of investigating the terrorist act or suspected act against providing an accused person with all the evidence available. The balancing exercise required of the Court is comparable to that required under the law relating to public interest immunity.

310 Section 54 and Schedule Item 52, *Statute Law Amendment (Evidence Consequential Provisions) Act 2009*; section 97 and Schedule Item 119, *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009.*

311 *Victorian Parliament Hansard* (Wednesday 19 March 2003) 337.

312 Ibid at page 381.

In short, if in any legal proceedings[313] an issue arises relating to such information, a person may be excused from disclosing that evidence if the Court is satisfied that:

- The disclosure of it would prejudice the prevention, investigation or prosecution of an act of terrorism or suspected act; and
- The public interest in preserving the confidentiality of the information outweighs the public interest in its disclosure.[314]

Section 23(2) sets out some guidelines that the Court must consider in balancing these two competing interests, including:

- In a criminal proceeding at first instance or on appeal, which of the parties is seeking disclosure;
- The nature of the proceedings and the importance of the information to the case;
- The likely effect that disclosure would have.

However, the Court is not restricted to those considerations, and may inform itself as it sees fit in reaching a decision.

The Court is entitled to inspect any documentary evidence before ruling on it.[315]

12.2 Operation of the legislation

The Review Committee has not been referred to any instance whereby a court has been invited to make a ruling under this provision.

12.3 Submissions

No submissions were received in respect of this Part of the Act.

12.4 Impact of the Charter of Human Rights

One of the basic tenets of the right to a fair trial is that the accused is entitled to know the case against him or her. On the other hand, this has to be balanced against the need to keep some information from the accused or from the public. This balancing exercise is often carried out by the courts in situations where they have to decide whether to admit evidence which may be subject to public interest immunity.

In the view of the Review Committee, the right to a fair hearing under section 25 of the Charter is engaged. However, taking into account:

- The matters discussed at Section 8.7.5.4 of this Report, and the fact that the Supreme Court may conduct its proceedings as it sees fit, including the manner in which it evaluates the evidence once submitted, or the manner in which it affords procedural fairness after the application is made; and

313 Defined as including any civil, criminal or mixed proceedings and any inquiry in which evidence is or may be given before any court or person acting judicially – section 3, *Evidence (Miscellaneous Provisions) Act 1958*; in other words, as stated in the Note to section 23, a civil or criminal proceeding before a court, a coronial inquest or a Royal Commission.

314 TCPA at section 23(1).

315 Ibid at section 24.

- The fact that the Court is given guidance at section 23(2) on matters to be taken into account in ensuring fairness whilst carrying out the important balancing exercise referred to above; and
- The further fact that section 23(3) makes it clear that the Court may inform itself in any way it sees fit, and in doing so, may inspect any document for the purpose of deciding whether disclosure should be ordered (section 24),

the Review Committee are of the view that any limitation on an accused person's right to a fair trial resulting from these provisions is reasonable, proportionate and justified.

12.5 Discussion and conclusion

After careful consideration the Review Committee consider that these provisions are necessary. Further, the Review Committee consider that they are effective and adequate and do not recommend any amendment to them. In the view of the Review Committee, the provisions should continue.

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13 In conclusion

The Review Committee have covered, to the best of their ability, the matters raised by the terms of reference. In particular, the Review Committee have expressed their views and stated their conclusions on the adequacy, effectiveness and continuing need for the various provisions contained in the TCPA. There is no need to repeat them. In assessing the adequacy and effectiveness of the TCPA the Review Committee have done so in the context of their assessment of the joint operations conducted by Victoria Police with Commonwealth or interstate agencies. The consultations with and briefings by agencies have been of great assistance to the Review Committee in making this assessment.

The Review Committee have also considered the effect of the Charter on these provisions and expressed their views and conclusions on that effect. Again, there is no need to repeat them.

The Review Committee have also considered the need for amendment to the TCPA and have set out their views and conclusions and recommended the amendments that they consider should be made.

The terms of reference require the Review Committee to assess the adequacy and effectiveness of the TCPA in the context of joint operations conducted by Victoria Police with Commonwealth agencies or agencies from interstate. Having consulted with and received comprehensive briefings from Victoria Police, AFP and ASIO, the Review Committee are satisfied that adequate measures are in place for inter-jurisdictional co-operation and action in relation to terrorism investigations. The Review Committee have been provided with examples of that co-operation. It is the view of the Review Committee that the agencies are working well in their joint endeavours to combat terrorism, and that those endeavours, which are assisted by the TCPA, are effective.

The Review Committee consider that the effectiveness of joint operations is well summed up by the following assessment of His Honour Judge Maidment in his submission to this Review:

> *"Throughout that period I had the pleasure of working closely with officers of the Victoria Police, the Australian Federal Police, New South Wales Police and ASIO. In my opinion, without the high level of co-operation between those organisations, the successful outcomes would not have been achieved."*
>
> *"Whilst in the early stages all participants had to familiarise themselves with the legislative frameworks in which they were required to operate, it was my observation that they did so quickly and effectively."*

His Honour, before being appointed a judge of the County Court, had been involved in the prosecution of the Benbrika and Elomar terrorism cases which are referred to in Chapter 7 of this Report.

The Review Committee did not identify any additional power that might be added by the Victorian Parliament to the existing powers contained in the TCPA. Victoria Police raised the possibility of a control order power being included in the legislation. The Review Committee consider that the current position, whereby this necessary power is provided by Commonwealth legislation, is adequate and appropriate and there is no additional need for such a power to be included in the TCPA. A control order power is not contained in any State or Territory legislation.

July 2014

Appendix A

Terms of Reference

1 Background

Terrorist incidents around the world, including attacks on the World Trade Centre and Pentagon in the United States in 2001 and the Bali bombings in 2002, led Australian governments to review counter-terrorism measures.

The Commonwealth was referred legislative powers to provide constitutional support for terrorism offences that apply uniformly throughout Australia. Victoria enacted the *Terrorism (Community Protection) Act 2003* (the Act) to cover those areas where Victoria continued to have legislative responsibility.

The Act was amended in 2006, pursuant to a Council Of Australian Governments agreement to further strengthen Australia's counter-terrorism legislation, to insert Parts 2A (preventative detention orders) and 3A (special police powers).

2 Purpose

This Review is for the purposes of section 38(1) of the Act, which requires the Minister to undertake a review of the operation of this Act and bring a report of the Review before each House of the Parliament, no later than 31 December 2014.

The Act is administered by the Attorney-General, with the exception of Part 4 (Mandatory Reporting about Prescribed Chemicals and other Substances – administered by the Minister for Police and Emergency Services) and Part 6 (Essential Services Infrastructure Risk Management – administered by the Premier).

The Department of Justice is responsible for overseeing the Review.

3 Scope

The Review will:

- assess the adequacy, effectiveness and continuing need for the Act
- identify whether there is a need for amendments to the Act or additional powers to mitigate and prevent the risk of terrorist acts
- assess the adequacy and effectiveness of the Act in the context of joint operations conducted by Victoria Police with Commonwealth agencies or agencies from interstate.

In conducting the Review, the Committee must consider the operation of the Act and must draw upon and take into account:

- the findings and observations of the 2012 Council Of Australian Governments (COAG) Review of Counter-Terrorism Legislation conducted by Justice Anthony Whealy, Richard Bingham, David Jones, Commander Justine Saunders, Assistant Commissioner Mike Condon and Graeme Davidson. The review was tabled in the Commonwealth Parliament on 14 May 2013 by the Attorney-General
- the agreement of COAG leaders at the Special Meeting on Counter-Terrorism on 27 September 2005 that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, and be exercised in a way that is evidence-based, intelligence-led and proportionate.

The scope of this Review does not extend to the operation of Part 6 of the Act. A separate review of Part 6 has been conducted by the Department of Premier and Cabinet and tabled in Parliament.

In conducting the Review, the Review Committee may seek public submissions.

4 The Review Committee

The Review will be conducted by a Review Committee consisting of three members with expertise and experience in the areas of policing, intelligence and the law.

The Review Committee members are:

- The Hon David Jones AM, former Judge of the County Court (Chair of the Review Committee)
- Lieutenant General Mark Evans AO DSC (Retd)
- Kieran Walshe APM, former Deputy Commissioner of Police

Secretariat support will be provided by the Department of Justice.

5 Reporting

The Review Committee will provide a copy of the final report to the Attorney-General for the report to be tabled as per section 38(2).

Appendix B
Comparative Tables of Legislation

Covert Search Warrants – Comparisons

1. Under the Commonwealth legislation, the police have emergency search and seize powers that do not require a warrant, but they are included in this table for comparative purposes. Five States and Territories (below) have covert search and seize powers that require a warrant. No equivalent powers are found in South Australia, Tasmania or the ACT.
2. In Victoria, New South Wales, Western Australia and the Northern Territory, the grant of a covert warrant is predicated upon a Court or judge being satisfied that the applicant police officer has reasonable grounds for suspecting or believing that a premises, or a person residing at the premises, has a connection to terrorist activity. In Queensland, the warrant may be granted in respect of organised crime or "designated offences" (being some serious drug-related or violent offences), as well as suspected terrorism.
3. In all of the States and Territories listed below, warrants can be granted remotely in an emergency by telephonic or electronic means, save for in Queensland.
4. Only under the Commonwealth Act and in New South Wales is provision made for post-execution notices to be given to the occupier of the premises in question.
5. In Victoria and Queensland, provision is made for the involvement of a Public Interest Monitor in the application process.

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Police Powers and Responsibilities Act 2000***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Emergency Powers) Act 2003***
Who may apply	N/A	A police officer, with the approval of the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner.	An officer of the terrorism investigation group of the NSW Police, as authorised by the Commissioner, an Assistant Commissioner or an officer of or above the rank of Superintendent (delegated the power to give authorisations and as prescribed by regulations), or a staff member of the terrorism investigation group of the Crime Commission, as authorised by the Commissioner of the NSW Crime Commission (or a staff member delegated the power to give authorisations and as prescribed by regulations).	A police officer of at least the rank of Inspector.	A police officer authorised by the Commissioner.	A police officer of the rank of Assistant Commissioner or above, or any police officer authorised by such an officer.
Grounds for application	N/A	The applicant must suspect or believe on reasonable grounds that: • a terrorist act has been, is being or is likely to be committed; or • a person who resides at or visits the premises has done something in preparation for or planning an act of terrorism, or has participated in training provided by a terrorist organisation; or • there has been in the past, or there is ongoing, some activity on those premises connected with an involvement in an act or terrorism; and	The person giving the authorisation to make an application, and the person making the application, must suspect or believe on reasonable grounds that: • a terrorist act has been, is being or is likely to be committed and • the entry to and search of the premises will substantially assist in preventing or responding to the act; and • it is necessary for the success of the warrants execution that it be carried out without the knowledge of the occupier(s).	No grounds for application set out in the Act.	The Commissioner must be satisfied, before authorising an officer to apply, and the applicant officer must also suspect, that there are reasonable grounds to believe that: • a terrorist act has been, is being or is about to be committed, whether inside WA or outside; and • the entry to and search of a place in WA will substantially assist in preventing or investigating the act; and • the entry and search needs to be carried out without the knowledge of the occupier.	The applicant must suspect or believe on reasonable grounds that: • a terrorist act has been, is being or is likely to be committed; and • the entry to and search of a place will substantially assist in responding to or preventing the act; and • it is necessary for the entry and search of the place to be conducted without the knowledge of any occupier.

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
		• the entry to and search of the premises will substantially assist in preventing or responding to an act or suspected act of terrorism; and • it is necessary for the success of the warrants execution that it be carried out without the knowledge of any occupier.				
Issuing Authority	N/A	The Supreme Court.	A Supreme Court judge declared by the A-G to be an eligible judge.	The Supreme Court.	The Supreme Court.	A judge.
Remote application	N/A	Yes, by telephone.	Yes, by telephone.	No	Yes, by any means including telephone, fax, email and radio.	Yes, by telephone, fax, email or other electronic communication, for a "special warrant".
Involvement of a PIM	N/A	Yes	No	Yes	No	No
Grounds for Issuing	N/A The officer must suspect on reasonable grounds that it is necessary to search the premises and to exercise the power without a warrant because: • it is necessary in order to prevent a thing that is on the premises from being used in connection with a terrorist offence; and • there is a serious and imminent threat to a person's life, health or safety.	The Court must be satisfied there are reasonable grounds for the police officer's suspicion or belief. Then must take into account: • the gravity and nature of the terrorist act (or suspected act); • whether, and to what extent, the powers sought under the warrant would assist in the prevention of an act or suspected act, or in the response to an act or suspected act that had already occurred; • the effect that the grant of the warrant	The judge must be satisfied there are reasonable grounds for issuing. In determining an application, the judge must consider: • the reliability of the information, including its nature and source; • whether there is a connection between the terrorist act and the kinds of thing it is proposed to search for, seize, photograph, etc.; • the nature and gravity of the terrorist act; • the benefits derived from any previous covert warrants, search	The judge must be satisfied that there are reasonable grounds for believing that there is evidence of terrorism at the place, or it is likely to be taken to the place in the next 72 hours. The judge must also be mindful of the obtrusive nature of the covert warrant, and must in particular consider: • the nature and seriousness of the act of terrorism; • the extent to which the warrant would help prevent, detect or provide evidence of the act of terrorism;	The judge must be satisfied that: • there are reasonable grounds for the applicant's suspicions; • considering the nature and seriousness of the terrorist act, and whether there are alternative means of finding the thing or class of things sought, the issue of the warrant is justified; and • (if an application for a warrant has been made in the previous 3 months for the same place) that the new application contains new information which, together with the	The judge must be satisfied there are reasonable grounds for issuing. In doing so, the judge must consider: • the reliability of the information, including the nature of its source; • whether there is a connection between the terrorist act and the kinds of thing it is proposed to search for, seize, photograph, etc.; • the nature and gravity of the terrorist act; • the extent to which the execution of the warrant would assist in the prevention of, or

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
		sought might have on the privacy of the occupier(s) of the relevant premises; • any conditions (or restrictions) that might be placed on the warrant if granted; and • any submissions made by the PIM.	• the extent to which the execution of the warrant would assist in the prevention of, or the response to, the act; • any alternative means of obtaining the information sought; • the extent to which the privacy of someone not knowingly concerned in the commission of the act would be affected; • if authorisation is sought to enter an adjoining place, whether it is reasonably necessary to enable access or to avoid compromising the investigation; and • whether any other conditions should be placed on the warrant.	• the benefits derived from any previous covert warrants, search warrants or surveillance warrants issued in connection with the person or place; • the extent to which the police have used, or can use, conventional policing methods, and the extent to which the use of conventional methods would be likely to help in the investigation or prejudice it; and • any submissions of the PIM.	information in the previous application, justifies issuing the warrant. Judge must also be satisfied that the warrant is reasonably necessary for: • facilitating the entry or search; • preventing the search being frustrated or jeopardised; or • for any other good reason.	response to, the act; • alternative means of obtaining the information sought; • the extent to which the privacy of someone not knowingly concerned in the commission of the act would be affected; • if authorisation is sought to enter an adjoining place, whether it is reasonably necessary to enable access or to avoid compromising the investigation; • whether any conditions should be placed on the warrant.
Duration of warrant	N/A	As specified in the warrant, but no more than 30 days.	As specified in the warrant, but no more than 30 days.	As specified in the warrant, but no more than 30 days.	As specified in the warrant, but no more than 30 days.	As specified in the warrant, but no more than 30 days.
Extension of warrant	N/A	No, but a further warrant may be issued over same premises.	No provision.	Yes, may be extended from time to time.	No, but a further warrant may be issued over same premises.	No
Contents of warrant	N/A	Must contain: • the address or location of the relevant premises; • the name of the applicant, and the names (or a description) of anyone else who will take part in enforcing the warrant; • the date of issue of the warrant, and the period for which it will remain in force;	Must contain: • the name of the applicant; • the address or other description of the subject premises; • the name of any person believed to be knowingly concerned in the commission of the act, or if no such person occupies the place, any known occupier;	Must contain: • confirmation that an officer may exercise covert search powers under the warrant; • details of the terrorism for which the warrant was issued; • any evidence that may be seized; • confirmation that the warrant may be exercised at any time of day or night;	Must contain: • the name, rank and number of the applicant; • a description of the target place; • a description of the thing or class of thing that may be searched for and seized; • a description of any place, adjoining the target place, entry to which is authorised;	Must contain: • the name, rank and number of the applicant; • the address or other description of the subject place; • the name of any person believed to be knowingly concerned in the commission of the act, or if no such person occupies the place, any known occupier;

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
		• the name(s) of the occupier(s) of the relevant premises, if known; • whether the warrant authorises more than one search and entry; • the name of, or a description of, the sort of thing that is being searched for, or seized, or photographed, etc.; and • any conditions placed on the warrant.	• a description of the kind of thing that may be searched for, seized, copied, replaced, etc.; • the date of issue; • the expiry date; • any conditions imposed on the warrant; and • any other matter prescribed in regulations (no regulations found).	• confirmation that, if practicable, the search must be videotaped; • the start and end time and date.	• a description of anything authorised to be removed and replaced; • if re-entry is authorised to return a thing removed or to retrieve anything substituted, a description of the thing; • any other terms and conditions placed on the warrant; • the expiry date; • the date and time of issue.	• a description of the kind of thing that may be searched for, seized, copied, replaced, etc.; • if re-entry is authorised to return a thing removed or to retrieve anything substituted, a description of the thing; • the date and time of issue; • the expiry date; • any conditions imposed on the warrant; and • any other matter prescribed in regulations (no regulations found).
Powers that may be exercised	The officer may: • search for the thing; and • seize the thing. If the officer finds a different thing which he or she reasonably suspects to be relevant to another offence, the officer may secure the premises pending an application for a search warrant. The officer may also seize any other thing, or do anything to make the premises safe, if he or she reasonably suspects that it is necessary: • to protect a person's life, health or safety; and • the circumstances are serious and urgent.	Authorises the officer, plus any other person named or described in the warrant, and with any necessary equipment, to enter the premises, any specified adjoining premises or specified premises which provide an access route to those which are the subject of the warrant. Entry by force, or by impersonation is permitted. The officer may then: • search for items described in the warrant; • seize those items; • replace any item so seized; • copy, photograph or describe in writing or sketches the thing named or described;	Authorises the officer to: • enter covertly; • impersonate; • use such force as is reasonably necessary to enter and search; • search for the kind of thing described in warrant; • break open any receptacle; and • do anything that is reasonable to conceal anything done from the occupier. If the warrant specifically authorises it, the officer may: • enter a specified adjoining place (with force if necessary) for the purposes of entering the subject place;	Authorises the officer to: • enter covertly or through subterfuge, as often as is reasonably necessary and to stay for as long as is reasonably necessary; • pass over, through, along or under another place to enter the relevant place; • search for anything sought under the warrant; • open anything that is locked; • seize anything found which the officer reasonably believes is evidence of the terrorism; • photograph anything found which the officer reasonably believes may provide evidence of terrorism;	Authorises any police officer to execute primary powers, which are to: • enter covertly; • impersonate; • search for and seize the thing or class of thing described in the warrant; • seize anything found not connected with the terrorist act but which the officer reasonably suspects to be evidence relevant to a serious indictable offence; • do a basic or strip search of anyone in the place at the time of execution for any thing or class of thing described in the warrant. If the warrant expressly authorises it, the officer may:	Powers automatically conferred are to: • enter covertly; • impersonate; • use such force as is necessary to enter and search; • search for any kind of thing or class of thing mentioned in the warrant; • break open any receptacle; • seize and detain any other thing found that is connected with a serious indictable offence. Additional powers, if the warrant expressly authorises, are to: • enter a specified adjoining place for the purposes of entering the subject place;

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
	The officer and any assisting officer may use such force against persons or things as is necessary and reasonable. Any person assisting who is not an officer may use reasonable force against things.	• use any electronic equipment for the purposes of such copying, etc.; and • test or keep a sample of anything found as named or described.	• seize and detain a thing of a kind described or another relevant thing, to replace a thing seized, or to seize and detain any other thing found connected with a serious indictable offence; • copy, photograph or record a thing of a kind described or another relevant thing; • operate any electronic equipment found on the premises, and to print, copy or otherwise record from the equipment a thing of a kind described or another relevant thing; • test a thing of a kind described or another relevant thing. The warrant may expressly authorise re-entry for returning a thing removed or retrieving a thing substituted, within 7 days of first entry or such longer period as the judge allows.	• inspect or test anything found in the place. Additional powers if expressly authorised in the warrant are to: • take a thing seized to an appropriate place for testing for evidence of terrorism; • in respect of any vehicle entered under the warrant, if the officer reasonably suspects it has evidence of the terrorism in or on it, - seize the vehicle; - take it to a place with appropriate facilities for searching it; - remove parts of the vehicle (panels, linings, etc.) for the purpose of searching it; and - search it for evidence of terrorism.	• enter but not search an adjoining place specified in the warrant; • remove a thing described in the warrant from the target place and replace it; • re-enter to return a thing removed or to retrieve anything substituted, within 7 days of first entry (or longer if authorised by the judge). If an authorised re-entry occurs as above, all the other powers are available to the officer during the re-entry. The warrant also authorises the officer to execute ancillary powers to: • take and use any equipment or facilities; • photograph or otherwise make a record of anything in the target place; • conduct a forensic test in the target place; • make reasonable use of any equipment, facilities or services in the place in order to exercise any power under the warrant – may also order anyone in the place to do anything reasonable to facilitate that use or to operate the equipment or facilities;	• seize and detain a thing of a kind described in the warrant or any relevant thing; • replace something seized; • copy, photograph, etc. a thing of a kind described in the warrant or any relevant thing; • operate any electronic equipment found on the premises; • print, copy or otherwise record from the equipment a thing of a kind described or any relevant information; or • test a thing of a kind described in the warrant or any relevant thing. The warrant may expressly authorise re-entry for returning a thing removed or retrieving a thing substituted, within 7 days of first entry or such longer period as judge allows. All powers available as above on a re-entry. If an officer reasonably believes it is necessary to do so to protect any person, including the officer, in respect of anyone in or near the place during its execution, to: • detain anyone in the place; • do a basic or strip search of that person;

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Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
					• operate any device or equipment in the place to gain access to, recover or reproduce any record, or order any occupier to do so. If an officer reasonably suspects it is necessary to do so to protect any person, including the officer, whilst the warrant is being executed, to: • detain anyone in the place; • do a basic or strip search of that person; • order the person to leave, or not to enter, the place or its vicinity; and • seize and retain any weapon or dangerous thing in the place.	• order the person to leave, or not to enter, the place or its vicinity; and • seize and retain any weapon or dangerous thing in the place.
Reporting to the Court	N/A	The person executing the warrant must report back to the Court within 7 days of the expiry of the warrant on: • which powers were exercised; • which conditions on the warrant were complied with, and how; • the period during which the entry and search were conducted; • the name of, or a description of, any person who entered the premises in accordance with the warrant;	The person executing the warrant must report back to the Court within 10 days of the execution of the warrant on: • the date of execution; • the name of the person who executed and anyone assisting; • the name of any person believed to be knowingly concerned in the commission of the act, or if no such person occupies the place, any known occupier; • the powers exercised; • the result of the execution;	The officer issued with the warrant or the officer who primarily executed it must report to the Court or the PIM (who may then refer it to the judge), as stated in the warrant, within 7 days of execution. Must take along anything seized or any photograph taken. The judge may order the officer what to do with the thing seized or photograph taken.	The applicant must report back to the issuing judge or Chief Justice within 7 days of execution of the warrant on: • the date and time of execution; • a description of each place entered; • the name(s) of any occupier(s) present, if known; • the name of the person executing and of anyone who assisted in the execution of the warrant; • which powers were exercised;	The applicant must report back to the judge within 10 days of the execution of the warrant on, or if not executed, within 10 days of the expiry date on: • the address or other description of the place; • whether or not the warrant was executed; and • any other particulars prescribed in regulations (no regulations found). If the warrant was executed, the report must include: • the date of execution;

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Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
		• the name(s) of the occupier(s) of the premises entered, if known; • details of any activity undertaken in the execution of the warrant (such as any seizure, item replacement, photographing, etc.); and • an analysis of any benefit that was derived from the issue and exercise of the warrant, in terms of any act or suspected act of terrorism prevented or investigated.	• if anything was copied, photographed, operated, etc., that was not authorised by the warrant, the grounds on which the thing was believed to be relevant or connected to a serious indictable offence; • a description of anything tested or taken for testing and the type of information obtained from it; • an analysis of whether or not the warrant assisted in the prevention of or the response to the terrorist act, and how; and • an analysis of whether or not the warrant assisted in the prevention of or the response to any other terrorist act or any serious indictable offence, and how. If the warrant was not executed, the report to the judge must be within 10 days of expiry and must explain why. If the place is re-entered, another report must be given to the judge within 10 days of the re-entry stating: • the address or other description of the place; • the date of re-entry; • the name of any person who re-entered;		• a brief description of anything seized (with a copy of any record), or anything removed and replaced, and the grounds for suspecting that the thing is connected to a terrorist act or is evidence relevant to a serious indictable offence; • a brief description of any photo or other evidentiary material obtained; • an analysis of whether the warrant assisted in the prevention or investigation of this or any other terrorist act and, if so, how; and • anything else required by regulations (no regulations found). If the warrant was not executed, the report to the judge must be within 7 days of expiry and must explain why, along with anything else required by regulations (no regulations found). If the place was re-entered as above, the report must: • state when re-entry took place; • describe any other place entered in order to effect the re-entry; • name each person involved; • describe the thing returned or retrieved;	• the name of the officer who executed it; • the name of anyone who assisted, and the nature of the assistance; • the name of any person believed to be knowingly concerned in the commission of the act, or if no such person occupies the place, any known occupier; • the powers exercised under the warrant; • the result of the execution, including a brief description of anything seized, photographed, etc.; • if anything was copied, photographed, operated, etc., that was not authorised by the warrant, the grounds on which the thing was believed to be relevant or connected to a serious indictable offence; • a description of anything tested or taken for testing and the type of information obtained from it; • an analysis of whether or not the warrant assisted in the prevention of or the response to the terrorist act, and how; and

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
			• a brief description of the thing returned or retrieved; • if the thing was not returned or retrieved, why; and • any other thing prescribed in regulations (no regulations made).		• if the thing was not returned or retrieved, explain why not; and • anything else required by regulations (no regulations found).	• an analysis of whether or not the warrant assisted in the prevention of or the response to any other terrorist act or any serious indictable offence, and how. If the warrant was not executed, the report must explain why. If the place is re-entered, another report must be given to the judge within 10 days of the re-entry stating: • the address or other description of the place; • the date of re-entry; • the name of any person who re-entered; • a brief description of the thing returned or retrieved; • if the thing was not returned or retrieved, why; and • any other thing prescribed in regulations (no regulations found).
Other reporting	No	The Chief Commissioner must provide an annual report to the Minister.	The Commissioner of Police and the Crime Commissioner must report annually to the Police Minister and the A-G. The Ombudsman also has a monitoring duty regarding these powers, and must report to the Police Minister and the A-G every 3 years.	The PIM monitors compliance with the provisions and reports to the Commissioner as appropriate. The PIM reports annually to the Minister.	The Commissioner must provide an annual report to the Minister.	The Commissioner must provide an annual report to the Minister.

	Commonwealth	Victoria	NSW	Queensland	Western Australia	Northern Territory
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Police Powers and Responsibilities Act 2000*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Emergency Powers) Act 2003*
Delayed Notice Provision?	The officer must notify the occupier of premises searched that entry has taken place within 24 hours or, if not practicable to do so, leave a written notice of entry at the premises.	No	Within 6 months of the execution of the warrant (may be postponed by the judge if reasonable grounds exist – any postponement beyond 18 months requires exceptional circumstances), the person who executed the warrant must cause an "occupier's notice" to be prepared and provided to the issuing judge for approval. It must contain: • the name of the applicant; • the name of the issuing judge; • the date of issue of the warrant; • the date of execution; • the address or other description of the subject premises; • the number of persons who entered to execute or assist in executing the warrant; • a summary of the nature of the covert search warrant; • a description of anything seized or replaced; • a description of anything returned or retrieved on a re-entry; • if the occupier was not believed to be knowingly concerned in the commission of the terrorist act, the notice must say so; and	No	No	No

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			• any other matter prescribed in regulations (no regulations found). As soon as practicable after the judge's approval, the notice must be given to any occupier believed at the time of execution to be knowingly concerned in the commission of the act, or if there was no such person occupying the place at the time of execution, any known occupier above the age of 18. If no such person is known, or his/her whereabouts are unknown, the judge may then give further directions. If adjoining premises were entered during the execution, then an "occupier's notice" must be prepared and given to the occupier of those premises as above.				
Report to Parliament	No	The Minister must lay the report before both Houses of Parliament within 12 sitting days of its receipt.	The A-G must table reports of the Commissioner of Police, the Crime Commissioner and the Ombudsman in Parliament as soon as practicable after receipt.	The Minister must table the PIM's report in the Assembly within 14 days of receipt.	The report may be included in the report to the Minister under the *Financial Management Act 2006* or, if not, be laid before Parliament within 30 days of receipt.	The report may be included in the annual report of the Police Force or, if not, be tabled in the Assembly within 7 days of receipt.
Review of the Act	No	Yes. By 31 December 2014 (extended by amending legislation).	Every 3 years, as soon as practicable after publication of Ombudsman reports.	No	Yes. On the 1st anniversary of its commencement and every 3 years thereafter.	Yes. Within 5 years of its commencement.
Sunset clause	10 years from commencement (being 15 December 2015).	1 December 2016.	No	No	10th anniversary of Royal Assent (being 19 December 2015).	No

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Preventative Detention Orders – Comparisons

1. The Commonwealth legislation permits detention under a PDO for a maximum of 48 hours. State and Territory legislation provides for up to 14 days detention, pursuant to the COAG Agreement of 27 September 2005.
2. The ACT legislation stresses that PDO powers are "a measure of last resort". The threshold test also requires reasonable satisfaction that detention is the least restrictive way of preventing a terrorist act, or that it is the only effective way of preserving evidence. The applicant must attest that none of the facts or grounds relied upon are based on information obtained, directly or indirectly, from torture. No PDO may be made in respect of a person less than 18 years of age. If the person has impaired decision-making ability, the Court must expressly consider the nature and extent of the impairment and whether there is any other way of dealing with the person under ACT law.
3. The Commonwealth and a number of States provide for interim PDOs to be made by senior police officers for up to 24 hours. The Victorian Government abandoned this option before the second reading debate on the Bill in 2006. Instead, interim orders are made by the Supreme Court allowing for 48 hours (or longer in certain circumstances) following an ex parte application. A similar model applies in New South Wales and the ACT.
4. In South Australia, Western Australia and the Northern Territories, three of the jurisdictions where the Supreme Court is not the issuing authority for final or substantive PDOs, provision is made for a review of the order by the Court as soon as practicable after the subject of the order is first taken into detention.
5. Monitoring contact with a lawyer – the default position in the ACT is that communications with a lawyer are not to be monitored, unless a senior police officer orders that they should be. In Victoria, the Supreme Court may order that they not be monitored. All other jurisdictions simply provide for compulsory monitoring, though exceptions may be made in Queensland and WA if the lawyer has been security cleared to an appropriate level by the Commonwealth A-G's Office.
6. The New South Wales Act provides for the release of the person as soon as is practicable after the detaining officer becomes satisfied that the grounds on which the order was sought or granted no longer exist. Other jurisdictions simply provide that the officer must apply for revocation of the order, and the issuing authority or court must revoke the order.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Criminal Code Act 1995*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2006*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
Who may apply	An AFP member (a member or a special member of the AFP).	A police officer authorised by the Chief Commissioner.	A police officer, with the approval of the Commissioner of Police, the Deputy Commissioner or an Assistant Commissioner responsible for counter-terrorism operations.	A police officer.	A police officer.	A police officer appointed by the Commissioner of Police.	A police officer authorised by the Commissioner.	A police officer of or above the rank of Superintendent, with the approval of the Chief Police Officer.	A police officer of or above the rank of Superintendent, authorised by an officer of or above the rank of Assistant Commissioner.
Grounds for application	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The applicant must reasonably suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be reasonably satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and	The Commissioner (before appointing an applicant) must be satisfied there are reasonable grounds to believe that the person: (i) is going to engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that there are reasonable grounds to believe that	The applicant must suspect on reasonable grounds that the person: (i) intends and has the capacity to carry out a terrorist act, or (ii) has a thing connected with the preparation for or carrying out of the act, or (iii) has done an act preparing for or planning an act, and must be reasonably satisfied that (i) it is reasonably necessary to detain the person to prevent a terrorist act, and	The applicant must be satisfied there are reasonable grounds to suspect that the person: (i) will engage in a terrorist act, or (ii) has a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or (iii) has done an act preparing for or planning an attack, and must be satisfied that (i) the order would substantially assist in preventing the terrorist act occurring, and

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Criminal Code Act 1995*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2006*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR A terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be reasonably satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence in Queensland or elsewhere, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR A terrorist attack has occurred in the last 28 days and the applicant is reasonably satisfied that: (i) it is necessary to detain the person to preserve evidence in Queensland or elsewhere, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(i) the order would substantially assist in preventing the terrorist act occurring, and (ii) detaining the person for the period in question is reasonably necessary for the purpose of substantially assisting in preventing of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR A terrorist attack has occurred in the last 28 days and the Commissioner is satisfied there are reasonable grounds to believe that: (i) it is necessary to detain the person to preserve evidence, and	(ii) detaining the person is the least restrictive way of preventing the act, and (iii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be reasonably satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence in the ACT or elsewhere, and	(ii) detaining the person for the period in question is reasonably necessary for the prevention of the act. The terrorist act must be imminent or, in any event, be expected to occur in the next 14 days. OR The applicant must be satisfied that a terrorist attack has occurred in the last 28 days and: (i) it is necessary to detain the person to preserve evidence in the Territory or elsewhere, and (ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Criminal Code Act 1995*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2006*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
							(ii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	(ii) detaining the person is the only effective way of preserving the evidence, and (iii) detaining the person for the period in question is reasonably necessary for the preservation of that evidence.	
Remote application	No	No	Yes	Yes	No	No	Yes	No	Yes
Issuing Authority	Certain judges, ex-judges or AAT members as appointed by the Minister.	The Supreme Court.	The Supreme Court.	A judge or retired judge as appointed by the Minister.	A judge or retired judge of the Supreme Court or District Court as appointed by the Minister.	The Supreme Court.	A judge or retired judge as appointed by the Governor.	The Supreme Court.	A judge declared to be an eligible judge by the Administrator.
PIM involved	No	Yes	No	Yes	No	No	No	Yes	No
Urgent interim power available	Yes, an order may be made by an AFP member of or above the rank of Superintendent, for up to 24 hours detention from the time of the person being taken into custody.	If the application was made ex parte, the Court may choose to make an interim order permitting detention for 48 hours, or until the application is finally determined, whichever is the later.	If the application was made ex parte, the Court may choose to make an interim order permitting detention for 48 hours.	Yes, an order may be made by the Commissioner, the Deputy Commissioner or an Assistant Commissioner permitting detention for 24 hours.	Yes, an order may be made by an officer of or above the rank of Assistant Commissioner permitting detention for 24 hours.	Yes, an order may be made by an officer of or above the rank of Assistant Commissioner permitting detention for 24 hours OR	No, but an application may be made ex parte and the order must be reviewed by the Supreme Court as soon as practicable after detention of person (see below).	If an application is made ex parte, the Court may choose to make an interim order for 24 hours from the time of detention.	No, but an application may be made ex parte and the order must be reviewed by the Supreme Court as soon as practicable after the detention of the person (see below).

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Criminal Code Act 1995*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2006*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
						If the application is made ex parte, the Court may choose to make an interim order for 48 hours from the time of the order, or until the application is finally determined, whichever is the later.			
Grounds for Issuing	The issuing authority must be satisfied as to the matters listed under the grounds for application.	The Court must be satisfied as to the matters listed under the grounds for application.	The Court must be satisfied as to the matters listed under the grounds for application.	The issuing authority must be satisfied as to the matters listed under the grounds for application.	The issuing authority must be satisfied as to the matters listed under the grounds for application.	The Court must be satisfied as to the matters listed under the grounds for application.	The issuing authority must be satisfied as to the matters listed under the grounds for application.	The Court must be satisfied as to the matters listed under the grounds for application.	The issuing authority must be satisfied as to the matters listed under the grounds for application.
Maximum permitted detention under final PDO	48 hours	14 days	14 days	14 days	14 days	14 days	14 days	14 days	14 days
Supreme Court review of a PDO	No	No	No	A detainee may seek a review by the Court at any time. The detaining officer must bring the detainee before the Court for a review of the PDO if the person is still in custody after 7 days.	Yes – the officer must bring the detainee before the Supreme Court for a review of the PDO (initial or substantive) as soon as practicable after the person is first taken into custody.	No	Yes – the officer must bring the detainee before the Supreme Court for a review of the PDO as soon as practicable after the person is first taken into custody.	No	Yes – the officer must bring the detainee before the Supreme Court for a review of the PDO as soon as practicable after the person is first taken into custody.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Criminal Code Act 1995***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2006***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Multiple PDOs	A further PDO for preventing a different terrorist act within the period covered by the first PDO can only be made if the information on which it is based came to light after the first PDO was made.	A further PDO for preventing a different terrorist act within the period covered by the first PDO can only be made if the information on which it is based came to light after the first PDO was made.	Yes, provided the cumulative duration does not exceed 14 days.	If a person is detained on the basis of preventing a terrorist act in a particular period, no further order is permitted for preventing the same act in the same period. If a person is detained on the basis of preventing a terrorist act in a particular period, no further order is permitted for preventing a different act in the same period unless it is based on information obtained after the first order made. If a person is detained on the basis of preserving evidence, no further order is permitted based on preserving evidence of the same terrorist act.	If a person is detained on the basis of preventing a terrorist act in a particular period, no further order is permitted for preventing the same act in the same period. If a person is detained on the basis of preventing a terrorist act in a particular period, no further order is permitted for preventing a different act in the same period unless it is based on information obtained after the first order made. If a person is detained on the basis of preserving evidence, no further order is permitted based on preserving evidence of the same terrorist act.	A further PDO for preventing a different terrorist act within the period covered by the first PDO can only be made if the information on which it is based came to light after the first PDO was made. If a person is detained on the basis of preventing a terrorist act in a particular period, no further order is permitted for preventing the same act in the same period. If a person is detained on the basis of preserving evidence, no further order is permitted based on preserving evidence of the same terrorist act.	Yes, provided the cumulative duration does not exceed 14 days.	A further PDO for preventing a different terrorist act within the period covered by the first PDO can only be made if the information on which it is based came to light after the first PDO was made.	Yes, provided the cumulative duration does not exceed 14 days.
Application to under 18s	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No to under 16s. Yes 16-18.	No PDOs for under 18s.	No to under 16s. Yes 16-18.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Criminal Code Act 1995*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2005*	*Terrorism (Preventative Detention) Act 2006*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
Application for revocation / variation	The officer must apply, and the issuing authority must revoke, if the grounds on which the order was made have ceased to exist.	The officer must apply, and the court must revoke, if the grounds on which the order was made have ceased to exist. The officer must apply, and the court must vary if, because new facts or circumstances have arisen, a variation is appropriate. The subject may apply, with the leave of the Court, for a revocation or variation on the ground that new facts or circumstances have arisen, and the Court must revoke or vary if satisfied it is appropriate to do so.	The officer or the subject may apply for revocation. The officer must apply if the grounds on which the order was made have ceased to exist. The subject must be released as soon as practicable after the officer becomes aware that the grounds on which the order was made have ceased to exist, simultaneously with the application to revoke. The subject may apply for a revocation on the ground that new facts or circumstances have arisen.	The officer must apply, and the issuing authority must revoke, if the grounds on which the order was made have ceased to exist.	The officer must apply, and the issuing authority must revoke, if the grounds on which the order was made have ceased to exist.	The officer must apply, and the issuing authority must revoke, if the grounds on which the order was made have ceased to exist. The officer must apply, and the issuing authority must vary if, because new facts or circumstances have arisen, a variation is appropriate. The subject may apply, with the leave of the Court, for a revocation or variation on the grounds that new facts or circumstances have arisen, or that relevant matters were not provided to the Court, and the Court must revoke or vary if satisfied it is appropriate to do so.	The officer must apply, and the issuing authority must revoke, if the grounds on which the order was made have ceased to exist.	The officer or the subject may apply for revocation or variation. The officer must apply, and the Court must revoke, if the grounds on which the order was made have ceased to exist. The Court may revoke or amend if new facts or circumstances have arisen.	The officer must apply, and the court must revoke, if the grounds on which the order was made have ceased to exist. The officer must apply, and the court must vary if, because new facts or circumstances have arisen, a variation is appropriate. The subject may apply for a revocation or variation of a PDO, and the Court must revoke or vary the PDO, if satisfied it is appropriate on the ground that new facts or circumstances have arisen.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Criminal Code Act 1995***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2006***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Contact with a lawyer	Yes, but only for limited circumstances. Communications must be monitored.	Yes, but only for limited circumstances. Communications must be monitored, though Court may order that communications not be monitored.	Yes, but only for limited circumstances. Communications must be monitored.	Yes, for any purposes. Communications must be monitored, unless they are with a security cleared lawyer (security cleared by Commonwealth AGs office) – then they are only monitored if the issuing authority so orders, following an application by a police officer, on the grounds that monitoring will assist in achieving the purpose for which the PDO was granted.	Yes, but only for limited circumstances. Communications must be monitored.	Yes, but only for limited circumstances. Communications must be monitored.	Yes, but only for limited circumstances. Communications must be monitored, unless: • the nominated senior officer approves otherwise, or • the contact is with a security cleared lawyer (security cleared by Common-wealth AGs office to the level of "Secret") – then communica-tions are only monitored if the issuing authority issues a "monitoring order" on the grounds that monitoring will assist in achieving the purpose for which the PDO was granted.	Yes, but only for limited circumstances. Communications not to be monitored, unless an officer of or above the rank of Superintendent so directs on the basis of a reasonable belief that a lack of monitoring may lead to • interference with evidence • danger to another person • alerting another suspect • interference with evidence • making prevention more difficult because a person is alerted, or • making a person's arrest more difficult because someone is alerted.	Yes, but only for limited circumstances. Communications must be monitored.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Criminal Code Act 1995***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2005***	***Terrorism (Preventative Detention) Act 2006***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Reporting	The A-G must provide an annual report to Parliament.	The Minister must provide an annual report to Parliament.	The Commissioner of Police must provide an annual report to the Minister and the A-G. The A-G must table in Parliament as soon as practicable after receipt. The Ombudsman also monitors and reports to the Minister and the A-G every 3 years, and the A-G must table that report in Parliament as soon as practicable after receipt.	No reporting requirements in the Act. The PIM may provide reports to the Minister on non-compliance with the Act by police officers, and must provide an annual report to the Minister. The Minister must table the annual report in Parliament within 14 days of receipt. (sections 742 and 743, *Police Powers and Responsibilities Act 2000* (Qld)).	The A-G must provide an annual report to Parliament.	The Minister must provide an annual report to Parliament.	The Minister must provide a quarterly report to Parliament.	The Director-General of the relevant administrative unit must provide an annual report to Parliament.	The Commissioner must provide an annual report to the Police Minister. The Minister must table in the Legislative Assembly within 7 days of receipt.
Review of Act or Part	Not in statute. COAG agreed in 2005 to review the Act by 2010. Actually reviewed in 2013.	Review of the whole Act by 31 December 2014.	Every 3 years, after the Ombudsman has reported.	No	No	No	1st anniversary of the Royal Assent, then every 3 years thereafter.	After 8 years (2014) – report to be presented by 19 November 2015.	No
Sunset clause	10 years after commencement of this Division, being 15 December 2015.	10 years after commencement, being 9 March 2016.	10 years after commencement of this Part, being 16 December 2015.	10 years after commencement, being 16 December 2015.	10 years after commencement, being 8 December 2015.	10 years after commencement, being 13 January 2016.	10th anniversary of the Royal Assent, being 22 September 2016.	10 years after commencement, being 19 November 2016.	10 years after commencement, being 28 June 2016.

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Special Police Powers – Comparisons

1. In Victoria and the ACT, the authorising body for the use of special police powers (save for in the case of longer-term planning processes, in Victorias case) is a court, on the application of the most senior police officer, with the approval of the Premier or Chief Minister. Other States and Territories allow authorisations to be granted by the most senior police officer, generally with the concurrence of a minister. Most (not including Queensland and the ACT) have special arrangements in place for dealing with emergencies.
2. Whilst the legislation nationwide permits the use of force in the exercising of special police powers, the South Australian statute specifically provides that care must be taken to avoid inflicting unnecessary harm, humiliation or embarrassment, and officers must avoid offending genuinely held cultural values or religious beliefs or damaging property.
3. All State and Territory legislation contains provision for reporting on the use of special police powers, usually through the A-G or Police Minister, to Parliament. The reporting provision in each Act generally requires details regarding the number of authorisations given, the grounds relied upon for applying for those authorisations, the powers exercised and the results of the exercising of those powers. In South Australia and the ACT, however, the report to the A-G and/or the Minister must also include a description of any inconvenience suffered by the community, businesses or individuals (other than those who were the target of the powers) arising out of the exercise of the powers.
4. Under the legislation of the ACT, officers exercising special powers under an authorisation must have undergone human rights training. The legislation also explicitly states that information obtained as a result of torture shall not be admissible.
5. Some States' legislation (New South Wales, South Australia and Western Australia) expressly provide for the appointment of interstate police officers to assist in the exercise of emergency powers.
6. Queensland and the ACT have separate legislation for the policing of mass gatherings / special events. These are not specific terrorism provisions, and are thus excluded from this table.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Who may apply	A police officer (being an AFP member, a special member or a member of a State or Territory police force) may apply for a declaration of a Commonwealth place as a "prescribed security zone".	In respect of Grounds (i) to (iii), the Chief Commissioner with the approval of the Premier. In respect of Ground (iv), the responsible minister with the approval of the Premier, on the advice of the Chief Commissioner.	No application provision.	No application provision.	No application provision.	In respect of Grounds (i) and (ii) – to protect prominent persons or a large number of persons attending an event, or to protect a special site, which is a transport hub, an area of mass gatherings or the location of an essential service – no application is needed for the use of special powers. The Commissioner of Police with the approval of the Premier may apply for the use of additional powers. In respect of Grounds (iii) and (iv) – to prevent or to reduce the impact of a terrorist act, or for the investigation of or recovery from an act – the Commissioner of Police must apply, with the approval of the Premier, for authorisation to use both special and additional powers.	No application provision.	The Chief Police Officer with the approval of the Chief Minister.	No application provision.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Grounds for application	The Minister may declare a prescribed security zone if he or she considers a declaration would assist in preventing a terrorist attack or in responding to a terrorist attack that had already occured.	The Chief Commissioner must be satisfied that an authorisation to use special powers: (Ground (i)) is necessary to protect persons attending special events that he/she is reasonably satisfied may be a terrorist target; or (Ground (ii)) would substantially assist in preventing, or reducing the impact of, a terrorist act that he/she is reasonably satisfied is occurring or may occur in the next 14 days; or (Ground (iii)) would substantially assist in the apprehension of those responsible or in the investigation of or recovery from a terrorist act that he/	No application provision.	No application provision.	No application provision.	Under Grounds (i) and (ii), for the use of additional powers, the Commissioner of Police must be reasonably satisfied that an authorisation for the use of those powers is necessary for the safety of those attending the event, to protect the special site and those in it from a terrorist act, to mitigate the effects of an act or to assist in the recovery from an act. Under Ground (iii), for authorisation to use special or additional powers, the Commissioner of Police must be satisfied that the use of the special and/or additional powers will substantially assist in preventing or reducing the impact of a terrorist act.	No application provision.	For a "Preventative authorisation", the Chief Police Officer must reasonably believe that a terrorist act is happening or will happen in the next 14 days, and be reasonably satisfied that an authorisation would substantially assist in preventing the act, reducing its impact or both. For an "Investigative authorisation", the Chief Police Officer must reasonably believe that a terrorist act has happened in last 28 days, or is happening, and be reasonably satisfied that an authorisation would substantially assist in apprehending a person responsible, investigating	No application provision.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
		she reasonably believes has occurred or is occurring; or (Ground (iv)) (the responsible minister must be reasonably satisfied that) it is reasonably necessary to protect essential services from a terrorist attack, to mitigate the effects of an attack or to assist in the recovery of the service from an attack.				Under Ground (iv), for authorisation to use special or additional powers, the Commissioner of Police must be satisfied that the use of the special and/or additional powers will substantially assist in apprehending those responsible for the terrorist act, in the investigation of the act or in the recovery from it.		the terrorist act or reducing the impact of it.	
Issuing Authority	The Minister.	Grounds (i) to (iii) the Supreme Court. Ground (iv) the Governor in Council.	The Commissioner or Deputy Commissioner (with provision for absence), with the concurrence of the Police Minister (if available).	First, the Commissioner or Deputy Commissioner appoints a Terrorist Emergency Commander. Then, one of these appoints a Terrorist Emergency Forward Commander for each terrorist attack site. Then, the latter declares an emergency situation for the site.	The Commissioner of Police (with provision for absence), with confirmation from the Police Minister and a judge of the Supreme Court or District Court that the officer has proper grounds for issuing the authorisation.	Under Grounds (i) and (ii), the Commissioner of Police with the approval of the Premier for the use of special powers, the Supreme Court for the use of additional powers. Under Grounds (iii) and (iv), the Supreme Court for substantive authorisation to use all powers.	The Commissioner, with the prior approval of a Supreme Court judge (the authorisation is known as a "Commissioner's warrant").	The Supreme Court or the Magistrates Court.	The Commissioner or authorised officer (with provision for absence) with the concurrence of the Police Minister. The Commissioner may declare a transport hub, the site of a special event or an area where the public gathers in large numbers as a "special

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Public Safety Preservation Act 1986*	*Terrorism (Police Powers) Act 2005*	*Police Powers (Public Safety) Act 2005*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
				The Commissioner must inform the Minister and the Premier.					area", with the approval of the Police Minister. The declaration must be Gazetted.
Urgent interim power available	No	Yes – the Chief Commissioner with the approval of the Premier under Grounds (ii) and (iii).	Yes - the Minister may be advised post authorisation within 48 hours if not available.	No	Yes – the confirmation of the Police Minister and a judge may be obtained later.	Yes – the Commissioner of Police with the approval of the Premier under Grounds (iii) and (iv) for use of all powers.	Yes – the Commissioner may issue a warrant but must seek the judge's approval within 24 hours.	No	Yes – the Minister may be advised post authorisation within 48 hours if not available.
Grounds for Issuing	The Minister must consider that the declaration of a place as a prescribed security zone would assist in preventing a terrorist act or in responding to an act that has occurred. A declaration must be gazetted and broadcast via television or radio and the internet.	The Chief Commissioner (interim orders) or the Supreme Court or the Governor in Council must be satisfied as to the matters listed under the grounds for application above.	The officer must be satisfied on reasonable grounds that a terrorist act is about to be committed or has been committed and that the exercise of special powers will substantially assist in preventing the terrorist act or in apprehending those responsible. The officer must be satisfied that the nature and extent of the powers to be authorised are appropriate to	The Commissioner or Deputy Commissioner must be satisfied on reasonable grounds that an emergency situation has arisen or is likely to arise, that results or may result from or may lead to a terrorist act at one or more places. The Terrorist Emergency Forward Commander may declare an that a terrorist emergency exists for a given area if	For a "preventative authorisation", the officer must have reasonable grounds to believe that a terrorist act is imminent, whether in SA or outside the State, and that an authorisation to use special powers will substantially assist in preventing the terrorist act. For an "investigative authorisation", the officer must have reasonable grounds to believe that	Under Grounds (i) and (ii), the Commissioner of Police (special powers) or the Supreme Court (additional powers) must be satisfied on reasonable grounds that an area might be at risk of a terrorist attack and that the authorisation: • is necessary to ensure the safety of persons attending an event, or • is necessary for the protection of a special site or those in	The Commissioner must have reasonable grounds to believe that a terrorist act has been, is being or is about to be committed, whether in or outside SA, and that the issue of a Commissioner's warrant to use special powers will substantially assist in: • preventing the terrorist act; • minimising the risk to the public from the act;	For either a preventative authorisation or an investigative authorisation, the Court must be reasonably satisfied in line with the grounds for application above and, if the authorisation is for or includes a particular area, that it is reasonably necessary to give the authorisation for that area.	The issuing authority must have reasonable grounds to believe that a terrorist act has occurred or is likely to occur in the near future, and that the exercise of the powers will substantially assist in: • preventing the act or minimising the risk to the public from it; • finding, removing or preserving evidence; or • apprehending a person responsible

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Public Safety Preservation Act 1986*	*Terrorism (Police Powers) Act 2005*	*Police Powers (Public Safety) Act 2005*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
			the threatened or suspected terrorist act.	reasonably satisfied that emergency powers are necessary to manage and control the site.	a terrorist act is being or has been committed, whether in SA or outside the State, and that an authorisation to use special powers will substantially assist in the investigation of it.	it, to mitigate the effects of an attack on the site or to assist in the recovery from an attack. Under Grounds (iii) and (iv), the Commissioner of Police (interim authorisation) or the Supreme Court (substantive authorisation) must be reasonably satisfied that a terrorist act has been, is being or is about to be committed and the use of special powers: • is reasonably necessary to prevent or to reduce the impact of the attack, or • will substantially assist in apprehending those responsible, in the investigation of the act or in the recovery from it.	• finding a person who is or may be connected to the act; • finding a vehicle that is or may be connected to the act; or • the investigation into the act.		or intending to commit an act. An area may be declared a special area if the Commissioner is satisfied it is necessary because of the nature of the site and the risk of a terrorist act at it.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Maximum duration of authorisation	A declaration of a place as a "prescribed security zone" may last for up to 28 days.	Under Ground (i), 24 hours after the scheduled end of the event. Under Grounds (ii) and (iii), 24 hours for interim authorisations, 14 days for substantive authorisations. Under Ground (iv), one year.	7 days where the authorisation is for the prevention of a terrorist act. 24 hours where the authorisation is for apprehending those responsible.	7 days.	In the case of a preventative authorisation, 7 days. In the case of an investigative authorisation, 24 hours.	Under Ground (i), 24 hours after the scheduled end of the event. Under Ground (ii) one year. Under Grounds (iii) and (iv), 72 hours for an interim authorisation, 14 days for a substantive authorisation.	7 days.	In the case of a preventative authorisation, 7 days. In the case of an investigative authorisation, 24 hours.	7 days for a special powers authorisation. 28 days for a special area declaration.
Extension of authorisation	No	Yes – by the Supreme Court for Ground (i). No extensions provided for in respect of Grounds (ii) – (iv), but new authorisations may be given.	Yes – both may be doubled with concurrence of Police Minister.	Yes – the Premier and the Minister may approve a further 7 days.	No, but further authorisations may be made in respect of same terrorist act with the effect of doubling the time limits.	Yes – the Supreme Court can extend all authorisations it is empowered to give.	No, but a further authorisation may be given in respect of the same terrorist act.	No, but a further preventative or investigative authorisation may be made in respect of the same terrorist act.	An authorisation may be extended by 7 days by the Commissioner or authorised officer, with the agreement of the Police Minister, and then by a further 14 days by the Police Minister. A special area declaration may be extended by 7 days.
Powers that may be exercised	The powers may be exercised: (i) if a person is in a prescribed security zone, or (ii) if a person is in a Commonwealth place (that is not a prescribed	The available powers are to: • obtain disclosure of identity; • stop and search persons;	The available powers are to: • obtain disclosure of identity; • stop and search persons;	The powers may be exercised by a terrorist emergency officer, being the terrorist emergency forward commander or a police officer	The available powers are to: • obtain disclosure of identity; • stop and search persons;	The special powers are to: • obtain disclosure of identity; • stop and search persons;	The available powers are to: • regulate the movement of people or vehicles in or out of a "target area";	The available powers are to: • obtain disclosure of identity; • stop and search persons;	The available powers are to: • obtain disclosure of identity; • stop and search persons;

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Public Safety Preservation Act 1986*	*Terrorism (Police Powers) Act 2005*	*Police Powers (Public Safety) Act 2005*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
	security zone) and an officer reasonably suspects that the person has committed, is committing or is about to commit a terrorist act. The powers are to: • obtain disclosure of identity and reasons for being in the place; • search persons and vehicles, and seize and detain anything related to terrorism or to another serious offence. The police have power to enter and search premises without a warrant in an emergency, which is not confined to the above geographical areas (see the Covert Search Warrant table).	• stop and search vehicles; • move vehicles; • enter and search premises without a warrant; • set up a cordon; • seize and detain things.	• stop and search vehicles; • enter and search premises without a warrant; • set up a cordon; • seize and detain things.	acting on his or her instructions. The powers are to: • regulate the movement of people or vehicles in or out of a "declared area"; • obtain disclosure of identity; • stop and search persons.	• stop and search vehicles; • enter and search premises; • set up a cordon; • seize and detain anything related to terrorism or to another serious offence. If a "special area" is declared by the Commissioner of Police (a transport hub, the site of a special event or an area where the public gather in large numbers), officers may search baggage.	• stop and search vehicles; • move vehicles; • set up a cordon; • seize and detain things. The additional powers are to: • strip search; • enter and search premises without a warrant.	• obtain disclosure of identity; • stop and search persons; • stop and search vehicles; • enter and search premises; • seize and detain things; • set up a cordon around an area.	• stop and search vehicles; • move vehicles; • enter and search premises; • set up a cordon; • seize and detain things.	• stop and search vehicles; • enter and search premises; • enter premises for the purpose of surveillance or to protect a person. Under a special area declaration, officers may do all of the above, but may also seize any terrorism or other serious offence related items found during a search. Other powers are available on public health and safety grounds under the Act, with no need for an authorisation or a declaration, if a terrorist act has occurred or is imminent: • move vehicles; • set up a cordon; • regulate the movement of people or vehicles in or out of an area;

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	*Crimes Act 1914*	*Terrorism (Community Protection) Act 2003*	*Terrorism (Police Powers) Act 2002*	*Public Safety Preservation Act 1986*	*Terrorism (Police Powers) Act 2005*	*Police Powers (Public Safety) Act 2005*	*Terrorism (Extraordinary Powers) Act 2005*	*Terrorism (Extraordinary Temporary Powers) Act 2006*	*Terrorism (Emergency Powers) Act 2003*
									• direct a person to remain in or go to a place for decontamination or quarantine for up to 48 hours (Chief Medical Officer has the same powers); • enter and make safe contaminated premises or premises damaged by the terrorist act; • destroy or decontaminate a thing found which is a risk to health and safety.
Privative clause	No	Yes, in respect of interim authorisations.	Yes	No	Yes, in respect of special powers authorisation or special area declaration.	Yes, in respect of interim authorisations.	Yes	No	Yes, in respect of both authorisations and special area declarations.

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
Other relevant provisions	May use reasonable force. May accept outside assistance in searching premises.	May use reasonable force. May give directions to other government agencies with respect to the exercise of their powers and functions.	May use reasonable force. May give directions to other government agencies with respect to the exercise of their powers and functions. May appoint AFP or interstate police as law enforcement officers for this Part, who have all of the above powers.	May give directions to other government agencies with respect to the exercise of their powers and functions. Act also contains special powers for chemical, biological or radiological emergencies.	May use reasonable force, but must not inflict unnecessary harm, humiliation or embarrassment and must avoid offending genuinely held cultural values or religious beliefs. May use such assistance as is considered necessary. May appoint AFP or interstate police as law enforcement officers for this Part.	May use reasonable force. May give directions to other government agencies with respect to the exercise of their powers and functions. Officer may authorise other persons to assist (may not conduct strip search).	May use reasonable force. May use such assistance as is considered necessary. May give directions to other government agencies with respect to the exercise of their powers and functions. May appoint AFP or interstate police as special officers for this Part .	May use reasonable force. May give directions to other government agencies with respect to the exercise of their powers and functions. All officers exercising powers must have undertaken human rights training. Evidence obtained through torture is inadmissible.	May give directions to other government agencies with respect to the exercise of their powers and functions.
Reporting	No provision.	The Premier must provide an annual report to Parliament.	The Commissioner must provide a report to the Police Minister and the A-G as soon as practicable after the authorisation ceases.	The Commissioner must provide a report to the Minister within 6 months of the end of the declaration. The Minister must table the report in Parliament within 6 months of the end of the declaration.	The Commissioner must provide a report to the Police Minister and the A-G as soon as practicable after an authorisation ceases. The A-G must table the report in Parliament within 12 sitting days of receipt.	The Minister must provide an annual report to Parliament.	As soon as is practicable after the issue of the authorisation, the Commissioner must give a written report to the Minister. The Commissioner must provide a report to the Minister and the A-G within 30 days of cessation of the authorisation.	As soon as possible after the expiry of the authorisation, the Chief Police Officer must give a written report to the Minister. The Minister must present the report to the Assembly no later than 6 sitting days after receipt. The annual report of the	For both special powers authorisations and special area declarations, the Commissioner must provide a report to the Minister and the A-G as soon as practicable after their expiration. The Minister must report to the Assembly within 6 months of receipt (7 days in

	Commonwealth	Victoria	NSW	Queensland	SA	Tasmania	WA	ACT	NT
Statute	***Crimes Act 1914***	***Terrorism (Community Protection) Act 2003***	***Terrorism (Police Powers) Act 2002***	***Public Safety Preservation Act 1986***	***Terrorism (Police Powers) Act 2005***	***Police Powers (Public Safety) Act 2005***	***Terrorism (Extraordinary Powers) Act 2005***	***Terrorism (Extraordinary Temporary Powers) Act 2006***	***Terrorism (Emergency Powers) Act 2003***
							The Minister must table the report in Parliament within 60 days of receipt.	Director-General under the *Annual Reports (Government Agencies) Act 2004* must include an assessment of the use and effectiveness of this Act.	the case of a special area declaration).
Review of Act or Part	No (though was reviewed in 2013).	By 31 December 2014.	Every 3 years, after Ombudsman has reported on the use of covert search warrant powers and the use of PDOs (Nb: Ombudsman has no standing in relation to the use of special police powers).	5 years after commencement.	2nd and 5th anniversaries.	No	1st anniversary then every 3 years.	8 years after commencement.	5 years after commencement.
Sunset clause	10 years from commencement, being 15 December 2015.	1 December 2016	No	No	10th anniversary of commencement, being 8 December 2015.	10th anniversary of commencement, being 14 December 2015.	10th anniversary of Royal Assent, being 19 December 2015.	10 years from commencement, being 19 November 2016.	No

Appendix C

Solicitor-General
Victoria

IN THE MATTER OF PREVENTATIVE DETENTION ORDERS UNDER THE *TERRORISM (COMMUNITY PROTECTION) ACT 2003*

1. I have been asked by the Review Committee which was established under s 38(1) of the *Terrorism (Community Protection) Act 2003* (Vic) (**the Act**) to review the operation of the Act, to advise in relation to a constitutional issue arising in respect of the provision which the Act makes for preventative detention.

2. Part 2A of the Act enables the Supreme Court to make orders for the detention of persons for up to 14 days in order to prevent an imminent terrorist attack occurring or to preserve evidence of, or relating to, a recent terrorist act.

3. The issue that arises is whether the manner in which an application for a preventative detention order is to be made impugns the institutional integrity of the Supreme Court so as to be invalid for inconsistency with Ch III of the Constitution (pursuant to the principle derived from the line of cases commencing with *Kable v Director of Public Prosecutions (NSW)*[1]).

4. The issue arises in particular in respect of s 13D of the Act, which relevantly provides as follows:

> **13D Form and content of application**
>
> (1) An application under section 13C must—
>
> (a) be made in writing; and
>
> (b) set out the facts and other grounds on which the applicant considers that the preventative detention order should be made; and
>
> (c) specify the period for which the applicant is seeking to have the person detained under the order and set out the facts and other grounds on which the applicant considers that the person should be detained for that period; and

[1] (1996) 189 CLR 51.

(d) set out the information (if any) that the applicant has about the person's age and capacity to manage his or her affairs; and

(e) set out the following—

(i) the outcomes and particulars of all previous applications for preventative detention orders in relation to the person;

(ii) the information (if any) that the applicant has about—

(A) the outcomes and particulars of all previous requests for Commonwealth control orders (including the outcomes of the hearings to confirm the orders) in relation to the person;

(B) the outcomes and particulars of all previous applications for variations of Commonwealth control orders made in relation to the person;

(C) the outcomes of all previous applications for revocations of Commonwealth control orders made in relation to the person; and

(f) set out the information (if any) that the applicant has about any periods for which the person has been detained under an order made under a corresponding preventative detention law; and

(g) set out a summary of the grounds on which the applicant considers that the order should be made.

(2) To avoid doubt, subsection (1)(g) does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 of the Commonwealth).

...

(6) An application may only be made without notice of it being given to the person in relation to whom a preventative detention order is being sought if that person is not then being detained under an order for the person's detention made under a corresponding preventative detention law.

...

5. Section 13D(1)(g), which with s 13D(2) is central to this advice, is a curious provision. While it requires the application for a preventative detention order to set out a summary of the grounds on which the applicant considers that the order should be made, paragraph (b) already requires the application to set out "the facts and other grounds on which the applicant considers that the preventative detention order should be made". It is difficult to see that paragraph (g) has any independent operation. This makes it more surprising that subsection (2) is confined to paragraph (g) and makes no reference to

paragraph (b)[2]. It is possible, however, to address the questions I am asked without dwelling further on this curiosity.

6. The Act contains a range of other provisions which were incorporated into the *Criminal Code* (Cth) (**the Code**) following an earlier referral of power by Victoria in accordance with s 51(xxxviii) of the Constitution.[3]

7. I am asked the following questions:

   (1) What is the effect of s 13D(1)(g) in light of subsection (2)?

   (2) Does that effect give rise to any issue with respect to the constitutional validity of the preventative detention provisions?

8. Neither s 13D nor Pt 2A generally creates any comprehensive statutory regime to deal with material the disclosure of which is likely to prejudice national security as described in s 13D(2). However, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**the NSI Act**) referred to in s 13D(2) may still operate of its own force. The NSI Act makes provision for the management of national security information, and for restrictions on its disclosure, in relation to civil proceedings in any court in respect of which the Attorney-General for the Commonwealth has given notice that the NSI Act applies: s 6A. The NSI Act defines a civil proceeding as any proceeding in an Australian court, other than a criminal proceeding: s 15A. As such, the NSI Act potentially applies to applications for preventative detention orders under the Act. This is confirmed by s 13ZP(3) of the Act. I have not been asked to review the operation of the NSI Act and it is therefore not necessary to make any further reference to the stand alone operation of that legislation.

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2 This issue also seems to arise with complementary Commonwealth provisions dealing with preventative detention orders. Sections 105.7(2) and (2A) of the Code, which provide for an application for an initial preventative detention order, and ss 105.11(2) and (3A), which provide for an application for a continued preventative detention order, take the same form as ss 13D(1) and (2). Section 104.2 of the Code, which deals with applications for interim control orders also broadly mirrors s 13D, but the equivalent of paragraph (b) only refers to requiring a statement of facts (without referring to grounds) and the equivalent of paragraph (g) separately requires a summary of grounds. These provisions in the Code were enacted prior to the enactment of s 13D of the Act.

9. The effect of the reference in s 13D(2) to the NSI Act is to adopt the definition of the expression "likely to prejudice national security" in s 17 of the NSI Act. In *Thomas v Mowbray*[4], Gummow and Crennan JJ explained that for disclosure of information to be "likely to prejudice national security" requires "a real and likely, not merely a remote, possibility of prejudice by the disclosure to the defence, security, international relations or law enforcement interests of Australia" (noting that the last three expressions are themselves further defined in the NSI Act).[5]

10. It may be observed that s 13D addresses only the form and content of the application for an order. The Act has little to say about the powers of the Supreme Court more generally. Section 13ZO provides that questions of fact are to be decided on the balance of probabilities. Section 13ZP provides that proceedings on an application under Pt 2A are civil in nature except as otherwise provided. While the rules regulating the practice and procedure of the Court in civil proceedings do not apply by virtue of s 13ZP(2), nothing in Pt 2A makes any special provision for the hearing of an application for a preventative detention order, including for the admission or disclosure of evidence which might be the subject of national security concerns such as that referred to in s 13D(2).[6]

11. Since nothing in Pt 2A makes special provision for the adducing into evidence of information likely to prejudice national security, or for the hearing and determination of an application in reliance on evidence to which the respondent to the application is denied access, the question whether or not such a course is

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3 Pt 5.3 of the Code as originally enacted, which did not include the division dealing with preventative detention orders, was based on Sch 1 to the Victorian referring Act, the *Terrorism (Commonwealth Powers) Act 2003* (Vic).

4 (2007) 233 CLR 307 (***Thomas***).

5 *Thomas* (2007) 233 CLR 307 at [122].

6 A provision which may relate to the disclosure of evidence is s 23 which is in Pt 5 of the Act. That section provides that "[i]f in any legal proceeding within the meaning of the *Evidence (Miscellaneous Provisions) Act 1958* [this includes any civil proceeding] an issue arises relating to the disclosure of counter-terrorism information ... the court ... may excuse that person from the requirement to disclose if satisfied that disclosure would prejudice the prevention ... of a terrorist attack ... and the public interest in preserving secrecy or confidentiality outweighs the public interest in disclosure". The question whether or not such information is disclosed is left entirely to the Supreme Court to decide.

taken in a particular application is left entirely to the Supreme Court to decide. In that respect, the legislation operates in a manner similar to the *Liquor Licensing Act 1997* (SA), the validity of which was unanimously upheld by the High Court in *K-Generation Pty Ltd v Liquor Licensing Court*[7]. It was critical in that case that the courts could determine for themselves what steps to take to maintain the confidentiality of the information in question in any particular case.[8] Moreover, the courts could decide what weight to attribute to evidence which has not been able to be tested by the opposing party in the usual manner.[9]

12. While such provisions naturally give rise to concerns regarding procedural fairness, and each case must depend on the features of its particular statutory regime, the High Court has not to date held such provisions to be constitutionally invalid.[10]

13. The essential basis on which statutory provisions of this kind have been upheld has been that the court in question retains its decisional independence and its capacity to act fairly and impartially.[11]

14. In *Pompano*[12], French CJ noted the existence of inherent powers of courts to deal with material whose publication is prevented by public interest immunity considerations. His Honour noted that it was an aspect of the inherent jurisdiction of the Supreme Court that it had power "to order that all or part of a case be heard in camera, to prohibit publication of part of the proceedings, and to privately inspect documents the subject of a claim for public interest immunity". His Honour continued that the existence of this group of inherent

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7 (2009) 237 CLR 501 (***K-Generation***).

8 *K-Generation* (2009) 237 CLR 501 at [94]–[99] (French CJ), [144]–[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), [257] (Kirby J). See also *Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 (***Pompano***) at [154] (Hayne, Crennan, Kiefel and Bell JJ).

9 *Pompano* (2013) 87 ALJR 458 at [88] (French CJ), [166] (Hayne, Crennan, Kiefel and Bell JJ); cf. at [209] (Gageler J).

10 See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [7] (Gleeson CJ), [30], [33], [44] (Gummow, Hayne, Heydon and Kiefel JJ), [170]–[174], [183], [191] (Crennan J); *Pompano* (2013) 87 ALJR 458 at [152], [167] (Hayne, Crennan, Kiefel and Bell JJ); see also at [88]–[89] (French CJ).

11 *Pompano* (2013) 87 ALJR 458 at [88]–[89] (French CJ), [167] (Hayne, Crennan, Kiefel and Bell JJ).

12 (2013) 87 ALJR 458 at [46].

powers suggested that statutory analogues to them, where enacted, "will not readily be regarded as impairing the defining or essential characteristics of the courts to which those analogues apply".

15. As explained, Pt 2A does not enter into the question of how the Court hears and determines an application for a preventative detention order. The impact of s 13D(2) is more limited. It adopts defined terms in Commonwealth legislation to identify a matters which an applicant for a preventative detention order is not required to disclose in the application for that order, in setting out a summary of the grounds relied on for seeking the order. Where it applies, it will have the effect of limiting the notice which a person in relation to whom an order is sought has of the case sought to be made against him or her, at least in advance of the hearing. Subject to that constraint, however, s 13D is silent even as to whether a person is to receive notice of an application, leaving that matter largely to the Court (which may make an interim order and direct that the respondent be given notice of the hearing for final relief: s 13E(4) and (5)); the exception is that s 13D(6) *precludes* the Court from dispensing with notice if the respondent is already detained under a corresponding preventative detention law.

16. In my opinion, s 13D(2) goes no further than this comparatively limited constraint on notice at the outset of an application. As mentioned, it does not purport to direct the Court as to how it should conduct the hearing or satisfy the requirements of procedural fairness. So, in a case where an application is not served on a person in relation to whom the order is sought, the Court may refuse to make any order, or stay the proceeding, until the respondent is given notice of the case to be met. Section 13D(2) does not prevent the Court from ordering that such notice extend to national security matters, although it is of course not bound to do so and may well decide that such notice is not appropriate.

17. Assuming notice of the application is given, s 13D(2) is of comparatively limited compass. The application is only the initiating document in the proceeding. Necessarily, despite the operation of s 13D(2), an applicant will need to apprise the Court of the information withheld from the application. Again, the Act says nothing as to how the Court is to deal with the information

once it is disclosed to it, including whether it may make orders permitting or restricting disclosure of the information to the applicant, the applicant's legal representatives, or the public. Such matters are left to the general law and the express and inherent powers of the Court to prevent injustice.

18. A similar provision in s 104.12A of the Code was briefly considered by some members of the High Court in *Thomas*. The majority held that it was not necessary to decide whether the provision was invalid as a result of denying procedural fairness, because the case before the Court did not raise that as a factual issue.[13] However, the minority judgments did address this issue.

    (1) Kirby J held that the effect of s 104.12A was "fundamentally inconsistent with the adversarial and accusatorial procedures, observed by the Australian judiciary until now in serious matters affecting individual liberty, as contemplated by Ch III of the Constitution"[14]. The dissenting view of Kirby J is in my opinion not consistent with the later authorities to which reference is made in this memorandum.

    (2) Hayne J also dissented, on the basis that reliance on intelligence material in order to form the kind of opinion which the legislation required the courts to form had the effect that the courts were left with no practical choice except to act upon the view of the Executive.[15] Again, that was a dissenting view, and his Honour did not hold that every provision enabling reliance on confidential material would necessarily be invalid. In light of subsequent decisions, current authority is against such a broad proposition in any event.

19. The Court in *Pompano* considered the *Criminal Organisation Act 2009* (Qld) which, among other things, provided for the Supreme Court of Queensland to declare an organisation to be a criminal organisation. Provision was made for the Court to rely on "criminal intelligence" in deciding whether to make a

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13 (2007) 233 CLR 307 at [31] (Gleeson CJ), [122]–[125] (Gummow and Crennan JJ), [599]–[600] (Callinan J), [651] (Heydon J).

14 (2007) 233 CLR 307 at [365].

15 (2007) 233 CLR 307 at [510]–[512].

declaration, and restrictions were placed on the disclosure of criminal intelligence to a respondent. The Supreme Court was required to consider an application to have information designated as "criminal intelligence" without notice to the respondent and in closed court.

20. The legislation was upheld. French CJ stated:

> The effect of Pt 6 of the [Criminal Organisation Act] upon the normal protections of procedural fairness is significant. On the other hand, the Supreme Court performs a recognisably judicial function in determining an application under that Part. It is not able to be directed as to the outcome. It retains significant inherent powers and its powers under the [Uniform Civil Procedure Rules 1999 (Qld)] in relation to the proceedings. The process is analogous in some respects to that used in the determination of public immunity claims in the exercise of the inherent power of the Supreme Court. The provisions of Pt 6 relating to an application for a criminal intelligence declaration do not impair the essential and defining characteristics of the Supreme Court so as to transgress the limitations on State legislative power derived from Ch III of the Constitution.[16]

21. Gageler J took a more limited view, upholding the validity of the legislation solely on the basis that the Supreme Court retained its inherent jurisdiction, in any case in which practical unfairness to a respondent becomes manifest, to stay the proceeding as an abuse of process.[17]

22. Hayne, Crennan, Kiefel and Bell JJ described the legislation in the following terms:

> As noted at the outset of these reasons, the [Criminal Organisation Act] requires the Commissioner to give, as part of the application for a declaration of an organisation as a criminal organisation, detailed particulars of both the grounds for making the declaration and the information supporting those grounds. The operation of the criminal intelligence provisions will prevent a respondent and the respondent's representatives knowing of one class of material that the Commissioner alleges supports the case for a declaration. In this respect the [Criminal Organisation Act] may be said to require departure from the usual incidents of an adversarial system of adjudication, but the nature and extent of that departure must be identified with some care.[18]

23. It may be observed that, unlike Pt 2A of the Act, the Criminal Organisation Act expressly required notice to be given to a respondent of the application, subject to a criminal intelligence exception comparable to s 13D(2). This aspect was

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16 (2013) 87 ALJR 458 at [78].

17 (2013) 87 ALJR 458 at [212].

18 (2013) 87 ALJR 458 at [158] (footnote omitted).

important to the reasoning of the joint judgment.[19] Nonetheless, their Honours concluded:

> When it is said, as it was in this case, that there has been a departure from hitherto accepted forms of procedure and thus a departure from accepted judicial process, the significance of providing for some novel procedure must be measured against some standard or criterion. Consideration of the continued institutional integrity of the State courts directs attention to questions of independence, impartiality and fairness. In cases where it is said that the courts have been conscripted to do the Executive's bidding, the principal focus will likely fall upon questions of independence and impartiality. But that is not and was not said to be this case. Where, as here, a novel procedure is said to deny procedural fairness, attention must be directed to questions of fairness and impartiality. Observing that the Supreme Court can and will be expected to act fairly and impartially points firmly against invalidity.[20]

24. This reasoning applies with equal force to s 13D(2). While the scheme of Pt 2A may permit applications to be made without notice to a respondent, and for notice (where given) to omit information whose disclosure is likely to prejudice national security, the Act leaves intact the capacity of the Supreme Court to act to ensure fairness in the hearing and determination of each application. It may be said that the Court in *Pompano* was considering the hearing without notice of a comparatively limited question, namely whether or not information was "criminal intelligence", and that the Court's reasoning would not necessarily extend to a proceeding in which individual liberty was at stake. There is force in this observation. However, in my opinion the reasoning in *Pompano* remains applicable. While the requirements of procedural fairness are doubtless more onerous in the context of Pt 2A, so that legislation impinging on those requirements may be less readily justified, the panoply of the Court's express and inherent powers to ensure fairness remains just as wide, and the statutory incursion on procedural fairness is of the same functional nature.

25. For the reasons set out above, my answers to the questions set out at the commencement of this memorandum are as follows:

    (1) Section 13D(1)(g), read with s 13D(2), operates to require an applicant for a preventative detention order to set out a summary of the grounds on which the order should be made, other than to state information the

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[19] (2013) 87 ALJR 458 at [163].

disclosure of which is likely to prejudice national security in the sense described. Section 13D(2) does not permit or direct the Supreme Court to have regard to such information in the absence of evidence. It does not purport to interfere in any way in the manner in which the Court conducts its proceeding, including the manner in which it applies the rules of evidence and evaluates the evidence once admitted, or the manner in which it affords procedural fairness after the application has been made.

(2) In light of the limited operation of s 13D(2), that provision is valid and does not give rise to constitutional invalidity of Pt 2A of the Act.

Dated: 5 June 2014

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[20] (2013) 87 ALJR 458 at [169].

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