

REPORT 1

EXPERT PANEL ON
TERRORISM AND
VIOLENT EXTREMISM
PREVENTION AND
RESPONSE POWERS

Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers
Report 1, 2017

CONTENT COORDINATION

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EXECUTIVE SUMMARY

The Victorian Government appointed an Expert Panel, consisting of Ken Lay AO APM and the Hon. David Harper AM QC, which commenced its review on 26 June 2017. The Panel's Terms of Reference require that it complete its work in two reports. Report 1 is focused on reforms to police powers to deal with terrorism. Report 2 has a broader remit, and considers reforms necessary to enhance the ability of relevant agencies and institutions to prevent, investigate, monitor and respond to terrorist attacks.

In this Report 1, the Panel makes a total of 16 recommendations relating to the following matters:

- _ Use of force (Chapter 2);
- _ Investigative and preventative detention (Chapter 3);
- _ Presumption against bail and related information sharing (Chapter 4);
- _ Presumption against parole and related information sharing (Chapter 5);
- _ Special police powers (Chapter 6); and
- _ Protection of criminal intelligence (Chapter 7).

The substance of the Panel's recommendations in relation to each of these matters is outlined below.

Chapter 2 discusses Victoria Police's powers to use appropriate force in response to, or to prevent, a terrorist act. The Panel considers the adequacy of Victoria's current 'use of force' provision, set out in section 462A of the *Crimes Act 1958*. This consideration is undertaken in light of recent changes to the equivalent NSW provisions in response to the Coronial Inquiry into the Lindt Café siege. The Panel recommends (Recommendation 1) changes to provide greater confidence to police and protective services officers who may be called upon to use force as part of a response to a terrorist threat.

Chapter 3 considers whether changes are required to Victoria Police's powers to detain a person, without charge, in order to prevent a terrorist attack or to preserve evidence relating to an attack. In 2016, the Council of Australian Governments (COAG) gave in-principle agreement to strengthening pre-charge detention laws based on a NSW model. NSW subsequently enacted an investigative detention regime that permits police to question a detained person for investigative purposes.

The Panel recommends (Recommendation 2) changes to Victoria's current preventative detention laws to: (a) permit police to question a suspect; (b) permit police to take a person into custody without first obtaining a Court order; (c) extend the maximum period for interim detention from 48 hours to four days; and (d) provide for an appropriate mechanism to protect sensitive criminal intelligence. The protection of criminal intelligence is considered separately as part of Chapter 7.

The Panel does not recommend adoption of the NSW ‘stand-alone’ investigative detention regime. It does, however, recommend that the current scheme of preventative detention be amended to provide for questioning of an investigative kind, and to include a detailed treatment of the circumstances in which police may question a detained person and the manner in which that questioning must be conducted. The Panel recommends that measures be put in place to identify individuals who may be particularly vulnerable under a modified scheme of preventative detention, including individuals who are disabled or who may suffer from mental illness. The Panel recommends that additional safeguards apply if such individuals are detained. The Panel reserves to Report 2 its consideration of: (a) whether the modified scheme for preventative detention should extend to persons aged 14 or 15; and (b) the additional safeguards required to protect the interests of persons aged under 18 who are detained.

Chapter 4 makes six recommendations to implement the Government’s commitment, as part of a 2017 COAG agreement, to introduce a presumption against granting parole to offenders who have demonstrated support for, or have links to, terrorist activity.

Recommendation 3 is that Victoria amend its laws to provide for a presumption against parole for ‘terrorism related offenders’, and that the definition of this term be sufficiently broad to ensure that the parole process captures the risk of terrorism as comprehensively as possible.

Recommendation 4 is that the Adult Parole Board or the Youth Parole Board (as applicable) should only be able to grant parole to a terrorism related offender if there are exceptional circumstances (in the case of a person convicted of a terrorist offence) or compelling reasons (for all other terrorism related offenders) for doing so.

Recommendation 5 requires the Adult Parole Board or the Youth Parole Board (as applicable) to cancel parole once it becomes aware of information that indicates that the offender is a terrorism related offender or that a known terrorism related offender presents an increased terrorist risk. Either board may choose not to cancel parole if there are exceptional circumstances (for persons convicted of a terrorist offence) or compelling reasons (for all other terrorism related offenders) for doing so.

Recommendation 6 is that parole decisions of the Youth Parole Board in relation to terrorism related offenders should be guided by additional considerations that address the special requirements of young persons within the youth justice system.

Recommendation 7 is that adult terrorism related offenders may only be released on parole by the Serious Violent or Sexual Offender Division of the Adult Parole Board (or equivalent), as part of its existing two-tiered decision-making process.

Recommendation 8 is that the Victorian Government and the Commonwealth Government enter into a Memorandum of Understanding to:

- confirm the roles and responsibilities of, and the information sharing arrangements between, members of the Victorian Joint Counter-Terrorism Team; and
- set out the responsibilities, including information sharing responsibilities, between the Joint Counter-Terrorism Teams in all jurisdictions.

The Panel recommends, further, that information sharing arrangements between police and intelligence agencies, and entities forming part of the youth justice system (including the Youth Parole Board), should be addressed as part of this Memorandum of Understanding or as a supplementary Memorandum of Understanding.

Chapter 5 makes four recommendations to implement the Government's commitment, as part of a 2017 COAG agreement, to introduce a presumption against granting bail to offenders who have demonstrated support for, or have links to, terrorist activity.

Recommendation 9 is that Victoria amend its laws to provide for a presumption against bail for 'terrorism related offenders', and that the definition of this term be sufficiently broad to ensure that the bail process captures the risk of terrorism as comprehensively as possible.

Recommendation 10 is that a court should only be able to grant bail to an accused person to whom the presumption applies if it is satisfied that there are compelling reasons or, in the most serious matters, exceptional circumstances for doing so.

Recommendation 11 is that only a court may grant or refuse bail to an accused person to whom the presumption applies.

Recommendation 12 is that the Memorandum of Understanding recommended in Chapter 4 should also address information sharing requirements in relation to bail decisions to ensure that prosecutors have the evidence they need to establish that the presumption applies.

Chapter 6 examines the special police powers contained in the *Terrorism (Community Protection) Act 2003 (Vic)* (TCPA). These are significant and exceptional powers that are intended only to be used by police in response to a terrorist attack or in response to an imminent threat of such an attack. Recommendation 13 is to retain the requirement for the Premier to approve an interim authorisation (which enlivens the exercise of the special powers) but make certain amendments to address police concerns that existing requirements are overly rigid. The Panel recommends additional amendments to: (a) enhance Victoria Police's ability to respond to a terrorist attack (or the threat of such an attack), including enabling protective services officers to assist police in this task; and (b) confer on police a power to take control of premises and 'things', such as premises or resources, for operational uses if it is necessary for them to do so for the purposes of responding to a terrorist attack (or the threat of such an attack).

Recommendation 14 is that Victoria Police continue to trial and streamline its processes to seek the Premier's approval for an interim authorisation.

Recommendation 15 is for further amendments to the TCPA to ensure consistency with proposed changes to the threshold test for terrorist acts that are yet to occur under the current Victorian laws permitting preventative detention (contained in Part 2A of the TCPA).

Chapter 7 considers the matter of sensitive criminal intelligence and the appropriate means of protecting that information under the TCPA. The Panel recommends (Recommendation 16) a single process for protecting criminal intelligence apply to procedural applications made by police under the TCPA. The process recommended by the Panel includes a broader definition of what constitutes criminal intelligence, a closed court procedure and a role for special counsel. The Panel has sought to strike the right balance between the public interest in enabling law enforcement authorities to rely on, and protect, criminal intelligence and the public interest in ensuring that the respondent can meaningfully respond to the case put against them.

RECOMMENDATIONS

Recommendation 1

The Panel acknowledges that section 462A of the *Crimes Act 1958* (Vic) provides adequate protection from criminal liability, and that it is well understood by Victoria Police personnel. Nonetheless, the Panel recognises the need to provide confidence to police officers and protective services officers (PSOs) in exercising force, in particular where pre-emptive lethal force may be required to respond to a terrorist act.

Therefore, the Panel recommends that the use of force power should be clarified in a way that:

- is consistent with section 462A;
- puts beyond doubt that it applies to pre-emptive action, including lethal force, employed in response to a life-threatening act where it may be the last opportunity to effectively and safely intervene; and
- applies to police officers and PSOs.

The Panel suggests that this could be achieved by:

- maintaining the current wording of section 462A in a new subsection (1); and
- creating a subsection (2) that clarifies this provision in relation to pre-emptive lethal force.

The Panel suggests the following wording for subsection (2):

- (2) For the avoidance of doubt, a police officer or protective services officer may use force, including pre-emptive lethal force, against a person who the police officer or protective services officer believes on reasonable grounds is likely to commit an indictable offence that will cause serious injury to, or the death of, another person.

Recommendation 2

The Panel notes:

- the existing scheme for preventative detention contained in Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic) and the fact that these laws suffer from a range of well documented deficiencies;
- the Government's in-principle agreement at COAG to use the NSW investigative detention scheme as a model for strengthened pre-charge detention laws; and
- the Government's commitment to change the current threshold requirement for a person to be detained in relation to a terrorist act that is yet to occur from the current requirement for the terrorist act to be one that is *'imminent and expected to occur, in any event, at some time in the next 14 days'* to a requirement that the terrorist act must be one that *'is capable of being carried out, and could occur, within the next 14 days'*.

The Panel recommends that the following changes be made to the existing preventative detention laws in Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic) to address some of the concerns relating to that scheme and to give effect to the COAG commitment to strengthen pre-charge detention laws:

- A new power for police to question a detained person regarding the terrorist act in relation to which the person was detained and that this new power be accompanied by:
 - the establishment of appropriate rules, processes and procedures etc. relating to the circumstances under which a detained person may be questioned and the manner in which that questioning may take place; and
 - the establishment of additional measures to safeguard and protect the interests of minors and other potentially vulnerable persons such as those with a cognitive or physical impairment.¹
- The extension of the existing maximum interim detention period from a period of 48 hours to a period of four days.
- A new power for an authorised police officer (being a police officer appointed by the Chief Commissioner of Police) to take a person into custody for a period of interim detention without the requirement to first obtain an order from the Supreme Court.
- An appropriate mechanism for the treatment of sensitive criminal intelligence (the subject of Recommendation 16).²

Recommendation 3

That the Victorian Government amend the *Corrections Act 1986* (Vic) to include a presumption against parole for offenders who may pose a terrorist threat. This presumption should apply to a broad range of offenders ('terrorism related offenders'),³ including those who:

- have been convicted of a terrorism offence;
- are, or have been, subject to a terrorism-related order; or
- have expressed support for terrorist activity or organisations.

'Terrorism related offenders' should also include those who are otherwise assessed by police or intelligence agencies to be a terrorist risk. This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with a person or group that is:

- advocating or has advocated support for terrorist acts or violent extremism;
- directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act; or
- a terrorist organisation within the meaning of Division 102 of Part 5.3 of the *Criminal Code Act 1995* (Cth).

Recommendation 4

The Adult Parole Board or the Youth Parole Board should only be able to grant parole to a terrorism related offender if satisfied that there are exceptional circumstances (in the case of a person convicted of a terrorist offence) or compelling reasons (for all other terrorism related offenders) for doing so.

1 The possible extension of the scheme to include 14 and 15 year olds and the necessary safeguards for minors detained under the scheme requires further detailed and considered deliberation. The Panel will consider these matters as part of Report 2.

2 The Panel considers the treatment of sensitive criminal intelligence in Chapter 7 of Report 1.

3 This term is taken from sub-section 159A(1) of the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (NSW). The Panel proposes a modified version of the NSW definition of this term.

Recommendation 5

Unless there are exceptional circumstances (in the case of a person convicted of a terrorism offence) or compelling reasons (for all other terrorism related offenders), the Adult Parole Board or the Youth Parole Board must cancel the parole of an offender if it becomes aware of:

- information that indicates that the offender is a terrorism related offender; or
- if the offender is already a terrorism related offender, information that the offender presents an increased terrorist risk.

Recommendation 6

Decisions of the Youth Parole Board in relation to parole, including decisions to grant, deny or cancel parole in relation to young, terrorism related offenders, should continue to be guided by additional considerations that address the special requirements of young persons within the youth justice system.

Recommendation 7

Adult terrorism related offenders may only be released on parole by the Serious Violent or Sexual Offender Division of the Adult Parole Board (or equivalent), as part of its existing two-tier decision-making process.

Recommendation 8

The Victorian and Commonwealth Governments should establish a Memorandum of Understanding to:

- confirm the roles and responsibilities of and information sharing arrangements between members of the Victorian Joint Counter Terrorism Team, including security-cleared Corrections Victoria staff; and
- set out the responsibilities, including information sharing, between the Joint Counter Terrorism Teams of all Australian jurisdictions (to ensure the effective oversight of the interstate movements of terrorism related offenders).

Either this or a supplementary Memorandum of Understanding should also set out information sharing arrangements between police and intelligence agencies and youth justice system agencies, including the Youth Parole Board.

Recommendation 9

That the Victorian Government amend the *Bail Act 1977 (Vic)* to include a presumption against bail for accused persons who may pose a terrorist threat. The presumption should apply to accused persons who:

- have been convicted of a terrorism offence
- are or have been subject to a terrorism-related order
- have expressed support for terrorist activity or organisations.

The presumption should also apply to accused who are otherwise assessed by police or intelligence agencies to be a terrorist risk. This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with any person or group that is:

- advocating or has advocated support for terrorist acts
- directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act
- a terrorist organisation within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code.

Recommendation 10

A court should only be able to grant bail to an accused person to whom the presumption applies in the following circumstances:

- If the accused has been charged with a ‘Schedule 2’ offence under the *Bail Act 1977*, the court must be satisfied that exceptional circumstances exist that justify the grant of bail;
- If the accused has been charged with an offence that is neither a Schedule 1 nor a Schedule 2 offence, the court must be satisfied that compelling reasons exist to justify the grant of bail.⁴

Note: a presumption against bail and a requirement to demonstrate ‘exceptional circumstances’ already apply to a person accused of a Schedule 1 offence under the *Bail Act 1977* (including a Victorian terrorism offence) or a Commonwealth terrorism offence.

Recommendation 11

Only a court may grant or refuse bail to an accused person to whom the presumption applies.

Recommendation 12

The Memorandum of Understanding between Victorian Joint Counter Terrorism Team (JCTT) members in relation to parole should also address information sharing requirements for bail decisions by setting out the roles and responsibilities, including information sharing arrangements:

- between members of the Victorian JCTT in relation to bail decisions
- between the JCTTs of all Australian jurisdictions in relation to interstate movements of persons relating to bail decisions.

Recommendation 13

That the requirement that the Premier’s approval of an interim authorisation be retained, but that Part 3A of the *Terrorism (Community Protection) Act 2003* (Vic) be amended to:

- provide for an interim authorisation to operate without the Premier’s approval if he or she is not available, and that the Premier must be notified as soon as practicable after the authorisation is made;
- provide that the Premier can revoke the interim authorisation;
- extend the duration of an interim authorisation from 24 hours to 48 hours (in sections 21D and 21E);
- provide that the Premier may delegate his or her power to provide written approval;
- extend the application of special police powers to protective services officers (and that these new powers be accompanied by requisite training); and
- introduce a power to enable a police officer to take control of premises or things for operational purposes, if necessary for the purposes of the interim authorisation or authorisation.

⁴ The reference to Schedule 1 and 2 offences relates to these schedules as amended by the *Bail Amendment (Stage One) Act 2017* (Vic), which is yet to come into force.

Recommendation 14

That Victoria Police continue to trial and streamline their processes for seeking approval for an interim authorisation.

Recommendation 15

That the requirement in sections 21D(1)(a) and 21D(4)(b) (that the terrorist act occur in the next 14 days) be replaced with the Commonwealth's formulation for consistency.

Recommendation 16

Create a single process for the protection of criminal intelligence, applicable to relevant applications under the *Terrorism (Community Protection) Act 2003* (Vic) (not criminal prosecutions), containing the following elements:

- a definition for 'criminal intelligence' similar to the definition used in the *Criminal Organisation Control Act 2012* (Vic) that includes 'significant damage to property or infrastructure' and 'national security';
- the court determines whether or not to grant a criminal intelligence protection order;
- the court, at its discretion, may make a criminal intelligence protection order on the papers;
- the test for determining whether to grant a criminal intelligence protection order should require the court to consider both the public interest in the protection of criminal intelligence and the public interest in ensuring that those against whom court orders are sought, are provided with sufficient information to respond meaningfully to the case put against them;
- the court should be able to exclude the respondent (and their legal representatives) from both the protection application and the substantive application;
- once a criminal intelligence protection order is made, the court may in its discretion use the criminal intelligence to determine an application in a way that does not disclose the information to the respondent or the respondent's legal representative;
- the respondent must be told everything except the criminal intelligence, and must be given an opportunity to make submissions, adduce evidence and produce material on the ultimate question in issue;
- there must be protections against witnesses being compelled (by cross-examination or otherwise) to disclose criminal intelligence;
- the court may appoint a special counsel to represent the interests of the respondent in both a protection application and substantive application;
- the court must retain its inherent jurisdiction to:
 - stay the proceeding for abuse of process if the non-disclosure of the criminal intelligence would result in an unfair trial;
 - not rely upon the criminal intelligence; and
 - decide what weight to give to the criminal intelligence.

CHAPTER 1 CONTEXT

1.1 INTRODUCTION

On 18 June 2017, the Andrews Labor Government announced a review by an Expert Panel of current laws to protect the community against terrorism and violent extremism. The context of this announcement is important. Terrorism and violent extremism pose a real and deadly threat to our way of life. Evidence suggests that this threat is growing, not diminishing, and that this trend may well continue for the foreseeable future. This is reflected in Australia's current National Terrorism Threat Advisory System threat assessment level of 'probable', meaning that:

*'credible intelligence, assessed by our security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.'*⁵

The menace posed by terrorism has built steadily since the horrific attacks on 11 September 2001. It was in the aftermath of these attacks that the Commonwealth and all States and Territories agreed, in 2002, to take a national approach to enacting legislation to deal with terrorism. Under this approach, new laws at a Commonwealth, State and Territory level have introduced new terrorism-related offences and powers. Since that time, these provisions have continued to evolve in response to the escalating and changing nature of the terrorist threat.

The Panel is mindful of the fact that many of the terrorism-related powers available to police are exceptional in nature and that, while the threat from terrorism and violent extremism is significant, Australia remains a relatively safe and peaceful place. Accordingly, it is important that our response to this threat is not disproportionate, as there is a risk that action of this nature may divide our community and undermine fundamental rights and institutional safeguards. This, in turn, may do irreparable damage that is no less real and regrettable than the terrible harm that may result from actual acts of terrorism and violent extremism.

1.2 THE THREAT

The Panel observes that the threat posed by terrorism and violent extremism is not 'owned' by any particular set of beliefs or ideology. It is not a creature of the 'right' or the 'left' of the political spectrum. Nor is it the sole province of any particular religion. It is vile in whatever shape it assumes and the Panel is mindful of the need, when discussing and deliberating on measures to respond to the danger – as it appears now and in whatever form it may take in the future – to ensure that the focus is not solely, and unhelpfully, on any particular sector of our community.

5 Australian Government, *Australian National Security* (accessed on 25 July 2017) <<https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-advisory-system.aspx>>.

Since the devastating attacks on September 11, 2001, the violent and extremist ideology advocated by groups such as al-Qa'ida and, more recently, the Islamic State of Iraq and the Levant (ISIL) has unquestionably emerged as the preeminent global security concern. Over time, al-Qa'ida and ISIL have proven adept at promoting this belief system on a global scale, and their reach has extended to Australia. These promotional efforts have become increasingly sophisticated, particularly in relation to the use of the internet, social media and encrypted communications technology to 'ruthlessly groom and recruit even younger people'.⁶ Another concern is the increased distribution of practical and effective weapons and tactical advice to followers via these channels. The ongoing conflict in Iraq and Syria has created a range of new challenges for law enforcement authorities, including those set out below.

- To the extent, however fleetingly, that ISIL's early victories on the military front have presented the concept of a global caliphate as a realistic objective, the hostilities have immeasurably enhanced ISIL's profile and credibility. This, in turn, has significantly increased the attractiveness of its murderous and extreme ideology and its ability to export that ideology to foreigners, including Australians, who are susceptible to radicalisation.
- A large number of Australians (estimated at approximately 210 in total since 2012), have travelled to Iraq and Syria to fight for ISIL. These individuals, some of whom have taken family members with them, may have combat training and experience and established a network of contacts with other extremists. They have the potential to pose a serious danger if they return to Australia, both as a result of their capacity to commit, or assist in the commission of, terrorist acts and in their ability to further promote their extremist ideology.
- The security issue is compounded by the possible involvement of family members, including young children, who will have been exposed to brutal violence and extremist indoctrination. The potential threat posed by returnee fighters and their families has increased significantly, of late, as a result of ISIL's recent military setbacks.⁷
- There are a significant number of Australians who have shown a commitment to the same extremist ideology that has motivated others to travel to fight in the conflict in Iraq and Syria, but have not done so themselves. In many cases, these individuals have been prevented from travelling only as a result of having had their passport cancelled or an application for a passport refused.⁸ There is a risk that these individuals may carry out attacks in Australia as a result of, and perhaps with a determination increased by, their inability to travel.

The increased global profile of entities such as ISIL and al-Qa'ida has created another type of threat. Disturbed individuals, who may have little or no genuine commitment to the repugnant ideology that drives groups such as ISIL, but may nevertheless be motivated to commit terrorist attacks in the name of this organisation (or others like it). They may do so in an attempt to attract more attention, and achieve a greater level of notoriety, than would be the case if the acts were committed without that 'branding'.

The use of the adjective 'disturbed' in this context encompasses a range of behavioural issues including, for instance, relatively low-level criminality, drug use and mental illness. The creation of fixated threat assessment centres in a number of jurisdictions, focussing on troubled individuals who may have the potential to commit violent acts, is evidence of the size of the potential problem. The Panel will consider this issue in greater detail in Report 2. The Panel acknowledges that mental illness is by no means an indicium of a propensity to commit acts of violence, let alone terrorism.

6 Greg Barton, 'Terror Threats Change Our Idea of What is Normal', *The Herald Sun* (online), 26 December 2016 <<http://www.heraldsun.com.au/news/opinion/greg-barton-terror-threats-change-our-idea-of-what-is-normal/news-story/fb04919e6bb437c403b7443464f85b7b>>.

7 ASIO estimates that approximately 40 individuals have returned to Australia from the conflict in Syria and Iraq, although the vast majority of these individuals are not considered by ASIO to be a security concern.

8 Approximately 205 Australian passports have been cancelled or refused in connection with the Syria/Iraq conflict.

An important factor in this discussion regarding the current threat environment is the changing nature of terrorist attacks themselves. Particularly over the last three years, many attacks have been relatively unsophisticated, involving one or only a handful of perpetrators striking with little warning or planning and inflicting as much harm as possible using crude but deadly tactics and means. These attacks are often by 'lone actors' who may be relatively or entirely unknown to police. As a result, they are difficult to detect and prevent. The development is significant enough to be described by many in the field as a paradigm shift in the terrorism landscape. At the same time, however, the threat of larger scale, more 'conventional', and organised attacks remains. This has been underlined by the counter-terrorism raids in Sydney, in late July 2017, relating to an alleged plot to bring down a commercial aircraft.

The number of terrorist attacks in Australia and elsewhere since the National Terrorism Threat Level was raised to 'probable' illustrates the potential danger. Since that time, there have been five terrorist attacks in Australia,⁹ and thirteen significant counter-terrorism disruptions. The most recent disrupted plot, referred to above, involved a series of counter-terrorism raids in Sydney in July 2017 and the arrest of multiple suspects, two of whom have since been charged with terrorism related offences, in connection with an alleged plot to bring down a commercial aircraft and detonate a type of toxic explosive device. Authorities allege that the plot evidences a disturbing level of organisation and sophistication.

These more recent incidents also serve to illustrate another troubling aspect of the current threat landscape, which is the increasing tendency of younger individuals to subscribe to terrorist type extremist ideologies. Farhad Jabaron was just 15 when he shot and killed Curtis Chang in Sydney. Numan Haider was only 18 when he stabbed two policemen in Melbourne. A 17 year old was charged with terrorism offences as part of the Operation Amberd investigation into an alleged plan to detonate home-made bombs in Melbourne on Mother's Day, 2015, and two 16 year old boys were arrested in Bankstown, Sydney, on 12 September 2016 and charged with preparing for and planning a terrorist attack and being members of a terrorist organisation. The trend is worrying and presents authorities with a new type of challenge.

As at the date of writing, approximately 72 people have been charged with terrorism offences as a result of 30 counter-terrorism operations across the country, and 39 individuals have been convicted of terrorism-related offences. 21 of these individuals are currently serving prison sentences, one of whom is a juvenile, and there are a further 43 people before the courts for terrorism-related offences, six of whom are juveniles.

Ironically, the success of our authorities in preventing terrorist attacks and prosecuting those who would do us harm has created a further danger. Jailed extremists have the potential to pose a continuing threat both in terms of the harm they may do when released, and their capacity to radicalise others whilst in prison.

Since September 2014, Victoria Police has charged 39 people with terrorism offences. 19 of these individuals have been convicted. Victoria Police is currently monitoring approximately 300 'persons of interest' who have been identified as posing a potential security risk.

Additionally a significant number of people who have travelled to Syria and Iraq to fight with ISIL are known to have left from Victoria, and authorities anticipate that at least some of these individuals will seek to return home as ISIL's initial territorial gains in those countries continue to be wound back, raising additional security concerns.

On the international stage, recent events – in the United Kingdom, France, Germany, Belgium, the Philippines, Malaysia, Turkey, Denmark and elsewhere – have also illustrated the murderous nature of the terrorism threat and its global reach.

⁹ A stabbing attack on two police officers by Abdul Numan Haider in Melbourne on 23 September 2014; the Martin Place siege in Sydney; the shooting of Curtis Chang by Farhad Khalil Mohammad Jabaron in Parramatta on 2 October 2015; a stabbing attack against a member of the public in south-west Sydney on 10 September 2016; and the siege in Brighton, Melbourne, on 5 June 2017.

1.3 THE PANEL'S TASK

The siege and hostage situation in Brighton, Melbourne, on 5 June 2017, served as the immediate impetus for the announcement of the Expert Panel review. The Panel's establishment, however, must be viewed against the much broader domestic and international security environment, which is outlined above. In its 2015 *'Review of Australia's Counter-Terrorism Machinery'*, the Department of Prime Minister and Cabinet offered the following sobering assessment:

*'All of the terrorism-related metrics are worsening: known numbers of foreign fighters, sympathisers and supporters, serious investigations. We are not "winning" on any front.'*¹⁰

The first duty of government is to protect the governed. Meeting this challenge now requires that our efforts to combat terrorism, at a local and national level, be as comprehensive and effective as possible. Consistent with this, the Panel's Terms of Reference state that the purpose for which the Panel has been convened:

'...is to examine and evaluate the operation and effectiveness of key legislation, and related powers and procedures relevant to Victoria Police, the courts, the Department of Justice and Regulation, Parole Boards, and other related entities as the case may be, to ensure they can best intervene across the risk spectrum, to prevent, investigate, monitor and respond to acts of terror, including identifying any potential areas which could be strengthened.'

The Panel has been instructed to consult with, and reflect upon interaction between, the State agencies referred to above and their Commonwealth counterparts including the Australian Security Intelligence Organisation and the Australian Federal Police.

The Panel has been directed to compile its work in two reports. The first report, (Report 1), is focused on providing advice and practical options for reforms to:

- ensure Victoria Police has clear guidance, powers and protections to effectively prevent, and respond to, terrorist activities; and
- remove any barriers to Victoria Police employing appropriate force when responding to terrorist acts.

The second report, (Report 2), is directed at providing advice and practical options for reforms to ensure that Victoria Police, the courts, the Department of Justice and Regulation, Parole Boards, and other relevant agencies are best supported by clear legislation and practical powers and procedures to prevent, investigate, monitor and respond to acts of terror.

In this first report, the Panel has identified the following areas for further and closer examination:

- Use of force (Chapter 2)
- Preventative and investigative detention (Chapter 3)
- Presumption against parole, and parole-related information sharing (Chapter 4)
- Presumption against bail, and bail-related information sharing (Chapter 5)
- Special police powers (Chapter 6), and
- Protection of criminal intelligence (Chapter 7).
- In considering these matters, the Panel has consulted with Victoria Police, the Department of Justice and Regulation, the Commissioner for Children and Young People and other entities within and external to government. The relevant details are set out in the Appendix.

¹⁰ Australian Government Department of Prime Minister and Cabinet, *Review of Australia's Counter-Terrorism Machinery* (January 2015), iv <https://www.pmc.gov.au/sites/default/files/publications/190215_CT_Review_1.pdf>.

The Panel's deliberations have been guided by the ultimate objective of making our community safer by maximising the ability of our law enforcement and other agencies to prevent and respond to the changing and dynamic nature of terrorism and violent extremism.

The Panel is also conscious, however, of the extraordinary nature of the powers already given to police, and the further powers being recommended in this report. It is worth reflecting that, to date, Victoria Police has exercised these powers sparingly. This reflects, in the Panel's view, both the fact that Victoria remains a relatively safe place and that Victoria Police has adopted an appropriately judicious approach to the use of these powers. It is important that the passage of time does not result in any diminished understanding of the exceptional nature of these powers, however, and that any new powers are appropriately constrained by necessary safeguards and limitations.

The Panel notes, further, that the *Terrorism (Community Protection) Act 2003* (TCPA) sunsets on 1 December 2021 and that the Attorney General must cause a review of the operation of the TCPA to be undertaken and completed by 31 December 2020. In the Panel's view, these sunset and review provisions are important safeguards.

On a concluding note, the Panel considers that the reserves of strength that lie at the heart of liberal, democratic and multicultural societies, such as ours, are formidable. As stated above, the Panel has also borne in mind that although terrorism, particularly in its current form, is a diverse and malignant threat, it does not constitute an existential one, and our response must not be disproportionate. Excessive measures will undermine the principles and institutions they are supposed to protect and have the potential to divide our community. A particularly disturbing prospect is the counter-productive effect of alienating whole communities who, understandably, see themselves as being unjustly subjected to repressive measures. Unity and social cohesion remain essential weapons in our longer term fight against terrorism and violent extremism. It is a battle that can be won.

CHAPTER 2 USE OF FORCE

Recommendation 1

The Panel acknowledges that section 462A of the *Crimes Act 1958* (Vic) provides adequate protection from criminal liability, and that it is well understood by Victoria Police personnel. Nonetheless, the Panel recognises the need to provide confidence to police officers and protective services officers (PSOs) in exercising force, in particular where pre-emptive lethal force may be required to respond to a terrorist act.

Therefore, the Panel recommends that the use of force power should be clarified in a way that:

- is consistent with section 462A;
- puts beyond doubt that it applies to pre-emptive action, including lethal force, employed in response to a life-threatening act where it may be the last opportunity to effectively and safely intervene; and
- applies to police officers and PSOs.

The Panel suggests that this could be achieved by:

- maintaining the current wording of section 462A in a new subsection (1); and
- creating a subsection (2) that clarifies this provision in relation to pre-emptive lethal force.

The Panel suggests the following wording for subsection (2):

- (2) For the avoidance of doubt, a police officer or protective services officer may use force, including pre-emptive lethal force, against a person who the police officer or protective services officer believes on reasonable grounds is likely to commit an indictable offence that will cause serious injury to, or the death of, another person.

2.1 BACKGROUND

Following the 2014 Lindt Café Siege in Sydney, the State Coroner of New South Wales considered use of force powers in his Inquest into the deaths arising from the siege. He recommended that the NSW Minister for Police consider whether police use of force powers should be amended to ensure that police officers have sufficient legal protection to respond to terrorist incidents in a manner most likely to minimise the risk to members of the public.¹¹ In this context, the Panel is tasked with providing advice and practical options to remove any barriers to Victoria Police employing appropriate force when responding to terrorist acts.

¹¹ State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café Siege: Findings and recommendations* (May 2017) 324.

The question for police is whether such authority as is given to them under the *Crimes Act 1958* (Vic) (*Crimes Act*) to use force in the execution of their duties provides them with the protection to which they are entitled. It is an important question. The use of lethal force in response to, or to pre-empt, a terrorist act may accord with police training and practice, and be a reasonable response in the circumstances encountered by them and which they must meet in order to do their job.¹²

If police officers lack confidence in the judgment of the internal and external reviews (including in some cases by the courts), which will follow the use of lethal force in such circumstances, they may hesitate to take appropriate action. This hesitation may cost innocent lives, or otherwise fail to avoid the harm that it is the duty of the police to prevent.

2.1.1 Summary of current legislation in Victoria

In Victoria, police members and members of the general public primarily rely on the use of force provision in section 462A of the *Crimes Act*.¹³ Police officers do not have a separate power to use force.

Under section 462A:

A person may use such force not disproportionate to the objective as he [or she] believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

To the Panel's knowledge, the use of section 462A by a police officer has not been tested judicially, which might suggest that this section is not problematic in the context of police responses. Judicial commentary on self-defence and civilian uses of force sheds light on the interpretation of this provision.¹⁴

Section 462A contains both an objective and subjective element.

- The standard 'not disproportionate' is objectively assessed. The use of force must be such that a reasonable person in the position of the police officer would not consider that use disproportionate to the aim of preventing the commission of an indictable offence.¹⁵
- The subjective element requires the police officer deploying force to believe on reasonable grounds that the force is necessary to achieve one of the objectives in section 462A. The court's assessment is to take into account 'the reality that the officer has to make decisions quickly, often in emergencies and under pressure'.¹⁶ Similarly, as Heydon JA stated in *Woodley v Boyd*, 'in evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight'.¹⁷

¹² The recent incident of the death of Ahmad Numan Haider, who was the subject of Joint Counter Terrorism Team (JCTT) and ASIO surveillance, is illustrative of such an example in which lethal force is used by a police officer in response to an imminent threat of serious injury or death (see the Finding of Coroner Olle, Coroners Court of Victoria, *Inquest into the Death of Ahmad Numan Haider* (31 July 2017) <http://www.coronerscourt.vic.gov.au/resources/a2408200-0e96-47c1-b6aa-ebeee1bb3622/ahmadnumanhaider_491714.pdf>).

¹³ Police officers (and members of the public) may also rely upon other provisions in the *Crimes Act*, including self-defence (under s 322K) and sudden or extraordinary emergency (s 322R).

¹⁴ For instance, Kyrou J considered reasonableness in the context of an arrest under 462A and the factors laid down by the Full Court in *R v Turner* [1962] VR 30, 36 in *Slaveski v State of Victoria* [2010] VSC 441 (1 October 2010) [120]-[129].

¹⁵ *R v Turner* [1962] VR 30, 36 (O'Bryan, Dean and Hudson JJ).

¹⁶ *Walker v Hamm* [2008] VSC 596 (19 December 2008) [55] (Smith J).

¹⁷ *Woodley v Boyd* [2001] NSWCA 35 (2 March 2001) [37]; see also *R v Turner* [1962] VR 30, 36.

2.1.2 Impact of police protocol on section 462A

Police protocols and training have sought to clarify the operation of section 462A of the *Crimes Act* and support the decision making around the use of force, particularly lethal force. Victoria Police has recently implemented force-wide, specific armed offender training to address the changing nature of terrorism, which has necessitated a significant change in policing tactics. Specifically, active armed offender training is provided to officers to assist them to rapidly neutralise threats posed by active armed offenders. In summary, the policing objective is to locate, isolate and neutralise the threat, and through positive action prevent continued lifethreatening behaviour.

In situations where tactical operators (such as snipers) are on scene and do not have direct access to information that would assist in applying section 462A, they may be provided advice about appropriate intervention options, including lethal force, from senior officers offsite. The information provided to personnel on the ground will invariably feed into the court's assessment of whether the officer using force did so based on reasonable grounds. The Panel has reviewed the protocols of Victoria Police and notes that they provide considerable assurance to officers on scene of when 'reasonable grounds' for using force are likely to be established. The Panel notes that it is still a matter for the individual operators to determine what type of force is required and to effect the application of force.

2.1.3 Criminal and civil liability for use of lethal force

A police officer who uses force and satisfies the requirements of section 462A will not incur criminal liability. Only the conduct of the police officer who deploys force is relevant in the court's assessment of criminal liability under section 462A, as they cannot lawfully be directed to use force.¹⁸

Police officers also have immunity from civil liability under the *Victoria Police Act 2013* (Vic) for 'police tort' claims,¹⁹ which include claims in negligence, assault and battery, as well as certain wrongful death actions.

2.2 ISSUES

The aftermath of the Lindt Café Siege and the NSW State Coroner's Inquest findings have cast a spotlight on the use of pre-emptive lethal force, raising wider questions about its lawfulness and appropriateness. In light of recent reform in NSW to use of force powers, it is timely to consider the effectiveness of section 462A and the strength of protections for police officers.

2.2.1 Reform in NSW following the Lindt Café Siege Inquest

Findings of the Coroner

The NSW State Coroner found that while the existing legal framework encouraged restraint, the need to wait for objective evidence that Monis was about to kill a hostage may have exposed the hostages to unacceptable risks.²⁰ While the Coroner observed that the use of force, including lethal force, is permitted under a number of statutory provisions,²¹ the Coroner also noted that the uncertainty of the framework under the *Crimes Act 1900* (NSW) may have the 'potential to hamper effective responses to terrorist incidents'.²²

¹⁸ *Enever v the Queen* (1906) 3 CLR 969. See also State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café Siege: Findings and recommendations* (May 2017) 322.

¹⁹ *Victoria Police Act 2013* (Vic) s 74(1). A 'police tort' is defined under section 72(1).

²⁰ State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café siege: Findings and recommendations* (May 2017) 324.

²¹ *Ibid* 321.

²² *Ibid* 324.

Overall, the Coroner concluded that the snipers and the police commanders believed that they did not have lawful authority to use lethal force against Monis because he did not pose an imminent or immediate danger to the hostages. That is, the officers believed that lethal force was not lawful unless Monis was causing death or serious injury, or there was an imminent risk that he would do so.²³ However, the Coroner found that this belief was ‘an unduly restrictive view of their powers’;²⁴ concluding that the police officers on scene ‘would have been lawfully justified in shooting Monis from soon after the siege commenced’.²⁵

Ultimately, the Coroner recommended, ‘[t]hat the Minister for Police consider whether the provisions of the *Terrorism (Police Powers) Act 2002* should be amended to ensure that police officers have sufficient legal protection to respond to terrorist incidents in a manner most likely to minimise the risk to members of the public’.²⁶

Specific use of force provision for declared terrorist acts

In response to the Coroner’s recommendation, the NSW Parliament implemented a specific use of force provision for declared terrorist acts, in effect creating a two-tier approach to the use of force. The *Terrorism Legislation Amendment (Police Powers and Parole) Bill 2017*, which amended the *Terrorism (Police Powers) Act 2002* (NSW), was introduced into NSW Parliament on 21 June 2017 and was subsequently passed. The legislation came into effect on 22 June 2017.

To trigger the use of force powers, the Police Commissioner must first declare the incident a ‘terrorist act’. Under section 24A(1):

If the Commissioner of Police is satisfied that:

- (a) an incident to which police officers are responding is or is likely to be a terrorist act, and*
- (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty,*

the Commissioner may declare that it is a terrorist act to which this Part applies.

Once a declaration is made, section 24B(1) of the *Terrorism (Police Powers) Act 2002* (NSW) permits police action that includes:

... authorising, directing or using force (including lethal force) that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty.

In the performance of their powers, the police officer must act in good faith.²⁷ The reference to ‘prevent or terminate their unlawful deprivation of liberty’ responds directly to the dilemma posed by the Lindt Café Siege, in which the snipers believed they had no legal authority to use lethal force against Monis at an earlier point because there was no ostensible threat of imminent physical harm against the hostages.

In addition, the *Terrorism (Police Powers) Act 2002* (NSW) provides a distinct protection for police officers against criminal liability. Under section 24B(2):

A police officer does not incur any criminal liability for taking any such police action for the purposes of a police action plan of the police officer in charge of the police officers responding to the terrorist act.

²³ Ibid 322.

²⁴ Ibid 324.

²⁵ Ibid 331.

²⁶ Ibid 324.

²⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 24B(3).

The implemented reforms received some criticism. Notably, the Law Society of NSW raised concerns about the reviewability of the Police Commissioner's decision to declare a terrorist act.²⁸

2.2.2 Issues in the Victorian context

Overall, section 462A of the *Crimes Act* is well understood by Victoria Police and appears to provide comprehensive protection in a range of situations. Nonetheless, the following concerns about the current law were raised by Victoria Police in its submission to the Panel.

- Section 462A of the *Crimes Act* does not provide police with complete certainty in preemptively using lethal force. As the Lindt Café Siege demonstrated, the concept of imminence presents a particular challenge for police in protracted events, such as sieges, where it is not clear when might be the last opportunity to intervene. As it is difficult to accurately assess the proportionality of a pre-emptive use of force, a court and jury may be reluctant to find that the use of force satisfies section 462A.
- The need for greater certainty about the protections available to police officers, given the significant personal and professional impacts on police officers that invariably result from the decision to use lethal force.

Concerns regarding the language of section 462A were also raised more generally (for example, the double negative of 'not disproportionate' was cited as confusing), with some stakeholders suggesting that this provision could be redrafted using clearer terms.

2.3 DISCUSSION

The issues highlighted in the course of the Expert Panel review demonstrated to the Panel that an identifiable gap in the law is difficult to find. There is a tension in opinions on the operation of the law in hypothetical situations and the practical realities of making a decision to use lethal force.

Section 462A remains in its original form without having been subjected to serious challenge. Moreover, police officers receive comprehensive training on the application of the provision, with additional guidance being provided by active armed offender training and Victoria Police's policies and protocols for critical incidents.

Yet significant apprehension persists. It is important that undue restraint should not hamper a justifiable and effective response to prevent significant harm or death. We expect much of the police in circumstances of great stress. Police officers are best equipped to respond appropriately and effectively when their powers are clear, particularly in situations when the use of lethal force is likely or necessary.

The measures required to combat risk must be judged against what is known, before the risk eventuates, about both its likelihood and, if it comes to pass at all, its consequences. Waiting for absolute certainty or overt signs that the risk of harm is imminent may be inconsistent with the response that good policing requires and indeed result in catastrophe. Yet those crucial minutes may also reveal the person of interest re-evaluating a former commitment to the infliction of egregious harm.

²⁸ Law Society of New South Wales, *No consultation on proposed "shoot to kill" legislation* (21 June 2017) <<https://www.lawsociety.com.au/about/news/1366567>>.

2.3.1 Language of section 462A

It has been suggested that section 462A could benefit from clearer wording, in particular, by replacing the 'not disproportionate' test with a 'reasonably necessary' standard, and by removing the subjective element from the test. The effect of this amendment would be to place greater emphasis on an objective assessment of the police officer's action. While this simplifies the language of section 462A, it removes an important safeguard for officers, in particular snipers (as was the case in the Lindt Café Siege incident), who would be greatly reliant on the information provided to them by senior officers located offsite, pursuant to police guidelines and protocols. That is to say, the removal of the subjective element may prevent evidence of an officer's or sniper's reliance on those information channels in making a decision to use force, particularly pre-emptively, from being included in the court's assessment.

The removal of a direct reference to proportionality may also pose problems for police officers in assessing the level of force required. The benefit of making proportionality explicit is that it requires the person to actively consider what level of force is appropriate and effective to achieve one of the stated aims in section 462A. While proportionality is to be inferred by the words '*reasonably necessary*', it raises the question: why leave an important part of the legislative provision to be inferred when it can easily be made explicit?

It is apparent that members of Victoria Police do not find the wording of section 462A to be problematic or unclear. The Panel is satisfied that police officers have a solid understanding of the demands of section 462A. Any substantial change to the wording of section 462A would require the retraining of police officers, which is likely to be resource-intensive and may exacerbate any existing apprehension in using force.

2.3.2 Specific use of force provision for terrorist acts

A two-tier regime may provide greater latitude for police officers to act in response to terrorist acts. Despite the apparent clarity that it offers, the Panel is not minded to follow the NSW model. It does not appear to offer any more protection than the previous legislative scheme.

The amendment purports to extend protection to those police officers who may be involved in the decision-making process but do not actually deploy force, through the words 'authorising, directing or using force'.²⁹ While the direction or authorisation of any use of force may be used in the assessment of the subjective element of section 462A, it does not implicate those police officers who direct or authorise the use of force. Consistent with the longstanding legal principle that prohibits police officers from acting on the direction of another, it is the police officer who deploys force who may be subject to criminal liability for the purposes of section 462A, not anyone else.

In addition, the prospect of having to first declare a terrorist act may inhibit police from taking timely and effective action against the threat, especially one that demands an efficient and timely response.

2.3.3 Separate protection against criminal liability

It has been suggested that a specific protection clause similar to the NSW model could allay some concerns around criminal liability. The Panel does not support this view, but is mindful of the significant personal and professional impact these proceedings have on the police officers involved, even where they are exonerated from wrongdoing.

²⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 24B(1).

In the opinion of the Panel, section 462A provides a flexible test that, where satisfied, affords sufficient protection from criminal liability. And its substitution by, or the addition of, a separate clause may have the unintended effect of weakening the protection it provides. Furthermore, the additional protection against civil liability is similarly broad; as long as the police officer's use of force does not amount to serious or wilful misconduct, in which case the State will be liable, they will be protected.³⁰

2.3.4 Clarifying the use of pre-emptive action

The case for change

In the spirit of the NSW Coroner's findings and recommendation, the Panel considers that while the law is sufficient, it requires amendment to provide police with confidence and clarity in the most difficult of operational environments.

Section 462A protects police officers so long as they act reasonably and proportionately. But the Panel also accepts that something more is needed. Lawyers may assert the clarity of the law. However, if the law fails to give well-trained police officers the confidence to do what is necessary to prevent significant harm without fear that the inevitable subsequent inquiry will expose them to prosecution, then the law needs further clarification.

As observed in the previous chapter, the nature of terrorism has changed. Resolving critical incidents by negotiation is less certain where the suspect has no intention of surviving the incident. The question of imminence also becomes more uncertain where the magnitude of the perceived risk is high but may not occur for some time. A shift from highly organised and sophisticated acts of mass violence to improvised and lower capability acts (including the use of knives and vehicles as weapons) has expanded the circumstances in which pre-emptive action may be justifiable. While section 462A is flexible enough to adapt to these changing circumstances, clarification would enable police officers to act with greater decisiveness.

Proposed solution

The Panel recommends that section 462A be clarified to explicitly state that pre-emptive use of lethal force will be lawful if it is proportionate and the officer believes it is reasonably necessary in the circumstances. The Panel considers that it is reasonable to reference police officers and protective services officers in the proposed subsection (2), recognising that these officers are most likely to be first responders to a terrorist incident and, as such, they may require a greater level of legislative assurance.

The proposed clarification is not intended to limit or alter the scope of the existing use of force power under section 462A, but rather is geared towards instilling greater confidence in officers to use force in situations where the imminence of significant harm is a matter for judgment that is necessarily made under pressure. Importantly, it must be interpreted in light of section 462A, which includes both objective and subjective elements.

It is proposed that this clarification could take the form of a new subsection (2) in section 462A, which would make the current wording in that section subsection (1). The Panel suggests the following proposed wording of subsection (2):

(2) For the avoidance of doubt, a police officer or protective services officer may use force, including pre-emptive lethal force, against a person who the police officer or protective services officer believes on reasonable grounds is likely to commit an indictable offence that will cause serious injury to, or the death of, another person.

The Panel considers that a clarifying provision within section 462A is an effective measure to address the concerns identified by Victoria Police.

³⁰ See *Victoria Police Act 2013 (Vic)* s 74(2).

CHAPTER 3 PREVENTATIVE AND INVESTIGATIVE DETENTION

Recommendation 2

The Panel notes:

- the existing scheme for preventative detention contained in Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic) and the fact that these laws suffer from a range of well documented deficiencies;
- the Government's in-principle agreement at COAG to use the NSW investigative detention scheme as a model for strengthened pre-charge detention laws; and
- the Government's commitment to change the current threshold requirement for a person to be detained in relation to a terrorist act that is yet to occur from the current requirement for the terrorist act to be one that is *'imminent and expected to occur, in any event, at some time in the next 14 days'* to a requirement that the terrorist act must be one that *'is capable of being carried out, and could occur, within the next 14 days'*.

The Panel recommends that the following changes be made to the existing preventative detention laws in Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic) to address some of the concerns relating to that scheme and to give effect to the COAG commitment to strengthen pre-charge detention laws:

- A new power for police to question a detained person regarding the terrorist act in relation to which the person was detained and that this new power be accompanied by:
 - the establishment of appropriate rules, processes and procedures etc. relating to the circumstances under which a detained person may be questioned and the manner in which that questioning may take place; and
 - the establishment of additional measures to safeguard and protect the interests of minors and other potentially vulnerable persons such as those with a cognitive or physical impairment.³¹
- The extension of the existing maximum interim detention period from a period of 48 hours to a period of four days.
- A new power for an authorised police officer (being a police officer appointed by the Chief Commissioner of Police) to take a person into custody for a period of interim detention without the requirement to first obtain an order from the Supreme Court.
- An appropriate mechanism for the treatment of sensitive criminal intelligence (the subject of Recommendation 16).³²

³¹ The possible extension of the scheme to include 14 and 15 year olds and the necessary safeguards for minors detained under the scheme requires further detailed and considered deliberation. The Panel will consider these matters as part of Report 2.

³² The Panel considers the treatment of sensitive criminal intelligence in Chapter 7 of Report 1.

3.1 BACKGROUND

3.1.1 Introduction

Both preventative and investigative detention permit a terrorism suspect to be taken into custody and detained without the requirement, which would ordinarily apply, for police to either release or charge that person within a reasonable period of time. In this sense, both forms of ‘pre-charge detention’ constitute fundamental departures from the ordinary, or conventional, criminal law process.

The concept of preventative detention – as it currently applies in Victoria – entails detaining a person to prevent a terrorist attack from occurring or to prevent the destruction of evidence. Investigative detention, by contrast, has a potentially much broader purpose. As the Panel understands it, the key distinction is that a person detained under an investigative detention scheme may be questioned by police for investigative purposes.

In Chapter 1, the Panel made reference to the evolving nature of the terrorist threat and the need for counter-terrorism efforts to adapt and evolve, in turn, to counter this threat. The advent of laws permitting preventative and, more recently, investigative detention (in NSW), are an example of that process and illustrate some of the associated complexities and difficulties.

3.1.2 Preventative detention

The enactment of laws permitting preventative detention for a period of up to 14 days was endorsed by the Council of Australian Governments (COAG) at a special meeting on counter-terrorism held in September 2005 in the aftermath of the July 2005 terrorist bombings in London. The introduction of uniform preventative detention laws at the Commonwealth level and in all States and Territories was one of several significant changes agreed to by COAG to strengthen Australia’s counter-terrorism laws. COAG agreed that all changes would be subject to review after a period of five years and would sunset after ten years.

In 2006, the *Terrorism (Community Protection) Act 2003 (Vic)* (TCPA) was amended to create a preventative detention regime in Victoria. The Second Reading Speech for the amending bill included the following statement articulating the primary reason for the change and the (ongoing) tension between the need to respond to a changing security environment while also preserving essential rights:

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.³³

Under Victoria’s current scheme, contained in Part 2A of the TCPA, an authorised police officer may apply to the Supreme Court for a preventative detention order (PDO) in two scenarios. In the first, there must be reasonable grounds to suspect that a terrorist act is imminent and the applicant must be satisfied that a PDO would substantially assist in its prevention. In the second, a terrorist act has occurred and the applicant must be satisfied that a PDO is necessary to preserve evidence. The relevant legislation is reproduced below.

³³ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2177 (Steve Bracks, Premier).

- (1) *An authorised police officer may apply for a PDO in relation to a person if satisfied that:*
- (a) *there are reasonable grounds to suspect that the person the subject of the application:*
 - (i) *will engage in a terrorist act;*
 - (ii) *possesses or has under his or her control a thing connected with the preparation for, or the engagement of a person in, a terrorist act; or*
 - (iii) *has done an act in preparation for, or planning, a terrorist act, and*
 - (b) *making the order would substantially assist in preventing a terrorist act occurring; and*
 - (c) *detaining the subject for the period which the applicant is seeking is reasonably necessary for the purpose referred to in paragraph (1)(b).*
- (2) *An authorised police officer may apply to the Supreme Court for a PDO if satisfied that:*
- (a) *a terrorist act has occurred within the last 28 days;*
 - (b) *it is necessary to detain the person to preserve evidence of, or relating to, the terrorist act; and*
 - (c) *detaining the person for the period which the applicant is seeking is reasonably necessary for the purpose referred to in paragraph 2(b).*

In relation to a terrorist act that is yet to occur, the act must be ‘imminent’ and ‘expected to occur, in any event, at some time in the next 14 days’.

The Supreme Court may grant the application if satisfied as to the matters set out above.

In particularly urgent matters, an application for a PDO may be made without notice being given to the person the subject of the application. In such cases, the Supreme Court may make an interim PDO pending the hearing and final determination of the application. The maximum period of detention under an interim PDO is 48 hours or until the final determination of the application (whichever is the later).

The maximum (total) period of detention under a PDO is 14 days and an application for a PDO may not be made if a person is under the age of 16 years.

The Victorian preventative detention scheme contains a number of safeguards. These include:

- a prohibition on police questioning a detained person except for very specific and limited purposes, such as to determine the person’s identity or ensure their safety and well-being;
- a requirement for an applicant for a PDO to notify the Public Interest Monitor (PIM) of the application and for the Supreme Court, in considering whether to make a PDO, to have regard to any submissions made by the PIM;
- a requirement for the Chief Commissioner of Police to nominate a police officer of or above the rank of superintendent to oversee the exercise of powers under, and the performance of obligations in relation to, a PDO;
- a requirement that any person detained under a PDO be treated with humanity and with respect for human dignity and not be subject to cruel, inhuman or degrading treatment;

- an entitlement for any person detained under a PDO to contact the Ombudsman or the Independent Broad-based Anti-corruption Commission (IBAC), to seek advice from a lawyer, and to contact a family member; and
- particular requirements with respect to the detention of any person under the age of 18 including a requirement that the person not be detained with persons of or over the age of 18 and that the person be entitled to contact a parent or guardian.

Further, an annual report must be prepared by the Attorney-General addressing a range of matters including the number of PDOs made during the year, the number of applications for PDOs, whether any person was taken into custody under a PDO and, if so, for how long, and the number of persons in relation to whom a PDO was made who were subsequently charged with an offence under Part 5.3 of the *Criminal Code Act 1995* (Cth).

The operation of the scheme is oversighted by the Ombudsman and IBAC.

Consistent with the 2005 COAG agreement, all jurisdictions have now enacted broadly consistent preventative detention laws providing for:

- preventative detention using substantially the same threshold test;³⁴
- preventative detention for the purpose only of preventing a terrorist act occurring or preserving evidence relating to a terrorist act that has occurred;
- a maximum detention period of 14 days;
- very limited questioning of a person detained; and
- sunseting of the relevant provisions after 10 years and a review every five years.

There are differences between jurisdictions, however.

- Some (such as South Australia and Western Australia) do not provide for an interim PDO.
- Of those jurisdictions that do provide for an interim PDO, some (such as Queensland) allow for a senior police officer to authorise that interim order, while others (such as Victoria) require court authorisation.
- Some (such as Queensland and Western Australia) provide for a judge or a retired judge, rather than a Court, to issue an ongoing (or final) PDO.
- Some jurisdictions (such as Victoria) have provided for a role for a PIM in the PDO process.

Since their enactment, preventative detention laws have had a troubled existence. The very concept of preventative detention has been criticised as an unjustifiable intrusion on civil liberties and fundamental human rights, such as the right not to be subject to arbitrary arrest or detention and the right to liberty.

Critics have also stated that the laws are unnecessary and ineffective. COAG, in its 2013 review of counter-terrorism legislation at the Commonwealth level,³⁵ recommended the repeal of preventative detention schemes, concluding that they were 'neither effective nor necessary'.³⁶ It was noted, further, that three police submissions on the issue (those received from Victoria, South Australia and Western Australia) 'unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime'.³⁷ In a similar vein, the Independent National Security Legislation Monitor (INSLM) stated in his 2012 annual report that preventative detention laws (at a Commonwealth level) were 'fairly ugly legislation, with no real utility and a proven lack of users'.³⁸

³⁴ The ACT applies a slightly stricter threshold test.

³⁵ Council of Australian Governments Review Committee, COAG Review of Counter-Terrorism Legislation (1 March 2013) 70 <<https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF>>.

³⁶ Ibid.

³⁷ Ibid 69.

³⁸ Australian Government Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 45.

In 2014, the *'Victorian Review of Counter-Terrorism Legislation'* (2014 Review) included a comprehensive review of Part 2A of the TCPA. The review considered the views on preventative detention expressed by the COAG Committee in its 2013 report, comments on those same provisions by the INSLM in his 2011 and 2012 annual reports, and submissions by Victoria Police and the Australian Federal Police (AFP) on the subject of preventative detention.

The 2014 Review identified a number of issues with the current preventative detention provisions which (at the time of the review) had never been used. Many of these issues were also identified in the 2013 COAG report. The matters identified include those set out below.

- Reflecting their purely preventative objective, PDOs do not enable police to interrogate a suspect and, to the extent that the suspect is likely to hold information of great interest to police and intelligence agencies, detaining a suspect under preventative detention laws may actually hinder an investigation.
- PDOs are unnecessary because the relatively high threshold for applying for one means that in many, if not all, instances in which police might consider making such an application, they would be in a position to exercise their more conventional powers to arrest and charge a suspect.
- Related to the point, above, the threshold requirements for applying for a PDO are too onerous. The requirement that the relevant terrorist act is imminent and expected to occur at some time in the next 14 days requires police to pinpoint with a high (and often unrealistic) degree of specificity the date on which an attack is likely to occur. Similarly, the requirement for police to be satisfied that it is necessary to detain the person to preserve evidence may be problematic in that it requires police to be satisfied that the detention is necessary to preserve evidence i.e. that if the person is not detained, the destruction of evidence will occur (rather than that this outcome be likely or probable, or that the risk of the destruction of evidence be unacceptably high).
- Preparing an application for a PDO is complex and time consuming, making it less useful in precisely the type of situation, characterised by urgency and a need to act quickly, for which it is intended.
- The fact that (as at the date of the 2009 and 2014 reviews), preventative detention laws had never been used demonstrates that they are not needed.
- The requirement to name a subject in the application for a PDO means that an application cannot be made in relation to a subject whose true identity is unknown to police.
- Preventative detention raises difficult civil liberties and human rights issues, and this is of particular concern in a jurisdiction such as Victoria that has enacted a Charter of Human Rights and Responsibilities.

The 2014 Review noted, however, that even allowing for the defects identified, Victoria Police 'strongly supported the retention of the PDO provisions',³⁹ and suggested amendments rather than the repeal of the existing laws. It was noted that the AFP also maintained that 'preventative detention orders remain relevant within the suite of preventative measures to counter the terrorist threat'.⁴⁰

The 2014 Review also considered alternatives to preventative detention, canvassing:

- the use of 'traditional' pre-charge, arrest and questioning powers at a Commonwealth level; and
- the use of the 'questioning warrant' or 'questioning and detention warrant' powers available to ASIO.

³⁹ Victorian Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (September 2014) 77.

⁴⁰ *Ibid* 79.

In both cases, the Committee was persuaded that ‘such powers...do not necessarily protect the community from all potential risks of a terrorist act’.⁴¹

The 2014 Review concluded, by majority, that preventative detention laws were ‘necessary in order for law enforcement agencies to be able to protect the community from a terrorist act to the maximum extent possible’ and that, ‘notwithstanding the operational difficulties the legislation presents to police, ...the preventative detention power...could be used effectively’.⁴²

To address the issues identified with the current laws, however, the review recommended six key changes.

- (Recommendation 6) That the requirement for a terrorist act to 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’ – the INSLM’s recommendation in his 2012 Annual Report was for the replacement of the ‘imminence test’ with a requirement for police and the issuing authority to be satisfied ‘that there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO’.⁴³
- (Recommendation 7) That the requirement for a PDO to set out the name of the person in respect of whom it is made be amended to require that a PDO 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 if an investigation or intelligence agency seeks to have a person released from detention under a PDO for the purpose of questioning, the authorised officer must return to the Supreme Court for a variation of the PDO, or for permission to interrogate, at any time while the PDO remains in force.
- (Recommendation 9) That Part 2A of the TCPA be amended to provide that the responsibility for the welfare of a detainee transfers from police to prison authorities at the same time as the detainee transfers from the custody of one to the other.
- (Recommendation 10) That Part 2A of the TCPA be amended to provide that, as soon as practicable after a detaining officer becomes satisfied that the grounds on which a PDO no longer exist, the detainee must be released.
- (Recommendation 11) That Part 2A of the TCPA be amended so that if a detaining officer is satisfied that either: (a) the grounds on which a PDO was made have ceased to exist; or (b) the facts and circumstances on which the PDO was made have changed, then the officer must apply to the Supreme Court for a variation or revocation (as appropriate).

All of the recommendations were accepted by the (then) Government and recommendations 7, 9, 10 and 11 have since been implemented.

The issue of the threshold that must be satisfied to activate the preventative detention powers for a terrorist act that is yet to occur, the subject of recommendation 6, has not yet been definitively addressed. The matter has been discussed at some length at a Commonwealth level and a range of possible reforms have been considered including:

- retaining the 14 day reference and amending the threshold to reasonable possibility of a terrorist act occurring;
- retaining the 14 day requirement but clarifying that the 14 day criteria is merely a guide to determining ‘imminence’, rather than a separate test.

It has been suggested, however, that the removal of the 14 day requirement might result in courts interpreting ‘imminence’ to require that the attack occur within an even shorter period.

41 Ibid 97.

42 Ibid.

43 Ibid 98.

On 30 October 2015, the Prime Minister wrote to all Premiers and Chief Ministers seeking agreement to a change to the threshold test for PDOs that would retain the 14 day requirement but soften the existing test by requiring that a PDO be necessary to prevent a terrorist act that is 'capable of being carried out, and could occur, within the next 14 days' (rather than that the act be imminent and expected to occur, in any event, in the next 14 days).⁴⁴

The Victorian Premier responded in writing on 9 November 2015 and advised the Prime Minister that Victoria would adopt the form of words favoured by the Commonwealth but that Victoria's preferred formulation was that recommended by the 2014 Review. In 2016, the Commonwealth Government amended its legislation to implement its preferred 'capable and could occur within 14 days' formulation.

NSW also amended its legislation in 2016. NSW, however, adopted a different form of words. The NSW legislation now requires that there be 'reasonable grounds to suspect' that the relevant terrorist act 'could occur at some time in the next 14 days'.⁴⁵

In accordance with the advice provided by the Premier to the Prime Minister in 2015, the Panel's understanding is that legislative amendments to the TCPA to implement the Commonwealth 'capable and could occur within 14 days' formulation were slated for passage sometime in late 2017. The proposed changes are on hold, pending the Panel's findings.

Recommendation 8 of the 2014 Review has not been implemented. The relevance of this recommendation is unclear in the context of COAG's agreement to pursue a strengthened and nationally consistent regime of investigative detention, discussed in more detail below.

Since the 2014 Review, PDOs have been made on two occasions. In 2014, three people were held under a PDO for a period of 48 hours in NSW as part of Operation Appleby in relation to a plot to behead a member of the public in Sydney. In April 2015, as part of Operation Rising, one person was held under an interim PDO for a period of 36 hours in Victoria in connection with a plot to carry out a terrorist attack in Melbourne on Anzac Day.

As stated at the outset, PDO laws were introduced to address a perceived gap in counter-terrorism capabilities where authorities feared an imminent terrorist act but available evidence fell short of the standard required to arrest and charge the suspect. The flaws inherent in the existing laws are well documented, however, and it is clear that even allowing for efforts to address some of these defects in light of the 2014 Review recommendations, the scheme remains of very limited utility in its current form.

3.1.3 Investigative detention

To reiterate, the Panel's understanding is that investigative detention, as the name suggests, has a broader focus than preventative detention. In particular, police are permitted under an investigative detention regime to question a detainee for investigative purposes.

The key operational or policy driver for investigative detention is that police involved in counter-terrorism operations need to be able to question detained suspects to progress investigations where:

- the suspect has been detained at short notice – frequently on the basis of sensitive criminal intelligence – to prevent a terrorist attack from taking place; and

⁴⁴ Under the 2004 Intergovernmental Agreement on Counter-Terrorism Laws entered into by the Commonwealth Government and all States and Territories, any changes to Commonwealth terrorism related legislation require consultation with the States and Territories and the agreement of those States and Territories.

⁴⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 26D(1).

- the person detained is central to the terrorist plot but police have not had an opportunity to gather the necessary evidence to substantiate a charge against that person.

On 1 April 2016, COAG agreed,⁴⁶ in-principle, to using a NSW legislative model as the template for strengthened pre-charge detention laws encompassing, as the Panel understands it, a form of investigative detention. The NSW model is that now contained in Part 2AA of the *Terrorism (Police Powers) Act 2002* (NSW).

The NSW investigative detention laws authorise the arrest, detention and questioning of a terrorism suspect for the purposes of assisting in responding to or preventing a terrorist act. Under the scheme, a person is a terrorism suspect if there are reasonable grounds for suspecting that:

- the person has committed a terrorist act or will commit a terrorist act;
- the person is or has been involved in preparing or planning for a terrorist act; or
- the person possesses a thing connected with the commission, preparation or planning for a terrorist act.

A police officer may, without warrant, arrest a terrorism suspect for the purpose of investigative detention if:

- the terrorist act concerned occurred in the last 28 days; or
- the police officer has reasonable grounds to suspect that the terrorist act could occur at some time in the next 14 days,

and the police officer is satisfied that the investigative detention will substantially assist in responding to or preventing the terrorist act.

Police may question a person detained under the scheme in connection with the terrorist act for which the person was arrested or in connection with any other terrorist act that occurred within the last 28 days or that there are reasonable grounds to suspect could occur at some time in the next 14 days.

The term ‘responding to’ is defined to include apprehending and prosecuting the persons involved in committing the terrorist act and preventing those persons and their associates from committing further terrorist acts.

The maximum period of detention is four days. This period may be extended by a detention warrant which may be granted by a Judge of the Supreme Court of NSW. The total maximum period of detention cannot exceed 14 days and children younger than 14 cannot be detained under the scheme.

The NSW investigative detention scheme has a number of in-built safeguards, including:

- a requirement for police to release a detained person if they cease to be satisfied that the person’s detention will substantially assist in responding to or preventing a terrorist act;
- a requirement for a review by a senior police officer as to whether the detention should continue as soon as practicable after the arrest of the suspect and a further review every 12 hours after arrest (and the release of the detained person if the senior police officer is satisfied that there are no reasonable grounds to suspect that the person is a terrorism suspect or is satisfied that there are no reasonable grounds to suspect that continuing the investigative detention will substantially assist in responding to or preventing a terrorist act);
- restrictions on the scope of questioning to which a suspect may be subject;
- a requirement that a detainee be given the opportunity to rest for a continuous period of at least 8 hours in any 24 hour period of detention and a requirement for ‘reasonable breaks’ during any period of questioning;

⁴⁶ The ACT reserved its position.

- a power for a Judge who grants a warrant extending a period of investigative detention to impose conditions on the suspect’s detention as a condition of granting that warrant; and
- provision for the making of regulations for or with respect to safeguards for persons held under investigative detention.

Provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) extend to the powers exercised by police officers under the investigative detention scheme, including powers relating to investigations and questioning, use of force, and other powers relating to persons taken into custody.

There is no restriction on detainees’ ability to access legal representation or see any other person whilst in detention provided that an application for a ‘prohibited contact direction’ has not been granted preventing such contact. Such an order may be made by an eligible Judge if the Judge is satisfied that it is reasonably necessary to achieve the purposes of the detention. Police also have the power to require that a detainee’s contact with any person (except the detainee’s legal representative) only take place under monitoring by a police officer.

The NSW Commissioner of Police must advise the Police Minister and the Attorney General if a person is detained under the laws and the Commissioner of Police must report annually on the exercise of powers under the scheme. This report must be tabled in Parliament. The scheme must also be reviewed by the relevant Minister as to effectiveness and appropriateness as soon as possible after the expiration of three years from its commencement.

The NSW investigative detention provisions have not, to date, been used and NSW is the only Australian jurisdiction to have introduced a scheme of this nature.

Following the COAG in-principle agreement in 2016, the Victorian Department of Justice and Regulation has continued to progress work on a Victorian investigative detention regime based on the NSW legislation. The Panel’s considerations on this issue have been informed by that work.

3.2 ISSUES

- [REDACTED]



3.2.2 Practical / Operational issues

The implementation of an investigative detention scheme in Victoria also presents considerable practical and operational issues. These include the need to provide suitable accommodation to detainees and a requirement for appropriate procedures and protocols within Victoria Police to deal with detainees. These difficulties are compounded by the possible detention of children as young as 14 and other potentially vulnerable persons, such as the mentally ill and the disabled.

Further, the Panel considers that investigative detention is likely to have limited utility. The NSW scheme does not require a detained person to answer questions. It is likely, however, that if a detainee refused to answer questions, it would no longer be possible for police to be satisfied that the person's continued detention would substantially assist in responding to or preventing a terrorist act. Police would then be required to release the person.

3.2.3 National uniformity

The Panel notes that national uniformity in this area is important to avoid the risk of creating 'safe havens' for terrorist activities and to maximise the operational effectiveness of our law enforcement authorities. National uniformity is of particular significance in relation to the threshold criteria for activating powers to detain and question a person, the minimum age beyond which detention will not be permitted, the maximum period of detention, and the protection of criminal intelligence.

3.3 DISCUSSION

3.3.1 Changes to the Victorian scheme of preventative detention

In light of all of the matters outlined above, and mindful of the Government's in-principle commitment at COAG to strengthen pre-charge detention laws for terrorism suspects using the NSW legislation as a basis, the Panel considers that significant changes should be made to Victoria's preventative detention laws. The fact that these laws, in their current form, are of limited utility, is not in dispute, and the Government has endorsed a stronger approach. The Panel is persuaded that such a stronger approach is both necessary and appropriate having regard to a range of factors, chief among these being:

- the unquestionably grave nature of the threat to community safety posed by terrorism and violent extremism, outlined in Chapter 1;
- the need for police to be able to respond quickly and effectively to threats that may emerge with little or no warning and about which they may know very little;
- the fact that a person detained under the current preventative detention laws may be key to police progressing their investigation of the terrorist act in connection with which that person was detained;
- the complex nature of terrorism related investigations, which may involve multiple suspects and plots, and the need for police to collect and analyse large amounts of data and information to substantiate charges while suspects are detained; and
- (related to the above point), the time required for police to prepare a fulsome application for an extension of an interim period of detention (and, under the current scheme for preventative detention, an initial application to the Supreme Court for the making of an interim preventative detention order).

In light of these considerations, the Panel recommends that Victoria's preventative detention scheme be amended to:

- empower an authorised police officer to take a person into custody for a maximum interim period of detention of four days without the requirement to first obtain an order from the Supreme Court;
- empower police to question a person detained under that scheme; and
- include an appropriate mechanism for the protection of sensitive criminal intelligence, as recommended in Chapter 7 of this report.

The Panel notes the Government's commitment to amend the current laws to provide that, in relation to a terrorist act that is yet to occur, the relevant threshold test is that the terrorist act must be one that is capable of being carried out, and could occur, within the next 14 days.

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

In this respect, the Panel makes the further recommendation that the amended preventative detention laws should:

- contain appropriate rules, processes and procedures etc. relating to the circumstances under which a detained person may be questioned and the manner in which that questioning may be carried out; and
- contain additional measures to safeguard the interests of minors (those aged under 18) and other potentially vulnerable persons, such as persons who may be cognitively or physically impaired.

The fate of children is of particular concern to the Panel. Their treatment generally, and necessary safeguards, warrants further and detailed consideration. For this reason, the Panel will defer to Report 2 its consideration of:

- whether the scheme should be extended to persons aged 14 or 15; and
- the necessary safeguards for any person under the age of 18 who is detained under the scheme.

In relation to potentially vulnerable adults, the Panel envisages that additional protections might include appropriate screening, access to appropriate assessment and treatment, specialised accommodation, a right to have a third party (such as a guardian) present during questioning, specialised rules relating to the manner in which questioning may take place, and access to an independent third party, such as the Victorian Public Advocate.

The provisions relating to the questioning of detainees, generally, should be formulated with a view to ensuring, so far as is possible, that the scheme is as legally sound as reasonably possible, and is compatible with the Charter. The Panel envisages that, at a minimum, these laws would:

- not abrogate the privilege against self-incrimination;
- provide for mandatory rest breaks for detainees;
- provide that detainees have the right to obtain legal advice;
- provide for detainees to be appropriately cautioned prior to any questioning, and that any questioning be recorded; and
- address the basis on which and (if applicable) the manner by which police may take a detainee’s fingerprints or perform a forensic procedure on a detainee (including the taking of DNA), and the destruction of any records made as a result of such procedures.

The extension of the maximum interim period of detention from 48 hours to four days is another very significant change. As stated above, the Panel is persuaded the change is necessary to allow police sufficient scope to undertake what may be very complex and difficult investigations on the basis of very limited information. The Panel is mindful, also, of the fact that the four day interim period is the maximum period of time that a person may be detained without a Court order. The Panel envisages that, consistent with the current scheme for preventative detention:

- police will be required to release a detained person – without delay – if they cease to be satisfied that the grounds on which the person was detained continue to exist; and
- the exercise of powers, including that of detaining a person for an interim period, will be subject to oversight by a nominated senior police officer (and by IBAC).

Permitting police to take a person into custody for an interim period of detention without the need to apply to the Supreme Court is also a very significant change. Again, on balance, the Panel is persuaded this change is necessary to ensure that police can respond quickly to potentially very serious threats that may emerge with little or no warning. The current requirements for the making of an application for a preventative detention order are extensive. While this may be necessary and appropriate, of course, it does mean significant time and police resources must be dedicated to the task of completing this application. This work will invariably need to be carried out in precisely those circumstances in which prompt action to detain a person may be necessary to protect the public. There will continue to be a requirement for police to apply to the Supreme Court for any extension of that interim detention period.

The Panel recognises that the recommended changes present challenges in view of the Charter. Particular risks attach to the extension of the maximum period of interim detention from 48 hours to four days. Police will need to exercise great caution to ensure that any period of interim detention is no longer than is absolutely necessary. The longer a person is detained, the greater the risk that the detention may be incompatible with the right of a person who is arrested or detained to be promptly brought before a court.

The Panel considered at some length whether laws allowing police to question a person detained on a preventative basis should form part of a preventative detention scheme or should be established on a stand-alone basis. The Panel considers the former approach preferable for several reasons, including:

- that while a questioning power may suggest an investigative focus, the scheme – in the form preferred by the Panel – remains intrinsically preventative in nature;
- the existing scheme for preventative detention contains important safeguards and restraints (including oversight by IBAC and the involvement of the PIM, contact rights, the right to seek legal counsel and the right to apply to have a detention order varied or revoked) that will automatically – and appropriately – apply in the case of a detainee being questioned by police;
- that a scheme of this nature is more likely, in the Panel's view, to have a firmer legal foundation;
- that preventative detention does not suffer from the problem, inherent in an investigative detention scheme, that the detention must cease if the detainee refuses to answer questions; and
- that police are already familiar with the existing scheme for preventative detention and changes to this scheme are likely to be preferable, from an operational perspective, to the creation of an entirely new legislative model.

The Panel is mindful of the fact that the existing powers of preventative detention are extraordinary, and that the recommended changes to these powers would confer on police even more exceptional powers. The Panel has given serious and lengthy consideration to whether such changes are necessary. The Panel has attempted to strike the right balance between protecting essential rights and liberties and ensuring that police have the powers they need to protect the community. It acknowledges, however, that the reforms are, inevitably, a compromise. The changes may not address all of the concerns of law enforcement authorities, nor give complete comfort to those justifiably uneasy as to the scope of these powers and their extraordinary nature.

The Panel notes that the TCPA will sunset on 1 December 2021 and that a review of the operation of the TCPA (inclusive of any preventative detention powers) must be undertaken and completed by 31 December 2020. These are important safeguards.

On a final note, the Panel understands that COAG may be considering changes to the detention after arrest scheme contained in Part 1C of the *Crimes Act 1914* (Cth). The Panel has no further information as to what changes may be under consideration. The Panel observes, however, that it will be important for all levels of Government to work together to consider the preventative and (if applicable) investigative schemes at a State and Territory level and the provisions in Part 1C as related parts of a larger whole that is of great importance in the counter-terrorism context.

CHAPTER 4 PRESUMPTION AGAINST PAROLE, AND PAROLE- RELATED INFORMATION SHARING

Recommendation 3

That the Victorian Government amend the *Corrections Act 1986* (Vic) to include a presumption against parole for offenders who may pose a terrorist threat. This presumption should apply to a broad range of offenders ('terrorism related offenders'),⁴⁷ including those who:

- have been convicted of a terrorism offence;
- are, or have been, subject to a terrorism-related order; or
- have expressed support for terrorist activity or organisations.

'Terrorism related offenders' should also include those who are otherwise assessed by police or intelligence agencies to be a terrorist risk. This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with a person or group that is:

- advocating or has advocated support for terrorist acts or violent extremism;
- directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act; or
- a terrorist organisation within the meaning of Division 102 of Part 5.3 of the *Criminal Code Act 1995* (Cth).

Recommendation 4

The Adult Parole Board or the Youth Parole Board should only be able to grant parole to a terrorism related offender if satisfied that there are exceptional circumstances (in the case of a person convicted of a terrorist offence) or compelling reasons (for all other terrorism related offenders) for doing so.

Recommendation 5

Unless there are exceptional circumstances (in the case of a person convicted of a terrorist offence) or compelling reasons (for all other terrorism related offenders), the Adult Parole Board or the Youth Parole Board must cancel the parole of an offender if it becomes aware of:

- information that indicates that the offender is a terrorism related offender; or
- if the offender is already a terrorism related offender, information that the offender presents an increased terrorist risk.

⁴⁷ This term is taken from section 159A(1) of the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (NSW). The Panel proposes a modified version of the NSW definition of this term.

Recommendation 6

Decisions of the Youth Parole Board in relation to parole, including decisions to grant, deny or cancel parole in relation to young, terrorism related offenders, should continue to be guided by additional considerations that address the special requirements of young persons within the youth justice system.

Recommendation 7

Adult terrorism related offenders may only be released on parole by the Serious Violent or Sexual Offender Division of the Adult Parole Board (or equivalent), as part of its existing two-tier decision-making process.

Recommendation 8

The Victorian and Commonwealth Governments should establish a Memorandum of Understanding to:

- confirm the roles and responsibilities of and information sharing arrangements between members of the Victorian Joint Counter Terrorism Team, including security-cleared Corrections Victoria staff; and
- set out the responsibilities, including information sharing, between the Joint Counter Terrorism Teams of all Australian jurisdictions (to ensure the effective oversight of the interstate movements of terrorism related offenders).

Either this or a supplementary Memorandum of Understanding should also set out information sharing arrangements between police and intelligence agencies and youth justice system agencies, including the Youth Parole Board.

4.1 BACKGROUND

As part of a national agreement at the Council of Australian Governments (COAG) meeting on 9 June 2017, the Victorian Government has committed to introduce a presumption against granting parole to offenders who have demonstrated support for, or have links to, terrorist activity.⁴⁸ The Government has also committed to include security-cleared Corrections Victoria officers in Victoria's Joint Counter Terrorism Team (JCTT) to support information sharing. The JCTT membership is currently comprised of Victoria Police, the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO).

4.1.1 Victoria's adult parole system

The Adult Parole Board of Victoria (APB) is responsible for parole decisions, in relation to Victorian offences, under the *Corrections Act 1986*. As an independent statutory body, the APB's decisions are not subject to ministerial or bureaucratic direction. APB decision making is excluded from the rules of natural justice, the *Charter of Human Rights and Responsibilities Act 2006* and from judicial review under the *Administrative Law Act 1978*.⁴⁹

Community safety is the APB's paramount consideration when making parole decisions,⁵⁰ and informs the purpose of parole, which is to 'promote public safety by supervising and supporting the transition of offenders from prison into the community.'⁵¹ The APB works to minimise the risk that prisoners will reoffend, while on parole and at the conclusion of their sentence.

48 Council of Australian Governments, *COAG Communiqué* (9 June 2017) 1.

49 Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015) 8–10.

50 *Corrections Act 1986 (Vic)* s 73A.

51 Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015) 5.

That risk cannot be eliminated. Parole nevertheless provides an opportunity to manage and reduce it. If the APB considers a prisoner's risk of reoffending to be too great, then it will deny his or her parole application. This does not eliminate the risk to community safety. The prisoner will, in the vast majority of cases, be released. Denying parole defers the risk to community safety. And it could even increase it, as a prisoner who has been denied parole will generally be released into the community at the conclusion of their sentence without the supports, conditions, and oversight that parole provides. Whereas parole provides an opportunity for an orderly transition, and thereby materially increase community safety, unconditional release may remove that opportunity altogether.

On the other hand, minimising the risk of reoffending sometimes means denying a prisoner parole, because the potential cost to the community of granting parole outweigh the benefits.⁵² In the four years since the murder of Jillian Meagher by Adrian Bayley in 2013 and Justice Callinan's review of Victoria's adult parole system,⁵³ the number of offenders on parole has fallen from more than 1600 to 841.⁵⁴

The APB's task is therefore to identify, assess and minimise the risk of reoffending as effectively as possible. The APB's decision is informed by evidence and advice, including conclusions drawn from risk assessment tools, reports of an offender's behaviour in prison, the forensic psychologist's reports, and outcomes of custodial rehabilitation and treatment programs.⁵⁵

The APB and Corrections Victoria work to reduce the risk of reoffending in two key ways:

- Setting terms and conditions of the parole order to address the risk factors of a particular offender – for example, alcohol and drug testing, place of residence, and prohibitions against associating with certain people.
- Compliance with these terms and conditions is overseen by parole officers, who monitor and investigate compliance, referring breaches or escalating risks to the APB and agencies such as Victoria Police, who can then take action to manage the risk by, for example, investigation, varying parole conditions or cancelling parole and returning the offender to prison.

The APB also has the power to cancel parole at any time before the end of the parole period.⁵⁶ This is independent of the breach of a parole condition, meaning that the APB may cancel parole if the risks of the offender remaining on parole – even in the absence of a breach – have increased to an unacceptable level.⁵⁷ If an offender is charged with committing an offence that is alleged to have occurred during the parole period –

- in the case of a serious violent or sexual offender charged with a sexual offence or violent offence allegedly committed while on parole: the APB must cancel the offender's parole, unless satisfied that circumstances exist that justify the continuation of the parole; and,
- in any other case, if a parolee is charged with an offence that is punishable by imprisonment and is alleged to have been committed during the parole period, the APB must consider whether to cancel the parole order or to vary its terms and conditions.

⁵² Ibid 8.

⁵³ The Hon. Ian Callinan AC, *Review of the Parole System in Victoria*, July 2013.

⁵⁴ Victorian Department of Justice – Corrections Victoria, *Monthly Time Series Prisoner and Offender data* (as at 30 June 2017) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+time+series+prisoner+and+offender+data>>.

⁵⁵ Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015).

⁵⁶ *Corrections Act 1986* (Vic) s 77(1).

⁵⁷ Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015) 23.

4.1.2 Stricter processes for some Victorian parole applicants

While introducing a presumption against parole represents a significant change in Victoria's corrections system, the APB does take a more rigorous approach to parole decisions for serious violent and sexual offenders.

The Serious Violent Offender or Sexual Offender Parole (SVOSO) division of the APB was established in 2014 to strengthen the decision-making process for these offenders. When a division of the APB recommends the release on parole of a serious violent or sexual offender, the SVOSO division must then decide whether to affirm or reject this decision. This two-tiered process is further strengthened by the requirement that the chairperson of the APB head the SVOSO division, whose membership must differ from the APB division that made the original decision.⁵⁸

Murderers of police officers face an additional threshold if they apply for parole. In 2016, laws introduced by the Victorian Government were enacted to provide that these prisoners will not be released on parole unless the APB is satisfied, among other things, that the prisoner no longer has the physical capacity to harm any person due to being close to death or seriously incapacitated.⁵⁹

As part of these changes, the APB is now also required to deny parole to a prisoner convicted of murder and related offences, where the prisoner has not satisfactorily cooperated with police to identify the location of the victim's body or remains.⁶⁰

4.1.3 Parole in relation to Commonwealth offences

The APB does not have jurisdiction to make parole decisions for offenders serving sentences for a federal offence. The Commonwealth Attorney-General is responsible for parole decisions for these offenders under section 19AL of the *Crimes Act 1914* (Cth).

Under the Commonwealth Constitution, the States are nevertheless responsible for the administration of sentences imposed for federal offences, including the administration of Commonwealth parole orders.⁶¹ This means that parole officers from Corrections Victoria are responsible for managing and ensuring the compliance of Commonwealth offenders who are released on parole into the Victorian community.

4.1.4 Potential application of the presumption

The vast majority of offenders *convicted* of a terrorism offence will be subject to the Commonwealth parole process because most terrorism offences are Commonwealth offences. However, the COAG commitment goes beyond this category of offender. It applies the presumption to any offender with links to or demonstrated support for terrorist activity, even if the offence they are convicted of and sentenced for is not a terrorism offence. This would therefore include those convicted and sentenced for offences such as assault and armed robbery, most of whom are likely to be subject to Victoria's parole process.

4.1.5 The Youth Parole Board and young offenders

Young offenders sentenced to a period of detention are for the most part managed separately from the APB. The Youth Parole Board (YPB) oversees the parole of offenders aged 10–20 years old (and older in some circumstances).

⁵⁸ *Corrections Act 1986* (Vic) s 74AAB.

⁵⁹ *Corrections Act 1986* (Vic) s 74AAA.

⁶⁰ *Corrections Act 1986* (Vic) s 74AABA.

⁶¹ If a prisoner is serving sentences for both Victorian and federal offences, who has jurisdiction for parole will depend on the structure of the sentence (Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015) 20).

The YPB is established by the *Children, Youth and Families Act 2005* (Vic) and exercises jurisdiction over all young people sentenced to a period of detention in Victoria. This includes young people sentenced following conviction for a Commonwealth offence – a key point of difference with the adult parole system.⁶²

While courts cannot set minimum non-parole periods for detention in youth justice custodial centres, the Board has a discretion to determine parole eligibility. As a general rule, the Board considers sentences of six months or more as carrying with them an eligibility for parole, with the option of remissions for sentences of less than six months.

Finally, Victoria is unique in having a dual track system under the *Sentencing Act 1991* (Vic). This allows adult courts to sentence offenders under 21 years of age to serve custodial sentences in youth detention instead of prison. To make such an order, the court must be convinced that the offender has reasonable prospects of rehabilitation and that he or she is, among other things, likely to be subject to undesirable influences in an adult prison.⁶³

Under the *Children, Youth and Families Act 2005*, the YPB and the APB can transfer young people between the youth detention system and the adult correctional system.⁶⁴ For example, if the APB considers it appropriate, it may direct the transfer of a young person under the age of 21 from prison to a youth justice centre. This person would then come under the jurisdiction of the YPB for the duration of their sentence.⁶⁵ Similarly, in certain circumstances, the YPB can direct the transfer a person aged 16 years or more from a youth justice centre to a prison to serve the remainder of their sentence. This decision could be made to address, for example, behaviour that threatens the safe operation of the youth justice centre.

4.2 ISSUES

Three sets of issues arise from the Victorian Government's commitment. First, how should the scope of the presumption against parole be set to capture known terrorist risks amongst prisoners:

- without identifying an excessive number of tenuous, incidental 'links' (e.g. merely having attended the same mosque as a convicted terrorist offender)?
- by allowing the APB and the YPB sufficient discretion to promote community safety by managing identified risks?

Second, the effectiveness of the presumption will depend on effective cooperation and information sharing between State, Territory and Commonwealth police, intelligence and corrections agencies and parole boards. However, while these agencies share the overall goal of community safety, their operational objectives can differ significantly to the point of introducing tensions which are challenging to manage – for example, an intelligence agency may be reluctant, or unable due to international agreements, to share information about a prisoner's terrorism risk with a correctional agency, to avoid compromising sources, even though this information would assist the correctional agency to rehabilitate the offender and ultimately reduce their risk of reoffending. The challenge is therefore how information sharing arrangements can be set out in a way that promotes the overall objective of community safety while preserving, as far as possible, these entirely legitimate but sometimes incompatible operational objectives.

Third, should the presumption against parole apply in the same way to young, terrorism related offenders, and how should youth parole boards be included in any proposed informationsharing arrangements?

⁶² *Children, Youth and Families Act 2005* (Vic) ss 462–3; *Crimes Act 1914* (Cth) s 20C.

⁶³ *Sentencing Act 1991* (Vic) s 32(1).

⁶⁴ *Children, Youth and Families Act 2005* (Vic) ss 464–477.

⁶⁵ *Children, Youth and Families Act 2005* (Vic) s 471.

4.3 DISCUSSION

4.3.1 The presumption against parole

The first step in implementing this presumption requires determining its scope, or the breadth of the cohort to which it applies. The Government's commitment refers to 'demonstrated support for' or 'links to' terrorist activity, but leaves open the question of the *degree* of support or the *proximity* of the link. For example, narrowly framed, the presumption may only apply to offenders whose link to terrorist activity amounts to active assistance in a terrorist offence. The problem with a narrowly framed presumption is that it may not identify offenders who present a genuine risk of committing a terrorist act.

A broader construction may include offenders with weaker links to terrorist activity. For example, an offender who is the relative of a terrorist offender comes to the attention of ASIO. Investigations indicate this link is incidental but that it warrants further monitoring. This offender may not present a terrorism risk. The problem with a broadly framed presumption is that it may capture offenders who do not exhibit anything more than an incidental connection to terrorism.

As noted earlier, community safety and protection is the APB's paramount consideration when making parole decisions. Community safety is also a critical consideration for the YPB (see below). In the Panel's view, this means that the presumption should be framed broadly to increase the likelihood that the risk of terrorism-related harms to the community are captured as comprehensively as possible. To do otherwise increases the likelihood of the APB and Corrections Victoria not receiving intelligence on genuine risks and therefore not being in a position to manage those risks. In the Panel's view, the problem of identifying offenders with tenuous links to terrorism can mostly be addressed during the APB's decision-making process (see below).

However, the Panel considers that it is still necessary to limit the breadth of this presumption to avoid capturing an excessive number of purely incidental 'links' – for example, membership in the same club or participating in the same custodial rehabilitation program as a terrorist offender. Unless such links are accompanied by additional risk factors indicative of something more than an unavoidable association, the presumption should not apply to such offenders.

Since COAG on 9 June, the South Australian and New South Wales governments have acted to establish a presumption against parole for offenders who may be a terrorist risk. South Australia introduced the Statutes Amendment (Terror Suspects) Detention Bill 2017 (SA), which creates a presumption against 'terror suspects.' NSW enacted the *Terrorism Legislation Amendment (Police Powers and Parole Administration of Sentences) Act 1999* (NSW), which establishes a presumption against parole for 'terrorism related offenders.' As set out in Table 4.1, the Panel has sought to incorporate and build on the strengths of both approaches to ensure the comprehensive application of the presumption in Victoria.

Table 4.1 Proposed list of terrorism related offenders

SUB-CATEGORY OF 'TERRORISM RELATED OFFENDER' FOR PURPOSES OF PRESUMPTION	IN NSW, THE PRESUMPTION AGAINST PAROLE FOR 'TERRORISM RELATED OFFENDERS' APPLIES TO AN OFFENDER WHO:	PROPOSED VICTORIAN APPROACH
Convicted of a terrorism offence	Is serving a sentence for a terrorism offence, who has previously been convicted of a terrorism offence or who has been charged with a terrorism offence.	<p>Has been convicted (this includes those sentenced) of a terrorism offence under State, Territory and Commonwealth laws.</p> <p>It is not recommended that the presumption extend to someone only because they have been charged (e.g. a charge based on false information). Any real risk posed by such individuals will be captured by the below categories.</p>
Subject to a relevant order	Is the subject of a control order made under Part 5.3 of the Commonwealth Criminal Code.	<p>Also include a person who:</p> <ul style="list-style-type: none"> – has been the subject of a control order – is or has been the subject of a preventative detention order.
Association with terrorist organisations	Has any associations with a terrorist organisation ⁶⁶ (within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code)	As per NSW. See 'Notification' below.
Support (statements, activities)	Has made statements or carried out activities advocating support for terrorist acts or violent extremism	<p>Has made statements or carried out activities supporting or advocating support for terrorist acts or violent extremism, including by supporting or advocating support for terrorist groups or offenders.</p>
Links or associations	Has any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism	<ul style="list-style-type: none"> – See 'Notification' below.

⁶⁶ This includes an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or, an organisation prescribed by the regulations (*Criminal Code Act 1995* (Cth) s 102.1).

SUB-CATEGORY OF 'TERRORISM RELATED OFFENDER' FOR PURPOSES OF PRESUMPTION	IN NSW, THE PRESUMPTION AGAINST PAROLE FOR 'TERRORISM RELATED OFFENDERS' APPLIES TO AN OFFENDER WHO:	PROPOSED VICTORIAN APPROACH
Notification	N/A	<p>Is for any other reason assessed by police or intelligence agencies to be a terrorist risk, which is then notified to correctional and/or parole authorities.</p> <p>This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with any person or group that is:</p> <ul style="list-style-type: none"> - advocating or has advocated support for terrorist acts or violent extremism - directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act - a terrorist organisation within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code.

The NSW 'sentenced, convicted or charged' sub-category covers all offenders who would be covered by the South Australian Bill, except for offenders who are the subject of a 'terrorism notification' from a terrorism intelligence agency. South Australia relies on a notification system to capture offenders outside of the 'charged and/or convicted' sub-category.

The Panel is of the opinion that merely being charged with a terrorism offence is not in itself sufficient to sustain the presumption against parole. However, the additional categories set out in Table 4.1 would capture an offender who, for example, had been acquitted of a terrorism charge, provided police or intelligence agencies retained sufficiently compelling evidence of the offender's demonstrated support for terrorism.

In addition, the Panel proposes retaining an element of South Australia's 'notification' approach, to allow police and intelligence agencies to notify Corrections Victoria or the APB of terrorist risks which are not clearly captured by the other categories. This would include offenders with current or previous associations with terrorist groups or individuals, as set out in Table 4.1.

This approach has two important features. First, it ensures that the associations that are captured are limited to those which police and intelligence agencies consider to be of sufficient strength to establish a terrorist risk. It is not the Panel's intention, in framing the presumption, to capture offenders whose links to terrorist groups or persons are inadvertent or incidental – for example, a mother or brother of a terrorist offender with no involvement in that person's offending. Limiting the breadth of the presumption only to offenders assessed as a terrorism risk addresses this concern.

Second, this approach ensures that the onus is on police and/or intelligence agencies to make an assessment of the terrorism risk of relevant offenders and to notify Corrections or the APB of this risk.

Together, these categories provide a clear and comprehensive mechanism to capture the terrorism risk of offenders who are eligible for release on parole.

4.3.2 Overcoming the presumption

The purpose of the first stage of the presumption is to identify a broad set of offenders who present a terrorist risk, without casting the net so wide that agencies' focus is diverted by too great a number of tenuous links. The second stage assesses these risks to manage and reduce them. The Panel considers that it is essential that the second part of the presumption grants the APB sufficient discretion to:

- assess the terrorism risk of parole applicants and identify those who have been inadvertently captured by the deliberately broad scope of the presumption; and
- reduce the risk posed by other applicants, either by denying parole or, in lower-risk cases, by making a parole order with appropriate terms and conditions.

There are two aspects to the assessment and management of risk by the APB:

- the degree of satisfaction that the APB must attain to overcome the presumption and release certain lower-risk offenders on parole – especially when this is a preferable risk-management strategy to releasing the offender into the community without any behavioural conditions or support; and
- the rigour of the internal decision making process, including the seniority and experience of decision makers and the inclusion of internal review processes to ensure the APB applies the utmost scrutiny to these cases.

The New South Wales approach

When or how should this presumption be overcome? The NSW legislation demonstrates one approach:

The Parole Authority must not make a parole order directing the release of an offender who is known to the Parole Authority to be a terrorism related offender unless:

(a) the Parole Authority is satisfied that the offender will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism [emphasis added], and

(b) the offender is otherwise eligible under this Act to be released on parole.

The Panel considers that this approach requires a level of confidence that is probably impossible for any parole board to attain. It arguably creates a standard that even some prisoners without any links to terrorism would, if it applied to them, struggle to meet. In practice, this could turn the presumption into an unconditional refusal of parole, thus removing an important incentive for terrorism related offenders to rehabilitate in custody. The Panel notes that this could, on the offender's eventual release, create the perverse consequence of *increasing, rather than reducing*, the risk to community safety. The Panel's view is that, if perverse outcomes are to be avoided, the APB must retain some discretion to manage these finely balanced risks. In the Panel's view, this approach could in some circumstances jeopardise the paramount principle of community safety and protection.

As the APB's *Parole Manual* states, the aim of parole is to promote public safety by minimising the risk of reoffending while offenders are on parole and after they finish their sentence.⁶⁷ While this risk cannot be eliminated, parole presents an opportunity to diminish it. If the risk of releasing a terrorism related offender on parole outweighs the benefits (e.g. in terms of offender rehabilitation), then according to existing APB guidelines, the safety and protection of the community could be better served by denying a parole application.⁶⁸

However, a low risk of reoffending may be better managed outside of prison, during a prisoner's parole period. For example:

- When considering advice that an offender presents a low risk on the basis of historical, weak links to a terrorist offender, the APB may decide on a short parole period of, for example, six months. The rationale for this approach is that a short period allows terms and conditions to be set – for example, covering associations, residence requirements, risk factors such as drug use – to, with the assistance of parole officers, manage the transition of the offender back into the community and oversee compliance. These considerations apply with particular relevance in the youth parole system (see below).
- A prisoner may have undergone treatment and disengaged from violent extremist views as much as he/she is ever going to. By releasing the prisoner on parole, the APB could reinforce these attitudinal gains. By denying parole, the APB might run the risk of these attitudinal gains being lost or replaced by the resurfacing of former attitudes. (This may also apply to an offender with a higher rather than lower risk of reoffending).

In the Panel's view, the APB needs to be given the discretion to manage risks effectively, take advantage of rehabilitation gains and avoid the potentially worse alternative of releasing a terrorism related offender into the community at the end of their sentence with no support or conditions to reduce their terrorist risk.

⁶⁷ Adult Parole Board of Victoria, *Parole Manual – Adult Parole Board of Victoria (Fifth Edition)* (April 2015) 5.

⁶⁸ *Ibid* 8–9.

It could be argued that expanding the serious offender post-sentence supervision scheme to all terrorism offenders and terrorism related offenders would address the risk of releasing a terrorism related offender into the community without the risk management process associated with parole. This issue is likely to be addressed to some extent by the new High Risk Terrorist Offenders scheme, which provides for continuing detention of high risk terrorist offenders at the conclusion of their sentence.⁶⁹ Victoria also has a post-sentence supervision and detention scheme for serious sex offenders, which is expanding to include serious violent offenders.

However, it is highly unlikely that either scheme would capture all terrorism related offenders. For example, it may be difficult to convince a court that an offender convicted and sentenced for a non-terrorism offence such as assault, which is not part of the serious offender scheme, presents an unacceptable risk to community safety on the basis of weak historical links to a terrorist group, particularly given the availability of alternatives such as control orders and preventative detention orders. It is also unlikely that children would be captured by Victoria's serious offender scheme. The Panel intends to address the issue of post-sentence detention and supervision in its second report.

The South Australian approach

The South Australian presumption operates by stating that the presiding member of the Board:

- (a) *must not confirm a decision of the Board to release a prisoner who is a terror suspect on parole unless the presiding member determines that there are special circumstances justifying the prisoner's release on parole [emphasis added]; and*
- (b) *must not confirm any other decision of the Board relating to a terror suspect unless the presiding member is satisfied that the decision is appropriate in all the circumstances.*

Neither the amending South Australian Act nor the *Correctional Services Act 1982* (SA) define what is meant by special circumstances. The Panel considers that while this has the advantage of allowing the parole board some discretion, there is some benefit in providing further guidance on the degree of risk about which a parole board must be satisfied before releasing a terrorism related offender on parole.

A Victorian approach

Overcoming the presumption

The Panel has considered two other options, which are found in Victoria's *Bail Act 1977*, as recently amended as part of the Victorian Government's response to Justice Coghlan's *Bail Review*.⁷⁰ The *Bail Act* includes a presumption against bail for more serious charges, with two options for overcoming it. For the most serious charges, including murder, aggravated home invasion and more serious drug trafficking offences, the accused is required to demonstrate exceptional circumstances. While neither the *Bail Act* nor the courts define this term, the Coghlan *Bail Review* notes that it is generally held that there must be 'something unusual or out of the ordinary in the circumstances relied on by the applicant before those circumstances can be characterised as exceptional.' The *Bail Review* also notes that exceptional circumstances may be constituted by a single circumstance or by a combination of them.⁷¹

69 This scheme was enacted by the Commonwealth in December 2016 and is in the process of being implemented nationally.

70 The Hon. Paul Coghlan QC, *Bail Review: First advice to the Victorian Government* (3 April 2017); and *Bail Review: Second advice to the Victorian Government* (1 May 2017).

71 The Hon. Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government* (3 April 2017) 30–1.

For other serious charges, including manslaughter, child homicide, rape and causing serious injury intentionally, the accused is required to demonstrate 'compelling reasons' to overcome the presumption against bail.

The Panel's view is that a terrorism related offender who has been convicted of a terrorism offence should only be released on parole if the APB is satisfied that there are exceptional circumstances for doing so. This is an appropriately high threshold for an offender with a demonstrated criminal history of terrorist offending.

The APB should only grant parole to a terrorism related offender who has not been convicted of a terrorism offence if satisfied that there are compelling reasons for doing so. This could be one or a combination of reasons, for example:

- evidence that the prisoner's link to terrorist persons or activity was merely incidental and was not accompanied by additional risk factors that indicate a more than merely incidental link;
- positive outcomes of the offenders participation in custodial treatment programs;
- advice by relevant agencies that the offenders risk of committing a terrorist offence is low or negligible (see discussion of information sharing below); and/ or
- that release, management and supervision on parole is more likely to reduce the risk of terrorist offending than an unsupported release into the community without parole.

The Panel notes the importance of judicial discretion in the application of this test – in particular, that judicial consideration of the totality of the circumstances is an important safeguard against the inflexible application of the presumption. This should ensure that the threshold for overcoming the presumption is proportionate to the level of terrorist risk associated with the offender. For example, evidence that an offender recently expressed strong support for terrorist activity would be harder to overcome than evidence of an older and weaker expression of support.

The decision-making process

On 9 May 2017, the Victorian Government introduced into Parliament the Corrections Legislation Miscellaneous Amendment Bill 2017. The Bill introduces, among other things, stricter parole laws for prisoners who have been convicted of certain serious offences, including Victorian terrorism offences and, in certain circumstances, Commonwealth terrorism offences.⁷² This includes requiring that such prisoners are only released on parole by the SVOSO division of the APB.

To ensure the same rigour is applied to all parole decisions that must address a risk of terrorist offending, the Panel recommends that this two-tiered approach be extended to the parole applications of terrorism related offenders.

The cancellation of parole

The decision whether to cancel parole is just as important to community safety as the decision whether to grant parole. As discussed, parole may be cancelled because of a breach, an alleged offence, or some other escalation of risk, even in the absence of a breach. The Panel considers that the APB should be in the same position to manage the increased risk that an offender on parole will commit a terrorist offence. This may arise from new or additional information about an offender's risk of committing a terrorism offence.

⁷² Corrections Legislation Miscellaneous Amendment Bill 2017 (Vic) cl 14.

This approach should be consistent with the approach recommended above and fit in with the APB's existing approach to parole cancellations. The Panel therefore recommends that, unless there are exceptional circumstances (in the case of a person convicted of a terrorism offence) or compelling reasons (for all other terrorism related offenders), the APB must cancel the parole of an offender if it becomes aware of:

- _ information that indicates that the offender is a terrorism related offender; or
- _ if the offender is already a terrorism related offender, information that the offender presents an increased terrorist risk.

4.3.3 Roles, responsibilities and information sharing

As discussed in Chapter 1, the terrorism threat has increased in recent years and its nature has changed. The global reach and sophisticated promotional efforts of terrorist organisations such as ISIL are creating a new cohort of actual and potential offenders. Effective cooperation between State, Territory and Commonwealth intelligence and police organisations is, as always, fundamental to addressing this threat. However, if the risk posed by terrorism related offenders – whether convicted of a terrorism offence or not – is to be effectively managed in the custodial setting, cooperation needs to include correctional authorities. The rehabilitation and disengagement of prisoners who present a terrorism risk is a fundamental ingredient in the protection of the community from terrorism – a process that commences early in an offender's sentence, and culminates in the parole process.

The Panel understands that Corrections Victoria has an effective working relationship with police and intelligence agencies. Recent events have, however, highlighted the need to formalise and clarify some of these arrangements – particularly around information sharing – to eliminate gaps and ensure that terrorism risks are captured and managed as effectively as possible. The Victorian Government's commitment, as part of the national approach agreed at COAG on 9 June 2017, to include security-cleared Corrections Victoria officers in Victoria's JCTT to support information sharing recognises this need. It expands the focus of the JCTT – whose membership currently extends to Victoria Police, the AFP and ASIO – to unambiguously include the correctional setting.

Meeting this changing terrorist threat through new information sharing arrangements presents a unique set of challenges. While police, intelligence, corrections and parole organisations share the objective of protecting the community from harm, how they achieve this objective differs. Each organisation deals with different facets of the risk of terrorism. Different operational procedures and objectives inform this. For example, Corrections' focus on rehabilitation has operational requirements that are foreign to some other agencies – for example, a case manager may need to openly communicate with a prisoner about the risk of recidivism, including the risk of engagement in terrorism. Otherwise, appropriate treatment may not be administered. It would therefore be desirable for the case manager to be aware of the terrorism risk of an offender. However, this information may not be forthcoming from an intelligence organisation because of concerns about compromising a source, or a larger operational objective, or some other legitimate interest.

Agencies' operational procedures have stood the test of time, including by adapting to meet new challenges. The environment continues to be dynamic, with new risks and challenges emerging very quickly. If information is not shared proactively by all relevant agencies, the overall management of the risk of terrorism to the community may be compromised and the risks could be catastrophic. This is particularly apt in the correctional space: if ASIO does not inform Corrections Victoria or the APB of a parole applicant's terrorism risk, the offender may be released on parole inappropriately, for too long a period, and/or with inadequate conditions. And if Corrections is not aware of ASIO information about a prisoner's terrorist links, it may not appreciate the significance of signs of an escalating risk of terrorist offending (e.g. new associations, sudden withdrawal from programs). The consequence of this is that Corrections could not share this intelligence with ASIO and ASIO would be deprived of significant information.

Corrections Victoria's involvement in the JCTT

These issues come to a head in relation to the proposed involvement of security-cleared Corrections officers in JCTT deliberations about parole applications by terrorism related offenders. The Panel notes again that Corrections and the JCTT already have an effective working relationship, however structuring this relationship to support the presumption against parole raises a complex set of challenges, as set out in Table 4.2.

The most straightforward way of implementing this commitment would involve security-cleared Corrections officers mediating between JCTT and the APB, to ensure that relevant intelligence information is considered during the APB's parole decision-making process. This arrangement would assist the APB, as it would allow it to hear information about terrorism risks in the appropriate context and seek clarification from Corrections if required. It would also address any concerns ASIO may have about participating directly in this process.

Three critical issues arise from this approach, as set out in Table 4.2. First, if senior, security-cleared Corrections officers are provided with intelligence information that they cannot share with operational staff, including case managers, this places Corrections in an invidious position. Corrections will be in possession of information that it cannot act on due to the inability to share this information with the operational staff who are working on the ground to manage the rehabilitation and reduce the reoffending risk of terrorism related offenders. This information gap could lead to a failure to detect escalating risks and to share that information with partner agencies. In the event that such a risk turns into a terrorist offence, this could unfairly undermine confidence in Victoria's corrections system and State-Commonwealth information sharing arrangements.

Second, it creates a risk of distorted or incomplete and fragmented assessments: if the Corrections case manager is unaware of the genuine terrorist risk of an offender, he or she could misinterpret the significance of a range of behaviours, leading to an underestimation of the risk of reoffending. Conversely, in the absence of information from the case manager about, for example, the offenders progress or the nature of his or her associations with persons of interest, intelligence agencies may arrive at a partial and exaggerated view of an offenders terrorism risk.

Third, this approach could undermine the objectives of community protection by preventing Corrections from acting on information that would assist it to rehabilitate and otherwise manage the reoffending risk of a terrorism related offender. For example, early advice of an offender's terrorism risk would allow Corrections to consider applying a variation of its disengagement policy for managing violent extremists in prison.

Table 4.2 Challenges of including Corrections Victoria in the JCTT

KEY ELEMENTS OF THE PROCESS	INITIAL ISSUES	SOLUTION	CONSEQUENCES FOR CORRECTIONS VICTORIA
Up to a year before a terrorism related offender's earliest eligible date of release on parole, the JCTT could meet to discuss that offender's parole application.	Concerns about the security of intelligence information that is shared with Corrections.	Security-cleared Corrections officer enables other JCTT members to share information.	<p>Security-cleared Corrections officer receives information that cannot be shared with Corrections case managers, who need it for purposes including prisoner management, parole recommendation.</p> <p>Failure to disseminate information within Corrections may be seen as a significant failure if as a consequence a case manager fails to detect and address an offender's terrorism risk.</p>
The information is provided to the APB to inform their parole assessment.	The APB's role is not to interpret 'raw' intelligence information but to assess findings and supporting information from agencies with appropriate expertise.	The information is provided as a finding or recommendation of the JCTT (consistent with current JCTT information sharing to support Commonwealth Attorney-General decisions on relevant Commonwealth parole applications).	Creates a situation where two risk assessments (JCTT's and the on the ground assessment by a Corrections' case manager) proceed in mutual isolation. This risks a distorted assessment (i.e. over- or under-estimation of risk).

KEY ELEMENTS OF THE PROCESS	INITIAL ISSUES	SOLUTION	CONSEQUENCES FOR CORRECTIONS VICTORIA
<p>The form of the Intelligence information that is shared with the APB.</p>	<p>Police and intelligence agencies cannot release information that could compromise sources and would be concerned about the prospect of information coming out in a subsequent court case.</p> <p>The APB may need more detailed information than ASIO, for example, is willing to provide.</p>	<p>Written information could be provided in summary form.</p> <p>ASIO may be reluctant to participate in a Victorian hearing, so it may be more appropriate for Corrections to fulfil this role to provide verbal responses to APB’s requests for further details.</p>	<p>Corrections playing the role of ‘go-between’ may address the issues faced by the APB and ASIO, but the problem of disseminating information internally persists.</p> <p>If the decision to deny parole is based on intelligence information that cannot be disclosed in any way to the applicant, this could create confusion and resentment that may ultimately increase the risk of reoffending on eventual release.</p>

Additional considerations

These information sharing challenges also arise in relation to offenders who are on parole. The risks associated with information gaps and blockages are potentially more serious in relation to an offender on parole in the community, given the reduction of controls available in the prison environment. The Panel therefore considers that information sharing arrangements need to take account of how agencies will share information in relation to offenders on parole, and not only for the purposes of the decision to grant parole. For example, if intelligence agencies have new information about the terrorist threat posed by an offender, there needs to be a mechanism to provide this information to Corrections and/or the APB so that they can manage this risk. This could include cancellation of parole.

It is also important to have clear and strong information sharing arrangements between Corrections and agencies, including private contractors, with responsibilities for administering services to offenders on parole. These services are designed to address reoffending risks (e.g. drug and alcohol, mental health) and could include services or programs designed to reduce an offender’s engagement in terrorism. Such arrangements go beyond the membership of the JCTT, but need to be considered to ensure that the risk of terrorism is managed as effectively as possible.

The information sharing challenges likely to be faced by the YPB are similar to the issues that have been discussed in this section and are discussed at the end of this chapter.

The Panel's recommended approach to information sharing

The Panel notes that ASIO plays a fundamental role in this arrangement: it is frequently the sole repository of intelligence information that, if shared, would enable both Corrections and the APB to better protect the community by managing terrorism related offenders' risk of reoffending. The challenge is for ASIO, in partnership with other JCTT members and Corrections Victoria, to develop a tool that increases the amount of information they are able to share and that ensures that it is shared as early as possible. The Panel is not critical of ASIO's approach to information sharing in the past – but as stated, times have changed, and the roles and responsibilities of all agencies with a role in countering terrorism must continue to evolve.

The Panel acknowledges that this issue is full of operational complexities that need to be worked through by all relevant organisations, as they have the keenest awareness of their operational needs. The sensitivity of these issues and the need for intergovernmental cooperation also require them to be worked through by State, Territory and Commonwealth senior officials, with a view to settling a position at COAG. With this in mind, the Panel has set out some general principles and considerations to help guide the development of a memorandum of understanding (MoU) in a way that responds to the issues raised in the latter part of this chapter.

The Panel recommends that the MoU:

- confirm the roles and responsibilities of and information sharing arrangements between members of the Victorian Joint Counter Terrorism Team (JCTT), including security-cleared Corrections Victoria staff; and
- set out the responsibilities, including information sharing, between the JCTTs of all Australian jurisdictions (to ensure the effective oversight of the interstate movements of terrorism related offenders).

In the Panel's opinion, the threat of terrorism will only be effectively reduced if the intelligence-gathering authorities constantly reassess the best means by which the intelligence at their command can be shared with those who need to know. For example, the case managers of parolees cannot carry out their duties to maximum advantage, and to best protect the community, unless they have access to the best and most relevant information about their clients. It may be that this information, or some of it, must for legitimate reasons be withheld. The Panel understands that this must be so. At the very least, however, the intelligence-gathering authorities which have relevant information in their possession must seek to fully engage with the needs of those who would – in the discharge of their duty to protect the community – benefit from the receipt of some or all of that intelligence. The intelligence-gathering authorities should, in the light of that understanding, accept the important responsibility of deciding how much, if any, of the information held by them, tailored or redacted to meet the needs of the occasion, can be transmitted to the professional benefit of those who receive it.

Table 4.3 Principles to guide the development of the Memorandum of Understanding

PRINCIPLE	COMMENTS
Shared objective of community safety	Any information sharing agreement between relevant agencies and across jurisdictions needs to be guided by the shared principle that community safety and protection is paramount.
Different ways of meeting this objective	There must be a clear understanding that each partner agency pursues the objective of community safety differently, for legitimate operational reasons.
Gaps and blockages	Agencies should identify the points at which their different operational guidelines create information gaps and blockages.
Facilitate the flow of information	<p>The tool that agencies develop to fill these gaps and remove these blockages should investigate how information can be packaged and/or delivered to harmonise the objectives of partner agencies, for example:</p> <ul style="list-style-type: none"> – ASIO provides intelligence information to Corrections in a summary form that protects sources; and – In the case of higher-risk information and offenders, Corrections ensures that information is restricted to, for example, more experienced or highly-trained case managers.
The ideal solution is the one most likely to provide the greatest protection to the community	<p>The ideal solution to information gaps and blockages:</p> <ul style="list-style-type: none"> – provides the greatest net benefit to the safety of the community; – is a tolerable compromise between agencies' objectives.

4.3.4 Parole for young offenders

Different considerations apply in the youth parole system owing to a number of important features that distinguish youth from adult offenders. In particular, the immaturity and vulnerability of children, many of whom have been exposed to family violence, require additional safeguards to protect them in detention. For example, the *Youth Parole Board 2015-16 Annual Report* shows that 45 per cent of detained young offenders had been subject to a previous child protection order, that 63 per cent were victims of abuse, trauma or neglect, and that 66 per cent had a history of both alcohol and drug misuse.⁷³

These considerations inform the Youth Parole Board's commitment to the rehabilitation of and best outcomes for young people under its jurisdiction. This approach is also reflected in other parts of the youth justice system. For example, the *Bail Act 1977* requires a bail decision maker, who is considering whether to grant a child bail, to take account of factors including the:

- need to strengthen and preserve the relationship between the child and the child's family, guardians or carers;

⁷³ Victorian Youth Parole Board, *Youth Parole Board Annual Report 2015-16* (2016) 14. These statistics are a snapshot of the youth detainee population on 7 October 2015.

- _ desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- _ need to ensure that the conditions of bail are no more onerous than are necessary and do not constitute unfair management of the child.⁷⁴

Sentences of detention for young offenders are generally much shorter than sentences for adult offenders.⁷⁵ This reduces the potential parole period from a matter of years for many adult offenders to what is generally a matter of months for young offenders. The youth justice system therefore has a smaller window of time within which to address the reoffending risks and behavioural needs of young offenders. This makes parole a critical means of supervising and supporting the transition of a young offender back into the community.

The YPB's decision-making framework balances these considerations about the needs of the young person with considerations about community safety.⁷⁶ In making parole decisions, the YPB considers the potential impact of releasing a young offender on the interests of and potential risk to the community, as well as the wellbeing of victims.⁷⁷ To assess this, the YPB will consider matters including the nature and circumstances of the offences, outstanding charges, and the young person's criminal history.

An additional, critical consideration is the capacity for parole to assist the young person's rehabilitation and the capacity of release plans to support this. The decision to release and the strategy for managing the young person on parole is based in part on reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychologists, psychiatrists, custodial staff, parole officers and support agencies

As discussed in relation to the APB, it may sometimes be preferable to order the release of a young, terrorism related offender on parole as this may give the youth justice system the best chance of addressing a young person's risk factors at the critical point of transition back into the community. This can enable the supervised delivery of intensive support to young people, including access to employment, education, training, mental health and drug and alcohol treatment and transitional and housing support services.⁷⁸

The rationale for a paroled release is more compelling when the typically short parole periods of the youth justice system are factored into this equation: the short-term benefit to the community of denying parole for only three to six months may be outweighed by the long-term consequences of failing to use parole to address the reoffending risk factors, such as alcohol abuse or unemployment, that need to be managed when a young person is released back into the community.

The presumption against parole for young persons

The Panel considers that young offenders sentenced to detention in youth justice facilities and coming under the jurisdiction of the YPB should be captured by the presumption against parole, provided they fall within one of the categories set out in Table 4.1 and the corresponding recommendation. The rationale for this is the same as it is in the adult parole system: to identify terrorism risks comprehensively.

⁷⁴ *Bail Act 1977* (Vic) s 3B.

⁷⁵ Section 413 of the *Children, Youth and Families Act 2005* limits Courts to imposing a maximum period of two years detention in a youth justice centre for a single offence and three years for multiple offending. These figures would increase by one year each under the Youth Justice Reform Bill 2017, which is before Parliament at the time of writing.

⁷⁶ Victorian Youth Parole Board, *Youth Parole Board Factsheet* <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0011/584498/1_youth_parole_board_factsheet_0912.pdf>.

⁷⁷ Victorian Youth Parole Board, *Youth Parole Board Annual Report 2015-16* (2016) 4.

⁷⁸ *Ibid* 22.

Overcoming the presumption

The Panel considers that the special circumstances of youth parole require additional considerations to guide the YPB's decision making in relation to whether there are exceptional circumstances or compelling reasons for releasing a young, terrorism related offender on parole.

For exceptional circumstances (in relation to young person convicted of a terrorism offence), this could include ill health or other factors, such as lack of prior convictions, which may indicate a low risk of reoffending. The Panel notes that this would still need to be assessed in relation to the totality of the circumstances, including the risk of reoffending and the value of parole in reducing the young person's risk of reoffending, in particular of committing a terrorist act.

For compelling reasons (in relation to all other young, terrorism related offenders), the YPB should continue to have the latitude to consider a broader range of factors, including:

- _ the child's engagement in rehabilitative measures whilst in detention;
- _ the nature of the child's relation to terrorism;
- _ the offending conduct for which the child has been detained; and
- _ conditions that can be attached to parole to mitigate risk.

The Panel notes that the YPB already considers such factors when making parole decisions. However, by applying these kinds of considerations to the compelling reasons test, the YPB would need to be satisfied that these factors constituted a compelling reason sufficient to overcome the risk that the young person may commit a terrorist act. As for adult parole, the totality of circumstances will have a bearing on what constitutes 'compelling' – for example, it would be harder to demonstrate compelling reasons to counter evidence of strong and persistent support for a terrorist organisation than if this support had been equivocal and fleeting.

As part of this, the Panel recommends the addition of specific parole conditions for children to reduce a young, terrorism related offender's risk profile (to apply for both exceptional circumstances and compelling reasons parole decisions). These could be adopted, with any necessary modifications, from the Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017. This Bill is currently before Parliament and contains mandatory parole conditions for certain serious offending, including:

- _ the person must not break any law;
- _ must be supervised by a parole officer;
- _ must obey any lawful instructions of that parole officer;
- _ must report as and when reasonably directed by that parole officer; may be interviewed by that parole officer at any reasonable time and place;
- _ advise the parole officer of any change of address;
- _ not leave the State without written permission of the Youth Parole Board;
- _ any other condition the Youth Parole Board considers necessary; and
- _ if the Youth Parole Board considers it appropriate, one or more of the following:
 - _ attend a day program;
 - _ undergo rehabilitation or treatment;
 - _ not contact specified persons; or
 - _ not visit particular places or areas or only visit places or areas at specified times.⁷⁹

⁷⁹ Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017 (Vic) cl 29(3).

The cancellation of parole

The Panel recommends the same approach be taken to the cancellation of youth parole orders as is recommended for adult parole orders, but that this should be informed by the types of additional considerations set out above.

Youth parole and information sharing

Decisions of the YPB are informed by information from a range of sources, including comments by the sentencing court and reports from custodial staff, parole officers, psychologists and psychiatrists, medical practitioners and other professionals working with the young person. If a young offender is a terrorist risk, then the YPB needs to be informed of this by police and intelligence agencies.

Young people in detention who are at risk of radicalisation should be provided the necessary supports and interventions at an early stage – well before the young person is eligible for release into the community. This can be achieved through appropriate information sharing and effective case management informed by the child's individual risk profile. The early provision of information about a young person's links to terrorist activity would give the youth justice system the greatest possible time to attempt to disengage that young person while in custody, rather than waiting until they are considered for parole.

The youth justice system is confronted with many of the same information sharing challenges as discussed above in relation to Corrections Victoria and the APB. The Panel considers that the MoU between members of the JCTT, including Corrections, also needs to address how information will be shared with these organisations. The rationale for doing so – community protection – is the same. In the Panel's view, future discussions about the nature of these information sharing arrangements must also address:

- how youth justice and the YPB can be included in these information sharing arrangements for the purposes of informing YPB decisions; and
- enhancing information sharing with those youth justice workers supervising young people on the community-based orders, in custody and on parole.

CHAPTER 5 PRESUMPTION AGAINST BAIL, AND BAIL-RELATED INFORMATION SHARING

Recommendation 9

That the Victorian Government amend the *Bail Act 1977* (Vic) to include a presumption against bail for accused persons who may pose a terrorist threat. The presumption should apply to accused persons who:

- _ have been convicted of a terrorism offence
- _ are or have been subject to a terrorism-related order
- _ have expressed support for terrorist activity or organisations.

The presumption should also apply to accused who are otherwise assessed by police or intelligence agencies to be a terrorist risk. This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with any person or group that is:

- _ advocating or has advocated support for terrorist acts
- _ directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act
- _ a terrorist organisation within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code.

Recommendation 10

A court should only be able to grant bail to an accused person to whom the presumption applies in the following circumstances:

- _ If the accused has been charged with a 'Schedule 2' offence under the *Bail Act 1977*, the court must be satisfied that exceptional circumstances exist that justify the grant of bail.
- _ If the accused has been charged with an offence that is neither a Schedule 1 nor a Schedule 2 offence, the court must be satisfied that compelling reasons exists to justify the grant of bail.⁸⁰

Note: a presumption against bail and a requirement to demonstrate 'exceptional circumstances' already apply to a person accused of a Schedule 1 offence under the *Bail Act 1977* (including a Victorian terrorism offence) or a Commonwealth terrorism offence.

Recommendation 11

Only a court may grant or refuse bail to an accused person to whom the presumption applies.

⁸⁰ The reference to Schedule 1 and 2 offences relates to these schedules as amended by the *Bail Amendment (Stage One) Act 2017* (Vic), which is yet to come into force at the time of writing.

Recommendation 12

The Memorandum of Understanding between Victorian Joint Counter Terrorism Team (JCTT) members in relation to parole should also address information sharing requirements for bail decisions by setting out the roles and responsibilities, including information sharing arrangements:

- between members of the Victorian JCTT in relation to bail decisions
- between the JCTTs of all Australian jurisdictions in relation to interstate movements of persons relating to bail decisions.

5.1 BACKGROUND

As part of a national agreement at the COAG meeting on 9 June 2017, the Victorian Government has committed to introduce a presumption against granting bail to alleged offenders who have demonstrated support for, or have links to, terrorist activity.⁸¹

5.1.1 The presumption for and against bail for Victorian offences

The *Bail Act 1977* governs the law of bail in Victoria. In general, every person has an entitlement to bail, unless they pose an unacceptable risk of committing further offences, not coming to court, interfering with witnesses and/or endangering the community. The presumption in favour of bail is consistent with the presumption of innocence. This can be contrasted with the parole process, which occurs after a person has been found guilty and sentenced for their offending.

Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Charter) provides for the presumption of innocence. Section 21 provides that every person has the right to liberty and security of person, and that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. However, these rights are not absolute. Section 7(2) of the Charter sets out the test to determine whether any limitation is justified. This includes determining the nature of the right and the importance, nature and extent of the limitation.

Certain circumstances may give rise to justifiable limitations. For example, section 4(2)(d)(i) of the *Bail Act 1977* allows for the denial of bail to an accused who presents an unacceptable risk of endangering the safety of members of the public if released on bail. The *Bail Act 1977* also limits the right to liberty by reversing the presumption in favour of bail in two ways. First, people who are charged with very serious offences such as murder or large-scale drug trafficking need to show 'exceptional circumstances' to be granted bail.⁸² People charged with Victorian terrorism offences also fall within this category. Second, where a person is accused of or has previously committed a serious offence, the accused must 'show cause' as to why he or she should be granted bail. This applies where an accused has been charged with certain offences (e.g. an indictable offence where a firearm, weapon or explosive was used).⁸³

The Coghlan Bail Review

Following the Bourke Street incident on 20 January 2017, the Victorian Government commissioned former Supreme Court Justice the Hon. Paul Coghlan QC to undertake the Bail Review of Victoria's bail system.⁸⁴ As part of the Government's response to the first Coghlan report, the *Bail Amendment (Stage One) Act 2017* was enacted in June 2017. The Act makes a number of significant changes, including:

- introducing guiding principles into the *Bail Act 1977*, including maximising the safety of the community, taking account of the presumption of innocence and promoting fairness, transparency and consistency in bail decision making

⁸¹ Council of Australian Governments, *COAG Communiqué* (9 June 2017) 1.

⁸² *Bail Act 1977* (Vic) s 4(2)(aa).

⁸³ *Bail Act 1977* (Vic) s 4(4).

⁸⁴ The Hon. Paul Coghlan QC, *Bail Review: First advice to the Victorian Government* (3 April 2017); and *Bail Review: Second advice to the Victorian Government* (1 May 2017).

- replacing the ‘show cause’ test with a ‘show compelling reason’ test, to ensure that proper weight is given to the onus placed on accused persons charged with relevant offences
- expanding the list of offences which require an accused to demonstrate exceptional circumstances to additional offences including aggravated home invasion and aggravated carjacking (to be included in a new Schedule 1 to the *Bail Act 1977*)
- expanding the list of offences which require an accused to demonstrate compelling reasons to a range of new offences including manslaughter, intentionally causing serious injury, armed robbery and rape (in Schedule 2)
- requiring that only a magistrate or judge may grant bail to an accused charged with an exceptional circumstances, Schedule 1 offence.

Under the amended approach, a bail decision maker must have regard both to whether an accused charged with a Schedule 1 offence can demonstrate exceptional circumstances (or compelling reasons for a Schedule 2 offence), and to whether the prosecution is able show that there is an unacceptable risk that if released on bail the accused would:

- fail to surrender himself into custody in answer to his bail
- commit an offence whilst on bail
- endanger the safety or welfare of members of the public or
- interfere with witnesses or otherwise obstruct the course of justice.⁸⁵

The *Bail Act’s* existing unacceptable risk test addresses the risk of terrorism by requiring the court to consider, among other matters, whether the accused has publicly expressed support for a terrorist act or a terrorist organisation or for the provision of resources to a terrorist organisation.⁸⁶ This applies to any accused person making a bail application.

5.1.2 The presumption against bail for Commonwealth offences

Under s 15AA of the *Crimes Act 1914* (Cth), a bail authority must not grant bail to a person accused of a Commonwealth terrorism offence unless the bail authority is satisfied that exceptional circumstances exist to justify bail. This applies to a broad range of terrorism offences under the *Criminal Code Act 1995* (Cth), other than an offence against s 102.8 of that Act, which applies to associating with terrorist organisations.

Persons accused of a Commonwealth offence to which s 15AA of the *Crimes Act 1914* (Cth) does not apply are subject to state bail legislation.

5.1.3 The South Australian approach

Following COAG on 9 June 2017, South Australia introduced the Statutes Amendment (Terror Suspects) Detention Bill 2017 (SA), which creates a presumption against granting bail to ‘terror suspects.’

Similar to the approach the same Bill adopts for parole (Chapter 4), the Bill creates a new category of ‘terror suspects’. A person is a terror suspect for the purposes of a bail application or bail agreement if:

- (a) *the bail application or bail agreement does not relate to a terrorist offence; but*

⁸⁵ *Bail Amendment (Stage One) Act 2017* (Vic) ss 5(2), 5(7)(b), 5(8); *Bail Act 1977* (Vic) s 4(2)(d)(i).

⁸⁶ Section 4(3)(ba). This requirement will not be affected by the commencement of the *Bail Amendment (Stage One) Act 2017* (Vic).

(b) *the person –*

(i) *has previously been charged with, or convicted of, a terrorist offence;*
or

(ii) *is the subject of a terrorism notification.*⁸⁷

As discussed in Chapter 4, a terrorism notification is provided by a terrorism intelligence authority (prescribed by regulation).

The Bill would also introduce three important changes to the process for making bail decisions. First, only a court may act as a bail authority for the purposes of a bail application by a terror suspect. Second, a terrorism intelligence authority is entitled to be heard in relation to any application under the *Bail Act 1985* (SA) relating to a terror suspect.⁸⁸

The third and most significant set of changes the Bill introduces relate to the way courts would be required to handle criminal intelligence information (see Chapter 7). The Bill proposes a new s 74B of the *Police Act 1988* (SA), requiring that in any proceedings before a court, the court:

(a) *must, on the application of a terrorism intelligence authority, take steps to maintain the confidentiality of information properly classified by the authority as terrorism intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and*

(b) *may take evidence consisting of or relating to information so classified by the terrorism intelligence authority by way of affidavit of a police officer of or above the rank of superintendent or another person authorised by the intelligence authority.*

The Bill also provides a power to make regulations under the new section, including regulations relating to the operations of a terrorism intelligence authority in the State, including in relation to its participation in any proceedings in the State and evidentiary provisions.

5.2 ISSUES

The issues that arise in relation to the national agreement to create a presumption against bail for accused persons with links to terrorism are similar to those that arise in relation to the presumption against parole (Chapter 4). First, how broadly should the presumption be set so that it effectively captures risk?

Second, what is the appropriate test for overcoming the presumption? This test must take account of any potential risk to the community as well as the presumption of innocence – a factor which does not apply when deciding whether or not a convicted offender should be granted parole. This means giving the bail decision maker sufficient discretion to administer the test.

Third, who should be able to make bail decisions in relation to accused persons to whom the presumption applies?

Fourth, how should the bail decision maker handle criminal intelligence information provided by police or intelligence agencies, particularly when these agencies seek to rely on this information without disclosing it to the accused?

Fifth, as for parole, the effectiveness of the presumption against bail will partly depend on effective cooperation and information sharing between State, Territory and Commonwealth police and intelligence agencies. The challenge is to ensure that these arrangements promote the overall objective of community safety while preserving, as far as possible, the sometimes differing operational procedures and objectives of police and intelligence agencies.

⁸⁷ Statutes Amendment (Terror Suspects) Detention Bill 2017 (SA) cl 5.

⁸⁸ Statutes Amendment (Terror Suspects) Detention Bill 2017 (SA) cl 7.

5.3 DISCUSSION

5.3.1 The presumption against bail

In keeping with the approach recommended in relation to the presumption against parole (Chapter 4), the Panel recommends a two-stage approach to the presumption against bail. In Chapter 4, the Panel recommended that the presumption should apply broadly to capture or identify the risk of terrorism as comprehensively as possible, albeit without identifying an excessive number of tenuous, incidental links to terrorism. As set out in Table 5.1, the Panel recommends that the same approach set out in Chapter 4 on parole should apply to the presumption against bail.

Table 5.1 Proposed list of accused persons to whom the presumption applies

SUB-CATEGORY OF ACCUSED PERSON TO WHOM THE PRESUMPTION APPLIES	RECOMMENDED VICTORIAN APPROACH TO THE PRESUMPTION AGAINST BAIL
Convicted of a terrorism offence	<p>Has been convicted (this includes those sentenced) of a terrorism offence under State, Territory and Commonwealth laws.</p> <p>It is not recommended that the presumption extend to someone only because they have been charged (e.g. a charge based on false information). Any real risk posed by such individuals will be captured by the below categories.</p>
Subject to a relevant order	<p>A person who:</p> <ul style="list-style-type: none"> – is or has been the subject of a control order – is or has been the subject of a preventative detention order.
Support (statements, activities)	<p>Has made statements or carried out activities supporting or advocating support for terrorist acts or violent extremism, including by supporting or advocating support for terrorist groups or offenders.</p>
Notification	<p>Is for any other reason assessed by police or intelligence agencies to be a terrorist risk, which is then notified to prosecuting authorities (e.g. police prosecutor, State or Commonwealth Director of Public Prosecutions).</p> <p>This includes offenders who have or have had an association or affiliation, sufficient to establish a terrorism risk, with any person or group that is:</p> <ul style="list-style-type: none"> – advocating or has advocated support for terrorist acts or violent extremism – directly or indirectly engaged in preparing, planning, assisting, fostering the doing of, or doing a terrorist act – a terrorist organisation within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code.

5.3.2 Overcoming the presumption

As discussed, the *Bail Act 1977* creates a presumption against bail for people accused of the two most serious categories of criminal offences. When the changes introduced by the *Bail Amendment (Stage One) Act 2017* come into force, a court will only be able to grant bail to:

- a person accused of a ‘Schedule 1’ offence (e.g. murder, serious drug trafficking, Victorian terrorism offences), if it is satisfied that there are exceptional circumstances to grant the accused parole
- a person accused of a ‘Schedule 2’ offence (e.g. intentionally causing serious injury or rape), if it is satisfied that the accused has shown compelling reason to be granted bail.⁸⁹

The court must also have regard to whether the release of the accused poses an unacceptable risk in determining if the accused has overcome the presumption.⁹⁰

The Panel notes that an accused person charged with a Schedule 1 offence, which includes offences against the *Terrorism (Community Protection) Act 2003* (the TCPA),⁹¹ will already need to demonstrate exceptional circumstances to overcome the presumption against bail. Information about this person’s terrorist links or support should be provided in relation to this bail application, but it is unnecessary for it to have any bearing on the threshold for overcoming the presumption, as exceptional circumstances is already the highest threshold.

For charges that do not involve Schedule 1 or Schedule 2 offences, but where the accused has, for example, a terrorist link or a previous terrorism conviction, the accused should be required to demonstrate compelling reasons to be granted bail. This reflects the increased risk to the community that such an accused potentially represents. This will allow the court to take account of factors including the strength of the alleged terrorist link and the seriousness of the alleged offending behaviour. If satisfied that the accused has demonstrated compelling reasons, the Panel notes that it would still be open to the prosecution to demonstrate that the accused presents an unacceptable risk.

When a person to whom the presumption applies make a bail application in relation to a Schedule 2 offence, the Panel considers that the test for overcoming the presumption should be higher than for an accused Schedule 2 offender who is not alleged to present a terrorist risk. Schedule 2 offences are already serious – for example, manslaughter, causing serious injury intentionally and aggravated home invasion. The combination of an alleged, Schedule 2 offence with a terrorist criminal history, existing links to terrorist activity, or demonstrated support for terrorism compounds the potential risk to the community. The Panel considers that this increased potential risk should be reflected by requiring that the accused demonstrate exceptional circumstances before becoming eligible to be granted bail. As above, if the accused meets this test, it would still be open to the prosecution to demonstrate that the accused presents an unacceptable risk.

The Panel notes that some Commonwealth offences are dealt with under Victoria’s bail laws and considers the Government consult with the Commonwealth to determine how the presumption will apply to these offences.

The right to liberty and the presumption of innocence

This recommendation extends the limitations on the right to liberty and the right to be presumed innocent within the Charter. The Panel considers that this limitation is justifiable for several reasons. First, it is critically important that the community is protected from harm caused by acts of terrorism. This is entirely consistent with the principle of maximising the safety of the community under s 1B of the *Bail Amendment (Stage One) Act 2017*. The presumption against bail for accused terrorism related offenders maximises the likelihood that these risks will be included as part of the bail decision-making process with a rigour that is commensurate with the seriousness of the potential risk to the community.

⁸⁹ *Bail Amendment (Stage One) Act 2017* (Vic) ss 5(2), 5(7)(b), 5(8).

⁹⁰ *Bail Act 1977* (Vic) s 4(2)(d)(i).

⁹¹ *Bail Amendment (Stage One) Act 2017* (Vic) s 13.

However, the presumption is intended to apply in a way that allows a court sufficient discretion to consider the totality of the circumstances before it. This includes taking account of the presumption of innocence and the right to liberty (consistent with s 1B of the *Bail Amendment (Stage One) Act 2017*). The extent of the limitation is not absolute. The ‘exceptional circumstances’ and ‘compelling reasons’ tests create a variable threshold for overcoming the presumption. This threshold is proportionate to the level of terrorist risk associated with the offender. For example, evidence that an offender’s association with a terrorist organisation was fleeting and represents a low risk may be easier to overcome than evidence of more committed involvement.

Young offenders

The Panel notes that s 3B of the *Bail Act 1977* already contains provisions which courts must apply to children when making a bail determination. These provisions require the court to consider matters including the:

- need to consider all other options before remanding the child in custody
- need to strengthen and preserve the relationship between the child and the child’s family, guardians or carers
- desirability of allowing the living arrangements of the child to continue without interruption or disturbance
- desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.

The Panel considers that these principles should also apply when there is a presumption against bail for a young, accused terrorism related offender and notes that this is consistent with the approach recommended in Chapter 4.

5.3.3 Bail decision making

The *Bail Amendment (Stage One) Act 2017* provides that only a court may make bail decisions in relation to a Schedule 1, ‘exceptional circumstances’ offence.⁹² The South Australian approach proposed in the Statutes Amendment (Terror Suspects) Detention Bill 2017 only allows a court to make these decisions in relation to ‘terror suspects.’⁹³ The Panel recommends that the Victorian Government adopt this approach in relation to the presumption against bail as it provides an appropriate level of oversight of what will often be complex and challenging decisions. In addition, courts are best placed to manage the criminal intelligence issues which are likely to arise in some of these cases.

5.3.4 Criminal intelligence information

Chapter 7 proposes a single process for the protection of criminal intelligence information during procedural or civil proceedings before a Victorian court, in relation to the TCPA. This includes a process for applying for and making ‘criminal intelligence protection orders’ in a way that allows courts to safeguard the rights of the accused and to retain their inherent jurisdiction to ensure procedural fairness. The Panel considers that a similar model be adapted to bail proceedings involving terrorism related offenders. This would apply in circumstances where a prosecuting authority intends to rely on intelligence information to oppose a bail application, but does not wish to disclose that information to the accused.

Enabling a court to retain its inherent jurisdiction would allow, for example, a court to decide that it could not rely on information about an accused’s terrorist risk without sharing that information with the accused. This would then place the onus on the prosecutor to decide whether it could continue to oppose the accused’s bail application in these circumstances.

⁹² *Bail Amendment (Stage One) Act 2017 (Vic)* s 11(2).

⁹³ Statutes Amendment (Terror Suspects) Detention Bill 2017 (SA) cl 7(2).

5.3.5 Roles, responsibilities and information sharing

In keeping the discussion in Chapter 4, the purpose of information sharing in relation to the presumption against bail is to promote the safety of the community by getting the right information into the right hands at the right time. The Panel notes that JCTT arrangements between Victoria Police, the AFP and ASIO are already well-established and formalised under an existing memorandum of understanding, so does not anticipate the same challenges as discussed in relation to parole in Chapter 4. However, the prosecuting agency will not be in a position to lead evidence to establish that the presumption applies in a particular case without timely, accurate and relevant information. This information must be shared by police and/or intelligence agencies.

The obvious triggers to make further enquiries – for example, a person is charged with a terrorism offence, or has publicly expressed support for terrorism – will not exist in many cases. Prosecutors may be dealing with an accused person who commits any kind of offence, with nothing to suggest any links to terrorism, unless police and intelligence authorities share this information. In addition, where it is proposed to rely on criminal intelligence information in bail applications, accurate and timely communications between intelligence agencies, police and prosecutors will be essential.

To address these issues, the Panel recommends that the Memorandum of Understanding between Victorian Joint Counter Terrorism Team (JCTT) members in relation to parole should also address information sharing requirements for bail decisions by setting out the roles and responsibilities, including information sharing arrangements:

- between members of the Victorian JCTT in relation to bail decisions, including how information would be shared with prosecuting agencies
- between the JCTTs of all Australian jurisdictions in relation to interstate movements of persons relating to bail decisions.

CHAPTER 6 SPECIAL POLICE POWERS

Recommendation 13

That the requirement that the Premier's approval of an interim authorisation be retained, but that Part 3A of the *Terrorism (Community Protection) Act 2003* (Vic) be amended to:

- provide for an interim authorisation to operate without the Premier's approval if he or she is not available, and that the Premier must be notified as soon as practicable after the authorisation is made;
- provide that the Premier can revoke the interim authorisation;
- extend the duration of an interim authorisation from 24 hours to 48 hours (in sections 21D and 21E);
- provide that the Premier may delegate his or her power to provide written approval;
- extend the application of special police powers to protective services officers (and that these new powers be accompanied by requisite training); and
- introduce a power to enable a police officer to take control of premises or things for operational purposes, if necessary for the purposes of the interim authorisation or authorisation.

Recommendation 14

That Victoria Police continue to trial and streamline their processes for seeking approval for an interim authorisation.

Recommendation 15

That the requirement in sections 21D(1)(a) and 21D(4)(b) (that the terrorist act occur in the next 14 days) be replaced with the Commonwealth's formulation for consistency.

6.1 BACKGROUND

6.1.1 Summary of current legislation

Part 3A of the *Terrorism (Community Protection) Act 2003* (Vic) (TCPA) enables the Chief Commissioner of Police (CCP) to apply to the Supreme Court of Victoria to authorise the exercise of special police powers in the following limited circumstances:

- to protect persons attending events from a terrorist act, where the event involves, or is likely to involve, the attendance of prominent persons or of a large number of people (section 21B);
- to prevent, or reduce the impact of, a terrorist act, where the CCP is satisfied on reasonable grounds that the terrorist act is occurring or that there is a threat of a terrorist act occurring in the next 14 days (section 21D);

- relating to the investigation of, or recovery from, a terrorist act, where the exercise of special police powers will substantially assist in apprehending persons responsible, investigating the terrorist act or preserving evidence, or the recovery process in the aftermath of the terrorist act (section 21E); and
- to protect essential services from a terrorist act (section 21F).

The special powers have only been enlivened once – as a preventative measure in 2006 to protect persons attending the Commonwealth Games.

Interim authorisations

Sections 21D and 21E of the TCPA are the relevant sources of power for responding to imminent or presently occurring terrorist acts. Each can be given through an interim authorisation before full authorisation is sought from the Supreme Court of Victoria.⁹⁴

Section 21D(1) applies if a terrorist act is occurring or may occur. It enables the CCP, or his or her Deputy,⁹⁵ to give an interim authorisation for the exercise of the special powers, with the written approval of the Premier, if the CCP:

- (a) *is 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; and*
- (b) *is satisfied that the exercise of those powers will substantially assist in—*
 - (i) *preventing the terrorist act; or*
 - (ii) *reducing the impact of the terrorist act, or of the threat of a terrorist act, on the health or safety of the public or on property.*

Section 21E(1) also applies if a terrorist act is occurring, but otherwise looks backward to an act that has occurred. It enables the CCP to give an interim authorisation for the exercise of the special powers, with the written approval of the Premier, if the CCP:

- (a) *is satisfied that there are reasonable grounds for believing that a terrorist act has occurred or is occurring; and*
- (b) *is satisfied that the exercise of those powers will substantially assist in—*
 - (i) *apprehending the persons responsible for the terrorist act; or*
 - (ii) *the investigation of the terrorist act, including the preservation of evidence of, or relating to, the terrorist act; or*
 - (iii) *the necessary recovery process for the community in the aftermath of the terrorist act.*

Interim authorisations, including purported interim authorisations, are not open to challenge or review.⁹⁶

The duration of an interim authorisation under sections 21D or 21E cannot exceed 24 hours.⁹⁷ If the CCP considers that an authorisation should have effect beyond 24 hours, they must make an application to the Supreme Court for an authorisation as soon as practicable,⁹⁸ and outline how the exercise of the special powers will substantially assist in achieving the aims of sections 21D or 21E.⁹⁹

⁹⁴ Sections 21D(3) and 21E(3) enable the Chief Commissioner to make an application to the Supreme Court for an authorisation, without an interim authorisation having been given.

⁹⁵ *Terrorism (Community Protection) Act 2003* (Vic) s 21AB.

⁹⁶ *Terrorism (Community Protection) Act 2003* (Vic) s 21J.

⁹⁷ *Terrorism (Community Protection) Act 2003* (Vic) s 21(2)(a).

⁹⁸ *Terrorism (Community Protection) Act 2003* (Vic) ss 21D(2), 21E(2).

⁹⁹ *Terrorism (Community Protection) Act 2003* (Vic) ss 21D(4), 21E(4).

Content and target of an interim authorisation

Section 21G(1) enables special powers to be exercised in relation to any or all of the following:

- (a) a particular person named or described in the authorisation;
- (b) a particular vehicle, or a vehicle of a particular kind, described in the authorisation;
- (c) a particular area described in the authorisation.

The interim authorisation must include a description of the general nature of the terrorist act or threatened terrorist act to which it applies, and must name or describe the person, vehicle or area targeted by the authorisation.¹⁰⁰

Special powers

Once an interim authorisation or authorisation under sections 21D or 21E is made, police officers may use special powers to:

- obtain disclosure of identity;
- search persons, including ordinary searches, frisk searches, and in the case of a person suspected of being the target of an authorisation, strip searches;¹⁰¹
- search vehicles;
- move vehicles;
- enter and search premises;
- cordon off target area, for the purposes of stopping and searching persons, vehicles or premises; and
- seize and detain things (including a vehicle).¹⁰²

In carrying out these powers, police officers and persons assisting police may use such force as is reasonably necessary to exercise their special powers.¹⁰³

6.1.2 Developments since the 2014 Review

The 2014 *Victorian Review of Counter-Terrorism Legislation* (2014 Review) comprehensively analysed special police powers, as well as the COAG Committee's review of these powers. Though there was little evidence to judge their effectiveness, the 2014 Review considered the powers to be effective and adequate, noting that improvements to their effectiveness and transparency could be made.¹⁰⁴

On this basis, the 2014 Review made two recommendations:¹⁰⁵

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' – that is, that the expression 'occurring in the next 14 days' be replaced by the expression 'occurring sufficiently soon as to justify the action being taken'.¹⁰⁶

¹⁰⁰ *Terrorism (Community Protection) Act 2003* (Vic) s 21H(4)(b)–(c).

¹⁰¹ *Terrorism (Community Protection) Act 2003* (Vic) s 21G(3), Schedule 1.

¹⁰² Police officers who are authorised to use special powers under sections 21B and 21F may only use the special powers specified in the authorisation (*Terrorism (Community Protection) Act 2003* (Vic) s 21N).

¹⁰³ *Terrorism (Community Protection) Act 2003* (Vic) s 21.

¹⁰⁴ Victorian Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (September 2014) 119.

¹⁰⁵ *Ibid* 122.

¹⁰⁶ *Ibid* 77.

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.’

In its response tabled on 16 September 2014, the Victorian Government indicated support for recommendation 12 and support-in-principle for recommendation 13.¹⁰⁷

At the time of writing, however, recommendations 12 and 13 are yet to be implemented.

6.2 ISSUES

In its submission to the Panel, Victoria Police have raised a number of concerns with the current provisions regulating special powers. Arguably, these issues should be understood in the context of the delay in implementing the reforms recommended by the 2014 Review which, if implemented, may alleviate some of the more general concerns in relation to the operation of these powers.

6.2.1 Written approval of the Premier

Victoria Police submits that the legislative requirement to obtain the Premier’s written approval would hamper to respond efficiently and effectively to a state of emergency. In its submission to the Panel, Victoria Police echoed its previous concerns, which were raised in the 2014 Review, that the Premier’s approval requirement ‘may cause administrative delays, which could limit the ability to take quick and effective action to protect the community’.¹⁰⁸

The current Victoria Police process for obtaining the Premier’s approval is guided by policies and protocols. The Panel has reviewed these policies and protocols, and notes that the process is multi-layered and expands upon the authorisation requirements of section 21H of the TCPA.

Victoria Police propose amending the TCPA to enable the CCP to authorise the immediate exercise of special powers without the written approval of the Premier, where they consider that an interim authorisation is necessary.

6.2.2 Duration of interim authorisations

Victoria Police has expressed dissatisfaction with the limited duration of an interim authorisation (24 hours), and cited the practical difficulties of this from an investigative and management perspective. In the view of Victoria Police, the authorisation would most likely expire before any meaningful investigation had been conducted.

Victoria Police propose that the period of an authorisation be extended for up to 7 days, as is the case in NSW.¹⁰⁹ It is intended that, under this proposed option, the combined duration of an interim authorisation and an authorisation conferred by the Supreme Court would not exceed 14 days.

6.2.3 Protective Services Officers

The functions of Protective Services Officers (PSOs) include providing services for the protection of persons holding official or public offices, places of public importance, and the general public in certain places.¹¹⁰

¹⁰⁷ *Government Response to Recommendations of the Review of Victorian Counter-Terrorism Legislation* (16 September 2014) 6–7.

¹⁰⁸ Victorian Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (September 2014) 117.

¹⁰⁹ *Terrorism (Police Powers) Act 2002* (NSW) s 11(2)(a).

¹¹⁰ *Victoria Police Act 2013* (Vic) s 37.

PSOs are not police officers under the *Victoria Police Act 2013* (Vic). By consequence, PSOs are not permitted to use special police powers without the supervision of a police officer. Section 21K(1) of the TCPA provides that:

The special police powers conferred by this Part may be exercised by any police officer or, subject to subsection (3), by any other person assisting the police officer in that exercise and acting under the direction and control of the police officer.

Victoria Police expressed concern that, in a multiple attack event, this section limits the ability for Victoria Police to draw on its PSOs as a resource to respond to the event. As section 21K of the TCPA would require PSOs to act 'under the direction and control of the officer', this would require police resources to be distributed to ensure that PSOs are adequately supervised.

In response to this issue, Victoria Police propose that the TCPA be amended to expressly provide that PSOs are permitted to exercise special police powers within designated areas.

6.2.4 Requisition of premises and resources

Victoria Police has raised concerns that the TCPA does not enable police to commandeer premises and things to utilise in the course of exercising its special powers.

Currently, section 21S(1) of the TCPA enables a police officer to enter and search any premises without warrant if:

- (a) *the police officer suspects on reasonable grounds that a person who is the target of an authorisation may be on the premises; or*
- (b) *the police officer suspects on reasonable grounds that a vehicle that is the target of an authorisation may be on the premises; or*
- (c) *the premises are in an area that is the target of an authorisation.*

Police also have the power to direct people to leave or remain at premises which are entered and searched,¹¹¹ and to seize and detain things for investigative or evidentiary purposes.¹¹²

Victoria Police expressed concern that the TCPA does not expressly provide police officers with the power to control premises or resources to utilise for operational purposes. This may inhibit the ability for police to effectively carry out their duties in an emergency situation (for instance, setting up sniper locations, forward command posts and family liaison centres).

Victoria Police proposes that Victoria includes in the TCPA a similar provision to that in Queensland's *Public Safety Preservation Act 1986* (Qld), which provides that where there is an emergency situation, an 'emergency commander' may direct an owner (or the person in charge or in control) of any resource, to surrender it and place it under the emergency commander's or police control.¹¹³ A 'resource' is defined as any animal or anything which may provide aid or be assistance in any emergency situation.¹¹⁴

Victoria Police submits that a similar provision would strengthen their ability to respond to incidents when utilising special police powers under the TCPA.

111 *Terrorism (Community Protection) Act 2003* (Vic) s 21S(3).

112 *Terrorism (Community Protection) Act 2003* (Vic) s 21U.

113 *Public Safety Preservation Act 1986* (Qld) s 8(1).

114 *Public Safety Preservation Act 1986* (Qld) schedule (definition of 'resource').

6.3 DISCUSSION

6.3.1 Efficiency in enlivening special powers

The process for seeking the Premier's approval was raised as a barrier to rapid action as part of the 2014 Review. Given the significant changes in the terrorism landscape since then, the Panel is of the view that it is timely to consider whether any efficiencies can be gained in the interim authorisation process.

2014 Review

While understanding of Victoria Police's concerns, the 2014 Review noted that the Premier's written approval provided an additional safeguard in light of the 'extraordinary nature' of the special powers, and an assurance that these powers would only be invoked where their use was 'necessary and effective'.¹¹⁵

The 2014 Review carefully considered the necessity of the Premier's written approval, ultimately concluding that it should be retained. The 2014 Review stressed the importance of the Premier's involvement as a significant and effective safeguard. At the same time, it observed that 'there could be more scope for practical and meaningful rehearsal of the application for and the use of these powers'.¹¹⁶

Role of the Premier

The Panel recognises the important role of the Premier in approving interim authorisations. Historically, the Premier has played an important part in declaring states of emergency. For instance, the *Emergency Management Act 1986* (Vic) provides for the organisation of emergency management in response to a wide variety of situations including acts of terrorism. Under that Act, section 23(1) empowers the Premier to declare a state of disaster to exist in the whole or in any part or parts of Victoria. In this regard, the legislative requirement to seek the written approval of the Premier is consistent with the Premier's leadership role in wider emergency circumstances.

In addition, the Premier is an elected representative and is directly accountable to Parliament and the people of Victoria. As the first Minister, the Premier and his department provide a whole-of-government perspective on issues of state-wide significance and concern. The requirement to seek the Premier's approval enables the Premier to take into account broader community values, including social cohesion. In this context, the extraordinary circumstances required to trigger their operation justify the role of the Premier in approving interim authorisations.

Significantly altering the Premier's role would have implications if other concessions are not made. The privative clause in section 21J of the TCPA prevents a decision of the CCP to order an interim authorisation from being challenged or reviewed. Removing the role of the Premier would therefore remove any oversight of the interim authorisation.

Upon examination, Victoria Police's policies that guide the authorisation process emphasise the need for written documents in the first instance. For example, there is an expectation that requests for the Premier's approval, and the Premier's approval itself, are to be set out in letters.

However, the legislative requirement for written approval has a flexible application in recognition of the practical necessity of enlivening an interim authorisation with as little delay as possible. Subsections 21H(2) and (3) of the TCPA explicitly provides for this flexibility:

(2) *An authorisation may be given orally or by instrument in writing.*

(3) *If the authorisation is given orally, it must be confirmed by instrument in writing as soon as it is reasonably practicable to do so and, in any event, before an application is made to the Supreme Court in respect of the matter.*

¹¹⁵ Victorian Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (September 2014) 119.

¹¹⁶ *Ibid* 120.

In practice, this would enable Victoria Police to seek approval via a telephone conversation in the first instance, which can be later confirmed in writing.

Other jurisdictions

The ACT and Tasmania are the most analogous jurisdictions to Victoria, in that they require the written approval of the Chief Minister and Premier respectively to enliven the special powers, in addition to the authorisation of the CCP or equivalent.¹¹⁷

NSW's special powers regime requires an authorisation to be given with the 'concurrence' of the Minister for Police,¹¹⁸ but allows for some flexibility in certain circumstances. Under section 9(2) of the *Terrorism (Police Powers) Act 2002* (NSW):

An authorisation may be given without the concurrence of the Police Minister if he or she is not able to be contacted at the time it is given.

Section 9(3) provides that if the authorisation is given without the concurrence of the Police Minister:

- (a) *the Police Minister is to be notified of the authorisation as soon as the Police Minister is available to be notified, and*
- (b) *in the case of an authorisation under section 5—the authorisation ceases to have effect if the Police Minister has not confirmed the authorisation within 48 hours after the authorisation was given.*¹¹⁹

As a further safeguard, the NSW regime enables the Minister for Police to revoke the authorisation.¹²⁰

Queensland provides for a devolved model under the *Public Safety Preservation Act 1986* (Qld). This legislation allows a 'terrorist emergency commander' to declare a terrorist emergency and enliven the use of 'terrorist emergency powers' under section 8M of that Act.¹²¹ The Minister for Police or the Premier only needs to be informed that a declaration has been made.¹²² The legislation preserves the right of the Minister for Police or the Premier to revoke the declaration,¹²³ and therefore the ability for police officers under the direction of the terrorist emergency forward commander to use special powers.

The Counter-Terrorism and Other Legislation Amendment Bill 2017 (Qld), which was introduced on 14 June 2017, will, if enacted, widen the scope for use of special powers and further devolve decision-making where an extraordinary emergency situation is declared.¹²⁴

6.3.2 Creating a more efficient approval process

The Panel understands the need for prompt, expedient and effective action, and that seeking the written approval of the Premier adds a layer of administrative process. It is important to distinguish the burden imposed by the legislative requirement to seek the Premier's approval from that which is a product of internal departmental processes. The Panel considers that improvements can be made at both levels, to ensure an appropriate balance is struck between safeguards and efficiency.

The Panel considers that the Premier's role should be retained, to provide a whole-of-government perspective and oversight over the temporary curtailment of liberties of the community or a section of the community. The role of the Premier provides an important safeguard against any unintended consequences of an interim authorisation.

¹¹⁷ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 64, 71; *Police Powers (Public Safety) Act 2005* (Tas) ss 9–10.

¹¹⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 9(1).

¹¹⁹ Section 5 of the *Terrorism (Police Powers) Act 2002* (NSW) is equivalent to section 21D of the *Terrorism (Community Protection) Act 2003* (Vic).

¹²⁰ *Terrorism (Police Powers) Act 2002* (NSW) s 12(1).

¹²¹ *Public Safety Preservation Act 1986* (Qld) s 8G.

¹²² *Public Safety Preservation Act 1986* (Qld) ss 8G(6)–(7).

¹²³ *Public Safety Preservation Act 1986* (Qld) s 8G(9)(a).

¹²⁴ Counter-Terrorism and Other Legislation Amendment Bill 2017 (Qld) sub-div 2.

Nonetheless, the Panel understands the need for amendments to account for the practical realities of invoking special powers where the Premier is unavailable. The Panel recommends that further flexibility, in line with the regime in NSW, is added to the legislative requirement to seek the Premier's written approval.

Interim authorisation while awaiting Premier's approval

There may be unforeseen instances where it is not possible to contact the Premier immediately and yet urgent action is required (for instance, a telecommunications breakdown or where the Premier's safety is in jeopardy). In these cases, the Panel proposes that in situations where the Premier is unable to be contacted, as soon as practicable after the CCP decides to enliven the use of special powers:

- the interim authorisation may be given without the Premier's approval as long as the Premier is notified of the decision as soon as he or she is available; and
- the Premier has the power to revoke the authorisation within the duration of the authorisation being made.

Victoria Police's policies and protocols could be adapted to reflect this flexibility, and provide guidance to the CCP in allowing for sufficient time for a response before triggering the powers.

The wording of the proposed amendments sections 21D and 21E could read as follows:

- (1) An interim authorisation made under section 21D may only be given with the approval of the Premier, except as provided by subsection (2).*
- (2) An authorisation may be given without the approval of the Premier if he or she is not able to be contacted at the time it is given, and the CCP has taken reasonable steps to contact the Premier.*
- (3) If the authorisation is given without the approval of the Premier, the Premier is to be notified of the authorisation as soon as he or she is available to be notified.*
- (4) The Premier may revoke the interim authorisation at any time.*
- (5) The cessation of an interim authorisation (by revocation or otherwise) does not affect anything lawfully done in reliance on the authorisation before it ceased to have effect.*

Power to delegate approval

There may also be situations where it is foreseeable that the Premier may not be able to be contactable. In these situations, the Panel proposes that the TCPA be amended to enable the Premier to delegate his or her approval to another Minister.

Extending the duration of interim authorisations

To ensure Victoria Police has the flexibility needed to ensure appropriate approval, the Panel proposes extending the duration of interim authorisations made under sections 21D and 21E from 24 hours to 48 hours, if the Premier (or the Premier's delegate) approves.

The current duration of 24 hours, after which the CCP must apply to the Supreme Court for an extension, is likely to be unduly restrictive for Victoria Police to effectively respond to a terrorist act, especially where the target of the authorisation is defined broadly. In the course of responding to a terrorist event, Victoria Police's capability is likely to be stretched – as well as preparing any advice on enlivening the special police powers, personnel will also be occupied with providing advice on operational issues and any investigations. An extension of the duration of interim authorisations may also obviate the need to apply to the Supreme Court for a short extension.

It is intended that an extension of time will enable Victoria Police to concentrate their efforts on organising their immediate operational response and conducting post-event investigations, as well as complete any written instruments required by the TCPA and, if necessary, prepare an application for the Supreme Court. The Panel is not of the view that a duration of 7 days is necessary.

Review of policies and protocols

In the Panel's opinion, Victoria Police's processes could be more flexible and improvements would greatly enhance the utility of the proposed legislation. The Panel considers that the current Victoria Police process exceeds the demands of section 21H(4) of the TCPA and should be modified accordingly.

In light of this, the Panel recommends that Victoria Police continue to review its processes for interim authorisations to ensure more timely advice to the CCP, and to trial its processes.

6.3.3 Enabling PSOs to use special powers

The Panel is sympathetic to the view that in a terrorist situation where special police powers have been enlivened, all available police resources should be directed to responding to the incident. PSOs are entrusted to protect places of significance (for example, Parliament and courts), public office holders (notably the Premier and members of Parliament), as well as maintaining the safety of the Victorian community more generally at public transport hubs. In extraordinary circumstances, there may be a need to supplement police officer resources in order to effectively and comprehensively resolve a terrorist related incident.

In this regard, the Panel considers that there is a role for PSOs to supplement the role of police officers by using special police powers, especially where those PSOs are entrusted with the safety of public places of significance and persons in public office.

It would not be remiss to note the extraordinary nature of these powers – they curtail, albeit temporarily both in terms of time and geographic area, the liberties of the community. If the Panel's recommendation is accepted, all officers, including PSOs, will need to have the requisite skills, experience and training to effectively and judiciously deploy these powers.

6.3.4 Threshold test for terrorist acts that are yet to occur

Recommendation 12 of the 2014 Review remains to be implemented. As noted in Chapter 3, the Victorian Government has previously committed to the application of the Commonwealth's 'is capable of being carried out, and could occur, within the next 14 days' formulation as the threshold test for detention in relation to terrorist acts that are yet to occur.

The Panel considers that the requirement in sections 21D(1)(a) and 21D(4)(b) (that the terrorist act occur in the next 14 days) should, for consistency, be replaced with the Commonwealth's formulation.

6.3.5 Additional power to appropriate premises and things

Victoria's special police powers are already significant and, once enlivened, provide police with a broad range of tools to manage their operational response to an imminent or occurring terrorist act. The Panel nonetheless recognises the practical value in providing police officers with a special power to appropriate premises and things for operational uses.

Legislation currently does not provide for a power to appropriate property for the purposes of incident management. Rather, Victoria Police relies on the consent of owners of premises and informal arrangements. Relying on the goodwill of premises owners, for instance, has not yet proved problematic. Seeking the consent of the owner of the property is appropriate and should be sought in the first instance.

However, there may be exceptional circumstances in response to a terrorist act where there is a critical need to act quickly and that the use of premises or a thing is required as a measure of last resort. In such circumstances, the Panel recommends that the TCPA be amended to enable a police officer (and PSO), if they reasonably consider the use of certain premises or thing/s to be necessary to respond to the terrorist act, to –

- direct an owner (or a person apparently in charge or in control) of premises or things within an area that is the target of an authorisation to place it in an officer’s control; and
- take possession and make use of premises or things for the purposes of an authorisation.

The duration of this possession must not exceed the duration of the interim authorisation, or the authorisation granted by the Supreme Court.

The Panel also recommends that the legislation provide for persons whose premises or things are used by Victoria Police to be able to claim compensation from the State. Compensation could cover losses, including any damage to the premises or thing, and any lost earnings during the police officers’ appropriation of the premises. Further legislative protection to owners of premises and things could be explicitly provided for in the proposed amendment; this would be similar to what is currently provided for under section 21S(2) of the TCPA, which provides:

The police officer must do as little damage as possible.

The *Emergency Management Act 1986* (Vic) provides a useful precedent for such a provision, with section 24(5) providing:

If the property of a person is taken or used under subsection (2)(c) that person may receive such compensation as is determined by the Minister.¹²⁵

A provision such as this would enable the Premier to determine compensation for persons whose premises or things are used for operational purposes.

¹²⁵ Section 24(2)(c) of the *Emergency Management Act 1986* (Vic) enables the Minister to take possession and make use of any person’s property as the Minister considers necessary or desirable for responding to a state of disaster.

CHAPTER 7 PROTECTION OF CRIMINAL INTELLIGENCE

Recommendation 16

Create a single process for the protection of criminal intelligence, applicable to relevant applications under the *Terrorism (Community Protection) Act 2003* (Vic) (not criminal prosecutions), containing the following elements:

- a definition for ‘criminal intelligence’ similar to the definition used in the *Criminal Organisation Control Act 2012* (Vic) that includes ‘significant damage to property or infrastructure’ and ‘national security’;
- the court determines whether or not to grant a criminal intelligence protection order;
- the court, at its discretion, may make a criminal intelligence protection order on the papers;
- the test for determining whether to grant a criminal intelligence protection order should require the court to consider both the public interest in the protection of criminal intelligence and the public interest in ensuring that those against whom court orders are sought, are provided with sufficient information to respond meaningfully to the case put against them;
- the court should be able to exclude the respondent (and their legal representatives) from both the protection application and the substantive application;
- once a criminal intelligence protection order is made, the court may in its discretion use the criminal intelligence to determine an application in a way that does not disclose the information to the respondent or the respondent’s legal representative;
- the respondent must be told everything except the criminal intelligence, and must be given an opportunity to make submissions, adduce evidence and produce material on the ultimate question in issue;
- there must be protections against witnesses being compelled (by cross-examination or otherwise) to disclose criminal intelligence;
- the court may appoint a special counsel to represent the interests of the respondent in both a protection application and substantive application;
- the court must retain its inherent jurisdiction to:
 - stay the proceeding for abuse of process if the non-disclosure of the criminal intelligence would result in an unfair trial;
 - not rely upon the criminal intelligence; and
 - decide what weight to give to the criminal intelligence.

7.1 BACKGROUND

7.1.1 Summary of existing legislation

Part 5 of the *Terrorism (Community Protection) Act 2003* (Vic) (TCPA) provides for the protection of counter-terrorism information by enabling the court to:

- excuse a person from the requirement to disclose counterterrorism information in certain circumstances; and
- inspect a document for the purpose of determining the question.¹²⁶

The circumstances in which a court may excuse a person from disclosing information are if:

- the disclosure would prejudice the prevention, investigation or prosecution of a terrorist act or suspected terrorist act; and
- the public interest in preserving secrecy of confidentiality outweighs the public interest in disclosure.¹²⁷

‘Counter-terrorism information’ is defined in the TCPA to mean information relating to covert methods of investigation of a terrorist act or suspected terrorist act.¹²⁸

7.1.2 Alternative legislation protecting criminal intelligence

In their written submission to the review, Victoria Police identified two models for protected information that may be relevant to the creation of new protections for criminal intelligence.

The first is Part 4 of the *Criminal Organisation Control Act 2012* (Vic) (COCA), which includes the following key elements:

- the court determines, following a separate hearing, whether to grant a criminal intelligence protection order (protection application);
- the court may order a closed court for both the protection application and the substantive application;
- the court may appoint special counsel to represent the interests of the respondent in both the protection application and the substantive application; and
- the applicant may withdraw the application if the court refuses to grant a criminal intelligence protection order or hear either application in closed court.¹²⁹

Criminal intelligence is defined in the COCA to mean:

any information, document or other thing relating to actual or suspected criminal activity in Victoria or elsewhere, the disclosure of which could reasonably be expected to—

(a) prejudice a criminal investigation, including by revealing intelligence gathering methodologies, investigative techniques or technologies, or covert practices; or

(b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or

(c) endanger a person's life or physical safety.¹³⁰

¹²⁶ *Terrorism (Community Protection) Act 2006* (Vic) ss 23–4.

¹²⁷ *Terrorism (Community Protection) Act 2006* (Vic) s 23.

¹²⁸ *Terrorism (Community Protection) Act 2006* (Vic) s 3.

¹²⁹ *Criminal Organisations Control Act 2012* (Vic) ss 70–83.

¹³⁰ *Criminal Organisations Control Act 2012* (Vic) s 3(1).

The other model identified by Victoria Police is contained in section 25K of the *Terrorism (Police Powers) Act 2002* (NSW) (TPPA). Section 25K was introduced with the investigative detention provisions on 16 May 2016 and applies only in relation to investigative detention. Section 25K includes the following key elements:

- _ an eligible Judge determines whether the particular information is within the statutory definition of criminal intelligence;
- _ once a determination is made, the information:
 - _ is withheld from the terrorism suspect and his or her legal representative; and
 - _ is not disclosed in the court record.
- _ the applicant may withdraw the particular information if the eligible judge refuses to make the determination.¹³¹

Criminal intelligence is defined in the TPPA to mean:

any report or other information whose disclosure:

- (a) will have a prejudicial effect on the prevention, investigation or prosecution of an offence, or*
- (b) will result in the existence or identity of a confidential source of information relevant for law enforcement purposes being revealed or made discoverable, or*
- (c) will result in confidential investigative methods or techniques used by police or security agencies being revealed or discoverable, or*
- (d) will endanger a person's life or physical safety.¹³²*

7.2 ISSUES

The primary issue identified by stakeholders during the Panel's consultations is that existing legislative provisions (including in the TCPA, the *Evidence Act 2008* (Vic) and the *Open Courts Act 2013* (Vic)) do not permit the court to receive and act on criminal intelligence evidence in procedural applications under the TCPA where that evidence is withheld from the respondent. This poses a problem, particularly in the context of applications for preventative detention orders, as it means that law enforcement agencies may withhold information relevant to an application for fear that the information will become public or fall into the wrong hands.

This concern was reflected in Victoria Police's submission to the review, which emphasised the necessity of having clear and robust mechanisms to protect criminal intelligence and the risk that, without such protections, law enforcement and intelligence agencies may be reluctant to share and use criminal intelligence in applications in which its use might be highly relevant. This issue is concerning to the Panel as a reluctance to use relevant information to support an application may jeopardise its success and risk losing the protection which a successful application would have provided.

¹³¹ *Terrorism (Police Powers) Act 2002* (NSW) s 25K.

¹³² *Terrorism (Police Powers) Act 2002* (NSW) s 25K(1).

7.3 DISCUSSION

7.3.1 Definition of criminal intelligence

In their submission, Victoria Police recommended that the definition of 'counter-terrorism information' be replaced with a wider and more functional definition that better captures the various types of criminal intelligence upon which Victoria Police may seek to rely. In particular Victoria Police suggested the following definition:

***Criminal intelligence** means any information, document or other thing relating to an actual or suspected terrorist act, or the preparation for such an act, in Victoria or elsewhere, where the disclosure of which could be expected to–*

- (a) prejudice or interfere with a terrorism related investigation, prosecution or intervention, including but not limited to revealing intelligence gathering collection or methodologies, investigative techniques or technologies, covert practices and methodologies, or inter-agency counter-terrorism information sharing arrangements or processes;*
- (b) enable the discovery of the existence, or identity of a confidential source (including but not limited to a law enforcement or intelligence source such as a police officer or ASIO agent) of information relevant to State, Commonwealth, or overseas law enforcement or counter-terrorism intelligence agency collection and investigations;*
- (c) endanger a person's life or physical safety, or threaten significant damage to property or infrastructure; or*
- (d) facilitate the escape of offenders from Victoria, and/or Australia, or*
- (e) facilitate the destruction or removal of evidence in relation to an actual or suspected terrorist.*

With the exception of paragraphs (d) and (e), and the underlined sections, this definition is broadly consistent with the definition of criminal intelligence in both the TPPA and the COCA. Victoria Police did not provide an explanation for the inclusion of paragraphs (d) and (e) and as such it is difficult to assess the utility of the expansion except to note that it is hard to conceive of a situation falling within paragraph (e) but not paragraph (a).

The Panel accepts that the present definition of 'counter-terrorism information' is inadequate and should be amended in line with the definitions of criminal intelligence in the COCA or TPPA. The Panel is not persuaded that the definition should be further expanded to include additional paragraphs (d) and (e). It is persuaded that paragraph (c) should be extended to include 'significant damage to property or infrastructure'. In this regard, the Panel notes the serious consequences for the respondent of the order if the court finds that information is criminal intelligence, and the need to ensure that the definition is no broader than is necessary to achieve the objective of the provisions.

In addition to the above, the Panel proposes that the new definition of criminal intelligence include an additional category of 'likely to prejudice national security', defined consistently with the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSIA).¹³³ The Panel considers that this inclusion may further facilitate information sharing between Commonwealth and State agencies by giving comfort to intelligence agencies that national security information will be protected from disclosure in relevant proceedings. The Panel also considers that this inclusion will cover the type of information captured by the underlined text in paragraph (a) of the Victoria Police proposal.

¹³³ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 8, 17.

7.3.2 Determination of whether information falls within the statutory definition of criminal intelligence

Method for determining the protection application

One of the key differences between the models for protection of criminal intelligence in the TPPA and COCA is the method adopted to assess whether to either grant a criminal intelligence protection order or classify material as criminal intelligence. Under the COCA, this determination is made by the court (usually a closed court), following a separate hearing on the question, potentially including witness evidence and submissions from both the applicant and special counsel (if appointed by the court).¹³⁴ By contrast, under the TPPA, this determination is made without a hearing by an eligible judge.¹³⁵

In their written submission to the review Victoria Police emphasised the necessity of having a process that was as expeditious as possible, in recognition of the time sensitive nature of T CPA applications (i.e. preventative detention orders). In order to address this objective, Victoria Police recommended the replacement of special counsel with a 'suitably qualified independent expert'. This recommendation appeared to reflect the perception that the role of special counsel, which necessarily involves allowing time for special counsel to:

- [*pre-hearing*] understand the relevant material and initially communicate with the respondent and/or the respondent's representative; and
- [*during hearing*] seek further information, if necessary, from the respondent and/or the respondent's representative including requesting an adjournment do so,¹³⁶

was too time consuming, especially in the context of terrorism where timing is often critical and delay potentially fatal. In the view of Victoria Police, an independent expert could aid the court in its determination without delaying the proceeding due to the need to communicate with the respondent.

The Panel acknowledges the time critical nature of counter-terrorism operations and the necessity of having an expeditious process for dealing with criminal intelligence. The Panel however is not convinced that the replacement of special counsel with an independent expert would expedite this process to the extent necessary to compensate for the consequential diminution in the rights of the respondent.

As an alternative, the Panel recommends a discretion that enables the court to determine a protection application on the papers, if the court considers it appropriate to do so. If necessary, the legislation could also specify considerations that the court may take into account when deciding whether to make a determination on the papers (for example, the urgency of the application and the existence of an unacceptable risk to the community). If the court decides to hold a protection application hearing, similar to the COCA, the Panel recommends a presumption that this be held in closed court and the court should have the option to appoint a special counsel. The Panel considers that these recommendations strike an appropriate balance between the need for expediency and the need to protect the rights of the respondent as much as possible.

Test for determining the protection application

The second key difference between the NSW and Victorian models is the test for determining whether to (depending on the jurisdiction) grant a criminal intelligence protection order or classify material as criminal intelligence. In Victoria the court must be satisfied that:

- the information is criminal intelligence; and

¹³⁴ *Criminal Organisations Control Act 2012* (Vic) ss 70–3.

¹³⁵ *Terrorism (Police Powers) Act 2002* (NSW) s 25K(2).

¹³⁶ *Criminal Organisations Control Act 2012* (Vic) ss 71–2.

- the reasons for maintaining the confidentiality of the criminal intelligence outweigh any prejudice or unfairness to the respondent in the substantive application.¹³⁷

By contrast, in NSW, the eligible judge must be satisfied that the particular information is within the definition of criminal intelligence.¹³⁸ While the Panel acknowledges the benefit of having legislation that is easy to understand, the Panel is concerned about the potential for uncertainty in the NSW test. In particular:

- the legislation is silent as to the weight, if any, the eligible judge should place on the potential prejudice or unfairness to the respondent in the substantive hearing if the information is classified as criminal intelligence;
- the legislation appears to assume that once a determination is made, the eligible judge will admit the information as evidence, and may then rely on that evidence in making its determination without regard to the possible unfairness and prejudicial effect of using that evidence; and
- it is unclear whether, notwithstanding that the information falls within the definition of criminal intelligence, the eligible judge has a discretion to refuse to act in reliance upon the undisclosed material, or stay the application, for abuse of process due to the non-disclosure resulting in an unfair trial.

Given the above risks, the Panel recommends the inclusion of a test, similar to the one set out in the COCA, for determining whether a criminal intelligence protection order should be granted similar to the one set out in the COCA. The Panel further recommends that the court retain, in both the protection application and the substantive hearing, its inherent jurisdiction to stay the proceeding for abuse of process if non-disclosure would result in an unfair trial.

7.3.3 Determination of substantive application involving criminal intelligence

In their submission to the review, Victoria Police recommended a procedure for determining a substantive application similar to the procedure adopted in section 25K of the TPPA. That is, once a criminal intelligence protection order is made:

- the criminal intelligence can be used as evidence in the substantive proceedings but withheld from the respondent and their legal representative;
- the material cannot be revealed in open court (including by witnesses) or supplied to any other person;
- the court file is closed and must not be accessed by any other person (including the media or its representatives) during or following the relevant proceeding; and
- the material is marked with a court reference and handed back to Victoria Police to be securely filed in a manner that allows for its retrieval, should it be required.

While the Panel acknowledges the simplicity and expediency of this approach, it is concerned that it may, in the Victorian context, unnecessarily burden certain rights protected by the *Charter of Human Rights and Responsibilities 2006* (Vic) (Charter), specifically the right to a fair hearing.¹³⁹ The Panel is also conscious to ensure that the approach it recommends does not exceed constitutional limits. Namely that, in accordance with Chapter III of the Constitution, 'State and Territory legislatures cannot confer or impose upon State or Territory courts functions which substantially impair their defining or essential characteristics as courts'¹⁴⁰ While the High Court has acknowledged the difficulty of identifying the exact constitutional limit, they have identified as a starting point consideration of the 'common law tradition of the open court, presided over by an independent judge, according procedural fairness to both parties'.¹⁴¹

¹³⁷ *Criminal Organisations Control Act 2012* (Vic) s 75.

¹³⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 25K(2).

¹³⁹ *Charter of Human Rights and Responsibilities 2006* (Vic) s 24.

¹⁴⁰ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 47.

¹⁴¹ *Ibid* 47[5].

To address the Charter issue and further safeguard against a risk of constitutional invalidity, the Panel recommends inclusion of the following elements:

A closed court procedure and explicit prohibitions against publication / witness disclosure

The inclusion of a closed court procedure could be achieved in one of two ways, either by explicitly setting out the procedure in the TCPA, or by amending section 30(2) of the *Open Courts Act 2013* (Vic) to make a criminal intelligence protection order under the TCPA a possible ground for a closed court order.¹⁴² The latter option has the benefit of avoiding duplication of existing law and as such is the Panel's preferred approach. The Panel also recommends explicitly stating in the legislation that despite anything to the contrary in the *Open Courts Act 2013* (Vic), there is a presumption that criminal intelligence will be dealt with in a closed court.¹⁴³

In relation to a prohibition against publication, the Panel recommends inclusion of an explicit provision that prohibits the mention of criminal intelligence in any open court, public court record or record of reasons provided to the respondent. Consistently with the approach to section 12 of the TCPA, the *Open Courts Act 2013* (Vic) should not apply to the new provision. The Panel also recommends the inclusion of clear protections against witnesses being compelled to disclose criminal intelligence in open court.

A role for special counsel

In contrast to the Public Interest Monitor, who argues for neither side,¹⁴⁴ the role of special counsel is to represent the interests of the respondent in any part of the hearing from which the respondent is excluded, or which deals with information withheld from the respondent. Unlike the respondent's own legal representation, the special counsel only appears in parts of the application that deal with criminal intelligence and does not usually incur any liability to the respondent in respect of their representation of them.

The Panel considers the inclusion of a role for special counsel will:

- mitigate against the risk of constitutional invalidity; and
- be essential to ensuring that the legislation is compatible with the Charter.¹⁴⁵

In this regard, the Panel is persuaded by the reasoning of the Supreme Court of Canada in *Charkaoui v Canada*, which suggested that the absence of special counsel may render a statutory scheme incompatible with human rights because there are less restrictive means available of achieving the purpose of the limitation:

*special [counsels] constitute one example of an approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible.*¹⁴⁶

While the Panel considers that the inclusion of special counsel is essential to Charter compatibility, it is presently unclear whether it is similarly essential to the constitutional validity of the scheme.¹⁴⁷ As such, while the Panel prefers an approach that uses special counsel, the Panel accepts that it may be possible, provided other safeguards are retained, to legislate for the protection of criminal intelligence without special counsel.

¹⁴² *Open Courts Act 2013* (Vic) ss 30(1)–(2).

¹⁴³ Noting the *Open Courts Act 2013* (Vic) s 28.

¹⁴⁴ The Public Interest Monitors role is described in section 4F of the *Terrorism (Community Protection) Act 2006* (Vic), as to 'appear at the hearing of the application to test the content and sufficiency of the information relied on and the circumstances of the application'.

¹⁴⁵ See *Chahal v United Kingdom* (1996) 23 EHRR 413, 469 regarding constitutional validity and the role of special counsel in ensuring that the respondent is accorded procedural fairness.

¹⁴⁶ *Charkaoui v Canada* [2007] 1 SCR 350, 398.

¹⁴⁷ The bench disagreed on the relevance of the inclusion of a public interest monitor (not special counsel) in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38. While French CJ took into account the role of the public interest monitor in favour of validity, Gageler J argued that 'it cannot cure a want of procedural fairness' (at [208]). The plurality did not consider the issue in detail.

The Panel has carefully considered the special counsel provisions in the COCA and has identified a number of elements that, in the opinion of the Panel, are not appropriate in the context of terrorism related applications. One such element is the flexibility given to the court to appoint, as special counsel, someone other than the person appointed (if any) in the protection application.¹⁴⁸ Given the time sensitive nature of applications under the TCPA, the Panel prefers an approach that requires, where possible, the appointment of the same person for both the protection and substantive application.

A second element that the Panel recommends modifying is the criteria prescribed for special counsel in the COCA. To be eligible as a special counsel under the COCA, the person must be a barrister and have, in the opinion of the court, 'the appropriate skills and ability'.¹⁴⁹ The Panel considers it preferable for there to be a designated pool of persons eligible to be selected as special counsel. Persons within this pool will have received specific training and will have appropriate security clearances. Creating a special counsel pool in advance will reduce the time required to identify an appropriate person and ensure that applications can proceed as quickly as possible.

The final element of the COCA that the Panel recommends amending is the ability for special counsel to communicate with the respondent after seeing the criminal intelligence. While an important measure for ensuring procedural fairness, the Panel is concerned that the risk of unintentional disclosure is too high and the potential for delays too great. The Panel is supported in this belief by results in the United Kingdom which has a similar ability, albeit in more limited circumstances.¹⁵⁰ The Panel understands that the power is rarely used and has not been shown to afford a greater deal of protection to the respondent.

The Panel's preferred approach would be to provide special counsel with a summary of:

- the allegations upon which the applications is based; and
- the evidence upon which the applicant seeks to rely in particular the criminal intelligence, prior to meeting with the respondent. This would maximise the ability of special counsel to extract relevant information from the respondent and minimise the unfairness of withholding the information from the respondent. This would also reduce the risk of accidental disclosure of the criminal intelligence to the respondent by special counsel.

Further protection of the rights of the respondent

The Panel recommends the inclusion of a specific provision in the legislation that states that respondent must be told everything except the criminal intelligence to enable them to respond meaningfully to the application against them. Furthermore the respondent or the respondent's legal representative must be allowed an opportunity to make submissions, adduce evidence and produce material on the ultimate question in issue. The Panel considers these elements to be fundamental to the principle of procedural fairness and to ensuring compatibility with the Charter.

Retention of judicial discretions

As mentioned above, the Panel recommends that the court retains its inherent jurisdiction to stay the proceeding for abuse of process if the non-disclosure of the criminal intelligence would result in an unfair trial. To this, the Panel now adds that the court should retain its inherent jurisdiction to decide:

- whether to rely upon the criminal intelligence; and
- the weight that should be given to the criminal intelligence.

The Panel considers that retaining these discretions will be important in ensuring that the scheme is constitutionally valid.

¹⁴⁸ *Criminal Organisations Control Act 2012 (Vic)* s 79(3).

¹⁴⁹ *Criminal Organisations Control Act 2012 (Vic)* ss 71(2), 79(2).

¹⁵⁰ For example, *Counter-Terrorism and Security Act 2015 (UK)*; *The Civil Procedure (Amendment) Rules 2015 (UK)* s 88.24.

7.3.4 Standardising the protection of criminal intelligence in the TCPA

Finally, the Panel notes that in addition to Part 5, there are other provisions of the TCPA, for instance section 13ZP(3), that address the protection of criminal intelligence. If the Panel's other recommendations are accepted, the Panel recommends removing these additional provisions. This will create a standard approach to the protection of criminal intelligence for all relevant TCPA applications and avoid any potential inconsistency between provisions.

NEXT STEPS

As outlined in Chapter 1, the Panel's Terms of Reference require that it complete its work in two reports. Report 1 is focused on urgent, practical changes to police powers and the presumption against bail and parole. In Report 2, the Panel is tasked with providing advice to Government on practical options for reforms to ensure that Victoria Police, the Courts, the Department of Justice and Regulation, Parole Boards, and other relevant agencies are best supported through clear legislation and practical powers and procedures to prevent, investigate, monitor and respond to acts of terror.

Consistent with these Terms of Reference, the Panel envisages that Report 2 will focus on a broader range of non-legislative and legislative responses to the terrorist threat, encompassing:

- the definition of a 'terrorist act';
- preventative measures to further enhance community resilience and social cohesion;
- post-sentence supervision and detention for those who are convicted of certain terrorism related offences and continue to pose an unacceptable risk to the community;
- rehabilitation; and
- other necessary early intervention measures including possible legal interventions.

As part of Report 2, the Panel will also consider:

- any possible further changes to police powers that may be warranted (but have not been addressed in Report 1); and
- whether an amended scheme of preventative detention that includes a power for police to question a detained person should extend to persons aged 14 or 15, and the necessary safeguards applicable to minors detained under such a scheme.

APPENDIX – CONSULTATION

Victoria Police
The Police Association Victoria

Adult Parole Board of Victoria
Commission for Children and Young People
Corrections Victoria
Department of Health and Human Services, Victoria
Department of Justice and Regulation, Victoria
Youth Parole Board Victoria

New South Wales Police
Queensland Police

Commonwealth Attorney-General's Department
Commonwealth Department of the Prime Minister and Cabinet

Australian Federal Police
Australian Security Intelligence Organisation

Hon Lisa Neville MP, Minister for Police
Hon Martin Pakula MLA, Attorney-General
Hon Robin Scott MP, Minister for Multicultural Affairs
Hon Gayle Tierney MLC, Minister for Corrections

John Champion SC, Director of Public Prosecutions
Brendan Murphy QC, Public Interest Monitor
Richard Niall QC, Solicitor-General

Dr Ian Freckelton SC
The Hon David Jones AM
Richard Maidment QC
Robert Stary
Bret Walker SC

Dr Bulent Hass Dellal AO, Australian Multicultural Foundation Associate
Professor Peter Lentini, Monash University

Professor Michele Grossman Deakin University
Professor Greg Barton, Deakin University
Dr Kate Barrelle, STREAT