

Submission from Commission for Children and Young People

*Justice Legislation Amendment (Terrorism) Bill
2018*

The Commission respectfully acknowledges and celebrates the Traditional Owners of the lands throughout Victoria and pays its respects to their Elders, children and young people of past, current and future generations.

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Introduction

The Commission for Children and Young People (**Commission**) is an independent statutory body established to promote continuous improvement in policies and practices relating to the safety and wellbeing of children and young people. We have a particular focus on vulnerable children and young people.

Our work includes monitoring and oversight of the child protection, out of home care and youth justice systems and the provision of advice and advocacy to improve services that relate to children and young people. We also have responsibility for administering two new regulatory schemes, the Child Safe Standards and the reportable conduct scheme.

The Commission provides the following submission in relation to the *Justice Legislation Amendment (Terrorism) Bill 2018* (Terrorism Bill).

Terrorism Bill

Overall comments

The Commission was consulted in 2017 during the review of the preventative detention scheme by the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (**Expert Panel**) and during development of the Terrorism Bill.

The Commission has expressed concern to the Expert Panel and to government about the impact of the proposed scheme (both Preventative Detention Orders (**PDO**) and Preventative Police Detention (**PPD**)) on minors, particularly on children as young as 14 and 15 years of age. The Commission has also conveyed that it is not aware of evidence to support the proposition that including children as young as 14 and 15 years in the scheme is critical to enhance community safety.

The Expert Panel itself expressed “significant misgivings” about extending the proposed scheme to children aged 14 and 15, stating in Report 2:

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

The Commission shares this view.

The Terrorism Bill includes numerous safeguards suggested by the Commission and recommended by the Expert Panel. It also includes, importantly, a monitoring role for the Commission as recommended by the Expert Panel, that will allow the treatment of children subject to the scheme to be monitored. The Commission welcomes these safeguards and commends the Victorian Government for including them in the Terrorism Bill.

However, there remain a number of concerns with the Terrorism Bill, in particular that the Terrorism Bill does not reflect recommendations 22 and 23 of the Expert Panel’s Report 2.

The Expert Panel recommended that the Supreme Court be empowered to make a PDO only if there are no other less restrictive means available to prevent a terrorist act or to preserve evidence and if satisfied the conditions of detention can be met. The Expert Panel recommended that the Supreme Court be empowered to make alternative orders. These recommendations have not been adopted in the Terrorism Bill.

The Charter of Human Rights and Responsibilities

Section 7(2) of the Charter provides:

- (2) *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*
 - (a) *the nature of the right; and*
 - (b) *the importance of the purpose of the limitation; and*
 - (c) *the nature and extent of the limitation; and*
 - (d) *the relationship between the limitation and its purpose; and*
 - (e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*
- (3) *Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.*

Section 38(1) of the Charter provides it is unlawful for a public authority to act in a way that is incompatible with a human right or in making a decision to fail to give proper consideration to a relevant human right.

The Commission submits the following rights under the Charter are engaged:

- Section 12 – Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.
- Section 17 (2) – Every child has the right, without discrimination, to such protection as is in his or her *best interests* and is needed by him or her by reason of being a child.
- Section 21 (1) – Every person has the right to liberty and security.
- Section 22 (1) – All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

The Terrorism Bill, if passed, will allow the detention and questioning of people 14 and over in circumstances where the detainees are not suspected of committing any offence. The Commission is concerned that the significant restrictions on human rights proposed in the Terrorism Bill, particularly in relation to 14 and 15 year old children, cannot be demonstrably justified as necessary to achieve a legitimate purpose.

No Other Less Restrictive Means

The Expert Panel recommended (Recommendation 22) that the Supreme Court be empowered to make a PDO only if there are *no other less restrictive means available* to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act and if the particular requirements of preventative detention of a minor can be met.

Recommendation 23 proposed empowering the Supreme Court to make alternative orders. The Expert Panel notes on page 103 that there is currently no alternative means by which to address the situation where the Supreme Court does not wish to make a PDO. The Expert Panel suggested a broad discretion be conferred on the court to make such alternative orders for minors where it considers it necessary to achieve the relevant objective. The Expert Panel envisaged the making of an order imposing conditions, restrictions or prohibitions similar in nature to those available under a supervision order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* or under the control order regime in

Division 104 of Part 5.3 of the *Criminal Code*. The Expert Panel suggested it should be open to the Supreme Court to make orders imposing conditions in relation to such things as residency, a minor's movements, the persons with whom a minor may associate or in relation to a minor's access to the internet.

The Commission considers these are important recommendations. Given the potential harm caused to children subject to the proposed scheme, the scheme should apply to children in a narrower range of circumstances than to adults. Preventative detention of children should be available only as a last resort.

The Terrorism Bill will allow children to be detained and questioned in situations where they are peripheral to or unaware of planning for a terrorist attack. For example, a child could be subject to a PDO if he or she has been given items connected with a terrorist attack by an older family member, whether or not the child is aware of or involved in the planning of such an attack.

Similarly, a child could be subject to a PDO where he or she has not been directly involved in a recent terrorist attack but, because of the involvement of older family members or associates, the child's detention is considered necessary to preserve evidence.

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

Developmental Needs of the Child

Finally, the Commission notes that part of recommendation 24 of the Expert Panel Report was not adopted. That recommendation required the developmental needs of a minor be catered for during detention. Section 484(2)(a) of the *Children, Youth and Families Act 2005* which provides that persons detained in remand centres, youth residential centres and youth detention centres are entitled to have their developmental needs catered for. This has been disregarded for the PPD and PDO schemes.

Monitoring Role of the Commission

The Commission welcomes the monitoring role for the Commission included in the Terrorism Bill. The proposed role reflects the recommendations of the Expert Panel and allows the Commission to monitor the treatment of a child while detained, have access to the child to facilitate monitoring, have access to the facility of detention to inspect conditions, obtain documents and information (including audio recording and audio visual recordings). This will enable the Commission to monitor rest periods, access to fresh air, meal breaks, access to health and therapeutic services, entitlements to visits from family or a lawyer (as explained in the Explanatory Memorandum). The Commission's role is outlined in section 8 of the Terrorism Bill (inserts new sections 4O to 4R of Part 1B in the TCPA).

The Commission is also permitted to provide advice to the Attorney-General, the Minister administering the *Commission for Children and Young People Act 2012* or the Chief Commissioner of Victoria Police about a child's treatment while in preventative detention. These are positive and important safeguards.

21 May 2018