

21 May 2018

Lizzie Blandthorn MP  
Chairperson  
Scrutiny of Act and Regulations Committee  
Parliament House, Spring Street  
EAST MELBOURNE, VIC 3002

By email: [sarc@parliament.vic.gov.au](mailto:sarc@parliament.vic.gov.au)

Dear Ms Blandthorn MP

**RE: Submission on the Justice Legislation Amendment (Terrorism) Bill 2018**

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) seeks to contribute to the Scrutiny of Acts and Regulations Committee's (**SARC**) consideration of the Justice Legislation Amendment (Terrorism) Bill 2018 (**the Bill**). The Bill was introduced to the Legislative Assembly on 10 May 2018. The Bill proposes to make a number of amendments to a variety of legislative instruments including the *Terrorism (Community Protection) Act 2003* and the *Crimes Act 1958*.
2. SARC has an important role in considering and reporting on whether Bills introduced into Parliament are compatible with the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**).
3. As Victoria's independent statutory human rights authority the Commission wishes to draw to SARC's attention some of the potential human rights impacts that the Bill's proposed reforms will have on children and vulnerable persons. We invite SARC to consider this submission and to publish the submission on its website.
4. In summary the Commission makes the following points:
  - The Commission acknowledges the importance of effective laws that protect the community from the threat of terrorism and violent extremism, but notes the importance of ensuring these laws are not disproportionate to the risks they pose to fundamental rights.
  - The Commission notes that the Bill implements many of the recommendations to improve Victoria's counter-terrorism framework made by the Panel on Terrorism and Violent Extremism Prevention and Response Powers (**the Panel**).

- The Commission shares the Panel's concerns regarding extending the Preventative Detention Scheme to children as young as 14, and is concerned that some of the important safeguards the Panel recommended to protect children in this scheme have not been included in the Bill. These are the Panel's Recommendations 22 and 23 of its Report 2.
- The Commission is concerned that the Bill does not include the Panel's Recommendation 2 of its Report 1 as it relates to the safeguards within the proposed preventative detention scheme to protect the human rights of vulnerable persons, such as those who may be cognitively or physically impaired.
- In considering this Bill Parliament needs to be satisfied that the rights of children and vulnerable persons detained under the proposed preventative detention scheme are protected to the greatest extent possible and that any limitations on their rights are reasonable and demonstrably justified under section 7(2) of the Charter.

### **Modification of the preventative detention scheme**

5. The Bill modifies the existing framework for preventative police detention (currently applicable to people 16 years and over), and extends it to children aged 14 and 15.<sup>1</sup> It authorises a police officer to detain a person where he or she is satisfied that the person will engage in a terrorist act, and that detaining the person is reasonably necessary to substantially assist in preventing a terrorist act occurring.<sup>2</sup> A police officer must apply to the Supreme Court for a preventative detention order as soon as reasonably practicable after a minor has been taken into custody and no later than 36 hours after this occurs.<sup>3</sup>
6. For adults, the Bill proposes extending the time police can detain a person without an order from the Supreme Court from 48 hours to 4 days.<sup>4</sup>
7. The Supreme Court may make a preventative detention order for up to 14 days if it is satisfied on reasonable grounds that the person will engage in a terrorist act, and that detaining the person is reasonably necessary to substantially assist in preventing a terrorist act occurring.<sup>5</sup>

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<sup>1</sup> Justice Legislation Amendment (Terrorism) Bill 2018 cl 17.

<sup>2</sup> Justice Legislation Amendment (Terrorism) Bill 2018 cl 13AC.

<sup>3</sup> Justice Legislation Amendment (Terrorism) Bill 2018 cl 11(2).

<sup>4</sup> Justice Legislation Amendment (Terrorism) Bill 2018 cl 13AA.

<sup>5</sup> *Terrorism (Community Protection) Act 2013* s 13E.

## Extending the preventative detention scheme to 14 and 15 year olds

8. The Panel acknowledged that preventative detention has “been long criticised as an unjustifiable intrusion on civil liberties and fundamental human rights such as the right not be subject to arbitrary arrest or detention and the right to liberty”.<sup>6</sup> The Panel acknowledged “significant misgivings” about applying the scheme to children aged 14 and 15. It stated:

*the application of preventative detention orders is an extraordinary power with extension to children 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.*<sup>7</sup>

9. However, despite describing the extension of the preventative detention scheme to 14 and 15 year olds as “regrettable and troubling”, it recommended a modified preventative detention scheme be extended to children aged 14 and 15. It did so citing examples of violent extremism involving minors aged 14 and 15. It also cited Australia’s “national agreement on strengthened preventative detention laws based on a NSW model which permits detention of children as young as 14 years”,<sup>8</sup> and noting that counter-terrorism legislative reform is guided by “the conduct that threatens the safety of the Australian community ... regardless of the age, ethnicity or religious affiliation of individuals”.<sup>9</sup>
10. Importantly, in recognition of its serious concerns regarding extending the preventative detention scheme to children as young as 14, the Panel recommended additional safeguards be implemented to protect the rights of children subject to the scheme.
11. The Commission is concerned that extending the preventative detention scheme to 14 and 15 year olds limits a number of Charter rights, including children’s right to protection in their best interest, the right to liberty and security, the right not to be subjected to arbitrary arrest or detention, the right to be presumed innocent until proved guilty according to law, and the right to a procedure that takes account of children’s age and the desirability of promoting their rehabilitation.
12. The Commission notes that Parliament must be satisfied under the Charter that there is sufficient evidence to warrant extending the preventative detention scheme to 14 and 15 year olds.

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<sup>6</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 100.

<sup>7</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 100.

<sup>8</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 100.

<sup>9</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 100.

## **Safeguards for children recommended by the Panel that are not included in the preventative detention scheme**

13. Noting the potentially significant impact of these laws on human rights, the Panel recommended that additional and exceptional safeguards and protections are necessary to ensure that minors detained under the scheme are protected to the greatest extent practicable.<sup>10</sup>
14. The Panel noted that these safeguards “should apply to any minor detained under that scheme and not only to those that are 14 or 15 years old”.<sup>11</sup>
15. While some safeguards have been included in the Bill, the Commission is concerned that it does not appear that those outlined by the Panel’s Recommendations 22 and 23 have been included. These recommendations provide for additional Supreme Court powers to make an order other than a preventative detention order.
16. Recommendation 22 and 23 of Report 2 states:

### **Recommendation 22**

*That the power to make a preventative detention order in respect of a minor only be available to the Supreme Court if it is satisfied:*

- *that 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*
- *that the particular requirements in relation to the preventative detention of a minor, including any conditions imposed on that detention by the court, can be met.*

### **Recommendation 23**

*That if the Supreme Court is satisfied that an order other than a preventative detention order would be a less restrictive means of preventing an imminent terrorist act occurring or preserving evidence of, or relating to, a recent terrorist act:*

- *the court be empowered to make alternative orders and impose appropriate conditions in response to an application for a preventative detention order in respect of a minor; and*

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<sup>10</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 100.

<sup>11</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 101.

- *the court be required, in making such orders or imposing such conditions, to consider a range of specific matters with respect to the minor including the minor’s physical and mental health and vulnerability.*<sup>12</sup>

17. These safeguards are an integral part of the Panel’s recommended preventative detention scheme. The safeguards aim to balance the rights of children with community safety concerns by ensuring that any limitation on children’s rights will be the least restrictive means available to prevent an imminent terrorist act occurring.

18. The Panel sets out the objective for Recommendations 22 and 23 at pages 103-104 of Report 2. It states:

*The discretion should be a broad one. The objective is to confer on the Supreme Court sufficient powers to enable it to make such orders, short of a preventative detention order, as are necessary to address the risks posed by the person the subject of the application....the minor’s best interests should be a primary consideration but subordinate to the paramount consideration of community safety.*

19. Recommendations 22 and 23 enable the Supreme Court to take into account the particular needs, circumstances and vulnerabilities of the child. The Panel sets out the following considerations by way of example:

- *the minor’s age, maturity, sex and background (including lifestyle, culture and traditions);*
- *the minor’s physical and mental health;*
- *the importance to the minor of having a meaningful relationship with family, friends and the wider community;*
- *the minor’s ethnic and cultural origins;*
- *the minor’s right to receive an education;*
- *the minor’s right to practise his or her religion;*
- *the vulnerability of the minor, including whether he or she has a history of trauma or whether there are other circumstances that may exacerbate the impact of preventative detention on the minor, and*
- *any other matter the court considers relevant.*<sup>13</sup>

20. The Panel advised that it should be open to the Supreme Court to impose obligations, restrictions or prohibitions that are reasonably appropriate and adapted to the community safety risk. The Panel provides the following examples:

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<sup>12</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 14.

<sup>13</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 104.

*It should be open to the Court to make an order imposing conditions in relation to residency, a minor's movements, the persons with whom a minor may associate, or in relation to the minor's access to the internet.*<sup>14</sup>

21. The Panel also suggested a safeguard to protect a child's privacy if an application is made for a preventative detention order. The Panel advised that "at a minimum, the minor's identity should be concealed".<sup>15</sup>
22. The safeguards outlined above embody the proportionality exercise required under section 7(2) of the Charter. Section 7(2) provides that Charter rights may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. This section also requires that in limiting a right, consideration is given to less restrictive means available to achieve the purpose that the limitation seeks to achieve. A detailed analysis is required to ensure that any limitation of rights is reasonable and justified. Any limitation will only be justified if it is supported by a cogent evidentiary basis.<sup>16</sup>
23. The rationale for not including the safeguards contained in Recommendation 22 and 23 of Report 2 is not provided in either the Explanatory Memorandum or the Statement of Compatibility to the Bill.
24. In light of the Panel's "serious misgivings" regarding extending the preventative detention scheme to 14 and 15 year olds, the Commission is concerned that the Bill does not include all the safeguards recommended by the Panel as necessary to protect the rights of children subject to the scheme.
25. The Commission believes all the safeguards recommended by the Panel ought to be included in the Bill unless there is evidence to suggest that they are unnecessary to protect the rights of children subject to the scheme.
26. Noting that this scheme provides extraordinary powers to police, and the risks inherent in this scheme for the rights of those detained, the Commission emphasises the need for Parliament to be satisfied that any limitations on children's rights deriving from the preventative detention scheme are reasonably justified in accordance with section 7(2) of the Charter. This includes Parliament being satisfied that there is sufficient evidence to substantiate not including within the Bill all the safeguards for children's rights recommended by the Panel.

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<sup>14</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 104.

<sup>15</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 2, page 104.

<sup>16</sup> *Re An Application Under the Major Crimes (Investigative Powers) Act 2004*; *DAS v Victorian Human Rights and Equal Opportunity Commission* (2009) 24 VR 415 at 448 [147]; *R v Momcilovic* (2010) 25 VR 436, [143]–[146].

## **Safeguards for vulnerable persons recommended by the Panel that are not included in the preventative detention scheme**

27. The Commission notes that Parliament must be satisfied that the proposed preventative detention scheme sufficiently protects the human rights of vulnerable persons, such as those with a cognitive or physical impairment.

28. As part of its Recommendation 2 of its Report 1, the Panel made recommendations that the preventative detention laws be changed “to establish additional measures to safeguard and protect the interests of minors **and other potentially vulnerable persons such as those with a cognitive or physical impairment**”.<sup>17</sup>

29. The Panel noted that its recommendation to extend the maximum interim detention period for adults from 48 hours to 4 days without seeking a Court order, as well as its recommendation to enable police to question a person detained, “significantly extends the scope of the current preventative detention scheme”.<sup>18</sup>

30. In light of the significance of these recommendations, the Panel further recommended:

*Certain additional measures to safeguard the interests of minors (those under the age of 18) **and other potentially vulnerable persons, such as persons who may be cogitatively or physically impaired.***<sup>19</sup>

31. The Panel detailed the following additional protections for vulnerable persons, such as persons who may be cogitatively or physically impaired:

*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.*<sup>20</sup>

32. On the Commission’s review, the Bill does not appear to include the protections suggested by the Panel for vulnerable persons, such as those with a cognitive or physical impairment.

33. The Commission believes the additional protections suggested for vulnerable persons within the Panel’s Recommendation 2 are important to ensuring this Bill strikes the appropriate balance between protecting community safety and protecting individual

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<sup>17</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1, page 8, 24

<sup>18</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1, page 34

<sup>19</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1, page 34

<sup>20</sup> Panel on Terrorism and Violent Extremism Prevention and Response Powers: Report 1, page 35

human rights, such as the right to humane treatment when deprived of liberty, and the recognition and equality before the law<sup>21</sup>.

34. Parliament must be satisfied that these “significant” extensions to police powers are proportionate and that the laws introduced do not unreasonably limit Charter rights, particularly for vulnerable individuals.

If you have any queries about this submission, please contact Emily Minter, Senior Legal Adviser, at [legal@veohrc.vic.gov.au](mailto:legal@veohrc.vic.gov.au).

Yours sincerely,



Sarah Bendall

Head of Legal and Dispute Resolution

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<sup>21</sup> *Charter of Human Rights and Responsibilities Act 2006* ss 8, 22.