



Centre for Resilient and Inclusive Societies (CRIS)

**Response to Stage 2, Review of the *Terrorism
(Community Protection) Act 2003*, Victoria**

4 June 2021

This Submission has been prepared by The Centre for Resilient and Inclusive Societies (CRIS). We thank the Department of Justice and Community Safety for the invitation to contribute to the Stage Two Review of Victoria's *Terrorism (Community Protection) Act 2003* (referred to hereafter as the Act). The Review provides an important opportunity to take stock of the current environment surrounding the risks of terrorism for community safety and wellbeing, and the opportunity to mitigate these risks through a variety of mechanisms, including the legislation that forms the subject of the current review process. In developing our responses to selected questions posed by the Stage Two Review process, we have consulted the Issues Paper related to this review.

A number of the broader issues related to the nature and extent of the risks and threats we now face from terrorism and violent extremism as a nation (related to Question 1 of the current Stage 2 Review of the Act) have also been the topic of a recent Commonwealth Inquiry on Extremist Movements and Radicalism in Australia, convened by the Parliamentary Joint Committee on Intelligence and Security. Both CRIS and the AVERT Research Network (an allied network of research scholars including many members of CRIS) made detailed submissions on the current threat landscape in Australia and internationally in their submissions, followed by invited testimony at the Inquiry's public hearings on 30 April 2021. These submissions may help inform the considerations of the current review of the Act and may be accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ExtremistMovements/Submissions





CRIS

Centre for Resilient
and Inclusive Societies

crisconsortium.org

@CRISconsortium

About CRIS

CRIS is a research and program-based think tank consortium of eight Australian and international academic, community and industry partners – Deakin University, Western Sydney University, Victoria University, the Resilience Research Centre-Dalhousie University (Canada), the Australian Multicultural Foundation (AMF), the Centre for Multicultural Youth (CMY), RAND Australia, and the Institute for Strategic Dialogue (ISD) (UK).

CRIS was established through a program grant from the State Government of Victoria to deliver research, programs and inform policies that advance and enrich our local, national, and international community cohesion and resilience. We work on a range of related issues including:

- Social polarisation and disengagement from the public sphere.
- The rise of social exclusivist identities based on ethnicity, religion, or culture.
- The influence of global conflicts and tensions on local environments and actors.
- The social harms created when grievances and alienation translate into violent action against specific groups or society at large.

For more information about CRIS, please visit: <https://www.crisconsortium.org>

The following members of CRIS have contributed to this submission:

Mark Duckworth PSM, *Senior Research Fellow, CRIS; Alfred Deakin Institute for Citizenship and Globalisation, Deakin University; Former Co-chair, Australia-New Zealand Counter-Terrorism Committee Countering Violent Extremism Sub-committee (CVESC). Mr Duckworth was involved in drafting the original legislation for the Terrorism (Community Protection) Act 2003 and the 2006 amendments during his time in government as a senior public servant.*

Professor Michele Grossman, PhD, *Research Chair in Diversity and Community Resilience; Director, Centre for Resilient and Inclusive Societies (CRIS); Convenor, AVERT Research Network, Alfred Deakin institute for Citizenship and Globalisation, Deakin University. Professor Grossman represents the AVERT Research Network on the Research and Evaluation Working Group, Countering Violent Extremism Subcommittee, ANZCTC and was a member of the Expert Reference Group for the Victorian Government's Ministerial Taskforce on Social Cohesion, Community and Violent Extremism four-year Research Institute on Social Cohesion, 2015-2018.*





CRIS

Centre for Resilient
and Inclusive Societies

crisconsortium.org

@CRISconsortium

Part 3: Ongoing need

1. Does this accurately characterise the current terrorism threat environment, including emerging risks?

2. Does the threat level warrant the continued operation of the Act?

Yes. The threat will not diminish in the foreseeable future and has diversified significantly since the initial drafting and implementation of the Act, as outlined in the characterisation of the threat environment contained in the Issues Paper and Stage One of the current review.

3. What does the sparing use of the powers in the Act indicate about the ongoing need for the Act?

These were never meant to be regular policing powers. The sparing use of the powers is quite appropriate given that they are extraordinary in nature. When the legislation was introduced in 2003 the then-Premier stated: “While the new measures are robust, they are also finely balanced to ensure that important civil liberties are not unduly infringed.” (Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 27 February 2003 p. 164 (Hon. Steve Bracks MP).

Some Parts, such as Part 3 (the power to detain and decontaminate), have not been used because there has not been a CBRN incident. However, the provision should be retained.

4. What is the best way to assess the ongoing necessity of the Act and the powers contained within?

In 2005 the Victorian government released a statement titled ‘Protecting our community: attacking the causes of terrorism’. That statement announced that Victoria would only enact and support counter-terrorism laws that:

- are based on evidence that they were needed;
- are effective against terrorism;
- contain safeguards against abuse;
- are subject to judicial review; and
- are subject to a legislative sunset.

COAG, at its meeting on 27 September 2005, endorsed these guiding principles for the development of the counter-terrorism legislation (See Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, p. 2177 [Hon. Steve Bracks MP]). These remain the core principles against which the legislation should be judged. Measuring the “effectiveness” of counter terrorism legislation is always difficult. However, the risks remain, and the legislative measures can mitigate those risks.



AUSTRALIAN
multicultural
foundation



CENTRE FOR
MULTICULTURAL YOUTH



DEAKIN
UNIVERSITY

ISD | Powering solutions
to extremism
and polarisation



AUSTRALIA



DALHOUSIE
UNIVERSITY



VICTORIA
UNIVERSITY

WESTERN SYDNEY
UNIVERSITY





5. Are all the powers in the Act still necessary and appropriately tailored to current and emerging terrorist threats including right-wing extremists, lone actors, and emerging technologies?

The legislation remains necessary to give police power to act in extraordinary circumstances. However, it is only one tool amongst many in combatting the current threats of terrorism. There is sometimes a view that every gap identified in police powers needs to be filled by legislation. Australia will not be able to legislate its way out of the current security threats.

The threats posed by lone actors and by extremists from varying ideological platforms are already covered sufficiently by existing powers in the Act. As noted in the Issues Paper, lone actors may 'use less advanced technology than traditional terrorist actions'. While these may be harder to detect and disrupt, these are also techniques used in a variety of non-terrorist criminal offences, and there is little material difference in the capacity to detect and disrupt other violent or weapons-based crime types as a consequence.

Emerging technologies are of particular concern. However, there is a real question about whether Victorian legislation is the best place to deal with this, given the role, and powers, of the Commonwealth and its specialist agencies dealing with cyber-terrorism and online content. The current Act would need to explain and justify the need for any police powers required that are not already covered through legislative and interagency cooperation and interoperability between the State and the Commonwealth in this area.

6. What would be the risks if some or all of the powers in the Act expired? How else could these risks be addressed?

The powers in the Act are not general policing powers. If the legislation expired, there are a number of tools that police would not have relevant to securing the safety of the community. Covert search warrants and preventative detention, for instance, would not be available in terrorist cases were the Act to expire. One of the justifications for preventative detention is that the consequences of terrorist acts mean that police may have to act earlier and with less knowledge than they would with other crimes in order to prevent a terrorist act from occurring. Even though they have been used sparingly, the absence of the legislation would mean that police would not be able to act as quickly or effectively when a threat is identified.





Part 4: Sunset and review

7. Are the review and sunset mechanisms relevant and effective safeguards on the powers in the Act?

Review and sunset mechanisms should remain an ongoing feature of the *Act*. When the legislation was first introduced, the Government of the day stressed the importance of these mechanisms, with the then-Premier in 2003 calling the sunset clause a “key safeguard” in reassuring the public that the measures contained in the *Act* continued to be both relevant and proportionate to the operating environment, providing a reasonable balance between special powers and civil rights in protecting communities from harm. Both review and sunset mechanisms remain critical elements of such safeguards.

8. Is the original purpose of the sunset clause still relevant given the ongoing threat posed by terrorism?

While the threat remains ongoing, we must ensure that these powers are seen as both extraordinary and that they are both relevant and proportionate to the nature of the threat. A sunset clause will mean that future governments will have to undertake a transparent and systematic review of the legislation’s purpose, scope and operation.

9. If a sunset clause is retained, when should the Act next expire?

Ten years is appropriate for the sunset clause. When the legislation was initially introduced in 2003, a three-year sunset clause was included because at that time it was not known how enduring the new terrorist threat would be. In the amendments enacted in 2006, this sunset was extended to ten years. This was consistent with the COAG agreement of 27 September 2005. While the threat is unlikely to diminish in the short term, it will continue to evolve. A sunset clause of ten years recognises that legislation of this type is necessary and it allows the powers to continue for an extended period, but it is also a guard against the normalisation of extraordinary powers. However, more frequent reviews, such as every 3 years, will improve oversight of the use of the legislation and make it more likely that the legislation remains both relevant and not subject to abuse.

10. Would the Act benefit from a more prescriptive review mechanism that contains, for example, explicit review criteria or a clarification of review objectives?

The criteria set out by Premier Bracks in 2005 would be a good basis for the review criteria, in particular the requirement to provide evidence that the legislation is needed; is effective against terrorism; and contains safeguards against abuse. More detailed criteria could limit the scope of the review.



Part 5: Safeguards and oversight

11. Do the changes to the threat environment over time impact the justifications previously used for the limitation of rights under the Act?

The changes to the threat environment are changes that speak to the diversification of the threat landscape, but not necessarily changes to its scope, frequency or intensity, so that further limitations of rights are not prima facie justified. One criticism of the legislation over time is that the safeguards are overly restrictive and that the small number of occasions in which these powers have been used are because the safeguards are too onerous. Others, however, have seen the legislation as unduly infringing civil rights. The Act seems to provide for a reasonable balance between these two perspectives.

12. Are the safeguards and oversight contained in the Act adequate and workable? If not, how could they be improved?

Additional safeguards were introduced in 2018 and, absent any evidence to the contrary, continue to be appropriate.

13. Are the safeguards and oversights adequate and workable for children and young people?

The detention of children and young people suspected of criminal involvement, and in particular involvement in terrorism-related activities, is a highly charged issue for many in the community and in government, not least because there are always questions around the extent to which children and adolescents fully understand or have agency in the activities they are allegedly involved in, and about their increased vulnerability on the basis of age to negative impacts from involvement in the criminal justice system. However, it is unfortunately the case that children and young people can be exploited by adult violent extremist individuals and organisations who encourage or recruit their participation in illegal activities through various influences and mechanisms.

For these reasons it is essential that children and young people have robust and transparent safeguards to ensure their wellbeing and protection during criminal proceedings or investigations. The current safeguards, developed over time in response to these concerns, appear appropriate. These safeguards include measures governing consent by parents or guardians, reduced detention periods for children and young people based on age and vulnerability, and independent robust review of both the legislation and its safeguarding measures by the Commission for Children and Young People (CCYP), the Victorian Ombudsman, the Victorian Inspectorate, the Public Interest Monitor (PIM). The key element here is independent monitoring and review, and this should be rigorously and systematically maintained to ensure that interpretation of these powers does not involve 'application creep' over time with respect to minors.



CRIS

Centre for Resilient
and Inclusive Societies

crisconsortium.org

@CRISconsortium

One issue is that these safeguards may not be understood across all Victoria's communities. When the preventative detention amendments were introduced in 2005/6 there was a considerable effort to educate communities about the provisions and the safeguards in the legislation. This included material written in many languages. There was a mistaken view by some at the time that the provisions would permit arbitrary detention. It would be useful for information to be updated and distributed in multiple languages so that all the safeguards under the Act are better understood.

Part 6: Specific issues raised in Stage One

Special police powers

21. Should special police powers be extended in this fashion?

On the face of it, no. It is not clear that the proposal from Victoria Police for the use of special powers to secure the safety of a prominent person beyond the specific events at which they are scheduled to appear is necessary. In the first instance, the category of 'prominent persons' is nowhere defined in the document or cross-referenced in relation to other legislation or statutory powers. This is an oversight that should be corrected.

The itineraries of persons whom we may assume would be considered prominent (such as visiting dignitaries) are usually very well planned in advance, which means that the current provisions should be adequate. There is no justification offered for why the private, non-official activities of prominent persons while in Victoria should be included in such provisions.

There is, however, the potential for such special powers to constitute overreach in relation to limiting the legitimate expression of protest or dissent by members of the public acting within the law. In our view, any such invitation to overreach conferred by an extension of these special powers should be avoided.

Moreover, the proposed changes could conceivably be extended to Australian prominent persons such as a Commonwealth or State Minister or the chief executive officer of a corporation, regardless of the known threats.

This has the potential to normalise these powers in a manner that may similarly represent overreach, especially since Australians expect a high level of access to public figures, including the right to protest.

Given the level of close personal protection already afforded to prominent persons, it is not clear how these proposals would significantly add to existing Police powers.

22. How would this improve the effectiveness of the Act?

These powers would make it easier for police but create uncertainty and potential resentment for the public. Given the need to balance the powers with civil rights, it is unclear what "effectiveness" means in this context.





CRIS

Centre for Resilient
and Inclusive Societies

crisconsortium.org

@CRISconsortium

23. If this extension were adopted, what safeguards or protections would be required to ensure the powers are exercised fairly and proportionately (eg. to minimise the risk of inadvertent non-compliance)?

It would have to be clear that such an extension, if adopted, did not infringe of the rights of Australians to engage in public protest or dissent. These are special, not normal, powers. They would require a very high level of training for police to know when and how to exercise them, and a very high threshold of justification for the need to apply them.

Australia's general terrorism threat level remains at **PROBABLE**. One safeguard would be that they would only be available in the threat level was raised to EXPECTED or CERTAIN.

