



Inspection Report:

Terrorism (Community Protection) Act 2003

Report by the Victorian Inspectorate on Victoria Police records inspected in March 2019

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Overview

This report presents the results of the first inspection by the Victorian Inspectorate ('the VI') under s 37D of the *Terrorism (Community Protection) Act 2003* ('the TCPA') of Victoria Police records, following the commencement of the VI's inspections role on 1 October 2018.

Under the TCPA, members of the Victoria Police can:

- Conduct covert searches of premises under the authority of a warrant;
- Detain and question people, including children, without charge; and
- Use special police powers under the authority of a Supreme Court order.

These powers were given to Victoria Police to assist them to prevent, or respond to, a terrorist act, or the threat of a terrorist act.

The VI provides independent oversight of these powers by conducting six-monthly inspections and reporting to the Minister and to Parliament. At these inspections, the VI's role is to assess Victoria Police's compliance with Parts 2, 2AA and 3A of the TCPA. We have also considered whether Victoria Police has appropriately prepared for the commencement of new powers on 1 October 2018, whether it has developed processes to support compliance, and the agency's transparency and cooperativeness in its interactions with the VI.

We note in this report the preparatory activities undertaken by the Counter-Terrorism Legal Unit ('the CTLU') of Victoria Police, and its officers' cooperative and transparent engagement with the VI prior to the inspection. It is evident the CTLU is committed to developing comprehensive processes to support compliance with the requirements of the TCPA, including embedding quality assurance mechanisms and checklists in its operations, and to training relevant officers.

However, we also report on compliance issues found upon inspection of records associated with the execution of, and reporting on, one covert search warrant. Victoria Police has commented upon the VI's findings, and outlined actions that it will take to prevent similar issues occurring in the future.

The VI has not made any recommendations as a result of its inspection.

HUMAN RIGHTS CONSIDERATIONS

The *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter') requires Victoria Police to consider the human rights of individuals when it exercises its powers. Furthermore, it would be unlawful for Victoria Police to act in a way that is incompatible with a human right. The powers given to Victoria Police under Parts 2, 2AA and 3A of the TCPA engage several of the human rights protected by the Victorian Charter, including:

- The right to liberty and security, and the right not to be subject to arbitrary detention;
- The right to humane treatment when deprived of liberty;
- Rights of children in the criminal process.
- The right not to have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The VI's role to assess Victoria Police's compliance with the requirements of these Parts of the TCPA contributes to the protection of the human rights of adults and children in Victoria.

Introduction

The TCPA governs Victoria Police's counter-terrorism powers.

The TCPA permits:

- Searches to be conducted covertly pursuant to a covert search warrant issued by the Supreme Court under Part 2. Covert search warrants can also permit the seizure and substitution of things, the copying or recording of things, the operation of electronic equipment either on the premises or remotely to copy, print or otherwise record information, and the testing or taking of samples.
- The making of preventative police detention decisions under Part 2AA in order to prevent or preserve evidence of a terrorist act. Adults can be detained for up to four days, and children aged 14 years or older can be detained for up to 36 hours.
- The use of special police powers under Part 3A pursuant to a Supreme Court Order, to protect people from a terrorist act. An application for an Order must be approved in writing by the Premier of Victoria.

The Act imposes strict requirements on Victoria Police in their exercise of powers under these Parts of the TCPA.

OUR ROLE

The VI performs an independent oversight function with respect to Parts 2, 2AA and 3A of the TCPA.

The VI is required to inspect Victoria Police records at six-monthly intervals to determine the extent of compliance with those Parts, including conducting an inspection within six months of the coming into effect of the provisions establishing its oversight role. Since those provisions came into effect on 1 October 2018, the VI was required to conduct an inspection before 31 March 2019.

The powers given to the Victoria Police under the TCPA are amongst the most intrusive and coercive afforded to law enforcement agencies. The VI's oversight role is an important integrity response to ensure Victoria Police complies with requirements of the TCPA and provide the public with assurance that police powers are used lawfully.

HOW WE ASSESS COMPLIANCE

The objective of our inspection was to determine the extent of compliance with the relevant Parts of the TCPA by the Victoria Police and its law enforcement officers. Since this was the first inspection conducted by the VI following the commencement of the powers, we also considered how well-prepared the Victoria Police was to use them.

We used the following criteria to develop and apply the inspection methodology detailed in Appendix A:

1. What activities has Victoria Police undertaken to ensure it is appropriately prepared to use new powers under the TCPA?
2. Were covert search warrants obtained and executed in accordance with Part 2 of the TCPA?
3. Were relevant record-keeping and reporting requirements complied with?
4. Was the agency transparent and cooperative with the VI?

These criteria do not address the requirements of Parts 2AA and 3A, because Victoria Police did not exercise those powers during the period covered by the inspection.

The VI consulted with Victoria Police on the development of its inspection criteria and methodology in advance of conducting this first inspection under the TCPA.

HOW WE REPORT TO THE MINISTER AND PARLIAMENT

To ensure procedural fairness, Victoria Police was given an opportunity to comment on the findings from our inspection and furnish additional records that might assist our assessment. After this process, the inspection results are considered finalised.

Included in this report are findings resulting from record checks and qualitative assessments of compliance activities such as training and the development of procedures. We provide more detail where there is a finding of non-compliance.

The VI may, in its discretion, not report on administrative issues (such as typographical or transposition errors) or instances of non-compliance where the consequences are negligible.

Note: Redaction of information pursuant to s 37D

Pursuant to s 37D of the TCPA, the VI must provide a copy of this report to the Chief Commissioner to facilitate the redaction of information under s 37D(3) where, in the Chief Commissioner's opinion, to include that information could reasonably be expected to—

- (a) endanger a person's safety; or
- (b) prejudice an investigation or prosecution; or
- (c) compromise operational activities or methodologies of Victoria Police.

This is a *redacted* version of the VI's Final Report, reflecting advice received from the Chief Commissioner pursuant to s 37D. Information has been excluded from this report on pages 8 and 9 (Findings 1 and 2) and that is clearly marked.

An *unredacted* version of the VI's Final Report has been transmitted to the Minister.

Inspection Results

INSPECTION DETAILS

The VI conducted its inspection on 23 March 2019 at the Counter-Terrorism Legal Unit ('the CTLU') of Victoria Police; we inspected records associated with one (1) covert search warrant that ceased prior to the inspection. There were no other relevant actions by Victoria Police under Parts 2, 2AA or 3A of the TCPA for the VI to assess.

The VI also received briefings from senior CTLU personnel and inspected a broad range of documents containing operational information as well as procedural, training and advice material.

FINDINGS - PREPARATORY ACTIVITIES

The VI sought information from the CTLU on Victoria Police's activities to prepare for the commencement on 1 October 2018 of provisions in the TCPA for the exercise of new powers. The VI considers these preparatory activities – such as delivering training and devising standard procedures - an important aspect of demonstrating that Victoria Police would be ready to comply with the new provisions of the TCPA.

Has the Chief Commissioner made an appointment of officers or a class of officers for the purposes of Pt 2AA?

Part 2AA empowers authorised police officers to make police detention decisions; an authorised police officer is a police officer (or a class or classes of police officers) appointed by the Chief Commissioner of Victoria Police under s 3(2) of the TCPA.

The VI confirmed that the Chief Commissioner has made an appointment under s 3(2).

The Chief Commissioner has restricted the appointment to a small class of senior police officers who could be expected to have knowledge of the operational context for a preventative detention decision. The VI considers the restriction of the appointment to be an appropriate measure to support compliance with the TCPA, given the consequences of decisions to be made by authorised police officers.

Have officers been trained in their obligations?

The VI requested a briefing from the CTLU on the training programs developed and delivered to officers who would need to understand their obligations under the TCPA and follow new procedures.

It is evident that the CTLU have considered how to best train officers in the TCPA's requirements and new internal procedures, and have developed a range of resources to equip officers to comply with them.

The steps they have taken include:

- A new component of the investigator training program provides an overview of the different TCPA powers. This training is completed by all officers that are new to the Counter-Terrorism Command.
- A specialised training program is in development which will detail the TCPA requirements and include scenario-based training on operational procedures. CTLU advised that this full-day program was due to be delivered by the end of June 2019.
- Another specialised training program, accompanied by a resource package, has been designed for CTLU members which includes checklists and templates.

Has the agency developed policies and procedures for using the new powers?

The VI requested a briefing from the CTLU on their development of policies and procedures for using existing and new powers under the TCPA.

The CTLU briefed the VI on the business and command structures in place to support the operational activities that would be involved in exercising powers under Parts 2, 2AA and 3A. This included arrangements for ensuring trained officers would be available and properly equipped during heightened (and potentially complex) tactical situations that might occur out of hours.

The CTLU, having been involved in the processes that led to reform of the TCPA, demonstrated a very good understanding of the new provisions. It had developed a resource package provided to all relevant staff which included an operational guide, templates and application checklists. The VI inspected these procedural documents and found them to be clear, well-structured and designed to be easy-to-follow in the high-pressure and high-risk context of the Counter-Terrorism Command.

Further work was planned to establish comprehensive procedures for police detention decisions under Part 2AA; Victoria Police not having exercised these powers at the time of the inspection. The VI will monitor the progress of these procedures at its second TCPA inspection.

Has the agency engaged with other bodies that have a new role in relation to the Victoria Police's powers under Parts 2, 2AA and 3A?

In addition to the VI's new role, other entities have operational or accountability functions under the TCPA – these include the Public Interest Monitor, Victorian Ombudsman, the Independent Broad-Based Anti-Corruption Commission, Victoria Legal Aid, and the Commissioner for Children and Young People. Victoria Police is required to notify or otherwise interact with these entities when exercising certain of its powers under Parts 2, 2AA and 3A. We sought to understand the extent to which Victoria Police was prepared to meet these requirements by seeking information about its preparatory engagement with these bodies.

The CTLU confirmed that it had established communication protocols with the Public Interest Monitor that had already been effectively used. It was progressing new communication arrangements with Victoria Legal Aid and the Commissioner for Children and Young People which would be used if a Part 2AA decision was made.

The VI will follow-up on the progress made by Victoria Police in its engagement and liaison activities at its second TCPA inspection.

FINDINGS - COVERT SEARCH WARRANTS

Were covert search warrants properly obtained?

In certain circumstances, a Victoria Police officer may apply to the Supreme Court for the issue of a covert search warrant; they may only do so if the Chief Commissioner of Victoria Police, a Deputy Commissioner or an Assistant Commissioner has approved the application.

At inspection, the VI found that the covert search warrant was properly obtained.

Specifically, the VI found:

- The application was approved by one of the requisite senior officers;
- The application was made to, and the warrant was issued by, the Supreme Court;
- The application was made in writing, supported by an affidavit, setting out the grounds on which the warrant was sought;
- Notice to the Public Interest Monitor was given and in all respects complied with the regulations made under the Public Interest Monitor Act 2011; and
- The warrant specified the necessary matters set out in s 8(3) of the TCPA.

The VI noted that the internal approval form for the application recorded the date, but not the time, that the Deputy Commissioner approved the application. The VI inspected other records to confirm that the application was approved prior to it being made to the Supreme Court.

The VI suggested to Victoria Police that best practice would be to:

- (i) Amend the approval form template to include a field for recording the time of the approval;
- (ii) Establish as a standard procedure that the approval be obtained prior to notification being sent to the Public Interest Monitor of the officer's intention to apply for the warrant.

Following the inspection, Victoria Police implemented both of these best practice suggestions.

Were covert search warrants properly executed?

A covert search warrant authorises specified persons to exercise certain powers, including entering premises, searching for and seizing any 'thing' of the kind described in the warrant. A Part 2 warrant may also authorise certain activities directed towards copying, photographing or recording 'things' that may be information or evidence relevant to or connected with the preparation for or assisting in a terrorist attack.

The VI inspected records to assess whether Victoria Police officers exercised their powers lawfully, and that the 'things' copied, photographed and recorded under the warrant inspected were permitted to be so copied, photographed and recorded.

The warrant inspected was issued subject to a condition; the VI therefore also assessed whether officers complied with this condition in their execution of the search.

The VI found that the premises was entered lawfully for the purposes of executing the warrant.

However, the VI found that some of the ‘things’ photographed or recorded during the search may have breached the condition, which restricted the ‘things’ permitted to be recorded to a category. The VI further found that the copying of an entire hard drive and multiple storage devices did breach the condition, because what was copied was not limited to the category of thing described in the condition.

Details of this finding, and Victoria Police’s response to it, are set out below.

Finding 1 – Non-compliance with condition limiting the kind of ‘things’ permitted to be copied, photographed or recorded.

The issuing judge limited the kind of ‘thing’ permitted to be copied, photographed or recorded during the search to things [information excluded from this report] by the person of interest on a targeted entity.

Officers executing the search:

- Took a large number of photographs of the inside of the premises, including furniture, personal effects, clothing, items associated with weaponry, and recording devices.
- Made multiple video-recordings of the inside of the premises.
- Made full copies of multiple storage devices.

The VI suggested to Victoria Police that the ‘things’ photographed and video-recorded included some items that were not [information excluded from this report] of the person of interest.

Victoria Police’s response was that [information excluded from this report].

The VI accepts that aspects of the premises and other ‘things’ that constitute [information excluded from this report] may, in this case, have been within the kind of items that the condition permitted to be photographed or recorded.

Further, the VI suggested to Victoria Police that the making of full copies of storage devices meant that officers would necessarily be copying ‘things’ (being records and/or information) that were not [information excluded from this report] of the person of interest. The VI acknowledges that the operational exigencies involved in conducting covert searches are likely to prevent officers from reviewing volumes of information on the premises for the purpose of identifying a smaller number of records or data for copying. However, where a condition clearly limits the ‘things’ permitted to be copied, Victoria Police is obliged to consider whether and how its proposed search procedures will comply with this restriction.

After raising these findings with the CTLU, Victoria Police have indicated that they will supplement their application procedures to ensure that consideration is given to compliance with the conditions at the stage of the warrant being issued. Victoria Police have demonstrated to the VI that the CTLU has appropriate processes in place to ensure there is sufficient communication between the CTLU, the applicant and the officers involved in planning and executing a covert search.

The Supreme Court made no direction under s 9(2) regarding the return of things seized to their owner, consequently the VI did not assess compliance with that section.

FINDINGS - RECORDS AND REPORTS

Did Victoria Police comply with record-keeping requirements?

Part 2 contains no specific record-keeping requirements in relation to covert search warrants.

Since Victoria Police did not exercise its powers under Part 2AA, which does provide for certain records to be kept, there were no record-keeping requirements for the VI to assess.

Were reports to the Victorian Inspectorate properly made?

The person to whom a covert search warrant is issued must, no later than 7 days after the warrant expires, make a report to the VI. The report must address all the matters required by s 11(2) of the TCPA, including:

- Which powers were exercised under the warrant;
- Details of compliance with any conditions to which the warrant was subject;
- Specified factual details about the conduct of the search;
- Details of the seizure, placement, copying, photocopying, recording, operation, printing, testing or sampling of any thing; and
- If known, the details of the benefit of the execution of the warrant to the prevention of or response to the terrorist act or suspected terrorist act.

The VI received a report on the one (1) warrant within the requisite timeframe. The report properly addressed all of the matters specified in s 11(2), with the exception that the VI considered that the report did not give adequate details of compliance with the condition to which the warrant was subject.

Finding 2 – Report did not adequately give details of compliance with a condition

The warrant was subject to a condition, which limited the kind of ‘thing’ permitted to be copied, photographed or recorded during the search to things [information excluded from this report] by a person of interest on a targeted entity.

The warrant report stated that “all items [listed in the report] were [information excluded from this report]”.

The VI does not consider this statement to provide adequate details of how Victoria Police complied with the condition, since it has found that some of the items copied, photographed or recorded, were not within the kind permitted to be so recorded (refer to Finding 1).

FINDINGS - TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, its cooperation during inspection, and its responsiveness to suggestions and issues to be a measure of its compliance culture.

Did the agency engage with the Victorian Inspectorate to prepare for its new oversight role?

CTLU officers met with the VI on multiple occasions prior to the conduct of the first inspection, to discuss the amendments to the TCPA, the VI's new role, and the inspection process. The CTLU provided the VI with background information about its activities and business structures, and were cooperative and responsive to the VI in the lead up to the inspection.

Did the agency self-disclose compliance issues?

Victoria Police made no self-disclosures at this inspection, however it was apparent that the CTLU was prepared to be transparent about the risk areas involved in exercising counter-terrorism powers, and Victoria Police's areas of focus for internal training programs, procedures and guidance resources.

Were issues identified at previous inspections addressed?

Since this was the first inspection by the VI of counter-terrorism records, there were no historical issues to be addressed.

The VI notes that Victoria Police accepted its two best practice suggestions relating to applications for covert search warrants (refer to page 7 of this report) and quickly implemented new templates and procedures to reflect those best practices between the inspection and the drafting of this report.

Appendix A – Inspection Criteria and Methodology

Ref	Criteria	Methodology
1	What activities has the agency undertaken to ensure it is appropriately prepared to use its new powers under the TCPA?	
1.1	Has the Chief Commissioner made an appointment of officers or a class of officers for the purposes of Pt 2AA? Have those officers been trained in their obligations?	Record checks – the appointment instrument; training documents. Qualitative assessment - quality of education programs, awareness campaigns and training.
1.2	Has the agency developed policies and procedures for using the new powers?	Record checks: policies and procedures, templates, checklists. Qualitative assessment - how thoroughly have procedures been developed, how widely are they distributed and adopted (are they in use?), have officers been guided in how to apply them. Level of engagement and responsiveness to VI.
1.3	Has the agency engaged with other bodies (such as the VO, IBAC, VLA, the Commission for Child and Young People, the PIM) on requirements associated with using the powers?	Qualitative assessment - engagement activity.
2	Were covert search warrants obtained and executed in accordance with Pt 2 of the TCPA?	
2.1	Were covert search warrants properly obtained? - Does the agency have sufficient procedures to ensure that warrants are properly applied for? - Were applications for covert search warrants properly made? - Were notifications to the PIM of applications for warrants properly given?	Record checks: Do relevant documents meet requirements? Have application procedures been complied with? Notification to PIM meets form, timeliness and content requirements?
2.2	Were covert search warrants properly executed? - Does the agency have sufficient procedures to ensure that covert searches are properly executed? - Were covert searches properly conducted? - If the warrant was issued subject to conditions, were they complied with?	Records checks: Contemporaneous operational records contain appropriate information and properly completed. If there were conditions on warrants were they complied with? Are there sufficient operational records to demonstrate compliance?

3	Was the agency transparent and were reports properly made?	
3.1	Were all records kept in accordance with the TCPA? What are the agency's record-keeping procedures and are they sufficient?	Records check.
3.2	Were reports properly made? - Were reports on covert search warrants sent to the VI in accordance with s 11 and including the matters required to be included?	Internal records (VI receives report).
3.3	Did the Chief Commissioner notify the VI of the security clearance required?	Internal records (VI receives notice)
3.4	Was the agency cooperative and frank? - Has the agency engaged with the VI's office to prepare for the new oversight? - Does the agency have a culture of compliance? - Was the agency proactive in identifying compliance issues? - Did the agency self-disclose issues? - Were issues identified at previous inspection(s) addressed?	Qualitative assessment based on engagement and provision of records.