

**VICTORIAN
INSPECTORATE**

Inspection Report:

Terrorism (Community Protection) Act 2003

Report by the Victorian Inspectorate on Victoria Police records inspected in February 2021

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Overview

This report presents the results of an inspection conducted by the Victorian Inspectorate ('the VI') of Victoria Police records under the *Terrorism (Community Protection) Act 2003* ('the TCPA'). It acquits the VI's obligation under section 37D of the TCPA to make a report on the results of its inspection to determine the extent of compliance achieved by Victoria Police and its law enforcement officers with Parts 2, 2AA and 3A of the TCPA.

Under the TCPA, members of Victoria Police can:

- conduct covert searches of premises under the authority of a warrant [Part 2];
- detain and question people, including children, without charge [Part 2AA]; and
- use special police powers, under the authority of a Supreme Court order or, in certain circumstances, under an interim authorisation [Part 3A].

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 (where operational records are available) and reporting to Parliament as well as the Minister (Attorney General). At these inspections, in addition to assessing Victoria Police's compliance with Parts 2, 2AA and 3A of the TCPA, the VI also assesses Victoria Police's processes to support compliance in its use of these powers - for example, the development of procedures, training for relevant officers and stakeholder engagement. We also comment on Victoria Police's transparency and cooperativeness in its interactions with the VI.

To inspect records associated with Victoria Police's use of powers under the TCPA, as well as its processes to support compliance with the requirements of the TCPA, the VI engages with the Counter-Terrorism Legal Unit ('the CTLU') of Victoria Police. We note in this report the CTLU officers' cooperative and transparent engagement with the VI, including in relation to our requests for information subsequent to the inspection conducted in February 2021.

However, the VI also reports on four compliance issues found during its inspection of records associated with the execution of three covert search warrants and the application for, and reporting on, one covert search warrant.

The VI has made four findings of non-compliance in this report. Five recommendations have been made as a result of our inspection of TCPA records.

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. 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; and
- the right not to have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The VI's role in assessing 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 the records of Victoria Police at least every six months to determine the extent of its compliance with those Parts and deliver reports on the results of its inspections to Parliament and the Attorney-General as soon as practicable after 1 January and 1 July each year.

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

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 prepared to use its 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.

HOW WE REPORT ON COMPLIANCE

To ensure procedural fairness, Victoria Police was given an opportunity to comment on the preliminary findings from our inspection and to furnish additional records that might assist our assessment.

Included in this report are findings resulting from the VI's inspection and assessment of records and documents relating to Victoria Police's obligations under the TCPA. The report provides 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 with negligible consequences.

Inspection Results

INSPECTION DETAILS

The VI conducted its inspection on 25 February 2021 at the CTLU of Victoria Police; we inspected records associated with three covert search warrants that ceased prior to the inspection. There were no other relevant actions by Victoria Police under the TCPA for the VI to assess.

The VI also received briefings from senior CTLU personnel and inspected procedural and training material.

Furthermore, to enable the VI to make its findings with respect to the inspected operational records, we requested additional information from Victoria Police. The following was provided in response to our requests:

- on 18 June 2021, a written response to three issues raised by the Inspector in a letter dated 6 April 2021;
- on 7 July 2021, a meeting involving officers of the VI and Victoria Police's Director, Legal Practice Division, and Acting Inspector, CTLU, was held at the VI's office;
- on 12 August 2021, a letter giving further information regarding the applicant's location during the execution of covert search warrants and communication with executing officers; and
- on 18 August 2021, an electronic copy of the CTLU's Standard Operating Procedures.

The VI acknowledges the CTLU's high level of cooperation and transparency in providing us with additional information to enable an assessment of Victoria Police's compliance with the TCPA.

FINDINGS – PREPARATORY ACTIVITIES

The VI inspected records at the CTLU connected with Victoria Police's delivery of training to its staff, standard procedures on the exercise of TCPA powers and stakeholder engagement. The VI considers these preparatory activities an important aspect of demonstrating Victoria Police has developed processes that enable it to comply with TCPA provisions.

Have officers been trained in their obligations?

During the February 2021 inspection, the VI was provided with a briefing on a wide range of training the CTLU had scheduled in 2021. These programs, directed at stakeholders with a role under the TCPA, are connected to Parts 2, 2AA and 3A of the TCPA. Scheduled training continues to focus on involving the stakeholders in a variety of scenario-based exercises. During the six months preceding the inspection, the CTLU continued to provide training despite the impact of restrictions caused by

the COVID-19 pandemic. Since much of the training was conducted online via Microsoft Teams, the number of participants was greater than it would have otherwise been.

Has Victoria Police further developed its policies and procedures for using TCPA powers?

At its inspection of Victoria Police records, the VI received an update from the CTLU on further amendments made to its policies and procedures for using TCPA powers. The VI also inspected an electronic copy of the CTLU's procedures provided to us following the inspection as well as a Special Police Powers prompt card to be carried by officers with an operational role under the TCPA. Existing procedures have been complemented by the development of decision-making templates, that amongst other things test the threshold for using powers, as well as briefing sheets.

In response to feedback provided by the VI following its inspection of three covert search warrants executed by Victoria Police during the period covered by this report, the CTLU agreed to amend its template for making a warrant report to the VI under section 11 of the TCPA. Each report will give the validity period for the warrant, which will allow the VI to determine Victoria Police's compliance with its obligation to provide us with a report no later than seven days after a warrant expires.

The CTLU has also agreed to provide more contextual information in future warrant reports, including:

- the applicant's location during the warrant's execution;
- a concise description of the actions of each officer involved in the entry and search; and
- an explanation of how the applicant is able to inform him or herself of what occurred during the search.

Additionally, the CTLU informed the VI it will provide us with a copy of the relevant warrant at the same time it delivers the section 11 warrant report. It is noted the provision of this additional information goes beyond the statutory requirements.

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

Victoria Police's level of engagement with external bodies with a role and functions under the TCPA has been impacted by the COVID-19 pandemic, however it has continued to engage with external stakeholders such as the Australian Federal Police and the Australian Security Intelligence Organisation – being members of the Joint Counter Terrorism Team. No significant update was provided for communication arrangements with other agencies, for example the development of memoranda of understanding.

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.

The VI inspected Victoria Police records to ensure compliance with the following requirements for covert search warrants:

- 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 ('PIM') 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 found an application was made to the Supreme Court for a warrant connected to a vehicle prior to the Assistant Commissioner giving his approval.

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

Finding 1 – Application for warrant made prior to obtaining the necessary approval

The VI identified one instance where the hearing of a warrant application in the Supreme Court was scheduled for 9.30am on a day in December 2020, but the Assistant Commissioner did not approve the application until 11.58am on the same day. In the opinion of the VI, the application was therefore not made in a manner prescribed by section 6(1) of the TCPA, which provides for the making of an application for a warrant by a 'police officer, with the approval of the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner'.

Victoria Police's response was that it agrees the TCPA requires the necessary approval to be given before an application is made for a covert search warrant. Victoria Police informed the VI of measures it has since undertaken to ensure necessary approvals are obtained prior to making an application, including updating the procedure and associated check list, placing greater emphasis on this requirement in the related training material and legal practice exercises, and improving lines of communication to facilitate approval.

Having regard to Victoria Police's transparency in making this error known to the PIM and the judge, and the provision of an approval letter some hours prior to the issuing of the warrant, the VI is not of the opinion that the delayed approval affected the validity of the particular warrant.

The VI supports the measures Victoria Police has agreed to take in response to our finding in this matter, and we look forward to inspecting records connected with these changes at the next scheduled inspection.

One warrant did not comply with the requirements of section 8(3) of the TCPA in respect of naming the occupiers of a residential premises.

Finding 2 – Mismatch between occupiers of premises as named in affidavit, covert search warrant and warrant report

An application for a covert search warrant is supported by an affidavit setting out the grounds on which the warrant is sought. A covert search warrant is required by section 8(3)(h) of the TCPA to specify “if known, the names of occupiers of premises named or described in the warrant”.

One inspected warrant named three persons as occupiers of the residential premises to which it related. However, the affidavit that supported the application for that warrant named only two of those persons as occupiers of the premises while the report made to the VI under section 11 of the TCPA named only one of those persons.

On inquiries being made with the CTLU, the VI was advised that the information contained in the affidavit supporting the warrant application was correct and that transcription errors had caused both the warrant and the warrant report to incorrectly name the occupiers of the residential premises (the error with the warrant report is reported separately at Finding 4 in this report – refer to page 13).

In the opinion of the VI, the error in relation to the content of the warrant raises an issue of non-compliance with the requirements of section 8(3) of the TCPA and may bring its validity into question.

Recommendation

1. That Victoria Police add a quality assurance measure to its procedures to ensure the draft warrant provided to the Supreme Court is consistent with the information given in the supporting affidavit.

Victoria Police’s response to recommendation 1:

‘CTLU have already actioned this recommendation by adding a quality assurance measure to our procedures and associated checklists to ensure that the draft warrant provided to the Supreme Court is consistent with the information given in the supporting affidavit’.

Were covert search warrants properly executed?

A covert search warrant authorises specified persons to exercise certain powers, including entering premises and 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 preparing for or assisting in a terrorist attack.

The VI inspected records to assess whether Victoria Police officers executed the three warrants lawfully. Information received by the VI shows each warrant was executed without the applicant having entered the particular premises and therefore, in the opinion of the VI, was not executed according to the prescribed terms of the warrant.

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

Finding 3 – Three covert search warrants were not executed according to prescribed terms

Section 9(1) of the TCPA provides that a warrant 'authorises the person to whom it is directed, together with any other person named or described in the warrant' to do a range of things including to enter and search the specified premises. It is the view of the VI that this requirement was not complied with in respect of three warrants; one warrant related to a residence and the other two warrants related respectively to a different residence and a vehicle that was located at that residence at the time the warrants were executed (all three are together referred to as 'the premises').

It is apparent from information in the warrant reports, as well as in the response from Victoria Police to questions asked by the VI, that rather than enter the premises, the applicant remained at a distance of 100-200 metres while other officers executed the warrants.

In the opinion of the VI, the manner in which each warrant was executed did not comply with the terms of the warrant and any evidence obtained by these officers may have been unlawfully obtained.

Victoria Police's response provided an alternative view of section 9(1) of the TCPA, where it suggested officers other than the applicant can lawfully enter premises so long as they 'are acting in concert with or at the direction of or in collaboration with the applicant'. Victoria Police noted the applicant on each occasion attended at the premises 'to the extent that it was operationally feasible and practical for him to do so'. With respect to the meaning of 'together with', it considers the warrants were executed appropriately 'having regard to the text, purpose and legislative intention of the provision'.

Victoria Police further 'maintains that each of the warrants were executed lawfully and considers that the ultimate assessment of this issue is a matter appropriately reserved for the presiding court'.

In the absence of a contextual definition given in the TCPA for 'together with', the VI notes its ordinary meaning implies that a thing or act is done jointly by two or more persons, and

therefore it does not have the same meaning as 'or'. Information received from Victoria Police based on its consultation with the applicant indicates he was neither on, nor within the curtilage of, the residential premises, nor within the vehicle at the time the warrants were executed.

Notwithstanding the applicant did not enter the premises when the warrants were executed, the VI accepts live communication between the applicant and other officers was available at all times. Further, the officers involved in the execution of the warrants were briefed by the applicant prior to each warrant's execution with regard to the conduct of the search and items of interest. Additionally, debriefings were held in-person between the applicant and other officers shortly after each of the premises was entered and searched. These actions at least ensured the warrants were executed at the direction of the applicant; however, the applicant's reports to the VI under section 11 of the TCPA were not based on direct knowledge of the execution of the warrants as the applicant did not enter each premises.

The warrant holder in these cases evidently held a coordinating and supervisory role and may not have been the person best suited to undertake the search. The VI acknowledges that due to the covert nature of the warrant, Victoria Police prefers as few persons as possible enter the premises and therefore there may be some impracticality in the warrant holder attending purely to fulfil the requirements of the TCPA.

Recommendations

2. That Victoria Police amend its procedures to ensure the applicant for a covert search warrant is on the premises when the warrant is executed.
3. That Victoria Police consider the practical constraints of executing the search when selecting the type of officer who will be the applicant for the covert search warrant. This will allow Victoria Police officers to execute the search warrant in its preferred manner and in accordance with legislative requirements. The VI notes there are no legislative restrictions in relation to who can fulfil this role.
4. That Victoria Police seek legislative amendment as part of the continued review of the TCPA if the legislative requirement of section 9(1) of the TCPA impacts the successful execution of a covert search warrant.

Victoria Police's response to recommendations 2, 3 and 4:

'Victoria Police acknowledges the recommendations of Victorian Inspectorate'.

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, the VI was not required to assess compliance with record-keeping requirements.

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 in relation to each of the three warrants within the requisite timeframe. While all matters specified in section 11(2) were addressed, the VI found an error in one report with respect to the named occupiers of premises identified in the warrant.

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

Finding 4 – Report did not correctly identify the occupiers of premises covered by a warrant

As reported at Finding 2 in this report, the report made to the VI under section 11 of the TCPA named only one person as the occupier of premises while the warrant relating to the premises named three persons as the occupiers.

Victoria Police's response was that the discrepancy was caused by a transcription error when the warrant report was drafted. The VI was advised that the information contained in the affidavit supporting the warrant application was correct and there were in fact two occupiers of the premises.

The VI considers there is no need for a supplementary warrant report since the report is only made to the VI and the VI has subsequently been informed of the error in the report.

Recommendation

5. That Victoria Police add a quality assurance measure to its procedures to ensure the warrant report provided to the VI is consistent with the information given in the warrant and notes any issues concerning any inconsistency between the warrant and the supporting affidavit.

Victoria Police's response to recommendation 5:

'CTLU have already actioned this recommendation by adding a quality assurance measure to our procedures and associated checklists to ensure that the warrant report provided to the Victorian Inspectorate is consistent with the information given [in] the warrant'.

FINDINGS – TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, its cooperation during inspections, and its responsiveness to suggestions and issues to be a measure of its compliance culture, which is necessary to maintaining the strength of, and confidence in, the Victorian integrity system.

[insert further information here and throughout the report to reflect Victoria Police's response to findings and recommendations]

Did Victoria Police self-disclose compliance issues?

Victoria Police did not make any compliance-related disclosures at the inspection.

Were issues identified at previous inspections addressed?

Since no issues were identified during the VI's previous inspection of Victoria Police records under the TCPA, there were no historical issues to be addressed.

The VI notes that Victoria Police has undertaken measures in response to Finding 1 in this report (refer to page 9), including updating procedures and training material to strengthen its ability to comply with the requirement to have the necessary approval prior to making an application for a covert search warrant.

Appendix A - Inspection Criteria and Methodology

Ref	Criteria	Methodology
1	What activities has Victoria Police undertaken to ensure it can comply with its use of powers under the TCPA?	
1.1	Have officers with a role under the TCPA been trained in their obligations?	Record checks – training documents. Qualitative assessment - quality of education programs, awareness campaigns and training.
1.2	Has the agency further developed its policies and procedures for using TCPA powers?	Record checks: policies and procedures, templates, checklists. Qualitative assessment - how well have any amendments been communicated? Level of engagement and responsiveness to VI.
1.3	Has the agency further engaged with other bodies (such as the VO, IBAC, VLA, the Commission for Children 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? <ul style="list-style-type: none"> - 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? <ul style="list-style-type: none"> - 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 reports properly made? <ul style="list-style-type: none"> - 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).

3.2	Was the agency cooperative and frank? <ul style="list-style-type: none">- 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.
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