Charles Sturt University

Submission to the Independent National Security Legislation Monitor

Call for Expert Submissions: High-Risk Terrorism Offender (HRTO) Review

Professor Mark Nolan and Dr Kristy Campion | Australian Graduate School of Policing and Security | Centre for Law and Justice

For further information please contact: Professor Nolan at mnolan@csu.edu.au

Charles Sturt University - TEQSA Provider Identification: PRV12018 (Australian University). CRICOS Provider: 00005F.

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About the authors

Prof Mark Nolan

(BSc(Hons)/LLB, MAsPacSt, PhD (ANU), SFHEA)

Professor Mark Nolan is an interdisciplinary legal scholar with qualifications in law, honours and doctoral training in social psychology, and a Masters of Asia Pacific Studies majoring in Thai language. Prior to becoming Director of the Centre for Law and Justice at CSU in April 2020, Mark worked at the ANU College of Law, The Australian National University, Canberra, since 2002. At ANU, Mark taught undergraduate and postgraduate students and researched in the area of criminal law and procedure, including codified Australian federal criminal law (such as counter-terrorism law, human trafficking, cybercrime, social security, and drug law), law and psychology, military discipline law (taught to Legal Officers in the ADF), Foundations of Australian Law, advocacy, and human rights law. Other research interests include citizenship law, social cohesion, human rights law, intergroup relations, stereotyping, prejudice, social justice theory, and sentencing law. Mark has made individual and joint submissions to parliamentary inquiries in the area of counter-terrorism law and federal criminal law since 9/11. Mark has also taught comparative counter-terrorism law in the US as well as to students visiting ANU from University of Alabama. Mark is currently the Editor-in Chief (April 2020-April 2022) of the ANZAPPL journal *Psychiatry, Psychology and Law*, and is the Deputy Research Director of a new research group at Charles Sturt University, that commenced work in 2022, called the Contemporary Threats to Australian Security Research Group. This group will initially research ideologically-motivated extremism such as right wing extremism and trade-based money laundering.

Dr Kristy Campion

(BA (Hons 1st Class), PhD (JCU).

Dr Campion is Lecturer of Terrorism Studies in the Master of Terrorism and Security Studies degree at Charles Sturt University and has published Australia's first comprehensive history of terrorism titled *Chasing Shadows: The Untold and Deadly Story of Terrorism in Australia*. She is the Joint Editor-in-Chief of the *Salus* Journal, an independent peer reviewed policing journal; sits on the editorial board of *Extremism* (United Kingdom) and the *National Security Journal* (New Zealand); and was a guest editor of a Special Issue on the Global Rise of the Far Right for *Social Sciences*. Dr Campion is the Younger Visiting Fellow of the Centre for Researching Extremism (C-REX) at the University of Oslo, and contributor of the Australian right wing terrorism and violence dataset. Her research has focused on diverse terrorism threat natures in Western democratic contexts. Her publications on ideologically motivated threats have been published in high-ranking scholarly journals. Her work right wing extremism has identified the extensive transnational and domestic networks; defined ideological systems and beliefs; critically examined the participation of women; and explored the contextual factors which have enabled its overall endurance. She has also published on other ideological threats including the extreme left, and religious threats such as Salafi jihadism. She is a key researcher in the Contemporary Threats to Australian Security (CTAS) research group leading the right wing extremism project.

TERMS OF REFERENCE ADDRESSED

We offer views relevant to the following Terms of Reference (**those in bold**):

- The influential role of, and reliance on, risk assessment results included in expert reports in Div 105A proceedings and State-based post-sentence detention regimes, compared to comparable international jurisdictions;

- The appropriateness of VERA-2R and other SPJ tools to assess future violent extremist risks;

- **Whether risk assessors should be required to demonstrate an understanding of the difference between an offender's violent extremist ideology and an offender's conservative religious beliefs, so they are better placed to make informed judgement on an offender's intention to commit a future terrorism offence;**

- **How a risk assessment may vary and what factors, other than a risk of violent extremism, should be considered and how different risk assessment methodologies enable assessors to account for mental illness;**

- **To what extent judicial officers understand and can interrogate risk assessments presented to the Court, focusing on effective communication to non-experts given the variations of terrorism activity and ideological affiliation;**

- **The merits of open discussion, academic debate, and external scrutiny about the structure and use of risk assessment methodologies (notwithstanding extant commercial or security interests);**

- **Whether the legislated objective of the HRTO scheme should be amended to expressly provide for rehabilitation of the terrorist offender as a Call for Expert Submissions – HRTO Review Page 2 primary consideration, retaining protection of the community as a paramount consideration;**

- **The case for and/or against establishing an independent body in Australia to oversee the validation of risk assessment tools, development of best-practice guidelines, and the accreditation and training of those practitioners utilising the tools (e.g. modelled on the Scottish Risk Management Authority (RMA)).**

We also have taken the liberty of bringing some other matters to the attention of the INSLM:

- **Whether the THRO regime should be acknowledged as existing in the HRTO legislation;**
- **Continued absence of separate facilities allowing for the separation of those on CDOs from those serving sentences for terrorism.**

SUBMISSIONS AND RECOMMENDATIONS

Whether risk assessors should be required to demonstrate an understanding of the difference between an offender's violent extremist ideology and an offender's conservative religious beliefs, so they are better placed to make informed judgement on an offender's intention to commit a future terrorism offence;

This submission supports the risk assessor being required to demonstrate expertise in extreme ideology in order to make the distinctions needed for an informed judgment on the likelihood of a future offence. It is suggested here, however, the beliefs (regardless of whether they are conservative, religious, or political) can and often are inseparable parts of ideological systems.

The key reorientation suggested here is for risk assessors to demonstrate understanding of extreme ideologies with positive evaluations of violence as a theory for social change, rather than distinguishing between extreme ideology and conservative beliefs. This comes with the recognition that ideology is not commonly a standalone explanation for engaged behaviour.

Ideology is a contested part of the already contested subfield of terrorism studies. While it is widely acknowledged that ideology had some influence or role in terrorism, the exact nature and extent remains subject to debate (Holbrook and Horgan 2019, Ackerman and Burnham 2019). Nevertheless, according to prominent scholar Martha Crenshaw: "understanding how underground groups view the world and themselves is essential to explaining terrorism" (Crenshaw 2012).

Ideology, according to Heywood (2007), is a "more or less coherent set of ideas that provides the basis for organised political action" – which can aim to preserve, modify, or even overthrow the existing order. This means that ideology can be considered "manifestly self-serving," reflecting the will of the individual rather than the entire community (Adams 1993). In pursuit of this social change, ideology has three contours.

1. An account of the current order – which explains why the world is the way that it is
2. A desired alternative – a future, improve world that can (and should) be advanced
3. A theory of social change – being a way to achieve that desired alternative

As a result, ideology is, in general, a system of stories, beliefs, narratives and ideas which interpret and explain the world around us. These narratives are taken to be axioms – to be incontrovertible truths which did not require justification or defence. They do not have to be true, evidence-based, or reasonable. They are often buttressed by a concept of a "good society" which embodies the values of the believer.

In extreme ideologies, the current order is normally reviled as being broken, corrupted, and beyond repair. The desired alternative is typically utopian in nature (whether religious or political). The theory for social change, as a consequence of these ideas, typically relies upon violence to enable the cleansing or rebirth of the utopian vision. The "good society" and its values become extremely narrow and limited. An example of this is how Islamic State militants rejected and murdered fellow Muslims in Syria and Iraq for not constituting their interpretation of a "good Muslim".

Terrorism scholar Martha Crenshaw specifically indicates that ideology allows the individual to identify and distinguish between friends and targets: the good insider and the bad outsider – both normally informed by abstractions and overgeneralised assumptions (Crenshaw 2012, 253). Beliefs and ideological rationalisations therefore remain significant for justifying terrorism – and as Crenshaw suggests – can follow engaged behaviour and violent action instead of preceding it.

Ideology, as a consequence, is seen to hold regulatory power over human behaviour, and guide, shape or influence human decisions. The exact nature of this cannot be quantitatively recognised, as it is generally known that most people who hold extreme ideologies do not engage in terror (Borum and Fein 2017). Synchronously, however, as was stated by one scholar "a terrorist without a cause (at least in his own mind... is not a terrorist" (Holbrook and Horgan 2019). So extreme ideology is essential to terrorism without necessarily being the only factor responsible for it.

The ideology argument is further complicated by studies which have demonstrated that Salafi jihadists who became Foreign Terrorist Fighters and committed acts of terrorism in Syria/Iraq did not necessarily have advanced understandings of their own ideology (Borum and Fein 2017). This is also reflected in the extreme right. Darren Osbourne who conducted a vehicle attack against British Muslims in 2017 had only spent four weeks readings ideological materials related to Islamophobia. His knowledge of advanced demographic conspiracies theories was considered shallow at best (Holbrook and Horgan 2019).

By contrast, even those with strong ideological understanding are not guaranteed to participate in violence. Abu Muhammad Al-Maqdisi, former mentor of Abu Mus'ab Al-Zarqawi (whose group Al' Qaeda in Iraq birthed Islamic State), is considered one of the most prominent living Islamist ideologues of contemporary times (Wagemakers 2008). Despite his teachings, which correlate with extreme versions of Salafi Jihadi ideology and have influenced terrorists in Saudi Arabia and Jordan, and his numerous stints in prison, there is no clear open source evidence to indicate he has participated in violence personally nor provided material support.

This is also reflected in the extreme right. In 2020, American scholars of right wing extremism, Pete Simi and Steven Windisch, published on the role of 'violent talk' in extreme subcultures. They immersed themselves in the United States extreme right and collected ethnographic data through 1-3 hour interviews with 56 individuals from 1997 to 2020. This included interviews with prominent leaders such as Tom Metzger from White Aryan Resistance, and individuals associated with Ku Klux Klan, Aryan Nations, and Hammerskins (the latter three have Australian chapters). They found that expressions of ideology, emphasising the positive evaluation of violence were often deployed as a rhetorical device to express anger and frustration. To quote Simi and Windisch directly:

> "For members of extremist groups, talk is one of the most concrete manifestations of how adherents communicate their ideas to each other and the general public. These discussions, however, **do not necessarily involve a direct correspondence between words and future behavior** [emphasis added]" (Simi and Windisch 2020)

The significant finding of Simi and Windisch's study was that extreme ideological expressions do not necessarily correlate with an actual desire to commit acts of violence. Instead, ideological expressions created a "sense of doing", allowed them to express emotion, and "achieve consistency between their personal and collective identities (Simi and Windisch, 2020).

Other studies suggest that affective networks have an impact on willingness to engage in violent behaviours. Loyalty to peer groups has therefore also been identified as an important motive for engagement in terrorist organisations (Porta 2012). Denizen of terrorism studies Walter Laqueur suggested, moreover, that it was not the most ideologically committed individuals who engaged in terrorism – but the "most aggressive and militant" (cited by Holbrook and Horgan 2019). Borum and Fein (2017) also note that violence can in some situations be explained by other concomitant factors such as identity issues, grievances, group affiliations, and so on.

To sum up these contending academic perspectives, terrorists must not be expected to be scholars of their own extreme ideologies and beliefs, so assessing ideology as a singular foundation for future offences is not supported by general consensus in the academic literature. Demarcating between ideology and beliefs, moreover, is not aligned with definitions of ideology which include beliefs.

As a result of this contention on extreme ideology, the following is suggested:

- That risk assessors are able to demonstrate competence in identifying, understanding and distinguishing extreme ideologies;
- That risk assessors are able to establish the interaction between extreme ideologies and positive evaluations of violence, as relevant to the classification (ideological or religious);
- That knowledge of extreme ideology is not overemphasised for its part of the risk assessment process;
- And that other factors as suggested in the scholarly literature are synthesised with ideological factors to arrive at a substantiated conclusion

How a risk assessment may vary and what factors, other than a risk of violent extremism, should be considered and how different risk assessment methodologies enable assessors to account for mental illness;

The INSLM would be interested in the significant debates between parties in the following NSW THRO Act proceedings, including the cited case law and concerns about the effectiveness of mental health orders (such as involuntary inpatient mental health orders and community treatment orders) as alternative possible orders to ESO or CDOs. Whether mental health orders be considered upon release from prison instead of application prior to release for CDOs or ESO-style monitoring is an important tension to acknowledge that was referred to in the two cases below. Exactly how mental illness can be recognised and incorporated into the risk assessments performed by experts in those cases is noted, and, is a feature of a structured professional judgment (SPJ) approach as opposed to a pure actuarial approach. For example, the clinical opinion, under an SPJ approach, that the VERA-2R risk profile is evident or exacerbated when active symptoms of an episodic mental illness are also observed.

In *State of New South Wales v Ibrahim (Final)* [2021] NSWSC 793 (3 year ESO applied for and granted and mental health orders considered not to be an appropriate form of protection for the community) the experts in paragraphs [191] note that assessed moderate risk of terrorism offending via VERA-2R assessments is clearly exacerbated in the prisoner's history of offending *when psychotic symptoms were active*. Some experts opined, but did not persuade the court (see paras [293]-[309]) that mental health orders were more appropriate than an ESO for this offender with a history of mental illness:

"The court appointed experts and Dr Eagle agree that, when in good mental health, Mr Ibrahim does not have religious or ideological beliefs or commitments that support engaging or participating in terrorism activities or violent extremism. That position, however, is starkly different in circumstances where Mr Ibrahim is mentally unwell. It is in that context that Mr Ibrahim's denial as to holding religious or ideological beliefs or commitments that support engaging or participating in terrorism activities or violent extremism is to be viewed." (paragraph [273])

In a second NSW THRO Act case, *State of New South Wales v Hardy (Final)* [2021] NSWSC 900, involving a prisoner who was a repeat player under the NSW THRO Act scheme, with attraction to Sovereign Citizen Movement ideology, another tension between the appropriateness of dealing with the threats posed by the offender via restrictive mental health orders rather than THRO Act orders like ESO and CDOs, was discussed between parties and by the judge:

"This is an unusual case. The Defendant is an intelligent man who has demonstrated disturbing behaviour in the past supportive of extremist ideology. This behaviour is said to be associated with mental health issues [anti-psychotic treatment for delusions; personality disorder, idiosyncratic use of language]. The question for the Court in the present proceedings is whether the Defendant should once again be dealt with under the THRO Act, this being a matter of significant controversy between the parties." [paragraph [3]]

See also paragraphs [46], [51], [88]-[89], [184], [218], [226], [233], [237], [265], [273], [282], [285], [294], [300], [305], [309], [319], [322], [326], [347], [387]-[388], [391]-[393], [397], [403], [405], [415],[424], [426], [428], and [430]. The upshot of these discussions is that the risk assessments seemed to be qualified by a fear that if the mental health of the respondent could deteriorate, that would make the respondent more susceptible to engaging in extremist behaviour more likely (see para [282], for example).

Another dynamic, here, was the lack of insight the respondent showed into his mental illness and a reluctance to participate in mental health programs and treatment whilst incarcerated. That lack of insight in

mental illness and reluctance to receive mental health treatment in prison, seemed persuasive for the judge to order the requested, maximum possible, 3-year ESO despite the fact that mental illness was thought to shape and contributing to the risk of extremist behaviour upon release. Justice Johnson concluded:

“I have considered these submissions. I am satisfied that an ESO should be made. These other forms of supervision [eg. mental health orders under the *Mental Health Act 2007* (NSW)], official scrutiny or possible treatment for mental health problems do not address the particular risk posed by the Defendant in this case.” [404]

This conclusion was drawn despite expert clinicians opining for the respondent (at [300] and [305]) that the mental health system of mental health orders could be satisfactory and more appropriate and effective than an ESO ordered under the NSW THRO Act. The Plaintiff State asserted that the NSW THRO Act orders, such as an ESO, were clearly meant to be ordered for those with mental health conditions, and, therefore, it was not the case that any presence of mental illness vulnerability should shift the respondent to the mental health system rather than the system of CDOs and ESOs; meaning, that assessing presence of active mental illness symptoms exacerbating extremist risk is the type of risk assessment that keeps the case within the scope of THRO rather than outside of it.

The interesting question is whether resisting use of the mental health orders is the best approach when a respondent, unlike Hardy, actually has some form of insight into their mental illness and its relationship to their commitment to and expression of extremist ideology and to their engagement in extremist behaviour. What if the respondent to a THRO or a Div 105A proceeding is willing to attend ongoing psychiatric or psychological treatment sessions, and, even, be compliant with taking appropriate psychotrophic medications? Could the use of mental health orders instead of THRO or Div 105A orders be appropriate?

In light of these two cases, representing two of the five completed THRO Act determinations in NSW in 2021, the INSLM may not wish to minimise, as Senator Fawcett seemed to in comments on the appropriateness of the VERA-2R as a risk-assessment tool in the Senate on 22 Nov 2021, that those posing a risk of terrorism offending or re-offending and the majority of terrorist offenders:

“ are quite sane and are quite competent; they just believe and intend to act upon their beliefs of the ideology they follow.”

Professor Paul Gill and colleagues (Gill et al., 2020) have analysed, via a systematic review of 25 studies of 1705 individuals, the relationship between mental health and expression of extremist ideology and engagement in extremism, and the utility of assumptions that offenders serving sentences for terrorism offences and/or posing risk of terrorism offending upon release from prison, or, in the community, rarely have comorbid mental health concerns. They point to a significant even though low to moderate prevalence of mental health diagnoses in their sample, but, conclude importantly that:

“The aggregated prevalence rates also suggest that mental health disorders and other complex needs require consideration in risk assessment and management instruments”.

Exactly how that is to be done, via an SPJ approach, perhaps, and with which psychometric instrument, is the challenge for the future.

To what extent judicial officers understand and can interrogate risk assessments presented to the Court, focusing on effective communication to non-experts given the variations of terrorism activity and ideological affiliation;

Improving judicial understanding of the results of the often multiple psychometric risk assessments presented in a legal proceeding like a trial under a Div 105A or under the THRO Act (whether they be pure actuarial risk assessments or SPJ risk assessment tools such as the VERA-2R), is an ongoing challenge for courts, expert witnesses, and Attorneys-General in multiple jurisdictions. There is clearly a shared responsibility for ongoing education and interdisciplinary dialogue between experts, stakeholders, and decision-makers.

Limitations identified and doubts raised around the suitability of risk assessment tool use with prisoners with particular backgrounds and demographics needs to be explained by experts in proceedings and strengthened via judicial education and other education. Interdisciplinary professional associations such as the Australian and New Zealand Association of Psychiatry, Psychology and Law, and work published in its locally-edited journal *Psychiatry, Psychology and Law*, is a useful starting point, but, the growing global literature on limitations and value of psychometric risk assessment is, of course, highly relevant to Australia as well.

We have seen this education and analysis occurring in the sex-offender risk assessment context where judicial awareness of research debates surrounding, for example, the validity of the Static-99 assessment of sex offender risk; especially via research (eg. Spianovic et al.) and judicial consideration in Western Australia in post-sentence detention and monitoring cases, has occurred.

For example, in *R v Samson* [2014] WASCA 199 at [51], Justice McKechnie stated:

“There has been a growth in risk assessment calculators purporting to be tools with which specialists, psychiatrists and psychologists can make more accurate predictions of risk. This growth may be in response to legislation similar to the DSO Act in many countries. The efficacy of some of these tools remains controversial. Static 99 is now one of the older tools. It has many limitations as explained in other cases. For present purposes however, it is not a valid test for Indigenous males of the same cohort as the respondent. Until validated, its use, if any, must be limited to members of the cohort on which it was developed. There is simply no evidence to suggest whether the Static 99 result has any efficacy whatsoever in relation to Australian Aboriginal men. If the Static 99 score is accepted as valid (and it is not) it suggests that the respondent has a 60% chance of not re-offending within a five year period. This is simply the reverse of the statement quoted earlier.”

Such judicial understanding and recognition of technical issues of the predictive validity of a (pure actuarial) risk assessment tool for a social group upon which a risk assessment test has not been normed and validated, is, upon appropriate expert testimony, not beyond the comprehension of judicial officers experienced in post-sentence detention cases. There is no reason why understanding of the strengths and limitations of risk assessments used in predicting extremist behaviour cannot also be achieved by Australian judicial officers. Such education and explanations, even by the authors of the VERA-2R, would be valuable rather than concluding too readily that there is no guidance to be given at all to the courts by the VERA-2R or other (especially “structured professional judgment” risk assessment tools). Effective expert testimony and accessible science translation work by experts, is the key here.

A further example of judicial awareness of the contested nature of psychometric risk assessments, we can cite the statement made in the child pornography case of *R v Barber* [2021] ACTSC 78, by Chief Justice Murrell who cautioned against overreliance on risk assessment stating at [59]:

"While an offender's prospects for rehabilitation are always a very relevant consideration, for offending of this type, it is difficult to reliably assess prospects. Risk level was assessed [via a psychometric tool] by Ms Bollinger and by the author of the pre-sentence report, but I do not place substantial weight on those assessments, as such assessments are notoriously unreliable."

Exactly how useful and how unreliable an assessment via psychometric testing is in any one case, including best-practice structured professional judgment approaches, must be the focus of expert testimony in the relevant proceeding, as well as being an important focus of ongoing education for all involved in post-sentence detention and monitoring work under Div 105A and other regimes such as the NSW THRO Act regime. As stated above, universities, professional association, Governments, and courts bear joint responsibility for stimulating interdisciplinary education here.

The merits of open discussion, academic debate, and external scrutiny about the structure and use of risk assessment methodologies (notwithstanding extant commercial or security interests);

The outcomes of risk assessment tools and methodologies have the capacity to influence both legal rulings directly, but also Australian democratic culture indirectly. Open discussion and external scrutiny of tools and methodologies, regardless of commercial interest, should be a priority.

The validation and critical analysis work that forensic and research psychologist and psychiatrists have been able to give risk assessment methodologies has been crucial in the ongoing refinement of assessment methodologies in the area of sex and violence offending in the relevant Australian State and Territory systems of CDOs and ESOs. This has clearly been the case for foreign jurisdictions as well. The need for such scrutiny extends beyond describing for the courts initial studies *and* meta-analytic studies or systematic reviews that can result in clearer guidance of what the research has found over a decade or decades. Open academic debate, unhindered by commercial and security interests, is imperative in this area. This means that academics, analysts and clinicians need to be funded and given access to relevant datasets and incarcerated individuals if some of this work is to be done, over time and in a statistically-rigorous way.

Whether the legislated objective of the HRTO scheme should be amended to expressly provide for rehabilitation of the terrorist offender as a primary consideration, retaining protection of the community as a paramount consideration

Both considerations, community protection and rehabilitation, seem important if deprivation of liberty post-expiration of a prison sentence for a terrorist (under HRTO) or even non-terrorist (under THRO) offence is to be done on sound principles of preventive justice (see Ashworth and Zedner, 2014, for a set of principles). Both considerations are linked and community protection is most effective if possible long-term desistance, and not just short-term incapacitation, is the basis of decisions about post-sentence detention and monitoring.

Beyond the link between long-term desistance bolstering community protection in a real and lasting way, one of the strongest arguments for making such amendments is the argument made by the Australian Government to the UN that invoked *both* considerations. The Australian Government relied on *both* community protection *and* rehabilitation when it gave its belated response to the United Nations Human Rights Committee's views in the communications of *Tillman* and *Fardon* relating to the NSW state continuing detention order regime for sex offenders (*Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 (12 April 2010); *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (12 April 2010)).

In reaction to the UN Human Rights Committee finding breaches of the International Covenant on Civil and Political Rights found in NSW state continuing detention order regime for sex offenders, the Australia Government offered the following to the Committee when arguing for post-sentencing detention and monitoring regimes to continue:

". . . in light of the Committee's previous jurisprudence on this issue, preventative detention must serve a legitimate purpose and have a number of safeguards in place . . . the community has a legitimate expectation to **be protected from these offenders, and, at the same time, . . . authorities owe these offenders a duty to try and rehabilitate them** . . . These schemes . . . [attempt] release into the community . . . in a way that is safe and respectful of the needs of both the community, and the offenders themselves." (emphasis added)

This quote used in scholarship and teaching by Prof Nolan at the time of the Government's response to these communications is not longer available as it once was on this A-G (Cth) website http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx. It is likely to be found in a range of relevant UN documents surrounding the follow-up of the Government's response to the UNHRC's views in the *Tillman* and *Fardon* communications, eg. perhaps in A/68/40; A/65/40; or A/69/40.

This formal response to the UN suggests that the Australian Government's stated legitimate purpose for tolerating the human rights abuses found to exist in post-sentence detention and monitoring regimes by the UNHRC relied explicitly on both community protection and individual prisoner rehabilitation.

If both were to be recited as paramount considerations throughout the HRTO legislation as relevant (eg. at least in the objects provision of Div 105A, as well as in other decision provisions) then this justification would potentially assist, beyond mere community protection, in determining *when* a CDO is most appropriate for the immediate community protection goal *as well as* the longer-term protection of the community that is afforded by successful rehabilitation, desistance and disengagement.

Another way of thinking of the value of adding rehabilitation to community protection here is that it raises the important question of where rehabilitative programming and risk and resilience testing for an individual is best conducted: in prison, or, in the community. If the sole decision-making criterion or object of the Div is stated as community protection only, the effectiveness of precise P/CVE strategies and where they are best attempted (in custody or in the community) is not fully considered. With one criterion only, it may be more tempting for decision-makers to privilege possible community protection over potential rehabilitative success too often against the interests and likelihood of real change and disengagement with support and realistic testing of risk in the community.

The case for and/or against establishing an independent body in Australia to oversee the validation of risk assessment tools, development of best-practice guidelines, and the accreditation and training of those practitioners utilising the tools (e.g. modelled on the Scottish Risk Management Authority (RMA)).

An accessible description of the benefit of such an authority is given in the media report https://www.theage.com.au/national/finding-a-new-way-to-manage-sex-offenders-20061001-ge38rb.html authored by long-standing academic researcher in the area of risk assessment for post-sentence detention and monitoring regimes, Emeritus Professor Bernadette McSherry (University of Melbourne), whose publications and publications with Prof Patrick Keyser (now ACU) have praised the work of such an authority.

One benefit of such an authority, and difference to our current HRTO, THRO and other sex and violent offender regimes in Australia, is that the offender knows at time of sentencing, and not just at some time prior to release upon application for interim and final CDOs or ESOs, that they will be subject to a risk management plan upon release from prison. This may assist in reducing the shock and pain for some offenders who have the reality of being subject to post-sentence detention and monitoring thrust upon them in the final stages of their sentences.

However, this would be a definite threat to the practices of the NSW THRO regime where terrorism risk is assessed for a range of offenders whose index offence is not terrorism, meaning that the involvement of a Risk Management Authority (like the Scottish one) cannot be done at time of sentencing for those sentenced to non-terrorism offences who risk of terrorism offending upon release emerges during incarceration and was not evidence at time of sentencing.

Even though at the time of sentencing, offenders convicted of offences that may trigger Div 105A continuing detention order proceedings must be warned of that fact under s 105A.23, that warning does not equate to the work of the Scottish authority.

Whether the THRO regime should be acknowledged as existing in the HRTO legislation.

It seems curious in a post-9/11 era largely shaped by referral of powers over counter-terrorism in Australia to the Commonwealth, why, there is no reference in Div 105A of the *Criminal Code* (Cth) to the existence of a quite different NSW THRO regime alongside the HRTO regime. One analogy is the way in which drugs offences in the States and Territories are acknowledged as being similar to Federal drugs offences that exist in the *Criminal Code* (Cth).

Such tension has not really been testing in a s 109 inconsistency or other constitutional argument, yet. However, the existence of two regimes, triggered on entirely different bases, is one factor the INSLM may wish to think through in this review.

Continued absence of separate facilities allowing for the separation of those on CDOs from those serving sentences for terrorism.

Related to the inclusion of rehabilitation as one of two paramount considerations in the HRTO regime is the question of when and if there may ever be built separate places of detention to house those on CDOs separate from sentenced prisoners. Whether greater rehabilitation in a CDO period of detention is achieved in a separate detention and treatment centre than within the confines of the prison, including supermax facilities, where the same individual served the entirety of their pre-CDO sentence, surrounded by sentenced prisoners, is an intriguing empirical question. The HRTO legislation suggests this aim of separation in different facilities is desirable, but, it has not really been achieved in Australia yet.

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