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**INSLM REVIEW OF DIVISION 105A OF THE CRIMINAL CODE ACT 1995**

Concerns surrounding terrorist rehabilitation and recidivism and hence the threat that convicted terrorists post to society are real. Usman Khan, a convicted terrorist in the UK who had been released stabbed five people at Fishmonger's Hall and London Bridge in November 2019. Sudesh Amman, who conducted a knife attack in London on 2 February 2020 was released from prison on terrorism charges the month prior to the attack. And Kujtim Fejzullai, the gunman who killed four people in an attack in Vienna in November 2020 had been paroled in December 2019 after being convicted of trying to enter Syria to join Islamic State.

In Australia, Khalid Sharrouf, Amer Haddara and Ezzit Raad were all convicted and spent time in jail before they left Australia and joined Islamic State. And more recently Momena Shoma, who was already serving a 42-year sentence for a terrorist attack in Melbourne was sentenced to another 12 years for an attack she carried out against a fellow inmate that was designated as a terrorist attack.

The data concerning radical Islamist terrorist recidivism is quite limited and virtually non-existent in the Australian context. There are several reasons for this: firstly, until the outbreak of the Syrian conflict and the emergence of Islamic State, the sample size of terrorism offenders has been quite small. Secondly, given the average jail sentence in Australia for radical Islamist terrorism offenders is around 13 years, most of the subjects remain in prison and will do so for years to come so many have not had the opportunity to recidivise. And lastly, this form of terrorism often requires a particular environment in which to manifest itself – the Iraq invasion and the Syrian conflict are two examples of this. Absent this external stimulus, individuals may retain their ideological views but not act them out.

Courts' sentencing remarks and the response of terrorism offenders to the control orders to which they are subject after their release from prison give some indication of the likelihood of recidivism. Courts have found more than 60 per cent of convicted

Islamic State-era radical Islamist terrorism offenders not to be contrite and that fewer than a quarter of them have good or better prospects for rehabilitation.<sup>1</sup>

Concerns raised by the courts also appear to be reflected in the experience of terrorists who have been released and then placed on control orders. Of 14 individuals subject to control orders that I am aware of, nine have been charged for breaching them (one person has been twice charged for breaching their orders) while another had his order extended for an additional year. One other person who was subject to a firearm prohibition order (FPO) was charged for breaching it.

It is therefore in the public's best interests that some form of post-sentence control mechanism should be imposed on terrorism offenders in order to best ensure the safety of the public. The issue then becomes whether the continuing detention order (CDO) achieves that aim or whether its aims can best be achieved by other means. The then-Attorney General said that the need for a CDO was because:

*There is no existing Australian regime for managing terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentence. Law enforcement agencies can seek to rely on control orders to manage the risk of terrorist offenders upon their release from prison. However, there may be some circumstances where, even with controls placed upon them, the risk an offender presents to the community is simply too great from prison.*

The reasons for requesting a CDO then, appear to be predicated on the fact that a normal control order is insufficient to mitigate the risk posed by a terrorism offender. A CDO is an extraordinarily powerful instrument for a government to employ, and the public should also demand that it should only be used *in extremis* where there were no other realistic options open to the government. It should not only be proportionate to the threat the individual poses, and not simply to control a difficult case or to appear tough on terrorists. Because of this, I have concerns about CDO being sought in the current environment.

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<sup>1</sup> Typology of Terror, Lowy Institute, <https://interactives.lowyinstitute.org/features/typology-of-terror/legal-status/>, accessed 21 January 2021.

There is no doubt that Abdul Nacer Benbrika has been highly influential amongst the Australian radical jihadist cohort and himself presents a serious security threat. His Australian citizenship has been cancelled. In imposing a CDO the Victorian Supreme Court accepted the Commonwealth's arguments that less restrictive measures such as a control order could not guarantee the mitigation of the risk, while it also did not accept that immigration detention would be as effective a control as a CDO or that if he was deported to Algeria it would negate his ability to influence supporters in Australia.

Benbrika still adheres to his violent jihadist ideology after 15 years in prison. There appears to be no logic to detaining him for an additional three years or explaining how this is likely to reduce the risk of his release into the community when it occurs three years hence. If he remains an unreconstructed jihadist after 15 years in prison then it is highly likely he will remain so in three years' time and the threat he poses will remain. Indeed, if it is believed that he retains such influence amongst others, then there is an argument that extending his detention may even increase his credibility as a jihadist ideologue. Radical Islamist literature after all praises *sabr*, or patience, as a virtue.<sup>2</sup> If his deportation to Algeria is considered equally problematic, this disregards the fact that as an Algerian citizen he is able to travel there at any time. The Algerian authorities' attitude towards him is likely to be the same whether he is deported or travels there freely.

The argument that less restrictive measures such as control orders are insufficient appears to be difficult to argue given the way in which authorities have been able to effectively monitor individuals to date, detect breaches, then detain and charge the individual concerned. The PJCIS noted that 12 individuals had been noted as being eligible for consideration for a CDO and that one of these individuals, Bilal Khazaal had been released on a control order. Khazaal was a significant figure in the Australian radical Islamist cohort but was only subject to the less restrictive control order. Khazaal was subsequently arrested by police for breaching that order and awaits trial.

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<sup>2</sup> See for example Dabiq Issue 5, p 24; Issue 7 p 12; Rumiya Issue 4 p 31; Issue 9 pp 26, 35.

It is not clear why the authorities felt that they could not effectively monitor Benbrika and determine whether he had breached a control order's numerous conditions, while at the same time they could effectively determine breaches by another high-profile terrorist offender such as Khazaal.

The other use of the CDO, with respect to Blake Pender, involved an offender with significant mental health and substance abuse issues and it is difficult to believe that the drafters of the legislation envisaged it being used on someone whose adherence to a radical Islamist ideology was as marginal (even if his violent behaviour was real) as Pender's. For this reason the court only imposed a one-year CDO. Once again the limitations of control orders formed part of the court's considerations.

The concerns regarding the legislation centre around its utility given the three-year limitation. If someone has served a lengthy jail sentence for a crime based on a radical Islamist ideology and they have not renounced the ideology then it is likely that they never will. This being the case, there appears little practical utility in continuing their detention. Better to release them under a control order (that can be extended if necessary) and perhaps a FPO that allows for searches to be conducted. The number of individuals caught breaching their control orders to date would indicate that the authorities are able to monitor individuals of concern.

A committed ideologue that continues to pose a threat to the community at the time the CDO was given is likely to remain a threat after the expiration of the CDO. The same limitations put forward regarding control orders will still be there. It is therefore difficult to understand what practical outcome the three-year detention is supposed to achieve. It appears anomalous for example, to impose a CDO on Benbrika because of the inadequacies of the control order, but then release Khazaal on the same 'inadequate' control order – noting that Khazaal's breaching of the order was detected. I am concerned that the practical outcome the CDO is designed to achieve is not questioned more rigorously, nor the perceived inadequacies of less restrictive measures such as control and associated orders are not scrutinised in more depth, given their apparent effectiveness to date. Given this, it is hard to see a reason why CDOs are warranted.