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## Purposes of parole and s19AG

1. There was some ambiguity at the hearing as to whether release on parole was 'automatic' at the time s 19AG was introduced. To clarify, the Minister could refuse parole in relation to offenders sentenced to more than 10 years imprisonment [see discussion at paragraph 10 below].

2. This has prompted us to re-visit the introduction of s 19AG with reference to the following:

    a. the purpose of, and restrictions to fixing a non-parole period by a court.

    b. the purpose of, and restrictions to an executive grant of parole.

3. These aspects may inform the analysis of whether 19AG is arbitrary under international human rights law at the time of its introduction, and whether this position changes post the 2012 parole amendments.

### The purpose of and restrictions to fixing a non-parole period by a court

4. At the time s 19AG was introduced the purpose of fixing a non-parole period (**a *NPP***) by a court was informed by the common law and the general principles of sentencing at s 16A. These principles were bounded by proportionality.[1] There were limited statutory restrictions on the formulation of the NPP.[2]

5. The majority of the High Court in *Bugmy v The Queen*[3] (citing *Deakin v The Queen*[4]) characterised the legislative intent behind the NPP as follows:

> "The intention of the legislature in providing for the fixing of a minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, **once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence**"[5] (emphasis added).

6. The sentencing exercise in relation to a NNP differs to the head sentence:

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1 *Bugmy v R* (1990) 169 CLR 525.

2 Section 19AB (as it then was) required a court to fix a non-parole period for any sentence over 3 years imprisonment.

3 (1990) 169 CLR 525.

4 (1984) 58 ALJR 367.

5 *Bugmy* at 7.

> "[The head sentence] must be proportionate to the gravity of the offence *Veen v The Queen* [No 2], whereas the minimum term represents a portion of the head sentence during which the offender will not be considered for parole. In one sense, that portion must itself bear a proportionate relation to the crime. Generally speaking, the perceived prospects of rehabilitation will make a significant difference. Among other things, those prospects will affect what is required by way of protection of the community. Release on parole is a concession made when the Parole Board decides that the benefits accruing by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community of relaxing the requirement of imprisonment."[6]

7. Intermediate appellate courts in Victoria have confirmed this approach and underscored that matters personal to the accused will be given greater weight in relation to the parole period.[7]

8. Intermediate appellate courts have also recognised that the NNP incentivises rehabilitation.[8] This is critical to public safety. In our submission the incentive is derived pre-sentence through the Court's ability to craft a NNP without restriction and post-sentence through the executive determination of parole. The pre-sentence incentive is important as this enables an accused's engagement with rehabilitation from the date of charge through the renunciation of violence at plea. The post-sentence incentive is critical as it enables continued engagement with programs in anticipation of release.

9. The parliamentary debates accompanying s 19AG make a brief reference to R v *Roache*[9] (considered a lenient penalty), however there were no broader objections to common law principle.

10. There were very limited legislative restrictions on the fixing of a NNP.[10]

**The purpose of, and restrictions to an executive grant of parole**

11. At the time s 19 AG was introduced the Crimes Act did not identify the purpose of parole to guide executive decision making (where it was engaged).[11] In

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6 *Bugmy* at 20.

7 See for example, *Hudson* [2010] VSCA 33 at 36, *Ashe* [2010] VSCA 119.

8 *Bugmy*, *Iddon &Crocker v. The Queen* (1987) 32 A Crim R 315.

9 As noted in paragraph 21 of the SNH submissions, the ¾ rule would have increased this sentence by 2.25 years.

10 For example, any sentence in excess of 3 years must include a NNP.

11 See 16AL(1) and (2) (as it was)

addition, at the time s 19AG was introduced federal offenders who received a term of imprisonment of 3-10 years were the subject of automatic release at the commencement of their non-parole period.[12] However, those who received a sentence in excess of 10 years were the subject of a ministerial discretion.[13]

12. The parliamentary debates and extrinsic material which introduced s 19AG make no reference to the existing parole discretion.

13. In 2012, the *Crimes Legislation Amendment (Powers and Offences) Act* extended this discretion to all federal offenders.

14. In 2015 the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill* introduced 19AKA which sets out the purposes of an executive grant of parole in Division 5. These include the protection of the community, the rehabilitation of the offender and the re-integration of the offender. [14] The Bill also introduced s 19ALA which sets out criteria to guide the Minister in their determination.

**Question 1:** Could you please explain what purpose, in your view, parole is intended to serve.

15. Our view on the purpose of parole aligns with the principles of common law (discussed above) and the statutory position expressed at s 19AKA of the Code.

    a. Parole **protects the community** as it incentivises and drives rehabilitation. In the context of terrorism, a flexible non-parole period would encourage participation in relevant disengagement/de-radicalisation programs and allow courts to reward those efforts.

    b. Parole **rehabilitates** the offender as it provides relevant pre-release and post-release programs as a condition of liberty.

    c. Parole **reintegrates** the offender as it allows for supervision in the Australian community, to which an offender must eventually return.

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12 Section 19AL(1) (as it was).

13 See section 19AL(2) (as it was).

14 Perhaps unusually, some courts have cited this provision during the sentencing exercise. See *R v Allami* [2018] VCC 930, *R v Hoang; R v Dau* [2017] VCC 399.

**Question 2:** I note that your submission cites the Victorian Court of Appeal's view that a non-parole period of 75% of the head sentence should be reserved only for the most serious cases – I understand that this is not necessarily the case in other jurisdictions. Would inconsistent practice across jurisdictions undermine your point that the mandatory imposition of a non-parole period of this length might not be appropriate.

16. The position of the Victorian Court of Appeal is expressed by Nettle J in the case of *Gray v The Queen.*[15] The quoted statistic is drawn from Redlich J in *R v Tran and Tran*[16] which relies on Australian Law Reform Commission report 'Same Crime Same Time: Sentencing of Federal Offenders' (Report 130). The ALRC report in turn cites *Stitt v The Queen*[17] from the NSW Court of Criminal Appeal:

> Generally speaking, in relation to federal offences ... non-parole periods have generally varied between 60 to 75 per cent, with periods of 75 per cent being rare and limited to the more serious cases where the prospects of **rehabilitation have not been considered good**. ... A similar approach has been taken in other States. (emphasis added)

17. It is important to note that the imposition of a 75% NNP is an end point, arrived at by the court after consideration of all the circumstances of the case, **including prospects for rehabilitation**. Courts may impose higher percentage NNPs from time to time, however this will be restricted to cases were prospects for rehabilitation are poor. This is consistent with the common law approach to parole detailed at paragraph 5 above.

18. Conversely, the ¾ rule is the starting point imposed by the legislature. It disregards the rehabilitative potential of an accused and impairs the pre-sentence incentive to reform. Perhaps a better comparison is how other state legislatures have approached percentage sentences for serious crimes. In states which have adopted percentage non-parole periods for serious offences, exemptions apply to children (see footnote 38 of the SNH submission).

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15 [2010] VSCA 312

16 [2006] VSCA 222

17 (1998) 102 A Crim R 428, 432

## International obligations and s19AG

**Question 4:** Could you please explain your view on the compliance of s 19AG with Australia's International Obligations.

19. At the time of introduction of s 19AG:

    a. courts exercising federal jurisdiction were primarily guided by common law principles when determining the appropriate non-parole period. There were also some limitations imposed by statute.[18]

    b. the Minister retained a qualified power to grant of parole. If an offender had received more than 10 years imprisonment and posed a risk, parole could be refused.

20. At common law parole has the function of providing for mitigation of punishment in favour of a prisoner's rehabilitation. However, parole also reflects the minimum time a prisoner must serve in accordance with principles of justice.

21. The Crime Act now indicates that an executive grant of parole has the function of protecting the community, rehabilitating the offender and re-integrating them into the community.[19] This is consistent with common law principles relating to the imposition of a non-parole period.

22. As the ¾ rule severely restricts a courts capacity to determine an appropriate and proportionate non-parole period it may be arbitrary under international law (both on its face and in application).

23. The relevant international instruments are set out at paragraphs of 25 -28 of the SNH submissions. We also draw attention to Article 3 of the CORC which states that in all actions concerning children (whether by courts, the legislature or the executive) the best interests of the child must be a primary consideration.

24. Recall that international human rights law warns against arbitrariness.[20] This includes laws which have 'elements of inappropriateness, injustice, lack of predictability, due process of law, as well as elements of **reasonableness,**

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18 For example, any sentence above 3 years must include a NNP.

19 Crimes Act 1914 (Cth) s 191AKA

20 See Article 9(1) of the ICCPR and Article 37 of the CRC.

**necessity and proportionality**'.[21] Australia has acknowledged laws must be based on reasonable and objective criteria.[22]

25. The extrinsic material does not refer to relevant common law or statutory principles and make a reasonable argument as to why these should be set aside for terrorist accused. The rationale proffered is that parole is 'not warranted' because it 'does not reflect community concern about their crimes' and the 'cost and expense of proceedings'.

26. The ¾ rule was not based on reasonable and objective criteria, nor was it tailored to address any perceived deficiencies in the common law or statute. Conversely, it sits against both common law and statutory principles which have developed to drive rehabilitation and manage risk. The ¾ rule applies to all offenders, regardless of their risk profile and prospects of rehabilitation.[23]

27. The argument for departing from common law and perhaps statutory principles does not seem reasonable, necessary or proportionate.

28. Arguably, the arbitrary nature of the provision is amplified in 2012 where all sentences between 3-10 years are now subject to the ministerial discretion.

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21 General Comment 35 [12]. In *Shams et al V Australia*, Communication Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc. CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (11 September 2007) Australia referred to the Committee's jurisprudence, acknowledging that 'the main test is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances' (at 10).

22 Human Rights Committee, *Views: Communication No. 488/1992*, (50th sess) UN Doc CCPR/C/50/D/488/1992 (31 March 1994) '(*Toonen v Australia')* In *Toonen*, laws banning homosexual intercourse in Tasmania were for the claimed purpose of preserving 'morality' and to prevent the spread of HIV. Australia conceded that the laws were not based on reasonable and objective criteria and were not proportionate for the purposes put forward. The laws were therefore considered arbitrary and in contravention of international law. They were subsequently repealed.

23 While at the time 19AG was introduced there was an absence of discretion for offenders sentenced to 3-10 years imprisonment, we maintain this does not detract from our argument as discretion was retained for those sentenced to a term of imprisonment in excess of 10 years.

**Question 5:** In your view, would it be possible to articulate a rationale for s 19AG which was convincing?

29. We cannot articulate a rationale for 19AG that would cure its arbitrary nature.

**Question 6A**: Does 19AG comply with international obligations in its application (rather than on its face)?

30. We respectfully disagree with the additional joint submission by government on this issue. The following factors are relevant to our position:

    a. Article 3 of the CORC marks the 'best interests of the child' as a primary consideration. This requirement informs the legislature when they design parole laws, the courts when they apply parole laws and the executive when they exercise a decision in relation to parole.

    b. The head sentence and non-parole period perform very different functions. The head sentence is a marker of the gravity of the offence, with reference to the maximum penalty. The NNP is primarily concerned with an individual accused's rehabilitative potential. It has significant work to do.

    c. A court cannot reduce the head sentence because of the austere operation of 19AG.[24]

    d. The application of section 19AG does not allow the best interests of the child to be a primary consideration. Section 19AG imposes barriers to the rehabilitation and reintegration of children. These barriers were remarked upon by The Honourable Justice Lasry during the sentencing of MHK.

**Question 6B:** Does judicial discretion in relation to the head sentence (including a non-custodial term) answer the argument that s 19AG reflects an assumption that all terrorist offences are necessarily of the most serious kind of offending?

31. The extrinsic material to the introduction of s 19AG and the additional joint submissions by government to the INSLM express the view that terrorism offences are of a seriousness to warrant a ¾ NNP. We disagree with this position and explore the nature of terrorism offences from paragraph 35 below.

32. What is unusual about the ¾ rule is that it applies across a range of offences which have markedly different maximum penalties [5 years to life imprisonment]. The ¾ rule ensures a very high percentage non-parole period in each and every case where a sentence of imprisonment is imposed, regardless of objective gravity or the subjective features of the case.

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24 *Lodhi v R* [2006] NSWCCA 101, 257-262.

33. The criticism we make is not answered by underscoring the discretion to impose a head sentence. We have previously noted that the head sentence has a very different function in the sentencing exercise.

34. The criticism we make is not answered by underscoring the courts discretion to impose a non-custodial disposition. Indeed, it is unclear how the discretion to impose a non-custodial sentence (permitted where the prospects of rehabilitation are significant) can sit alongside a total absence of discretion once a term of imprisonment is imposed.

## The nature of terrorism offences

**Question 3:** How would you respond to the proposition that taking even very preliminary steps towards an extremely destructive act is necessarily a very serious matter.

35. Criminal defence lawyers are exposed to a wide spectrum of criminal offending, much of which involves gross violence and terrible suffering by victims. At times, terrorism offences reach this level of seriousness.

36. The terrorism offences in the code capture a wide range of conduct which differs in terms of objective and subjective gravity. The following provides brief illustration:

37. Completed terrorist acts and preparatory offences:

    a. Include property damage (eg *R v Demirian,*[25] *R v Roche,*[26] *R v Lodhi,*[27] *R v Moukhabier*[28] )

    b. Include preparations for mass casualty events (eg *R v Fattal,*[29] *R v MHK*[30])

38. Terrorist organisation offences:

    a. include domestic terrorist organisations;[31]

    b. include any non-state armed group in a conflict zone;[32]

    c. extend to 'informal' and 'passive'[33] membership. These offences apply despite a group's alliance with Australian interests, or the engagement of a particular accused in terrorist activity. In *R v Lelikan*[34] the accused is charged with membership of the Kurdistan Workers' Party (the PKK), a

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25 [1989] VicRp 10.
26 [2005] WASCA 4.
27 [2006] NSWSC 691.
28 Fixed for trial.
29 [2010] NSWSC 10.
30 [2016] VSC 742.
31 *R v Benbrika* [2009] VSC 21.
32 See *R v Brookman* [ongoing]
33 In pre-trial argument of *R v Zainab Abdirahman-Khalif* the expert witness has raised the spectre of 'passive' membership. This form of membership was put to the expert by the Crown in their letter of instruction.
34 Fixed for trial.

de facto ally of Australia against ISIS. In *R* v *Vinayagamoorthy*[35] three accused were initially charged with membership of the LTTE before the matter resolved. Membership offences are exceedingly problematic where the impugned group is an overseas self-determination movement seeking a degree of democratic representation. These offences put at risk much of the diaspora community.

d. do not contain uniform exemptions for impartial actors. For example, the terrorist organisation training provisions capture non-military instruction provided by the ICRC or Geneva Call.[36] A uniform humanitarian carve-out was proposed by the INSLM in 2013 but has not been adopted.[37] These concerns have been raised by the UN Special Rapporteur on the right to health before the Human Rights Council.[38]

39. Foreign incursion offences:

a. Capture a breadth of 'hostile activity' by non-government groups in conflict zones. [39] The pre-Syria prosecutions portray eclectic behaviour resulting in non-custodial dispositions through to 4 years imprisonment. Post-Syria prosecutions have included the provision of $3,000[40] for website maintenance through to the trafficking of young people into armed groups. Penalties have ranged from recognizance release orders to short terms of imprisonment ( 44 days) through to 10 years imprisonment.

b. In a recent case, the Crown prosecutor opened pre-trial argument with the position that wearing a sandwich board exhibiting 'bring down

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35 [2010] VSC 184.

36 Consider submissions to the INSLM

37 INSLM, Annual Report 7 November 2013, Recommendation V/2. A similar discussion has taken place in relation to declared areas, see *Centre for Military and Security Law, Submission to the Acting Independent National Security Legislation Monitor re: Offences relating to the entering and remaining in 'declared areas' under division 119 of the Criminal Code Act 1995 (Cth)*, paragraph 2.

38 The Criminalisation of Health Care, report commissioned by the UN Special Rapporteur for Human Rights and Health https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf

39 These offences were initially contained within the *Crimes (Foreign Incursion and Recruitment Act) 1978* (Cth) and in 2014 were transferred to the Code. Post 2014 these offences are captured by the ¾ rule. See *R v Mohamed* [2016] VSC 581, *R v El Sabsabi* [2016] VSC 40, *R v Williams* [discontinued], *R v Succarieh* [2017] QDC 73, *R v Beiber* [2018] NSWSC 535.

40 *R v Kocoglu* [ongoing]

government' would satisfy the definition of 'hostile activity'.[41] The Supreme Court of Victoria has determined that the contemplated 'acts' need not be violent, so long as they are directed at one of the impugned objectives at section 117.1.

40. In terms of the objective seriousness of offences which attract s 19AG, maximum penalties range from 5 years for advocating terrorism, 10 years for membership offences, 15 years for terrorist organisation offences and life imprisonment for preparatory activities or completed acts of violence .

41. We agree that if the prosecution case involves preliminary steps towards an extremely destructive act then this is a very serious offence. However, it does not follow that all terrorism offences captured by the ¾ rule attend with the same seriousness so as to warrant a mandatory penalty. We respectfully disagree with the remarks in the final paragraph of page 12 of the additional joint submission from government.

41 *R v Cerantonio* Trail Transcript page 316, 27/10/17. The current indictment in this case reads "Encouraging acts of and/or participating in acts with persons of the Islamic faith who are engaged in, or willing to carry out or facilitate, acts directed at achieving the overthrow by force or violence of the government of the southern Philippines". The Court has determined that the 'acts encouraged and/or participated in' do not themselves need to be violent.

**De-radicalisation of offenders.**

**Question 7:** In your submission, you note that in the case of MHK, the firm representing the accused – Stary Norton Halphen – devised an 'ad hoc disengagement program for a child offender'. Could you please explain what this program involved and how you assess its effectiveness?

42. This question is best answered in the context of common law principles and criminal justice infrastructure.

43. A significant aspect of a defence solicitor's role is the identification of rehabilitative interventions for clients. Early engagement with suitable programs helps inform the sentencing exercise and reduces recidivism.

44. In the absence of programs, funding, direction or support from state and federal government in the context of terrorism offences we were prompted to create an *ad hoc* program.

*The position at common law*

45. The Australian legislature has implemented a host of regimes in an attempt to distil the risk posed by returning foreign fighters and domestic terrorist accused. While each regime reflects a different statutory purpose and standard of proof, all require the admission of evidence concerning "radicalisation". In the criminal jurisdiction courts must forecast risk upon application for bail,[42] and at a sentencing hearing.[43] Within the civil jurisdiction, courts must forecast risk upon application for a control order,[44] for continuing detention,[45] or upon judicial review of the refusal of parole.[46]

46. While the assessment of risk is broadly familiar to the Australian common law, only the sentencing courts have attempted to make inroads into terrorist risk

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42 See for example section 15AA *Crimes Act 1914* (Cth), Section 4(3) *Bail Act 1977* (Vic), section 19 *Bail Act 2013* (NSW).

43 Section 16A of the *Crimes Act* 1914 (Cth) does not expressly address 'protection of the community', this being a common-law principle. However, 16A does call for an assessment of the rehabilitative prospects of an accused.

44 See 104.4 *Criminal Code Act 1995* (Cth).

45 See 105A.7(1)(b) of the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

46 See *Crimes Act 1914* (Cth), section 19ALA (1)(a).

assessment.[47] In *Lodhi,* the New South Wales Court of Criminal Appeal reaffirmed 'community protection' as a common law sentencing principle and endorsed the use of prior convictions and expert evidence.[48] However, a review of Australian terrorism sentencing decisions reveals that markers of 'dangerousness' are absent. Few accused hold relevant prior convictions.[49] Similarly, expert psychological evidence has been unable to articulate relevant risk factors.[50] While the "VERA-2R" psychometric risk assessment tool is currently being developed by the New South Wales Department of Justice, its validity has not yet been tested.[51]

*Risk and renunciation*

47. In response, the Australian common law has tied political risk assessment to the act of 'renunciation'.[52] The prosecution expects an accused to orally surrender their ideology in court and be cross-examined.[53] If an accused does not renounce, they face a significant penalty.[54] This has arguably marred the boundaries of proportionality,[55] and has been adopted without critique in every terrorism

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47 Bail decisions are rarely published. There has only been one contested control order hearing. The continued detention regime has not commenced. Parole has recently been refused for the first time, and we are in the process of filing a judicial review.

48 *Lodhi v R* [2007] NSWCCA 360, at [98].

49 See for example; *Lodhi v R* [2007] NSWCCA 360*, R v Mallah [2005] NSWSC 317* at 52, *Benbrika & Ors v The Queen [2010] VSCA 281, R v Fattal & Ors* [2011] VSC 681 at 100

50 Ibid.

51 This ties in to a broader dilemma about the use of psychiatric actuarial tools in the Criminal courts, see Zedner, Lucia "Erring on the Side of Safety: Risk Assessment, Expert Knowledge, and the Criminal Court" page 235

52 *Lodhi v R* [2007] NSWCCA 360 at 83.

53 See *R v Besim* [2016] VSC 537 at 133

54 See for example, *R v Ghazzawy* [2017] NSWSC 474 at 18.

55 The court in *Lodhi* argued that the idea of 'renunciation' did **not** offend the proportionality principle. This is because the risk of political violence is uniquely imagined in two ways: "In the context of the crimes presently under consideration, incapacitation does not merely refer to the prospect that in the future a particular offender will re-offend. With respect to the crime of preparation for terrorist acts the Court is not simply concerned with future criminal conduct of a recidivist character. It is concerned with the possibility of perfection of the very crime for the preparation of which the offender has been found guilty." The imagined division of risk is unusual and problematic. First, it is unlikely that an accused would ever try to 'perfect' the crime for which they were arrested given the prosecution and passage of time. This logic is not applied to other criminal offending. The court did not hear any expert evidence on political violence to draw this conclusion. Second, this exercise blurs the prohibitions in *Veen*. Each imagination of risk is really just a forecast of future violence.

sentencing decision since *Lodhi*. *MHK* is the only accused to have orally performed the act of renunciation.[56] He was equipped to do so due to our improvised development of a rehabilitation program in youth custody.

48. It is now evident that renunciation has been adopted by Australian courts as a shorthand method for risk assessment in terrorism prosecutions. In addition, the prosecution has begun to pursue its use outside the sentencing context.[57] Australian courts are not equipped to move beyond this technique in the absence of programs to create the evidentiary basis to assess risk.

*Need for programs*

49. Currently, the only coordinated approach to rehabilitation for terrorism offenders is at the post-conviction phase which is likely to be many years after the initial charges were filed. This is the CISP program.

50. At risk of repetition, the absence of programs poses the following dilemmas:

    a) Those who are acquitted of terrorism offences may continue to pose a danger.

    b) Those who are convicted are unable to answer risk assessments or renounce ideology. There is a tension between what the common law requires, and what the justice system facilitates.

    c) Those who are convicted may be unresponsive to intervention having spent 18 months – 4 years on remand without support.

51. Reliance on the new continued detention regime is inadequate, as it has not yet been tested. It is unclear what evidence the court will admit in the absence of test actuarial tools.

*Concerns or impediments*

52. One impediment to the implementation of a pre-sentence programs is confidentiality. Religious, ideological and political ideas will be explored by the care team. Terrorism prosecutions often develop evidence of a person's motives and belief systems but if this therapeutic regime were to be adduced as evidence

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56 *R v MHK*

57 The prosecution has called for renunciation in relation to foreign incursion offences (which sit outside the terrorism legislation and do not require proof of ideological commitment) and at applications for bail.

in support of the prosecution case, the program itself would collapse. This is reflected by the recommendations of the Harper Lay review discussed below.

*Creation of ad hoc program*

53. The program involved extensive consultation with academia. This included ANU and Deakin University who at the time hosted the Federal Government's Australian Intervention and Support Hub. It also involved consultation with the Muslim community, prison management, youth justice and the Magistracy. We also read broadly on de-radicalisation programs in other jurisdictions. This consultation was undertaken pro bono.

54. Having received direction on the most appropriate constellation of support our firm compiled a team of suitable workers and commenced weekly engagements in prison.

55. Those providing assistance from outside Parkville were provided with a small stipend or were paid for in a private capacity.

*Evaluation of program*

56. We have no means of formally measuring whether de-radicalisation has occurred. This may be enabled once the VERA 2R is introduced to Victoria.

57. However, the effectives of these interventions can be measured against MHK's ongoing rehabilitative trajectory. We note that subscription to violent extremism tends to exclude strong therapeutic or pro-social relationships, especially with those outside the extremist community and women. The changes observed by his care team over a significant period of time point to a de-escalation of his adherence to violent ideology.

*Response to program*

58. Our firm gave evidence about the absence of programs before the Victorian Government Expert Panel on Terrorism and Violent Extremism (**the *Harper-Lay Review***), chaired by The Hon David Harper AM and Mr Ken Lay AO. The Harper-Lay Review made the following recommendations in Report 2:

> **Recommendation 10**
>
> That the delivery of disengagement programs to young persons (whether CISP or new programs):

- be formalised within the youth justice system, including court-ordered diversion, community-based orders, in prison and on parole; and
- be reviewed and validated (including risk assessment tools and interventions) to ensure its suitability and efficacy for young persons.

**Recommendation 11**

That suitable new disengagement programs be developed and made available to adults and young people on bail or remand. This could include incorporation within existing court-based bail support programs.

59. The Harper-Lay Review noted the importance of ensuring confidentiality of this process :

> The Panel accepts that this is a risk that needs to be addressed and recommends that information disclosed should not be admissible against the accused unless it is necessary to prevent the commission of a crime. The Panel notes that this is consistent with the recommendation made by the recent *Youth Justice Review and Strategy*, that there should be legislative protections that prohibit the use of disclosures made during rehabilitation and interventions on remand as evidence of guilt at trial (Recommendation 6.20). The Panel does, however, recognise the significance of this issue from a law enforcement and prosecuting agency perspective. Ultimately, the Panel is of the view that there is a compelling need for accused persons to be engaged in the pre-trial stage as part of Victoria's collective CVE efforts, particularly given the length of time that they could spend on remand or bail.[58]

**Question 8**: Assuming pre-sentence deradicalization programs were generally available, how might the court support such programs or encourage their use? How might the Government, whether State or Federal?

60. Any pre-sentence de-radicalisation program would be a natural development of Victoria's "justice reinvestment" commitment. "Justice reinvestment" describes a shift in criminal policy in the 1990s and advances "fiscally sound, data driven criminal justice policies to break the cycle of recidivism, avert prison

58 Harper Lay Review, Report 2, page 52.

expenditures and make communities safer."[59]

61. Court-endorsed therapeutic programs were first adopted in 1994 with the Mental Health Court Liaison Service. The service was developed in response to the increasing number of people presenting at the Melbourne Magistrates' Court with mental health issues and offered support to defendants. In this regard, the Magistrates' Court has continued to deliver an innovative range of programs based on problem-solving approaches. [60] In 2004 the Victorian Attorney General released the "Justice Statement" which outlined a commitment to problem solving courts. In 2008 the "Justice Statement 2: the next chapter" re-affirmed this intention.[61]

62. Problem solving courts such as the Drug Court and the Assessment and Referral Court address a wide range of issues including substance abuse, mental health, and homelessness. These courts have a number of shared features; a focus on wellbeing, judicial supervision, integrated service provision, harm-minimization, and goal setting.[62]

63. However, this level of intervention by courts relies upon the accused entering a plea of guilty.

64. In November 2006 Victoria expanded their therapeutic model to assist people pleading not-guilty.

65. The Department of Justice and the Magistrates' Court of Victoria established the pre-trial Court Integrated Services Program (CISP) [**Note – this is different to the Community Integration and Support Program (CISP) in the terrorism context]**. CISP provides accused persons with access to services "to reduce rates of re-offending and promote safer communities".[63] CISP tailors a program to each accused and provides a multi-disciplinary team. While on bail, the offender must return to court each month, and a progress report is put before a Magistrate. Engagement and participation in are a condition of bail and non-

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59 Council of State Governments Justice Centre (2010) 'About the project: The strategy" *Justice Reinvestment.* Cited by The Australian Justice Reinvestment Project, "Value of a justice reinvestment approach to criminal justice in Australia" Submission to Senate Legal and Constitutional Affairs Committee, paragraph 19

60 Victoria Auditor-General 'Problem Solving approaches to Justice: Australian Framework" 2011, page 3

61 Victoria Auditor-General 'Problem Solving approaches to Justice: Australian Framework" 2011, page 2

62 Arie Freiberg 'Problem-oriented courts: An update" (2005) 14 JJA 196, page 197

63 Court Integrated Services Program (CISP)

compliance can forfeit bail.

66. Since the creation of CISP several remand centres offer drug, alcohol and other support programs to assist accused where bail is refused. For further detail visit http://www.corrections.vic.gov.au/home/release/transition+programs/

*How can this program be used?*

67. Any de-radicalisation program cannot be used by an accused as part of the 'defence case'. It cannot be adduced as evidence to defend a criminal charge.

68. If successful, this program will be relevant to sentence. At plea, a primary issue is the extent of the offender's commitment to violent extremism and their capacity for rehabilitation. The Court routinely hears expert evidence to appropriately determine sentence. This is best provided by professionals with a long association with the accused rather than a perfunctory assessment in the days before a court hearing.

*Parliamentary comments*

69. The Victorian government recently introduced the *Justice Legislation Amendment (Terrorism) Bill 2018,* to give effect to the Harper-Lay Review. The absence of de-radicalisation programs was raised by The Hon Robert Clark MP (Liberal Party, Shadow Minister for Counter Terrorism) in the Legislative Assembly:

> "Another aspect of how we protect the community against a potential terrorist risk is through deradicalisation and counter radicalisation. There has been an issue raised with us by experienced practitioners who suggest there may be ways in which deradicalisation measures can better be taken particularly in relation to younger persons charged with terrorism offences. The point has been made to us that if a person under 18 is charged with terrorism-related offences, there is an opportunity for different parties to engage with them, to seek to persuade them of the error of their ways, to seek to in effect deradicalise them through dialogue and engagement and to perhaps convince them that their views, which may be radical in some respects, do not need to and should not lead to violence within Australia or indeed violence anywhere in the world, and that their philosophical or faith-based goals can be pursued without resorting to violence and to crime.
>
> The point has been made to us that the capacity of authorities to engage along those lines with young adults who are on remand is more limited than the capacity to engage with those aged under 18. There can therefore be a

long period of time where young adult alleged offenders are on remand, cannot be engaged with in this way and their view of the world may become more radical rather than less radical during that period. The question therefore becomes: can there be changes made to the law that would enable better engagement with young adult offenders with a view to de-radicalisation?

Whether there needs to be special provision made that can promote greater freedom of engagement with those young accused persons perhaps needs to be examined, because the argument is that often these young adults are open to being pointed in a different and better direction, that their ideas have been hijacked and that what might have been a faith-based commitment of some sort can be diverted by those of malevolent inclination into a very destructive direction, but that through engagement the young adult can be diverted from that. On many occasions the young accused person's family and friends are horrified at the direction they are taking, and if they have an opportunity to engage with that person, they can help divert them from the direction in which they are inclined. That seems to be a very valid consideration and one which, as I said previously, practitioners very experienced in this area are pointing to as a defect in the current regime and as an opportunity to do things better.[64]

70. These comments were supported by The Hon Edward O'Donohue (Liberal Party, Shadow Minister for Police) in the Legislative Council:

"The bill also leaves unresolved the issue of what else can be done to facilitate the deradicalisation of young adults accused of terrorism offences, who currently cannot be engaged in deradicalisation programs until they have been convicted. I thank my colleague the member for Box Hill in the other place, the coalition spokesperson on counterterrorism, for the work he has done with the member for Hawthorn in the other place and me in some discussions with experts in this area. We acknowledge that deradicalisation is a very challenging area; it is a difficult area. As with all offending, some offenders are more prepared than others to engage in rehabilitative programs and measures, but one of the things that the consultation facilitated by Mr Clark has uncovered is that some say more could be done between charge and conviction in trying to tackle radicalisation.

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64 Victoria, *Parliamentary Debates,* Legislative Assembly, 6 June 2018 http://hansard.parliament.vic.gov.au/?IW_INDEX=Hansard-2018-1&IW_FIELD_TEXT=SpeechIdKey%20CONTAINS%20(6-06-2018_assembly_77)%20AND%20OrderId%20CONTAINS%20(16)&LDMS=Y

Of course that is difficult when someone is not yet convicted of an offence, but at the same time court wait times appear to be getting longer and blowing out, and the effluxion of time can make it more difficult to then engage in deradicalisation programs and the like.

This is not meant to be a critique of the government. It is a difficult question. This bill does not address that issue, but I think it is an issue that does need to be addressed. More work needs to be done in deradicalisation of people who have been radicalised, and that opportunity may present itself in a correctional environment post-conviction. As I said, there is an open question about what can be done between charge and conviction given the presumption against bail means it is likely to be in a correctional environment as well. There is also some uncertainty about the scope of special police powers to direct people in an affected area and some uncertainty about how the courts will apply the provisions intended to protect terrorism risk information."[65]

**71.** These concerns were also echoed by Ms Fiona Patten (Reason Party)**:**

"What I find even more frustrating in this is that all of the therapeutic recommendations outlined in that expert panel's second report have been completely ignored, particularly the recommendation:

That suitable new disengagement programs be developed and made available to adults and young people on bail or remand.

I would have thought that that should have been at the top of the to-do list, but it has been completely ignored. I know that the 17-year-old that I was mentioning earlier was in fact deradicalised while on remand at Parkville. However, under these reforms the same would not be possible until a person in his position was convicted and sentenced, and that seems absurd. If you have got a 17-year-old kid there, you are able to take immediate action on that child. With these new laws you will not be able to take that immediate action; you will need to wait until that person has gone through the conviction and sentencing process."[66]

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65 Victoria, Parliamentary Debates, Legislative Council 26 July 2018 http://hansard.parliament.vic.gov.au/isysquery/6f478772-8f5b-49b0-b449-0a815aa11c40/1/doc/

66 Victoria, Parliamentary Debates, Legislative Council 26 July 2018 http://hansard.parliament.vic.gov.au/isysquery/ef55971c-a71a-4117-b2e1-b1bb2233df8b/1/doc/

**72.** In answer to these questions The Hon Mikakos (ALP) provided the following information:

> "— Okay. So as I indicated to the house, in their second report the expert panel recommended the development of new disengagement programs for adults and young people on bail or remand. The 2018–19 budget provided $14.1 million over two years for programs and services to combat violent extremism, and work is underway to develop programs suitable for people on remand. The programs obviously need to be carefully developed to ensure compliance with section 25 of the charter.
>
> In relation to young people, what I can say to the member is that youth justice takes a holistic approach to identifying and assessing offending risk factors and providing effective interventions to address the underpinning causes of radicalisation. Youth justice then provides targeted programs and interventions that address the underpinning causes of radicalisation in young people. This includes programs targeted at young people who offend, to promote the development of non-violent and pro-social ideas and attitudes.
>
> Key education and intervention programs for young people include the adolescent violence intervention program, which assists young people to understand the reasons underpinning their violent behaviour and to support their motivation to change. Parkville College also works with young people in custody to develop understanding and positive attitudes towards all cultures and religions.
>
> The specific details around the breakdown I do not have with me at hand, but I will certainly seek information, whether that is available, for the member.
>
> I am being reminded that the $14.1 million over two years is actually a subset of a bigger bucket of money. So the 2018–19 Victorian budget provided $20.9 million in output funding over five years to implement recommendations made by the expert panel. This is in budget paper 3, pages 92 and 102. So this includes $14.1 million in output funding over two years for the combating violent extremism initiative for programs, services and research to prevent violent extremism and to undertake communications activities. This is in budget paper 3, page 102. There is also $6.8 million in output funding over five years and $0.8 million ongoing for key legislative reforms relating to preventative detention, police powers, presumptions against parole and bail for terrorist offenders, and for capacity-building

programs for frontline workers. This is referenced in budget paper 3, page 92.

The combating violent extremism initiative which the member was asking about and which is that $14.1 million, seeks to build on the existing evidence base and to deliver priority initiatives to prevent and counter violent extremism. Funding over two years will address five core elements: research and expert advice to inform program delivery; continuation of existing programs and expansion as appropriate, subject to evaluation; development and delivery of new programs for adults and young people, where needed; the development and delivery of new communications programs; and also monitoring and evaluation of their impact.

I hope that satisfies the member in terms of the detail that the member is seeking. I am just having a look to see if I have anything further on the funding. No, I do not."[67]

*Relationship of rehabilitation programs to INSLM terms of reference*

73. The objective of the INSLM is to assist Ministers in ensuring that Australia's counter-terror legislation:
    a. is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and
    b. is effective in responding to terrorism and terrorism-related activity; and
    c. is consistent with Australia's international obligations, including
        i. human rights obligations; and
        ii. counter-terrorism obligations; and
        iii. international security obligations; and
    d. contains appropriate safeguards for protecting the rights of individuals.

74. We appreciate that the INSLM may only review federal legislation and cannot traverse questions of resource allocation.

75. The material in these submissions is relevant to the INSLM for the following reasons:

    a. The capacity to rehabilitate and reintegrate terrorist accused informs the repeal of mandatory parole laws for children.

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67 Victoria, Parliamentary Debates, Legislative Council 26 July 2018 http://hansard.parliament.vic.gov.au/isysquery/6f478772-8f5b-49b0-b449-0a815aa11c40/6/doc/

b. Parole is relevant to the deterrence and prevention of terrorism. A de-radicalised/disengaged child stands as an example of reform to others and presents a decreased personal risk to the community.

c. Section 19AG currently impairs innovation as it decouples rehabilitation from the sentencing exercise. The reintroduction of flexible sentencing would be a timely reform in the context of the foreshadowed investment in Victoria.

**Legal Aid funding:**

76. Commonwealth terrorism offences receive a co-contribution to legal aid funding from federal government. In some circumstances these matters can be better resourced than state criminal proceedings. The junior counsel fees are significantly better than state junior counsel fees.

77. However, funding is linked to the volume of material and not the complexity of legal issues.

78. In 2015 we ran a foreign incursion matter in relation to the YPG. This matter was discontinued after 9 months by the Federal Attorney General. The case engaged novel matters of domestic and international law. The brief was otherwise slim. Our firm was able to bill $3400 to legal aid at the end of this process.

79. We recommend that sperate resources be allocated for terrorism litigation based on complexity and volume.

**Diversion and other referral services**

80. We recommend that government and/or the AFP provide law firms with information on referral services for young people who are at risk of radicalisation. This includes diversion programs or those funded under the CVE rubric.