

REPORT 2

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EXPERT PANEL ON  
TERRORISM AND  
VIOLENT EXTREMISM  
PREVENTION AND  
RESPONSE POWERS

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Expert Panel on Terrorism and Violent Extremism Prevention and Response  
Powers Report 2, 2017

#### **CONTENT COORDINATION**

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#### **ACCESSIBILITY**

If you would like to receive this publication in an accessible format, such as large print or audio, please contact the Department of Premier and Cabinet on 9651 5111.

Information in this document is available on:

<https://www.vic.gov.au/safeguarding-victorians-against-terrorism.html>

ISBN 978-1-925551-70-9 (pdf/online)

Authorised and published by  
the Victorian Government 1 Treasury Place, East Melbourne 3002

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## EXECUTIVE SUMMARY

The Expert Panel's Terms of Reference were developed in response to the siege and hostage incident in Brighton, Melbourne, on 5 June 2017. The Terms of Reference direct the Panel (consisting of Ken Lay AO APM and the Hon David Harper AM QC) to examine the effectiveness of Victoria's counter-terrorism legislation, and recommend improvements to assist relevant agencies manage the risks posed by violent extremism. The Brighton incident highlighted the opportunity for more to be done to counter the threat of, and meet the challenges posed by, violent extremism.

The Brighton incident is also the subject of two other reviews, namely the Victorian Coroner's Inquest into the death of Yacqub Khayre and the Justice Assurance and Review Office's review of Corrections Victoria's management of Khayre (JARO Review).<sup>1</sup> Each of these reviews has a forensic focus in relation to the circumstances leading up to, and at the time of the incident, whereas the work of the Expert Panel focuses on the opportunities at all stages of the system to strengthen the management of the threat of violent extremism in Victoria. The Panel has taken the JARO Review into account in formulating its recommendations, but does not comment on the specifics of that review of the Brighton incident so as not to prejudice the coronial inquest, which is currently underway.

The Panel also acknowledges the importance of achieving a nationally consistent approach to countering the threats posed by violent extremism and terrorism — an objective affirmed by the Council of Australian Governments (COAG) at its special meeting on counter-terrorism on 5 October 2017.

Report 1 primarily focused on Victoria Police's powers in relation to counter-terrorism and the presumption against bail and parole. More generally, Report 1 assessed the tools required to counter the risk posed by violent extremists, including persons who are planning or preparing to carry out a terrorist act, individuals who have committed a terrorist act, or other offenders who pose a risk of committing a terrorism offence while on parole or bail.

Building on Report 1's findings and recommendations, Report 2 extends its focus to include the full spectrum of policies and programs to counter the risk of terrorism — that is, policies and programs aimed at preventing or intervening early in relation to emerging risks, or responding rapidly to risks after they have eventuated. It is the Panel's view that these are key aspects of ensuring the safety of the community from the threat of violent extremism. In this context, the Panel notes that Report 2 adopts the accepted terminology and language of 'countering violent extremism' (CVE), and uses the terms 'violent extremism' and 'terrorism' generally interchangeably.

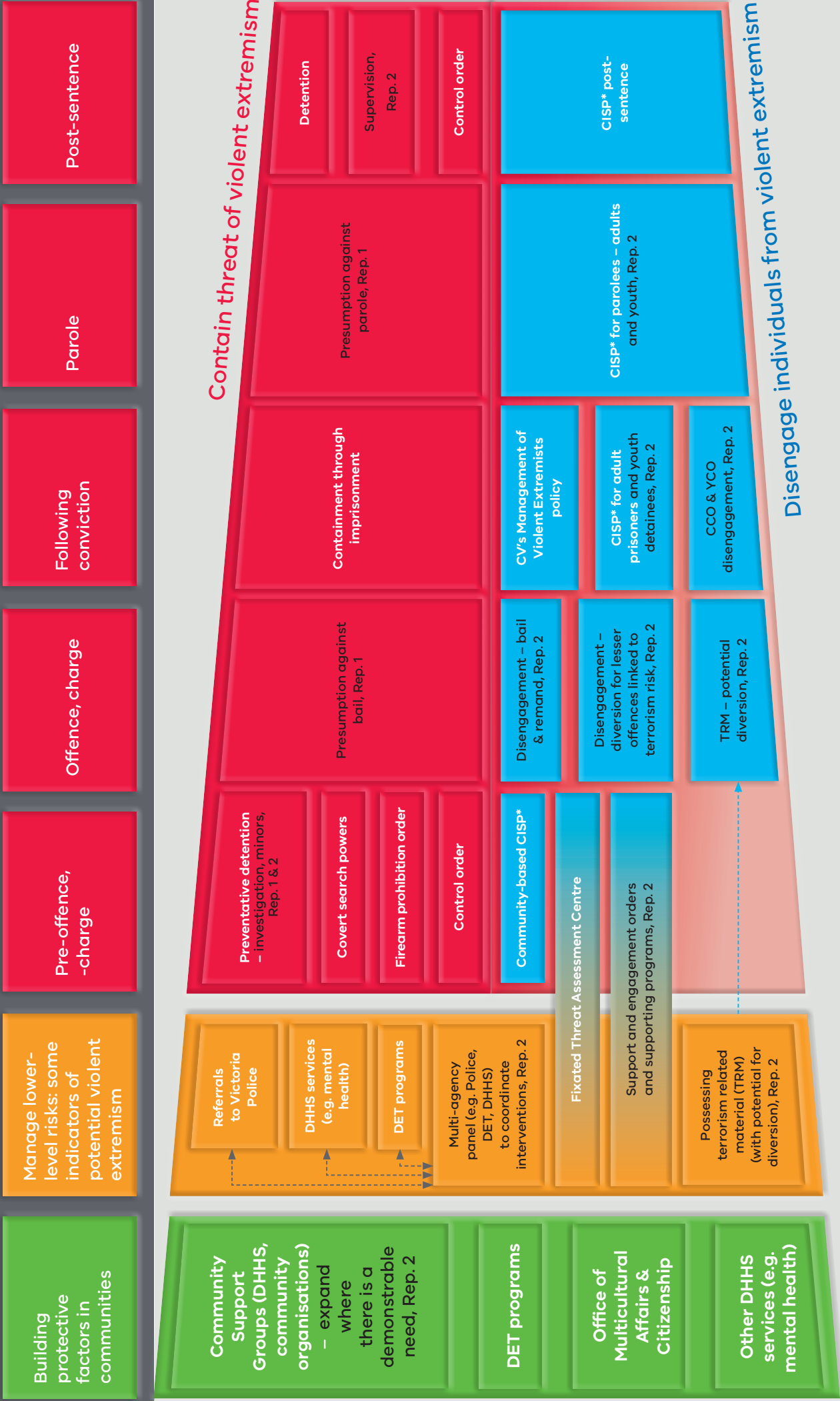
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1 The Justice Assurance and Review Office is a business unit within the Victorian Department of Justice and Regulation.

The CVE policy spectrum is illustrated in Figure 1, which provides an overview of the key measures recommended in Reports 1 and 2. These measures apply across a broad range of risks, as depicted by the three main sections of Figure 1:

- The green column on the left depicts prevention programs that have a community-wide focus. In this space, CVE programs are designed to build protective factors in communities to address the risk of violent extremism.
- The orange column to its right signals a shift to interventions directed towards individuals showing early signs of radicalisation towards violent extremism. Generally, these are lower level, emergent risks that can often be managed by addressing the underlying drivers of concerning behaviour (such as unemployment, drug and alcohol issues, and social isolation).
- The red section to the far right is reserved for the management of risks of immediate concern, including those considered in Report 1. The interventions highlighted in this section are geared towards individuals who have radicalised to violent extremism, having passed the points of prevention and early intervention strategies.

# Overview of tools to prevent and counter violent extremism



## BLACK TEXT: RECOMMENDATIONS

CISP – Community Integration Support Program  
CCO – Community Corrections Order  
CV – Corrections Victoria

DET – Department of Education and Training  
DHHS – Department of Health and Human Services  
YCO – Youth Control Order

\* Disengagement programs to apply to violent extremists across the ideological spectrum (e.g. right- and left-wing), Rep. 2

In this Report 2, the Panel makes 26 recommendations relating to the following matters:

- countering violent extremism (Chapter 1);
- disengagement programs (Chapter 2);
- the legislative definition of a ‘terrorist act’ (Chapter 3);
- support and engagement order (Chapter 4);
- a proposed offence of possession of ‘terrorism related material’ (Chapter 5);
- preventative detention orders for minors (Chapter 6); and
- post-sentence supervision of high risk terrorist offenders (Chapter 7).

The substance of the Panel’s recommendations in relation to each of these matters is outlined below.

**Chapter 1** provides an overview of a broad spectrum of CVE programs and policies, from community resilience and social cohesion programs to disengagement programs that focus on individuals who are at risk of radicalising towards violent extremism. CVE calls upon a rich diversity of expertise, including that of police, teachers and others involved in education, human services, multicultural affairs, mental health, researchers and academics, and local community organisations. The Panel’s recommendations reflect this diversity by focusing on opportunities to expand and supplement existing programs across these areas, and to improve coordination and information sharing between responsible organisations, both government and non-government.

**Chapter 2** examines the measures to achieve the disengagement of terrorist offenders and individuals who are radicalising or have radicalised to violent extremism. Based on a recent evaluation of the Victorian Government’s existing disengagement program, the Panel considers the current scope and delivery of interventions in Victoria. The Panel makes recommendations [REDACTED] for the development of new disengagement programs for young persons in the justice system, for adults and young persons on bail or remand, and for violent extremists across the ideological spectrum (including right- and left-wing extremists). Noting that disengagement programs are newly emerging, the Panel also recommends the establishment of an expert advisory committee to provide technical advice to the Victorian Government on the development and evaluation of disengagement programs.

**Chapter 3** considers the nationally agreed legal definition of a ‘terrorist act’ and its three elements (motive, intention and action). This consideration reveals a gap in the legislation, and a corresponding gap in the protection it provides. By restricting the legislative definition of ‘a terrorist act’ to an act motivated by a political, religious or ideological cause, the legislation exposes the community to the danger of a terrorist act motivated by something other than politics, religion or ideology. The Panel examines in depth the ability of the present suite of counter-terrorism enactments to respond effectively to the changing nature of the terrorist threat — a threat which ranges from highly organised and structured major criminal organisations to the lone, disaffected, but potentially deadly actor. None of these may have any affiliation to known terrorist groups and their motivation may be neither political, religious or ideological; or it may be an unknown and perhaps unknowable mixture of personal grievances unconnected with politics, religion or ideology. This threat is personified most recently by Stephen Paddock, the Las Vegas gunman.

In the Panel's view, there is an urgent need to ensure that law enforcement agencies have all the powers and tools necessary to respond effectively to acts done 'with the intention of (i) coercing ... [a] government ... or intimidating the public'<sup>2</sup> regardless of any motive (if any). Under the present definition of a terrorist act, those powers and tools are not available if the suspected offender is motivated by something other than politics, religion or ideology. Such offenders are likely to become increasingly common. The Panel therefore proposes amendments to the current legislative definition of terrorism. The changes are intended to overcome the present gap in police powers to prevent some terrorist acts (for example, where the motive of the lone actor is unclear). They are also intended to remove from prosecutorial authorities the requirement that, before a conviction for a terrorist act can be obtained, the prosecution must prove that the accused was motivated by politics, religion or ideology. As national consistency is important, the Panel recommends that these amendments be considered by an appropriate inter-jurisdictional body.

**Chapter 4** continues the Panel's examination of disengagement programs for persons who are radicalising, or have radicalised, to violence. Such radicalisation may necessitate mandatory intervention. The Panel recommends creation of a 'support and engagement order' (SEO) that will enable a court to impose a 'support and engagement plan'. It is intended that the plan may include mandatory participation in support and disengagement programs, counselling, family group conferencing and the imposition of conditions where appropriate.

Considered in the context of existing counter-terrorism interventions (namely preventative detention orders and control orders), the Panel considers that the SEO should be supportive and community engagement focused, with, as its central objectives:

- the disengagement of persons who are radicalising towards, or have radicalised towards, violence;
- addressing the underlying causes of radicalisation towards violence (for example, unemployment, drug and alcohol issues, and social isolation); and
- reconnecting persons with their community and positive support networks (for instance, family and friends).

**Chapter 5** considers the limitations of existing offences in dealing with the recent proliferation of terrorist publications and materials. Recognising the risk posed by these materials, particularly the demonstrated correlation between possession and a heightened risk of a person preparing for or engaging in a terrorist act, the Panel recommends that the Victorian Government seek national agreement to create a new offence in the *Criminal Code Act 1995* (Cth) of possession of 'terrorism related material' (defined to mean material that provides instructions for the doing of a terrorist act). Relevantly, the Panel notes the decision of COAG on 5 October 2017 to further consider such an offence.

While acknowledging the need to ensure that offences targeting ancillary conduct are sufficiently linked to a terrorist act, and do not disproportionately burden freedom of thought or speech, the Panel considers that the recommended offence is necessary and appropriate to:

- enable police to intervene early to disrupt terrorist activity before it escalates to action; and
- criminalise the possession of material that attracts or encourages people to engage in terrorism and provides instructions on how to do so.

If national agreement is not possible, the Panel recommends that the Victorian Government consider amending the *Terrorism (Community Protection) Act 2003* (Vic) to create an offence of possessing 'terrorism related material' in that Act.

<sup>2</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 4(1)(c).



**Chapter 6** examines the application of a modified preventative detention scheme to minors. In Report 1, the Panel recommended changes to Victoria's preventative detention scheme for terrorism suspects, including the addition of a power for police to question a detained suspect. The Panel deferred to Report 2 its consideration of:

- whether the recommended modified preventative detention scheme should apply to minors aged 14 or 15 (the scheme is currently limited to those aged 16 years or over); and
- what safeguards should apply to minors detained under the recommended modified preventative detention scheme.

The Panel recommends the extension of the scheme to minors aged 14 or 15. Although it is a matter of great regret, the Panel is persuaded that in the current environment there is a serious risk of minors as young as 14 or 15 engaging in terrorist activity. The Panel strongly recommends and outlines a range of additional safeguards to apply to all minors (not only those who are aged 14 or 15) under the recommended modified preventative detention scheme.

In **Chapter 7**, the Panel considers how to address the risk posed by convicted terrorists who have served their term of imprisonment but pose a continuing threat to community safety. This consideration is undertaken having regard to current efforts to implement a national post-sentence detention scheme for high risk terrorist offenders and Victoria's existing post-sentence supervision and detention scheme for serious sex offenders.

The Panel recommends that the Victorian Government seek national agreement to create a post-sentence supervision scheme as an integrated part of the national post-sentence detention scheme, or that the current control order regime at the Commonwealth level be reformed to enable those laws to provide a practical alternative measure to post-sentence detention. If national agreement is not forthcoming, the Panel recommends that the Victorian Government consider extending the Victorian post-sentence supervision and detention scheme for serious sex offenders to enable the post-sentence supervision of high risk terrorist offenders.

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# RECOMMENDATIONS

## CHAPTER 1 COUNTERING VIOLENT EXTREMISM

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### Recommendation 1

That the Victorian Government consider expanding locally designed and delivered programs where there is a demonstrable need for them, subject to the outcome of the evaluations of existing community programs.

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### Recommendation 2

That the Victorian Government support further research on:

- the nature and extent of right- and left-wing extremist threats in Victoria, and how to counter them; and
- Islamophobia in Victoria, its impact on Muslim Victorians, and how to counter it.

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### Recommendation 3

That the Victorian Government consider expanding capacity-building programs for frontline workers in the community to ensure that the risk of violent extremism is accurately identified, managed and, if necessary, referred to Victoria Police.

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### Recommendation 4

That the Victoria Police process for referring persons of interest to other agencies, departments and community organisations be formalised to ensure:

- the need for cooperation and intervention by other agencies is identified by Victoria Police, in collaboration with partner agencies, as comprehensively as possible; and
- all relevant agencies and expertise are included in this process so that referrals are well targeted and gaps in available services are identified.

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### Recommendation 5

That the Victorian Government consider developing a formal, multiagency coordination panel to ensure effective coordination of interventions between Victoria Police and other bodies including the Department of Education and Training (DET) and the Department of Health and Human Services (DHHS).

## Recommendation 6

That information sharing barriers between Victoria Police and other bodies, including the DET and DHHS, are examined to ascertain the extent to which these barriers are cultural, operational and / or legal, and how best to address them.

This examination should promote shared, multi-agency objectives, in particular by:

- enabling agencies to jointly develop a comprehensive understanding of individuals' risk of violent extremism;
- supporting appropriate interventions and services; and
- allowing for appropriate management of operational risks to service providers, particularly risks to the safety of staff and to the safety of the broader community.

## Recommendation 7

That Victoria Police, DHHS, DET and any other members of the proposed multi-agency panel jointly develop a memorandum of understanding to clarify information sharing arrangements between members.

## Recommendation 8

That a monitoring and evaluation framework be developed to assess the effectiveness of secondary and tertiary interventions.

## CHAPTER 2

### PROGRAMS TO DISENGAGE PERSONS RADICALISING TOWARDS VIOLENT EXTREMISM

**Recommendation 9 (Priority enhancements in order to maximise the value of existing disengagement and early intervention programs)**

- 
- | Age Group | Percentage |
|-----------|------------|
| 18-29     | 85%        |
| 30-49     | 90%        |
| 50-64     | 75%        |
| 65-79     | 55%        |
| 80+       | 45%        |

## 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.

**Recommendation 12**

That suitable new disengagement programs be developed to address other forms of violent extremism across the ideological spectrum, including right- and left-wing extremism (noting the existing program is currently tailored to respond to Islamist extremism).

**Recommendation 13**

That an expert advisory committee (with membership to include countering violent extremism (CVE) and clinical specialists) be established to provide technical advice to the Victorian Government on:

- \_ best practice approaches to disengagement interventions and programs;
- \_ the efficacy of risk assessment tools;
- \_ the development of new disengagement interventions and programs; and
- \_ the ongoing evaluation and effectiveness of disengagement interventions and programs.

## CHAPTER 3 LEGISLATIVE DEFINITION OF A 'TERRORIST ACT'

The Panel's consideration of the national legal definition of a 'terrorist act' has been prompted by answers to two critical questions:

Should the complete set of legislative tools be available to authorities to prevent a violent extremist intentionally creating a widespread state of terror or coercing a government?

Y

Are those tools always available?

N

**Recommendation 14**

That the Victorian Government refer to an appropriate inter-jurisdictional body consideration of amendments to the legal definition of a 'terrorist act' to:

- \_ remove motive as an essential element of that definition; and
- \_ strengthen the distinction between terrorism and other crimes so as to capture terrorism's unique significance and gravity (noting that the Panel has provided an example of a way to accomplish this in Part 3.3.1 of this chapter) –

and thereby ensure that the necessary tools are always available.

## CHAPTER 4 SUPPORT AND ENGAGEMENT ORDER

**Recommendation 15**

That the Victorian Government create a 'support and engagement order' (SEO) in the *Terrorism (Community Protection) Act 2003* (Vic). The SEO scheme should include the following elements:

- \_ application by the Chief Commissioner of Police to the Magistrates' Court or the Children's Court where applicable;
- \_ a test requiring, for example, the court to be satisfied that:

- the person has exhibited behaviours indicative of radicalisation towards violence; and
- the order is necessary to ensure the person's participation in, and compliance with, an appropriate support and engagement plan;<sup>3</sup>
- an ability for the court to order that a person participate in certain support and disengagement programs, counselling, family group conferencing and, where appropriate, comply with certain conditions; and
- a graduated approach to compliance that includes warnings, court facilitated conciliation, fines and, if all else fails, a summary offence.

The Panel acknowledges that in order to be effective the SEO scheme will need to be supported by the development of:

- validated risk assessment tools to assist decision-makers, including the court, to determine when, and whether, a person is radicalising towards violence; and
- programs that address the specific characteristics of a person subject to an SEO including age, risk level, cultural identity and the ideological cause influencing the person's radicalisation towards violence.

The Panel notes that this development should be informed / guided by advice from the expert advisory committee (Recommendation 13 in Chapter 2).

## CHAPTER 5 POSSESSION OF 'TERRORISM RELATED MATERIAL' OFFENCE

### Recommendation 16

That the Victorian Government seek national agreement to amend the *Criminal Code Act 1995* (Cth) to:

- introduce an offence of possessing 'terrorism related material'; and
- define 'terrorism related material' to mean material that provides instructions for the doing of a terrorist act.

### Recommendation 17

That if national agreement in line with Recommendation 16 is not possible, the Victorian Government consider amending the *Terrorism (Community Protection) Act 2003* (Vic) to create an offence of possessing 'terrorism related material' in that Act.

## CHAPTER 6 PREVENTATIVE DETENTION OF MINORS UNDER A MODIFIED PREVENTATIVE DETENTION SCHEME

### Recommendation 18

That the recommended modified preventative detention scheme (Recommendation 2 in Report 1) apply to persons who are 14 or 15 years of age.

<sup>3</sup> The Panel acknowledges that further consideration may be required to craft an appropriate test and as such this language is an example only.

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#### **Recommendation 19**

That Victoria Police be empowered to take a person under the age of 18 (a minor) into custody for the purpose of preventing a terrorist act from occurring or to preserve evidence of, or relating to, a terrorist act for a maximum period of 36 hours.

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#### **Recommendation 20**

That after taking a minor into custody, Victoria Police be required to apply for a preventative detention order from the Supreme Court in order to continue to detain the minor:

- as soon as reasonably practicable; or
- if it is not reasonably practicable to do so sooner, on the expiration of 36 hours from the time that the minor was first detained.

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#### **Recommendation 21**

That in response to an application by Victoria Police for a preventative detention order in respect of a minor, the Supreme Court be empowered to make a preventative detention order permitting the continued detention of the minor for a maximum period of 14 days inclusive of any period during which the minor was detained by Victoria Police before the making of that order.

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#### **Recommendation 22**

That the power to make a preventative detention order in respect of a minor only be available to the Supreme Court if it is satisfied:

- that there are no other less restrictive means available to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act; and
- that the particular requirements in relation to the preventative detention of a minor, including any conditions imposed on that detention by the court, can be met.

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#### **Recommendation 23**

That if the Supreme Court is satisfied that an order other than a preventative detention order would be a less restrictive means of preventing an imminent terrorist act occurring or preserving evidence of, or relating to, a recent terrorist act:

- the court be empowered to make alternative orders and impose appropriate conditions in response to an application for a preventative detention order in respect of a minor; and
- the court be required, in making such orders or imposing such conditions, to consider a range of specific matters with respect to the minor including the minor's physical and mental health and vulnerability.

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#### **Recommendation 24**

That special safeguards apply if a minor is detained under a preventative detention scheme including:

- conferring on the Supreme Court a power to make specific orders in relation to the conditions under which a minor may be held in preventative detention and a requirement for the applicant for a preventative detention order to satisfy the court that those conditions can be met;

- incorporating into the scheme additional protections for minors, including requirements for minors to have their developmental needs catered for, that any questioning of a minor be recorded by audio-visual means and that a minor be legally represented; and
- an active monitoring role by the Commission for Children and Young People in relation to any minor held in detention.

## CHAPTER 7

### POST-SENTENCE SUPERVISION OF HIGH RISK TERRORIST OFFENDERS

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#### Recommendation 25

That the Victorian Government seek national agreement for a post-sentence supervision scheme for high risk terrorist offenders who pose an unacceptable risk to the community if released without supervision. This could be by:

- establishing a specific post-sentence supervision scheme that is complementary to the national post-sentence detention scheme; or
- reforming the current Commonwealth control order laws so that those laws are complementary to the national post-sentence detention scheme.

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#### Recommendation 26

That if national agreement in line with Recommendation 25 is not possible, the Victorian Government consider extending the existing scheme for the post-sentence supervision and detention of serious sex offenders to provide for the post-sentence supervision of high risk terrorist offenders.

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# CHAPTER 1

## COUNTERING VIOLENT EXTREMISM

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### Recommendation 1

That the Victorian Government consider expanding locally designed and delivered programs where there is a demonstrable need for them, subject to the outcome of the evaluations of existing community programs.

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### Recommendation 2

That the Victorian Government support further research on:

- the nature and extent of right- and left-wing extremist threats in Victoria, and how to counter them; and
- Islamophobia in Victoria, its impact on Muslim Victorians, and how to counter it.

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- the need for cooperation and intervention by other agencies is identified by Victoria Police, in collaboration with partner agencies, as comprehensively as possible; and
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### Recommendation 6

That information sharing barriers between Victoria Police and other bodies, including the DET and DHHS, are examined to ascertain the extent to which these barriers are cultural, operational and / or legal, and how best to address them.



This examination should promote shared, multi-agency objectives, in particular by:

- enabling agencies to jointly develop a comprehensive understanding of individuals' risk of violent extremism;
- supporting appropriate interventions and services; and
- allowing for appropriate management of operational risks to service providers, particularly risks to the safety of staff and to the safety of the broader community.

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#### **Recommendation 7**

That Victoria Police, DHHS, DET and any other members of the proposed multi-agency panel jointly develop a memorandum of understanding to clarify information sharing arrangements between members.

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#### **Recommendation 8**

That a monitoring and evaluation framework be developed to assess the effectiveness of secondary and tertiary interventions.

This chapter provides an overview of a broad spectrum of ‘countering violent extremism’ (CVE) programs and policies, from community resilience and social cohesion programs to disengagement programs that focus on individuals who are at risk of radicalising towards violent extremism. The Panel notes that the discussion and the recommendations made in this chapter are specific to the context of liberal democratic societies, with their rejection of authoritarianism and their commitment to social welfare and human rights such as free speech.

CVE is a complex area of practice and academic discourse, with considerable debate about the meaning of key terms and about preferred approaches. It includes a rich diversity of perspectives including those of police, education, human services, multicultural affairs, mental health, researchers and local community organisations. The Panel has endeavoured to take these different perspectives into account where they have significant implications for policy making in the Victorian context, but it is beyond the scope of this chapter to enter into a more detailed survey of the CVE literature.

That said, an accurate understanding of the underlying problem of violent extremism is critical to the effective design of CVE programs. The first part of this chapter provides an overview of CVE and its underlying rationale,



## 1.1 BACKGROUND

### 1.1.1 What is ‘countering violent extremism’?

CVE initiatives and policies are designed to prevent people from engaging in acts of violent extremism and terrorism. There is a range of views about the scope and emphasis of CVE.<sup>4</sup> One approach is to reserve the term for interventions that focus on disengaging individuals at risk of becoming — or who have already become — violent extremists. The Commonwealth Government adopts this approach, defining CVE as:

*the efforts of Australian governments to prevent processes of radicalisation leading to violent extremism, including terrorism, and where possible to help individuals disengage from a preparedness to support or commit acts of violence to achieve political, social or ideological ends.<sup>5</sup>*

The alternative is to take a more expansive approach that includes preventative programs in communities. In contrast to managing the risk of violent extremism in individuals, these programs focus on building protective factors, namely community resilience and social cohesion,<sup>6</sup> in communities. The European Commission takes this approach:

*CVE constitutes all actions that strengthen the resilience of individuals and communities to the appeal of radicalisers and extremism.<sup>7</sup>*

4 Sarah Marsden, James Lewis and Kim Knott, *Introductory Guide: Countering Violent Extremism* (Centre for Research and Evidence on Security Threats, 2017).

5 Commonwealth Government (2015), quoted in *ibid* 2.

6 The Scanlon Foundation maps social cohesion across five domains: belonging (e.g. shared values, trust), social justice and equity, participation (e.g. voluntary work, political involvement), acceptance and rejection, legitimacy (e.g. experience of discrimination), and worth (e.g. life satisfaction). See Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2016* (Scanlon Foundation, 2016) 11.

7 Sarah Marsden, James Lewis and Kim Knott, *Introductory Guide: Countering Violent Extremism* (Centre for Research and Evidence on Security Threats, 2017).

Regardless of the approach, the critical point that emerges from debates about the definition of CVE is that there is an important distinction between programs aimed at strengthening communities and programs aimed at mitigating risk in individuals. The Panel prefers a narrower definition that limits CVE to risk-based interventions that focus on individuals. As many commentators and practitioners have pointed out during the Panel's consultations, describing community resilience and social cohesion initiatives as CVE risks stigmatising whole communities as potential violent extremists. Not only would this be unfair, it could also increase alienation and divisiveness within the community, which are recognised drivers of violent extremism and other forms of anti-social behaviour. The Panel considers that CVE (narrowly defined) is nevertheless connected to community resilience and social cohesion programs in a fundamental way.

### Community resilience, CVE and counter-terrorism

As set out in Table 1.1, CVE sits on a 'policy spectrum'<sup>8</sup> between community resilience programs and counter-terrorism responses to violent extremism.

**Table 1.1 – Community resilience, CVE and counter-terrorism**

	COMMUNITY RESILIENCE	COUNTERING VIOLENT EXTREMISM	COUNTER-TERRORISM
Description	Community-based programs that focus on building resilience and address community needs, such as employment referrals, social groups and counselling.	Diversion and disengagement programs to steer individuals away from engagement with violent extremism (e.g. housing and counselling to address underlying issues, or an experienced mentor to guide a person's exploration of their beliefs).	Law enforcement responses that seek to monitor potential terrorist activity and disrupt and prosecute terrorist acts.
Scope	Community	Individuals	Individuals and networks or groups
Orientation	Builds protective factors.	Manages the risk of radicalisation towards violent extremism.	Disrupts violent extremist or terrorist acts.*

\*Note: CVE may be used as a component of a counter-terrorism intervention — for example, to disengage a high risk individual from adherence to a violent extremist ideology.

Counter-terrorism is an intelligence and criminal justice response to violent extremism. It has been the dominant response to domestic terrorist threats across much of the world since September 11. This response has been characterised by increasing cooperation between intelligence and law enforcement agencies, new police powers and new offences, in particular to target preparatory activities and associations with terrorist organisations.

Counter-terrorism strategies focus on risks to community safety that cannot, or can no longer, be managed effectively by, for example, CVE interventions. If police become aware of a potential terrorist attack, their primary objective will be to disrupt this attack rather than disengage a suspect from adherence to a form of violent extremism. This has an element of prevention — but it is aimed at preventing the terrorist act rather than the progression of a person further along a path of radicalisation towards violent extremism.

8 Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2015) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 6.

At the opposite end of the spectrum, community resilience and social cohesion programs do not specifically target risks of violent extremism or terrorism in individuals. They instead aim to build a community's strengths and improve its capacity to meet and even thrive in the face of social and cultural challenges.<sup>9</sup> Rather than managing risk factors, community resilience programs build *protective factors* against potentially harmful social outcomes, such as unemployment, social isolation, and anti-social behaviour. Radicalisation to violent extremism may be one of these anti-social behaviours, which is why community resilience programs need to be included in any discussion of CVE. However, countering or preventing violent extremism is not the driving force of community resilience programs. Community resilience and social cohesion objectives are much broader.

The field of CVE is spread out between these two approaches: one side interfaces with community resilience programs to divert individuals who have been identified as being an emerging risk of radicalising towards violent extremism. This could involve referral to a social worker, a housing officer, a police officer, or any combination of these. Training to aid identification of risk, and manage escalation and referral pathways is therefore a critical supporting element of CVE. The other side of CVE interfaces with counterterrorism measures through, for example, efforts to disengage individuals who have already 'crossed the line'<sup>10</sup> to violent extremism. CVE is different from, but complements, each of these other approaches. These complementary relationships do not, however, erase the critical differences between each approach: community resilience programs build protective factors in communities; CVE programs manage risks in individuals; and counter-terrorism responses disrupt potential terrorist acts and contain and prosecute them when they do occur (yet may retain elements of a CVE response to supplement disruption activity).

### Types of CVE interventions

Adopting a public health model, the CVE field can be broken down into primary, secondary and tertiary interventions, as set out in Table 1.2.

Primary CVE interventions focus on preventing the emergence of radicalisation towards violent extremism within the community. As Table 1.2 illustrates, primary CVE interventions share common ground with community resilience programs. The key difference is their scope: where community resilience programs have a preventative focus, this focus tends to be broad — for example, preventing poor social outcomes such as unemployment, social isolation, or anti-social behaviour (not just violent extremism). Primary CVE programs, by contrast, tend to focus specifically on detecting and preventing the emergence of violent extremism. This can take a range of forms, including:

- educating individuals about violent extremism;
- preventing the emergence of conditions, behaviours, and attitudes (e.g. racism) which may drive individuals towards violent extremism;
- training and upskilling existing social and community services providers (e.g. psychologists, social workers, healthcare professionals) to increase their capacity to identify and manage emerging signs of radicalisation towards violent extremism;<sup>11</sup> and
- facilitating positive intergroup interactions between people of different cultural and faith backgrounds in local communities and schools.<sup>12</sup>

9 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 18.

10 Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2016) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 9–10.

11 Ibid 12.

12 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 31.

**Table 1.2 – The community resilience, CVE policy spectrum and counter-terrorism responses**

	COMMUNITY RESILIENCE	PRIMARY PREVENTION	SECONDARY INTERVENTIONS	TERTIARY INTERVENTIONS	COUNTER-TERRORISM RESPONSES
<b>Description</b>	Builds a wide range of protective factors against poor social outcomes, not just in relation to violent extremism.	Builds protective factors, so in this sense is similar to community resilience programs. Differs from community resilience by specifically addressing the risk of violent extremism.	Targeted interventions that focus on individuals at risk of becoming a member of a violent extremist group or an adherent to a violent extremist cause in the future.	Programs to disengage violent extremists from their networks and from pursuing a course of violent behaviour.	Law enforcement responses that seek to disrupt and prosecute terrorist acts.
<b>Scope</b>	Community	Community, specific groups (e.g. upskilling professionals)	Individuals	Individuals	Individuals and networks or groups
<b>Orientation</b>	Builds protective factors.	Builds protective factors designed to prevent the emergence of violent extremism in the community.	Interventions aimed at preventing individuals radicalising towards violent extremism.	Disengagement of individuals who have passed the point of prevention and 'crossed the line' to violent extremism.	Disrupts violent extremist or terrorist acts (but may include elements of a CVE response).

Secondary CVE interventions target individuals at risk of radicalising towards violent extremism.<sup>13</sup> These programs address individuals displaying signs or indicators of radicalisation,<sup>14</sup> who may be 'engaged within a social network which contains extremist influences, or expressing ideological support for a violent extremist ideology (or potentially both).'<sup>15</sup> Secondary interventions comprise a range of approaches, including:

- establishing mentoring relationships with a youth or social worker or religious leader to guide an at-risk person in conversations that explore their personal challenges, identity and beliefs; and
- health and social services including mental health services, housing, family violence interventions, drug and alcohol programs and other forms of social support to address underlying issues.

Tertiary interventions work with individuals who have passed the point of both prevention and targeted early intervention. They are 'aimed at facilitating those already considered extremist to disengage from a violent extremist network and to desist from violent behaviour' or the tendency to engage in violent behaviour.<sup>16</sup> These programs are discussed in detail in Chapter 2.

### Key features of the problem of violent extremism

It is easy to fall into the habit of thinking that the objective of CVE programs is to target violent extremists, but this is only true of tertiary interventions designed to disengage confirmed violent extremists. The objective of primary and secondary interventions is pre-emptive: to prevent the accumulation and convergence of violent extremist risk factors in an individual. CVE 'counters' the crystallisation of factors that carries a person down a path of radicalisation towards violent extremist offending.

<sup>13</sup> Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2016) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 11.

<sup>14</sup> Ibid 10.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 9.

A considerable body of literature is devoted to defining these factors. As it is beyond the scope of this report to consider this literature in detail, the Panel has highlighted four points that it considers critical to understanding the problem of violent extremism.

*Violent extremism is the concern, not radical thoughts*

First, the object of CVE is radicalisation towards violent extremism rather than radicalisation per se. The concept of radicalisation assumes a 'straightforward causal relationship between ... radical or extremist *thought* and violent extremist *behaviour*' — whether this relates to Islamist, left- or right-wing examples.<sup>17</sup> This is an unsatisfactory basis for government intervention as it falsely assumes that radicalisation leads inevitably to violent extremism and that violent extremism can be predicted and prevented by identifying ideological or theological 'radicals'.<sup>18</sup> The evidence does not support these assumptions.

In addition, interventions based on these assumptions, particularly in relation to Islamist versions of violent extremism, may be perceived by some Muslim communities as an unfair and inaccurate conflation of Islam with radicalism and of belief with threat.<sup>19</sup> This can also apply to conflating radical right-wing belief with the threat of violence. This can lead to the creation of 'suspect communities'<sup>20</sup> and this can, in turn, alienate these communities.

The Panel supports what appears to be the prevailing view in the CVE literature, which is that CVE programs should not target people just because they have 'radical' beliefs or thoughts. Precepts of fundamental importance to the theory of democratic governance point in the same direction. CVE interventions should only target individuals who are radicalising towards violent extremist behaviour, or who see violence as a way of putting radical thought into action. This includes those who have 'crossed the line' to a point where it is no longer a matter of preventing them from engaging in violent extremism but of disengaging them from it (Chapter 2).<sup>21</sup>

*There is no single path to, or cause for, radicalisation towards violence*

The second point expands on the last: not only does radicalisation per se lack any value as a predictor of violent extremism, there is simply no stable set of signs or risk factors that can be used to reliably predict who will commit a possible violent extremist or terrorist act. 'Violent extremists are not simply marginalised misfits';<sup>22</sup> nor do they fit neatly within any other social type. Radicalisation models cannot predict who will become a terrorist. There is no single pathway to violent extremism, just as there is no archetypal violent extremist:

*By now it is recognized that the search for individual characteristics is pointless because there is no evidence that violent [extremist] individuals possess a distinct and stable psychological profile.*<sup>23</sup>

17 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 7–8.

18 Ibid 34. This issue is also addressed in Matteo Vergani, Greg Barton and Muhammad Iqbal, 'Beyond Social Relationships: Investigating Positive and Negative Attitudes towards Violent Protest with the Same Social Movement' (2017) 53(2) *Journal of Sociology* 445, .

19 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 34.

20 Ibid 35.

21 Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2016) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 9–10.

22 Commission on Countering Violent Extremism, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism* (Centre for Strategic and International Studies, 2016) 15.

23 Matteo Vergani, Greg Barton and Muhammad Iqbal, 'Beyond Social Relationships: Investigating Positive and Negative Attitudes towards Violent Protest with the Same Social Movement' (2017) 53(2) *Journal of Sociology* 445, 447. See also Paul Gill, John Horgan and Paige Deckert, 'Bombing Alone: Tracing the Motivations and Antecedent Behaviours of Lone-Actor Terrorists' (2014) 59(2) *Journal of Forensic Science* 425, 433; Australian Strategic Policy Institute, *Gen Y Jihadists: Preventing radicalisation in Australia* (2015) 6.

That said, there are emerging tools drawn from an evidence base of dynamic risk factors and warning signs that, used in a structured way, can inform professional judgement about risk. This is known as 'structured professional judgement,' which refers to approaches that fill the gap between clinical and actuarial approaches to risk assessment and risk management. As Douglas and Kropp argue, '[t]he structured professional approach allows for a logical, visible, and systematic link between risk factors and intervention, in addition to the ability to identify persons who are at a higher or lower risk of violence'.<sup>24</sup>

<sup>25</sup>

The incidence of mental illness is not sufficiently pronounced to have any predictive value 'as a primary driver of extremist thinking or a direct cause of terrorist violence'.<sup>26</sup> It is nevertheless sometimes argued that, in line with other areas of crime prevention, more consideration should be given to underlying factors such as mental illness. Historically, this connection has been downplayed,<sup>27</sup> yet there is some evidence of an increased incidence of mental illness amongst lone-actor attackers. Mental health problems are recorded in around 40 per cent of this cohort (compared with attackers who are members of terrorist organisations, where the rate is about eight per cent).<sup>28</sup>

#### *Multiple, interacting push and pull factors are involved*

Third, there has been a shift away from explanations based on a single cause or factor to explanations based on multiple interacting factors. For example, rather than look to mental illness as a single explanatory factor in lone-actor terrorist attacks, researchers have argued for further research to understand how multiple, 'correlated behaviours ... can crystallise within the individual offender'.<sup>29</sup> This also highlights a shift to focusing on behaviour rather than attempting to identify and interpret 'what are realistically only semi-stable (at best) sociodemographic characteristics'.<sup>30</sup>

This approach has been echoed in relation to the idea that ideology is the decisive factor that differentiates violent radicalisation from other forms of radicalisation. Rather than supporting this proposition, the evidence is that a number of factors can play a significant role in drawing an individual along the path to violence, including: emotional pull to act in the face of injustice; thrill, excitement and coolness; status and internal code of honour; and peer pressure.<sup>31</sup>

<sup>24</sup> Kevin Douglas and P Randall Kropp, 'A Prevention-Based Paradigm for Violence Risk Assessment: Clinical and Research Applications' (2002) 29(5) *Criminal Justice and Behaviour* 627.

<sup>25</sup>

<sup>26</sup> Michele Pathé et al, 'Establishing a Joint-Agency Response to the Threat of Lone-Actor Grievance-Fuelled Violence' (2017) *Journal of Forensic Psychiatry & Psychology* 1, 3.

<sup>27</sup> The argument against this is made in Emily Corner and Paul Gill, 'A False Dichotomy? Mental Illness and Lone-Actor Terrorism' (2015) 39(1) *Law and Human Behaviour* 23. Corner and Gill also note that people with a mental illness may be susceptible to ideological influences in their social environment (at 31).

<sup>28</sup> Michele Pathé et al, 'Establishing a Joint-Agency Response to the Threat of Lone-Actor Grievance-Fuelled Violence' (2017) *Journal of Forensic Psychiatry & Psychology* 1, 3. See also Emily Corner and Paul Gill, 'A False Dichotomy? Mental Illness and Lone-Actor Terrorism' (2015) 39(1) *Law and Human Behaviour* 23, 30.

<sup>29</sup> Emily Corner and Paul Gill, 'A False Dichotomy? Mental Illness and Lone-Actor Terrorism' (2015) 39(1) *Law and Human Behaviour* 23, 32.

<sup>30</sup> Paul Gill, John Horgan and Paige Deckert, 'Bombing Alone: Tracing the Motivations and Antecedent Behaviours of Lone-Actor Terrorists' (2014) 59(2) *Journal of Forensic Science* 425, 433, 435.

<sup>31</sup> Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) refers to a 2012 study on 'home grown violent extremist Islamist cells' in the UK, Canada, Denmark, France and the Netherlands that 'did not find evidence that ideological interpretations were significant' in differentiating radicalisation per se from radicalisation towards violent extremism (at 36).

This shift in the understanding of the causes of violent extremism extends to a new understanding of the process of radicalisation towards violent extremism. CVE literature has generally moved away from a linear, 'conveyor belt model' of violent extremism,<sup>32</sup> where radicalisation leads predictably to violent extremism.<sup>33</sup> New 'multi-level pathway models' emphasise that the process of radicalisation towards violent extremism is nonlinear, social and dynamic.<sup>34</sup> A number of authors have argued that intersecting push and pull factors play a role in a person radicalising towards violent extremism. 'Structural conditions, including real and perceived marginalisation, grievances, and experiences of injustice or corruption', may push people to join a violent extremist organisation or cause.<sup>35</sup> Islamophobia and racism can also play a significant role in pushing people towards violent extremism. Pull factors include 'radical recruitment narratives, propaganda and social ties to extremist networks'.<sup>36</sup> Psychological factors, such as thrill seeking, desire for revenge or the desire to right perceived wrongs, can also play a part.<sup>37</sup>

The dynamic interplay of push and pull factors highlights the centrality of social identity to the process of radicalisation towards violent extremism.<sup>38</sup> This is because radicalisation is 'an interactive process that involves an 'other' — in the form of the society or community that the person is pulling away from'.<sup>39</sup> Violent extremist views can be formed partly as a reaction to racial, religious or ideological intolerance. It also involves a group or a cause which offers an alternative identity or a way out, particularly in relation to issues of real or perceived injustice and lack of opportunity.<sup>40</sup> Violent extremism creates a link between feeling rejected and looking for an alternative identity.<sup>41</sup>

It provides social meaning, in particular by:

- explaining a complex and disappointing world;
  - allowing an individual to take action where he or she previously felt powerless;
  - providing a stronger, positive sense of self, belonging and purpose; and
  - incorporating the group into his or her social identity.<sup>42</sup>
- These push and pull factors often operate 'within fragile, oppressive, or conflict-affected environments'.<sup>43</sup> Indeed, conflict — for example, conflict generated by Islamophobia — increases the effect of these factors. As one former al Qaeda recruiter said, 'recruiters love Islamophobia. It drives recruitment'.<sup>44</sup>

32 Preben Bertelson, 'Danish Preventative Measures and De-Radicalization Strategies: The Aarhus Model' [2015] (1) *Panorama: Insights into Asian and European Affairs* 241, 250.

33 Kate Barrelle, 'Disengagement from Violent Extremism' (2013) 4 <<http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-disengagement-from-violent-extremism-kb.pdf>>.

34 Ibid 5–10. This is also a strong theme in Directorate General for Internal Policies, *Preventing and Countering Youth Radicalization in the EU* (European Parliament, 2014) 9, 11–12.

35 Commission on Countering Violent Extremism, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism* (Centre for Strategic and International Studies, 2016) 15.

36 Ibid 14.

37 Ibid 14.

38 Kate Barrelle, 'Disengagement from Violent Extremism' (2013) 1 <<http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-disengagement-from-violent-extremism-kb.pdf>>.

39 Ibid 8.

40 Commission on Countering Violent Extremism, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism* (Centre for Strategic and International Studies, 2016) 17.

41 Kate Barrelle, 'Disengagement from Violent Extremism' (2013) 3 <<http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-disengagement-from-violent-extremism-kb.pdf>>.

42 Ibid 4.

43 Commission on Countering Violent Extremism, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism* (Centre for Strategic and International Studies, 2016) 14.

44 Ibid 11.



- In essence, it is not that individual sociodemographic factors such as social isolation and mental illness do not play a part. They do, sometimes. They represent the absence of protective factors, but not in a way that can reliably predict violent extremist actions. The important thing is how these factors interact with the kinds of push and pull factors discussed above.<sup>45</sup> And this means shifting the focus away from the idea that violence can be predicted by way of a unique psychological profile, 'towards the identification of individual vulnerabilities and predisposing factors that, under certain conditions, can increase the likelihood of the emergence of political violence.'<sup>46</sup>

#### *Family and friends often notice concerning changes in behaviour*

The fourth point concerns behaviour. The shift from focusing on sociodemographic traits to behaviour is significant within CVE because it highlights the important role played by those close to individuals at risk of radicalising towards violent extremism. Behaviour that displays signs of radicalisation towards violent extremism tends to be observed by those close to the individual concerned. For example, a 2014 study of lone-actor terrorist attacks found, in 82 per cent of cases, that other people were aware of the grievance that motivated the act. In 79 per cent of cases, other people were aware of the offender's commitment to an extremist cause. In 64 per cent of cases, family and friends were aware of the terrorist offender's intentions because the offender told them.<sup>47</sup> This is a recurring theme in the literature,<sup>48</sup> which is borne out by the recent Coroner's *Inquest into the Death of Ahmad Numan Haider*, which found that a number of Haider's family and friends noticed a change in his mood and attitudes in the lead-up to his knife attack on two police officers on 23 September 2014.<sup>49</sup>

45 See Matteo Vergani, Greg Barton and Muhammad Iqbal, 'Beyond Social Relationships: Investigating Positive and Negative Attitudes towards Violent Protest with the Same Social Movement' (2017) 53(2) *Journal of Sociology* 445, 447.

46 Ibid.

47 Paul Gill, John Horgan and Paige Deckert, 'Bombing Alone: Tracing the Motivations and Antecedent Behaviours of Lone-Actor Terrorists' (2014) 59(2) *Journal of Forensic Science* 425, 429.

48 For example, see *ibid.*

49 State Coroner of Victoria, *Inquest into the Death of Ahmad Numan Haider* (31 July 2017) 25.

## Implications for CVE programs and policy

These features of the problem of violent extremism have important implications for the design of CVE programs, as set out in Table 1.3.

**Table 1.3 – Implications of features of violent extremism for CVE policy**

	KEY FEATURES OF VIOLENT EXTREMISM	IMPLICATIONS FOR CVE POLICY
1	CVE programs target radicalisation towards violent extremism rather than radicalisation per se.	<ul style="list-style-type: none"> <li>Supports CVE's widening of 'counter-terrorism' approaches to include preventative and non-coercive methods<sup>50</sup> such as disengagement programs.</li> <li>Shifts focus to identifying behaviours that indicate a risk of committing violence rather than targeting particular 'types' of people, which avoids stigmatising and eroding the trust of the communities.</li> </ul>
2	There is no profile and no single factor that allows for the prediction of violent extremist radicalisation.	<ul style="list-style-type: none"> <li>There is no basis for intervention based on sociodemographic 'profiles', including racial or religious.</li> <li>Highlights reliance on understanding risk indicators, addressing the multiple causes of violent extremism, targeting behaviour, and on community reporting.</li> </ul>
3	Radicalisation towards violent extremism is driven by multiple factors, which interact in a dynamic, social and nonlinear process.	<ul style="list-style-type: none"> <li>There is no one-size-fits-all, single-agency intervention.</li> <li>Multiple causes may require multiple, coordinated interventions across government agencies and departments and community organisations.</li> <li>CVE is a shared responsibility:               <ul style="list-style-type: none"> <li>between government, the community, researchers and other stakeholders; and</li> <li>between different government agencies and departments.</li> </ul> </li> </ul>
4	The signs of radicalisation towards violent extremism are often observed by people close to the radicalising individual.	<ul style="list-style-type: none"> <li>Government must facilitate community reporting by ensuring that the community trusts government sufficiently to report its concerns and knows who to turn to with its concerns.</li> <li>There need to be structures in place to allow practitioners on the ground (e.g. psychologists, health care professionals, social workers) to accurately assess, respond to and refer individuals who may be showing signs of radicalising towards violent extremism.</li> </ul>

Regarding the third point, if one of the main objectives of CVE is to counter the aggregation and escalation of risk, countering violent extremist narratives directly may not always be the only or even the most effective approach. Depending on the specific case, it may be more effective to address an individual's mental health, housing, employment, educational or drug and alcohol issues. A youth or social worker may be best placed to assist a young person at risk of radicalising towards violent extremism by helping them work through their search for social identity and responses to real or perceived grievances in a more constructive way. Such interventions work on mitigating the factors that push and pull people towards violent extremism.

This also means that CVE is a shared responsibility between government and the community and between different government agencies and departments. As will be discussed below, it can be challenging for government to align the operating objectives of different government agencies to ensure that this responsibility is effectively coordinated.

<sup>50</sup> Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 34–5.

The difficulty of predicting the emergence of violent extremism highlights the importance of community reporting of emerging risks of violent extremism (second and fourth points).<sup>51</sup> This means that members of the community need to trust government sufficiently to report concerns they may have about a radicalising family member or friend.<sup>52</sup> It also means that there need to be structures in place to allow practitioners on the ground (e.g. in mental health, education) to accurately assess, respond to and refer individuals who may be showing signs of radicalising towards violent extremism. Relationships of trust between practitioners and community members are also integral to the effectiveness of community reporting.

Inappropriately framed CVE interventions that stigmatise communities as terrorist risks should be avoided because they risk 'further alienating those citizens that are best placed to recognise the risk of violent extremist behaviour prior to its occurrence'.<sup>53</sup> The Government therefore needs to ensure that its CVE message targets the process of radicalisation towards violent extremism and acts of violent extremism — not the communities from which some violent extremists are drawn. This balance can be difficult to strike, especially in the context of media reporting and statements of public figures that inflame tensions through hate speech, Islamophobic or other discriminatory statements that brand entire communities as potential terrorists.

### 1.1.2 Countering violent extremism in Victoria

#### Policy framework

Over the past decade, Victoria has amassed a significant body of knowledge and experience in relation to CVE, much of it world-leading. Victoria's efforts have been informed by a collaborative approach involving many countries, where knowledge and experience has been pooled to identify international best practices across a range of CVE-related activities. This includes bodies such as the Global Counter Terrorism Forum (GCTF), the Hedayah Centre, the United Nations, and international summits like the 2015 White House Summit to Counter Violent Extremism.

This global body of knowledge consistently emphasises a number of core principles fundamental to effective CVE work, including:

- effectively preventing the spread of violent extremism in different communities requires a localised and tailored effort that is sensitive to local cultures and religious beliefs;
- communities need to be empowered to identify and address potential cases of radicalisation towards violent extremism;
- credible and authentic voices that challenge extremist narratives should be amplified;
- governments should address social, economic and political marginalisation as part of their efforts to address individuals' grievances, increase their sense of belonging, and make them less vulnerable to recruitment into violent extremism; and
- treating CVE exclusively as a security issue can be counterproductive. CVE responds to a multi-faceted problem that requires a whole-of-government and community response.

<sup>51</sup> This principle informs the 'FIRE' framework for identifying indicators of radicalisation in Kate Barreille and Shandon Harris-Hogan, *Framework of Indicators of Radicalisation and Extremism (FIRE): Report September 2013* (2013) Global Terrorism Research Centre, Monash University.

<sup>52</sup> See Michele Grossman and Paul Thomas, 'Community Reporting – The Key to Defeating Terrorism?' [2017] (5) CREST Security Review 24, 24–5; Paul Thomas, Michele Grossman, Shamin Muah and Kris Christmann, *Community Reporting Thresholds* (Centre for Research and Evidence on Security Threats, 2017) 20–45; Sharon Pickering, David Wright-Neville, Jude McCulloch and Pete Lentini, *Counter-Terrorism Policing and Culturally Diverse Communities: Final Report 2007* (Monash University, 2007) 22.

<sup>53</sup> Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 35.

Victoria has a strong track record in developing CVE and community resilience policies and programs that are consistent with these principles. In 2005, the Victorian Government became the first in Australia to address the policy implications of terrorism as 'an internal threat and no longer just an overseas problem'.<sup>54</sup> From the beginning, Victorian policies have recognised the need to go beyond 'law enforcement measures and capabilities' to combat terrorism,<sup>55</sup> including building CVE capacity within the community through community awareness programs and training for Imams.

The Victorian Government formed a Social Cohesion and Community Resilience Ministerial Taskforce (Taskforce) in June 2015 to run for four years, with a total funding of \$25 million. Its role is to promote social cohesion and community resilience with a view to preventing violent extremism.

Social cohesion, community resilience and preventing violent extremism are also the responsibility of the Minister for Multicultural Affairs. Some of this is in conjunction with the Deputy Premier as part of a \$19 million package (over three years, from 2016 to 2019) for the implementation of [REDACTED] initiatives linked to the Multicultural Policy Statement.

The Taskforce's work is guided by the *Strategic Framework to Strengthen Victoria's Social Cohesion and the Resilience of its Communities* (Strategic Framework, December 2015), which is a whole-of-Victorian Government document intended to inform efforts to promote social cohesion and community resilience and to prevent violent extremism. The Strategic Framework (the Framework) promotes these outcomes by taking a holistic, strength-based approach that goes beyond a narrow CVE focus. Key principles of the Framework include:

- prevention relies on strong, trusting community relationships and therefore should not be securitised;<sup>56</sup>
- social cohesion should not be used as a 'cover story' for efforts to prevent extremism; and
- social cohesion and violent extremism are separate, but operate through interacting domains, noting that:
  - low levels of social cohesion may foster the conditions for individuals to move down a pathway to violent extremism; and
  - community fear about violent extremism creates distrust and reduces social cohesion.

[REDACTED]

**This section has been redacted in full due to the sensitive and security-related nature of the information it contains.**

<sup>54</sup> Mark Duckworth, 'The Idea of Resilience and Shared Responsibility in Australia' in Robert Bach (ed), *Strategies for Supporting Community Resilience* (CRISMART, 2015) 41, 103.

<sup>55</sup> Ibid.

<sup>56</sup> A community is 'securitised' when it is treated as a security risk or terrorism threat. The securitisation of a community stigmatises that community as a terrorist or violent extremist threat.

### The role of Victoria Police

Victoria Police plays a number of important roles in relation to CVE. Victoria Police receives referrals of potential violent extremist risks from a range of sources, in particular the National Security Hotline, other government agencies such as DHHS and DET, [REDACTED]. Referrals that require further action will be assessed according to their level of risk, and triaged accordingly. For example, credible evidence of a potential attack would be handled by the Joint Counter Terrorism Team (JCTT), whereas lower risks would be scrutinised further to develop a comprehensive understanding of the nature and level of a person's terrorism risk. This process utilises a range of inputs, including advice from forensic psychologists. In such cases, an individual may be selected for a CVE intervention. Chapter 2 examines this process in relation to the Community Integration Support Program (CISP).

However, Victoria Police has a number of other potential CVE intervention options, including referrals to:

- programs or services run by other departments or agencies, such as DHHS services to address mental health or drug and alcohol issues;
- [REDACTED] and
- Commonwealth Government programs and services.

[REDACTED] The Panel understands that agencies including DET, DHHS and Victoria Police have also discussed formalising information sharing arrangements and the establishment of a 'secondary panel' or a 'multiagency panel' to assess the support needs of individuals. This could involve the provision of a package of support services or referral to law enforcement (see Parts 1.3.2 and 1.3.3 of this chapter).

### Victorian Fixated Threat Assessment Centre

Recent events in Victoria have highlighted the challenges with the existing framework for responding to the threat of violence posed by high risk persons with complex needs. Since 2014 there have been a number of lone-actor attacks in Victoria, including:

- the stabbing of two police officers and the fatal shooting of Numan Haider in Melbourne (September 2014);
- the Bourke Street tragedy (January 2017);
- the Malaysian Airlines bomb threat incident at Melbourne Airport (June 2017); and
- the Brighton hostage shooting incident (June 2017).

[REDACTED]

New South Wales has recently followed the example of Queensland by establishing a Fixated Threat Assessment Centre. This is partly a response to evidence presented to the NSW Coroner's *Inquiry into the Lindt Café Siege* that a state and federal threat assessment capability 'would likely have acted on the warning signs' exhibited by Man Monis' approaches to public figures over a number of years.<sup>58</sup>

the establishment of a Victorian Fixated Threat Assessment Centre (VFTAC) to provide an integrated response by police and mental health services to grievancefuelled violence or attacks by angry, disaffected individuals.

The VFTAC is proposed to address gaps in the current response framework, which does not provide a structured, coordinated and joint approach by police and mental health clinicians to such threats. This approach will include systematic procedures for screening and referral, research on key cohorts and behaviours of concern, inter-agency and multi-disciplinary cooperation, skill sharing and information sharing. In addition to the core operations of the VFTAC, the proposal includes a set of specialist mental health services to treat cases referred by the VFTAC and to treat other individuals assessed as posing high threats to public safety.

The primary objectives of the VFTAC would be to:

- assess threats to public safety posed by high risk individuals;
- facilitate joint mental health and policing responses to address those threats; and
- ensure that individuals with mental health issues or who have alcohol and drug treatment needs engage or re-engage with mental health or other appropriate services.

The VFTAC proposal is widely supported by recent reviews and practices in other jurisdictions, for example:

- <sup>59</sup>
- the Australia-New Zealand Counter-Terrorism Committee (ANZCTC) has established a joint police and mental health working group, with representation from Victoria Police, to develop a national approach to fixated threat assessment and management; and
- fixated threat assessment centres have been established by NSW, Queensland, New Zealand, the Netherlands and the United Kingdom.

### Returning foreign fighters

The Victorian Government also has arrangements in place to manage the reintegration of Australian families exposed to violent extremism. These arrangements do not apply to the fighters themselves, who are likely to be subject to offence provisions under Division 119 —Foreign incursions and recruitment of the *Criminal Code Act 1995* (Cth). While no such families have returned to Victoria, the Commonwealth has estimated that up to 70 Australian children are currently in conflict zones in Iraq and Syria (all are from Victoria and NSW).

<sup>58</sup> Recommendation 43 of the NSW State Coroner's *Inquest into the deaths arising from the Lindt Café Siege* recommended the NSW Police Force and NSW Health establish a Fixated Threat Assessment Centre for referral, assessment and mitigation of such risks (at 41 and 416).

<sup>59</sup>



### 1.1.3 Other jurisdictions and programs

#### The Commonwealth's national framework

The Commonwealth Government has developed a national *Countering Violent Extremism Intervention Framework* under which the National Diversion Team led by the Australian Federal Police (AFP) operates.<sup>60</sup> This framework guides the Commonwealth Government's collaboration with the governments of all states and territories on CVE intervention programs. The Commonwealth Government accords CVE 'the highest priority', alongside counter-terrorism.<sup>61</sup>

The Commonwealth Government also has a broader *Countering Violent Extremism Strategy* ('CVE Strategy'), which commenced in 2011.<sup>62</sup> The CVE Strategy 'supports Australia's broader counter-terrorism efforts by addressing factors that make people vulnerable to extremist influences and recruitment by terrorists'.<sup>63</sup> It recognises the importance of collaboration between governments, community groups and individuals.<sup>64</sup> The CVE Strategy's objectives are to:

- identify and divert violent extremists and, when possible, support them in disengaging from violent extremism;
- identify and support at-risk groups and individuals to resist and reject violent extremist ideologies;
- build community cohesion and resilience to violent extremism; and
- achieve effective communications that challenge extremist messages and support alternatives.<sup>65</sup>

60 Cat Barker, *Update on Australian Government Measures to Counter Violent Extremism: A Quick Guide* (Research Paper, Parliamentary Library, Parliament of Australia, 2017).

61 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 May 2017, 156 (Katherine Jones, Deputy Secretary, Attorney-General's Department).

62 Cat Barker, *Update on Australian Government Measures to Counter Violent Extremism: A Quick Guide* (Research Paper, Parliamentary Library, Parliament of Australia, 2015); Cat Barker, *Update on Australian Government Measures to Counter Violent Extremism: A Quick Guide* (Research Paper, Parliamentary Library, Parliament of Australia, 2017).

63 Australian Government, *Countering Violent Extremism Strategy*, Living Safe Together <<https://www.livingsafetogether.gov.au/aboutus/Pages/countering-violent-extremism-strategy.aspx>>.

64 Australian Government, *CVE Strategy Fact Sheet*, Living Safe Together <<https://www.livingsafetogether.gov.au/aboutus/Documents/CVEStrategyFactSheet.pdf>>.

65 Ibid.

The Commonwealth Government organises its approach to countering violent extremism into four streams of activity, as set out in the table below.

**Table 1.5 – Four streams of Commonwealth Government CVE activities**

STREAM	KEY INITIATIVES
1 Building strength in diversity and social participation	<ul style="list-style-type: none"> <li>– Living Safe Together website.</li> <li>– Social policy programs (e.g. multicultural community initiatives) to support community harmony, migrant integration and strengthen economic participation.</li> </ul>
2 Targeted work with vulnerable communities and institutions	<ul style="list-style-type: none"> <li>– Support communities to identify people who may be radicalising towards violence and prevent them from doing so.</li> <li>– Community information resources and training packages.</li> <li>– Work with state and territory governments to develop and implement programmes to rehabilitate people imprisoned for terrorism related offences, as well as prevent the radicalisation of other prisoners.</li> </ul>
3 Addressing terrorist propaganda online	<ul style="list-style-type: none"> <li>– Addressing online radicalisation, including by challenging terrorist propaganda, reducing access to that propaganda and empowering communities to combat extremist narratives.</li> </ul>
4 Diversion and deradicalisation	<ul style="list-style-type: none"> <li>– Early intervention programmes to help people move away from violent ideologies and reconnect with their communities.</li> <li>– The <b>Living Safe Together Grants Programme</b> to assist community-based organisations to build their capacity to deliver services.<sup>66</sup></li> </ul>

The Commonwealth Government also awards grants to a range of CVE programs through the Living Safe Together Grants Programme and through the ANZCTC (many of which are through the ANZCTC's Countering Violent Extremism Sub-Committee).<sup>67</sup> These grants cover a range of CVE activities undertaken by organisations across Australia, including youth centres, various multicultural services (such as youth services and migrant resource centres), and CVE initiatives undertaken by some state police and corrections services.<sup>68</sup>

The Commonwealth Government also administers the National Security Hotline, which is an important component of Australia's national counter-terrorism efforts. In addition to information about individuals who may be radicalising towards violent extremism, the Hotline receives information about websites or social media that promote extremist views. As discussed above in relation to Victoria Police, this information can feed into counter-terrorism responses (e.g. investigations, or blocking a suspected would-be foreign fighter from departing Australia), CVE interventions, or both.

### The Australian Multicultural Foundation

The AMF runs a number of community resilience, social cohesion and primary prevention CVE programs. The emphasis of these programs is on building community strength and protective factors, including by developing the capacity of communities to identify and seek support for individuals showing early signs of radicalising towards violent extremism, including:

- CyberParent Web app — the app 'encourages safe and healthy internet use in Australian homes,' is available in 17 languages and covers topics including cyberbullying, grooming and online recruitment;

<sup>66</sup> Australian Government, *Countering violent extremism*, Attorney-General's Department <<https://www.ag.gov.au/NationalSecurity/Counteringviolentextremism/Pages/default.aspx>>.

<sup>67</sup> Cat Barker, *Update on Australian Government Measures to Counter Violent Extremism: A Quick Guide* (Research Paper, Parliamentary Library, Parliament of Australia, 2017).

<sup>68</sup> Ibid.



- Community Awareness Training Manual: Building Resilience in the Community — this is delivered as a ‘train the trainer’ program to give participants the skills and knowledge they need to deliver information in the community about matters including recognising anti-social behaviour, including violent extremism, ‘along with prevention strategies and where to go for support’;
- Leadership Australia: A new Generation — ‘designed to develop a group of confident and well connected young Australian Muslims’ to ‘represent the views of young Australian Muslims to the wider community ... and provide a resource for other young Muslims who seek mentorship and leadership within the community’; and
- Australian Muslim Youth Leadership and Peer Mentorship Program — co-hosted with the Islamic Council of Victoria (ICV), this 12-month course is designed to broaden the social participation of young Muslim leaders in Victoria.<sup>69</sup>

### The NSW ‘Step Together’ Helpline

As discussed above, all States and Territories work with the Commonwealth to intervene to prevent individuals from radicalising towards violent extremism or to disengage those who have. These arrangements are supported by a range of initiatives of varying scope across jurisdictions. A comprehensive overview of these arrangements is beyond the scope of this Report. The Panel has instead chosen to focus on the NSW ‘Step Together’ Helpline, as it highlights a potential gap in the Victorian approach in relation to community reporting.

The NSW Government launched the Step Together Helpline on 28 June 2017 as a ‘free telephone and online support service operated by trained counsellors’.<sup>70</sup> The service is delivered by ‘On the Line’, a counselling and support services non-government organisation. The rationale for the service is that ‘family and friends are usually the first to know when a person is being exposed to violent extremist influences’, and the resource will help them seek support for that person ‘before law enforcement needs to get involved’.<sup>71</sup> The Helpline is a ‘counselling and support service only’ to help people find the ‘support and information’ they need when they are worried that someone close to them ‘may be trying to effect political or social change through violence’.<sup>72</sup>

The purpose of the Helpline is therefore to target a lower level of risk than the National Security Hotline, which is set up to support a counter-terrorism, law enforcement response.<sup>73</sup> This does not mean that information will not be referred to law enforcement in the event of ‘a serious or imminent risk’ to safety or that a crime may be committed.<sup>74</sup>

### The Danish approach to countering and preventing violent extremism

Denmark has developed an approach to countering violent extremism ‘based on extensive multi-agency collaboration between various social-service providers, the educational system, the health-care system, police, and the intelligence and security services’.<sup>75</sup> The Danish CVE approach has been developed as a supplement rather than as an alternative to ‘punitive or other repressive measures’.<sup>76</sup> The approach balances ‘the protection of the state and society against terrorist attacks’ with ‘the welfare state’s responsibility for the individual’s well-being’.<sup>77</sup>

69 See Australian Multicultural Foundation <<http://www.amf.net.au>>.

70 NSW Liberals, ‘Step Together to Tackle Violent Extremism’ (Media Release, 28 June 2017) <<http://nsw.liberal.org.au/step-together-tackle-violent-extremism>>.

71 Ibid.

72 Step Together <<https://stepttogether.com.au/>>.

73 NSW Liberals, ‘Step Together to Tackle Violent Extremism’ (Media Release, 28 June 2017) <<http://nsw.liberal.org.au/step-together-tackle-violent-extremism>>.

74 Step Together, *Frequently Asked Questions* <<https://stepttogether.com.au/frequently-asked-questions-violent-extremism>>.

75 Ann-Sophie Hemmingsen, ‘An Introduction to the Danish Approach to Countering and Preventing Extremism and Radicalization’ (Danish Institute for International Studies, 2015) 5.

76 Ibid 8.

77 Ibid 15.

Three features of this approach stand out. First, it involves systematic integration across three levels of government, including civil society actors at the local level:

- national agencies (e.g. Prison and Probation, the Danish Security and Intelligence Service);
- regional level (municipalities, Info-houses, Police districts); and
- local cooperation (professionals such as teachers, social workers, mentors; networks of schools, social services providers and police).<sup>78</sup>

Networks are a critical feature of the Danish approach at the local level. Schools, social services and police (SSP) collaborate to prevent primarily young people from engaging in violent extremism and other forms of crime. Psychiatric services, social services and police (PSP) also cooperate 'to prevent individuals with psychiatric problems from engaging in crime,' and the Prison and Probation Services (KSP) work to 'prevent individuals released from prison or other institutions from (re)engaging in crime'.<sup>79</sup>

Second, this approach 'benefits greatly from existing structures and initiatives developed for other purposes.'<sup>80</sup> This includes existing arrangements between state, regional and local actors which provides Denmark with a readymade scaffolding for its multi-tiered CVE approach. It also includes a well-established, multi-agency approach to crime prevention in Denmark:

*Such multi-agency approaches to prevention, based on cooperation between the police and social service agencies and revolving around information-sharing to spot potential future problems and launch preventive measures as early as possible, are not new in Denmark. Since 1977, networks of schools, social services and the police (SSP) have existed in most municipalities. These were established primarily to prevent young people under the age of eighteen from engaging in crime.*<sup>81</sup>

The Danish CVE approach is an extension and refinement of this historical approach to crime prevention in Danish society, particularly in relation to youth.

Table 1.6 sets out the key elements of the Danish prevention model, which corresponds to the public health model of primary, secondary and tertiary interventions discussed earlier.

Third, as indicated in Table 1.6, Info-houses are central to the Danish approach. Rather than being physical houses, they are defined as 'a framework for local cooperation between the police and municipal social service administrations and providers' and as 'centres of excellence' for sharing knowledge about extremism and radicalisation.<sup>82</sup> There is one Info-house in each of Denmark's 12 police districts, giving them considerable reach into local communities. The main functions of Info-houses are to:

- collect incoming referrals and assess whether concerns are warranted;
- assess whether an issue is best addressed as a social challenge or as a national security matter;
- decide if action is to be taken and, if so, by whom (e.g. Danish Security and Intelligence Service's Centre for Prevention, local civil actors, government services); and
- coordinate cooperation between local actors in accordance with 'local needs, resources and existing structures'.<sup>83</sup>

<sup>78</sup> Ibid 16.

<sup>79</sup> Ibid 18.

<sup>80</sup> Ibid 5.

<sup>81</sup> Ibid 18.

<sup>82</sup> Ibid 27; Danish Ministry of Immigration, *Preventing and Countering Extremism and Radicalisation: National Action Plan* (Regeringen, October 2016) 14.

<sup>83</sup> Ann-Sophie Hemmingsen, 'An Introduction to the Danish Approach to Countering and Preventing Extremism and Radicalization' (Danish Institute for International Studies, 2015) 27–9.

Information sharing between Danish agencies is regulated by article 115 of *The Danish Administration Justice Act*. The Panel understands that this permits but does not require the sharing of information between police and other agencies under certain circumstances, including to prevent crime and to administer multi-agency intervention programs.

Finally, the Danish approach places great importance on the role of mentors in relation to specific and targeted interventions. Through the Info-house referral process, individuals at risk of engaging in violent extremism and those requiring disengagement may be referred to mentors to supplement and support other interventions. The key objectives of mentoring are:

- to establish a relationship in which the mentee can work on concerns which he or she cannot discuss elsewhere;
- to challenge and broaden the mentee's viewpoints; and
- to build the mentee's life skills and resilience.<sup>84</sup>

**Table 1.6 – Danish prevention model**

LEVEL	OBJECTIVE	COHORT	EXAMPLES OF ACTIVITIES
General ('primary')	Prevent problems from arising through outreach and general resilience building	Broad population, particularly youth	<ul style="list-style-type: none"> <li>– Education about opportunities within Danish society</li> <li>– Facilitate dialogue about sensitive topics</li> <li>– Develop critical thinking skills, particularly in relation to the internet</li> <li>– Training to improve professionals' awareness of extremism risks</li> </ul>
Specific ('secondary')	Prevent the worsening of problems through interventions	Individuals and groups identified as extremist	<ul style="list-style-type: none"> <li>– Guidance to individuals through mentoring, coaching (e.g. education, careers)</li> <li>– Guidance to relatives of at-risk individuals</li> <li>– Outreach to communities (e.g. to prevent travel to conflict areas)</li> </ul>
Targeted ('tertiary')	Prevent specific events through intervention and exit strategies	Violent extremist individuals	<ul style="list-style-type: none"> <li>– Exit programmes, individually tailored by national security agencies, police and municipalities and coordinated by Info-houses</li> <li>– Mentoring and coaching programs to build capacity (life-skills, education), assist with housing, therapy and medical help. Coordinated by Info-houses<sup>85</sup></li> </ul>

<sup>84</sup> Preben Bertelson, *Mentoring* (Department of Psychology Aarhus University). See also Preben Bertelson, 'Danish Preventative Measures and De-Radicalization Strategies: The Aarhus Model' [2015] (1) *Panorama: Insights into Asian and European Affairs* 241, 241–252.

<sup>85</sup> Ibid 24–7.

This is supported by the *Mentoring effort, parent coaching and relatives and carers networks* methodology manual, a resource published by the Danish Government to guide the efforts of, in particular:

- professional and other mentors of a person who belongs to an extremist environment or is at risk of radicalisation; and
- coaches of parents who may also facilitate relatives and carers networks for young people who are part of an extremist environment or at risk of radicalisation.<sup>86</sup>

In 2014, an external evaluation of elements of the Danish approach found that the initiatives examined had:

- contributed to the dissemination of knowledge to help local and national actors identify, prevent and tackle concerning behaviour;
- resulted in municipalities with a higher incidence of violent extremist vulnerability prioritising resources accordingly; and
- resulted in dialogues between the Danish intelligence service and selected Islamic community leaders which were found to be useful, though had limitations in reaching people within extremist environments.<sup>87</sup>

### The United Kingdom's 'Prevent' program

The United Kingdom's *Prevent* strategy aims to prevent people becoming terrorists. Under this strategy, organisations including schools and councils develop projects to reduce the risk of people becoming involved in terrorism.<sup>88</sup> *Prevent* also focuses on removing extremist material from the internet and on providing training materials to develop the awareness of education, health and other professionals.<sup>89</sup>

At-risk individuals are referred to the 'Channel' program, which is an early intervention multiagency process designed to 'provide support for people vulnerable to being drawn into terrorism'.<sup>90</sup> Channel works through panels chaired by local authorities. The Channel Panels work with multi-agency partners to assess referrals and tailor a package of support measures to address an individual's risk of radicalisation towards violent extremism.

86 Danish Centre for Prevention of Extremism, *Mentoring Effort, Parent Coaching and Relatives and Carers Networks: Solution-Focused Work on Life Skills* (19 May 2016) <<http://uim.dk/publikationer/mentoring-effort-parent-coaching-and-relatives-and-carers-networks>>.

87 Ministry of Foreign Affairs of Denmark, *Lessons Learned from Danish and Other International Efforts on Countering Violent Extremism in Development Contexts* (2015) 52–3.

88 United Kingdom Government, *Prevent Strategy* (June 2011) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97976/prevent-strategy-review.pdf#page=5](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf#page=5)>. See also Full Fact, *What is the Prevent Strategy?* (7 August 2017) <<https://fullfact.org/law/what-prevent-strategy/>>.

89 Ibid.

90 United Kingdom Government, *Channel Duty Guidance: Protecting Vulnerable People from Being Drawn into Terrorism. Statutory Guidance for Channel Panel Members and Partners of Local Panels* (2015) 2.

A number of commentators, academics, community members and NGOs have criticised the *Prevent* program, including Channel. The *Prevent* strategy was criticised for blurring 'the boundaries between crime prevention and social policy'<sup>91</sup> by funding and thereby framing social cohesion programs as measures to prevent violent extremism. It has been argued that this approach constructs the entire Muslim community as 'at risk',<sup>92</sup> subjecting the community to surveillance,<sup>93</sup> and 'perpetuates misconceptions of Muslims as dysfunctional and culturally responsible for the contemporary terror threat'.<sup>94</sup> It has also been criticised for stigmatising the Muslim community and reinforcing Islamophobia.<sup>95</sup> Following a 2011 review, social cohesion policies were removed from the *Prevent* strategy. However, some consider the results of these changes to be mixed. This is put down partly to the enduring impact of the initial erosion of community trust. In addition, some have argued that the incentive remains for local authorities to secure funding for social policy programs by linking them with CVE, which can perpetuate the securitisation of social policy programs and the stigmatisation of Muslim communities.<sup>96</sup>

One of the main criticisms of Channel is that it creates a statutory duty for prisons, health services and schools to report, but offers little guidance to avoid the reporting of low risk cases, which inflates the number of cases reported without sufficient cause.<sup>97</sup> In 2015, for example, 3955 people were referred to the scheme.<sup>98</sup>

The United Kingdom's *Prevent* Program contains a useful lesson concerning the relationship between social cohesion and CVE. The UK Government claims that *Prevent* has been effective in stopping certain individuals travelling down a path towards violent extremism, for example by leaving the country to fight in conflict zones.<sup>99</sup> That is, the UK Government claims the effectiveness of *Prevent* as a CVE program. However, the criticisms of *Prevent* do not, as a general rule, relate to the effectiveness of interventions in relation to high risk cases. Rather, they strongly suggest that as a CVE strategy, the risk-based approach of *Prevent* has been applied too broadly — first, by framing social cohesion initiatives as risk-based CVE strategies (stigmatising communities rather than targeting at-risk individuals); second, reporting requirements that, it has been argued, generate self-defeating over-reporting and do not give professionals the support to accurately identify genuine signs of risk.

91 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 44, citing J Skocylis, *The Local Prevention of Terrorism: Strategy and Practice in the Fight Against Terrorism* (Palgrave Macmillan, 2015).

92 Ibid 44.

93 Vikram Dodd, 'Government Anti-Terrorism Strategy 'Spies' on Innocent', *The Guardian* (UK) (online), 17 October 2009 <<https://www.theguardian.com/uk/2009/oct/16/anti-terrorism-strategy-spies-innocents>>.

94 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 44, citing G Kassimeris and L Jackson 'British Muslims and the Discourses of Dysfunction: Community Cohesion and Counterterrorism in the West Midlands' (2012) 5 *Critical Studies on Terrorism* 179. See also Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2015) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 18–9.

95 Dominic Casciani, 'Prevent Extremism Strategy "Stigmatising", Warns MPs', *BBC News* (online), 30 March 2010 <<http://news.bbc.co.uk/1/hi/uk/8593862.stm>>.

96 Michele Grossman et al, *Stocktake Research Project: A Systematic Literature and Selected Program Review on Social Cohesion, Community Resilience and Violent Extremism 2011–2015* (2016) 44–5.

97 Josh Halliday, 'Almost 4,000 People Referred to UK Deradicalisation Scheme Last Year', *The Guardian* (UK) (online), 21 March 2016 <<https://www.theguardian.com/uk-news/2016/mar/20/almost-4000-people-were-referred-to-uk-deradicalisation-scheme-channel-last-year>>.

98 National Police Chief's Council, Freedom of Information Request Reference Number: 000026/16, 4 <<http://www.npcc.police.uk/Publication/NPCC%20FOI/CT/02616ChannelReferrals.pdf>>.

99 See 'Reality Check: What is the Prevent Strategy' *BBC News* (online), 4 June 2017 <<http://www.bbc.com/news/election-2017-40151991>>; and 'Prevent Scheme "Fundamental" to Fighting Terrorism' *BBC News* (online), 27 December 2016 <<http://www.bbc.com/news/uk-38440939>>.

## 1.2 ISSUES

Four sets of issues have emerged from the Panel's consultations and review of the Victorian approach to CVE.

- There may be opportunities to expand and refine **primary prevention programs**, [REDACTED]
- The Panel considers that there are significant gaps in relation to **secondary interventions**, particularly in relation to community reporting and multi-agency responses to the risk of people radicalising towards violent extremism.
- Victoria Police, DHHS and DET are in the process of formalising their **information sharing arrangements**. The Panel considers that this report provides a timely opportunity to address a set of common information sharing barriers with which all agencies are grappling.
- There remains an issue of whether the **evaluation** of existing CVE programs is sufficiently robust to effectively identify the CVE programs upon which to focus in the future.

## 1.3 DISCUSSION

Victoria has the benefit of being able to draw on its own strong history of CVE policy and programs, in addition to those of other jurisdictions. Some of the key lessons to emerge from Victoria's experiences are set out below.

- Drawing unnecessary attention to government involvement in CVE programs may undermine their legitimacy in the eyes of the community and therefore their effectiveness. Some members of the community may see this involvement as, for example, a form of surveillance and profiling. This can cause irreparable harm to programs and to the reputations of, and relationships with, those delivering them.
- To foster long-term commitment and genuine partnerships, it is necessary to provide communities with a high degree of ownership of programs, from design and implementation to management and governance. Genuine community ownership is also a way of mitigating the risk discussed above.
- While CVE can be effective, it is important to manage government and community expectations of what it can achieve. For example, the outcomes of CVE policies and programs can be impeded by events outside of the government's control, including divisive language used by some community leaders and the refusal of program participants to engage.
- There is no 'off the shelf' solution to, or 'universal blueprint'<sup>100</sup> to meeting the challenge of violent extremism. Violent extremism surfaces in different jurisdictions in different ways, and each jurisdiction must harness and develop its capabilities and adjust its institutional structures to meet this challenge.

The Panel considers that the discussion and recommendations which follow should be read with these lessons in mind. The Panel also welcomes the discussion of CVE at the recent Council of Australian Governments (COAG) meeting, where leaders 'reaffirmed that our most effective defence against terrorism is to prevent radicalisation and the progression to violent extremism'. COAG also noted that 'there is no single factor that makes someone vulnerable to radicalisation; this is a complex and individual process'.<sup>101</sup> This is a key theme of this chapter and informs a number of the following recommendations.

<sup>100</sup> Ministry of Foreign Affairs of Denmark, *Lessons learned from Danish and other international efforts on Countering Violent Extremism in development contexts* (2015) 5.

<sup>101</sup> Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism – Communiqué* (Canberra, 5 October 2017) <<https://www.coag.gov.au/sites/default/files/communique/special-communique-20171005.pdf>>

### 1.3.1 Primary prevention programs

The Panel notes that there have been a number of very positive developments in the area of primary prevention, [REDACTED]

[REDACTED] The Panel notes that [REDACTED] the Victorian Government is in the process of developing a wideranging set of primary prevention programs. The issues that the Panel has identified are opportunities to refine and / or consolidate the existing approach so that it is well placed to meet future challenges.

[REDACTED] The Panel considers that the co-design process is essential to the successful adoption and ownership of these programs by communities. Codesign can help to ensure that community resilience and protective factors respond to community needs and progress positive outcomes that empower communities. This is one way of avoiding the kind of community backlash experienced in the UK through inappropriately designed social cohesion initiatives.

For similar reasons, the Panel supports the idea of building protective factors against anti-social behaviour generally, rather than a disproportionate focus on preventing violent extremism, which may exaggerate the extent of this problem. The Panel understands that this kind of measured and open approach can instil the trust and confidence that communities need to communicate, [REDACTED], the concerns they may have about a friend or family member radicalising towards violent extremism.

### Consultation with Muslim communities

This section has been redacted in full due to the sensitive and security-related nature of the information it contains.

### Countering violent extremism

[REDACTED] the development of a program or programs to target violent extremism across the political spectrum (that is, left- and right-wing extremism) should in the Panel's opinion be examined.

In addition, the Panel considers that more work is required to understand the nature and extent of the right-wing extremist threat in Victoria. [REDACTED]

[REDACTED]

102

#### *Capacity-building programs for frontline workers*

This section has been redacted in full due to the sensitive and security-related nature of the information it contains.

### 1.3.2 Secondary interventions

Victoria has made some significant advances in the areas of primary prevention (as outlined in this chapter) and tertiary interventions (i.e. disengagement programs for violent extremists, as discussed in Chapter 2). Support and engagement orders (as recommended in Chapter 4) and the VFTAC can also operate as either a secondary or tertiary intervention. However, the Panel considers that there are some gaps in relation to secondary interventions to support and divert individuals at risk of radicalising towards violent extremism.

#### **Community reporting**

Currently, the main options for community members to report their concerns about a radicalising family member, friend or associate are limited to the National Security Hotline [REDACTED]

[REDACTED]

[REDACTED]

103

102

103 'Person of interest' generally refers to a person who is the subject of a police investigation but has not been arrested or charged with an offence. In relation to violent extremism, 'person of interest' has a broader meaning that also includes individuals who may be a threat to community safety as a result of their radicalisation towards violent extremism (even though they may not be the subject of an investigation).



The Helpline also does not provide a holistic and coordinated, multi-agency response. Based on Victoria's experience and examples from other jurisdictions such as Denmark, the Panel considers that multi-agency responses are a critical ingredient of CVE programs and would be reluctant to recommend a reporting mechanism that was not supported by a multi-agency approach (see below).

That said, the Helpline has only been in operation since June 2017. The Panel considers that the Victorian Government should review any evaluations of the Helpline if and when they become available.

The Panel also considers that, in addition to proposed changes to multi-agency responses (see below), it is preferable to expand capacity-building programs for frontline workers to ensure that they are in a position to identify, manage and refer relevant risks and that they function as a trusted point of contact for the local community.

The Panel has considered whether reporting should be mandatory but is persuaded by the weight of criticism of mandatory reporting in the United Kingdom that this would likely lead to over-reporting.<sup>104</sup> The Panel considers that mandatory reporting carries an unacceptable risk of alienating communities and needlessly diverting the resources of police and intelligence.

Additional capacity building would need to be supported by broader education and community awareness of the role of the relevant agencies, so as to build confidence and trust in the program. It would also need to be supported by effective information sharing arrangements (see below).

## Multi-agency responses

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] The Panel understands that there have been discussions between relevant agencies and departments about establishing a multi-agency panel to assess the support needs of affected individuals and provide them with suitable support services or referral to law enforcement. [REDACTED]

104 In addition to the discussion earlier in this chapter, see Andrew Zammit, 'Dangers of Using Schools to Address Extremism' (13 October 2015) 25(20) *Eureka Street* <<https://eurekastreet.com.au/article.aspx?aid=45561>>.

[REDACTED]

There are likely to be other situations that require a coordinated approach to referral from Victoria Police to other agencies, departments and community organisations. The Panel recommends that the process by which Victoria Police refers persons of interest to other agencies, departments and community organisations should be formalised to ensure:

- the need for cooperation and intervention by other agencies is identified as comprehensively as possible by Victoria Police, in collaboration with partner agencies; and
- all relevant agencies and expertise are included in this process so that referrals are well targeted and that gaps in available services are identified.

[REDACTED]

The Panel recommends that the Victorian Government consider developing a formal, multiagency coordination panel to ensure effective coordination of interventions between Victoria Police and other bodies, including DET, DHHS, [REDACTED] and other community-based service providers. The formal governance structures discussed above should be considered as potential models for this coordination panel. The proposed multi-agency panel would have a broader remit than the VFTAC and should not be conceived as a replacement for multiagency arrangements under the VFTAC, although the operations of each may need to be coordinated to avoid overlap, duplication and interference.

The Panel considers that the effectiveness of any multi-agency panel will depend to a large extent on effective collaboration of partner agencies in the design of the panel, and the monitoring and evaluation of the referral process once it is established. The Panel considers that there should be regular reviews of the referral process to ensure that it is meeting the needs and operational objectives of all partner agencies as effectively as possible and that relevant information is not overlooked during multi-agency interventions. Additional considerations in relation to multi-agency panel arrangements are discussed further in the following section on information sharing.

105

[REDACTED]

### 1.3.3 Information sharing

Effective multi-agency relationships depend on effective information sharing. The Panel understands that there are good working relationships between Victoria Police and DET, DHHS [REDACTED]. As discussed, many of these arrangements are in the process of being formalised to meet the evolving challenges of the CVE landscape. The Panel considers that this report provides a timely opportunity to address a common set of information sharing issues with which all parties are grappling. The Panel has identified a number of barriers to effective information sharing, which create difficulties for existing arrangements, and would likely inhibit the effectiveness of more structured multi-agency arrangements, as per the above recommendations.

Information sharing is important because it enables early intervention and support to be provided to at-risk individuals. There are many situations in which Victoria Police would like to share the personal information of a POI with departments such as DET and DHHS. This may be necessary for the effective management of referrals from [REDACTED] mental health services or DET, or to support the assessment and management of risk under a support and engagement order (as proposed in Chapter 4). Victoria Police may need to disclose a POI's sensitive health and other information to community-based service providers to support a referral for a CVE intervention [REDACTED].

#### Barriers to information sharing

Victoria Police is limited in the information it can share with these parties. First, it is not able to share information about whether a relevant individual is a national security POI, or is the subject of police investigation or inquiries. In addition, under Victoria's information privacy principles (IPPs), contained in Schedule 1 to the *Privacy and Data Protection Act 2014* (Vic), personal information can only be used or disclosed for a purpose, other than the purpose for which it was collected, if:

- the individual consents to the disclosure of the information (IPP 2.1(b)); or
- the disclosure is reasonably necessary to lessen or prevent: a serious and imminent<sup>106</sup> threat to an individual's life, health, safety or welfare; or, a serious threat to public health, public safety or public welfare (IPP 2.1(d)); or
- suspected unlawful activity has / is / may be engaged in, and the disclosure is a necessary part of the investigation of that unlawful behaviour or the reporting of concerns to the relevant authorities (IPP 2.1(e)).

In addition, sensitive information (e.g. racial, ethnic, political, religious information) can only be collected with an individual's consent, unless the collection is required under law (IPP 10.1).

Section 22 of the *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic), which is yet to commence, will remove the 'and imminent' requirement, which means that information could be shared for a purpose other than the purpose for which it was collected if it is reasonably necessary to, for example, lessen a serious threat to an individual's safety.

[REDACTED]

<sup>106</sup> Section 22 of the *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic), which is yet to commence, removes the requirement 'and imminent'.

### Consequences of barriers

The main problem created by the operation of these privacy principles is that sometimes Victoria Police would like to share personal information about a POI:

- to develop, in collaboration with partners such as DHHS [REDACTED] or DET [REDACTED] a holistic picture of a POI's risk profile in order to determine whether any intervention options present safety risks; and / or
- to inform a partner that a particular individual [REDACTED] is a POI who could jeopardise the safety of those working with him or her.

At the same time, departments [REDACTED] need to be able to freely disclose similar information to Victoria Police to evaluate an individual's progress in a CVE intervention. Departments also need to receive sensitive or personal information — in particular, information about an individual's terrorism risk — so that they can take measures to ensure:

- the safety of staff who may be working directly with the individual;
- the safety of members of the public, for example, in the delivery of community-based programs or programs in public meeting places such as mentoring meetings in cafes or appointments at clinics; and
- that interventions are effectively targeted at the risk factors that drive an individual's concerning behaviour.
- Victoria Police currently considers that the safety information privacy principle (IPP 2.1) sets too high a bar for this kind of information sharing. This has the potential to inhibit the effectiveness of Victoria police's risk management and referral process. It also creates uncertainty for departments [REDACTED] which may not have the necessary level of confidence that they have all the information they need to effectively manage the spectrum of risks set out above.

The Panel recommends that the Victorian Government examine information sharing barriers between Victoria Police and other bodies, including DET and DHHS, to ascertain the extent to which these barriers are cultural, operational and / or legal, and how best to address them. This examination should promote shared, multi-agency objectives, in particular by:

- enabling agencies to jointly develop a comprehensive understanding of an individual's risk of violent extremism;
- supporting appropriate interventions and services; and
- allowing for the appropriate management of operational risks to service providers, particularly risks to the safety of staff and that of the broader community.
- Whether by adjusting the safety exemption or by some alternative means, the Panel considers that the information sharing arrangements between agencies need to be improved to ensure that the risk of harm to the public and to relevant staff can be more easily and effectively managed. The examination that the Panel is proposing should take account of the potential impact of the removal of the 'imminence' limitation to the safety privacy principle (IPP 2.1), which may go some way towards addressing these issues. This examination needs to take account of the detailed views of partner agencies on when, where and how these barriers arise.

- The Panel considers that this examination should involve close consultation with relevant agencies and departments to identify mechanisms to share information in a way that best meets their operational objectives. The guidelines set out in Chapter 4 of Report 1 should be used to steer this process. This is critical because most of the information sharing challenges can only be worked through with the detailed operational knowledge and goodwill of those involved in day-to-day multi-agency referrals and interventions. The Panel understands that information sharing frameworks developed for Fixed Threat Assessment Centres in other jurisdictions may provide some useful examples for this undertaking.
- The need for close collaboration can be illustrated as follows: even if the safety privacy principle was modified to give Victoria Police the confidence it requires, it would still need to address the issue of how to package sensitive criminal intelligence information. As discussed in Report 1 (Chapter 4), Victoria Police will often need to withhold at least some of this information to avoid compromising ongoing investigations, sources or other sensitive matters. In some cases, information may not be able to be released at all. Partner agencies need to come to an in-principle understanding of the circumstances in which these kinds of decisions need to be made and how best to manage shared operational risks.
- The Panel therefore recommends that Victoria Police, DHHS, DET and any other members of the proposed multi-agency panel jointly develop a memorandum of understanding (MoU) to clarify information sharing arrangements between members. This could include agreement about how to handle and dispose of shared information (for example, return to Victoria Police or destroy). In addition to calibrating the operational objectives of partner agencies, the MoU should ensure that information sharing arrangements balance community safety with the affected individual's right to privacy. The MoU would support the development of the proposed multi-agency panel by setting out the circumstances and the manner in which information should be shared between agencies.

### 1.3.4 Monitoring and evaluation

Primary prevention and community resilience programs are difficult to evaluate, in particular because of the difficulty of estimating the impact of broad interventions on reducing what are already low probability events.<sup>107</sup> The Panel considers that these programs should continue to be evaluated with reference to key qualitative indicators such as improved knowledge of community support services or increased access to services reducing disadvantage.

The Panel therefore recommends that the Victorian Government develop a monitoring and evaluation framework to assess the effectiveness of secondary and tertiary interventions.

The framework should include information about the number of individuals referred and managed, types of intervention, and outcome indicators such as information about employment, housing, and any subsequent offending. As discussed earlier, it often takes time for the outcomes of programs in their infancy — in particular, pilots — to become measurable. The framework should take account of this.

The monitoring and evaluation framework should also take account of the need for relevant organisations — both community and government — to be appropriately trained to undertake evaluations designed to improve the effectiveness of interventions over time.

<sup>107</sup> For a discussion of the difficulties of evaluating CVE programs, see Shandon Harris-Hogan, Kate Barreille and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2015) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 7–8, 16–7, 20.

## CHAPTER 2

# PROGRAMS TO DISENGAGE PERSONS RADICALISING TOWARDS VIOLENT EXTREMISM

### Recommendation 9 (Priority enhancements in order to maximise the value of existing disengagement and early intervention programs)

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

### 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.

### Recommendation 12

That suitable new disengagement programs be developed to address other forms of violent extremism across the ideological spectrum, including right- and left-wing extremism (noting the existing program is currently tailored to respond to Islamist extremism).

### Recommendation 13

That an expert advisory committee (with membership to include countering violent extremism (CVE) and clinical specialists) be established to provide technical advice to the Victorian Government on:

- best practice approaches to disengagement interventions and programs;
- the efficacy of risk assessment tools;
- the development of new disengagement interventions and programs; and
- the ongoing evaluation and effectiveness of disengagement interventions and programs.

## 2.1 BACKGROUND

The disengagement of individuals who are radicalising or have radicalised towards violent extremism is a highly complex and multi-disciplinary field. Concepts of disengagement are both differently defined and highly contested among experts and practitioners.<sup>108</sup> From a theoretical perspective, disengagement has predominantly referred to the physical cessation of violent extremist behaviour, whereas deradicalisation is used to refer to the psychological change relevant to abandoning extreme worldviews.<sup>109</sup> Confusion has stemmed, however, from the two terms not being mutually exclusive given that, for example, disengagement can intrinsically involve an element of psychological change leading to the renunciation of violence.<sup>110</sup> For the purpose of this report, the Panel defines disengagement to cover the spectrum of behavioural and psychological change which shifts or ceases an individual's support for, and / or beliefs in, the legitimacy of using violence to achieve a desired outcome. A disengagement program can therefore be characterised as an intervention, or suite of interventions, that would support both behavioural and psychological changes in an individual.

Effective disengagement programs can typically involve two aspects:

- the application of risk assessment tools to assess whether an individual is suitable for disengagement intervention; and
- the delivery of appropriate interventions to facilitate disengagement from violent extremism and address the root causes of the support and / or involvement.

Disengagement programs seek to address both the ideological basis of involvement as well as underlying social and psychological factors. These may include mental health, drug and alcohol, family and social relations, and / or employment issues. Interventions may involve mentoring and, if relevant, religious education to engage with the individual's extreme ideological beliefs. Interventions also focus heavily on social support to assist the individual's long-term reintegration into society. Similar to the highly specific and varied pathways that can lead to violent extremism, the pathways and processes of disengagement do not involve a 'one-size-fits-all' model.<sup>111</sup> A key feature of this level of intervention is a strong focus on developing and delivering a highly individualised intervention package.

By their nature, disengagement programs can be delivered at both the secondary and tertiary intervention levels across the CVE policy spectrum (see Chapter 1, Table 1.2). That is, they can be applied to individuals who are at risk of radicalising towards violent extremism as well as those who have passed the point of prevention and have radicalised to violent extremism. While disengagement efforts in a prison-based setting seek to prevent recidivism or reoffending, community-based disengagement seeks to avert an individual's movement towards violent extremism.

Based on the Panel's review of existing literature, disengagement is an emerging and currently under-researched field, with a lack of consensus regarding best practice principles.<sup>112</sup> For this chapter, the Panel relied on Daniel Koehler's recent study of disengagement and deradicalisation to frame its understanding.<sup>113</sup>

<sup>108</sup> Kristen Bell, 'Looking Outward: Enhancing Australia's Deradicalisation and Disengagement Programs' (2015) 11(2) *Security Challenges* 1, 2.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid 3.

<sup>111</sup> Daniel Koehler, *Understanding Deradicalisation: Methods, Tools and Programs for Countering Violent Extremism* (Routledge, 2016) 130.

<sup>112</sup> Charisse Smith and Mark Nolan, 'Post-Sentence Continued Detention of High Risk Terrorist Offenders in Australia' (2016) 40 *Criminal Law Journal* 163, 174.

<sup>113</sup> Daniel Koehler, *Understanding Deradicalisation: Methods, Tools and Programs for Countering Violent Extremism* (Routledge, 2016). Daniel Koehler is Director of the German Institute on Radicalisation and Deradicalisation Studies (GIRDS) and Fellow at George Washington University's Program on Extremism.

The Panel found the observations on disengagement programs, set out below, to be useful.

- Some of the world's most renowned programs are government-run prison-based models that actively engage prisoners and rely strongly on ideological dialogue as a core element of intervention.<sup>114</sup>
- A key characteristic of these programs is that they are based on respectful, positive and non-coercive contact approaches. Such programs pursue voluntary as opposed to mandatory participation where possible, to avoid participant resentment and resistance.<sup>115</sup>
- Pro-social ties are a key element of successful disengagement, particularly the role of family and friends. This can range from counselling intended to assist family members in facilitating an individual's disengagement, through to social support and assistance to families as an incentive for program participation.<sup>116</sup>
- Given relevant programs and initiatives are relatively new and work within broadly defined terms of 'disengagement', 'intervention', 'deradicalisation' and 'rehabilitation', there is currently no comprehensive typology for understanding core disengagement program characteristics.<sup>117</sup>
- Despite global disengagement models reporting high rates of success and low rates of recidivism, there is a lack of independent or external scientific evaluations to support these findings.<sup>118</sup> This is, in part, due to the relevant security considerations and the challenge of demonstrating an ongoing positive impact on the individual.<sup>119</sup>
- Finally, disengagement practice lacks standardisation and the development of extensive evaluation tools or ethical and professional standards. As a result, Koehler states:

*Governments, practitioners, and researchers need to be able to compare and differentiate programs according to their type, goals, and methods, but also on their impact, proficiency, and skills, in order to develop true 'best practices'; develop and build new programs based on well-established principles, and improve existing programs regarding identified mistakes or insufficiencies.<sup>120</sup>*

In summary, the aim of disengagement programs is to address an individual's attachment to, and active support for, violent extremism. This is achieved through context-specific dialogue and alternative forms of social connection and support. As discussed in Chapter 1, the majority of Victoria's CVE programs and policies have focused largely on building community resilience and early intervention strategies. In terms of a Victorian approach to disengagement, CISP is the predominant program currently delivered in Victoria.<sup>121</sup>

## 2.1.1 Community Integration Support Program (CISP)

CISP was launched in October 2010 as Australia's first prison-based terrorist disengagement program. The launch coincided with the prosecution in Victoria of several individuals as part of national counter-terrorism Operations Pendennis and Neath. The initial pilot program was designed to address concerns that individuals imprisoned for terrorism related offences may spread their ideological views among the broader prison population. Further, without some form of intervention, it was likely that some or all of the prisoners would leave prison with their ideological views and imperatives unchanged.

<sup>114</sup> Ibid 121.

<sup>115</sup> Ibid 122.

<sup>116</sup> Ibid 141.

<sup>117</sup> Ibid 109.

<sup>118</sup> Ibid 122.

<sup>119</sup> Ibid 153.

<sup>120</sup> Ibid 154.

<sup>121</sup> The Panel notes that as of March 2016, a similar program model is being delivered in New South Wales.



Given the context of the arrests made as part of Operations Pendennis and Neath, CISP was designed to address Islamist extremism and is primarily aimed at Victorian prisoners and parolees. Over time, the focus of CISP has broadened beyond terrorist offenders to encompass three additional categories of individuals:

- those at risk of becoming radicalised while in prison;
- those who have the potential to radicalise other prisoners; and
- those at risk of becoming radicalised while in the community (i.e. non-prisoners or non-parolees).

CISP is regarded as the foundation of Victoria's approach to prison-based disengagement intervention, with a broadly positive trajectory since its launch.<sup>122</sup> While the program experienced a number of challenges inherent in the early stages of piloting and program implementation, CISP has established itself as one of Australia's most significant CVE initiatives. In early 2015, CISP was expanded beyond the prison context to provide community-based early intervention for individuals who are identified as vulnerable to, or at risk of, violent extremism. While the expansion of the program is still at a relatively early stage, the Panel understands the results to date have been positive.

[REDACTED]

### CISP structure and process

Participation in CISP is voluntary, except for prisoners convicted of terrorism offences, for whom participation is mandated as a condition of parole.

**This section has been redacted in full due to the sensitive and security-related nature of the information it contains.**

<sup>122</sup> Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is Countering Violent Extremism? Exploring CVE Policy and Practice in Australia' (2016) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6, 10.

## 2.2 ISSUES

This section has been redacted in full due to the sensitive and security-related nature of the information it contains.

### 2.2.2 Need for additional disengagement programs

In reviewing the current scope and reach of CISP, the Panel considers that there are three areas across Victoria's CVE policy spectrum where there is no equivalent disengagement program:

- **Pre-trial stage** – CISP is currently unavailable for accused persons in the pre-trial stage, resulting in a gap in the availability of disengagement programs for accused persons on remand or bail. As these individuals may await trial for relatively long periods of time, the Panel considers that there is a need for accused persons to be engaged at these early stages to reduce the risk of recidivism and avoid the reinforcement of existing grievances.  
  
The Magistrates' Court of Victoria's pre-trial court-based bail support program and Assessment and Referral Court (ARC) List provide bail support through access to social and health services to reduce rates of reoffending. While these programs involve specialist assessment and a tailored case management approach, they do not include targeted disengagement interventions. The Panel also understands that some support is available in remand such as access to counsellors and Imams through a Muslim chaplaincy service but not to the extent of the tailored support and mentoring provided by CISP.
- **Youth justice system** – With a number of young people being charged with terrorism offences in the juvenile justice setting, there is a real potential for radicalisation of other young offenders in the system. The current absence of a dedicated disengagement program for young offenders impacts these offenders across the youth justice continuum from the pre-plea diversion stage through to custodial settings. This includes young offenders on bail or who have been remanded in custody, on diversionary orders, on community-based orders, in custody and on parole. The Panel notes that this could be through expansion of CISP or through the development of new disengagement programs. Note also that the availability of disengagement programs as part of diversionary and community-based orders is further discussed in Part 4.3.5 of Chapter 4.
- **Disengagement from other forms of extremism** – The original CISP approach was designed to engage individuals and prisoners who claimed to be motivated by Islamist ideology. Accordingly, CISP's current format is not tailored to address other forms of political, religious or ideological extremism. It is the Panel's view that based on Victoria's approach to CVE and the objectives of the *Strategic Framework to Strengthen Victoria's Social Cohesion and the Resilience of its Communities*,<sup>123</sup> other disengagement programs should be developed to address various forms of violent extremism, including those espoused by both right- and left-wing extremists. For example, the interactions between Islamist extremism and right-wing extremism can have a 'reactive co-radicalisation effect' — whereby a fear of Islamist extremism can promote Islamophobic extremist violence (as demonstrated by contemporary right-wing extremist movements).<sup>124</sup>

<sup>123</sup> Department of Premier and Cabinet, *Strategic Framework to Strengthen Victoria's Social Cohesion and the Resilience of its Communities* (November 2015) 3.

<sup>124</sup> Douglas Pratt, 'Islamophobia as Reactive Co-Radicalisation' (2015) 26(2) *Islam and Christian-Muslim Relations* 205, 217.

Further, recent examples of violent confrontations between right- and left-wing extremist movements in parts of Victoria are symptomatic of this interplay, with extreme anti-fascist groups regularly organising counter-rallies to oppose right-wing extremist group events.<sup>125</sup> These local incidents are also increasingly influenced and fuelled by hate-based campaigns and attacks around the world, such as the Charlottesville riots in August 2017.<sup>126</sup> The triangulated relationship between all three forms of extremism gives rise to an increased threat of violent extremism and it is essential that the Victorian Government is well equipped to deal with that threat. As noted in Chapter 1, this is also an important part of providing support for, and investment in, addressing the impact of Islamophobia on Victoria's Muslim communities.

## 2.3 DISCUSSION

### 2.3.1 Ongoing delivery of CISP

the Panel is of the view that the ongoing delivery of CISP is important to Victoria's disengagement efforts. Since its initial launch, the program's administrators have accumulated a range of experiences and adapted the program accordingly to establish a strong framework for disengaging terrorist offenders and individuals who may be radicalising towards violent extremism. CISP has also built trust in the community-based setting through Victoria Police's engagement and the resultant relationship it has formed with Victoria's Muslim communities. In turn, this has been used as a platform for developing broader partnerships and programs with local Muslim communities. Trust is, in this context as in others, difficult to establish and easy to lose; but once firmly in place is an element of fundamental importance.

In relation to CISP's early intervention program, the Panel notes that, as outlined in Chapter 1, targeting the disengagement of at-risk individuals, including young people, is an important part of Victoria's CVE policies and programs. The Panel finds that there are clear benefits to delivering CISP at these earlier stages given that, by virtue of the program's holistic focus on an individual's social and psychological needs to facilitate disengagement, CISP can bring about positive pro-social outcomes in a community setting.

<sup>125</sup> Rania Spooner, Darren Gray and Marika Dobbin, 'Far Left, Right-Wing Groups Rally: Anti-Islam, Anti-racism Groups Protest in Melbourne', *The Age* (online), 26 June 2016 <[www.theage.com.au/victoria/far-left-rightwing-groups-rally-antiislam-antiracism-groups-protest-in-melbourne-20160626-gps0p6.html](http://www.theage.com.au/victoria/far-left-rightwing-groups-rally-antiislam-antiracism-groups-protest-in-melbourne-20160626-gps0p6.html)>.

<sup>126</sup> Julia Ebner and Jacob Davey, 'The Far-Right Has Learned to Mobilise and Radicalise. Charlottesville's a Wake-Up Call', *The Guardian* (online), 15 August 2017 <[www.theguardian.com/commentisfree/2017/aug/14/far-right-charlottesville-mobilise-radicalise-white-supremacists-coalition](http://www.theguardian.com/commentisfree/2017/aug/14/far-right-charlottesville-mobilise-radicalise-white-supremacists-coalition)>.

### 2.3.2 Pre-trial programs

The Panel notes that some concerns have been expressed in relation to introducing a dedicated disengagement program into the pre-trial stage (on remand or bail). These are:

- **That an accused may use participation in such a program to demonstrate that they are rehabilitated, thereby undermining the prosecution's ability to convict and sentence the accused.** In the Panel's view, this is a matter for the court to consider. Given courts are highly experienced in making these types of assessments, this is most certainly not a reason to overlook the benefits of at-risk individuals having access to programs and supports to avert them from the path of further offending.
- **That an accused may not participate in such a program because of concerns that information discussed as part of the program may be admitted against the accused.** 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).<sup>127</sup> 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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Panel therefore recommends that:

- a targeted disengagement component be developed and delivered to eligible individuals on bail (possibly as part of the Magistrates' Court's bail support programs, including the ARC List referred to in Part 2.2.2 of this chapter); and
- a dedicated disengagement program be developed and delivered to eligible individuals who have been remanded in custody remand.

These issues apply equally to young offenders in the youth justice system, and the Panel proposes similar recommendations in relation to this cohort.

### 2.3.3 Youth justice programs

As raised in Part 2.2.2 of this chapter, the current gap in dedicated disengagement intervention in the youth justice system has significant implications for Victoria's approach in the tertiary space. Given that young people can also be at risk of radicalisation towards violent extremism, a coordinated CVE approach requires that young people across the youth justice continuum should have access to targeted disengagement programs similar to CISP. As noted earlier, while CISP could be expanded to a younger cohort, including those in the youth justice system, there is a need for more formalised and targeted program delivery in this area. It is the Panel's view that this could involve the development and delivery of new programs or those similar to the existing model in the adult prison system.

<sup>127</sup> Penny Armytage and James Ogloff, 'Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Executive Summary' (Department of Health and Human Services Victoria, July 2017) 33.

<sup>128</sup> [REDACTED]

The Panel notes the considerable and significant recommendations made by the *Youth Justice Review and Strategy*, which should guide the development of disengagement programs in the youth justice system. Of particular importance are its findings and recommendations which highlight the need for:

- offending risks and trends to be well understood so that screening and assessment tools are accurately applied, particularly for violent offending;
- assessing and addressing the needs of young people in youth justice to recognise the highly complex needs and volatility of young people's lives and circumstances, including cultural requirements;
- access to intervention and rehabilitation programs for young offenders across the youth justice system; and
- highly skilled professional and youth justice staff to work together to develop and deliver intensive intervention, including the need for greater clinical practice and oversight combined with specialist support.<sup>129</sup>

The Panel also understands that assessment tools [REDACTED] could be adapted to undertake risk assessments and inform disengagement of young people entering the justice system. However, these tools will require dedicated review and validation to ensure they are applicable to this cohort and their often complex needs. A lack of valid and reliable tools can impact the screening process which determines individual suitability and interventions relevant to the young person's disengagement.<sup>130</sup> The Panel therefore recommends that specific consideration be given to the development of robust and validated risk assessment tools. This would also need to include the involvement of qualified experts and clinicians specialising in young people.<sup>131</sup>

### 2.3.4 Right- and left-wing extremist programs

In considering the necessary interventions to disengage right- and left-wing extremists, the Panel acknowledges that there are currently no convicted terrorists of either political persuasion and that there are a significantly lower number of persons of interest falling within these categories. However, the Panel understands that the rise of social media has provided a platform by which vocal anti-diversity and white supremacist movements in Australia and the Western world are able to connect with like-minded individuals. The recent rise in violent street-based right- and left-wing extremist movements has also brought this issue to the forefront of Victoria's CVE policy planning. Consequently, it is the Panel's view that the increasing impact of identity politics and polarisation across the political spectrum warrants the broadening of Victoria's disengagement programs.

<sup>129</sup> Penny Armytage and James Ogloff, 'Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Executive Summary' (Victorian Government, July 2017) 33.

<sup>130</sup> Charisse Smith and Mark Nolan, 'Post-Sentence Continued Detention of High Risk Terrorist Offenders in Australia' (2016) 40 *Criminal Law Journal* 163, 179.

<sup>131</sup> Ibid 166.

[REDACTED]

### 2.3.5 Establishment of an expert advisory committee

Disengagement practice and programs around the world are still in their early stages of standardisation and validation. The Panel therefore recommends that an expert, multidisciplinary body be established to advise and support the development (and ongoing improvement) of disengagement interventions across both the secondary and tertiary spectrum.

The proposed committee could include qualified experts, practitioners and clinicians such as:

- CVE and disengagement specialists;
- clinical, including child and adolescent, specialists;
- social workers and counsellors;
- religious leaders or authorities;
- Victoria Police; and
- Corrections Victoria and other relevant government departments.

This expert body would be responsible for providing input and advice to the Victorian Government, ensuring disengagement policy and programs are well-placed to address the constantly changing landscape of violent extremism.<sup>134</sup> Matters about which it could advise include:

- best practice approaches to disengagement intervention across the CVE policy spectrum;
- the efficacy of risk assessment tools;
- the development of new disengagement programs; and
- the ongoing evaluation and effectiveness of disengagement programs (including CISP).

<sup>132</sup> [REDACTED]

<sup>133</sup> [REDACTED]

<sup>134</sup> Ibid 261.

For the development of new disengagement programs, the committee could, in particular, provide advice on program delivery to the areas identified in this chapter, such as:

- youth justice;
- remand or bail;
- diversion from the justice system (particularly in relation to lower level offending as raised in Chapters 4 and 5); and
- the proposed ‘support and engagement order’ (Chapter 4).

In recognition of CISP’s current capacity and potential for increased demand, the committee could also provide advice in relation to alternative program providers (e.g. locally-based) for disengagement intervention.

## CHAPTER 3

# LEGISLATIVE DEFINITION OF A 'TERRORIST ACT'

The Panel's consideration of the national legal definition of a 'terrorist act' has been prompted by answers to two critical questions:

Should the complete set of legislative tools be available to authorities to prevent a violent extremist intentionally creating a widespread state of terror or coercing a government?

Y

Are those tools always available?

N

### Recommendation 14

That the Victorian Government refer to an appropriate inter-jurisdictional body consideration of amendments to the legal definition of a 'terrorist act' to:

- remove motive as an essential element of that definition; and
- strengthen the distinction between terrorism and other crimes so as to capture terrorism's unique significance and gravity (noting that the Panel has provided an example of a way to accomplish this in Part 3.3.1 of this chapter) –

and thereby ensure that the necessary tools are always available.

## 3.1 BACKGROUND

### 3.1.1 The national and international definitions

#### Summary of existing Australian legislation

The Panel's Terms of Reference require an examination and evaluation of key legislation. The definition of a 'terrorist act' in section 4 of the *Terrorism (Community Protection) Act 2003* (Vic) (TCPA) falls squarely within those terms. The Panel is accordingly of the view that it is required to consider the utility of that definition.

A significant factor in the Panel's consideration is that the definition in the TCPA replicates the definition of a 'terrorist act' in the Commonwealth *Criminal Code*.<sup>135</sup> It is, indeed, substantially the same as the definition of 'terrorist act' in other Australian jurisdictions.<sup>136</sup> It is also consistent with definitions of terrorism in the United Kingdom,<sup>137</sup> Canada,<sup>138</sup> South Africa,<sup>139</sup> and New Zealand.<sup>140</sup>

<sup>135</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 4; *Criminal Code Act 1995* (Cth) sch 1 s 101.1.

<sup>136</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 3; *Terrorism (Police Powers) Act 2005* (SA) s 2(1) (definition of 'terrorist act'); *Terrorism (Extraordinary Powers) Act 2005* (WA) s 5; *Terrorism (Preventative Detention) Act 2005* (Tas) s 3(1) (definition of 'terrorist act'); *Police Powers and Responsibilities Act 2000* (Qld) s 211; *Terrorism (Emergency Powers) Act* (NT) s 5; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 6.

<sup>137</sup> *Terrorism Act 2000* (UK) s 1.

<sup>138</sup> *Criminal Code*, RSC 1985, c C-46, s 83.01(1).

<sup>139</sup> *Protecting Constitutional Democracy Against Terrorism and Related Activities Act 2004* (South Africa) s 1.

<sup>140</sup> *Terrorism Suppression Act 2002* (NZ) s 5.



The TCPA definition is set out below.

#### **4 What is a terrorist act?**

- (1) *In this Act, terrorist act means an action or threat of action where—*
  - (a) *the action falls within subsection (2) and does not fall within subsection (3); and*
  - (b) ***the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and***
  - (c) *the action is done or the threat is made with the intention of—*
    - (i) *coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
    - (ii) *intimidating the public or a section of the public.*
- (2) *Action falls within this subsection if it—*
  - (a) *causes serious harm that is physical harm to a person; or*
  - (b) *causes serious damage to property; or*
  - (c) *causes a person's death; or*
  - (d) *endangers a person's life, other than the life of the person taking the action; or*
  - (e) *creates a serious risk to the health or safety of the public or a section of the public; or*
  - (f) *seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to—*
    - (i) *an information system; or*
    - (ii) *a telecommunications system; or*
    - (iii) *a financial system; or*
    - (iv) *a system used for the delivery of essential government services by any entity (whether publicly or privately owned); or*
    - (v) *a system used for, or by, an essential public utility (whether publicly or privately owned); or*
    - (vi) *a system used for, or by, a transport system.*
- (3) *Action falls within this subsection if it—*
  - (a) *is advocacy, protest, dissent or industrial action; and*
  - (b) *is not intended—*
    - (i) *to cause serious harm that is physical harm to a person; or*
    - (ii) *to cause a person's death; or*
    - (iii) *to endanger the life of a person, other than the person taking action; or*
    - (iv) *to create a serious risk to the health or safety of the public or a section of the public.<sup>141</sup>*

141 *Terrorism (Community Protection) Act 2003 (Vic)* s 4.

This definition contains three elements: a motive;<sup>142</sup> an intention;<sup>143</sup> and an action.<sup>144</sup> They are of equal legislative weight. All three must be satisfied. If any one of them is not present, no 'terrorist act' has occurred. An act is therefore not a 'terrorist act' unless those responsible had as their motive the advancement of a political, religious or ideological cause.<sup>145</sup> They may have coerced a government or terrified the population at large. They may have caused multiple deaths and massive injuries to people and property in the process. But unless the offenders' motive was to advance a political, religious or ideological cause, what they did would not have been a terrorist act; and none of the vitally important counter-terrorism measures in the counter-terrorism legislation would have applied to it.

[REDACTED]

[REDACTED]

The Commonwealth *Criminal Code Act 1995* (Cth) (*Criminal Code*) makes it an offence for a person to possess things connected with terrorist acts. It is also an offence to collect or make documents likely to facilitate such acts.<sup>146</sup> But these offences too fall within the category of those which depend upon there being a political, religious or ideological motive. [REDACTED]

[REDACTED]

[REDACTED]

<sup>142</sup> Ibid s 4(1)(b).

<sup>143</sup> Ibid s 4(1)(c).

<sup>144</sup> Ibid ss 4(1)(a), 4(2).

<sup>145</sup> Ibid s 4(1)(b).

<sup>146</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 101.4, 101.5.

[REDACTED]

### International approaches to the definition

The international approach has recognised that, especially in its inherent tendency to make victims of the innocent, and without distinction of age or sex or any other characteristic, terrorism is an affront to human rights. The rights of the terrorist must be seen against this important consideration. On the one hand, respect for human rights must protect those against whom suspicions of terrorist connections are wrongly held. On the other, the human rights of victims of terrorism must be protected against terrorists with no concern whatever for those rights. As the United Nations Human Rights Council and its Commission on Human Rights has observed,<sup>147</sup> terrorism is 'criminal and unjustifiable',<sup>148</sup> and is a threat to human rights the violation of which may kill and maim, and may leave what is left of the lives of those who survive as nothing more than a catalogue of mental and physical pain.

It appears from the Panel's research that there is no international equivalent, outside the UK, Canada, New Zealand and South Africa, of the Australian requirement that a 'terrorist act' be done with the intention of advancing a political, religious or ideological cause. When the international community as a whole considered the definition of terrorism it expressly stressed that terrorism's defining characteristic is not the motive of the terrorist.<sup>149</sup> It is the intention to terrorise.

On 28 September 2001, the Security Council of the United Nations unanimously adopted Resolution 1373, which required all member States 'to have laws prohibiting the financing, planning, perpetration or support of terrorist acts'.<sup>150</sup> And on 8 October 2004, in the aftermath of the bombing on 9 September 2004 of the Australian Embassy in Jakarta, the Security Council by another unanimous resolution (No. 1566) condemned 'in the strongest possible terms all acts of terrorism **irrespective of their motivation**, whenever and by whomsoever committed'.<sup>151</sup> The resolution continued that the Council:

*Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, **and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.***<sup>152</sup>

147 HRC Res 7/7, 7<sup>th</sup> sess, 79<sup>th</sup> mtg, UN Doc A/HRC/RES/7/7 (27 March 2008); CHR Res 2004/44, UN ESCOR, 60<sup>th</sup> sess, 55<sup>th</sup> mtg UN Doc E/CN.4/RES/2004/44 (19 April 2004).

148 HRC Res 7/7, 7<sup>th</sup> sess, 79<sup>th</sup> mtg, UN Doc A/HRC/RES/7/7 (27 March 2008) para 3.

149 See, for example, SC Res 1566, 5053<sup>rd</sup> mtg, UN Doc S/RES/1566 (8 October 2004). For examples of definitions that omit any reference to motive, see *The International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001) art 2, and *The International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992) art 2(b).

150 SC Res 1373, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

151 SC Res 1566, 5053<sup>rd</sup> mtg, UN Doc S/RES/1566 (8 October 2004) (emphasis added).

152 Ibid para 3.

These resolutions are relevant for a number of reasons. First, because they express the international community's consistent categorisation of terrorism as an egregious offence. And secondly, because they emphasise that terrorism is defined not by the motive of the terrorist but by the intention to terrorise. The approach of the international community is replicated in, for example, France<sup>153</sup> and in the United States (where the general approach to the definition is in any event very different)<sup>154</sup> as well as in other nations such as Belgium,<sup>155</sup> Singapore,<sup>156</sup> and Switzerland.<sup>157</sup>

### Previous Australian consideration of the definition of a 'terrorist act'

The definition of a 'terrorist act' has been considered by several Australian reviews including:

- 2006 Security Legislation Review Committee (the Sheller review);<sup>158</sup>
- 2006 Parliamentary Joint Committee on Intelligence and Security Review;<sup>159</sup>
- 2012 Independent National Security Legislation Monitor (INSLM) Annual Report;<sup>160</sup>
- 2012 Council of Australian Governments Review of Security and Counter-Terrorism Legislation;<sup>161</sup> and
- 2014 Victorian Department of Justice Victorian Review of Counter-Terrorism Legislation.<sup>162</sup>

Of these reviews, the deletion of the motive element was recommended by only one: Mr Brett Walker SC, in the 2012 INSLM Annual Report. Against this, however, many noted receipt of opinions which supported deletion. The Sheller Review, for example, received submissions from both the Commonwealth Attorney-General's Department and the Commonwealth Director of Public Prosecutions arguing for the removal of the motive element. The Panel will, later in this chapter, address the substance of the arguments expressed in these reviews.

## 3.2 ISSUES

### 3.2.1 Lack of clear powers for police and courts

All acts intended to provoke a widespread state of terror or to coerce a government are, in the Panel's opinion, properly characterised as terrorism. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Criminals may have intended to, and indeed succeeded in, terrorising the entire community; yet the act could not be successfully prosecuted as a 'terrorist act'.

<sup>153</sup> *Code pénal* [Criminal Code] (France) arts 421-1, 421-2-1 to 6.

<sup>154</sup> 18 USC § 2331. The *Patriot Act* of the USA defines 'domestic terrorism' without including motive as an element, but other federal laws do include it in their definition. The State of Nevada, in which over 50 people were killed and hundreds wounded in a mass shooting on 2 October 2017, defines an 'act of terrorism' in a way which relevantly mirrors the *Patriot Act*. Other States have similar legislation.

<sup>155</sup> *Code pénal* [Criminal Code] (Belgium) art 137.

<sup>156</sup> *United Nations (Anti-terrorism Measures) Regulations* (Singapore, cap 339, 2003 rev ed) s 4.

<sup>157</sup> *Strafgesetzbuch* [Criminal Code] (Switzerland) SR 311, art 260.

<sup>158</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (June 2006).

<sup>159</sup> Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (December 2006).

<sup>160</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 20 December 2012* (December 2012).

<sup>161</sup> Council of Australian Governments, *Review of Security and Counter-Terrorism Legislation* (2012).

<sup>162</sup> Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (September 2014).

And in these circumstances, counter-terrorism powers, otherwise available, would be denied to the authorities. [REDACTED]

[REDACTED] This conclusion necessarily follows from the fact that the legislative definition of a terrorist act includes as an element of the offence that it be done or threatened with the motive of advancing a political, religious or ideological cause.<sup>163</sup>

The same is true in relation to an application for a preventative detention order. The effect of section 13C(1)(a)(i)(A) of the TPCA is that an applicant for such an order must be satisfied that there are reasonable grounds to suspect that the subject of the application will, motivated by an intention to advance a political, religious or ideological cause, engage in a terrorist act. If the applicant is not satisfied that the prescribed motivation is present, the application ought not to be made. And if it were made, it is at the very least arguable that the Court would be bound to refuse it, regardless of the consequences.

Prominent people must frequently attend significant meetings and other events. Of equal importance, large crowds frequently gather for celebrated occasions. The protection of these attendees is a central responsibility of government. The special police powers conferred by Part 3A of the TPCA are intended to provide that protection. If the Chief Commissioner of Police has the written permission of the Premier, he or she may apply to the Supreme Court for an order authorising the exercise of those powers. It is clear that they are reserved for serious threats against which extraordinary protections are required. Yet it is at the very least arguable that they cannot be invoked unless, behind the threat, stands a person or persons motivated by a desire to advance a political, religious or ideological cause. It is in the opinion of the Panel unacceptable that the Chief Commissioner and the Premier, and perhaps the Court, might be required to make decisions of the utmost importance but without adequate satisfaction that the advancement of a relevant cause is a motivational factor at the base of the threat.

Division 102 of the *Criminal Code* is headed 'Terrorist organisations'. These may be specifically identified by regulation or, if not, may nevertheless be captured by the relevant definition because they are directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act.<sup>164</sup> If none of their members are motivated by a desire to advance a political, religious or ideological cause, but are merely embittered misfits with no motive other than to damage society by mass murder intended to cause widespread terror, their organisations, unless already identified by regulation, will not be terrorist organisations.

Other provisions of the *Criminal Code* create offences for providing or receiving training connected with terrorist acts<sup>165</sup> and for possessing things connected with terrorist acts.<sup>166</sup> But unless the motive behind the training or possession is the advancement of a political, religious or ideological cause, no offence will have been committed.

<sup>163</sup> A qualification must be added here. It is possible to suspect that one or other of alternative conclusions might be true. For example, one could suspect that a motivation was either religious or based on nothing more than revenge.

<sup>164</sup> *Criminal Code Act 1995* (Cth) sch 1 s 102.1.

<sup>165</sup> *Ibid* s 101.2.

<sup>166</sup> *Ibid* s 101.4.

The Panel acknowledges that motive, whether religious, political, ideological or otherwise, may be crucial to the decision to commit a terrorist act, and to any subsequent criminal prosecution. Moreover, the presence of a religious, political or ideological motive, if discovered, may unmistakably identify a planned activity as a terrorist act. These propositions are not under challenge. Rather, the question is whether the motive element is essential to the definition of a terrorist act, and specifically to the exercise of relevant powers. The Panel is of the firm view not only that it is not, but that its continued presence in counter-terrorism legislation opens a gap which diminishes the safety of not only the Victorian community but of all Australians.

### 3.2.2 Has the gap been a problem so far?

Generally speaking, the answer is no. The Panel is not aware of any case in which the police, with knowledge of a plan to coerce a government or intimidate the public at large, have not been able to form a reasonable belief that the motive of the offenders was the advancement of religion. On the basis of a reasonable belief in the existence of a desire to advance a religious cause, the police have been able to employ the powers conferred upon them by the counter-terrorism legislation.

The Panel therefore accepts that the extent of the legislative protection has not yet been fully tested in circumstances in which an action intended to intimidate the public at large, or coerce a government, has clearly been planned, prepared for, or executed, without any motivation to advance a political, religious or ideological cause. This is not a reason to avoid reform or to ignore potential improvements. The Panel's opinion is based on what it considers to be real risks, regardless of whether those risks have eventuated. If they do eventuate, the consequences could be very significant.

In forming this opinion, the Panel has had regard to the Lindt Café siege, an incident which will be further considered later in this chapter. That siege may be the precursor of situations in which a court is unable, even with the assistance of expert evidence, to conclude that a relevant motive existed. That was the situation which confronted the NSW State Coroner at the conclusion of the inquest into the death of Man Monis and his victims. If Monis had survived and been prosecuted and if, at the end of his trial, the evidence of motive had been as the Coroner found it at the conclusion of the inquest, a verdict of not guilty of committing a terrorist act would have probably been the proper verdict; and the legislative gap would have been exposed.<sup>167</sup>

### 3.2.3 A looming problem for the future

Acknowledging that the definition of a 'terrorist act' has been crafted by agreement among states, territories and the Commonwealth, and is also reflected in some UK inspired international legislation, the Panel considers it is now out of step not only with the generality of international approaches to the place of motive in the definition of terrorism, but also with the dynamic and evolving nature of terrorism. Terrorism may, in the future, be perpetrated in a wide range of scenarios and for a wide range of reasons that have so little to do with politics, religion or ideology that prosecutors who must satisfy a jury beyond reasonable doubt of a political, religious or ideological motive may face acute difficulty.

Extremists from the Middle East have demonstrated that they are adept at promoting their suicidal and fiercely destructive brand of terrorism to disaffected elements within Western populations. It is doubtless probable that religious motives will be ascribed to those snared by this propaganda until, at their trial, expert evidence is called to the effect that their knowledge of Islam is nil, and that religion is merely a cloak to cover nothing more than a general hatred of society.

<sup>167</sup> A guilty verdict could only have been justified if the prosecution proved beyond reasonable doubt that Monis had a political motive. He may have argued that he lacked the capacity to form one, or at least one capable of being sensibly identified.

Violent extremists, as members of small groups united not so much by ideology as a desire to be accepted among colleagues who provide them with the strongest sense of belonging they have ever known, are increasing their prominence in the right / left divide. Intelligence organisations also note the increase in the terrorism risk of lone actors — persons who act on their own without outside command or direction from established ideological groups. This, too, is a cohort to whom motivation may be difficult to attribute.

Each of these cohorts can intend to cause widespread terror while the authorities are hampered by the intrusion of the motive element into their efforts to employ against them the powers otherwise available to combat the terror that they intend to cause. In the Panel's opinion, a definition which deprives the entities referred to in the Panel's Terms of Reference of the powers they need 'to intervene across the risk spectrum' is a definition which should be amended. It requires those entities to engage in enquiries about something — motive — which may have nothing to do with the degree of harm caused by a terrorist act. Such enquiries would be a waste of time when time may be of the absolute essence.

### 3.3 DISCUSSION

#### 3.3.1 A draft of a possible definition

With the above considerations in mind, the Panel suggests the following as a potential formulation for further national consideration:

- (1) *In this Act, **terrorist act** means an action or threat of action where—*
  - (a) *the action falls within subsection (2) and does not fall within subsection (3); and*
  - (b) *whether or not the action is done or the threat is made with the intention of advancing a political, religious, ideological or other cause, or none, the action is done or the threat is made with the intention of—*
    - (i) *provoking a widespread state of terror in the community as a whole, or in an ethnic or other community within that larger community, or intimidating the population at large, or*
    - (ii) *coercing, or influencing by intimidation, the government, or one or more of the parliamentary, executive or judicial arms of government, of the Commonwealth or a State, Territory or foreign country, or part of a State, Territory or foreign country.*

#### 3.3.2 Public perceptions need to change

One of the frequently cited reasons for retaining the existing definition of a 'terrorist act' is that it accords with the general community perception of terrorism. That perception is one that firmly associates terrorism with the advancement, through the use of violence, of a political, religious or ideological cause. And although politics and ideology remain within the parameters of that perception, the foreground is dominated by Islam. The media, and hence the non-Muslim public, tend to see terrorism through the prism created by the events of 11 September 2001, a prism enlarged by subsequent terrorist acts in which Muslim offenders, or those claiming to be followers of Islam, have been involved. There is a consequential assumption that criminal behaviour which is in some way linked to Islam, no matter how tenuous its connection with an attempt to terrorise a community or coerce a government, is a terrorist act. This not only insults the Muslim community; it is an unjustified and unjustifiable attack on its identity and its sense of self-worth, and adds to its sense of alienation, of being outsiders in an Australia to which it belongs. The sense of isolation fertilises the ground in which terrorism flourishes. The undue preoccupation with Islam as a problem also induces inappropriate media, community and perhaps law enforcement responses. The political pressure to foster anti-Muslim sentiments for political advantage is then difficult for some in politics to resist, and a vicious cycle can result.

Unfortunate inconsistencies in the perception of terrorism, and the application of the law to it, are a further result. An examination of recent cases illustrates the point. The Queanbeyan incident is a convenient beginning.

On 7 April 2017, two teenagers robbed a Queanbeyan service station and murdered one of its attendants. In almost every respect it was an unfortunately typical example of serious criminality. But some media reported that the letters 'IS' were inscribed on a petrol bowser; and there was a possibility that one of the offending pair had some previous terrorist connection.

In its coverage, the ABC referred to 'physical evidence found at the scene', and reported the Prime Minister as saying that the circumstances raised 'sufficient concern' to justify the involvement of the Joint Counter-terrorism Team (JCTT).<sup>168</sup> The ABC report added that 'NSW Deputy Police Commissioner Burn said evidence pointed to the attack being terror related' but emphasised that there was 'no imminent attack'.<sup>169</sup>

A very nasty murder had occurred. But no terrorist act had been committed. If attention had been more relevantly concentrated on the harm (a murder and a robbery) unnecessary alarm might have been avoided, together with unnecessary pain in the Muslim community.

The other side of this coin is illustrated by the horrific event which occurred in Bourke Street Melbourne on 20 January 2017. On that day, a car was driven into pedestrians in the CBD of Melbourne. Six people were killed and at least thirty others wounded, three of whom sustained critical injuries. Police have alleged that the victims were intentionally hit and have charged the driver of the vehicle with six counts of murder. The harm caused bears no relationship to the Queanbeyan tragedy.

If the driver had, during the incident, evidenced an association with violent extremists, the media and the public would have accepted that this was an example of terrorism. The same reaction may have been generated if there was no more evidence to support it than that the driver was a Muslim. Because he is not a Muslim, and because he gave no indication of any association with Islamic-related violence, the incident has not been categorised as a terrorist incident. It does nothing for community cohesion that public perceptions are generated by such inappropriate considerations.

The present law provides a partial explanation for the public's acceptance of this incident as not being related to terrorism. A charge that the driver committed a 'terrorist act' could not be sustained under current counter-terrorism legislation because it requires a 'motive' element which is not present in this case. But if the 'upside' is a slight lessening of public discomfort, the 'downside' is that, if the police had known in advance of the incident but had no reason to believe that it was religiously, politically or ideologically inspired, they would have had no access to the preventative measures otherwise available to them under the counter-terrorism legislation.

This would not be the position if the proposed definition of a 'terrorist act' were adopted. The counter terrorism powers in the legislation would have been available to the police had the relevant information been available to them. Moreover, evidence of an intention to intimidate the public or coerce or intimidate a government, and of the giving effect to those intentions by action, if made out at trial, would have been sufficient under the proposed definition to warrant a conviction on a charge of committing a terrorist act. And, had there been advance police intelligence, a court could have made (for example) a preventative detention order. It is possible that, in a comparable incident in the future, lives would be thereby saved and many permanently disabling injuries avoided.

<sup>168</sup> 'Queanbeyan Stabbing: Counter-Terrorism Police Investigate Fatal Rampage', ABC News (online), 8 April 2017 <<http://www.abc.net.au/news/2017-04-07/counter-terrorism-police-join-investigation-into-fatal-stabbing/8425580>>.

<sup>169</sup> Ibid.



In the opinion of the Panel, these benefits outweigh the ephemeral advantage which flows from the fact that the incident has not been classified as a terrorist incident.

The third illustrative case comes from the United States. At about 9.00 pm on 17 June 2015, Dylann Storm Roof entered the Emanuel African Methodist Episcopal Church in Charleston South Carolina. He was white, 21 years old, and angry. As he entered the church he interrupted a Bible study meeting and announced that 'blacks are raping our women and taking over the country.' He then began to shoot. Nine attendees at the meeting were killed. It seems that the tenth was spared so that she could add to the offender's need to magnify his message of hate by testifying to his words as the killing began.

Under the Panel's proposed definition of a 'terrorist act' Roof would be guilty of terrorism. Under the definition deemed applicable by the then FBI Director, James Comey, a political motive was required but was not present. Comey's view prevailed. Roof was not charged or tried as a terrorist.

A definitional problem also accompanied the Lindt Café siege. It was generally accepted as a terrorist act. During the inquest, the State Coroner of New South Wales heard evidence from 'internationally renowned experts in terrorism and radicalisation who reviewed what was known about Monis (the perpetrator) and what occurred during the siege.' Despite this, his Honour noted that:

*even with the benefit of expert evidence, it remains unclear whether Monis was motivated by [the ideology of Islamic State] ... or whether he used that organisation's fearsome reputation to bolster his impact.<sup>170</sup>*

It remained unclear, therefore, whether Monis was motivated by a political, religious or ideological cause, or whether he was simply a damaged man seeking to bolster his own self-importance. In other words, it remained unclear whether the actions of Monis during the siege were 'terrorist acts' within the statutory definition. Nevertheless, his Honour concluded that:

*either way, he adopted extreme violence with a view to influencing government action and/or public opinion concerning Australia's involvement in the Middle East. That clearly brings his crimes within the **accepted definition of terrorism**.<sup>171</sup>*

If his Honour meant by 'the accepted definition of terrorism' the standard Australian statutory definition of a 'terrorist act', his Honour was, in the Panel's respectful opinion, wrong. The statutory definition extends beyond an intention to influence governments to require, in addition, a political, religious or ideological motivation. His Honour did not, at least explicitly, refer to this essential element.

If, on the other hand, his Honour was referring to the publicly 'accepted definition of terrorism' then the Panel agrees. Monis was a terrorist. But if that is so, a problem of definition clearly arises. If, properly considered, the acts of Monis during the Lindt Café Siege did not meet the statutory definition of 'terrorist acts' — because, even with the benefit of expert evidence, it remained unclear, and therefore impossible to prove, that he was motivated by a political, religious or ideological cause — then, in the Panel's opinion, the definition requires amendment by the omission of the 'motive' element.

It might be said, repeating the Coroner's words, that Monis 'adopted extreme violence with a view to influencing government action',<sup>172</sup> and that this demonstrates a political motive. The answer is that an intention to coerce or influence a government by intimidation is already and on any view an element in the definition of a terrorist act. Adding it as a motive is pointless.

<sup>170</sup> State Coroner of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (May 2017) 17.

<sup>171</sup> *Ibid* (emphasis added).

<sup>172</sup> *Ibid*.

The above examples reveal the paradox inherent in the present definition. The words 'an act done with the intention of advancing a political, religious or ideological cause' were doubtless inserted into the definition of 'a terrorist act' so as to reflect the common perception of a terrorist as a criminal with a cause. But by their very presence they remove from the category of a 'terrorist act' actions which by common consent should be classified as such.

### **3.3.3 Counter-terrorism laws should apply to all intentional acts of terror**

#### **But if they do, will their reach be too broad?**

The Panel understands that a key concern of many of the stakeholders consulted is that the removal of the motive element will significantly broaden the types of action currently classified as 'terrorist acts'. This is seen as problematic. Those who advance this argument stress that unless the 'motive' element of the definition of a 'terrorist act' is retained, the additional powers and penalties attached to terror-related offences will be applied to an inappropriately wide field of criminal activity. Proponents of retaining the motive element therefore argue that it confines the scope of a 'terrorist act' to the threat it was designed to address (i.e. extreme violence or destruction motivated by a political, religious or ideological cause). For all else (i.e. extreme violence motivated by a personal grievance, revenge or hate) the regular criminal law is appropriate.

In the opinion of the Panel, the answer is clear. Take paragraph (1)(c) of the present definition. It is intended to catch actions done or threats made with the intention of (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public. As the enactment of Australian counter-terrorism legislation makes clear from the very fact of its enactment, when these circumstances obtain, the regular criminal law is inadequate. It cannot, chameleon-like, become adequate simply because the actions or threats are motivated by a political, religious or ideological cause — but not otherwise.

There is a variation to the argument that the proposed definition will inappropriately broaden the scope of the counter-terrorism laws. Those who are caught by those laws will face particular hurdles when applying for bail, and for parole. They are liable to preventative detention, to being made the subject of covert search warrants, to post-sentence detention, and to all the other restraints on personal liberties for which these laws provide. The pool of those thus affected must not be enlarged.

The Panel accepts without question that the reach of the counter-terrorism laws must never exceed their legitimate purpose. But that purpose is to encompass all who intend to coerce a government or intimidate the public. The present definition fails to do this. The proposed definition does no more than close that gap.

#### **The present definition has, in practice, a tendency to inappropriately broaden its reach**

As the reaction to the Queanbeyan incident demonstrates, the presence of the motive element tends at times to induce an assumption that criminal acts not intended to terrorise a community or coerce a government are nevertheless classified as terrorist acts. This is a particular danger whenever a Muslim is involved, or whenever a criminal with no connection with any religion adopts the insignia of religiously-inspired violence simply to inflate the impact of his or her actions. Criminality well below the proper threshold for a terrorist act may then be labelled as such. The damage to community cohesion in these circumstances could be significant. And it is a phenomenon likely to become more common in the near future.

It is, in the Panel's view, important to concentrate on the intended harm and not to be distracted by an attempt to ascertain motive.

### **The definition is directed towards intentional action and consequential harm, not incidental effect**

The Panel does not accept that the motive element is what distinguishes terrorism from other types of crime. Rather, terrorism is distinguished from other crimes by the intention to cause the distinctively egregious harm which results from the terrorist act. Terrorism may take many forms and be perpetrated for many reasons. But, at its core, it is about the intended effect of the violence. It is not about the motivation behind acts of violence, or the incidental — albeit frightening — consequences some such acts may have. Two examples which have been put to the Panel are relevant to this consideration.

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#### **Hypothetical 1 – Application to organised crime**

Two rival motorcycle gangs, A and B, have been engaged in a protracted and increasingly violent dispute. As the dispute escalates, the retaliatory action gradually creeps into a number of public places, culminating in members of A shooting at members of B outside a packed Melbourne hotel. Passers-by and patrons of the hotel are terrified by the public display of violence.

#### **Hypothetical 2 – Application to ordinary crime**

A man, A, enters a busy service station with a gun, intending to commit armed robbery. A uses the gun to threaten the cashier, B, and the members of the public present at the service station, and demands all money kept on the premises. A woman, C, sees the incident occurring and attempts to intervene. A panics and shoots and kills C. The members of the public present are terrified by the display of violence.

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In the opinion of the Panel, violence of this kind would not fall within the amended definition of a 'terrorist act', despite the consequence of each hypothetical shooting being the creation of terror in some members of the public. The Panel has come to this conclusion for two reasons. First, because the intention of A in both situations was not to provoke a state of terror in the community, but rather to further a private agenda (i.e. retaliation against a rival gang, or to rob a service station). As such, the requisite element of intention was absent. For this reason alone the action could not be classified as a 'terrorist act'. Second, a group of bystanders would not constitute either what the Panel conceives to be a 'community' (as opposed to a section of the public) or the population at large.

### **In summary: the proposed definition is broader – but tighter**

The answer to these concerns is, in the opinion of the Panel, straightforward. It comes in two related parts. First, the special powers created by counter-terrorism legislation are directed at preventing the special threat which terrorism poses: in general terms, the intentional generation through violence (threatened or actual) of widespread terror extending across an entire community, or across ethnic, religious or other communities within the wider community; or the coercion of a government through violence or the threat of violence. If those special powers are worth putting in place to provide protection against such a threat, they should be capable of employment whenever the threat arises. The motive behind those responsible for the threat is irrelevant to that purpose.

Consistently with this, the second part of the answer emphasises that any broadening of the definition which would follow the deletion of the 'motive' element does no more than ensure that all who should be included in the definition are indeed included. The broadening is not an over-reach: it is essential.

Even if it were accepted that, when it was introduced, the inclusion of the motive element was an essential characteristic of a 'terrorist act', the contemporary capacity of individuals and small groups to cause massive harm has changed the nature of terrorism. No purpose is served by the necessity to attribute a motive to those who inflict such horrendous suffering. On the contrary, such a necessity removes from law enforcement agencies the means best designed to provide protection against the lone terrorist without any discernible motive, or with a motive other than the advancement of a political, religious or ideological cause.

The definition must be broadened to catch all terrorist acts, not just some. All acts intended to provoke a widespread state of terror in the community as a whole, or in an ethnic or other community within that larger community, or to coerce a government, must come within the definition — no matter what the underlying motivation, or lack of it. The first consideration must be the safety of the public. The incorporation of motive as an element of a 'terrorist act' inhibits society's capacity to provide that protection.

The Panel therefore respectfully disagrees with the proposition that removal of the motive element will unjustifiably broaden the definition of a 'terrorist act'. The Panel considers it completely justifiable to change a definition that is no longer serving the purpose for which it was intended. The Panel also disputes the assertion that the recommendations, taken as a whole, would significantly broaden the definition of a 'terrorist act'. While removal of the motive element (as an essential element) will broaden one aspect of the definition, the suggested amendments to the intention element will tighten another. For relevant purposes, the overall effect will be insignificant. The Panel acknowledges that the important distinction between terrorism and other crimes must be retained. The Panel believes, however, that this can be achieved. As outlined in the potential formulation (see Part 3.3.1 of this Chapter), the Panel suggests an addition to paragraph (1)(c) (which would become paragraph (1)(b) if the Panel's suggestion is adopted).

The Panel intends that the wording set out in Part 3.3.1 of this Chapter, or wording to that effect, will capture the fact that terrorism is what it is because of the breadth of its impact. That impact typically extends to wholly innocent members of the population at large, although in certain circumstances a particular community, being part of the whole, is most deeply impacted. It is for this reason that the Panel favours the inclusion of the expression 'provoking a widespread state of terror in the community as a whole, or in an ethnic or other community within that larger community'. And the expression 'population at large' is thought to appropriately apply to acts intended to intimidate by means of, for example, cyber-attacks on systems of communication facilitated by the internet. Such attacks may cause general panic. They do not commonly give rise to physical trauma.

These observations, however, merely seek to elucidate the Panel's approach to the definitional issue. If the Panel's reasoning is adopted, it will be the task of those with expertise in drafting legislation to put to government a form of words which meets the end to be achieved.

### The definition could be further narrowed by amending the action element

A means of further strengthening the definition may be to amend the action element defined in subsection (2) to set a higher threshold for the harm caused by a ‘terrorist act’. An example of how this might be accomplished is the definition of ‘action’ adopted in New Zealand. This is extracted below, beside the current definition in Australia:

#### TERRORISM (COMMUNITY PROTECTION) ACT 2003 (VIC)

Action falls within this subsection if it—

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person’s death; or
- (d) endangers a person’s life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system<sup>173</sup>.

#### TERRORISM SUPPRESSION ACT 2002 (NZ)

The outcomes referred to in subsection (2) are—

- (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
- (b) a serious risk to the health or safety of a population;
- (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
- (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
- (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.<sup>174</sup>

While only one element of the Australian definition (paragraph d) is clearly absent from the New Zealand definition, many, if not all, of the other elements of the New Zealand definition are slightly stronger when compared to the Australian definition. For instance, in paragraph (b), (Australian paragraph (e)), the risk to health and safety must be to a ‘population’ rather than the ‘public or a section of the public’. Further, in paragraph (c), (Australian paragraph (b)), the serious damage to property must be property of ‘great value or importance’. If considered necessary, the Panel considers this to be an appropriate means of further narrowing the definition — and is preferable to retaining the ‘motive’ element.

### 3.3.4 The present definition creates both operational and prosecutorial risks

#### Operational risks

The definitional problem adversely affects not only the capacity of the authorities to respond to terrorist acts, but also their capacity to prevent, investigate and monitor them.

The powers conferred by the TCPA protect the public. When properly constrained and properly exercised they are, in the Panel’s opinion, an appropriate addition to the armoury of the authorities. But if they cannot be employed against a terrorist who is not motivated by the ‘motive’ element, they do not provide the protection they should. The following example illustrates this point.

<sup>173</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 4(2).

<sup>174</sup> *Terrorism Suppression Act 2002* (NZ) s 5(3).

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### A hypothetical case – The hate-filled man vs the political terrorist

A man, A, deliberately drove his car into members of the public attending a festival at Federation Square to mark the commencement of an international sporting event. Sixteen attendees were killed and hundreds of others injured. B, a well-known sports commentator had been scheduled to speak at the event and a large cohort of his fans was expected to be in the audience to hear him speak.

A was known to authorities, due to his vitriolic criticism of B and any who supported him. The police were aware of a number of recent Facebook posts by A that described his plans to drive through the festival and 'take out B and as many of his fans possible'. While A clearly intended to terrorise, his conduct would not be captured by the current definition of a 'terrorist act' as it was not motivated by politics, religion or ideology. As a result, despite knowing his intentions, police would not have been able to intervene using TCPA powers.

Change the facts ever so slightly and those powers would be available. Suppose that, in addition to the above, A had also written repeatedly to the Premier threatening to attack those attending the international sporting event unless the Premier withdrew funding from the public broadcaster on whose channel it would appear. The police would almost certainly have concluded that A's actions were politically motivated, or were designed to coerce the government; and, as a result, that the commission of a terrorist act was probable. Once having arrived at this conclusion, police would have had at their disposal the powers given to them under the TCPA.

In each of the situations postulated above, the actions of A resulted in 16 dead and hundreds injured. But different laws would have applied. The Panel considers that this is unsatisfactory.

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The recent mass shooting in Las Vegas, on 1 October 2017, further highlights this point. In that situation, had police been provided with information disclosing that the perpetrator was about to carry out the attack, but not revealing the attacker's motivations, they would not have been able to use the powers contained in the TCPA to prevent the attack (e.g. by applying for a preventative detention order). The Panel observes that, at the time of writing, the attacker's motivations are still unclear.<sup>175</sup>

If the police have no evidence of motive, but otherwise have reason to suspect that a terrorist act might occur, they would be obliged to look for the 'motive' element. This might be easy. Or it might mean wasting very precious time. Moreover, as Walker SC points out:

*One does not need to go so far as detecting inappropriate police profiling of certain minorities, to have strong concerns about investigating and prosecuting a person partly on the basis of his or her religious etc. beliefs. By including motivation as an element of terrorist offences, it is these beliefs about which police are required to collect evidence as part of their investigations into whether someone is committing, or has committed, a terrorist offence.<sup>176</sup>*

It is perhaps necessary to re-emphasise a point already made. The Panel does not suggest that religious, ideological or political beliefs are never relevant. They may be very relevant indeed. But it ought not to be a **requirement** that they be part of the investigation.

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<sup>175</sup> See Jennifer Medina, Richard Pérez-Peña and Adam Goldman, 'Meticulous Planning by Las Vegas Gunman Before He Opened Fire', *New York Times* (online), 3 October 2017 <<https://www.nytimes.com/2017/10/03/us/las-vegas-gunman.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article>>; Nino Bucci, 'Las Vegas Shooter Stephen Paddock, Islamic State and the Mystery of Motive', *The Age* (online), 6 October 2017 <<http://www.theage.com.au/world/las-vegas-shooter-stephen-paddock-islamic-state-and-the-mystery-of-motive-20171006-gyvkv.html>>.

<sup>176</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 118.

### **An alternative proposal**

An alternative proposal suggested by stakeholders was that, if the police are hampered by an inability to know whether a potential terrorist act is to be committed by offenders with the necessary motive, special powers might be exercisable at the beginning of an incident for a limited period of time — perhaps up to 48 hours. As the Panel understands the proposal, the police would take advantage of that period to ascertain whether or not the offenders were motivated by a desire to advance a political, religious or ideological cause but, in the meantime, could proceed to exercise the broader powers which ultimately depend on motive. If evidence of the existence of the defined motive is discovered within the time allowed, the police could make an application for continuation of those broader powers. If it is not, they would revert to the ordinary powers that govern their ordinary duties in investigating and responding to criminal acts.

In the opinion of the Panel, this suggestion fails to cover the situation which would arise were the police to discover a plan to coerce a government or intimidate the public, with possible mass murder involved, but with no known motive. Requiring the police to revert to their ordinary powers governing their ordinary duties might prevent them from protecting the public against an extraordinary emergency. And the requirement to revert to ordinary powers might come at the very time that counter-terrorism powers were most urgently needed.

### **Recklessness**

Victoria Police has submitted that the definition of a ‘terrorist act’ should cover an action or threat made recklessly with the effect of coercing a government or intimidating the public. The Panel disagrees. It is very difficult to envisage how a government could effectively be coerced by reckless action, because as soon as it was apparent that the coercion was unintentional its coercive nature would be eliminated. Much the same applies to intimidating the public. In the opinion of the Panel, these situations are best left to other aspects of the criminal law. Of its nature, terrorism requires intent.

### **Prosecutorial risks**

Prosecutorial risks are, in the opinion of the Panel, real. So long as the present definition remains, prosecutors will be bound to prove, as an essential element in a successful prosecution for committing a terrorist act (and therefore something to be proved beyond reasonable doubt) that the accused did the act while motivated by a desire to advance a political, religious or ideological cause. This may not always be possible, even in cases in which the intention to coerce or influence a government, or terrorise the community or a section of it, was beyond any doubt. Moreover, an attempt to prove that the motive was to advance a religious cause would necessitate an attempt to prove not only that the cause was indeed religious, but also that the religion in question could at least conceivably be promoted by the evil of a terrorist act. Such a prosecution might, for no logical purpose in a logical system of criminal law, seriously damage religious tolerance in an otherwise tolerant multi-cultural society. The hypothetical case described below illustrates this point:



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### Another hypothetical – The irreligious man and the religious motive

A person, of Muslim background, was convicted of exploding a bomb by remote control in a crowded public place. Hundreds were killed or maimed. The police swooped too late to prevent the explosion, but arrested the man before he escaped from the point at which the remote control was activated. The offender was not a worshipper at any mosque, and had a reputation for not only being irreligious, but also for scoffing at the (mainstream Islam) religion of his community. He was known to police, but only because he had a criminal record of more or less petty crime. He belonged to no political movement, had no known connections with any ideological group, and if he had an 'ideology', it was so totally lacking in coherence that it was beyond sensible description. The prosecution, however, had compelling evidence of a keen interest in what, although he was incapable of articulating his beliefs, he called 'violent jihadism'. At his trial, the prosecution relied upon religion as satisfying paragraph (b) of the definition. The Crown called evidence in an attempt to prove that 'violent jihadism' is sufficiently connected with Islam — an undoubted religion — to be a 'religion' sufficient to meet the motive element in the definition of a 'terrorist act'.

The only defence was that the accused had no religious (or political or ideological) motive. A necessary element in the crime of committing a terrorist act was therefore absent. Consistently with this, the defence called opinion evidence from three experts. One was Christian, one was Muslim, and the third was of no religion. All had impeccable academic and theological credentials in Islamic theology. All said that, in their opinion, 'violent jihadism' is no part of Islam as the Quran is properly interpreted. All also said that 'violent jihadism' is not a known religion. The accused's case, as put to the jury in final address, was that the prosecution had not proved beyond reasonable doubt either that Islam is compatible with 'violent jihadism', or that the latter is itself a religion.

The judge instructed the jury that there was no evidence that 'violent jihadism' is a religion in itself. If the jury returned a guilty verdict it could only be on the basis that Islam and violent jihadism *are* compatible, or at least that a strand of Islam condoned indiscriminate violence. Only when satisfied beyond reasonable doubt on this point, and likewise that the bomb was exploded with the intention of advancing a religious cause, could the jury return a verdict of guilty.

If, thus instructed, the jury found the accused guilty, the Muslim community would doubtless be outraged; not because an evil man had been put on trial for a terrible crime, but because their religion and their community had unjustly been brought into disrepute. On the other hand, if a 'not guilty' verdict were returned, the media would be in a frenzy and the authorities deeply embarrassed by the exposure of a legislative gap which, in the public mind, a government properly concerned about the safety of the community ought to have closed.

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In summary: motive may be an important piece of evidence in a criminal prosecution. It may be relevant and admissible in the hypothetical trial, and the evidence of an attachment to 'violent jihadism' may have been admitted in that trial for that reason; it helped explain what the accused had done. But in both domestic and international law, motive is usually irrelevant to criminal responsibility. Murder is murder whatever the motive — including in cases in which motive is nowhere to be found. Likewise, a terrorist act should be a terrorist act even if motive is incapable of proof, or even seemingly non-existent. The Panel can see no reason why the definition of a terrorist act should effect the opposite result.



### 3.4 NEXT STEPS – A NATIONAL APPROACH IS PREFERABLE

National consistency in the endeavour to prevent terrorism is important, particularly given the coordinated and cooperative approach to interjurisdictional responses to the terrorist threat. To this end, the Panel acknowledges that this objective was affirmed at a recent special meeting of the Council of Australian Governments on counter-terrorism.<sup>177</sup>

However, if the Panel's recommendations are, for whatever reason, not accepted nationally, the Panel recommends that the Victorian Government consider other methods to ensure that Victoria Police has adequate powers to respond to terrorist acts without having to prove motive first. Not to do so would, in the respectful opinion of the panel, miss an opportunity to strengthen the tools available to ensure the safety of the Victorian community.

This end could be achieved by incorporating the suggested amendment into the TCPA definition. The result would be that Victoria Police and other relevant Victorian authorities would have access to a range of counter-terrorism tools in circumstances denied to their counterparts in other jurisdictions. This should not affect the capacity of Victoria Police to call upon the Australian Security Intelligence Organisation or the Australian Federal Police for appropriate assistance; the greater Victorian powers would encompass the lesser powers of the Commonwealth. However, it is true that the Commonwealth will not be in a position to prosecute the perpetrators of widespread community terror for the commission of a terrorist act, if these perpetrators have been apprehended by means of powers available in Victoria but not available elsewhere. This and other consequences of such an amendment will need to be further considered. The Panel nevertheless reiterates that a national approach to this important issue is the preferred option.

<sup>177</sup> Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism – Communiqué* (Canberra, 5 October 2017) <<https://www.coag.gov.au/sites/default/files/communiqué/special-communique-20171005.pdf>>.

## CHAPTER 4 SUPPORT AND ENGAGEMENT ORDER

### Recommendation 15

That the Victorian Government create a 'support and engagement order' (SEO) in the *Terrorism (Community Protection) Act 2003* (Vic). The SEO scheme should include the following elements:

- application by the Chief Commissioner of Police to the Magistrates' Court or the Children's Court where applicable;
- a test requiring, for example, the court to be satisfied that:
  - the person has exhibited behaviours indicative of radicalisation towards violence; and
  - the order is necessary to ensure the person's participation in, and compliance with, an appropriate support and engagement plan;<sup>178</sup>
- an ability for the court to order that a person participate in certain support and disengagement programs, counselling, family group conferencing and, where appropriate, comply with certain conditions; and
- a graduated approach to compliance that includes warnings, court facilitated conciliation, fines and, if all else fails, a summary offence.

The Panel acknowledges that in order to be effective the SEO scheme will need to be supported by the development of:

- validated risk assessment tools to assist decision-makers, including the court, to determine when, and whether, a person is radicalising towards violence; and
- programs that address the specific characteristics of a person subject to an SEO including age, risk level, cultural identity and the ideological cause influencing the person's radicalisation towards violence.

The Panel notes that this development should be informed / guided by advice from the expert advisory committee (Recommendation 13 in Chapter 2).

<sup>178</sup> The Panel acknowledges that further consideration may be required to craft an appropriate test and as such this language is an example only.

## 4.1 BACKGROUND

The first two chapters of this report have considered ways to prevent and counter violent extremism, and disengage persons radicalising towards violence. This chapter will again consider disengagement but in the context of participation in court ordered programs, via the proposed ‘support and engagement order’ (SEO). Considered in the context of the broader strategy to prevent and counter violent extremism, SEOs would be a form of late stage secondary / tertiary intervention (see Table 1.2 in Chapter 1) and, as such, would be a tool for managing low–mid level risk. In contrast to existing measures for preventing terrorism (i.e. preventative detention orders and control orders), which are highly intrusive and place a significant burden on a person’s liberty, SEOs are intended to:

- disengage persons who are radicalising towards, or have radicalised to, violence;
- address the underlying causes of radicalisation towards violence (for example, unemployment, drug and alcohol issues, and social isolation); and
- reconnect persons with their community and positive support networks (i.e. family and friends).

### 4.1.1 Existing interventions

As will be discussed in Part 4.2, below, SEOs are intended to address a legislative gap in the powers available to police to intervene across the risk spectrum and, as such, must be considered in the broader context of counter-terrorism interventions. Set out below, in order of severity (from least to most severe), are the existing counter-terrorism interventions.

#### Firearms prohibition order

The firearms prohibition order (FPO) was recommended by Victoria Police and is currently before Parliament.<sup>179</sup> While not a counter-terrorism intervention per se, Victoria Police has indicated that the FPO will have broad utility in this space.<sup>180</sup> Similar to the NSW FPO scheme set out in Part 7 of the *Firearms Act 1996* (NSW), the proposed Victorian FPO will enable the Chief Commissioner of Police (or a delegate) to issue an FPO against any person (14 years and over) if satisfied that it is in the public interest to do so.<sup>181</sup> Persons subject to an FPO will be prohibited from acquiring, carrying, possessing, or using a firearm for a period of ten years for an adult and five years for a child.<sup>182</sup> The issuing of an FPO will also trigger enhanced police search powers including an ability to search, without a warrant or consent:

- premises or vehicles to ensure compliance with an FPO;
- the person subject to an FPO; and
- persons in the company of the person subject to an FPO.<sup>183</sup>

These search powers may be exercised an unlimited number of times throughout the duration of the order. A number of new offences will also apply to the FPO scheme including an offence of contravening an FPO (applicable to both the subject of the FPO and any other person) and entering certain premises (i.e. a shooting ranges and premises where firearms are stored).<sup>184</sup>

<sup>179</sup> Firearms Amendment Bill 2017 (Vic).

<sup>180</sup> The Hon Lisa Neville MP, ‘New laws to target illegal guns, organised crime and drive-by shootings’ (Media Release, 19 September 2017).

<sup>181</sup> Firearms Amendment Bill 2017 (Vic) cls 112D, 112E.

<sup>182</sup> Ibid cls 112D, 112J.

<sup>183</sup> Ibid cls 112Q, 112R, 112S.

<sup>184</sup> Ibid cls 112B, 112C, 112O.

### Control order

The control order scheme is contained in Division 104 of the Commonwealth *Criminal Code Act 1995* (Cth) (*Criminal Code*) and enables an issuing court to impose certain obligations, prohibitions and restrictions (conditions) on a person for a maximum period of 12 months.<sup>185</sup> To make a control order, the court must be satisfied on the balance of probabilities that one of seven listed circumstances applies to the person.<sup>186</sup> Relevantly, these circumstances include that the making of the control order would substantially assist in preventing a terrorist act, or preventing the provision of support for, or the facilitation of, a terrorist act.<sup>187</sup> For each of the conditions imposed, the court must be satisfied that the condition is 'reasonably necessary, and reasonably appropriate and adapted for the purpose' for which the order is sought.<sup>188</sup> The conditions that a court may impose include:

- a requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours;
- a requirement that the person wear a tracking device;
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet); and
- a requirement that the person participate in specified counselling or education.<sup>189</sup>

Section 104.27 makes it an offence, punishable by five years' imprisonment, for a person to contravene a condition of a control order.<sup>190</sup>

### Preventative detention order

The Victorian preventative detention order (PDO) scheme is contained in Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic) and substantially replicates the Commonwealth PDO scheme contained in Division 105 of the *Criminal Code*.<sup>191</sup> It enables detention of a person without charge for a maximum period of 14 days for the purpose of preventing an imminent terrorist act, or preserving evidence relating to a terrorist act that has occurred.<sup>192</sup> The Panel considered the PDO scheme in detail in Report 1, in the context of the NSW investigative detention scheme, and in Report 2, in relation to minors. The Panel has recommended a number of amendments to the PDO scheme including:

- removing the requirement that police must apply to the Supreme Court for an interim PDO;
- extending the maximum duration of an interim PDO from 48 hours to 96 hours;<sup>193</sup>
- enabling police to question a person detained subject to a PDO; and
- reducing the minimum age of persons that can be subject to a PDO from 16 to 14 (subject to a number of additional safeguards).

<sup>185</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 104.4, 104.5, 104.14, 104.16.

<sup>186</sup> *Ibid* sch 1 s 104.4(1)(c).

<sup>187</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 104.4(1)(c)(i), 104.4(1)(c)(vi).

<sup>188</sup> *Ibid* sch 1 s 104.4(1)(d).

<sup>189</sup> *Ibid* sch 1 s 104.5(3).

<sup>190</sup> *Ibid* sch 1 s 104.27.

<sup>191</sup> *Ibid* sch 1 div 105.

<sup>192</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13C, 13E, 13F, 13G, 13I.

<sup>193</sup> Note that the 96 hour interim period applies to PDOs in respect of adults only; the treatment of minors subject to a PDO is dealt with in Chapter 6 of Report 2.

## 4.2 ISSUES

While there are significant powers available to police to intervene when the risk of terrorism begins to crystallise (that is, the attack is being planned or is about to occur), there are no specific powers available to police to intervene when a person is radicalising towards violence but has not engaged in, or planned / prepared to engage in, a terrorist attack.<sup>194</sup> This is problematic for a number of reasons, foremost of which is the significant consequences if the intervention happens too late (or not at all) and a terrorist attack occurs.

Further while control orders and PDOs are available at the later stages, it can often be difficult for police to assess the point at which a person crosses the line from thought, to preparation, to action. This issue is increasingly problematic in the 'new threat environment' which has seen a shift towards 'rapid radicalisation and low complexity plots'.<sup>195</sup> Where, previously, plots were highly complex involving multiple people and the preparation of sophisticated weapons, the plots currently emerging are low complexity involving minimal organisation and using readily available weapons such as vehicles or knives.<sup>196</sup> Not only has this meant that police have far less time to intervene before an attack, but it is also increasingly difficult to predict precisely when an attack will occur. This is so despite there likely being clear indications that a person is becoming or has become radicalised to violence.

This 'new threat environment' is in part a result of the increasingly sophisticated use of propaganda by terrorist organisations such as Islamic State (IS) to encourage people to engage in terrorism. Disseminated over the internet and on social media, this material (discussed in more detail in Chapter 5) is varied and can contain anything from promotional videos that depict military training or gross acts of violence (for example, beheadings) to specific instructions for the doing of terrorist acts. Potentially attributable to the rise in 'rapid radicalisation', possession or hoarding of this type of material has been identified by experts as one of a number of key behavioural indicators of a person radicalising towards violence.<sup>197</sup>

In its submission to the Panel, Victoria Police recommended addressing these issues, and in particular the legislative gap, by creating a community protection intervention order (CPIO). Described as similar to a family violence intervention order, the CPIO would enable Victoria Police to intervene early when individuals were beginning to / in the process of radicalising towards violence but do not meet the threshold for a PDO or control order.

As previously foreshadowed, the Panel agrees that an additional tool is required to address this legislative gap and supports the creation of an order similar to the CPIO (renamed a 'support and engagement order' (SEO)) in accordance with the below discussion and comparison of the proposed Victoria Police CPIO with the Panel's preferred SEO. The SEO would focus on support and community engagement, and provide an alternative pathway for responding to radicalisation towards violence that does not involve the criminal justice system (unless the SEO is breached). The Panel considers that the creation of an SEO is consistent with and in part acquiesces the Victorian Government's commitment at the recent special meeting of the Council of Australian Governments to defend against terrorism through the prevention of radicalisation and progression to violent extremism.<sup>198</sup>

<sup>194</sup> Note a person who commits a low-mid level offence may have participation in a disengagement program attached to either a diversion plan or a youth control order / community correction order. See Part 4.4.

<sup>195</sup> Transcript of proceedings, *INSLM Statutory Deadline Reviews* (Independent National Security Legislation Monitor, Dr James Renwick SC, 19 May 2017) 6 (Michael Phelan).

<sup>196</sup> *DPP (Cth) v Besim* [2017] VSCA 158; State Coroner of Victoria, *Finding – Inquest into the Death of Ahmad Numan Haider* (31 July 2017).

<sup>197</sup> [REDACTED]

<sup>198</sup> Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism – Communiqué* (Canberra, 5 October 2017) <<https://www.coag.gov.au/sites/default/files/communique/special-communique-20171005.pdf>>.

## 4.3 DISCUSSION

### 4.3.1 Disengagement and support programs

The Panel acknowledges that the availability of high quality, tailored, disengagement programs is of critical importance to the effectiveness of the SEO. Such programs must be tailored not only to the age, risk level, and cultural identity of those subject to the order, but also to the ideological cause influencing the person's radicalisation towards violence. As discussed in Chapter 2, there is currently only one program of this type, Community Integration Supported Program and it is aimed at high risk, primarily adult, Islamist extremists. For the SEO to be effective, it will be necessary for government to invest in and support the development of additional programs that address varying levels of risk, different ideological influencers of radicalisation towards violence (i.e. right- and left-wing violent extremism), and the specific vulnerabilities of the youth cohort. Legislating for the SEO prior to developing these programs will significantly limit its efficacy.

More generally, the Panel notes that, while appropriate disengagement programs will be central to the SEO, the intention is for the order to holistically address the underlying causes of a person radicalising towards violence (for example mental health issues, alcohol and drug dependencies, unemployment, social isolation). As such disengagement will be only one of a suite of programs that may be applied as part of the order. Further, the Panel recommends that the SEO scheme include the ability for the court to refer a person to a psychologist or counsellor and to family group conferencing. The latter option will be particularly important for young people.

### 4.3.2 Elements of the SEO

#### Applicant, relevant court and referrals

In a submission provided to the Panel by Victoria Police, the Chief Commissioner of Police (or an appropriate delegate) was identified as the appropriate applicant. Further, it was recommended that the application be heard by the Magistrates' Court. The Panel accepts both of these recommendations and adds that, for persons aged 17 years and under, applications should be heard by the Children's Court.

The Panel has also considered whether it is appropriate to include an explicit mechanism in the legislation that enables people to refer a person to Victoria Police if they believe on reasonable grounds that the person is exhibiting behaviours indicative of radicalisation towards violence. A similar provision is contained in the legislation establishing the therapeutic treatment order (TTO) scheme. Specifically, section 185 of the *Children, Youth and Families Act 2005* (Vic) enables any person to make a report to the Secretary of DHHS, if they believe on reasonable grounds that a child is exhibiting sexually abusive behaviour. Once a referral is received, the Secretary must then conduct an investigation into the matter.<sup>199</sup> The Secretary may also choose to refer the matter to the Therapeutic Treatment Board for advice.<sup>200</sup> Depending on the outcome of the investigation, the Secretary may then apply to the court for a TTO.<sup>201</sup>

While the Panel acknowledges the benefit of a referral mechanism, it notes that it may be of limited utility in the context of an SEO. This is because one of the key indicators of radicalisation towards violence — possession of 'terrorism related material' — is also the subject of the next chapter and the Panel's recommended offence. As such, some people (particularly friends and families) may be reluctant to refer matters to Victoria Police if they believe that the referral could result in a criminal investigation and possible prosecution. To overcome this concern, consideration might be given as to whether an appropriate Secretary (e.g. Secretary, DHHS) could receive confidential referrals and, in conjunction with Victoria Police, make an application for an SEO.

<sup>199</sup> *Children, Youth and Families Act 2005* (Vic) ss 185, 210.

<sup>200</sup> *Ibid* s 245.

<sup>201</sup> *Ibid* s 246.

The Panel has not had time to consider this option in detail, but considers that further consideration should be given to whether this is a viable option. The Panel also recommends further consideration be given to the exact consequence of a referral, noting that it may be sufficient, in the SEO context, to have the referral without any compulsory follow up.

### Application

Victoria Police's CPIO has undergone significant development in the past few years and as such, the Panel has had the benefit of various iterations of the proposal. In the two most recent iterations, the test for granting a CPIO has been described as follows:

#### OPTION 1

The court is satisfied that the person:

- is radicalising / radicalised, or radicalising other persons; and
- meets a defined level of risk based on behaviours or risk profiles **sufficient to constitute a danger** to themselves, other persons, the community or community infrastructure.

#### OPTION 2

The court is satisfied that:

- the person is radicalising / radicalised; and
- the person **poses or is likely to pose a danger** to themselves or others; and
- the radicalisation / danger will continue to exist, or increase, in the absence of intervention; and
- the person refuses to voluntarily undertake disengagement; and
- the order is deemed necessary to ensure attendance and participation in disengagement programs, and / or disrupt radicalisation.

The Panel has considered these options in the context of the issues identified above. Further, the Panel has compared these options to the test for a TTO:

*the Court is satisfied that:*

- (a) *the child has exhibited sexually abusive behaviours; and*
- (b) *the order is necessary to ensure the child's access to, or attendance at, an appropriate therapeutic treatment program.*<sup>202</sup>

Based on these considerations, the Panel recommends applying a two limb approach to the SEO test similar to the test for a TTO, with the first limb describing the problematic behaviour exhibited and the second limb assessing whether the SEO is 'necessary'.

In regards to the first limb, a key difference between the approach adopted by Victoria Police and the test for a TTO is the inclusion of an element (emphasised above in bold) explicitly connecting the behaviour to the risk of harm. This is similar to the tests adopted in the context of post-sentence supervision and detention of serious sex offenders, in that it requires the court to make an assessment of the risk posed by an offender.<sup>203</sup> This reflects what the Panel understands to be the primary objective of these type of orders — protection of the community. This may be contrasted to what the Panel considers to be the primary objective of the SEO — advancement of individual welfare and community engagement. While the Panel acknowledges that inclusion of an element explicitly connecting the behaviour to the risk of harm would create a more obvious causal connection between the behaviour and the potential harm, it is concerned that inclusion of this element in the test for an SEO may be difficult to prove and may detract from the overall individual welfare focus of the order.

<sup>202</sup> Ibid s 248.

<sup>203</sup> Specifically in the context of post-sentence supervision and detention the court must be satisfied that 'the offender poses an unacceptable risk of committing a relevant offence'; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 9, 35; *Criminal Code Act 1995* (Cth) sch 1 s 105A.7.

As such, rather than including a separate ‘risk’ element, the Panel recommends building the connection between the behaviour and the harm into the first limb of the test, for instance:

*the person has exhibited behaviours indicative of radicalisation towards violence.*<sup>204</sup>

In contrast to Victoria Police’s proposed options, this language explicitly links radicalisation with violence, thereby clarifying that radical behaviours or thoughts do not, and must not, of themselves, constitute grounds for an order. Further, it implicitly rather than explicitly connects the behaviour to the harm. While the Panel considers that the language in the example sets an appropriate threshold for intervention, it notes that Victoria Police has expressed concerns that the threshold is too high and ought to be lowered to achieve the objective of the order.

Accepting that further consideration may be required to develop an appropriate test, the Panel notes the following three elements (present in the above example) that it considers necessary to the first limb of the test:

- the test must capture observable behaviours / actions which are capable of being the subject of direct evidence;
- the test must describe the type of behaviour in a way that links it to a harm (i.e. radicalisation towards **violence**); and
- the test may wish to import the notion of behavioural escalation (i.e. **radicalisation towards** violence).

In regards to the second limb of the test, the Panel recommends a slightly different approach to the TTO, namely, that the court must be satisfied that the order is necessary to:

*ensure the person’s participation in, and compliance with, an appropriate support and engagement plan.*<sup>205</sup>

This approach reflects the broader remit of the SEO, specifically that the key objective of the order — disengagement — may require more than mere participation in a program (which is the focus of the second limb of the TTO test). If the proposed language is accepted ‘support and engagement plan’ will need to be defined and should include at a minimum, support and disengagement programs, sessions with a psychologist or counsellor, family group conferencing, and conditions where appropriate.

### Definition of ‘radicalisation towards violence’

The Panel does not recommend defining ‘radicalisation towards violence’ (or an equivalent behavioural description) in legislation. This is because there is no definitive list of behavioural indicators of ‘radicalisation towards violence’, and defining the term in legislation could risk omitting key behavioural indicators and limiting the court’s discretion. To give an example of the types of behaviour that may attract an application for an SEO, the following have been identified by Victoria Police as indicative of radicalisation towards violence:

- hoarding and / or disseminating violent extremist material and participating in online extremist media;
- statements of moral superiority over, or hatred towards, other groups;
- confrontational or threatening rhetoric or behaviour;
- statements promoting the use of violence to advance a cause or change in government policy; and
- close connection to individual(s) already radicalised towards violence.<sup>206</sup>

<sup>204</sup> The Panel notes that this language is an example only and is not intended to be a definitive recommendation.

<sup>205</sup> As with the first limb, this wording is an example only.

<sup>206</sup> [REDACTED]



The Panel recognises that, given it is not recommending inclusion of a definition, the availability of appropriate and validated risk assessment tools to provide guidance to the court when deciding whether an SEO should be ordered will be critical to the success of the scheme. These tools will need to identify behavioural indicators of radicalisation towards violence and enable an assessment of the risk arising as a result of a person exhibiting these behaviours. Further, these tools will need to be developed by persons with expertise in the area (i.e. clinical psychologists), continually adapted, and regularly independently evaluated. While the Panel understands that there is an existing ideologically neutral tool that enables this type of assessment, this tool is still under development and has not been validated. It is therefore important for the long term efficacy of the SEO scheme that the Victorian Government invests in and supports the development and validation of appropriate risk assessment tools.

The Panel further notes that consideration should be given to the identification of appropriate persons to use the risk assessment tools, in particular whether it is appropriate for a police officer (who is not a trained psychologist or psychiatrist) to use the risk assessment tool or whether such tools should only be used by qualified professionals.<sup>207</sup> Consideration should also be given as to whether it is appropriate for the risk assessment to be based only on observed behaviours, or whether it is also necessary for an in-person evaluation to occur prior to assessment. Depending on the outcome of these considerations, it may be necessary to include a referral mechanism in the legislation to enable the court to:

- refer a matter to an expert (for example, a psychologist or psychiatrist) for consideration prior to making an order; and
- have regard to the expert’s report when deciding whether to make an order.

A final matter that was raised with the Panel is the need for specialist training for judicial officers to assist them in determining whether to make an SEO. The Panel agrees and recommends that consideration be given to not only specialist training but also, potentially, the creation of specialist judicial officers to hear SEO applications.

### **Factors which the court must consider**

In addition to the two elements that have been incorporated into the Panel’s recommendation, Victoria Police also recommended (in Option 2) the inclusion of a number of other elements in the test for a CPIO including that:

- the person refuses to engage voluntarily in disengagement programs; and
- the radicalisation towards violence will continue to escalate in the absence of intervention.

While the Panel agrees that these factors are relevant to the court’s consideration of whether or not to grant an SEO, it does not consider that they should be elements of the test. Rather, the Panel’s preference is that they be included as part of a non-exhaustive list of factors that the court may consider when determining whether an SEO is necessary to ensure the person’s participation in, and compliance with, an appropriate support and engagement plan. The non-exhaustive list could also include:

- the frequency and seriousness of the behaviour exhibited;
- whether the order is likely to be effective in managing the person’s behaviour;
- whether the order, if made, will have a significantly adverse impact on the person; and
- if the person is a child, whether the order is in the best interests of the child.

<sup>207</sup> Charisse Smith and Mark Nolan, ‘Post-sentence continued detention of high risk terrorist offenders in Australia’ (2016) 40 *Criminal Law Journal* 163, 167.

The benefit of including these factors as a non-exhaustive list (rather than as elements of the test) is that it provides guidance to the court regarding when to make an order without limiting the court's discretion or the flexibility of the order. In addition, the inclusion of the list will contextualise the order and its intended application.

### Duration and conditions

In its submission to the Panel, Victoria Police proposed an initial minimum period of 12 months with an option to apply to the court for an additional 12 month period. While the Panel agrees that 12 months is an appropriate maximum period for the SEO, it does not consider that this should be set as the minimum period. Rather, the court should have the discretion to determine an appropriate period for the order. Similarly, the optional additional period of 12 months should be a maximum period.

Victoria Police further proposed in its submission that the court be able to attach a wide range of conditions to the CPIO, many of which are similar to conditions available under the control order scheme.<sup>208</sup> These include:

- \_ a prohibition / restriction on internet usage;
- \_ a requirement to reside at a certain nominated address / abide by curfew hours;
- \_ restrictions on contact with certain individuals / groups;
- \_ restrictions on attendance at certain locations / events; and
- \_ restrictions on the individual's movements.

While the Panel appreciates that, in certain circumstances, the imposition of conditions may be necessary to ensure compliance with, and achieve the objectives of, the SEO, the Panel does not recommend inclusion of a specific list of possible conditions in the legislation. The Panel is concerned that inclusion of such a list, particularly one that included conditions which may appear harsh or onerous, could detract from the overall welfare focus of the order. Instead, the Panel proposes inclusion of the following general power:

*the Court may impose any other condition that it considers appropriate.*

This replicates the court's discretion in the context of TTOs<sup>209</sup> and, in the Panel's opinion, is a preferable approach as it:

- \_ gives the court complete discretion to impose any condition it considers appropriate (including potentially the conditions identified by Victoria Police); and
- \_ acknowledges that the court is in the best position to determine the appropriateness of the conditions based on available evidence and the advice of Victoria Police.

The Panel further recommends inclusion of the following powers:

*the Court may order:*

- (a) *a condition directing the person to participate in a specified support or disengagement program; and*
- (b) *a condition directing the person to permit reports of his or her progress and attendance at any ordered programs to be given to the Chief Commissioner.*

These are similar to the conditions available to the court when making a TTO<sup>210</sup> and, in regards to the latter, will assist Victoria Police to monitor a person's compliance with their SEO.

<sup>208</sup> *Criminal Code Act 1995* (Cth) sch 1 s 104.5(3).

<sup>209</sup> *Children, Youth and Families Act 2005* (Vic) s 249.

<sup>210</sup> *Ibid* s 249.

### Minimum age

Victoria Police did not recommend a minimum age of persons that could be subject to a CPIO. In this respect, the Panel has been guided by the existing counter-terrorism interventions which are consistently moving towards a minimum age of 14 years old. The Panel therefore proposes that the minimum age for an SEO be set at 14 years of age. If this recommendation is accepted, it will be necessary to ensure that appropriate safeguards, reflecting the specific vulnerabilities of young persons, are included in the legislation.

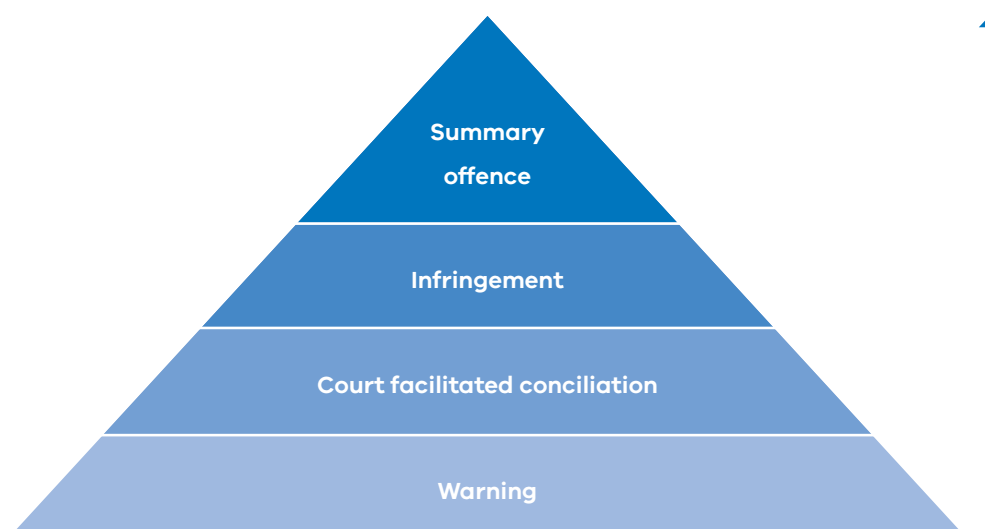
### Sanctions for breach

In its submission, Victoria Police recommended that breach of an order result in a criminal sanction. This approach may be contrasted to the TTO scheme which does not prescribe a sanction for breach.<sup>211</sup> The Panel understands that this reflects the therapeutic nature of the TTO, and incorporates the notion that an order aimed at helping a person avoid criminality should not also be a pathway to criminal prosecution.

While the Panel is sympathetic to this reasoning, it also acknowledges the arguments advanced by Victoria Police that, without an appropriate sanction, people subject to an order will not feel compelled to comply and therefore it will be of little utility. In light of this, the Panel proposes inclusion of a graduated approach to compliance either explicitly in legislation or else through appropriate guidelines:

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<sup>211</sup> The Panel notes that it is possible, albeit unlikely, that the child could be charged with contempt of court.



As depicted in the diagram above, sanctions for breach of an SEO would initially amount to no more than a warning, but could culminate in a summary offence punishable by a maximum penalty of approximately 10 penalty units. This approach would give both the police and courts ample discretion to respond to breaches based on frequency and severity while not immediately penalising breaches with criminal sanctions.

The Panel considers that this approach strikes the right balance between ensuring compliance with the SEO and maintaining its overall support and engagement focus.

### **Disclosure of information and admissibility as evidence**

The Panel notes that persons subject to an SEO may have engaged in low level illegal activity (for instance, the proposed possession of 'terrorism related material' offence) or may go on to engage in terrorism activity. The Panel further notes that the success of SEOs will depend on persons subject to an order being able to fully engage in programs without fear of disclosing information that could later be used against them in a criminal proceeding. Accordingly, the Panel recommends, as a general principle that, similarly to the TTO scheme,<sup>212</sup> the following be included in the SEO legislation:

*Any statement made by a person when participating in a support or engagement program under a support and engagement order is not admissible in any criminal proceedings in relation to that person.*

The Panel recommends two caveats. The first, that information may be admitted as evidence in respect of an offence against the relevant Part of the Act (i.e. it may be used as evidence in a proceeding for breach of an SEO). The second, a clarification that disclosure of information obtained under an SEO is permitted if the disclosure is necessary to prevent the commission of an offence, noting that the information would still not be admissible in a criminal proceeding against the person subject to the SEO (and who provides the information).<sup>213</sup>

<sup>212</sup> *Children, Youth and Families Act 2005* (Vic) s 251.

<sup>213</sup> Note that the information may be admissible in a civil proceeding for instance in an application for a PDO.

### 4.3.3 Evaluation of the SEO

Consistent with PDO and control order legislation, the Panel recommends that the SEO legislation include a sunset clause and a requirement that the responsible Minister cause a report to be prepared each year on the scheme's operation.

This report should include:

- the number of SEO applications made to the court, including the number of cancellations, variations and extensions that were sought;
- the number of SEO applications that were successful;
- the number of SEO applications involving minors that were successful;
- an overview of the orders made (i.e. duration, programs ordered, conditions imposed);
- an evaluation, where possible, of the outcome of the SEO; and
- the number of people prosecuted / convicted for breaching an SEO.

Further, the Panel recommends regular independent evaluations of the SEO scheme to assess its effectiveness. These evaluations should, at least in the first few years of operation, review the legislation, the risk assessment tools and the support and disengagement programs. This level of scrutiny reflects the reality that both the risk assessment tools and the disengagement programs for countering violent extremism are in their infancy and are not supported by the same level of data and expertise available for other types of criminality (i.e. sex offenders).

### 4.3.4 Possible legal issues

The Panel notes that, while the objectives of the orders are different, there may be sufficient similarity between the SEO and the control order scheme to give rise to a possible constitutional challenge on the grounds of section 109 of the *Commonwealth Constitution*. The Panel however considers this risk to be low and is satisfied that the SEO would not be inconsistent with the control order provisions as the Commonwealth regime does not seek to define and exhaustively legislate for the field of control orders (or an equivalent order of this type).

The Panel further notes that the SEO may limit certain rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter*). Depending on the conditions imposed, the rights limited may include those relating to protection of families and children to protection, freedom of movement, freedom of association, freedom of expression and freedom of thought, conscience, religion and belief.<sup>214</sup> The Panel is of the opinion that these limitations can be reasonably justified, noting that the Chief Commissioner of Police (or the appropriate delegate) will need to give proper consideration to the relevant *Charter* rights each time he or she applies for an SEO.<sup>215</sup>

### 4.3.5 Further considerations

The Panel has also considered existing mechanisms that may be used to disrupt potential terrorist threats and address the behaviour of persons radicalising towards violence. In this regard the Panel notes recent comments by the United Kingdom Independent Reviewer of Terrorism Legislation, Mr Max Hill QC, regarding the importance of using 'non-terrorism legislation to meet precursor criminality' rather than relying solely on terrorism legislation.<sup>216</sup>

<sup>214</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 12, 14–7.

<sup>215</sup> *Ibid* s 38.

<sup>216</sup> Lizzie Dearden, 'Terror laws should be scrapped, says Government's independent reviewer of terrorism legislation', *The Independent* (online), 19 August 2017 <<http://www.independent.co.uk/news/uk/home-news/terror-laws-uk-offences-abolish-max-hill-interview-independent-reviewer-legislation-isis-attack-a7883836.html>>.

This was mentioned specifically in the context of an increasing number of people engaging in terrorism that were, prior to this engagement, already ‘operating at a low level of criminality’.<sup>217</sup> These comments are consistent with what some analysts have described as an emerging ‘crime-terror nexus’ that has seen criminal organisations and terrorist groups recruiting from the same pool of people.<sup>218</sup> This pool is characterised by people who have either previously engaged in — or are currently engaging in — criminal activity.<sup>219</sup>

In the Panel’s opinion, these comments reinforce the necessity of responding to the threat of terrorism before or as it arises, using both regular criminal law and counter-terrorism legislation. The Panel recommends the use of the following existing mechanisms as a pathway to compulsory disengagement of persons radicalising or radicalised towards violence.

### Adult and youth diversion

Section 59 of the *Criminal Procedure Act 2009* (Vic) enables the Magistrates’ Court to adjourn a proceeding to enable an accused to participate in a diversion program. Amendments to the *Children, Youth and Families Act 2005* (Vic), which recently passed both Houses of Parliament, will also create a legislative basis for a specific youth diversion program in the Children’s Court.<sup>220</sup> Consistently with the Panel’s recommendation in Chapter 2 — that disengagement programs be developed across the spectrum of terrorism risk — consideration should be given to the application of these programs in the context of adult and youth diversion for persons who are demonstrating ‘at-risk’ behaviours. The Panel considers that this option is particularly appropriate given that a significant number of the behavioural indicators of radicalisation towards violence are also low level offences such as minor property damage, trespassing, vandalism, assault and the recommended possession of terrorism related material.

### Youth control orders and community correction orders

Similar to the application of disengagement programs in adult and youth diversion, the Panel recommends the use of disengagement programs in existing alternative sentencing models. Part 3A of the *Sentencing Act 1991* (Vic) provides for a community based sentence, a community correction order, for a wide range of offending behaviours. It enables the court to impose certain conditions including treatment and rehabilitation.<sup>221</sup> The amendments to the *Children, Youth and Families Act 2005* (Vic), mentioned above, also establish an intensive supervision regime, youth control orders, for children who would otherwise be sentenced to detention.<sup>222</sup> The amendments enable the court to impose certain conditions including that the child attend counselling, a treatment service or a cultural program.<sup>223</sup>

<sup>217</sup> Ibid.

<sup>218</sup> Rajan Basra, Peter R Neumann and Claudia Brunner, ‘Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus’ (2016) 10(6) *Perspectives on Terrorism* 25, 25.

<sup>219</sup> Ibid.

<sup>220</sup> Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017 (Vic) pt 9.

<sup>221</sup> *Sentencing Act 1991* (Vic) s 48D.

<sup>222</sup> Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017 (Vic) pt 3.

<sup>223</sup> Ibid cl 409F(2).

## CHAPTER 5 POSSESSION OF 'TERRORISM RELATED MATERIAL' OFFENCE

### Recommendation 16

That the Victorian Government seek national agreement to amend the *Criminal Code Act 1995* (Cth) to:

- introduce an offence of possessing 'terrorism related material'; and
- define 'terrorism related material' to mean material that provides instructions for the doing of a terrorist act.

### Recommendation 17

That if national agreement in line with Recommendation 16 is not possible, the Victorian Government consider amending the *Terrorism (Community Protection) Act 2003* (Vic) to create an offence of possessing 'terrorism related material' in that Act.

## 5.1 BACKGROUND

As discussed in Chapter 1, the Panel acknowledges that the threat of terrorism cannot be exclusively addressed by the criminal justice system (i.e. by a 'counter-terrorism' response, see Chapter 1, Table 1.1). Rather, it must be addressed across the 'policy spectrum'.<sup>224</sup> To this end, the preceding chapters have considered ways to counter violent extremism in the context of primary prevention, secondary intervention and tertiary intervention (see Chapter 1, Table 1.2). This has included discussion of opportunities to intervene early, both voluntarily and mandatorily (i.e. support and engagement order (SEO), to disengage persons who are becoming, or have become radicalised to violent extremism.

Building on this previous discussion, this chapter will consider the Panel's response to the threat of terrorism through a criminal justice lens, in particular through the creation of a new offence of possession of 'terrorism related material'. This offence will provide police with an additional mechanism, to intervene early and disrupt the trajectory of persons radicalising towards violence. It is intended that this offence may be used in conjunction with the proposed SEO.

### 5.1.1 Summary of relevant offences

The Commonwealth *Criminal Code Act 1995* (Cth) (*Criminal Code*) makes it an offence for a person to possess things connected with terrorist acts. It is also an offence to collect or make documents likely to facilitate such acts.<sup>225</sup> The Victorian *Terrorism (Community Protection) Act 2003* (Vic) makes it an offence for a person to provide documents or information to another person for the purpose of facilitating terrorist acts.<sup>226</sup>

<sup>224</sup> Shandon Harris-Hogan, Kate Barrelle and Andrew Zammit, 'What is countering violent extremism? Exploring CVE policy and practice in Australia' (2015) 8(1) *Behavioural Sciences of Terrorism and Political Aggression* 6.

<sup>225</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 101.4, 101.5.

<sup>226</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 4B.

The Commonwealth offences have been the subject of judicial consideration regarding the proper construction of the phrase ‘connected with’.<sup>227</sup> This has resulted in the following elements being read into the meaning of ‘connected with’:

- a terrorist act must be proposed or contemplated (whether or not the decision has been made as to what kind of terrorist act it will be);
- some activity in preparation for that terrorist act is under way, or is proposed, or contemplated (whether or not a decision has been made as to what kind or activity that will be); and
- the thing is being used, or is intended to be used, in aid of that preparatory activity.<sup>228</sup>

This interpretation was discussed by the Commonwealth Director of Public Prosecutions (CDPP) in his submission to the 2012 COAG Review. Relevantly the CDPP requested that ‘consideration be given to amending sections 101.4 and 101.5 of the *Criminal Code* to make it clear that a thing or document may, *because of its very nature*, be capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act’.<sup>229</sup> The Review accepted this argument and ultimately made two recommendations to amend the *Criminal Code* to include the requested clarification.<sup>230</sup> The Panel understands that neither recommendation has been implemented.

In addition to the above offences, section 80.2C of the *Criminal Code* makes it an offence for a person to advocate the doing of a terrorist act or the commission of a terrorism offence. Further, section 101.2 of the *Criminal Code* makes it an offence for a person to provide or receive training connected with terrorist acts, and section 102.4 makes it an offence to intentionally recruit a person to join or participate in the activities of a terrorist organisation. More broadly, the *Criminal Code* also contains separate offences for persons who urge violence against the *Constitution*, the government, or a group which is (or member of a group who is) distinguished by race, religion, nationality, national or ethnic origin or political opinion.<sup>231</sup>

## 5.2 ISSUES

Recent trends are showing an increase in the prevalence of terrorist publications such as online magazines *Rumiyah* and *Dabiq* (created by Islamic State (IS)) and *Inspire* (created by Al-Qaeda). These publications are designed to attract, encourage and assist people to engage in terrorism and often contain detailed instructions on committing terrorist acts. Of particular concern to the Panel is that these publications have been shown to be both persuasive, and of practical use to persons contemplating acts of terrorism. For instance, in 2015, a 17 year old boy (MHK), who the court described as ‘infected’ with the ‘evil and toxic ideology’ of IS,<sup>232</sup> was able to successfully construct seven pipe bombs from instructions published in an edition of *Inspire*.<sup>233</sup> In its consideration of the matter the court noted that the manual contained ‘detailed’ instructions and:

*explained how explosive devices could be made readily from available materials, which could be purchased without raising suspicion. They emphasised the need to acquire large amounts of shrapnel in order to maximise the number of deaths and injuries caused by explosion of such a device. They also advocated that the bomb should be placed in a crowded area, and camouflaged with material such as cardboard, which would not inhibit or reduce their lethal effect on unsuspecting victims.*<sup>234</sup>

<sup>227</sup> *Benbrika v R* (2010) 29 VR 593; *Director of Public Prosecutions v Karabegovic* [2013] VSCA 380; *R v Khazaal* (2012) 246 CLR 601.

<sup>228</sup> *Benbrika v R* (2010) 29 VR 593, 660; *Director of Public Prosecutions v Karabegovic* [2013] VSCA 380.

<sup>229</sup> Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2012).

<sup>230</sup> *Ibid.*

<sup>231</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 80.2–80.2B.

<sup>232</sup> *DPP (Cth) v MHK (a Pseudonym)* [2017] VSCA 157 [3].

<sup>233</sup> *DPP (Cth) v MHK (a Pseudonym)* [2017] VSCA 157.

<sup>234</sup> *DPP (Cth) v MHK (a Pseudonym)* [2017] VSCA 157 [6].



A further example of the threat posed by the availability of these materials is the recent pattern of terrorist attacks that have involved driving cars or vans into crowded places. This method of attack was the subject of a 2010 *Inspire* article entitled 'The Ultimate Mowing Machine', which encouraged people to turn their vehicle into 'a mowing machine, not to mow grass but to mow down the enemies of Allah'.<sup>235</sup> The article contained detailed instructions for the carrying out of vehicular attacks including methods for achieving maximum harm.<sup>236</sup> This method of attack was similarly advocated by IS in a widely disseminated 'fatwa' in 2014.<sup>237</sup> Since the publication of these articles, there has been a marked increase in the number of terrorist attacks that have used cars or vans including attacks in Berlin, London, Nice, and most recently, Barcelona.

These examples are consistent with recent research that shows a correlation between the possession of this type of material and a heightened risk of a person becoming radicalised to violence or preparing for / engaging in a terrorist act.<sup>238</sup> The problem has been exacerbated by (or perhaps was a precursor to) a shift in the nature of terrorism. As was noted by Mr Michael Phelan, Deputy Commissioner for National Security, Australian Federal Police:

*since mid-2014 rapid radicalisation and low complexity plots have become the norm. The result is police have very little lead time or none at all to prevent spontaneous attacks. The new threat environment means police have had to change the way in which we respond to disrupt terrorism. The pace at which plots develop, coupled with the potentially catastrophic consequences of a terrorist act, mean police need to act fast to disrupt terrorist activity.*<sup>239</sup>

The ability for police to act fast is, however, limited to the offences and powers available to them under relevant legislation. In relation to the possession offences, this means proving that a person is in possession of a document / thing that is *connected with* the preparation for, or the engagement of a person in, or assistance in, a terrorist act.<sup>240</sup> The italicised element limits the offence by requiring a causal link between the document / thing and the terrorist act. This limitation is reflective of the balance that was struck when preparatory offences were first introduced in the *Criminal Code*. As was noted by the Parliamentary Joint Committee on Intelligence and Security, the creation of preparatory offences represented a significant extension of the criminal law such that it was necessary to ensure 'that offences which target[ed] ancillary conduct [we]re sufficiently linked to intention or terrorist activity'.<sup>241</sup>

In addition to the legislative limit discussed above, the possession offences have been further restricted by the court's construction of the phrase 'connected with'. These limits have meant that the existing possession offences tend to only be applicable to persons who are beginning to demonstrate both capability and intent to carry out a terrorist act. There is no offence that exists for persons who are in possession of, and being negatively influenced by, 'terrorism related material', but have no specific terrorist act contemplated. This is problematic, particularly for police, who may be increasingly concerned about the behaviour of such a person but are unable to intervene to disrupt the escalating risk.

235 [REDACTED]

236 Ibid.

237 '[S]mash his head with a rock, or slaughter him with a knife, or run him over with your car, or throw him down from a high place, or choke him, or poison him' (see Abu Mohammed al Adnani, Islamic State of Iraq and the Levant, 'Fatwa' (22 September 2014)).

238 D Elaine Pressman and John Flockton, 'Violent Extremist Risk Assessment Development of the VERA-2 and Applications in the High Security Correctional Setting' in Andrew Silke, *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform* (Routledge, 2014) 122.

239 Transcript of proceedings, *INSLM Statutory Deadline Reviews* (Independent National Security Legislation Monitor, Dr James Renwick SC (19 May 2017) 6 (Michael Phelan).

240 *Criminal Code Act 1995* (Cth) sch 1 ss 101.4, 101.5.

241 Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (December 2006).

Acknowledging the ongoing need to ensure that offences targeting ancillary conduct are sufficiently linked to terrorist activity, and do not disproportionately burden freedom of thought or speech, the Panel considers that the recommended offence is necessary and appropriate to:

- enable police to intervene early and disrupt terrorist activity before it escalates to action; and
- criminalise the possession of material that attracts or encourages people to engage in terrorism *and* provides instructions on how to so engage.<sup>242</sup>

## 5.3 DISCUSSION

### 5.3.1 Commonwealth or Victorian offence

It is explicit in both the *Criminal Code*, and the Victorian legislation giving effect to the referral of power in respect of terrorism, that Victoria is not restricted from also legislating in the field.<sup>243</sup> As a result, the offence could be introduced into either the Victorian *Terrorism (Community Protection) Act 2003* (Vic) or the Commonwealth *Criminal Code*. Given, however, that the vast majority of terrorism related offences are already contained in the *Criminal Code*, the Panel recommends that the Victorian Government seek, through the appropriate inter-jurisdictional committee (for instance the Council of Australian Governments), to have the new offence included in the *Criminal Code*. This will ensure consistency in the national approach to terrorism and avoid any prosecutorial difficulties that may arise as a result of having different offences across two jurisdictions. Relevantly, the Panel notes that this offence was considered at the recent Council of Australian Governments meeting, where leaders agreed the Commonwealth will develop a new Commonwealth offence that will allow law enforcement agencies to intervene with appropriate safeguards when an individual is in possession of instructional terrorist material.<sup>244</sup>

Alternatively, if the Commonwealth or the states and territories object to the offence, or do not wish for it to be included in the *Criminal Code*, the Panel recommends that Victoria independently legislate for the new offence.

### 5.3.2 Elements of the offence

In its submission to the Panel, Victoria Police identified two schemes relevant to the new possession of 'terrorism related material' offence. These are, firstly, the objectionable material offences in the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) (*Classification Act*); and, secondly, the child abuse material offences in the *Crimes Act 1958* (Vic) (*Crimes Act*). The Panel will consider each, where relevant, below.

#### Possession of 'terrorism related material'

Section 51G of the *Crimes Act* makes it an offence for a person to knowingly possess child abuse material including, if the material is electronic, controlling access to the material whether or not the person has physical possession of the electronic material. Child abuse material is defined in section 51A of the *Crimes Act* and contains two elements:

- a factual element (i.e. material that depicts a child as a victim of sexual assault); and
- an objective mental element (i.e. material that reasonable persons would regard as being, in the circumstances, offensive).

<sup>242</sup> *DPP (Cth) v MHK (a Pseudonym)* [2017] VSCA 157; *DPP (Cth) v Besim* [2017] VSCA 158; State Coroner of Victoria, *Finding – Inquest into the Death of Ahmad Numan Haider* (31 July 2017) 19.

<sup>243</sup> *Criminal Code Act 1995* (Cth) sch 1 s 100.6.

<sup>244</sup> Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism – Communiqué* (Canberra, 5 October 2017) <<https://www.coag.gov.au/sites/default/files/communique/special-communique-20171005.pdf>>.

Section 51U of the *Crimes Act* then clarifies that it is not a defence to a child abuse material offence for the accused to argue that they were under a mistaken but honest and reasonable belief that reasonable persons would not regard the child abuse material as being, in the circumstances, offensive (i.e. the objective mental element is absolute liability).

The Panel understands that the rationale for including the absolute liability element in the definition of child abuse material was that it enabled the definition of child abuse material to be far broader than if it were merely descriptive. Given that the definition recommended for 'terrorism related material' is fairly narrow, the Panel does not think that this level of complexity is necessary. Rather, the Panel recommends the following elements for the offence of possession of 'terrorism related material':

1. X had possession of the material (**physical element**);
2. X intended to have possession of the material (**first mental element**); and
3. X knew that the material was 'terrorism related material' (**second mental element**).

The Panel further recommends that, similar to the possession of child abuse material offence, a clarification should be included regarding electronic material and controlling access.<sup>245</sup> The Panel considers this to be an appropriate departure from the common law in relation to possession as it ensures that, for instance, a person who stores 'terrorism related material' on a personal online storage account, will be considered to possess the material despite not having physical possession of the material.

### Production and distribution of 'terrorism related material'

While Victoria Police did not specifically recommend the prohibition of the production and distribution of 'terrorism related material', for completeness the Panel has also considered the utility of introducing offences for these activities. The *Classification Act* contains three offences that are relevant to this consideration:

- a person must not, for the purpose of gain, make or produce an objectionable film;<sup>246</sup>
- a person must not print or otherwise make or produce an objectionable publication for the purpose of publishing it;<sup>247</sup> and
- a person must not use an online information service to publish or transmit, or make available for transmission, objectionable material.<sup>248</sup>

'Objectionable film' and 'objectionable publication' are each defined in section 3 to include the following:

- describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult; or
- promotes, incites or instructs in matters of crime or violence.<sup>249</sup>

'Objectionable material' is then defined separately for purposes of the online transmission offence, and includes both an 'objectionable film' and 'objectionable publication'.<sup>250</sup> While these offences may incidentally cover persons who produce or distribute 'terrorism related material', there is also, as has been mentioned, a further specific offence of advocating terrorism in section 80.2C of the *Criminal Code*.

<sup>245</sup> *Crimes Act 1958* (Vic) s 51G(3).

<sup>246</sup> *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 24.

<sup>247</sup> *Ibid* s 32.

<sup>248</sup> *Ibid* s 57.

<sup>249</sup> *Ibid* s 3.

<sup>250</sup> *Ibid* s 56.

This offence has two elements, both of which must be satisfied:

- the person must advocate the doing of a terrorist act or the commission of a terrorism offence; and
- the person must, when engaging in the conduct, be reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.<sup>251</sup>

The legislation then goes on to clarify that:

*A reference [...] to advocating the doing of a terrorist act or the commission of a terrorism offence includes a reference to:*

- (a) *advocating the doing of a terrorist act or the commission of a terrorism offence, even if a terrorist act or terrorism offence does not occur; and*
- (b) *advocating the doing of a specific terrorist act or the commission of a specific terrorism offence; and*
- (c) *advocating the doing of more than one terrorist act or the commission of more than one terrorism offence.*<sup>252</sup>

While some production and distribution will be captured by this offence, the Panel acknowledges that the scope of the offence may be limited. In particular, it appears that the offence requires a degree of connection between advocating for the commission of specific terrorist act(s) or terrorism offence(s) and their actual commission. As such, it is unclear whether, for instance, a video that depicted the beheading of IS prisoners alongside a call to arms would constitute the promotion of a terrorist act, or whether this type of promotion would be too remote from the terrorist act advocated. Further, it is unclear what level of specificity would be required to satisfy the elements of the offence. For instance, in the same example, while it is doubtless that the conduct depicted is intended to advocate terrorism, the exact act advocated is unclear and as such it is possible that it would not fall within the scope of the offence. These ambiguities are particularly problematic in regards to dissemination. For instance, would disseminating a terrorist publication (such as *Inspire* or *Dabiq*) by sharing it on social media constitute advocating terrorism, or would it be necessary for the person to also specifically advocate the doing of certain acts depicted in the publication.

In the United Kingdom these ambiguities are resolved by:

- having both an offence of encouraging terrorism and an offence of disseminating terrorist publications; and
- criminalising indirect encouragement of terrorism (i.e. action that glorifies terrorism).<sup>253</sup>

While this approach clarifies some of the ambiguities identified above, the Panel is conscious of the need to strike an appropriate balance between criminalising conduct that poses a threat to the community and protecting freedom of thought and speech. This balance has, in the Panel's opinion, been appropriately struck by the existing offence of advocating terrorism. Additionally the Panel notes that the offence is relatively new and untested and as such it is difficult to assess whether the issues identified above will eventuate. Further the Panel acknowledges that some of the potential gaps identified in relation to the advocating terrorism offence may already be addressed by offences contained in the *Classification Act* and the *Crimes Act*. For example:

- a person who uses social media to transmit a terrorist publication may be guilty of an offence under section 57 of the *Classification Act*; or
- a person who takes a photograph of a child holding a severed head in a foreign conflict zone may be guilty of an offence under section 51C or the *Crimes Act*.

<sup>251</sup> *Criminal Code Act 1995* (Cth) sch 1 s 80.2C.

<sup>252</sup> *Ibid* sch 1 s 80.2C(4).

<sup>253</sup> *Terrorism Act 2006* (UK) ss 1–2.

For these reasons, the Panel recommends that consideration of any changes to the law in this space await an evaluation of the effectiveness of the existing offences.

### Definition of 'terrorism related material'

In its submission to the Panel, Victoria Police recommended the following definition for 'terrorism related material':

- (1) *material that describes, depicts, expresses, or otherwise deals with matters such as serious crime, torture, or violence in such a manner that the availability of the publication itself is likely to be injurious to the public good (including community harmony);*
- (2) *a publication shall be deemed to be ['terrorism related material'] if the publication promotes, favourably depicts, glorifies or supports, or tends to promote, favourably depict, glorify or support acts of terrorism or politically or religiously motivated violence, including but not limited to:*
  - (a) *acts of torture or the infliction of extreme violence or extreme cruelty; or*
  - (b) *the use of violence or coercion to compel any person to participate in, or submit to an act of torture or mass violence or acts of terrorism; or*
  - (c) *instructions or manuals on how to facilitate acts of terror or mass violence (including the construction of improvised explosive devices), or attacks upon infrastructure; or*
  - (d) *advocating or providing instructions on how to facilitate, the movement of persons to areas of conflict to carry out, participate in or support terrorism or politically or religiously motivated violence.*

This definition largely mirrors the definition of 'objectionable' in section 3 of New Zealand's *Films, Videos and Publications Classification Act 1993* (NZ) and is similar to the definition of 'objectionable publication' in section 56 of the *Classification Act*.

While there may be clear policy, investigatory and prosecutorial utility in casting the net wide for the definition of 'terrorism related material', the Panel is conscious that the same balance, referenced above in relation to advocating terrorism, must be struck in relation to the possession offence. Critical to striking this balance will, in the Panel's opinion, be the adoption of a definition that is no broader than is necessary to achieve the intended purpose of the offence.

Mindful of the breadth of the definition proposed by Victoria Police, the Panel is not presently convinced that it strikes the correct balance. For example, paragraph (1) of the definition defines 'terrorism related material' to be any material which 'is likely to be injurious to the public good (including community harmony)'. This is a broad test and would likely have the effect of prohibiting possession of material that is not strictly connected to the doing of a terrorist act. This is problematic for a number of reasons; key of which is that it creates a disconnect between the offence and its justification. In order to justify the limitation on freedom of thought and speech, the offence must be necessary to protect the community. The further the offence gets from this objective (i.e. the broader the definition is), the harder it is to justify the burden it places on freedom of speech, and the more likely it is that, rather than prevent action, it will in effect, criminalise thought.

A further issue with defining 'terrorism related material' broadly is the possibility that it may not fit within the Commonwealth's existing power to legislate. Currently, the Commonwealth Parliament derives its power to legislate for terrorism related offences from its legislative power in section 51 of the *Constitution* and from a referral of power from all Australian States and Territories.

If the definition is cast too broadly, it may not fit within the Commonwealth's power to legislate and may therefore require a further referral of power.

The Panel has for this reason crafted a definition that strikes what it considers to be a better balance between the competing interests. The Panel has settled on 'material which provides instructions for the doing of a terrorist act'. This definition has a clear connection to the doing of a terrorist act and would capture material, such as the manuals at the centre of the MHK case, that provides practical instructions for the planning, preparation or engagement in terrorist acts. In addition, its scope is specifically, as opposed to incidentally connected to material that provides instructions for the doing of a terrorist act (as defined in section 100.1 of the *Criminal Code*) (i.e. it would not capture a scientific article with instructions on how to build a bomb for authorised Australian Defence Force purposes).

The Panel notes that the definition recommended is, similarly to that which is recommended by Victoria Police, likely to attract criticism for inappropriately burdening freedom of thought and speech, and may be the subject of a legal challenge for impermissibly infringing the constitutionally implied freedom of political communication. The Panel is, however, comfortable that the proposed limitation is proportionate and justifiable given the risk posed to the community by possession of 'terrorism related material'. Further it considers the risk of constitutional invalidity to be low as:

- the purpose of the offence and the means adopted to achieve it are legitimate; and
- the offence is reasonably appropriate and adapted to advance the purpose.<sup>254</sup>

### Definition of 'material'

Victoria Police recommended that 'material' be defined broadly to capture 'traditional physical books, magazines and pamphlets, as well as material accessed through the internet'. The Panel agrees that the definition should cover a wide range of mediums similar to section 51A of the *Crimes Act*. Section 51A defines 'material' in the context of child abuse material to mean:

- any film, audio, photograph, printed matter, image, computer game or text; or
- any electronic material (defined to mean data from which text, images or sound may be generated); or
- any other thing of any kind.
- Given the breadth of this definition, the Panel considers it suitable for the definition of material in the context of 'terrorism related material'.

### Defences

As noted by Victoria Police in its submission to the Panel, consideration needs to be given to the inclusion of appropriate defences. The Panel agrees that robust defences are required to ensure that the offence is no broader than is necessary to achieve the objectives of the offence. As such, the Panel recommends inclusion of, at the minimum, the child abuse material defences referred to below, as well as any others considered relevant:

- administration of the law (section 51J);
- classification (section 51K);
- public benefit (section 51L) – *public benefit* is defined to include material that is used for a genuine medical, legal, scientific or academic purpose; and
- unsolicited possession (section 51T).

<sup>254</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 194.

The latter defence is relatively new and responds to challenges brought about by the internet, by making it:

*a defence to a charge for an offence against section 51G(1) for A to prove on the balance of probabilities that—*

*(a) A did not intentionally come into possession of child abuse material; and*

*(b) on becoming aware of having come into possession of child abuse material, A, as soon as it was practicable to do so, took all reasonable steps in the circumstances to cease possessing the material.<sup>255</sup>*

The Panel has also considered whether it is necessary to include a defence that protects one time viewers or people who are ‘simply curious’. This type of defence is often raised in relation to young people who can be disproportionately affected by an offence of this kind. This is due to a variety of factors including the developmental maturity of young people affecting their ability to make informed decisions, and the fact that many young people are still seeking to explore their identity. While the Panel acknowledges this concern, it is not persuaded that it warrants the creation of a separate defence. This is because:

- a person who merely accesses ‘terrorism related material’ (i.e. views it on a website) would not be captured by this offence. In order to possess material, a person must have physical custody of, or physical control over, that material.<sup>256</sup> While the Panel proposes to slightly expand this in relation to electronic material, discussed above, this will not alter the need to demonstrate controlling access (i.e. access to a personal online storage account or shared drive). The distinction between possession and access is reflected in the recent decision to create a new offence of accessing child abuse material in addition to the existing offence of possession of child abuse material;<sup>257</sup>
- the Panel’s intention, as discussed below, is for this offence to be used in conjunction with the recommended SEO. As such, people who possess only a few pieces of ‘terrorism related material’ would, in the opinion of the Panel, be possible candidates for an SEO; and
- the Panel considers that these type of concerns are more appropriately dealt with by law enforcement and prosecutorial discretion rather than inclusion of a specific defence.

## Penalty

Victoria Police did not make a recommendation in regards to the penalty that should be attached to the offence.<sup>258</sup> The Panel has considered similar offences for guidance on an appropriate penalty. Relevantly:

OFFENCE	MAXIMUM PENALTY	PENALTY UNITS	TERM OF IMPRISONMENT
Making objectionable films		240	Imprisonment for 2 years
Producing objectionable publications		240	Imprisonment for 2 years
Publication or transmission of objectionable material		240	Imprisonment for 2 years
Advocating terrorism			Imprisonment for 5 years
Possession of child abuse material	Level 5		Maximum 10 years
Producing child abuse material	Level 5		Maximum 10 years

<sup>255</sup> *Crimes Act 1958* (Vic) s 51T.

<sup>256</sup> *DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185.

<sup>257</sup> *Crimes Act 1958* (Vic) s 51G(3).

<sup>258</sup> Except to suggest that it should be dealt with in the summary division.

The Panel has also considered these penalties in light of the rationale for creating this offence and the careful balancing that is required for this type of offence. The Panel has also been guided by Victoria Police's submission which emphasised both the need for an offence that enables early intervention and also the vulnerability of some persons seeking to possess 'terrorism related material'.

Given the above, the Panel recommends a low penalty similar or potentially lower than the penalties attached to the above mentioned *Classification Act* offences. Further, the Panel recommends that it be made explicit, potentially in legislation, that a court may order, in lieu of a sentence, that a person be placed on an SEO (see Chapter 3). These recommendations reflect that while the offence is intended to have a deterrent effect, it is also intended as a form of early intervention and disengagement (i.e. the objective is not strictly punitive).

In this regard, the Panel considered whether there ought to be an aggravating factor that limited the scope of the offence (i.e. possession of multiple pieces of 'terrorism related material', or possession of particularly objectionable material). Ultimately, however, the Panel determined that these types of considerations were more appropriately a matter for prosecutorial discretion / sentencing rather than legislation.

Finally, the Panel considered the use of the classification tool CETS (Child Exploitation Tracking System) in the context of child abuse material. CETS provides an objective assessment of the seriousness of the child exploitation material, and is used to inform the decisions of police (whether, and with what, to charge the accused), prosecution (prosecutorial approach) and the court (sentencing). While consideration might be given to development of a similar tool in the context of 'terrorism related material', the Panel is not presently convinced that this is necessary given the narrowness of the definition proposed for 'terrorism related material'.



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## CHAPTER 6

# PREVENTATIVE DETENTION OF MINORS UNDER A MODIFIED PREVENTATIVE DETENTION SCHEME

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### Recommendation 18

That the recommended modified preventative detention scheme (Recommendation 2 in Report 1) apply to persons who are 14 or 15 years of age.

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### Recommendation 19

That Victoria Police be empowered to take a person under the age of 18 (a minor) into custody for the purpose of preventing a terrorist act from occurring or to preserve evidence of, or relating to, a terrorist act for a maximum period of 36 hours.

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### Recommendation 20

That after taking a minor into custody, Victoria Police be required to apply for a preventative detention order from the Supreme Court in order to continue to detain the minor:

- as soon as reasonably practicable; or
- if it is not reasonably practicable to do so sooner, on the expiration of 36 hours from the time that the minor was first detained.

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### Recommendation 21

That in response to an application by Victoria Police for a preventative detention order in respect of a minor, the Supreme Court be empowered to make a preventative detention order permitting the continued detention of the minor for a maximum period of 14 days inclusive of any period during which the minor was detained by Victoria Police before the making of that order.

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### Recommendation 22

That the power to make a preventative detention order in respect of a minor only be available to the Supreme Court if it is satisfied:

- that there are no other less restrictive means available to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act; and
- that the particular requirements in relation to the preventative detention of a minor, including any conditions imposed on that detention by the court, can be met.

### Recommendation 23

That if the Supreme Court is satisfied that an order other than a preventative detention order would be a less restrictive means of preventing an imminent terrorist act occurring or preserving evidence of, or relating to, a recent terrorist act:

- the court be empowered to make alternative orders and impose appropriate conditions in response to an application for a preventative detention order in respect of a minor; and
- the court be required, in making such orders or imposing such conditions, to consider a range of specific matters with respect to the minor including the minor's physical and mental health and vulnerability.

### Recommendation 24

That special safeguards apply if a minor is detained under a preventative detention scheme including:

- conferring on the Supreme Court a power to make specific orders in relation to the conditions under which a minor may be held in preventative detention and a requirement for the applicant for a preventative detention order to satisfy the court that those conditions can be met;
- incorporating into the scheme additional protections for minors, including requirements for minors to have their developmental needs catered for, that any questioning of a minor be recorded by audio-visual means and that a minor be legally represented; and
- an active monitoring role by the Commission for Children and Young People in relation to any minor held in detention.

## 6.1 BACKGROUND AND ISSUES

In Report 1, the Panel considered Victoria's current scheme of preventative detention for the purposes of preventing an imminent terrorist act or preserving evidence of a recent terrorist act. The Panel recommended changes to that scheme including, most significantly, the addition of a power for police to question a detained suspect. These recommendations were made in the context of a 2016 agreement by the Council of Australian Governments (COAG) to use a NSW legislative model as the template for strengthened pre-charge detention laws for terrorist suspects in all states and territories.

As set out in Report 1, the NSW legislative model contained in Part 2AA of the *Terrorism (Police Powers) Act 2002* (NSW) permits police to detain and question a terrorism suspect aged 14 or above.<sup>259</sup> Victoria's current laws permit the preventative detention of individuals aged 16 or above.<sup>260</sup> In Report 1, the Panel deferred to Report 2 its consideration of:

- whether the modified preventative detention scheme the subject of recommendation 2 in Report 1 should be extended to apply to minors aged 14 or 15; and
- what safeguards should apply to any person under the age of 18 who is detained under that scheme.

<sup>259</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 25F.

<sup>260</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13J(1).

## 6.2 DISCUSSION

### 6.2.1 Should the modified preventative detention scheme apply to 14 and 15 year olds?

There is some evidence that minors, and even children as young as 14 years of age, can present as a terrorist threat. Factors include the targeting of children by groups such as 'Islamic State' (IS) through social media especially and the 'grooming' of children by adults associated with extremist ideologies.

Some recent examples of this threat include those set out below.

- In 2015, a 15 year old British teenager pleaded guilty to a charge of inciting terrorism in connection with a plot to behead a police officer at an Anzac Day parade in Melbourne. The boy was 14 years of age when he committed the offence.
- In October 2015, a 15 year old Sydney boy shot and killed a NSW police employee, Mr Curtis Cheng, in Parramatta. A number of individuals have pleaded guilty to terrorist related charges in connection with the murder.

The Panel understands that of the 43 individuals currently before Australian courts on terrorism related charges, six are juveniles.

Authorities are also concerned about the potential impact of returned fighters fleeing the collapse of IS's 'caliphate' in Iraq and Syria. In some cases, it is feared that these individuals will return with young children who have been exposed to extreme violence and indoctrinated with IS's toxic brand of extremist ideology.

In response to the 2015 murder of Mr Cheng, the Commonwealth Government, with the support of the states and territories, amended the *Criminal Code Act 1995* (Cth) (*Criminal Code*) to permit control orders to be issued for children aged 14 or 15 years. Previously, the lower age limit for such orders was 16 years of age. In the Second Reading Speech, the Attorney-General, Senator the Hon George Brandis QC stated:

*[r]ecent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security through their involvement in planning and supporting terrorist acts.<sup>261</sup>*

The Panel notes that the age threshold for preventative detention orders at the Commonwealth level remains at 16 years but that, as stated above, there is national agreement to strengthen preventative detention laws based on the New South Wales model, which provides for children as young as 14 to be taken into custody under temporary detention laws that have an express investigative focus.

Measures to address the threat posed by minors must be balanced and proportionate, and be crafted with due regard to the particular vulnerability of children. The Panel is mindful of relevant provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter*). These provisions include that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child,<sup>262</sup> and that an accused child who is detained or a child who is detained without charge must be segregated from all detained adults.<sup>263</sup>

<sup>261</sup> Commonwealth, *Parliamentary Debates*, Senate, 12 November 2015, 8426 (George Brandis, Attorney-General).

<sup>262</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

<sup>263</sup> *Ibid* s 23(1).

Where preventative detention is being contemplated, the Panel notes that the following rights, which apply to children and adults, are relevant:

- the right not to be subject to arbitrary arrest or detention;<sup>264</sup>
- the right not to be deprived of liberty except on grounds, and in accordance with procedures, established by law;<sup>265</sup>
- the right to be brought promptly before a court;<sup>266</sup>
- the right to apply to a court for a declaration or order regarding the lawfulness of detention;<sup>267</sup> and
- the right to humane treatment when deprived of liberty.<sup>268</sup>

The Panel also notes the relevance of Australia's international treaty obligations under the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child (UNCROC). Article 37 of the UNCROC sets out the relevant principles in relation to the arrest, detention and imprisonment of children. It provides that no child should be deprived of liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child must be in conformity with the law and only be used as a measure of last resort and for the shortest appropriate period of time.

The Panel had significant misgivings about extending the proposed modified preventative detention scheme to children aged 14 or 15. Preventative detention is an extraordinary power and its application to children is of particular concern given the potential for even a short period of detention to cause irreparable harm to a child as young as 14 or 15.

However, there is national agreement on strengthened preventative detention laws based on a New South Wales model that permits the detention of children as young as 14. National consistency in this area is important.

On balance, the Panel is ultimately persuaded by the notion that:

*...it is conduct that threatens the safety of the Australian community which guides the development of counter-terrorism policy and legislative reform, irrespective of the age, ethnicity or religious affiliation of individuals.<sup>269</sup>*

It is a greatly troubling and regrettable development but the Panel acknowledges that minors, and even children as young as 14 or 15 years of age, can pose a terrorist threat. Mindful of its Terms of Reference, which are:

*'...to examine and evaluate the operation and effectiveness of key legislation, related powers, procedures and non-legislative matters relevant to Victoria Police, the Courts, the Department of Justice and Regulation, Parole, and other related entities as the case may be to ensure they can best intervene across the risk spectrum to prevent, investigate, monitor and respond to acts of terror',*

the Panel concludes that the recommended modified preventative detention scheme should extend to children as young as 14 or 15. Additional and exceptional safeguards and protections are necessary, however, to ensure that minors detained under the scheme are protected to the greatest extent practicable without rendering the scheme inoperable or unusable, from a law enforcement perspective. These matters are dealt with in more detail below.

<sup>264</sup> Ibid s 21(2).

<sup>265</sup> Ibid s 21(3).

<sup>266</sup> Ibid s 21(5).

<sup>267</sup> Ibid s 21(7).

<sup>268</sup> Ibid s 22.

<sup>269</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (February 2016).

## 6.2.2 Additional safeguards to apply to detained minors

Having regard to the recommended changes to the current preventative detention scheme, which include the addition of a power to question a detained person, the Panel considers that if its recommendations are accepted, the additional protections set out below should apply to any minor detained under that scheme and not only to those who are 14 or 15 years of age.

### Legislative requirements and conditions

The Panel notes the protections for minors under the existing preventative detention laws, which include the following:

- a requirement for minors to be detained separately from adults (unless there are exceptional circumstances);<sup>270</sup>
- a requirement for minors to be detained in a youth justice facility unless the Supreme Court orders otherwise;<sup>271</sup>
- the application of certain provisions of the *Children, Youth and Families Act 2005* (Vic) to minors detained in youth justice facilities;<sup>272</sup>
- the right for a minor to have contact with a parent or guardian, or another person able to represent the child's interests (subject to a prohibited contact order and monitoring);<sup>273</sup> and
- particular requirements in relation to the taking of identification material from a minor.<sup>274</sup>

These protections exist over and above the existing safeguards for any person detained under the preventative detention scheme, which include:

- the involvement of the Public Interest Monitor in any application for a preventative detention order;<sup>275</sup>
- a right to apply for the revocation or variation of a preventative detention order;<sup>276</sup>
- a requirement that detained persons be treated with humanity, respect for human dignity and not be subject to cruel, inhuman or degrading treatment;<sup>277</sup>
- a requirement for oversight by a senior police officer and a right to make representations to this officer (including in relation to the person's treatment);<sup>278</sup>
- mandatory release if the grounds on which the person was detained can no longer be satisfied;<sup>279</sup>
- a right to contact a lawyer and parents or a family member;<sup>280</sup>
- the mandatory appointment by the Chief Commissioner of Police of a nominated senior police officer to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order;<sup>281</sup> and
- oversight by the Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC).<sup>282</sup>

<sup>270</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13ZBA(1).

<sup>271</sup> *Ibid* s 13F(8).

<sup>272</sup> *Ibid* s 13WA(5).

<sup>273</sup> *Ibid* s 13ZH.

<sup>274</sup> *Ibid* s 13ZL.

<sup>275</sup> *Ibid* ss 13DA, 13E(1A).

<sup>276</sup> *Ibid* s 13N.

<sup>277</sup> *Ibid* s 13ZB.

<sup>278</sup> *Ibid* ss 13P(4)–(7).

<sup>279</sup> *Ibid* s 13V(1A).

<sup>280</sup> *Ibid* ss 13ZD, 13ZF.

<sup>281</sup> *Ibid* s 13P(4).

<sup>282</sup> *Ibid* ss 13ZE, 13ZS.

The Panel also notes:

- the requirement for the Victorian Attorney-General to cause to be prepared an annual report about the operation of the preventative detention regime and for a copy of this report to be laid before each House of Parliament;<sup>283</sup>
- a requirement for the Attorney-General to cause a review of the operation of the Act to be undertaken and completed by 31 December 2020;<sup>284</sup> and
- the sunseting of the *Terrorism (Community Protection) Act* 2003 (Vic) (TCPA) (together with the preventative detention powers contained in that Act) on 1 December 2021.<sup>285</sup>

With the possible exception of the requirement for minors to be detained in a youth justice facility unless the Supreme Court orders otherwise — and this matter will be dealt with in more detail below — these existing protections together with the additional measures discussed below should form part of a modified preventative detention regime applicable to minors.

### **Application for a preventative detention order in respect of a minor**

In Report 1, the Panel recommended, among other things, that the current preventative detention scheme be amended to allow police to take a person into custody for an interim period of a maximum of four days without the need to first apply to the Supreme Court for a preventative detention order.

In the case of minors, however, the Panel considers that police should be required to apply to the Supreme Court for a preventative detention order as soon as reasonably practicable after taking the minor into custody but, in any event, no later than 36 hours after doing so. For example, if a minor is taken into custody for the purpose of preventative detention at 3pm on a Tuesday, police will be required to apply to the Supreme Court for a preventative detention order for the continued detention of the minor as soon as reasonably practicable but, in any event, no later than by 3am on the following Thursday.

The maximum period of an ongoing or continuing preventative detention order in respect of a minor should, as under the current scheme, be 14 days inclusive of any period during which the minor is detained before the making of the court order for the minor's continued detention.

As is the case under the current preventative detention scheme, it will be open to police to apply for an extension (or a further extension) to a preventative detention order. Again, as under the current scheme, the maximum total period (including any extension) during which the child may be held is 14 days, inclusive of any initial period of police initiated detention.

Preventative detention is intended to be used where there is a credible threat of an imminent terrorist act occurring, or where a terrorist act has taken place and the order is necessary to preserve evidence of or relating to that act, but there is insufficient information or evidence for police to arrest and charge the individual(s) involved. It is intended to serve as a means of pre-emptive disruption or dislocation. Further, it is a measure of last resort and is not a substitute for the more ordinary police investigative and arrest powers.

<sup>283</sup> Ibid ss 13ZR.

<sup>284</sup> Ibid s 38.

<sup>285</sup> Ibid s 41.

More so today than ever, terrorist threats can arise very quickly and with little or no warning. Police may have no information aside from that provided by an overseas intelligence source. The individuals involved may be entirely unknown to police. In these circumstances, a power for police to act expeditiously is essential. As with preventative detention of adults, the Panel's view is that a requirement for police to apply to the court for a preventative detention order before being able to take a person into custody would frustrate the very purpose of that order. As stated in Chapter 3 of Report 1, a requirement for a court order requires police to dedicate time and significant resources to preparing the application for that order at precisely the time when there will be the greatest need for urgent action to protect the public. The requirement to obtain a court order before doing so significantly detracts from the utility of the current preventative detention scheme, and this has long been recognised.<sup>286</sup>

A requirement for a court order to be sought as soon as reasonably practicable and no later than 36 hours after the minor has been taken into custody is, in the Panel's view, a reasonable compromise between enabling police to take prompt and effective action to address a real threat while also respecting the foundational human rights engaged by preventative detention.

Immediately upon taking a minor into custody for the purposes of preventative detention, the Panel considers that police should be required to notify the following parties:

- the Supreme Court of Victoria;
- the Public Interest Monitor;
- the Commission for Children and Young People;
- the IBAC;
- the Ombudsman; and
- the Secretary of the Department of Justice and Regulation.

These parties should also be provided with any information in relation to an application to detain the minor as soon as practicable (and before any such application is made). Consistent with current requirements under the TCPA, the minor who is the subject of an application should also be provided with notice of the application.

The Panel notes that from the moment they detain a child for preventative purposes, police will have legal custody and care of the minor, with all of the responsibilities, obligations and duties that attach to such a role.

### **Additional court powers to make an order other than a preventative detention order**

Currently, the TCPA provides that the Supreme Court may make a preventative detention order (or an interim preventative detention order) if satisfied as to the matters set out in section 13E(1). If the court does not wish to make a preventative detention order, there is no alternative means by which it may address the matter.

In the case of an application for a preventative detention order in respect of a person under the age of 18 years, the Panel considers that the making of such an order should only be available to the court if it considers that there is no less restrictive means available to prevent an imminent terrorist act from occurring or to preserve evidence of, or relating to, a recent terrorist act.

A broad discretion should be conferred on the court to make such other orders in respect of the minor as it considers are necessary to achieve the relevant objective. The Panel envisages the making of an order imposing conditions, restrictions or prohibitions of a similar nature to those available under a supervision order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) or under the control order regime set out in Division 104 of Part 5.3 of the *Criminal Code*.

<sup>286</sup> See, eg, Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 56.

Consistent with the control order regime, it is suggested that the Supreme Court should have the power to impose any obligation, restriction or prohibition that is reasonably appropriate and adapted to address the risk. It should be open to the court, for instance, to make an order imposing conditions in relation to residency, a minor's movements, the persons with whom a minor may associate or in relation to the minor's access to the internet. In keeping with the current preventative detention laws, the Panel considers that the maximum period for which an order may be made should be 14 days. Further, and subject to the conditions set out in the existing laws:

- it should be possible for police to apply for an extension (or a further extension) to an existing preventative detention order, up to a total maximum period of 14 days;<sup>287</sup> and
- it should be open to police to seek more than one preventative detention order in relation to the same individual.<sup>288</sup>

The discretion should be a broad one. The objective is to confer on the Supreme Court sufficient powers to enable it to make such orders, short of a preventative detention order, as are necessary to address the risk posed by the person the subject of the application. It is not intended that a less restrictive means would encompass the making of a control order under the *Criminal Code*, for instance; the means are those means available to the Supreme Court by exercising the recommended discretion to make orders or impose conditions etc.

In making any alternative order or orders, the Panel considers that the court should be required to take into account:

- the minor's age, maturity, sex and background (including lifestyle, culture and traditions);
- the minor's physical and mental health;
- the importance to the minor of having a meaningful relationship with family, friends and the wider community;
- the minor's ethnic and cultural origins;
- the minor's right to receive an education;
- the minor's right to practise his or her religion;
- the vulnerability of the minor, including whether he or she has a history of trauma or whether there are other circumstances that may exacerbate the impact of preventative detention on the minor; and
- any other matter the court considers relevant.

This list is similar to that set out in section 104.4(2A) of the *Criminal Code* in relation to the making of control orders. Consistent with the approach taken under that regime, the minor's best interests should be a primary consideration but subordinate to the paramount consideration of community safety.

If an application is made for the preventative detention of a minor, all proceedings in relation to the matter should adequately protect the minor's privacy. At a minimum, the minor's identity should be concealed.

### Further legislative requirements and conditions

If police detain a minor on their own initiative, or the court makes a preventative detention order in respect of a minor, the Panel considers that all of the protections for minors set out in Part III of the *Crimes Act 1958* (Vic) (*Crimes Act*), including those set out below, should operate (in so far as they are applicable):

- a requirement that a parent or guardian of the minor or, if a parent or guardian is not available, an independent person, be present while the minor is questioned; and

<sup>287</sup> See s 131 of the *Terrorism (Community Protection) Act 2003* (Vic).

<sup>288</sup> See s 13K of the *Terrorism (Community Protection) Act 2003* (Vic).



- a requirement that a minor be allowed to communicate with his or her parent or guardian or alternative independent person in private before being questioned.

Other requirements set out in Part III of the *Crimes Act* for the questioning of persons taken into custody should also apply to a minor held under preventative detention, including:

- a requirement for an appropriate caution to be administered before any questioning takes place; and
- preservation of the right to remain silent.

In addition, the Panel considers that the following requirements should apply:

- a requirement for the questioning of a minor to be recorded by audio-visual means, and that the recording be required to show both the minor and the minor's parent or guardian, or independent third party if applicable;
- a requirement that the minor be afforded adequate and reasonable opportunity to rest, including during any period of questioning. The Panel notes that the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW) provides that a detained terrorism suspect may be questioned but only if given the opportunity to rest for a continuous period of at least 8 hours in any period of 24 hours and to have reasonable breaks during any period of questioning.<sup>289</sup> Rest breaks for minors, particularly during any period of questioning, will invariably need to be more generous; and
- a requirement that a detained minor have access to a lawyer for the purposes of obtaining legal advice in relation to his or her detention, including before being questioned, and a mechanism for the provision of Victoria Legal Aid to the minor if appropriate or necessary.

The Panel acknowledges that there are existing protections in the TCPA in relation to legal representation including:

- if a person subject to an application for a preventative detention order is not legally represented on the hearing of the application, to order Victoria Legal Aid to provide legal representation for the person if the court is satisfied that it is in the interests of justice to do so having regard to the person's financial circumstances or any other circumstances;<sup>290</sup> and
- a right for a person detained to contact a lawyer.<sup>291</sup>

Part III of the *Crimes Act* also provides that a person held in custody may communicate with a legal practitioner before any questioning or investigation commences.<sup>292</sup>

In the case of any minor taken into custody under the recommended modified preventative detention regime, the Panel considers that access to legal advice will be particularly important. Minors will be especially in need of expert legal advice and it is imperative that they have ready and timely access to such advice. A mechanism will be needed to ensure that a minor is provided with a lawyer as soon as practicable and this should incorporate a means by which Victoria Legal Aid be available, should this be necessary.

The role of a parent or guardian or independent person will be critical in providing emotional and other support to a detained minor. If a prohibited contact order is made in relation to the parent or guardian of a detained minor, there must be a clear means by which an independent third party is appointed to provide that support to the minor. The Panel notes that it may be necessary for the independent third party to possess particular skills or qualifications in order that they may competently and effectively perform that role.

<sup>289</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 25G(4).

<sup>290</sup> *Ibid* s 13E(1).

<sup>291</sup> *Ibid* s 13ZF.

<sup>292</sup> *Crimes Act 1958* (Vic) s 464C.

No matter how well intentioned or justifiable in the interests of protecting community safety, the Panel considers that a body of laws that permits children as young as 14 to be taken into custody for up to 14 days without being charged can have no moral authority unless it guarantees the detained minor access to essential legal and emotional support.

The Panel envisages that the mechanism for the protection of criminal intelligence contemplated in Report 1 could be used in relation to any proceedings for a preventative detention order in respect of a minor. This would ensure that if criminal intelligence is at issue in those proceedings, a special counsel may be appointed to represent the minor's interests.

In relation to the obligation on the Victorian Attorney-General to report annually on the operation of the preventative detention laws, this report should extend to any preventative detention of a minor (whether initiated by police or by order of the Supreme Court).

### Treatment and conditions

The TCPA provides that all minors must be detained in a youth justice facility unless the Supreme Court is satisfied that it is reasonably necessary for the minor to be detained at another place having regard to factors such as the minor's age and vulnerability, the likely impact on the person of detention in a youth justice facility, the grounds on which the order is made, the risk posed by the minor and any other factor that the court considers is relevant.

The possible addition of a power to question a detained person is an important change and the Panel notes that a default requirement for a minor to be detained in a youth justice facility may create difficulties for police tasked with questioning that person. Appropriate alternatives to detention in a youth justice facility will need to be further considered. The Panel notes that the accommodation requirements will need to be feasible from a police operational perspective while also ensuring that the minor is accommodated in a place that is suitable and adequate for the purpose having regard to the minor's age and vulnerability, and the obligations of police under the *Charter* and relevant provisions of the TCPA with respect to the minor.<sup>293</sup>

Long-term, the proposed new youth justice centre to be built near Cherry Creek may offer a suitable venue for holding any minor detained for preventative purposes.

The Panel considers that, when making a preventative detention order in relation to a minor, the Supreme Court should be required to impose such conditions as it considers are reasonably necessary to ensure that the minor's welfare and interests are appropriately protected. The court may, for instance, impose particular and specific requirements with respect to the periods of rest for the minor (including during any period of questioning) or the manner in which the minor may be questioned.

As noted above, the TCPA provides that some of the provisions of the *Children, Youth and Families Act 2005* (Vic) (CYF Act) apply to a minor detained in a youth justice facility. These provisions include:

- an obligation on the Secretary of the Department of Justice and Regulation<sup>294</sup> to determine the form of care, custody or treatment which he or she considers to be in the best interests of each person detained;<sup>295</sup>

<sup>293</sup> See sections 17(2), 22 and 23(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and section 132B of the *Terrorism (Community Protection) Act 2003* (Vic).

<sup>294</sup> While the TCPA specifies the Secretary of the Department of Human Services is to perform this (and other) role(s) in relation to the preventative detention of minors, the Panel understands that due to the recent transfer of responsibility for the supervision of young people in the criminal justice system from the Department of Health and Human Services to the Department of Justice and Regulation, this role (and other roles, as necessary) under the TCPA will now be performed by the Secretary of the Department of Justice and Regulation.

<sup>295</sup> *Terrorism (Community Protection) Act 2003* (Vic) s 13WA(5)(b); *Children, Youth and Families Act 2005* (Vic) s 482(1)(a).

- an entitlement for persons detained to have reasonable efforts made to meet their medical, religious and cultural needs;<sup>296</sup>
- an entitlement for detained persons to complain to the Secretary of the Department of Justice and Regulation or the Ombudsman about the standard of care, accommodation or treatment which they are receiving;<sup>297</sup>
- an obligation on the Secretary of the Department of Justice and Regulation to make sure that the entitlements set out in section 482(2) of the *CYF Act* referred to above are complied with and to report annually to the responsible Minister on the extent of compliance;<sup>298</sup> and
- a prohibition on the following:<sup>299</sup>
  - the use of isolation as a punishment;<sup>300</sup>
  - the use of physical force unless it is reasonable and necessary for the purposes set out in the *CYF Act*,<sup>301</sup> and otherwise authorised by law;
  - the administering of corporal punishment;<sup>302</sup>
  - the administering of any form of psychological pressure intended to intimidate or humiliate;<sup>303</sup> and
  - the use of any form of physical or emotional abuse.<sup>304</sup>

The Panel reiterates that these protections should continue to apply to a minor held in preventative detention — whether during the ‘interim’ period of police initiated detention or following the making of a preventive detention order. Further, the protections outlined above, and those discussed below, should also apply regardless of whether the minor is detained in a youth justice facility or elsewhere. The Panel suggests that the only exception would be if a minor was detained elsewhere than in a youth justice facility and a particular condition would have no relevance or would otherwise be inappropriate in that alternative environment e.g. the requirement under section 482(1)(a) of the *CYF Act* for the Secretary of the Department of Justice and Regulation to determine the form of care, custody or treatment which he or she considers to be in the best interests of a person detained in a remand centre, youth residential centre or youth justice centre.

It may also be appropriate, in the Panel’s view, for some of the additional protections contained in the *CYF Act* that are not incorporated into the TCPA to apply to a minor subject to preventative detention (including when the minor is being detained by police prior to any preventative detention order). In particular, all detained minors should be entitled to have their developmental needs catered for.<sup>305</sup>

### Monitoring role for the Commission for Children and Young People

The existing scheme for preventative detention provides that a detained person may contact the Ombudsman or the IBAC<sup>306</sup> and that Part 2A of the TCPA does not affect a function or power of the Ombudsman under the *Ombudsman Act 1973* (Vic) or the IBAC under Part 9 of the *Victoria Police Act 2013* (Vic) or Part 3 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).<sup>307</sup>

296 *Terrorism (Community Protection) Act 2003* (Vic) s 13WA(5)(c); *Children, Youth and Families Act 2005* (Vic) s 482(2)(c).

297 *Terrorism (Community Protection) Act 2003* (Vic) s 13WA(5)(c); *Children, Youth and Families Act 2005* (Vic) s 482(2)(e).

298 *Terrorism (Community Protection) Act 2003* (Vic) s 13WA(5)(d); *Children, Youth and Families Act 2005* (Vic) s 482(3).

299 *Terrorism (Community Protection) Act 2003* (Vic) s 13WA(5)(g).

300 *Children, Youth and Families Act 2005* (Vic) s 487(a).

301 *Ibid* ss 487(b)(i)–(ii).

302 *Ibid* s 487(c).

303 *Ibid* s 487(d).

304 *Ibid* s 487(e).

305 See *Children, Youth and Families Act 2005* (Vic) s 482(2)(a).

306 *Terrorism (Community Protection) Act 2003* (Vic) s 13ZE.

307 *Ibid* s 13ZS.

The TCPA also provides that the Public Interest Monitor must be notified of any application for a preventative detention order and that the court, when considering whether to make a preventative detention order, must have regard to any submissions made by the Public Interest Monitor. The Public Interest Monitor's role is to test the content and adequacy of the information contained in the application and the circumstances of that application and, for that purpose:

- to ask questions of any person giving information in relation to the application; and
- to make submissions in relation to the appropriateness of granting the application.

In the case of a minor detained under the modified preventative detention scheme, the Panel recommends that:

- Victoria Police should be required to notify the Commission for Children and Young People (Commission) immediately upon taking the minor into custody and before making an application to the Supreme Court to detain the minor (in addition to notifying the Public Interest Monitor, the Secretary of the Department of Justice and Regulation, the Ombudsman, the IBAC and the Supreme Court of Victoria); and
- the Commission should perform a broad monitoring role, incorporating active inspection and monitoring functions with respect to the minor's detention with the objective of ensuring that the minor is being appropriately treated and that all of the requirements and mandated conditions, etc. in relation to that detention are being satisfied or observed, as applicable. This role should extend to any period of initial detention by police before the making of a preventative detention order by the Supreme Court.

To perform this monitoring role, the Panel considers that the Commission should be provided with adequate powers, including powers to:

- visit and speak to the minor;
- communicate with the minor's parents, guardian or independent third party;
- inspect the facility in which the minor is being detained;
- request, and be provided with, information from staff of the facility in which the minor is being detained and from police regarding the minor's treatment in detention;
- access, inspect and review documentation (as specified by the Commission) regarding the conditions of the minor's detention, including:
  - information regarding the rest periods provided to the minor;
  - the minor's access to fresh air and recreation;
  - records as to any questioning of the minor including the duration of any questioning and the length of any breaks in questioning;
  - meal and toilet breaks;
  - access to health and therapeutic services;
  - visits from parents or the minor's guardian or independent third party appointed in lieu of a parent or guardian, and lawyer; and
- access to relevant CCTV footage of any period of questioning (with appropriate restrictions, as required, to protect any sensitive criminal intelligence etc.).

The Commission's role should also incorporate a power to report to the Victorian Attorney-General immediately regarding any matter of concern in relation to the preventative detention of a minor, and to report to the Attorney-General after every instance of a minor's detention in relation to that detention generally.

The Commission should also be required to include in its annual report to Parliament information as to the number of times it has been required to perform its monitoring role with respect to the preventative detention of a minor and any general conclusions or observations arising out of that role.

### **Additional threshold protection**

The Panel is acutely aware of the vulnerabilities of children and the need, particularly in the context of a legal instrument as exceptional and powerful as preventative detention, to provide for the adequate protection of any minor who is detained. It is with this in mind that the Panel has recommended the additional safeguards set out above.

As a final means of endeavouring to ensure, to the greatest extent practicable, that minors are adequately protected, the Panel recommends that if an application is made for a preventative detention order for a minor, the Supreme Court be required to be reasonably satisfied before making such an order or imposing any conditions that those requirements or conditions will be met. The burden of proof in relation to that matter must rest with the applicant for the order and the applicant should be required to provide evidence to the court sufficient, in the eyes of the court, to discharge that burden.

### **6.2.3 Post-release**

If a minor is detained under the modified preventative detention regime, the Panel notes that there will invariably be a need for authorities to consider what additional measures may be required to deal with that person following their release from custody. While it is entirely possible that the individual may be charged with terrorism related or other offences, this may not occur. Regardless, the individual may continue to present as a potential security concern.

To the Panel's mind, there are two issues here. One is to ensure minors are appropriately transitioned from detention back into the community. Law enforcement authorities will need to work with the person's family and other specialists to ensure that this transition is appropriately supported.

A second issue is whether the person remains a threat to the safety of the community. In such cases, the community's long-term interests are best served by appropriate engagement with the person to mitigate that threat following their release from preventative detention. Chapters 1, 2 and 4 outline the tools available for intervention (both voluntary and mandatory).

### **6.2.4 COAG resolution on pre-charge detention**

The Panel notes the recent Council of Australian Governments (COAG) resolution to 'enhance' the existing Commonwealth pre-charge detention regime under Part 1C of the *Crimes Act 1914* (Cth).<sup>308</sup> The Panel welcomes this resolution, reiterating its statement in Chapter 3 of Report 1 that this is a critical component of Australia's counter-terrorism measures and that collaborative efforts between governments at all levels are essential to the development of an effective legislative framework. The Panel notes, however, that in its discussions on changes to Part 1C, COAG appears not to have expressly considered the issue of the minimum age for persons who may be subject to the scheme. The Panel did not contemplate the extension of Victoria's preventative detention scheme to minors younger than the age of 14 years.

<sup>308</sup> Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism – Communiqué* (Canberra, 5 October 2017) <<https://www.coag.gov.au/sites/default/files/communiqué/special-communicé-20171005.pdf>>.

## CHAPTER 7

# POST-SENTENCE SUPERVISION OF HIGH RISK TERRORIST OFFENDERS

### Recommendation 25

That the Victorian Government seek national agreement for a post-sentence supervision scheme for high risk terrorist offenders who pose an unacceptable risk to the community if released without supervision. This could be by:

- establishing a specific post-sentence supervision scheme that is complementary to the national post-sentence detention scheme; or
- reforming the current Commonwealth control order laws so that those laws are complementary to the national post-sentence detention scheme.

### Recommendation 26

That if national agreement in line with Recommendation 25 is not possible, the Victorian Government consider extending the existing scheme for the post-sentence supervision and detention of serious sex offenders to provide for the post-sentence supervision of high risk terrorist offenders.

## 7.1 BACKGROUND

### 7.1.1 Introduction

Australia-wide, 39 people have been convicted of terrorism related offences since 2001. Twenty-one of these individuals are presently serving prison sentences for terrorism offences, one of whom is a juvenile. A further 43 are currently before the courts on terrorism related offences, six of whom are juveniles.

In Victoria, police have charged 39 people with terrorism offences since September 2001, 19 of whom have been convicted and seven of whom are currently serving a term of imprisonment.

Current numbers are small but there is an identified and demonstrable need to address the threat posed by convicted terrorists who have completed their term of imprisonment but remain a very real threat to the community.

What follows is a brief outline of relevant laws and developments to address this threat.

### 7.1.2 A national post-sentence detention scheme for high risk terrorist offenders

In December 2015, as part of ongoing efforts at a national level to address terrorism, the Council of Australian Governments (COAG) agreed to a nationally consistent post-sentence preventative detention scheme for high risk terrorist offenders (HRTD scheme).

In 2016, the HRTTO scheme was enacted by the insertion of Division 105A into the *Criminal Code Act 1995* (Cth) (*Criminal Code*).<sup>309</sup> The laws, which commenced on 7 June 2017, provide for the continued detention of high risk terrorist offenders deemed an unacceptable risk to the community if released at the end of their custodial sentence.

Under the HRTTO scheme, the Commonwealth Attorney-General may apply to the Supreme Court of a state or territory for a continuing detention order in relation to a 'terrorist offender'. A 'terrorist offender' is a person who has been convicted of a defined set of terrorism related offences and who is either serving a sentence of imprisonment or is already detained under a continuing detention order. The defined set of terrorism related offences includes:

- an offence against Subdivision A of Division 72 of the *Criminal Code* (international terrorist activities using explosive or lethal devices);
- a serious Part 5.3 offence – an offence against Part 5.3 of the *Criminal Code* (terrorism), the maximum penalty for which is seven or more years of imprisonment; or
- an offence against Part 5.5 of the *Criminal Code* (foreign incursions and recruitment).

The application for a continuing detention order may not be made more than 12 months before the end of the offender's sentence of imprisonment or, if the offender is already subject to a continuing detention order, 12 months before the end of the period of that order. A single continuing detention order may not be made for a period that is longer than three years but successive orders may be made in respect of the same individual.

A court may make a continuing detention order if:

- satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community; and
- satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.<sup>310</sup>

The court has the power to appoint one or more relevant experts if it considers that doing so is likely to materially assist it in deciding whether to make a continuing detention order. If a relevant expert is appointed, that expert must:

- conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if released into the community; and
- provide a report of that assessment to the court, the Commonwealth Attorney-General and the offender.

In considering whether to make an order, the court must have regard to a range of matters, including:

- the safety and protection of the community;
- any report received from a relevant expert in relation to the offender, and the level of the offender's participation in any such assessment; and
- any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation.<sup>311</sup>

A continuing detention order commits a terrorist offender to detention in a prison.<sup>312</sup> The period of detention must not be for more than three years and must be limited to the period reasonably necessary to prevent the unacceptable risk. Orders must be reviewed every 12 months and the scheme does not apply to minors.

<sup>309</sup> See *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

<sup>310</sup> *Criminal Code Act 1995* (Cth) sch 1 s 105A.7(1).

<sup>311</sup> *Ibid* s 105A.8.

<sup>312</sup> The word 'prison' is defined in section 105A.2 of the *Criminal Code Act 1995* (Cth) to include 'any gaol, lock-up or other place of detention'.



Implementation of the HRTTO scheme remains a work-in-progress. Outstanding matters for resolution include accommodation arrangements for individuals detained under the scheme (who will be accommodated in state and territory correctional facilities), any necessary further referral of powers by the states and territories to the Commonwealth, cost sharing arrangements between the states and territories and the Commonwealth and the development of appropriate risk assessment and clinical tools to support the scheme.

At present, the earliest an application for a continuing detention order may be made is mid-2018, and the earliest an order could commence is mid-2019.

### **7.1.3 Victoria's Serious Sex Offenders (Detention and Supervision) Act 2009**

A majority of states and territories manage particularly dangerous offenders by way of post-sentence controls in the form of continuing post-sentence supervision or detention.<sup>313</sup> In Victoria, the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (SSODSA) provides for the post-sentence supervision or detention of serious sex offenders.

The main purpose of the SSODSA is to:

*enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who present an unacceptable risk of harm to the community to be subject to ongoing detention or supervision.*<sup>314</sup>

The SSODSA's secondary purpose is to '*facilitate the treatment and rehabilitation of...offenders*'.<sup>315</sup>

Relevantly, the scheme provides for the post-sentence supervision of a serious sex offender if the County Court or the Supreme Court is satisfied that the offender, who must be serving a custodial sentence for a 'relevant offence', poses an unacceptable risk of committing such an offence if a supervision order is not made. The court must be satisfied by acceptable, cogent evidence and to a high degree of probability. A 'relevant offence' is any of the serious sexual offences contained in Schedule 1 to the SSODSA.

A supervision order may not be made in respect of an offender who is under the age of 18, or for a period longer than 15 years. An order is subject to review at least every three years.

If a supervision order is made, certain 'core conditions' apply, including that the offender:

- not commit a 'relevant offence' or a violent offence;
- not engage in conduct that threatens the safety of any person; and
- report to, and receive visits from, the Secretary of the Department of Justice and Regulation or any person nominated by the Secretary.

In addition to the core conditions, the court must consider imposing a range of other conditions covering a wide spectrum of matters, including:

- where the offender may reside;
- times at which the offender must be at his or her place of residence;
- places or areas that the offender must not visit or may only visit at specified times;
- treatment or rehabilitation programs or activities that the offender must attend and participate in;

<sup>313</sup> *Crimes (High Risk Offenders) Act 2006* (NSW); *Criminal Law (High Risk Offenders) Act 2015* (SA); *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act 2013* (NT).

<sup>314</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 1(1) (SSODSA).

<sup>315</sup> *Ibid* s 1(2).



- persons or classes of persons with whom the offender must not have contact; and
- forms of monitoring (including electronic monitoring).

A court may also impose any other conditions that it considers appropriate to reduce the risk of offending or to provide for the reasonable concerns of victims.

In 2015, the Victorian Government commissioned a review of the SSODSA following the murder of Ms Masa Vukotic by Sean Price, who was on bail and subject to a supervision order under the SSODSA at the time of the murder.<sup>316</sup>

A key recommendation of the review was that the post-sentence supervision and detention laws contained in the SSODSA should be extended to apply to serious violent offenders such as Sean Price in order that the scheme 'operate to reduce the number of victims of the most serious interpersonal harm caused by acts of violence, whether sexual or not'.<sup>317</sup>

The Victorian Government agreed, in-principle, to implement all 35 review recommendations, including that relating to the extension of the scheme to serious violent offenders. These recommendations are being implemented in two parts. The Serious Sex Offenders (Detention and Supervision) Amendment (Governance) Bill 2017 (Vic) will implement the recommendations relating to governance of the post-sentence supervision and detention scheme. Reforms include the creation of a new statutory body to oversee the administration of the post-sentence supervision and detention scheme and the establishment of multi-agency panels with legislative responsibilities to coordinate service delivery and share offender information. The Bill is currently before Parliament.

The Panel understands that the second tranche of proposed changes will result in the extension of the scheme to serious violent offenders, being individuals who have been convicted and sentenced in the higher courts for particularly serious violent offences, including murder and manslaughter.

The new scheme is anticipated to commence in mid-to-late 2018.

The Panel notes that the proposed definition of a 'serious violent offender' under the expanded scheme will not capture individuals convicted of a terrorism related offence that is not a serious violent offence. Offences not captured include directing the activities of a terrorist organisation or providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act. Nor will it necessarily capture individuals who have been convicted of an offence that is not a serious violent offence but who have been 'radicalised' before entering prison or during their term of imprisonment and, as a result, may pose an unacceptable risk to public safety at the time that their sentence is completed.

#### **7.1.4 South Australia's Statutes Amendment (Terror Suspect Detention) Bill 2017**

The Statutes Amendment (Terror Suspect Detention) Bill 2017 (SA) is currently before the South Australian Parliament. The Bill amends four Acts relating to the treatment of 'terror suspects'. Relevantly, the Bill will (if passed) amend the *Criminal Law (High Risk Offenders) Act 2015* (SA) to create a new state-based post-sentence supervision and detention scheme for 'terror suspects' serving a sentence of imprisonment, being any person:

- charged with a terrorist offence;
- who has ever been convicted of a terrorist offence; or
- who is the subject of a terrorism notification.

<sup>316</sup> Complex Adult Victim Sex Offender Management Review Panel, *Review of the Reviews of Sean Price by the Department of Justice and Regulation and Chief Psychiatrist* (November 2015) Corrections Victoria <<http://www.corrections.vic.gov.au/utility/publications/manuals+and+statistics/review+of+post-sentence+supervision+scheme+for+serious+sex+offenders>>.

<sup>317</sup> Ibid 61.

The definition of a ‘terrorist offence’ includes all of the offences incorporated in the HRTTO scheme, together with any prescribed offence. A ‘terrorism notification’ is a notification to the government by a terrorism intelligence authority relating to persons suspected of terrorist activities or of supporting or otherwise being involved with terrorist activities.

## 7.2 ISSUES

In common with other jurisdictions that have post-sentence supervision and detention laws, Victoria’s SSODSA has two levels of protection, being supervision and detention. If a court is not satisfied that it is necessary to make a detention order to address the unacceptable risk posed by an offender, it may make a supervision order as a less onerous means of addressing that risk.

As set out above, the HRTTO scheme confers on the court a power to make a detention order only; there is no complementary power to make a supervision order if a detention order is not deemed necessary.

In the Panel’s opinion, the lack of any specifically designed post-sentence supervision scheme for high risk terrorist offenders constitutes a ‘gap’ in the counter-terrorism statutory framework. One benefit of filling this gap is that the greater freedoms afforded to a person subject to a supervision order would offer that person increased scope to demonstrate their rehabilitation in ways that would not be possible if the person was subject to a regime of continued detention.

## 7.3 DISCUSSION

Viewed in light of the established post-sentence supervision and detention schemes for managing the highest risk offenders at a state and territory level, the creation of the HRTTO scheme without a complementary post-sentence supervision component appears to be an anomaly. To reiterate, if a court is not satisfied that a detention order is warranted, the alternative and less onerous option of a supervision order is not available.

While preventative detention orders and control orders present as possible alternative mechanisms for addressing the risk posed by an offender, there are drawbacks to the use of either in this way. Preventative detention orders have a very narrow focus. They may only be made if a court is satisfied on reasonable grounds that the order would substantially assist in preventing an imminent terrorist act that is expected to occur sometime in the next 14 days, or is necessary to preserve evidence of a terrorist act that has occurred in the last 28 days. There are also strict constraints on the duration of any period of detention. In the Panel’s view, they are not a viable means of addressing a real and ongoing risk.

Control orders were not conceived to manage the risk to the community that may be posed by a person convicted of terrorist related offences who has served a term of imprisonment. Their purpose is to:

*allow obligations, prohibitions and restrictions to be imposed on a person...for one or more of the following purposes:*

- (a) protecting the public from a terrorist act;*
- (b) preventing the provision of support for or the facilitation of a terrorist act;*
- (c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>318</sup>*

<sup>318</sup> *Criminal Code Act 1995* (Cth) sch 1 s 104.1.

They are calibrated to address a particular threat or to respond to a specific act rather than as a means of protecting the community from the more generalised threat posed by a convicted terrorist offender currently serving a custodial sentence. This is reflected in the range of restrictions and conditions that may be applied. Although the list of obligations, prohibitions and restrictions available under the control order regime is formidable, a comparison with those available under the current SSODSA reveals some potential 'gaps'. Control orders do not, for instance, permit a court to impose conditions relating to the types of employment or behaviour in which a person may engage.

The SSODSA also provides a much greater level of flexibility by conferring on the court a discretion to impose any other condition it considers appropriate to reduce the risk of re-offending or to provide for the reasonable concerns of the victim or victims of the offender in relation to their own safety and welfare.

In addition, although there is no limit to the number of control orders that may be made in relation to the same individual, a single control order may only be made for a maximum of 12 months, suggesting that they are better suited to serving as a short to medium-term tool for managing risk.

Further, while the HRTTO scheme provides for an application to be considered by a state or territory Supreme Court, an application for a control order — or an interim control order, in the first instance — may only be made to the Federal Court. If an application for a continuing detention order is made under the HRTTO scheme and that application is unsuccessful, authorities will need to make an application for a control order in a different jurisdiction and applying a different threshold. In addition, the *Criminal Code* does not expressly permit the making of an application for a control order while a person is serving a term of imprisonment, and in the absence of this express authority, doubt has been expressed as to whether an application for a control order may even be made under those circumstances. It is, in the Panel's view, not an ideal situation.

While reform of the existing control order scheme is an option, and acknowledging the potential for overlap with that scheme, the Panel considers that the enactment of post-sentence supervision laws at a Commonwealth level to complement the HRTTO scheme is probably the most effective means of mitigating the risk posed by high risk terrorist offenders. This approach would result in a fully integrated, comprehensive and cohesive national scheme tailored to address the threat of convicted terrorists who retain the motivation and means to do harm even after serving out their term of imprisonment.

Under such a scheme, if an application is made for a continuing detention order and the court is not satisfied that the making of such an order is necessary to address the unacceptable risk posed by the offender, it would have the option of making a supervision order. Conversely, if an offender was subject to a supervision order and breached that order to the extent that an application for a detention order was considered appropriate, such an application would be possible.

Consistent with the content of the HRTTO scheme, the Panel considers that the following matters should be core components of a national post-sentence supervision scheme:

- community safety as the paramount or primary purpose of the scheme and the treatment and rehabilitation of the offender as a secondary purpose;
- that the scheme only apply to offenders of or over the age of 18 years who pose an unacceptable risk of committing a serious Part 5.3 offence if released into the community at the end of their sentence;
- that the court be required, before making a supervision order, to have regard to expert evidence as to the risk posed by the offender;
- that there be scope to require that an offender reside at a particular place, such as at a 'residential facility' within the meaning of the post-sentence supervision and detention scheme under the SSODSA;

- that a ‘serious terrorist offence’ be defined to mean:
  - an offence against Division 72 Subdivision A of the *Criminal Code* (international terrorist activities using explosive or lethal devices);
  - a terrorism offence against Part 5.3 of the *Criminal Code* where the maximum penalty is 7 or more years imprisonment (terrorism);
  - an offence against Part 5.5 of the *Criminal Code* (foreign incursions and recruitment), except an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements);
  - an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), except an offence against paragraph 9(1)(b) or (c) of that Act (publishing recruitment advertisements);
- that an offender have the right to appeal the making of an order;
- that any order be subject to periodic review by the court that made the order and that the offender have the right to apply for an additional review of an order by the court that made the order but only if the court is satisfied that there is new information that would justify a review or that a review would be in the interests of justice;
- that an order remain in force for a maximum of 15 years;
- a requirement for the Commonwealth Attorney-General to cause an annual report to be prepared regarding the operation of the provisions; and
- that the provisions be subject to a 10 year sunset provision.

As an alternative national option, appropriate changes to the HRTTO scheme and the control order regime are recommended to:

- better integrate these two separate schemes; and
- ensure that control orders allow a court adequate flexibility to apply the full range of appropriate conditions, restrictions and prohibitions etc. necessary to address the risk posed by a high risk terrorist offender.

A final Victorian option is to further expand the Victorian post-sentence supervision and detention scheme to any person who is a ‘serious terrorist offender’, being a person who:

- is of or over the age of 18 years;
- is serving a custodial sentence in Victoria for a ‘serious terrorist offence’, as that term is defined under the HRTTO scheme; and
- presents as an unacceptable risk if released into the community unsupervised.

If the SSODSA scheme is extended in this way, and it is considered that a serious terrorist offender should be subject to a post-sentence detention order, rather than a supervision order, it is suggested that an application for that order should be made under the HRTTO scheme (rather than extending the Victorian post-sentence supervision and detention scheme under the SSODSA to high risk terrorist offenders).

The Panel acknowledges that the combination of a state-based post-sentence supervision scheme and a Commonwealth post-sentence detention scheme for high risk terrorist offenders would be an awkward one. It is for this reason that the Panel’s strong preference is for an integrated post-sentence supervision and detention scheme at the Commonwealth level or for a national agreement to reform Commonwealth control order laws and better harmonise those laws with the HRTTO scheme. If a state-based post-sentence supervision scheme is implemented, it will be necessary for the government to work through the complex legal, procedural and practical details of how the two sets of laws can work together.

A key component of this work would be ensuring that effective information sharing arrangements are put in place between relevant Commonwealth authorities and state entities including the Department of Justice and Regulation and the Adult Parole Board, which will have responsibilities for the management of an offender subject to a post-sentence supervision order.

The Panel acknowledges that there would also be the need for the state and Commonwealth governments to work together if an offender might potentially be subject to both a post-sentence supervision order and a control order. In that situation, section 109 of the *Constitution* would render inoperative any state-based post-sentence supervision scheme to the extent that it altered, impaired or detracted from the operation of the Commonwealth control order laws.

The Panel is confident, however, that if a situation arose in which the two schemes could operate with respect to the same offender, then our two levels of government would cooperate to most effectively manage that offender using whichever means best achieved that end.

The Panel also acknowledges that the creation of a state-based post-sentence supervision scheme alongside the HRTTO scheme might make it less likely that an application for a post-sentence detention order under the HRTTO scheme would be successful. The Panel notes, however, that the ultimate objective of the HRTTO scheme and any state-based post-sentence supervision scheme is to protect the community from the unacceptable risk that a particular offender may pose. If that risk can be addressed by means of post-sentence supervision rather than detention then that, in the Panel's view, is the appropriate outcome. Offenders who have served their full sentence should not be subject to a continued period of detention unless that extreme measure is absolutely necessary.

Further, and as discussed above, control orders already present as a less restrictive means of addressing an unacceptable risk. This is expressly noted in the Commonwealth HRTTO legislation. To the Panel's mind, the issue at present is that if a court declines to make a detention order under the HRTTO scheme, the problems associated with the application of a control order in those circumstances mean that there is no seamless means by which the court may draw upon a less onerous and appropriately targeted alternative. This is in contrast to the two-tiered protective regime provided for in the SSODSA that ensures that if the court is not satisfied that a detention order is necessary to address the unacceptable risk, it may make a supervision order instead.

The Panel is mindful of the gravity of recommending that post-sentence supervision laws apply to the highest risk terrorist offenders, and of the complexities involved. These include the human rights implications and inevitable and significant cost and resource implications for government. As discussed above, the post-sentence supervision and detention scheme under the SSODSA is currently being expanded to extend to serious violent offenders. This process is a costly and resource intensive exercise. The further expansion of this scheme to serious terrorist offenders would present additional challenges for government. These include the need to 'house' offenders subject to a supervision order, to develop appropriate therapeutic and rehabilitative treatment tools for offenders, and to ensure that the most recalcitrant offenders are subject to the necessary level of supervision and control. The Panel does not underestimate the difficulties and costs involved but is mindful of the overriding need to ensure that counter-terrorism laws are as effective as possible.

As has been stated elsewhere:

*[p]ost-sentence detention laws raise complex ethical, moral and legal questions about the lengths to which we as a community are prepared to go to endeavour to protect ourselves from the risks posed by dangerous offenders.*<sup>319</sup>

<sup>319</sup> Bernadette McSherry, 'High-Risk Offenders: Continued Detention and Supervision Options Community Issue Paper' (Issues Paper, Sentencing Advisory Council Victoria, 25 August 2006) 9.

The Panel acknowledges this difficult balancing exercise in which the rights of the community to live free from violence must be balanced against the rights of offenders to be free from further restrictions once they have completed their term of imprisonment. However, post-sentence supervision and detention of certain serious, high risk offenders is now an established and worthwhile mechanism to safeguard the community from certain categories of particularly high risk offenders. And in the current environment, characterised by a heightened risk of terrorism and a need to take action to protect the community, the Panel is persuaded that its extension to the highest risk category of convicted terrorists is warranted.

This is particularly the case in the context of recent national agreement for the introduction of an assumption against parole for terrorist offenders, dealt with in Chapter 4 of Report 1. Adequate post-sentence controls, whether in the form of post-sentence supervision or detention will play a particularly critical role where the managed transitional period ordinarily provided by parole will not be available.

The Panel's view is that the laws must remain protective, rather than punitive in nature, and that their application must be limited to the very highest risk offenders who pose a real, ongoing and very serious threat to community safety.

Risk assessment in relation to terrorism and violent extremism has been described as 'in its infancy',<sup>320</sup> however, and it has also been stated that '[c]urrently there are no validated tools that specifically assess risk for terrorism'.<sup>321</sup> This is a significant challenge to the implementation of a post-sentence supervision scheme for high risk terrorist offenders. An assessment of this nature is clearly critical to the operation of the scheme and appropriate clinical tools will also be required to ensure that offenders are properly managed (including being provided with all reasonable opportunities to demonstrate that they no longer present an unacceptable risk) during the course of their incarceration, and during the time that they are subject to the order. The 2015 review of the SSODSA noted that 'earlier assessment and treatment could result in more effective interventions under sentence and reduce the need to apply for a post-sentence order, or reduce the duration of the order required'.<sup>322</sup>

As discussed in Chapter 1, the Panel considers that the 'structured professional judgement' approach offers promise. This approach, which might be described as an amalgam of the alternatives of unstructured clinical judgement and actuarial assessment, draws upon an evidence base of dynamic risk factors and warning signs that, used in a structured way, can inform professional judgement about violent extremist risk. Two examples of this approach in an Australian context are [REDACTED] tools.

The Panel's understanding is that 'VERA 2R' ('Violent Extremism Risk Assessment Version 2 Revised'), a further developed version of the VERA instrument, has been identified as suitable to support the newly established HRTS scheme. Work is ongoing at a national level to deliver training in the use of VERA 2R and to establish a 'community of practice' in relation to its application.

320 Geoff Dean and Graeme Pettet, 'The 3 R's of risk assessment for violent extremism' (2017) 19(2) *Journal of Forensic Practice* 91, 91.

321 Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Criminal Law Journal* 179, 169.

322 Complex Adult Victim Sex Offender Management Review Panel, *Review of the Reviews of Sean Price by the Department of Justice and Regulation and Chief Psychiatrist* (November 2015) Corrections Victoria, 150 <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/review+of+post-sentence+supervision+scheme+for+serious+sex+offenders>>.

While VERA 2R may constitute the most suitable available instrument for assessing risk and managing post-sentence high risk terrorist offenders, the Panel understands that it has only been developed relatively recently and lacks a strong and validated body of evidence as to its efficacy in this context. It is suggested that the application of VERA 2R to post-sentence supervision will, as contemplated under the HRTTO scheme, require the use of other psychometric tools on a case-by-case basis. Expert clinical judgement and appropriate interventions as part of an individual management plan for each offender will also be essential. This will be especially the case if the instrument is sought to be used to assist in providing 'cogent evidence'<sup>323</sup> to a court of the unacceptable risk posed by an offender.

The Panel also notes that ongoing review and assessment of VERA 2R will be critical to strengthening its capability and credibility. The importance of this work is obvious. The clinically reliable assessment of risk must be continually improved upon to avoid the risk of unjustly restricting the liberty of a person who poses no risk or no more than an acceptable risk, being one that a liberal democracy should be prepared to accept.

While this is clearly a key area of risk, the Panel's view is that the work undertaken to support the proposed HRTTO scheme provides a solid foundation for the effective functioning of a complementary post-sentence supervision scheme.

As suggested in relation to the proposed support and engagement order the subject of Chapter 4, the Panel recommends regular evaluations of the post-sentence supervision scheme — in whatever form it is enacted — to assess its effectiveness. At least in the early years of its operation, these evaluations should encompass a review of the legislation and any clinical tools used to assess risk and manage offenders.

The Panel notes, in closing, that:

- the Independent National Security Legislation Monitor (INSLM) is currently reviewing the operation of control orders under Division 104 of the *Criminal Code* and is examining as part of this review the interoperability of control orders and continuing detention orders under the HRTTO scheme; the INSLM's report is due by 7 September 2017 (but can be tabled up to 15 sitting days after the date on which it is received by the Prime Minister); and
- the Commonwealth Parliamentary Joint Committee on Intelligence and Security is also reviewing the control order scheme, and its report is due by 7 March 2018.

The outcome of both reports will further inform and influence thinking in this area.

\*This footnote was redacted on 9 April 2018 based on advice from Victoria Police.

<sup>323</sup> Under the existing post-sentence supervision scheme contained in the SSODSA, the court is required to be satisfied by 'acceptable, cogent evidence' and 'to a high degree of probability' that the evidence presented is of 'sufficient weight' such that the offender poses an unacceptable risk if the supervision order is not made (s 9(2)).

## APPENDIX CONSULTATION LIST

**Note: this is a list of those consulted in relation to matters in Report 1 and Report 2.**

Adult Parole Board of Victoria

Commission for Children and Young People

Corrections Victoria

Department of Health and Human Services, Victoria

Department of Education and Training, Victoria

Department of Economic Development, Jobs, Transport and Resources, Victoria

Department of Justice and Regulation, Victoria

Emergency Management Victoria

Victoria Police

Youth Parole Board Victoria

[The Police Association](#)

New South Wales Police

Queensland Police

[Commonwealth Attorney-General's Department](#)

[Commonwealth Department of the Prime Minister and Cabinet](#)

[Commonwealth Director of Public Prosecutions](#)

Australian Federal Police

Australian Security Intelligence Organisation

[The Hon James Merlino MP, Minister for Education](#)

[The Hon Jenny Mikakos MP, Minister for Youth Affairs](#)

[The Hon Lisa Neville MP, Minister for Police](#)

[The Hon Martin Pakula MP, Attorney-General](#)

[The Hon Gayle Tierney MP, Minister for Corrections](#)

[The Hon Robin Scott MP, Minister for Multicultural Affairs](#)

Children's Court of Victoria

Magistrates' Court of Victoria



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John Champion SC, Director of Public Prosecutions

Dr Ian Freckelton SC

The Hon David Jones AM

Richard Maidment QC

Brendan Murphy QC, Public Interest Monitor

Richard Niall QC, Solicitor-General

Robert Stary and Jessie Smith, Stary Norton Halphen

Bret Walker SC

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Leila Alloush, Victorian Arabic Social Services

Penny Armytage

Dr Kate Barrelle, STREAT

Professor Greg Barton, Deakin University

Dr Bulent Hass Dellal AO

Expert Reference Group to the Research Institute on Social Cohesion

Abdi Aziz Farah, Himilo Community Connect

Professor Michelle Grossman, Deakin University

Associate Professor Peter Lentini, Monash University

Professor James Ogloff AM

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