
Post-sentence continued detention of high-risk terrorist offenders in Australia

Charisse Smith and Mark Nolan*

In December 2015, the Council of Australian Governments agreed to implement a nationally-consistent post-sentence preventative detention regime for convicted terrorists. This scheme will allow for the continued imprisonment of high-risk terrorist offenders in a similar way as the existing sex offender and violent offender continuing detention order regimes. This article will assess whether the introduction of a continuing detention order regime for terrorism is possible and defensible, based on the requirements and justifications provided for the sex offender and violent offender regimes. Specifically, it will be considered whether psychometric risk assessment for terrorist offenders can validly estimate which offenders are at a high-risk of reoffending and pose a threat to the community and whether the introduction of an effective rehabilitation program for terrorism is possible.

INTRODUCTION

Since the terrorist attack in the United States on 11 September 2001, there have been extensive changes to Australia's national counterterrorism laws. In 2002, the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) amended the *Criminal Code* (Cth) to define a terrorist act as "advancing a political, religious or ideological cause and coercing or influencing by intimidation an Australian or foreign government or intimidating the public or a section of the public".¹ The pre-emption of terrorist acts also became the focus of the legislation, where a person can be charged with preparatory, group-based and financing offences whether or not a terrorist act eventuates.² The purpose of the offences

is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act ... the legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community.³

As of February 2015, 45 persons, all of them men and almost all identifying as Muslim, have been charged under Australia's terrorism laws for preparatory conduct and 26 have been convicted.⁴ A number of the offenders have already been released, and others are nearing the completion of their sentences.⁵

The consequences of releasing a terrorist offender who remains radicalised (defined as a commitment to an extremist, political or religious ideology)⁶ is a real threat to counterterrorism efforts. For example, in January 2015, released French terrorist offender Cherif Kouachi perpetrated

* Charisse Smith: LLB(Hons), BSc(Psychology). Mark Nolan: BSc(Hons), LLB, MAsPacSt, PhD, SFHEA, Associate Professor, ANU College of Law. This article is based on an Honours thesis by Charisse Smith, submitted to the ANU College of Law in Semester 2, 2015. The authors thank Professor Clive Williams, Vesna Shields and Stephen Smith for their comments and feedback.

¹ *Criminal Code* (Cth) s 100.1.

² *Criminal Code* (Cth) Divs 101-103.

³ *R v Elomar* (2010) 264 ALR 759; [2010] NSWSC 10, [79].

⁴ Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (UNSW Press, 2015) 96.

⁵ Such as Belal Khazaal in 2016 and Abdul Benbrika in 2020: Lynch, McGarrity and Williams, n 4, 97-98.

⁶ John Horgan, *Walking Away From Terrorism: Accounts of Disengagement from Radical and Extremist Movements* (Routledge, 2009) 152.

Smith and Nolan

the Charlie Hebdo attack in Paris, where 11 people were killed and 11 more were injured.⁷ An Australian example of a former convict returning to terrorism is Khaled Sharrouf, who was imprisoned following a failed terrorist plot in 2005. In 2013, he used his brother's passport to leave Australia and has resurfaced in Iraq and Syria, fighting with the terrorist group, Islamic State. Two of the offenders who were plotting with Sharrouf, Ezzit Raad and Amer Haddara, have also travelled to fight in Syria and Lebanon, where they are reported to be trying to recruit Australian fighters.⁸

In response to the potential danger of releasing radicalised offenders back into society, Prime Minister Malcolm Turnbull announced on 11 December 2015 that the Council of Australian Governments has tasked the Australia–New Zealand Counter-terrorism Committee “to develop a nationally consistent post-sentence preventative detention scheme to enable a continuing period of imprisonment for high risk terrorist offenders”.⁹ This would allow for the continued detention of convicted terrorists at the expiration of their sentence if they continue to pose a threat to national security. Australia currently has continuing detention order (CDO) regimes for sex offenders and violent offenders that will likely be used as a model for a CDO regime for terrorist offenders.

This article provides a review of the current preventative counterterrorism frameworks. It then considers the requirements of and justifications for similar sex offender and violent offender CDO regimes, arguing that effective psychometric testing and prison-based rehabilitation programs are necessary to justify a CDO regime for terrorist offenders. Ultimately, it will be concluded that as there are no terrorism-specific risk assessment tools that have been validated to date, the underlying justifications and aims of a CDO regime are compromised. Rehabilitation programs could be combined with other preventative counterterrorism measures to attempt to meet the potential threat that released offenders possibly pose. However, for any convicted terrorists who remain radicalised upon release this may not be a sufficient solution.

PREVENTATIVE DETENTION

Preventative detention and counterterrorism

There are a series of existing counterterrorism laws that could be used to assist the prevention of terrorist acts by released offenders, including Control Orders (COs), Preventative Detention Orders (PDOs) and the detention for questioning powers of the Australian Federal Police (AFP) and Australian Security Intelligence Organisation (ASIO).

In 2005, COs and PDOs were introduced into the Commonwealth *Criminal Code* to “enable Australia better to deter and prevent potential acts of terrorism”.¹⁰ COs can be used to impose obligations, prohibitions and restrictions on an individual's movement, association and communication for up to 12 months.¹¹ For example, an order might restrict an individual from being at specific places or communicating with specific people, or require an individual to wear a tracking device or meet a curfew.¹² COs require a court to be satisfied on a balance of probabilities that the making of an order would substantially assist in preventing a terrorist act, or the provision of support for a terrorist act,

⁷ Clarke Jones, “Prison Time Can Add to the Terror Threat”, *ABC* (online), 14 January 2015 <<http://www.abc.net.au/news/2015-01-14/jones-prison-radicalisation-only-adds-to-the-terror-threat/6014568>>.

⁸ Alex White and Mark Dunn, “Freed Terrorists from Cell Led by Abdul Nacer Benbrika Could Still Be a Threat”, *Herald Sun* (online), 20 June 2014 <<http://www.heraldsun.com.au/news/law-order/freed-terrorists-from-cell-led-by-abdul-nacer-benbrika-could-still-be-a-threat/story>>.

⁹ Council of Australian Governments, *Council of Australian Governments Communiqué: Countering Violent Extremism* (Communiqué, 11 December 2015) 3.

¹⁰ *Anti-Terrorism (No 2) Act 2005* (Cth); Council of Australian Governments, *Council of Australian Governments Communiqué: Special Meeting on Counter-Terrorism* (Communiqué, 27 September 2005) 3.

¹¹ *Criminal Code* (Cth) Div 104; Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005* (Cth) cl 19.

¹² Anthony Whealy, “Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis” (Paper presented at the British Institute of International and Comparative Law, London, April 2010) 8.

Post-sentence continued detention of high-risk terrorist offenders in Australia

and that the person has previously been involved with, or convicted of, terrorism. The court must also be satisfied that the order is reasonably necessary and appropriate.¹³ Seven COs have been issued between their introduction and November 2015.¹⁴

PDOs are used to detain individuals for up to 48 hours in order to prevent a terrorist act, or preserve evidence relating to a terrorist act, which has occurred in the last 28 days.¹⁵ An issuing authority may make a PDO if satisfied that the individual will engage in a terrorist act, or possesses a thing or has done an act in preparation for a terrorist attack, and that the order would substantially assist in preventing a terrorist attack and the detention is reasonably necessary.¹⁶ Each state and territory has enacted analogous PDO provisions that allow detention for up to 14 days.¹⁷ Four PDOs were issued between September 2014 and October 2015.¹⁸ Prior to this, the regimes had not been used.

There are also two sets of Commonwealth provisions that allow individuals to be detained for questioning. The first is the *Crimes Act 1914* (Cth), under which the AFP can detain terrorist suspects for questioning for up to 24 hours, excluding “dead time” (periods where questioning is suspended, such as while the person has meal breaks or sleeps).¹⁹ The broad scope of what “dead time” can include allows for extended periods of detention. There is now a seven-day limit on “dead time”,²⁰ following the controversial case of Dr Haneef, who was detained and questioned for 12 days before being charged.²¹ Further, under the *Australian Security Intelligence Organisation Act 1979* (Cth) an individual can be detained for up to seven days under a warrant if the individual is able to assist in the collection of intelligence that is important in relation to a terrorism offence.²²

Continuing detention orders

A CDO is a form of post-sentence preventative detention where an offender continues to be detained in prison beyond their original sentence on the basis that they have not rehabilitated and, if released, it is likely the offender will commit further offences of a similar nature. A CDO regime is not currently available for terrorist offenders in Australia, however, regimes have been introduced for sex offenders and violent offenders. A CDO regime exists for sex offenders in NSW, the Northern Territory, Queensland, South Australia, Victoria and Western Australia. In NSW, there is also a CDO regime for violent offenders.²³

The requirements for issuing a CDO under the various laws are similar, and require an application to be made to the Supreme Court, who can make an order if satisfied by “cogent” evidence that the offender poses “an unacceptable risk of offending” to a “high degree of probability”.²⁴ A high degree of probability has been interpreted by the courts to be “more than a finding on the balance of

¹³ *Criminal Code* (Cth) s 104.4(1).

¹⁴ Explanatory Memorandum, *Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (Cth) cl 21.

¹⁵ *Criminal Code* (Cth) Div 105.

¹⁶ *Criminal Code* (Cth) s 105.4(4).

¹⁷ See, eg *Terrorism (Police Powers) Act 2002* (NSW).

¹⁸ Anthony Dowsley and James Dowling, “Terror Accused Harun Causevic Will be Forced to Wear Tracking Device”, *Herald Sun* (online), 17 September 2015 <<http://www.heraldsun.com.au/news/victoria/terror-accused-harun-causevic-will-be-forced-to-wear-tracking-device/story-fnpp4dl6-1227531129715>>; Svetlana Tyulkina and George Williams, “Preventative Detention Orders in Australia” (2015) 38 *UNSW Law Journal* 738, 749.

¹⁹ *Crimes Act 1914* (Cth) Pt 1C Div 2.

²⁰ *Crimes Act 1914* (Cth) ss 23DB(9)(m), (11), 23DD.

²¹ See generally George Williams, “Anti-Terror Legislation in Australia and New Zealand” in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge, 2nd ed, 2012) 541, 553-554.

²² *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34E, 34G.

²³ *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); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

²⁴ See, eg *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3).

Smith and Nolan

probabilities, but less than a finding of proof beyond reasonable doubt”.²⁵ If the court considers the prisoner to be at a high-risk of reoffending, it will consider whether a supervision order (where an offender is released subject to conditions) or a CDO should be imposed,²⁶ the length of which is determined by the court and is to be reviewed annually.²⁷ In order to issue a CDO, the court must also be satisfied that effective treatment was accessible to the offender during their sentence. The courts have maintained that a failure to provide opportunities for rehabilitation may support the refusal to issue a CDO, as any further detention would be purely punitive, rather than preventative.²⁸

Challenges, justifications and aims of CDOs

Australia’s CDO laws have been highly criticised for depriving liberty on a preventative basis. They are argued to be unconstitutional and breach human rights, and contradict the principles of proportionality, finality in sentencing and double jeopardy, especially as a lower-than-criminal standard of proof is required.²⁹ Nevertheless, the Australian Government and Australian courts have upheld them. In *Fardon v Attorney-General (Qld)*,³⁰ the High Court of Australia rejected that the Queensland sex offender CDO scheme was unconstitutional.

International human rights challenges have been more successful. In 2010, the United Nations Human Rights Commission (UNHRC) held that both the Queensland and NSW sex offender schemes were in violation of human rights in respect of arbitrary detention, double punishment and retroactive punishment under the *International Covenant in Civil and Political Rights* (ICCPR).³¹ Central to this decision was the finding that the statutes deny due process by adopting a lower-than-criminal standard of proof.³² However the Australian Government rejected this finding and endorsed the regimes, stating that:

Australia stresses that the community has a legitimate expectation to be protected from these offenders, and at the same time, that authorities owe these offenders a duty to try and rehabilitate them.³³

These justifications are reflected in the stated aims of the various statutes authorising CDOs which are to: “ensure protection of the community” and to “facilitate the rehabilitation of the offender”.³⁴ The presence of both aims in Australia’s refusal to repeal CDO schemes makes the availability of *both* valid risk assessment and prison-based rehabilitation crucial elements of Australia’s asserted human rights compliance.

RISK ASSESSMENT

The assessment of a high risk of reoffending under the sex offender and violent offender CDO regimes is determined having regard to evidence from two qualified clinicians who have examined the prisoner

²⁵ *Cornwall v Attorney-General (NSW)* [2007] NSWCA 374, [21]; *DPP (WA) v D* [2010] WASC 49, [13] (Hasluck J).

²⁶ See, eg *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(5).

²⁷ See, eg *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(5)(a), Pt 3.

²⁸ *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324, [30]-[31] (Keane, Holmes JJA and Dutney J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, [113] (Gummow J); Michelle Edgely, “Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia” (2007) 33(2) *University of Western Australia Law Review* 351, 375.

²⁹ See generally Bernadette McSherry and Louis Waller, “High Risk Offenders: Continued Detention and Supervision Options” (Community Issues Paper, Sentencing Advisory Council Victoria, August 2006) 34-37; Patrick Keyzer and Bernadette McSherry, *Sex Offenders and Preventive Detention* (Federation Press, 2009) 44-56.

³⁰ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46.

³¹ Human Rights Committee, *Communication No 1629/2007: Fardon v Australia*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010); Human Rights Committee, *Communication No 1635/2007: Tillman v Australia*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010).

³² Ian Freckelton and Patrick Keyzer, “Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations” (2010) 17 *Psychiatry, Psychology and Law* 345, 349.

³³ Australian Government, *Response of the Australian Government to the Views of the Committee in Communication No 1635/2007 Tillman v Australia and Communication No 1629/2007, Fardon v Australia* (5 September 2011) 5 <www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/FardonvAustralia-AustralianGovernmentResponse.pdf>.

³⁴ See, eg *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3.

 Post-sentence continued detention of high-risk terrorist offenders in Australia

and prepared a report indicating their level of risk of recidivism.³⁵ It is standard practice for clinicians to use actuarial and psychometric risk assessment instruments to support their expert opinion as to whether or not an offender is at an unacceptable risk of reoffending. The particular form of the risk assessment adopted is not mandated by statute and is at the discretion of the clinician.

The use of risk assessments in general, and in particular to support any form of deprivation of liberty, has been highly contentious, predominantly as risk assessment can be erroneous. As Kirby J stated in *Fardon v Attorney-General (Qld)*, “Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness.”³⁶ Errors in risk assessment “undermine the objectives of the regime”,³⁷ as a defensible CDO scheme depends on accurate and reliable risk assessment:

If the deprivations entailed by preventive measures are to be warranted, appropriate, and proportional, it is necessary to calculate both the gravity of the risked harm and the likelihood of it occurring ... where there is doubt about the validity of risk-assessment tools or the accuracy of their findings such deprivation is difficult to justify.³⁸

Where valid risk-assessment tools are adopted and used appropriately, risk assessment can be highly informative in evaluating the likelihood of future reoffending. The ability of tools to predict risk continues to increase as research informs the modification and administration of tools as well as demonstrating which tools have the highest levels of predictive ability for a given population.³⁹ Research has shown that tools are more likely to be valid where they: include relevant risk factors, are only applied to populations the tool has been shown to produce accurate results for, are only used by experienced psychologists or psychiatrists, and, where the tool follows a specific structure which reduces the opportunity for differing interpretations and biases.⁴⁰

The use of risk assessment in CDOs is further criticised on the basis that some actuarial and psychometric tools are inappropriate for forensic use.⁴¹ Assessments are commonly presented to the court as though they are exact, which may lead to greater validity being assigned to the tools than is merited.⁴² While in some cases expert testimony appears to be uncritically accepted,⁴³ the tools can come under scrutiny during cross-examination or by the judges’ own initiative. This is exemplified in *DPP (WA) v Samson*, where McKechnie J refused to order a CDO despite the high-risk classification given by the Static-99, a sex offender risk assessment tool, on the basis that it had not been validated on the indigenous Australian population and therefore could not be relied upon for assessment of the indigenous prisoner.⁴⁴ If the evidence is not accepted without scrutiny, the use of risk assessments can be valuable in assisting judicial decisions.

Approaches to risk assessment

Psychometric tools generally adopt one of three approaches in assessing risk: unstructured professional judgment (UPJ), an actuarial approach or structured professional judgment (SPJ). In an

³⁵ See, eg *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4).

³⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, [124] (Kirby J).

³⁷ Tamara Tulich, “Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales” (2015) 38 *UNSW Law Journal* 824, 841.

³⁸ Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 119.

³⁹ See, eg Jay P Singh, Martin Grann and Seena Fazel, “A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Metaregression Analysis of 68 Studies Involving 25,980 Participants” (2011) 31 *Clinical Psychology Review* 499, 511; Karl Hanson and Kelly E Morton-Bourgon, “The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-analysis of 118 Prediction Studies” (2009) 21 *Psychological Assessment* 1, 1.

⁴⁰ Patrick Keyzer and Bernadette M McSherry, “The Preventive Detention of ‘Dangerous’ Sex Offenders in Australia: Perspectives at the Coalface” (2013) 2 *International Journal of Criminology and Sociology* 296, 300.

⁴¹ Keyzer and McSherry, n 29, 31-32.

⁴² Keyzer and McSherry, n 40, 31.

⁴³ Bernadette McSherry, “The Preventive Detention of ‘Dangerous’ People” (2012) 112 *Precedent* 4, 7.

⁴⁴ *DPP (WA) v Samson* [2014] WASC 199, [51].

Smith and Nolan

UPJ the assessor uses only their expert clinical judgment to determine individual risk. The factors and sources to be considered, as well as their weighting, are at the discretion of the assessor.⁴⁵ This approach has limited empirical support and is subject to bias, low accuracy and low validity.⁴⁶ It also has low “inter-rater reliability”, meaning that two different clinicians may produce entirely different assessments of risk using only their individual clinical assessment skills.⁴⁷

Both actuarial approaches and SPJs use statistically-informed lists of risk factors for aiding the determination of risk. A risk factor is a measurable characteristic that correlates with the outcome (the offending behaviour) and precedes it, however it does not have to cause the outcome.⁴⁸ Relevant risk factors should apply to a majority of the individuals who commit that offence but should not apply to the majority of the remainder of the population.⁴⁹ In essence, the tool compares the individual to the profile of the typical offender. Risk factors can be static or dynamic. Static factors are categorical or historical and do not fluctuate over time or in response to external pressure or circumstance as dynamic factors do. Some examples of static factors are age, gender, age of first offence and nationality.⁵⁰ In contrast, dynamic factors can change over time, and include factors such as level of social support, response to treatment, employment status or illness.⁵¹ A risk factor can be positively related to the outcome and increase the likelihood of it occurring. Alternatively, it can be negatively related and decrease the likelihood of the outcome occurring (this is also known as a protective factor).

In an actuarial assessment, a clinician evaluates an individual on a range of predetermined relevant risk factors and then combines the risk scores according to test instructions based on actuarial models to produce a final risk estimate.⁵² The difficulty with an actuarial approach is that it classifies an individual based only on group data and does not allow for individual and situational factors to be considered.⁵³ In contrast, in an SPJ the clinician rates an individual on predetermined risk factors, and then produces a final risk estimate based on the risk factor scores as well as their clinical judgement.⁵⁴ Certain risk factors might weigh more heavily or the clinician might take additional circumstances into account in determining the final risk score for a particular individual.⁵⁵

Meta-analyses (statistical recalculations of data sets from all available relevant studies) have found that actuarial assessments and SPJ in general produce equally valid risk assessments, and both are superior to UPJ.⁵⁶ However the utility and accuracy of each may be different for certain types of offenders. For example, tools developed to assess risk of recidivism for sexual offenders have found to

⁴⁵ John Monahan, “The Individual Risk Assessment of Terrorism” (2012) 18 *Psychology, Public Policy, and Law* 167, 173.

⁴⁶ Jennifer L Skeem and John Monahan, “Current Directions in Violence Risk Assessment” (2011) 20 *Current Directions in Psychological Science* 38, 39.

⁴⁷ Skeem and Monahan, n 46, 39.

⁴⁸ Monahan, n 45, 172.

⁴⁹ Mark R Kebbell and Louise Porter, “An Intelligence Assessment Framework for Identifying Individuals at Risk of Committing Acts of Violent Extremism against the West” (2012) 25 *Security Journal* 212, 215.

⁵⁰ Karl Roberts and John Horgan, “Risk Assessment and the Terrorist” (2008) 2(6) *Perspectives on Terrorism* 3, 5.

⁵¹ Roberts and Horgan, n 50, 5.

⁵² Monahan, n 45, 174.

⁵³ Elaine Pressman, *Risk Assessment Decisions for Violent Political Extremism* (October 2009) Public Safety Canada, 12 <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-02-rdv/index-en.aspx>>; McSherry and Waller, n 29, 18.

⁵⁴ Pressman, n 53, 12.

⁵⁵ Monahan, n 45, 173.

⁵⁶ Laura Guy, *Performance Indicators of the Structured Professional Judgment Approach for Assessing Risk for Violence to Others: A Meta-Analytic Survey* (PhD Thesis, Simon Fraser University, 2008) 7, 103; Singh, Grann and Fazel, n 39, 12.

Post-sentence continued detention of high-risk terrorist offenders in Australia

be the most accurate when an actuarial approach is adopted.⁵⁷ In contrast, one of the best-validated tools for violent risk assessment, the Historical Clinical Risk-20 (HCR-20), follows an SPJ approach.⁵⁸

Pre-existing risk assessment tools

A range of risk assessment tools exist for general crime, spousal violence, general violence and sexual crimes, and have been shown to have some predictive validity.⁵⁹ Currently there are no validated tools that specifically assess risk for terrorism. Given the violent propensities of terrorists it has been proposed that risk assessment tools for violent offenders might be effective in predicting terrorism recidivism.⁶⁰ However research indicates that the factors that relate to terrorism differ from those that relate to violent offending, and violent offender tools will therefore not be able to accurately distinguish between who is likely to commit a terrorist act and who is not.⁶¹

Research does not support the view that the characteristics of the typical violent offender reflect those of the typical terrorist offender. The only consistent similarity is that both tend to be young males, however the proportion of women involved in terrorism is greater than for other crimes.⁶² In contrast to the typical violent offender, terrorists are more likely to be married, have positive interpersonal relationships, come from stable middle class families and have higher levels of education, income and employment, and have fewer prior convictions than violent offenders.⁶³

Violent offenders and terrorist offenders also differ significantly in terms of motivation. Extremist “jihadist” Islamic terrorism (eg as perpetrated by Al-Qaeda or ISIS) is frequently driven by a commitment to an ideology that requires self-sacrifice and acts of violence, with the intention of coercing a government or section of the public. In contrast, violent offenders are often “motivated by personal gain, impulse control issues, criminogenic needs, uncontrolled rage, or, other psychological and mental problems”.⁶⁴

One tool, the HCR-20, has already been evaluated and it was found that less than a third of the risk factors were applicable to terrorist offenders.⁶⁵ As such, reliance on violent offender tools would not produce results to a sufficient level of accuracy to justify their use in a CDO regime for terrorist offenders. Therefore, in order to accurately assess risk for terrorism recidivism, the development of a new tool is necessary, which includes risk factors relevant to terrorism.

Developing a risk assessment tool for terrorism

Form and specificity of the tool

Research indicates that the most appropriate form of tool for terrorism risk assessment is one that utilises an SPJ approach.⁶⁶ UPJ generally has low predictive ability and is likely to be even less

⁵⁷ Hanson and Morton-Bourgon, n 39, 1.

⁵⁸ Christopher Webster et al, *HCR-20: Assessing Risk for Violence Version 2* (Mental Health, Law and Policy Institute, Simon Fraser University, 1997). The HCR has found to have a statistically high ability to predict risk: Min Yang, Stephen CP Wong and Jeremy Coid, “The Efficacy of Violence Prediction: A Meta-analytic Comparison of Nine Risk Assessment Tools” (2010) 136 *Psychological Bulletin* 740, 755.

⁵⁹ See n 39.

⁶⁰ Monahan, n 45, 175.

⁶¹ Kebbell and Porter, n 49, 215.

⁶² Monahan, n 45, 175.

⁶³ Elaine Pressman and John Flockton, “Calibrating Risk for Violent Political Extremists and Terrorists: The VERA 2 Structured Assessment” (2012) 14 *The British Journal of Forensic Practice* 237, 241; Louise E Porter and Mark R Kebbell, “Radicalization in Australia: Examining Australia’s Convicted Terrorists” (2010) 18 *Psychiatry, Psychology and Law* 212, 218; Monahan, n 45, 175.

⁶⁴ Pressman and Flockton, n 63, 241.

⁶⁵ Pressman, n 55, 17.

⁶⁶ Monahan, n 45, 183.

Smith and Nolan

accurate for terrorist offenders than for other offenders, as terrorism is rare and clinicians are unlikely to have extensive experience in assessing terrorist offenders. An actuarial approach is also not feasible as

the sample size of people who actually engage in terrorist acts will never be large enough to allow the statistical power needed to determine the optimal quantitative combination of risk factor scores, or to generate a final estimate of risk that does not rely in substantial part on clinical judgment.⁶⁷

Consideration must also be given to whether a tool should be developed for terrorism in general or for specific types of terrorism. Terrorists are a heterogeneous group who commit a variety of crimes and it is possible that risk factors that capture one type of terrorism may not capture others.⁶⁸ Nevertheless, experts argue that it is possible to create a single SPJ tool that can be used for all forms of terrorism using generic risk factors, and allowing for elaboration on specific factors to capture any significant differences.⁶⁹ A similar approach is taken in risk assessment for violent offenders, where the same tool can capture a diversity of offences by including general risk factors relevant to all kinds of violent offenders that can be expanded on.⁷⁰

Risk factors for terrorism

The greatest obstacle to developing a specific tool for assessing risk for terrorism is determining which risk factors to include. While this remains a contentious and growing area, a number of researchers have proposed characteristics or factors that do appear to be common across terrorist offenders and could form the basis for a predictive instrument comprising terrorism-specific risk factors.⁷¹

The inclusion of risk factors which focus on identity and group processes will likely be essential. Studies consistently report that individuals become involved in terrorism because they are looking for an identity that can provide meaning, direction and acceptance by others.⁷² Research supports that many Muslims in Australia feel alienated and marginalised, and commentators have noted that this makes them susceptible to terrorism:

The Australian Muslim population ... feel targeted unfairly by the media and government policies. They feel their belief system and value system to be subjected to ridicule and derision, and labelled "un-Australian".⁷³

The adoption of a radicalised terrorist identity will likely result in an "us versus them" mentality, where all individuals are classified as a part of a stable and fixed in-group or out-group.⁷⁴ For terrorists their immediate in-group likely includes other organisation members, and their wider in-group can include any individual who shares their religious, cultural or other ideological status.⁷⁵ The out-group therefore includes anyone who does not share these characteristics.

⁶⁷ Monahan, n 45, 183.

⁶⁸ Monahan, n 45, 180.

⁶⁹ Pressman and Flockton, n 63, 242.

⁷⁰ Tulich, n 37, 842.

⁷¹ John Horgan, "From Profiles to Pathways and Roots to Routes: Perspectives from Psychology on Radicalization into Terrorism" (2008) 618 *Annals of the American Association of Political and Social Sciences* 80, 80; Jon Cole et al. "Guidance for Identifying People Vulnerable to Recruitment into Violent Extremism" (Working Paper, University of Liverpool, 2010) 7; Kebbell and Porter, n 49, 214; Monahan, n 45, 185.

⁷² Kate Barrelle, *Disengagement from Violent Extremism* (2010) Monash University, 1 <<http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-disengagement-from-violent-extremism-kb.pdf>>.

⁷³ Centre for Muslim Minorities & Islam Policy Studies, Monash University, *Muslim Voices: Hope & Aspirations of Muslim Australians* (School of Political and Social Inquiry, Monash University, 2009) <https://www.dss.gov.au/sites/default/files/documents/01_2014/muslim-voices-report.pdf>; Shahrām Akbarzadeh, "Investing in Mentoring and Educational Initiatives: The Limits of De-Radicalisation Programmes in Australia" (2013) 33 *Journal of Muslim Minority Affairs* 451, 452.

⁷⁴ Fathali M Moghaddam, "The Staircase to Terrorism: A Psychological Exploration" (2005) 60 *American Psychologist* 161, 162; Hebrī Tajfel and John C Turner, "An Integrative Theory of Intergroup Conflict" in William Austin and Stephen Worchel (eds), *The Social Psychology of Intergroup Relations* (Brooks-Cole, 1979) 33.

⁷⁵ See Barrelle, n 72, 2, 5; Moghaddam, n 74, 165-166.

Post-sentence continued detention of high-risk terrorist offenders in Australia

A strong terrorist identity is indicative of risk as it will likely lead to negative views and rejection of the out-group – for example, “Western” values and the dominant national identity.⁷⁶ As individuals radicalise they become further isolated from members of the out-group and have little to no positive contact with them, preventing opportunities to challenge their negative views.⁷⁷ Studies further suggest that radicalising terrorists become isolated from their mainstream in-group and unradicalised members of their family, and contact becomes limited to the immediate in-group faction of extremists, which prevents exposure to moderate views from non-radicalised individuals.⁷⁸

This radicalised in-group identity, with its mistrust and negative views of the out-group, intensifies when the group is perceived to be under threat or has been mistreated.⁷⁹ Perceptions of threat or injustice can be a result of prior grievances to the individual or the in-group, particularly in the form of the loss of lives, perception of harmful foreign (such as Western and non-Islamic fundamentalist) policies and domestic counterterrorism policies that are seen to target the in-group.⁸⁰ It has been suggested that “everything that has happened since September 11th has reinforced the notion of Muslims under siege”,⁸¹ where it is believed that the rest of the world has negative behavioural intentions towards the in-group, and the rest of the world cannot, or will not, help them.⁸² The stronger these perceptions, the higher the individual’s level of risk likely is, and the more likely they view action as necessary for revenge or protection, and that “all means are justified for group defence”.⁸³

Violent action taken against the out-group is commonly justified by an extremist ideology or religion.⁸⁴ Terrorists almost uniformly display rigid ideologies, a low tolerance for other ideologies, and an exaggerated sense of their own morality.⁸⁵ Many extreme Islamic terrorists aspire to achieve martyrdom in furtherance of their ideological cause and consider it “the ultimate blessing”.⁸⁶ A strong ideology may also contribute to the dehumanisation of out-group members and potential targets, assisting in the justification for killing and diffusion of responsibility.⁸⁷

Finally, in calculating risk, it is important to consider the individual’s willingness, intent or capability to commit terrorist acts. For example, terrorists commonly access extremist material over the internet, such as speeches, instruction manuals, or videos of Muslim murders which are intended to inspire anger and revenge.⁸⁸ Prior training for terrorist activities or participation in overseas conflicts may also signify these features.⁸⁹ Finally, expressions of desire to kill or selection of a target will likely indicate high risk.⁹⁰

⁷⁶ Barrelle, n 72, 2; Pressman, n 55, 9.

⁷⁷ Kebbell and Porter, n 49, 217.

⁷⁸ Cole et al, n 71, 10; Kebbell and Porter, n 49, 217.

⁷⁹ Daniel Bar-Tal and Dikla Antebi, “Beliefs about Negative Intentions of the World: A Study of the Israeli Siege Mentality” (1992) 13 *Political Psychology* 633, 634; Maykel Verkuyten and Ali Aslan Yildiz, “National (Dis)identification and Ethnic and Religious Identity: A Study Among Turkish-Dutch Muslims” (2007) 33 *Personality and Social Psychology Bulletin* 1448, 1448; Moghaddam, n 74, 162-163.

⁸⁰ Kebbell and Porter, n 49, 217; Monahan, n 45, 186.

⁸¹ Phil Rees, *Dining with Terrorists* (Pan Books, 2nd ed, 2005) 331.

⁸² Bar-Tal and Antebi, n 79, 634.

⁸³ Bar-Tal and Antebi, n 79, 634.

⁸⁴ Kebbell and Porter, n 49, 217; Moghaddam, n 74, 162.

⁸⁵ Cole et al, n 71, 7; Pressman, n 55, 12.

⁸⁶ Pressman, n 55, 9; Rees, n 81, 248.

⁸⁷ Cole et al, n 71, 14; Kebbell and Porter, n 49, 217.

⁸⁸ Kebbell and Porter, n 49, 217; Rees, n 81, 330-331.

⁸⁹ Cole et al, n 71, 16.

⁹⁰ Kebbell and Porter, n 49, 217.

Smith and Nolan

Current tools under development

The VERA and the VERA-2

The VERA was designed by Canadian researchers in 2009 as a terrorism-specific assessment tool for individuals suspected or convicted of terrorism.⁹¹ It follows an SPJ approach and is designed to assess risk for different types of terrorist offenders. It includes 33 risk factors relevant to terrorist offenders, based on empirical evidence and consultation with experts. The factors are grouped into five categories: attitudinal, contextual, historical, protective and demographic items. Risk indicators are scored as low, moderate or high based on interviews, analysis of records, observations and any other available information.⁹²

Beardsley and Beech completed one small study that applied the VERA to five case studies of convicted terrorists who had “committed extremist acts at different time periods across a range of countries”.⁹³ Information was collected from the internet about each of the subjects. The results supported that the factors included in the VERA are relevant to violent extremists and that the VERA can be applied to terrorists who work alone or in a group.⁹⁴ However, there were various methodological issues with the study, severely compromising whether any general conclusions should be drawn from the research. These weaknesses include a small sample size, the use of historical terrorist figures as subjects, and the scoring of the factors based on online research.

In 2010, the risk factors in the VERA were modified to produce the VERA-2, following evaluations by experts in law enforcement and forensic psychology. Feedback included insights from those using VERA to assess prisoners held in the Supermax facility at the Goulburn Correctional Centre in NSW, Australia.⁹⁵ In the VERA-2, there are now 31 risk factors that are grouped into five categories: beliefs and attitudes, context and intent, history and capability, commitment and motivation, and protective factors.⁹⁶ In the VERA-2, the demographic factors of sex, marital status and age were removed. The tool also now includes expressions of desire or intent to commit a terrorist act and to die for the cause. The revised version also added involvement in de-radicalisation programs as a protective factor, and added new risk factors including the individual being driven by criminal opportunism, moral superiority and excitement.⁹⁷ The tool is still under development and is currently only intended for consultative purposes. An empirical study on its ability to validly predict risk is currently underway.⁹⁸

The ERG22+

The ERG22+ was launched in 2011 and was developed by the United Kingdom (UK) National Offender Management Service. It assesses offenders on 22 risk factors that have been found to be related to and precede terrorist acts, plus any other factors deemed relevant by the assessor (hence adopting an SPJ approach). The areas assessed include engagement in extremist groups, intent and

⁹¹ Pressman, n 53, 34.

⁹² Pressman, n 53, 34; Pressman and Flockton, n 63, 242.

⁹³ Nicola L Beardsley and Anthony R Beech, “Applying the Violent Extremist Risk Assessment (VERA) to a Sample of Terrorist Case Studies” (2013) 5 *Journal of Aggression, Conflict and Peace Research* 4, 4.

⁹⁴ Beardsley and Beech, n 93, 4.

⁹⁵ Elaine Pressman and John Flockton, “Violent Extremism Risk Assessment” in Andrew Silke (ed), *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform* (Routledge, 2014) 123, 125.

⁹⁶ Pressman and Flockton, n 63, 243.

⁹⁷ These changes were drawn from comparing the VERA and the VERA-2.

⁹⁸ Alana Cook, *Research Continues on Risk Assessment Guides for Extremist Violence – But More is Needed* (15 December 2014) Academia <http://www.academia.edu/9878722/Research_continues_on_risk_assessment_guides_for_extremist_violence_but_more_is_needed>; Alana Cook et al, *Threat Assessment Tools for the Individual Assessment of Terrorism: A Content Evaluation of the MLG, VERA-2, and the HCR-20* Canadian Network for Terrorism, Security, & Society <https://www.academia.edu/18897216/Threat_Assessment_Tools_for_the_Individual_Assessment_of_Terrorism_A_Content_Evaluation_of_the_MLG_VERA-2_and_HCR-20V3>.

Post-sentence continued detention of high-risk terrorist offenders in Australia

disinhibition to cause harm, and capability of causing serious harm.⁹⁹ Factors are scored against three categories: no evidence, some evidence, or strong evidence. The authors of the test maintain that the ERG22+ factors are working hypotheses, evaluations of the effectiveness of the tool are needed and that ongoing validity studies are continuing.¹⁰⁰

The MLG

The MLG was developed for the assessment and management of group-based violence (GBV), including extremism and terrorist violence.¹⁰¹ The tool was developed on the basis that some forms of violence, including terrorism, are group-based, and factors should therefore primarily focus on factors applicable to groups rather than individuals.¹⁰² The MLG follows an SPJ format and consists of 20 risk factors in four domains: individual, individual–group, group, and group–societal. Each factor is scored on a tripartite scale as: not relevant, possibly or partially present, or relevant. The factors included were drawn from the literature in consultation with international experts in GBV.¹⁰³ The MLG remains in draft form and is currently being evaluated in the same study as the VERA-2.¹⁰⁴

Cook conducted a study in which criminal justice and mental health professionals applied the MLG to 11 GBV case studies, including three terrorist offenders. The results found that the MLG was easy to apply and achieved reliability levels comparable to those found with other SPJ tools for other offences. The factors in the tool were found to be less relevant for “lone-wolf” offenders, with only factors in the individual domain being identified as applicable.¹⁰⁵ The generalisability of this study (the extent to which its results are applicable to other contexts) is also compromised by a small sample size.

Comparing tools

It is currently not possible to say whether the VERA-2, ERG22+ or MLG will be a more effective tool to assess risk of recidivism for terrorist offenders incarcerated in Australian prisons. The study conducted by Cook suggests that the MLG will have limited applicability to “lone-wolf” terrorists and will have to be supplemented by another tool. It is likely that the VERA-2 and ERG22+ will produce similar outcomes as they were developed on a review of the same literature and include similar risk factors.¹⁰⁶ It is possible that the VERA-2 will achieve a higher level of accuracy than the ERG22+ as it also includes six dynamic protective factors, which are important to consider in assessing risk as they may significantly change a score that was determined on positive risk factors alone.¹⁰⁷ The VERA-2 was also specifically designed to assess future risk for terrorist offenders, whereas the ERG22+ has been developed to inform risk management and rehabilitation.¹⁰⁸ Finally the VERA-2 was partly developed on literature regarding terrorists in Australia, and has been modified based on feedback with Australian offenders. Therefore, it may be more relevant to an Australian population.

In summary, while the tools use transparent and empirically-derived factors that appear to be related to terrorism and distinguish terrorists from the rest of the population, and will likely be able to accurately assess risk, at this stage implementing a CDO regime for prisoners serving sentences for

⁹⁹ Interventions Unit, “ERG22+ Structured Professional Guidelines for Assessing Risk of Extremist Offending” (Working Paper, National Offender Management Service, Ministry of Justice, 2011).

¹⁰⁰ Andrew Silke, “Risk Assessment of Terrorist and Extremist Prisoners” in Andrew Silke (ed), *Violent Extremism Risk Assessment* (Routledge, 2014) 117, 118.

¹⁰¹ Alana Cook, Stephen Hart and Randall Kropp, *Multi-Level Guidelines for the Assessment and Management of Group-Based Violence* (Mental Health, Law and Policy Institute, Simon Fraser University, 2013).

¹⁰² Alana Cook, *Risk Assessment and Management of Group-Based Violence* (PhD Thesis, Simon Fraser University, 2014) 4.

¹⁰³ Cook, n 102, 19-22.

¹⁰⁴ See n 98.

¹⁰⁵ Cook, n 102, 35, 47, 53.

¹⁰⁶ Silke, n 100, 118.

¹⁰⁷ Roberts and Horgan, n 71, 5.

¹⁰⁸ Silke, n 100, 118.

Smith and Nolan

terrorism based on these tools would be premature. The controversial deprivation of liberty resulting from a CDO is only justifiable if informed by valid and accurate risk assessments.

AN AUSTRALIAN DE-RADICALISATION PROGRAM

The sex offender and violent offender CDO regimes assume that rehabilitation opportunities, including optional offence-specific treatment programs, were available in prison during the offender's initial sentence.¹⁰⁹ Evaluations suggest that sex offender and violent offender programs can be successful in reducing recidivism, resulting in lower rates of reoffending than for offenders who did not undergo a program.¹¹⁰ For example, an evaluation of the Victorian Sex Offender Program found a recidivism rate of 4 per cent for offenders who underwent the program, 10 per cent for those who were removed from the program and 20 per cent for offenders who did not engage in the program.¹¹¹

There is a scarcity of publicly-available information on current efforts to rehabilitate terrorist offenders in Australian prisons, likely due to security reasons. The information that has been released indicates that several methods have been adopted, including psychological counselling, religious instruction, mentoring, and education and vocational programs.¹¹² Although this is a positive step, there is an urgent need for further development of formal, transparent, consistent and empirically-supported best practice programs.

Rehabilitation programs for terrorist offenders are generally called "de-radicalisation programs", which is useful shorthand despite the diversity of approaches adopted by the programs.¹¹³ The initial aim of a rehabilitation program should be disengagement, which entails ceasing physical involvement in extremist activities.¹¹⁴ Disengagement, if maintained, will be sufficient to prevent further terrorist activities. Ideally de-radicalisation would also be achieved, which involves the cognitive rejection of an extremist ideology or belief that legitimises the use of violent extremism.¹¹⁵ De-radicalisation will be more difficult to achieve than disengagement, however may be necessary to ensure that an offender does not re-engage in terrorism.¹¹⁶

International de-radicalisation programs

De-radicalisation programs have become prevalent around the world in recent years in an effort to combat the threat of terrorism. Determining clear comparable levels of success of these programs is difficult, as what constitutes a successful program is debatable, there are discrepancies in definitions, and many of the programs have only recently commenced, limiting the time in which offenders have had to reoffend.¹¹⁷ In addition, information on released offenders may not be available or results may have been skewed to enhance the apparent success of a program.¹¹⁸ Nevertheless, when treated with

¹⁰⁹ Sentencing Advisory Council, "High Risk Offenders: Post-Sentence Supervision and Detention" (Discussion Paper, Sentencing Advisory Council Victoria, 23 February 2007) 4.

¹¹⁰ Karen Gelb, "Recidivism of Sex Offenders" (Research Paper, Sentencing Advisory Council Victoria, January 2007) 34-37; Mark Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Thomas Reuters, 2015) 389, 391-392.

¹¹¹ K Owen et al, "Recidivism of Sex Offenders: Base Rates for Corrections Victoria Sex Offender Program" (Research Paper, Sentencing Advisory Council Victoria, 2007).

¹¹² Paul Maley and Cameron Stewart, "Extremist Muslims Working with Cops", *The Australian* (online), 19 December 2015 <<http://www.theaustralian.com.au/in-depth/terror/extremist-muslims-working-with-police/news-story/9f4ba0ce808885ddf6522d090202e18b>>.

¹¹³ John Horgan, "Pakistan's Deradicalisation Programme Has a Lesson" (2015) 17(69) *The Statesman* 10, 11.

¹¹⁴ John Horgan and Kurt Braddock, "Assessing the Effectiveness of Current De-Radicalization Initiatives and Identifying Implications for the Development of US-Based Initiatives in Multiple Settings" (Report, National Consortium for the Study of Terrorism and Responses to Terrorism, September 2009) 42.

¹¹⁵ Horgan and Braddock, n 114, 42.

¹¹⁶ Jason-Leigh Striegheer, "The Deradicalisation of Terrorists" (2013) 1 *Salus Journal* 19, 21.

¹¹⁷ Horgan and Braddock, n 114, 45.

¹¹⁸ For example it is suspected that Yemen boosted their success rates to pacify the United States: Striegheer, n 116, 29. See generally Horgan and Braddock, n 114, 45.

Post-sentence continued detention of high-risk terrorist offenders in Australia

caution, recidivism rates and reports of success can provide *some* indication of which programs have been effective in disengaging and de-radicalising extremists.

For instance, the Saudi Arabian program has been praised for achieving high levels of success. It is a well-financed program that adopts a number of strategies including support to and from family members, religious education, vocational training and post-release support programs. Initial reports of success of 100 per cent have been revised and are now estimated to be approximately 80-90 per cent.¹¹⁹ Likewise, the Singaporean program is reported to have achieved encouraging results, where none of the offenders released are reported to have been involved in further terrorist activity. The Singaporean program engages offenders in reinterpreting Islamic texts and also provides support to the family of offenders, including counselling and financial assistance.¹²⁰ Denmark and Germany also appear to have successful programs. Denmark's Back on Track program aims to develop mentoring relationships to assist prisoners in countering terrorism.¹²¹ Germany's Violence Prevention Network program similarly aims to help offenders move away from violence and extremism by working closely with a mentor and their family, before and after release.¹²²

Developing an Australian de-radicalisation program

Currently there is no way to conclusively determine what is required for an Australian program to be effective. However, it is possible that a successful program could be developed by taking into account strategies that have been beneficial in overseas programs, by including factors discussed in the psychological literature as encouraging disengagement and de-radicalisation, and by tailoring the program to meet Australia's economic, social and political circumstances with advice from local communities and families with knowledge of radicalised offenders. The program could then be refined in practice. Once there is valid risk assessment, it could provide information as to whether the program was able to reduce risk of recidivism. Based on an analysis of the literature, an Australian rehabilitation program is more likely to be effective if it is applied flexibly to each individual offender and their rehabilitative readiness, involves the offender's family, includes a focus on identity change, allows the offenders to work closely with a mentor, religious re-education is offered and support is continued after release.

Counselling to tailor the program to the individual

Overseas programs, as well as psychological research, emphasise the necessity of tailoring a program to meet the needs of the individual offender.¹²³ A "one-size fits all" approach is far less likely to be effective.¹²⁴ Research continually shows that not all terrorists hold extreme ideological beliefs as traditionally suspected, and involvement in terrorism can be motivated by a range of factors, such as financial need.¹²⁵ Similarly, case studies on former terrorists show that some terrorists become de-radicalised, yet remain with the group because of "the high level of investment ... the sense of community established, the pressure to continue the struggle [and] the fears of leaving".¹²⁶

The first step in a rehabilitation program should therefore be counselling sessions, in which the individual's circumstances, path to radicalisation and risk factors are explored, and a specific treatment

¹¹⁹ Striegger, n 116, 30.

¹²⁰ Arie W Kruglanski, Michele J Gelfand and Rohan Gunaratna, *Aspects of Deradicalisation* (2015) Institute for the Study of Asymmetric Conflict, 4 <<http://www.asymmetricconflict.org/articles/aspects-of-deradicalization>>; Marisa L Porges, "Reform School for Radicals" (2011) 6 *The American Interest* 1, 7.

¹²¹ Riazat Butt and Henry Tuck, "European Counter-Radicalisation and De-radicalisation: A Comparative Evaluation of Approaches in the Netherlands, Sweden, Denmark and Germany" (Report, Institute for Strategic Dialogue, 2014) 16-17.

¹²² Butt and Tuck, n 121, 21-23.

¹²³ John Horgan and Mary Beth Altier, "The Future of Terrorist De-radicalization Programs" (2012) 13 *Georgetown Journal of International Affairs* 83, 88.

¹²⁴ Clarke Jones, "Terrorists Can Be Turned Around – Here's How", *ABC* (online), 8 October 2014 <<http://www.abc.net.au/news/2014-10-08/jones-terrorists-can-be-turned-around/5796544>>.

¹²⁵ Horgan and Altier, n 123, 88.

¹²⁶ Striegger, n 116, 25.

Smith and Nolan

plan can be developed.¹²⁷ A committee of psychologists and psychiatrists assess participants for psychological issues, determine what the offenders needs are, and, consider what logistical support is necessary for effective rehabilitation.¹²⁸ This might include education and vocational training if necessary, which will provide the offender with opportunities for income and social interaction away from terrorism.¹²⁹ This method has been attributed as a primary reason for the success of the Saudi Arabian program, where a specific program is developed for each offender.

Family and community reintegration and support

A component that focuses on family and community re-engagement should also be incorporated as research suggests that family and community can play an integral role in drawing individuals away from terrorism.¹³⁰ This could include involving the offender's family and community in the rehabilitation process, allowing a high level of family contact and providing support to the family.¹³¹ As a result the family can encourage the offender's rehabilitation, there will be a stable home for the prisoner to return to and the offender will have a social support system away from terrorism.¹³² This approach is reported to have contributed to successful disengagement and de-radicalisation in other countries, including Indonesia, Germany and Saudi Arabia.¹³³ The difficulty with this component is that family and friends may also have extremist ideologies and be involved in terrorism.¹³⁴ This element of a program will therefore depend largely on the circumstances of the individual prisoner.

Identity change

In light of the radicalisation and risk factors concerning identity, identity change should be a focus of an Australian program. This could be modelled off of the UK Healthy Identity Intervention (HII), which recognises that "identity issues appear to go to the heart of why people engage in terrorist acts and also why they choose to disengage".¹³⁵ The concept of identity is the focus of several modules in the HII, and requires participants to explore how their terrorist identity developed and why they have offended, how they can make new commitments to move on in life without reoffending and what changes they can make to achieve or maintain a desired identity.¹³⁶

A component that focuses on identity change should also include engaging with the wider Australian community, as negative views of the out-group and a sense of intergroup difference appears to have contributed to extremism for many of Australia's offenders.¹³⁷ The ability to positively identify as both Muslim and Australian, and positive experiences with other Australians, will decrease perceptions of intergroup differences and assist with disengagement and de-radicalisation.¹³⁸ A common approach taken by successful international programs is the opportunity to interact with

¹²⁷ Horgan, n 113, 10.

¹²⁸ Jones, n 124.

¹²⁹ Porges, n 120, 3.

¹³⁰ Mary Beth Altier, Christian N Thoroughgood and John G Horgan, "Turning Away from Terrorism: Lessons from Psychology, Sociology, and Criminology" (2014) 51 *Journal of Peace Research* 647, 649.

¹³¹ Porges, n 120, 4.

¹³² Porges, n 120, 4.

¹³³ Butt and Tuck, n 126, 23; Horgan and Braddock, n 114, 29, 41.

¹³⁴ Bianca Spaccavento, Nita Dowel and Chris Quilkey, "Custody and Sentence Planning: A Throughcare Model for 'AA' Inmates" (2008) 3 *Australian Journal of Correction Staff Development* 7, 9.

¹³⁵ Interventions Unit, "Healthy Identity Intervention" (Report, National Offender Management Service, Ministry of Justice, 2013) 3.

¹³⁶ See Interventions Unit, n 135, 9-10.

¹³⁷ Porter and Keibell, n 85, 221.

¹³⁸ Porter and Keibell, n 85, 226.

Post-sentence continued detention of high-risk terrorist offenders in Australia

out-group members, overcome stereotypes, reduce threat and equalise status.¹³⁹ This can also partly be achieved through close relationships with prison officials.¹⁴⁰

Mentoring

Research suggests that promoting mentoring relationships is critical in a rehabilitation program for terrorism, as the officials provide an important source of support, expertise and connection.¹⁴¹ In Germany, offenders work closely with a dedicated trained mentor both before and after release, and this is considered instrumental in reducing recidivism. The mentor helps prepare the detainee for a life away from terrorism, find employment and accommodation, and continues to provide dedicated support after release, with meetings at least once a month for the first year.¹⁴² Analogously, in Denmark, the mentoring relationship is considered vital to encouraging rehabilitation. In the Danish program, the mentor attempts to strengthen the offender's ability to engage in alternate positive social circles once released, as well as supporting their ability to cope with everyday situations and controversies.¹⁴³

Religious re-education

De-radicalisation programs also typically include some form of religious re-education, where misinterpretations of ideological texts are challenged in order to weaken possible theological justifications for violence. This is usually done through debates or open discussions where offenders are encouraged to explain their interpretation of the ideology. Structured responses are offered to counter these interpretations and attention is drawn to religious text that renounces the use of violence.¹⁴⁴ This has been a focus of most programs, including those in Indonesia, Yemen and Saudi Arabia.¹⁴⁵

It is likely that religious re-education would be necessary for a rehabilitation program in Australia. A study of convicted Australian terrorists demonstrated that they uniformly shared distorted ideological beliefs.¹⁴⁶ In addition, many of the offenders had only recently converted to the Muslim faith or developed a renewed interest in the faith prior to becoming involved in terrorism, which may have left them reliant on extremist interpretations of religious texts.¹⁴⁷

Former terrorists could be utilised to assist with reshaping offenders' ideologies. This was the predominant approach adopted in Egypt and Indonesia.¹⁴⁸ In Egypt, these efforts included former leaders travelling to prisons urging their followers to renounce violent methods, and reportedly resulted in the disengagement of all of the members.¹⁴⁹ The approach appears to be more effective if it includes former leaders, as the disengagement and de-radicalisation effect appears to follow through to the members and there is no one to re-radicalise the offenders, however it is more difficult to

¹³⁹ Including Saudi Arabia, Singapore and the Philippines: Barrelle, n 72, 12; Kruglanski, Gelfand and Gunaratna, n 120, 7.

¹⁴⁰ Porges, n 120, 6.

¹⁴¹ Interventions Unit, n 135, 3; Porges, n 120, 6.

¹⁴² Butt and Tuck, n 121, 22-23.

¹⁴³ Butt and Tuck, n 121, 16-17.

¹⁴⁴ Horgan and Braddock, n 114, 32, 38.

¹⁴⁵ Horgan and Braddock, n 114, 28, 32, 38.

¹⁴⁶ Porter and Keibell, n 85, 220, 227.

¹⁴⁷ Porter and Keibell, n 85, 220.

¹⁴⁸ Horgan and Braddock, n 114, 28; Kruglanski, Gelfand and Gunaratna, n 120, 5. Note that the success of the Indonesian program appears to have been limited by a lack of funding and staff: Striegheer, n 116, 32.

¹⁴⁹ Kruglanski, Gelfand and Gunaratna, n 120, 5.

Smith and Nolan

disengage and de-radicalise leaders initially.¹⁵⁰ If feasible, this is likely to be beneficial in an Australian program, where a majority of the terrorist plots were orchestrated by a group, and it appears that the leaders were highly influential.¹⁵¹

Post-release factors

Post-release support has also been recognised as an integral element to successfully preventing re-engagement. International programs that did not include post-release initiatives have displayed higher rates of recidivism.¹⁵² For example, offenders who underwent Yemen's de-radicalisation program have admitted that they received no assistance on their release and struggled to readjust to life outside of prison, encouraging their return to terrorism.¹⁵³ In contrast, aftercare interventions are heavily resourced, and have been held to contribute to the success of the programs in Saudi Arabia, Germany and Singapore.¹⁵⁴ For instance, the types of support offered by the Saudi Arabian program include financial support, counselling, schooling, job placement and even assisting detainees to marry.¹⁵⁵

In summary, it appears that overseas programs have been successful in disengaging and de-radicalising terrorist offenders. These best practices could be used, in conjunction with psychological research, to inform the development of a successful Australian disengagement, and ideally also de-radicalisation, program. If a formal program were to be introduced and made available to offenders, this essential prerequisite of a CDO regime would be satisfied.

CONCLUSION

In order to meet the potential threat posed by released terrorist offenders, Malcolm Turnbull has announced that Australia will introduce a nationally-consistent CDO regime, allowing for the continued incarceration of prisoners who remain engaged and/or radicalised. However, while ensuring that Australia has sufficient counterterrorism measures it is imperative to also ensure that individual liberties and human rights are not breached by arbitrary post-sentence detention processes. The introduction of a CDO regime for terrorism can be justified if there is valid risk assessment to determine which offenders pose an unacceptable risk of reoffending, and disengagement or de-radicalisation programs are introduced to assist offenders to rehabilitate and reduce the time of any further detainment. Similar CDO regimes for sex offenders and violent offenders are currently upheld by the Australian Government, despite concerns for the accuracy of risk assessments and a finding by the UNHRC that the regimes violate the ICCPR.

There are currently no terrorist-specific risk assessment tools that have been validated adequately. The three tools in development, the VERA-2, the ERG22+ and the MLG, seem likely to be able to assess risk, as they reflect psychological findings regarding terrorist offenders. However until research suggests that they can validly assess risk for terrorist recidivism, and are applicable to Australian offenders, the introduction of a CDO regime is more controversial. The deprivation of liberty a CDO regime imposes is only defensible if there are accurate and reliable risk assessment tools that can determine which offenders are at a high risk of reoffending and which offenders are not.¹⁵⁶ Adopting tools that have not yet been shown to accurately do this would "undermine the objectives of the regime"¹⁵⁷ and may unjustifiably deprive individuals who are not at risk of reoffending of their liberty.

International examples indicate that effective rehabilitation programs are possible. In developing an Australian program, psychological literature and international programs provide valuable insights

¹⁵⁰ Kruglanski, Gelfand and Gunaratna, n 120, 6.

¹⁵¹ Porter and Keibell, n 85, 220.

¹⁵² Porges, n 120, 5.

¹⁵³ Porges, n 120, 5.

¹⁵⁴ Butt and Tuck, n 121, 22-23; Porges, n 120, 5.

¹⁵⁵ Porges, n 120, 5.

¹⁵⁶ Ashworth and Zedner, n 38, 119; Sentencing Advisory Council, n 45, 7.

¹⁵⁷ Tulich, n 44, 841.

Post-sentence continued detention of high-risk terrorist offenders in Australia

into what is likely to be effective. If formal rehabilitation programs for terrorist offenders exist in Australian prisons, a CDO regime for terrorists may be more acceptable.

Until valid risk assessment tools are available, the preferable solution is to focus on rehabilitating offenders during their sentences, and using the COs, PDOs and AFP and/or ASIO detention for questioning powers, upon their release. However, this may not be an adequate long-term remedy and may not be politically acceptable. A lack of valid risk assessment interferes with initial screening to determine which prisoners require treatment, and which risk factors need to be addressed. In addition, without appropriately-validated risk assessment tools, it is difficult to measure whether any interventions are effective and which offenders remain radicalised, and therefore which offenders require COs, PDOs and ongoing monitoring via the detention for questioning powers.

Further, for any offenders who remain radicalised on release, it is possible that the range of current preventative measures would not be sufficient in preventing further terrorist acts. First, existing preventative measures do not allow for rehabilitation to reduce an offender's risk of reoffending. In addition, PDOs and the detention for questioning powers are only temporary and cannot detain the individual over lengthy periods. Even if short periods of detention were used if necessary while the offender is on a CO, the possibility to commit future terrorist acts is not completely eliminated.

For radicalised extremist Islamic "jihadist" offenders, it is likely that prison time has only served to "reinforce the psychology of exclusivity and martyrdom and foster or magnify the root causes that led to terrorism",¹⁵⁸ where their incarceration is viewed as "an illustration of the unfairness of democratic countries towards Islam".¹⁵⁹ Any measures adopted following the expiration of sentence, including CDO regimes, may further reinforce this perception. In addition, some offenders will be returning to families and communities that respect and reinforce their ideology and may encourage their return to terrorist activities.¹⁶⁰ For some radicalised released offenders (who are unlikely to be deterred by a fear of death or capture, as sacrifices and martyrdom are encouraged by their ideology)¹⁶¹ CDOs may be the only solution. Therefore once it is possible to validly assess risk, a CDO regime could be justifiably introduced. This would require ongoing views that human rights norms are qualified by national security and community protection needs.

¹⁵⁸ Jones, n 7; Rees, n 83, 231-232.

¹⁵⁹ Whealy, n 12, 35.

¹⁶⁰ See, eg *Jabbour v Thomas* (2006) 165 A Crim R 32; [2006] FMCA 1286, [43].

¹⁶¹ Don Scheid, "Indefinite Detention of Mega-terrorists in the War on Terror" (2010) 29 *Criminal Justice Ethics* 1, 7; Rees, n 81, 248.