AUSTRALIAN MUSLIM ADVOCACY NETWORK

Friday, 23 June 2023

To: Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Committee Secretary,

Re: **Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995***

The Australian Muslim Advocacy Network (AMAN) acknowledges and appreciates the invitation of the Parliamentary Joint Committee on Intelligence and Security to make submissions on its review of the controversial Division 105A of the *Criminal Code Act 1995* (the Act). Our submission is enclosed.

Yours faithfully,

[redacted]

AUSTRALIAN MUSLIM ADVOCACY NETWORK

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AUSTRALIAN MUSLIM ADVOCACY NETWORK

Submission

REVIEW INTO DIVISION 105A OF THE CRIMINAL CODE

Parliamentary Joint Committee on Intelligence and Security

23 June 2023

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1. Background on AMAN

AMAN works to secure the psychological and physical safety of Australian Muslims in the face of anti-Muslim hate campaigns using research and policy dialogue. AMAN has played a leading role in developing and introducing new hate crime laws in Queensland. It has engaged with the Global Internet Forum to Counter Terrorism to publish critical research on terrorism definitions and online safety.[1] It has also been involved in publishing peer-reviewed research on online hatred[2], models of extremism with the University of Queensland researchers[3], and legal scholarship on the legality and necessity of the motive element in the Australian definition of a terrorist act.[4] AMAN engages with the community, community practitioners and researchers to understand the effectiveness and fairness of terrorism laws.

2. Overview

Division 105A was introduced to the Act via the *Criminal Code Amendment (High-Risk Terrorist Offenders) Act 2016* in September 2016. The Review to which these submissions relate seeks to examine "the operation, effectiveness and implications"[5] of that Amendment. In short, the Division granted unprecedented executive and judicial power to extend the detention of allegedly "high-risk" individuals, beyond their judicially-

[1] Vaughan, Katy (2022) Interoperability of terrorism definitions between the law and tech platforms. Report to the Global Internet forum to Counter Terrorism. AMAN's advisor facilitated the legal working group overseeing this paper.
[2] Abdalla, M., Ally, M. & Jabri-Markwell, R. Dehumanisation of 'Outgroups' on Facebook and Twitter: towards a framework for assessing online hate organisations and actors. SN Soc Sci 1, 238 (2021). https://doi.org/10.1007/s43545-021-00240-4
[3] Risius M, Blasiak K, Wibisino S, Jabri-Markwell R, Louis W (2021) Dynamic Matrix of Extremisms and Terrorism (DMET): a continuum approach towards identifying different degrees of extremisms. Report to the Global Internet Forum to Counter Terrorism
[4] Jabri Markwell, R. (2023) "Religion as a Motive – Does Australian Terrorism Law Serve Justice?", International Journal for Crime, Justice and Social Democracy. doi: 10.5204/ijcjsd.2686.
[5] Under section 29(bbaaa) of the Intelligence Services Act 2001.

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determined period of imprisonment, based on dangerous and seemingly unsubstantiated premises of "unacceptable risk" and precrime intervention – language ordinarily restricted to temporary detention awaiting trial (or remand) and bail laws.

AMAN echoes the views of the Islamic Council of Victoria (ICV) that "the term "pre-crime" is a loaded term which concludes that a crime will be committed in the future when there is no evidence that this is the case"[6]. Indeed, a salient concern that arises in the INSLM Report and much of the Submissions from various expert bodies and individuals arises from the predictive nature of the framework, which relies on the Violent Extremism Risk Assessment 2 Revised (VERA-2R) tool as well as other tools of prediction and CVE programs offered within the correctional system. Expert analysis of these tools has been, to be blunt, scathing in highlighting their extremely limited effectiveness and reliability[7]. This raises crucial concerns for all relevant stakeholders from a variety of perspectives.

Primarily, individuals subjected to continuing detention orders (CDO) or extended supervision orders (ESO) suffer from the unreliability of predictive tools by potentially having their detention extended or liberty restricted in circumstances where it is, at best excessive and, at worst, entirely unjust.

Secondly, the safety of the community, on behalf of whom these unprecedented laws were justified in the first place, is not best protected through a regime that potentially suffocates the rehabilitation of offenders and may, through its unreliability, allow other offenders which pose a greater risk, to escape post-sentencing orders entirely. Indeed, one of the core purposes of sentencing such offenders is to promote their rehabilitation,[8] as research suggests that such an approach poses the strongest long-term promise of community safety.

[6] Islamic Council of Victoria, *Submission Review Into Division 105A of the Criminal Code*, 13 June 2022, 3.
[7] Dr Emily Corner and Dr Helen Taylor, *Testing the Reliability, Validity and Equity of Terrorism Risk Assessment Instruments,* Centre for Social Research and Methods, The Australian National University.
[8] *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 3A(d).

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3. Issues

A. Australia's Obligations to International Law

The 'balancing act' required of most, if not all, governments of the world today is that which considers the aim of protecting each nation's population by preventing terrorism with protecting the human rights and civil liberties of those populations.

B. Abolishment of CDOs

In this regard, we refer to the findings of the INSLM, which state that "all concerned citizens must be troubled by detention of a person in a prison other than as a sentence for a crime that they committed"[9].

The Review further opines that

> "*it is not credible that lengthy detention is a proportionate response to the risk of an offender committing further Pt 5.3 offences upon release if little is required to be done by way of rehabilitation while an offender is serving their sentence and nothing is required to be done while they are detained post-sentence*"[10].

The post-sentencing regime relies heavily, if not entirely, on the predictive prowess of certain assessments and programs and their ability to determine the likelihood of a particular offending committing further terrorism offences if released from custody at the expiration of their sentence.

[9] Grant Donaldson, *Independent National Security Legislation Monitor Report*, 3 March 2023, 90.
[10] Ibid, 97.

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Ultimately, the Review, as well as the expert opinion commissioned by the Department of Home Affairs, makes plain the explicit limitations of these tools, which, according to the INSLM, are "plainly flawed"[11]. It continues that

> *"judges of superior courts in Australia have no particular qualification or skill in predicting the future. The regard in which the Australian judiciary is held, and the sprinkling of judicial pixie dust on this power to order detention in prison, should not obscure an irrebuttable risk of injustice. The risk of error posed by untestable judicial predictions about future behaviour, with the consequence of error being that a person will be detained in prison for no good reason, cannot be ignored"[12].*

C. Effectiveness of VERA-2R & Other Tools

In 2020, the Department of Home Affairs commissioned a report by Dr Emily Corner of the Australian National University's Centre for Social Research & Methods. That report was finally released in 2022, following sustained and reticent protestations of the Department under Freedom of Information laws. The purpose of the report was to "undertakes a holistic and impartial analysis of the VERA-2R and Radar to demonstrate the extent to which these risk assessment instruments accurately classify offenders or overestimate or underestimate the risk they pose…also provides the most comprehensive overview of the state of the empirical knowledge of the causes of radicalisation and terrorism to date"[13].

[11] Ibid, 102
[12] Ibid, 104.
[13] Dr Emily Corner and Dr Helen Taylor, *Testing the Reliability, Validity and Equity of Terrorism Risk Assessment Instruments,* Centre for Social Research and Methods, The Australian National University, 2.

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The report's author asserts that the results "from this project should be used to inform the development of policy and practice in Australia's response to countering radicalization and violent extremism"[14].

The report, like the Review of the INSLM, is highly critical of using VERA-2R, Radar and other predictive tools. The author concludes that the

> "*lack of evidence underpinning both instruments has potentially serious implications for their validity and reliability. Without a strong theoretical and empirical basis for factor inclusion, it is not reasonable to anticipate that the instruments are able to predict their specified risk with anything other than chance. If an instrument with a weak evidence base is employed as a predictive instrument by practitioners, it is not possible to determine if individuals who pass through assessment processes would ever be suitable for the management plan as determined by the risk decision outcome made on the instrument*" (emphasis added)[15].

Similarly, the submission of the Australian Federation of Islamic Councils (AFIC), which was prepared with the advice of an individual who received training on terrorism assessment tools, including the VERA-2R, highlights the problematic nature of the tool and its use by decision-makers.

A particular concern outlined in AFIC's submissions is the potentiality, if not probability, for inconsistency between "expert" assessors trained in the VERA-2R and decision-makers who receive no such training. AFIC outlines that "practitioners broadly understand that these tools contain risk indicators and are not accurate prediction tools. This does not always carry across with decision-makers who rely on the final assessment"[16].

[14] Ibid.
[15] Ibid, 5.
[16] Australian Federation of Islamic Councils, *Submission with respect to the Review of Division 105A of the Criminal Code Act (Cth) 1995*, 30 September 2022, 3.

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AFIC also highlights that the VERA-2R tool does not allow an assessment of "no risk". The submissions explain that "the minimum rating that can be provided is 'low-risk', meaning that risk-averse decision makers may wrongly take any VERA-2R rating as a predictor of risk"[17].

Finally, AFIC expresses unease in relation to the potential conflation between conservative (yet non-threatening) religious beliefs and violent extremist ideology, particularly as risk assessors are not required to demonstrate an understanding of differences between the two, nor does the VERA-2R allow for consideration of this nuance[18]. AFIC asserts that "there is indeed a real risk of misidentifying certain beliefs as concerns…assessments are prone to simplify the nuances of Islamic terminology and interpretations"[19].

D. Exceptionalism of the terrorism sentencing and post-sentencing

Currently, terrorism policing, sentencing and post-sentencing represent a continuum of exceptionalism from other areas of criminal law, including serious violent crime. Jabri Markwell writes,

> *"The High Court in Veen v The Queen (No 2) summarised the factors for terrorism sentencing, namely, 'protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform' (495). The Hon Weinberg (2021:768) explained that sentencing in terrorism cases is far from straightforward. Where general sentencing principles apply, a judge will have regard for the objective gravity of the offence, which includes consideration of the actual harm suffered by any victim. In contrast, in terrorism sentencing, the absence of a victim or harm has*

[17] Ibid, 4.
[18] Ibid.
[19] Ibid, 5.

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been found to not be a mitigating circumstance (Lodhi v The Queen(2007) 179 A Crim R 470; Weinberg 2021:770). The amateurish nature of a conspiracy has been found to not reduce the moral culpability of offenders (Weinberg:770), standing in 'stark contrast in which judges ordinarily deal with sentencing for attempt' (770). Reviewing Victorian and NSW cases, Weinberg noted that:

principles of general deterrence and protection of the community had to be given paramount weight. Personal circumstances which, in other circumstances, might be regarded as powerfully mitigating would be afforded far less weight. (775)

Youth is not a significant mitigating factor, and the interests of rehabilitation are outweighed by the need for general deterrence, denunciation and retribution (DPP (Cth)v Besim[2017] VSCA 158 [116]).[20]

The general public may also not be aware that,

In Australia, an individual can be prosecuted under s 101.6 of the Criminal Code for doing 'any act in preparation for, or planning, a terrorist act' even if a terrorist act does not occur. The words 'any act' covers behaviours that would not constitute any level of harm (Blackbourn 2021). Weinberg (2021) wrote that 'the types of conduct that can give rise to preparation or planning for a terrorism offence under the Code fall well short of conduct that is capable of amounting to an attempt' (770). As former INSLM, James Renwick (2021) stated:

The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community. The anti-terrorist legislation, relevantly for the present matter, is concerned with actions even where the terrorist act contemplated or threatened by an accused person has not come to fruition or fulfilment. Indeed, the legislation caters for prohibited activities connected with terrorism even where no target has been selected, or where no final decision

[20] Jabri Markwell, R. (2023) "Religion as a Motive – Does Australian Terrorism Law Serve Justice?", *International Journal for Crime, Justice and Social Democracy*. doi: 10.5204/ijcjsd.2686, 5.

has been made as to who will carry out the ultimate act of terrorism. The maximum penalty of life imprisonment testifies to the seriousness with which the present offence is to be regarded.[21]

AMAN is also concerned that the sentencing and post-sentencing regime have developed in this exceptional manner due to their development around Muslim subjects.

E. Removing counterproductive elements of law

Another exceptional element of terrorism law is the inclusion of a motive element in the definition of a terrorist act. The Australian Muslim community has requested that the term 'religious cause' and 'religiously motivated' be removed from the Criminal Code Act's definition of a terrorist act.[22] ISIS ideology is a violent ideology. Islam does not support terrorism or sexual slavery.

The category of 'religiously motivated' terrorism, by conflating our religion with terrorism, has increasingly made our community a target for a wide range of terrorists. It has fueled ISIS' claim of religiosity; and fueled racist nationalist narratives about Islam as a threat. Moreover, it has made our community 'a suspect community' in the eyes of law enforcement.

The ongoing disrespect and discrimination arising from this legal category not only poisons social cohesion but makes it extremely difficult for Australian Muslims to work in fields of justice, corrections, law enforcement, and countering violent extremism. The effect of this legal category is extremely counterproductive when one considers the

[21] Ibid
[22] *Criminal Code Act 1995* (Cth), s 100.1(1)(b).

message from research that social cohesion, religious literacy and religious social engagement are critical protective factors.

Forthcoming research from Victoria University will show that community-led social engagement to disengage from violent ideology is very possible. Violent ideologies can be disengaged from through *greater* religious education and religious social bonds. This builds on previous research showing 'religiosity and religious literacy as protective factors (Aly and Striegher 2012:859; Beller and Kröger 2018: 345; Patel 2011).'[23] Extant research shows,

> *behavioural (Smith and Guenther 2021: 89), ideological (Davey and Ebner 2019) and social (Aly and Striegher 2012: 859; Cherney et al. 2020: 97, 100, 101; Harris-Hogan and Barrelle 2020: 1393–94) factors contribute to a person's transition to extremist violence. Social and behavioural factors are also critical to disengagement (Barrelle 2015), which is relevant to assessing the scope for rehabilitation.*[24]

Our legal framework must support rehabilitation and an approach that poses the strongest long-term promise of community safety.

4. Recommendations

AMAN ultimately adopts the recommendations set out in the Submissions of the Australian Human Rights Commission as well as those of the Islamic Council of Victoria. AMAN also recommends the following:

i. The removal of the motive element within the terrorist act definition, or in the alternative, the removal of the term "religious" from the definition of terrorism in s100.1(1)(b) of the Act.

[23] Ibid, 6.
[24] Ibid, 9.

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ii. A cohesive and collaborative approach to CVE, which works with various communities and stakeholders rather than isolates them.

iii. Assessment tools are backed by empirical evidence as well as expert training, including specific training for decision-makers exercising powers under Division 105A (such as judges and members of the executive).

iv. The abolishment of CDO entirely, as proposed by the INSLM.[25]

v. Significant amendment to the ESO framework to prevent ESOs from becoming a 'replacement' for the Parole system reserved only for individuals convicted of terrorism offences.

vi. Re-centering the scope for rehabilitation throughout policing, prosecution decisions, judicial sentencing and parole management.

[25] Grant Donaldson, *Independent National Security Legislation Monitor Report*, 3 March 2023, 104.

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