Australian Government
Department of Home Affairs

Supplementary Submission to the Inquiry into the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 – Responses to Questions on Notice

Parliamentary Joint Committee on Intelligence and Security

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Part 1 – Responses to Questions on Notice – Public Hearing – 13 November 2020

Question 1: If somebody has agreed to do a deradicalisation course, or has in fact participated in one whilst in detention, does that make it harder for the AFP to convince a court, in terms of a continuing detention order, that there is a high probability they will reoffend?

Senator FAWCETT: To come back to this issue of thresholds to be met, if somebody has agreed to do a deradicalisation course, or has in fact participated in one whilst in detention, does that make it harder for the AFP to convince a court, in terms of a continuing detention order, that there is a high probability they will reoffend?

Mr Feakes: Sorry, just to be clear, if an individual has 'not' participated in a deradicalisation program?

Senator FAWCETT: No, if they have, or they've indicated they're willing to, does that make it harder for the AFP to convince a court at that higher threshold of 'highly probable'?

Mr Teal: Given where we are in certain proceedings, I'll take that on notice, Senator Fawcett, to provide you with an appropriate answer, if you are happy with that?

Senator FAWCETT: Sure. I guess my question is: if we've had trouble convincing courts to issue a CDO, do we run the risk that if the ESOs have the same threshold—which has been the evidence provided by the Human Rights Commission and the Law Council—we would suffer the same problem with ESOs in that we would struggle to get a court to order an ESO?

Answer: In determining whether to make a post-sentence order the Court must have regard to, amongst other factors, any treatment programs in which an offender has had an opportunity to participate, and the level of the offender's participation in any such programs.

This requirement provides the offender with the opportunity to demonstrate their desire to disengage and their level of rehabilitation.

It would be at the discretion of the Court to determine the weight placed (if any) on the offender's level of participation (including non-participation) in determining whether to make an ESO.

Unacceptable risk of committing a serious part 5.3 offence

The Extended Supervision Order scheme (the ESO scheme) fits within the High Risk Terrorist Offenders regime (the HRTO regime), as a less restrictive measure to a CDO. It is therefore appropriate that the eligibility requirements and threshold for obtaining an extended supervision order (ESO), namely that the offender poses an unacceptable risk of committing a serious Part 5.3 offence, are consistent with CDOs.

Standard of proof

The Department expects that should the standard of proof for ESOs be raised to that which applies to CDOs – being to a "high degree of probability" – there may be similar challenges in the making of applications for ESOs.

The proposed standard of proof for the making of an ESO, being on the balance of probabilities, is consistent with the standard of proof for the making of control orders. This reflects the fact that both ESOs and control orders impose restrictions on an offender's personal liberties that are less restrictive than ongoing custodial detention.

Question 2: Do [VERA-2R practitioners] resit the training? Is it a kind of thing where you do it and you are qualified for a period of time?

Mr Teal: Currently 209 people have been trained in the VERA tool. There were two sessions in 2017, one train-the-trainer session in 2018, eight sessions in 2019, one session in 2020, and also corrections New South Wales trained in 2019 and 2020.

Senator KENEALLY: Do people resit the training? Is it a kind of thing where you do it and you are qualified for a period of time?

Mr Teal: I'm very happy to provide a more fulsome answer to your point on notice.

Answer: Please refer to the Department's response to Question 1 of Senator Keneally's written questions, found at page 13 of this supplementary submission.

Question 3: How many times has the VERA tool been used?

Senator KENEALLY: Let's do it on notice, because I have some other questions and I am mindful of the time. You said 209 people. I don't know if you're able to tell us in this hearing, but how many times has the VERA tool been used?

Mr Teal: Not to the granularity in terms of specific numbers, other than it is being used in an ongoing manner. I can provide you with more information in that regard, but I can't tell you X amount of times.

Senator KENEALLY: Is that because you can't tell me in this room in a public hearing, or is that because you don't have that information?

Mr Teal: I think it's a bit of both.

Senator KENEALLY: Why don't we put that on notice.

Answer:

The VERA-2R is used in Australia by trained professionals in law enforcement, corrections, countering violent extremism programs and other human services. It used to assess a person's risk of engaging in violent extremism across a range of activities, including:

- assessment for offender custodial accommodation and management regimes;
- decisions about rehabilitation and reintegration planning, and treatment programs;
- parole decisions by the Commonwealth Attorney-General and state or territory parole authorities;
- applications for CDOs under the HRTO regime and NSW Terrorist High Risk Offender (THRO) schemes;
- assessment of persons of interest identified by countering violent extremism disengagement programs; and
- assessment of Australian citizens returning to Australia from conflict zones.

While the Department supports the governance and implementation of the capability in Australia, records are not held on the number of individual VERA-2R assessments that are conducted across all jurisdictions and agencies.

Question 4: Where amongst those 16 control orders the AFP have sought a condition that the court has rejected, or the court has added a condition that the AFP haven't sought?

Senator KENEALLY: On that, I think your submission makes the point that there have been only 16 control orders made since 2005, when the scheme was passed by the parliament. Would it be possible—I'm happy for you to do it on notice—for you to give us some examples of where amongst those 16 control orders the AFP have sought a condition that the court has rejected, or the court has added a condition that the AFP haven't sought? That would be very useful.

Mr Feakes: We can speak to the AFP. There have been instances where a court has not enforced the conditions that the AFP has applied for. I can't give you any further details than that. That's why I say the AFP could. There have been instances where a court has not just taken the advice of the AFP and enforced the conditions that they sought.

Senator KENEALLY: That's what I'm asking for.

Mr Feakes: Exactly.

Senator KENEALLY: That would be great to assist our deliberations, thank you.

Answer:

There are a variety of reasons that a control originally sought by the AFP may not be ultimately granted. In 2020, some controls sought by the AFP were not included in the order because they were amended by agreement with the respondent, varied by the court, or the court determined that the condition was not reasonably necessary, or reasonably appropriate or adapted for a Division 104 purpose.

Variation by agreement

At the commencement of interim control order proceedings, the Court and/or the respondent may request the AFP amend the controls requested. If agreement can be reached, an amended order will be sought. For instance, in control order proceedings for Mr S Thorne, controls were amended and agreed between both parties prior to the interim hearing. The Court made all the controls as requested without amendment.

Variation by the court

Alternatively, the Court may vary the terms of a control sought, rather than refuse to impose that control. This has occurred in control order proceedings for the below individuals:

- Mr M Kaya - the Court imposed a varied curfew control at the interim stage.
- Mr K Kaya - the Court imposed a varied specified premises control at the confirmation stage.
- Mr P Dacre, the Court imposed a varied reporting control at the confirmation stage.
- Mr A Granata, the Court imposed a varied reporting control and a varied employment control.
- Ms AB Namoa, the Court imposed a varied employment control.

Refusal by the court to order certain controls

Finally, the Court may decline to make a control if not satisfied it is reasonably necessary, and reasonably appropriate and adapted for a Division 104 purpose. For instance in the control order applications for Mr A Granata, Mr B Khazaal and Mr A Naizmand, the court declined to make a control prohibiting contact with a specified person.

Question 5: Of those people who have had control orders applied to them, are they all people who have been motivated by Islamic violent extremism? Are any of them violent right-wing extremists?

Senator KENEALLY: Okay. We'll wait and get that information on notice. My last set of questions goes to the use of these control orders and CDOs thus far. We've had 16 control orders made. If I understand correctly from the AFP evidence earlier, there are still seven individuals on control orders. The AFP gave evidence that there are 13 terrorist offenders who are set to be released over the next few years that they would consider applying these ESO schemes to. My question is—I suspect I know the answer—of those people who have had control orders applied to them, are they all people who have been motivated by Islamic violent extremism? Are any of them violent right-wing extremists?

Mr Feakes: I think we'd need to take that on notice and come back to you to make sure we've got the right details and don't mislead you.

Answer:

All of the persons currently subject to control orders have ideological backgrounds which are associated with Islamic extremism.

Question 6: Of the 13 people that the AFP referred to who are currently in jail for terrorism offences have been motivated by violent right-wing extremism?

Senator KENEALLY: I'm trying to understand—and I think I know the answer, but I'm trying to get it confirmed—whether any of the 13 people that the AFP referred to who are currently in jail for terrorism offences have been motivated by violent right-wing extremism.

Mr Teal: Let me get the answer for you, and we'll come back to you.

Answer:

At the time of arrest/conviction, all of the persons due for release before 2025 held ideological views consistent with Islamic extremism.

Question 7: Is [Cormac Rothsey] on any type of post-release supervision?

Senator KENEALLY: Thank you. I specifically want to refer to two individuals. There's a right-wing extremist called Cormac Rothsey who pleaded guilty to using a carriage service to menace, harass or offend and was sentenced to 10 months in jail after he had threatened to assassinate Jacinda Ardern. He had also threatened to blow up a mosque in Sydney and claimed he wanted hundreds of Muslims to die. He was released from jail a few months ago. Is he on any type of post-release supervision?

Mr Teal: I'll take that on notice.

Answer:

Mr Cormac Patrick Rothsey was released from prison in July 2020 after being convicted for using a carriage service to menace, harass or cause offence contrary to section 474.17(1) of the Criminal Code (Cth).
Mr Rothsey is ineligible for a post-sentence order under Division 105A of the Criminal Code, as he was not convicted of an eligible Commonwealth terrorism offence. Mr Rothsey is also ineligible for an order under the NSW ***Terrorism (High Risk Offenders) Act 2017***.

Question 8: If [Michael Holt] in this group of 13 [terrorist offenders due to be released between now and 2025]?

Senator KENEALLY: Thank you. I also want to refer to a white supremacist named Michael Holt who was sentenced to 4½ years for weapons and child pornography offences. He's described as a Neo-Nazi who fantasised about shooting up shopping centres and had stockpiled an arsenal of weapons in his home. He is due to be released sometime in the next year, according to media reports. I'm particularly interested to know if he's in this group of 13?

Mr Teal: Again, I'll take that on notice.

Answer:

Mr Michael Holt was convicted of NSW weapons offences and Commonwealth child abuse material offences. Mr Holt may be considered for parole in 2021 and his head sentence expires in September 2022. Mr Holt would be ineligible for a post-sentence order under Division 105A of the Criminal Code, as he was not convicted of an eligible Commonwealth terrorism offence. It will be a matter for NSW authorities to consider the availability of any NSW post-sentence orders in the lead up to his release from custody.

Part 2 – Responses to Written Questions on Notice – Senator Kristina Keneally

Question 1: The Department has previously provided evidence to the Committee that it facilitates training in the VERA-2R tool.

Answer:

a) How often is this training offered?

Training in VERA-2R is offered periodically, depending on demand, noting this includes other law enforcement,corrective services and countering violent extremism functions, in addition to HRTO-related purposes. The Department provided:

- two VERA-2R training courses in 2017;
- one 'train the trainer' course in 2018;
- eight VERA-2R training courses in 2019; and
- two VERA-2R training courses in 2020, including one in November 2020, (with one further session planned).

In 2019-20, the Department also supported three in-house training courses run by Corrective Services New South Wales.

During 2020, the Department's VERA-2R training has been affected by the COVID-19 pandemic.

The Department is also providing assistance to Corrections New Zealand to establish its VERA-2R assessment capability. The Department delivered training to New Zealand Corrections staff in 2019, with additional user training and train-the-trainer sessions planned for 2021.

b) How many staff are currently trained in the use of the VERA-2R tool?

As at 23 November 2020, the Department has trained 222 people in the VERA-2R tool, including 13 since 13 November 2020.

The Department is conducting a stocktake of trained users to be completed mid-December 2020. This will identify if trained users are still in roles that require them to be certified VERA-2R users.

c) Are staff required to re-sit training?

In 2019, the VERA-2R Community of Practice developed guidelines for recertifying VERA-2R users. The Department is updating its governance processes to put the guidelines into practice.

The guidelines state that users are expected to recertify every three years. To meet re-certification criteria, users are expected to:

- confirm that they continue to be mandated by their agency to undertake VERA-2R assessments.
- confirm that they have completed at least one VERA-2R assessment on an individual, or at least 3 VERA-2R case studies, provided by the Department, per year.

If the user is unable to be engaged in VERA-2R assessment, their certification may be suspended for up to 12 months. If they are unable to recertify at that time, they will be required to retake the core training to regain certification.

The Department has also created a training and case study package (approved by Dr Pressman, the VERA-2R author) to update 2017 trained users in the 2018 version of the VERA-2R.

d) If so, how often?

See answer to 1(c) above.

Question 2: Has the Department shared information or consulted with any foreign countries in relation to the VERA-2R tool?

Answer:

a) If so, which countries has the department consulted or shared information with?

The Department engages with other countries about VERA-2R use as part of Countering Violent Extremism and Counter Terrorism dialogues. It is not appropriate to describe those engagements in further detail here.

The Department liaises regularly with Dr Pressman, the author of the VERA-2R, about the use of the tool. The Department has also engaged Dr Pressman to return to Australia in 2021, when travel restrictions permit, to conduct a masterclass for VERA-2R experts who will provide expert reports for the Department and further train-the-trainer training.

The Department also liaises regularly with the Netherlands Institute of Forensic Psychiatry and Psychology. The Institute publishes the VERA-2R manual and is also overseeing a VERA-2R validation research project.

The Department is currently supporting New Zealand to develop its VERA-2R assessment capability, with the expectation that it will become an independent user country by the end of 2021.

b) How often has this occurred?

See answer 2(a) above.

Question 3: Has the Department considered using other CVE tools other than VERA-2R?

Answer:

Yes.

In selecting the VERA-2R for the High Risk Terrorist Offenders (HRTO), a HRTO Implementation Working Group, comprised of Commonwealth and State and Territory representatives, were informed by Australian psychologists experienced in assessing high-risk sex and violent offenders and an international literature review.

The Department continues to monitor the range of tools available to support violent extremist risk assessment. VERA-2R users may also use other assessment tools as appropriate to the circumstances of the person being assessed.

a) If so, which tools?

The international literature review and HRTO Implementation Working Group considered the Extremist Risk Guidance (ERG22+) and Radar instruments.

Question 4: An eligible offender's risk is continually assessed by Commonwealth, State and Territory agencies closely up to the point of their sentence expiry to ensure information remains up to date and relevant.

Answer:

a) How often do these assessments occur?

In managing HRTO-eligible offenders, the Department of Home Affairs requests information from relevant Commonwealth, State, and Territory agencies to inform and support decisions about an offender's ongoing management. This may include agencies providing previous VERA-2R assessments undertaken to support decisions about police investigations, prisoner management, treatment and release. As part of a contemplated CDO application, the Department may also engage a relevant expert (e.g. a forensic psychologist) who is qualified to undertake a VERA-2R assessment for a particular purpose: understanding the risk the offender poses of committing a serius Part 5.3 offence if released into the community.

The proposed amendments will enable the AFP Minister to direct eligible terrorist offenders to be subject to a risk assessment for the purposes of considering whether a post-sentence application be made (see proposed section 105A.18D). This will ensure current and relevant information can be considered when determining the most appropriate management option for an eligible offender.

b) Has an offender's risk ever fluctuated throughout a sentence?

As outlined above, risk assessments may be undertaken throughout an offender's incarceration for a range of purposes. In managing HRTO-eligible offenders, a risk assessment is only undertaken by an appropriately qualified expert (e.g. a forensic psychologist) near the conclusion of an offender's sentence with the focus being on their potential risk of committing a serious Part 5.3 offence if released into the community. This provides the most relevant and current assessment of an offender's risk.

Question 5: Under paragraph 105A.7B(3)(n), the court may include in an ESO that an offender attend and participate in treatment, rehabilitation or intervention programs and activities or undertake psychological or psychiatric assessment or counselling. Have any offenders refused to participate in treatment, rehabilitation or intervention activities in prisons?

Answer:

In regards to HRTO-eligible offenders in prison, the Department does not hold comprehensive data on participation in state and territory treatment, rehabilitation or intervention activities whilst incarcerated. These state or territory treatment activities are voluntary while offenders are serving a period of imprisonment. The Department is aware that some HRTO-eligible offenders have refused to engage, have disengaged after a period of participation, and/or have reengaged after a period of disengagement in these activities.

Question 6: Would an offender's refusal to participate in these activities have bearing on the issuance of an ESO?

Answer:

In determining whether to make a post-sentence order the Court must have regard to, amongst other factors, any treatment programs in which an offender has had an opportunity to participate, and the level of the offender's participation in any such programs.

This requirement provides the offender with the opportunity to demonstrate their desire to disengage and their level of rehabilitation.

It would be at the discretion of the Court to determine the weight placed (if any) on the offender's level of participation (or non-participation) in determining whether to make an ESO.

Question 7: Has an offender been compelled by the court to undertake these programs?

a) If so, how was this enforced?

Answer:

The Department is not aware of any terrorist offender being compelled by a control order to undertake treatment, rehabilitation or intervention programs or activities or undertake psychological or psychiatric assessment or counselling.

Under a control order, the court may impose a condition that a person is required to participate in specified counselling or education only if the person agrees, at the time of the counselling or education, to participate in the counselling or education. However, a person subject to this control would retain complete discretion to choose whether he or she would participate in such activities or programs.

In 2019-2020, seven individuals were subject to this condition through their control order.

The Department is aware of one offender who received a recognisance order under the ***Crimes Act 1914*** (Cth) upon conviction, which included a requirement to comply with a condition to attend psychological and other counselling, including counselling directed at 'de-radicalisation', as directed by their Community Corrections Officer.

Question 8: Would an offender's ongoing rehabilitation needs have bearing on the issuance of an ESO?

Answer:

The court must have regard to any other matter the Court considers relevant, which may include an offender's ongoing rehabilitation needs. It would be at the discretion of the Court to determine the weight placed (if any) on an offender's ongoing rehabilitation needs in determining whether to make an ESO.

If the Court decides to make an ESO in relation to an offender, the Court must be satisfied on the balance of probabilities that each of the conditions to be imposed on the offender is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk. In determining whether a condition is reasonably necessary, and reasonably appropriate and adapted for that purpose, the Court may take into account the offender's ongoing rehabilitation needs.

Question 9: How would an offender's participation in ongoing rehabilitation be managed post-release?

Answer:

The conditions that a Court imposes through an ESO will determine the management of an offender post-release.

Subject to the conditions imposed by a Court, state and territory agencies will work with offenders subject to ESOs on a case-by-case basis to support their rehabilitation and reintegration prospects, and to reduce their risk of reoffending.

This may include participation in a specialised violent extremism disengagement program, such as the Proactive Integrated Support Model (PRISM) in New South Wales or the Community Integrated Support Program (CISP) in Victoria.

States and territories may also provide other measures to support rehabilitation, such as psychological counselling, other offence-related programs and educational and employment programs, as part of a treatment plan tailored to the needs of the offender.

Question 10: The Department of Home Affairs has the overall management responsibility of the HRTO regime. How often does the Department consult with operational agencies to inform the considerations of case management pathways for HRTO-eligible offenders?

a) In what forums does this consultation occur?

Answer:

The Department of Home Affairs works closely with all relevant Commonwealth and state and territory agencies that provide information relevant to the assessment of an offender and support the offender's ongoing management. In particular, the Department chairs:

- the HRTO Working Group, convening relevant Commonwealth agencies to consider HRTO-eligible offenders; and
- the Terrorist Offender Review Committee, convening relevant State and Territory agencies, on a jurisdictional basis, to provide strategic oversight on the management of HRTO-eligible offenders.

The Department, informed by relevant Commonwealth and state and territory agencies, considers all potential management options for ensuring community safety prior to the release of a terrorist offender. The use and timing of those measures is considered on a case-by-case basis.

The current process for determining the most appropriate case management pathway for HRTO-eligible offenders will be adjusted to ensure that ESOs, as an extension of the HRTO regime, will be considered in the same forums.