



Australian Government

Australian Institute of Criminology

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Parliamentary Joint Committee on Intelligence and Security

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

Introduction

The Australian Institute of Criminology (AIC) is Australia's national research and knowledge centre on crime and justice. The AIC informs crime and justice policy and practice in Australia by undertaking, funding and disseminating policy-relevant research of national significance.

This submission is in response to an invitation from the Parliamentary Joint Committee on Intelligence and Security (PJCIS) as part of their review of post-sentence terrorism orders. The PJCIS review is being undertaken in response to the Independent National Security Legislation Monitor (INSLM 2023) review into the operation, effectiveness and implications of Division 105A of the *Criminal Code Act 1995*.

The AIC welcomes the opportunity to contribute to the PJCIS review. The information presented in this submission is based on the AIC's recent report *Review of violent extremism risk assessment tools in Division 104 control orders and Division 105A post-sentence orders* (Cubitt & Wolbers 2023). In this report, the AIC reviewed published research into risk assessment tools for violent extremism and conducted interviews with experts in the field to understand the role that risk assessments play in relation to the legislation.

This submission summarises the final report, including the AIC's recommendations in relation to risk assessment. The report was tabled in Parliament by the Attorney-General, and has been released publicly on the AIC's website (<https://www.aic.gov.au/publications/special/special-14>).

Divisions 104 and 105A of the *Criminal Code Act 1995* and the role of risk assessment

Research undertaken by the AIC focused on the ability of risk assessment tools to assist with expert assessments of the risk of an individual engaging in future acts of violent extremism, with particular reference to Division 104 and Division 105A of the *Criminal Code Act 1995*.

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Division 104 of the Criminal Code sets out the circumstances in which a control order may be made by the issuing court for the purpose of:

- protecting the public from a terrorist act;
- preventing the provision of support for, or the facilitation of, a terrorist act; or
- preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country.

A control order may impose a range of obligations, prohibitions and restrictions on a person, including:

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person wear a tracking device; and
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation).

The continuing detention order (CDO) scheme was introduced as part of the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (the HRTO Act). Division 105A of the Criminal Code provides for the Minister responsible for the Australian Federal Police to apply to a state or territory Supreme Court for a CDO against a terrorist offender who is deemed to pose an unacceptable risk of committing a serious Part 5.3 (Terrorism) offence if released into the community. A CDO commits the offender to detention in prison for the period of the order, which must not be more than three years. A CDO must be reviewed at 12-month intervals.

Extended supervision orders were added to Division 105A in 2021 as an alternative to a CDO. Together these orders are now known as post-sentence orders. The extended supervision order scheme enables the court to make an order in respect of a high-risk offender who poses an unacceptable risk of committing a serious Part 5.3 (Terrorism) offence, after being released into the community at the end of their custodial sentence. When making the order, the court is able to impose a broader range of conditions than would be available under a control order and which are considered reasonably necessary, adapted and appropriate to manage the risk of the offender committing a serious Part 5.3 offence. This broader range of conditions allows the court to tailor conditions to the particular risk posed by a convicted offender, and to better protect the community from that risk.

Risk assessment tools may be used to help guide decisions regarding whether to impose control orders or post-sentence orders for terrorist offenders. The Violent Extremism Risk Assessment 2 Revised (VERA-2R) has been adopted as the primary assessment tool for use as part of the HRTO regime to assess the risk of an offender perpetrating an extremist act (PJCIS 2021a). Under Division 105A of the Criminal Code, the court may appoint a relevant expert to conduct a risk assessment and submit a report on the offender, while the HRTO regime may also be supported by historical assessments completed in correctional settings or assessments made in the process of determining the need for a control order or continuing detention order (PJCIS 2021a). The VERA-2R has been used in applications for continuing detention orders, as well the NSW Terrorist High Risk Offender schemes, but is also used much more widely by law enforcement and correctional agencies and in support of countering violent extremism interventions (PJCIS 2021b).

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The PJCIS (2021a, 2021b) has previously raised questions regarding the maturity of the VERA-2R as a risk assessment tool, as well as the underlying evidence base, and noted concerns raised by stakeholders about the accuracy of the tool in predicting future risk of an individual engaging in violent extremism. This was the basis for the AIC undertaking further research on behalf of the Department of Home Affairs (the Department). These issues were also canvassed as part of the review by the INSLM.

INSLM commentary on risk assessment

In March 2023, the INSLM provided a report to the Attorney-General on the *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*. The review by the INSLM focused on Division 105A of the *Criminal Code Act 1995* and made a series of recommendations, one of which suggested that CDOs should be abolished. While the focus of the review by the INSLM was the legislative regime convening CDOs, important commentary was also made relating to the use of risk assessment in matters under Division 105A of the *Criminal Code Act 1995*.

The INSLM was critical of several components of risk assessments. In particular, the INSLM report highlighted the lack of evidence to support the use of risk assessments for violent extremism. The report stated:

That the field of ‘risk assessment for violent extremist offending’ can be properly characterised as a ‘body of knowledge or experience which is sufficiently organised or recognized to be accepted as a reliable body of knowledge or experience’ is not obvious. (INSLM 2023: 72)

The INSLM elaborated on this reasoning, suggesting that the emergence of a validated actuarial risk assessment for extremist violence was unlikely for several reasons:

It is doubtful that there will ever be validated actuarial risk assessment instruments for the risk of a person engaging in extremist violence. There are a number of bases for this doubt. First, there will never be a large enough pool of offenders to enable valid statistical analyses of risk factors. Second, within the pool of offenders, the variety of extremist violence and its causes is so diffuse that prediction of future acts is impossible. (INSLM 2023: 74)

Finally, the INSLM’s report discussed the Structured Professional Judgement process (SPJ), which is considered to be best practice in risk assessment for violent extremism. The SPJ process uses one or more risk assessments to structure clinical engagement with an offender and to determine the risk that they pose for continued offending. The INSLM report noted several questions in relation to the role that risk assessments play in the SPJ process, the extent to which they were relied upon and the balance given to professional judgements against the outcomes of the risk assessments (INSLM 2023: 78).

The INSLM did not make any recommendations strictly in relation to the use of risk assessments for violent extremism. However, given the commentary about the use of risk assessment in post-sentence terrorism orders, some of which draws upon the AIC’s draft report, the outcomes and recommendations of the AIC’s research into violent extremism risk assessment tools are relevant to the review being undertaken by the PJCIS.

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Review of violent extremism risk assessment tools

Scope

In February 2022, the Department formally requested the AIC undertake a review of the use of violent extremism risk assessment tools in relation to Divisions 104 and 105A of the *Criminal Code Act 1995*. The request was made in response to Recommendation 2 of the PJCIS *Advisory Report on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, and the Committee's comments about risk assessment in its *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*.

The terms of reference for this review required that the AIC:

- identify and describe violent extremism risk assessment tools currently available to support risk assessments of convicted terrorist offenders;
- assess each tool's suitability to assist an expert to conduct an assessment of the risk to the community from an offender, for the purpose of issuing a control order under Division 104 or for a post-sentence order under Division 105A of the *Criminal Code Act 1995*; and
- review current risk assessment frameworks, including the use of Structured Professional Judgement, to assess the risk of violent extremist offending and consider how violent extremism risk assessment tools might be improved.

This review did not consider the implementation of violent extremism risk assessment tools for purposes other than Divisions 104 and 105A of the Criminal Code. Importantly, the scope of the AIC review was broader than that of the PJCIS review, in that it was focused on the use of risk assessment tools for both control orders and post-sentence orders for terrorist offenders, and the findings from this review were relevant to both types of orders.

The validation of any violent extremism risk assessments was out of scope of this review. This included the collection or analysis of data relating to individuals who have committed acts of violent extremism with a view to understanding the predictive accuracy of these assessments. Importantly, Division 104 and 105A proceedings, including the manner in which risk assessment outcomes were considered by the court, were out of scope of this review.

Methodology

The AIC's review relied on two data sources. First, we conducted a comprehensive review of published studies related to the development, accuracy and use of violent extremism risk assessment tools. Second, we conducted semi-structured interviews with experts in the field of violent extremism risk assessment to supplement and contextualise findings from empirical studies. The review was conducted over a 20-week period in 2022.

Literature review

The literature search was undertaken in collaboration with the AIC's JV Barry Library, and focused on English-language theoretical, conceptual and empirical research. We primarily relied upon research published between January 2015 and September 2021 to ensure recency of the research. Noting similarities in relation to the violent extremism threat environment, Australian studies were

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considered alongside studies from New Zealand, the United States, the United Kingdom, Canada and Europe. Follow-up searches were undertaken independently by the authors, with a focus on literature published between 2010 and the time of writing in 2022. Foundational works published prior to 2010 that discuss risk assessment tools were also included. This methodology was developed to ensure comprehensive coverage and an up-to-date account of the field.

Stakeholder interviews

Sixteen interviews were undertaken with stakeholders who were involved in the process of assessing risk for violent extremism, from researching and developing the tools to implementing those tools. These stakeholders included:

- practitioners involved in delivering risk assessments;
- academics and practitioners involved in the research, design and validation of risk assessments; and
- individuals involved in management and policy relating to risk assessments.

There was considerable diversity of experience in the field of violent extremism risk assessment among interview participants. Questions focused on the delivery and suitability of specific risk assessments with which the participant had experience. Participants were asked about the SPJ process and its suitability for these specific purposes. Questions regarding the research, design and validation of risk assessments, and the current status of risk assessment use in Australia, were asked of interview participants with relevant expertise. Finally, questions relating to views on current approaches to risk assessment, their suitability to the current threat environment, and emerging ideologies were also posed. Questions were framed within the context of Division 104 and Division 105A proceedings.

Findings

The AIC review focused on the four principal risk assessments implemented in Australia: the VERA-2R, the Terrorist Radicalisation Assessment Protocol-18 (TRAP-18), the Radar, and the Extremist Risk Guide 22+ (ERG 22+).

The review made several conclusions with respect to the use of these risk assessment tools for control orders and post-sentence orders. These are briefly summarised below:

- The VERA-2R and ERG 22+ were useful for informing decisions relating to Division 104 control orders and Division 105A post-sentence orders, while the Radar and TRAP-18 were not suitable. The VERA-2R remains the most suitable of the available options for use in post-sentence and control orders. However, there is little evidence to support any individual risk assessment tool offering superior performance for decision making relating to Division 104 or 105A orders.
- Risk assessment tools were rarely used in isolation—in fact, practitioners reported using several risk assessments concurrently in the SPJ process. There was no empirical evidence showing how these risk assessment tools are or should be used in combination. Instead, the process was implemented in an ad-hoc fashion by practitioners due to concerns that each individual risk assessment tool did not sufficiently account for all risk domains.

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- There is a paucity of robust empirical evidence on the efficacy of these risk assessments. While some, such as the TRAP-18, feature a larger body of research, there is little research supporting the validity of others, including the VERA-2R. Where research has been undertaken, it is almost universally authored by the creator of those tools or their colleagues, and the sample sizes are often small and not generalisable. Whether these risk assessments are valid for measuring risk of violent extremism, to the threshold required for post-sentence orders, remains unclear.
- The opportunity for independent research is restricted by the controls placed on the content of these risk assessment tools, the domains and questions used, the training materials and the data resulting from their implementation. This practice hinders the development of best practice and, ultimately, the quality of risk assessment that can be implemented.
- There are two main barriers to publicly releasing research on risk assessment tools. First, agencies that commission research into the validity of these risk assessment tools are not required to make that research public. Second, licensing arrangements with the authors of these tools place constraints on research. There was concern these barriers undermine efforts to build confidence among critics of violent extremism risk assessment and, more importantly, among those who rely on risk assessment outcomes to make decisions.
- Based on its current use, the VERA-2R should not be considered a predictive risk assessment tool, and should not be implemented solely in an attempt to forecast the risk that an individual will commit a terrorist act (whether for the first time or as a repeat offender). Rather, it forms part of an overall assessment made by the relevant expert.
- SPJ was the optimal approach to the assessment of violent extremism risk. This was evident from both the literature review and the interviews. However, it was less clear whether there was consistency in the way that SPJ was implemented in relation to Division 104 and 105A proceedings. There is uncertainty regarding how risk assessment tools were applied between practitioners (and in what combination), which risk assessments were used in different matters and how, and whether there were consistent findings and outcomes between practitioners and cases.
- The evidence base on risk and protective factors for violent extremism is rapidly developing. The recent systematic review by Wolfowicz et al. (2021) identified risk and protective factors across five domains related to radicalised attitudes, intentions and behaviours, and the strength of their respective association. Half of the 127 studies included in this review were published between 2018 and 2020. It is not clear that existing risk assessment tools for terrorism are consistent with this latest evidence.
- Only a handful of the studies included in the Wolfowicz et al. (2021) systematic review were based on Australian samples, meaning there is a paucity of Australian data on risk and protective factors for both cognitive and behavioural radicalisation.

These findings, and the evidence in support of them, are outlined in full in the Cubitt and Wolbers (2023) report.

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Recommendations

On the basis of these findings, the AIC made the following recommendations to the Department:

- Recommendation 1: The VERA-2R remains the most suitable risk assessment tool for use with Division 104 control orders and Division 105A post-sentence orders and should continue to be used, in conjunction with other suitable tools as appropriate, but it must be subjected to further scrutiny and, in particular, validation.
- Recommendation 2: Any risk assessment tool employed to inform expert assessments for Division 104 and 105A proceedings must be validated for, at a minimum, face validity, construct validity, and inter-rater reliability. These validation studies must be undertaken by appropriately qualified researchers who are fully independent of the authors of these tools and their colleagues.
- Recommendation 3: Any use of risk assessment tools (including the VERA-2R), or consideration of the outcomes of a Structured Professional Judgement process, should be accompanied by a clear acknowledgement and communication that risk assessment tools in themselves do not predict the likelihood of violent extremism. The development or validation of risk assessment tools that are predictive of the likelihood of extremist or terrorist acts remains an important focus but will require a long-term strategy.
- Recommendation 4: A commitment should be made by agencies that fund this research that any research into risk assessment tools, including validation studies, be made fully public.
- Recommendation 5: While Structured Professional Judgement was considered the optimal framework for risk assessment, empirical research is required to better understand whether it produces consistent findings and outcomes between cases and between practitioners.
- Recommendation 6: The Department of Home Affairs should take carriage of making relevant data available for the purpose of independent validation studies.
- Recommendation 7: The recently funded Centre of Excellence for CVE Research, Risk Assessment and Training should lead the development and implementation of a strategy for advancing research into risk and protective factors for cognitive and behavioural radicalisation among Australian samples. This research can directly inform the regular review and, potentially, future refinement of existing risk assessment tools or the development of new tools.

Importantly, while the AIC's review highlighted the limitations of the current approach to risk assessment, it also outlined a proposed course of action that would help to improve the validity and management of risk assessments for post-sentence terrorism orders. The report details a pathway to validating current tools with a view to developing validated, predictive risk assessment. It also recommends mechanisms for improving understanding of the SPJ process and the use of different risk assessment tools in that process, building awareness of what risk assessment offers to decision makers in this context, and increasing the quality of Australian evidence on cognitive and behavioural radicalisation to guide improvements to existing risk assessment tools. In doing so, these recommendations would help to address many of the limitations of risk assessment discussed in the INSLM report.

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URLs correct as at June 2023

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