SUBMISSION BY DR RODGER SHANAHAN
PJCIS REVIEW INTO OPERATION AND EFFECTIVENESS OF DIVISION 105A OF THE CRIMINAL CODE ACT 1995

A similar submission concerning the effectiveness and operation of Division 105A of the Criminal Code Act 1995 was previously provided to the INSLM during his consideration of the subject legislation. My views regarding the issue remain the same – the continuing detention element of Division 105A of the Act is both contrary to the principles of justice in a liberal democracy and of no demonstrable practical value.

My comments on these pieces of legislation will be confined to their use against those convicted of Islamist terrorism offences given that is where my expertise lies. It is for others to make observations regarding its efficacy in cases of non-Islamist radicalism.

The Threat Posed by Terrorist Recidivism

The data concerning radical Islamist terrorist recidivism is quite limited and virtually non-existent in the Australian context. There are several reasons for this: firstly, until the outbreak of the Syrian conflict and the emergence of Islamic State, the sample size of terrorism offenders has been quite small. Secondly, given the average jail sentence in Australia for radical Islamist terrorism offenders is around 13 years, most of the subjects remain in prison and will do so for years to come.

The INSLM report quoted a number of sources that showed recidivism rates for terrorist offenders to be very low. The devil, as always, is in the detail however. Some of these figures related to individuals arrested for nationalist terrorist offences where peace agreements or resolution of the conflict had essentially taken away the motivational factor. Some included individuals arrested for Islamist terrorism offences, however it was not clear if individuals who subsequently left the country (and therefore may have joined terrorist groups overseas) were included in the figures.

Exactly how one is to measure recidivism rates amongst Islamist terrorists in the Australian context is something that has been afforded very limited attention in the Australian context. In ideologically-driven terrorism cases it can be difficult to discern

the true intent of people. Courts may not always come up with the right outcome – Majid Raad for example was acquitted as part of the 2009 Operation Pendennis trial and yet went on to join Islamic State in Syria in 2014. Yacqub Khayre was acquitted in the 2009 trial of five people over a plot to attack Holsworthy Barracks in Sydney but in 2017 was shot and killed by police in Melbourne after what was considered at the time to be an act of terrorism. More recently Momena Shoma, who was already serving a 42-year sentence for a terrorist attack in Melbourne was sentenced to another 12 years for an attack she carried out against a fellow inmate that was designated as a terrorist attack.

The threat that convicted terrorists post to society are real. Usman Khan, a convicted terrorist in the UK who had been released stabbed five people at Fishmonger's Hall and London Bridge in November 2019. Sudesh Amman, who conducted a knife attack in London on 2 February 2020 was released from prison on terrorism charges the month prior to the attack. And Kujtim Fejzullai, the gunman who killed four people in an attack in Vienna in November 2020 had been paroled in December 2019 after being convicted of trying to enter Syria to join Islamic State.

Potential for Recidivism

The ideal of course, is to prevent terrorist activity carried out by those released after being convicted of terrorism or jihadist foreign fighter-related crimes. Courts' sentencing remarks and the response of terrorism offenders to the control orders to which they are subject after their release from prison give some indication of the likelihood of recidivism. Courts have found more than 60 per cent of convicted Islamic State-era radical Islamist terrorism offenders not to be contrite and that fewer than a quarter of them have good or better prospects for rehabilitation.[1] This alone should be cause for concern because it deals with those sentenced to a wide range of jail terms.

In the Australian context, an additional indicator of terrorist recidivism is afforded authorities through the imposition of control/supervision orders. The willingness of an individual to abide by the sometimes significant control measures placed on a person can also provide data regarding the prospects for recidivism short of the actual conduct

[1] Typology of Terror, Lowy Institute, https://interactives.lowyinstitute.org/features/typology-of-terror/legal-status/, accessed 21 January 2021.

of a terrorist attack. If a person is unable or unwilling to abide by the restrictions imposed by the state then it can be another indicator as to whether an individual has rejected their radical Islamist ideological stand or simply convinced others that they have.

Concerns about the willingness of radical Islamists to adhere to court-imposed restrictions appear well-founded. Of 14 individuals subject to control orders that I am aware of, nine have been charged for breaching them (one person has been twice charged for breaching their orders) while another had his order extended for an additional year. One other person who was subject to a firearm prohibition order (FPO) was charged for breaching it.

Hence if we were to simply measure recidivism by comparing the number of individuals re-arrested or re-convicted for terrorism offences then the numbers would be low. If we were to include those charged with breaching control/supervision orders as a measure of recidivism then that rate is much more significant.

Protecting the Public from Terrorist Recidivism

It is therefore in the public's best interests that some form of post-sentence control mechanism should be imposed on terrorism offenders in order to best ensure the safety of the public. The issue then becomes what form that control measure takes. I would argue that the control order mechanism, whilst undoubtedly resource intensive is an adequate safety measure in the present circumstances. Its effectiveness is shown by the numbers of people picked up in breach of it and this in and of itself should send a strong message that for individuals convicted of terrorism offences their monitoring has not ceased.

At the same time the global jihadist movement was energised by events in Iraq and Syria and the announcement of the *khilafa* gave individuals an idealized society with which they could identify and whose protection and expansion they felt a religious obligation to achieve. Absent the Islamic State's Islamist utopia the attraction of the siren call of global jihad has been very much reduced. The circumstances facing those released from prison following their sentence is quite different to that which they faced when they

committed their crimes. In this environment the ability of external actors to influence Australian Muslims to take radical action is greatly reduced, as is the ability of home-grown influencers to argue that circumstances call for individuals to undertake jihad.

Given this, the continued use of supervision orders would appear to be proportionate to the threat posed by released terrorists and also a good mechanism for evaluating an individual's continued adherence to radical Islamist ideology.

The same cannot be said for the use of the continuing detention order (CDO). It is a draconian measure that goes against the fundamental precept that one should be freed after the expiration of their sentence. The then-Attorney General said that the need for a CDO was because:

There is no existing Australian regime for managing terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentence. Law enforcement agencies can seek to rely on control orders to manage the risk of terrorist offenders upon their release from prison. However, there may be some circumstances where, even with controls placed upon them, the risk an offender presents to the community is simply too great from prison.

CDOs have been used in the case of Abdul Nacer Benbrika and Blake Pender. There is no doubt that Abdul Nacer Benbrika has been highly influential amongst the Australian radical jihadist cohort and himself presents a serious security threat. His Australian citizenship has been cancelled. In imposing a CDO the Victorian Supreme Court accepted the Commonwealth's arguments that less restrictive measures such as a control order could not guarantee the mitigation of the risk, while it also did not accept that immigration detention would be as effective a control as a CDO or that if he was deported to Algeria it would negate his ability to influence supporters in Australia.

If Benbrika still adheres to his violent jihadist ideology after 15 years in prison, there appears to be no logic to detaining him for an additional three years or explaining how this is likely to reduce the risk of his delayed release into the community. If he remains an unreconstructed jihadist after 15 years in prison then it is highly likely he will remain so in three years' time and he threat he poses will remain. Indeed, if it is believed that

he retains such influence amongst others, then there is an argument that extending his detention may even increase his credibility as a jihadist ideologue. Radical Islamist literature after all praises *sabr*, or patience, as a virtue.[2] If his deportation to Algeria is considered equally problematic, this disregards the fact that as an Algerian citizen he is able to travel there at any time. The Algerian authorities' attitude towards him is likely to be the same whether he is deported or travels there freely.

The argument that less restrictive measures such as control orders are insufficient appears to be difficult to argue given the way in which authorities have been able to effectively monitor individuals to date, detect breaches, then detain and charge the individual concerned. The PJCIS noted that 12 individuals had been noted as being eligible for consideration for a CDO and that one of these individuals, Bilal Khazaal had been released on a control order. Khazaal was a significant figure in the Australian radical Islamist cohort but was only subject to the less restrictive control order. Khazaal was subsequently arrested by police for breaching that order and awaits trial. It is not clear why the authorities felt that they could not effectively monitor Benbrika and determine whether he had breached a control order's numerous conditions, while at the same time they could effectively determine breaches by another high-profile terrorist offender such as Khazaal.

The other use of the CDO, with respect to Blake Pender, involved an offender with significant mental health and substance abuse issues and it is difficult to believe that the drafters of the legislation envisaged it being used on someone whose adherence to a radical Islamist ideology was as marginal (even if his violent behaviour was real) as Pender's. For this reason the court only imposed a one-year CDO. Once again the limitations of control orders formed part of the court's considerations.

The concerns regarding the legislation centre around its utility given the three-year limitation. If someone has served a lengthy jail sentence for a crime based on a radical Islamist ideology and it is not believed that they have genuinely renounced the ideology then it is likely that three additional years will make any difference. Better to release

[2] See for example Dabiq Issue 5, p 24; Issue 7 p 12; Rumiyah Issue 4 p 31; Issue 9 pp 26, 35.

them under a control order (that can be extended if necessary) and perhaps a FPO that allows for searches to be conducted.

It appears anomalous to impose a CDO on Benbrika because of the inadequacies of the control order, but then release Khazaal on the same 'inadequate' control order – noting that Khazaal's breaching of the order was detected. I am concerned that the practical outcome the CDO is designed to achieve is not questioned more rigorously, nor the perceived inadequacies of less restrictive measures such as control and associated orders are not scrutinised in more depth, given their apparent effectiveness to date. Given this, it is hard to see a reason why CDOs are warranted.

Conclusion

Given the differences in terrorist typologies, and domestic legislation, more work is required to determine a better methodology for measuring terrorist recidivism more generally, but particularly in the Australian context. Regardless, the approach to mitigating the risk presented by terrorist recidivism has centred on the generalized use of control orders and the limited use of continuing detention orders. I believe that control orders, while expensive, are an effective and legitimate response to the peculiar threat posed by radical Islamist terrorism offenders following their sentence completion. I do not believe that detention orders are either a legitimate response to the perceived threat, nor do I believe that they are effective.

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