



Position Paper

Australia – On the need to augment the current counter-terrorism strategy with context-specific deradicalisation, rehabilitation and prevention programmes.

21 October 2015

I. Introduction

1. Pursuant to the *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combatting Terrorism*¹, the *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*,² and the report of the United Nations Secretary-General *Uniting Against Terrorism*,³ International Commission of Jurists Victoria (Australia branch) ('ICJV') renews the call for a human rights approach to countering the threat of violent extremism. ICJV maintains that the counter-terrorism strategy of the Australian Government that relies exclusively on criminalisation of an ideological threat and the use of heavy sanctions is discriminatory and fails in its goal of protecting the public

¹ International Commission of Jurists, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combatting Terrorism*, adopted 28 August 2004.

² *Assessing Damage, Urging Action* (Report of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists, 2009).

³ Report of the Secretary-General, *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, General Assembly, 60th session, Agenda items 46 and 120, UN Doc A/60/825 (27 April 2006).

against the threat of violent extremism. The current approach risks aggravating, rather than mitigating, the social causes of violent extremism. An effective counter-terrorist strategy must include prevention, deradicalisation and rehabilitation programmes in order to be effective and just.

2. The current counter-terrorism approach implemented by the Government and upheld by the courts expands the reach of the criminal law and increases the powers of law enforcement in an effort to prevent terrorist attacks before they occur. This is done by criminalising the motivation and ideology surrounding otherwise non-culpable conduct, so that law enforcement can apprehend individuals who might in the future commit an act of violence. ICJV contends that criminalising ideology instead of conduct is inherently problematic from a human rights perspective. It leads to discriminatory application of the law, it promulgates social division and anti-Muslim sentiment across society that in turn perpetuates radicalisation. As such, the counter-terrorism strategy as it is currently operating fails to fulfil its goal of protecting the public.
3. ICJV reminds the Government of its dual obligation under international law: to safeguard the public and the international community against acts of terrorism, and to protect the fundamental rights of all persons. A multi-faceted counter-terrorism strategy is needed that includes prevention, deradicalisation and rehabilitation programmes. These programmes must take effect prior to the involvement of law enforcement, and throughout an individual's engagement with the criminal justice system. Community engagement programmes that reach out to at-risk youth, and rehabilitation programmes for individuals who have been charged with or convicted of terrorism offences, are necessary to reduce the threat of violent extremism and to protect the interests of society at large.
4. In this submission, ICJV exposes the ideological nature of the offences as they are currently applied, and outlines the inherent risk of discrimination and the adverse consequences of criminalising ideology. Then, this submission discusses interventions from other jurisdictions that can provide a useful starting point in thinking about an Australia-specific solution.

II. Criminalising Ideology

5. The International Commission of Jurists Victoria contends that the threat to society caught by the criminal offence provisions in Part 5.3 of the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*) is an ideological threat, not a physical one. This is evident in the definition of 'terrorist act', how the terrorism offence provisions in Part 5.3 of the *Criminal Code* are drafted, and how they are applied by the courts. Criminalising ideology raises the problems of discrimination and unfair sentencing, and these must be addressed by the Government and the courts.

A. Legal Framework

6. The provisions in Part 5.3 of the *Criminal Code* relate to terrorism offences. A terrorist act is defined according to specific violent or destructive conduct⁴ that is undertaken to advance a political, ideological or religious cause.⁵ The offence provisions that attach to a terrorist act extend criminal responsibility to conduct far prior to any actual act of violence or property destruction, and attach to conduct 'that would rarely amount to criminal behaviour'.⁶
7. Terrorist offences in the *Criminal Code* are drafted to capture preparatory or anticipatory conduct, even if no particular act of terrorism was conceived or would even be possible.⁷ The offences attach to possession of a thing that has a connection with the preparation, engagement in or assistance with a terrorist act,⁸ or making a document that has a connection with a terrorist act.⁹ They also attach to membership in an organisation that is construed by the court as a

⁴ *Criminal Code Act 1995* (Cth) s 100.1(2).

⁵ *Criminal Code Act 1995* (Cth) s 100.1(1), definition of *terrorist act*.

⁶ *R v Wissam Mahmoud Fattal* [2011] VSC 681 (16 December 2011) at [3] (King J).

⁷ *Criminal Code Act 1995* (Cth) s 101.6(2). See also, *R v Lodhi* [2006] NSWSC 691 (14 February 2006), at [54] (Whealy J).

⁸ *Criminal Code Act 1995* (Cth) s 101.4.

⁹ *Criminal Code Act 1995* (Cth) s 101.5.

terrorist organisation,¹⁰ regardless of whether that organisation has committed or attempted any acts of violence, and regardless of whether or not a specific act of violence was planned.¹¹

8. Because the offence provisions in the *Criminal Code* capture preparatory acts, the offences are complete by actions that are not in themselves terrorist acts.¹² For the offence of preparing for a terrorist act, it is not necessary to prove that there was a threat of actual violence in order to impose criminal responsibility: it must only be proven that there was a political or religious motivation and an intention to engage in violence, even if an act of violence was never to eventuate.¹³ Criminal responsibility for a preparatory act, then, is therefore determined in large part by the offender's political and religious views, as well as an intention to express their views using violence. As there need not be any actual act of violence underway in order to prove the offence, the courts will rely heavily on evidence of religious and political views to prove the offence.

9. For the offences of being in possession of a thing connected with a terrorist act, or collecting or making documents connected with a terrorist act, criminal responsibility is attached to conduct that can be very remote from any actual act of violence. Criminal responsibility can attach to possession of a thing connected with a terrorist act, even if that terrorist act exists only in the contemplation of another person.¹⁴ The person in possession of the thing need not have any direct connection with a terrorist act in order to be found guilty of a terrorist offence, nor even possess an intention to engage in politically motivated violence; the person need only have knowledge of another person's intentions, or recklessness towards their intentions while in possession of an otherwise innocuous thing such as batteries and clocks,¹⁵ or receipts.¹⁶

¹⁰ *Criminal Code Act 1995* (Cth) Div 102, subdivision B.

¹¹ *R v Benbrika* [2009] VSC 21 (3 February 2009) at [48] (Bongiorno J).

¹² *Lodhi v R* (2007) 179 A Crim R 470, at [79] (Spigelman CJ); *R v Benbrika* [2009] VSC 21, (3 February 2009) at [7] (Bongiorno J); *DPP (Vic) v Fattal* [2013] VSCA 276 (2 October 2013) at [166] (Full Court).

¹³ See, eg, *R v Lodhi* [2006] NSWSC 691 (14 February 2006) at [51] (Whealy J).

¹⁴ *Benbrika v R* (2010) 29 VR 593 at [315] (Full Court); *R v Karabegovic (Ruling No 1)* [2013] VSC 566 (22 October 2013) at [40] (Dixon J).

¹⁵ *R v Sharrouf* [2009] NSWSC 1002 (24 September 2009).

¹⁶ *R v Mulahalilovic* [2009] NSWSC 1010 (30 January 2009).

10. The offence of collecting or making a document relies on a more remote connection still: there need not be anyone contemplating a terrorist act. The High Court has ruled that criminal liability is proved if content of the document could be seen to justify an act of terrorism or instruct in methods of carrying it out.¹⁷ It is the document itself that can potentially be connected with some act of violence, not necessarily the intention of the person in whose possession the document was found. However, 'the fact that there is no nexus between making the document and any actual terrorist act does not affect the assessment of the gravity of the offence.' It is precisely *because* 'the Crown may never be in a position to bring forward evidence of the identity or numbers of people who read the document, or whether they are influenced by its contents to commit terrorist acts'¹⁸ that the act of making or collecting a document is criminal.

11. Criminal responsibility justifiably attaches to possession of a thing or a document if that thing or document is sufficiently harmful to society that mere possession of that thing poses a threat, such as certain weapons or narcotics. However, terrorism offences are unique in that the object itself is not outlawed; rather, it is the ideological ends to which it might be put, or that it represents, that constitutes the threat.

12. Although criminality attaches to an underlying ideology, the threatening nature of the ideology has not been clearly defined; rather, vague language is used to refer to concepts that have no determinative meaning. For example, it has been said that an offender's 'criminality must be assessed, as far as this is possible, by reference to the potential for his actions to have advanced the cause of violent jihad',¹⁹ or, with regards to making a document, 'because of its connection with

¹⁷ *R v Khazaal* (2012) 289 ALR 586 at [34] (French CJ). Cf *R v Lodhi* [2006] NSWSC 691 (14 February 2006), where the documents themselves, maps of the Australian Electricity Supply, did not satisfy this requirement, but were deemed culpable because of the defendant's inferred intentions for possessing them.

¹⁸ *R v Khazaal* [2009] NSWSC 1015 (25 September 2009) at [15] (Latham J).

¹⁹ *R v Kent* [2009] VSC 375 (2 September 2009) at [22] (Bongiorno J).

adherents of violent struggle against the enemies of Islam'.²⁰ It is not clear from the case law how 'violent jihad' or 'enemies of Islam' ought to be proven or understood. But, inherent in this use of language and in the structure of the criminal offence provisions, is the idea that this criminal ideology is intrinsically connected with Islam. There is little evidence in terrorism judgements of a nuanced distinction being made by the courts between what ideologies characterise violent jihad, as opposed to personal political opinions or legitimate, if conservative or fervent, Muslim faith.

B. Criminalising Ideology

13. The International Commission of Jurists Victoria notes that criminalising ideology rather than conduct is a problematic use of the criminal law.²¹ Criminalising ideology leads to a highly discretionary and unpredictable application of the law, which undermines the liberal conception of rule of law upon which Australian society is based. Further, it is discriminatory in practice, leading to racial profiling in law enforcement, increased social prejudice and provokes distrust and fear across society of a particular minority group.

1. Discrimination

14. One significant danger of imposing a criminal law that attaches to intentions, opinions and motivations is that it lends itself to discriminatory and selective application. It would be impossible for Australian security forces to monitor the potential criminal intentions of every member of society, and apprehend every person who holds political opinions that might lead to violence. Instead, certain groups are targeted based on their ethnicity and background, and their culpability is linked to religious beliefs and cultural associations.

15. In addition to selective and discriminatory application, terrorism offences are heavily stigmatised and often accompanied by extensive media coverage and militaristic law enforcement operations. The combination effect of broadly

²⁰ *R v Khazaal* [2009] NSWSC 1015 (25 September 2009) at [15] (Latham J).

²¹ *Assessing Damage, Urging Action* (Report of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists, 2009), 34.

publicised and discriminatory application reinforces anti-Muslim prejudice across society. This leads to increased levels of racially-motivated violence and hostility.²² Prejudice, discrimination and fear are destructive of a cohesive and peaceful society. Furthermore, discriminatory law enforcement and increased levels of social prejudice directed against a particular segment of society based on religious affiliations reinforces the circumstances that lead to radicalisation.

16. Selective application of the criminal law based on the cultural and religious beliefs of certain members of society contravenes the principle of equality before the law. Furthermore, there is a fundamental lack of understanding evident in the application of the criminal law regarding the causes of violent extremism, and thus the possibility of early intervention and rehabilitation. By attaching criminality to ideology, there is a significant risk that individuals will be sentenced on account of their religious beliefs, as opposed to their likelihood to commit an act of violence. Such an error embeds religious discrimination in the administration of justice.

2. Sentencing

17. A second problem that arises from criminalising ideology is that the conventional sentencing regime is ill-equipped to provide an appropriate sentencing. Prison terms for terrorist offenders are determined on the assumption that criminal sanctions are unlikely to act as a deterrent for politically or religiously motivated acts of violence.²³ Courts have also been hesitant to accept that offenders can be rehabilitated, based on lack of evidence during trial that they have renounced their incriminating beliefs.²⁴ Rather, the courts have emphasised the principle of community protection as the main justification behind sentencing.²⁵ ICJV maintains that there is a lack of clarity

²² See, eg, *Islamophobia Register Australia* <<http://www.islamophobia.com.au>>.

²³ *Lodhi v R* (2007) 179 A Crim R 470 at [87] (Spigelman CJ) [87]; *R v Touma* [2008] NSWSC 1475 (24 October 2008) at [81] (Whealy J).

²⁴ See, eg, *Benbrika v R* (2010) 29 VR 593 at [575]-[576] (Full Court); *R v Khazaal* [2009] NSWSC 1015 (25 September 2009) at [45] (Latham J); *R v Elomar* [2010] NSWSC 10 (15 February 2010) at [93], [106], [130] and [178] (Whealy J); *R v Fattal* [2011] VSC 681 (16 December 2011) at [99] (King J).

²⁵ *Lodhi v R* (2007) 179 A Crim R 470 at [88] (Spigelman CJ); *R v Benbrika* [2009] VSC 21, [85]; *R v Fattal* [2011] VSC 681 (16 December 2011) at [97] (King J).

and internal coherence in how the community protection principle has been justified; and the conclusion that offenders are not likely to be deterred or rehabilitated is fundamentally flawed. The result is that sentences are being imposed for the wrong reasons, they are disproportionate and they are ill-fitting with regards to the nature of the crime.

a) Culpability—act of violence

18. In the influential judgment in the New South Wales Court of Criminal Appeal, *Lodhi v R*,²⁶ Spigelman CJ emphasised that the main consideration in sentencing for terrorism offences is protection of the community. The reason given is that deterrence and rehabilitation are unlikely to be effective against an ideologically motivated act of violence, and so the key concern must be to protect society from ‘the threat of terrorist activity’.²⁷ ICJV maintains that sentencing according to a ‘threat’ defined by reference to an act of violence is inconsistent with the nature of the offence for which the offender is being sentenced.

19. Australian case law is not sufficiently clear about the nature of the threat that is captured by the terrorist offence provisions, and thus the threat that incarceration is protecting against. Chief Justice Spigelman in *Lodhi* specifies that the threat against which the community must be protected is not the threat of recidivism, but that they will perfect the terrorist act for which they were preparing.²⁸ This reasoning is flawed. In this context, sentencing by reference to potential conduct of an offender is inconsistent with the nature of the offence for which they were convicted in this case. A preparatory offence is completed by the preparatory conduct undertaken with a certain ideological motivation, not by reference to a specific or attempted act of violence.²⁹

20. The purpose of a preparatory offence is to pre-empt the possibility of an attempted act of violence; there exists another specific offence that criminalises

²⁶ *Lodhi v R* (2007) 179 A Crim R 470.

²⁷ *Lodhi v R* (2007) 179 A Crim R 470 at [79] (Spigelman CJ).

²⁸ *Lodhi v R* (2007) 179 A Crim R 470 at [108] (Spigelman CJ).

²⁹ *Lodhi v R* (2007) 179 A Crim R 470 at [230] (Price J). See also, *Criminal Code Act 1995* (Cth) ss 101.4(3), 101.5(3) and 101.6(2).

the actual act of violence.³⁰ The conduct captured by the offence is not in itself criminal; and the seriousness of an offence is not determined by proximity to an act of violence³¹ or the likelihood that it would have been attempted.³²

Therefore to link the seriousness of the offender's preparatory conduct with the seriousness of a completed terrorist act means that sentencing is conducted by reference to a criminal offence that was not attempted, committed, tried or proven.

21. To determine a sentence by reference to an actual act of terrorist violence risks leading to disproportionate and incoherent sentencing. This is because the sentence depends upon a two-fold act of imagination: the court must imagine the consequences of a terrorist act, but the actual terrorist act can only be inferred by reference to circumstantial evidence of what the offender might have had in mind, or even what another could have contemplated. This situation is illustrated in the *Lodhi* trial judgement where Whealy J refers to the potential harm of a completed terrorist act in order to determine the degree of seriousness:

it seems clear that he had not at that stage necessarily made a final determination as to the precise target, or the precise area of the target, that was to be hit. Indeed, the maps themselves would not have given sufficient information to the offender. Nor would they, of themselves, have given sufficient insight into how such an attack upon the electrical system could be maintained. They were, however, a starting point for a terrorist related enterprise potentially of some considerable magnitude.³³

And further:

I am not satisfied beyond reasonable doubt, however, that the offender had at any time made up his mind that it would be he who would carry out the bombing of the Australian Electrical Supply System. Indeed, I am perfectly satisfied that the proposal had not reached the stage where the identity of a bomber, the precise area to be bombed or the manner in which the bombing would take place, had been worked out. The obtaining of the electrical maps was at a very preliminary stage indeed, a matter, which the Crown accepted

³⁰ *Criminal Code Act 1995* (Cth) s 101.1.

³¹ *Lodhi v R* (2007) 179 A Crim R 470 at [229] (Price J).

³² *DPP (Vic) v Fattal* [2013] VSCA 276 (2 October 2013) at [166] (Full Court).

³³ *R v Lodhi* [2006] NSWSC 691 (14 February 2006) at [21] (Whealy J).

throughout the presentation of its case to the jury.³⁴

22. To find a very high level of culpability warranting a 15-year minimum sentence on the basis of the imagined consequences of an act that was not fully conceived of, much less attempted, relies on a very tenuous connection between the sentence and the offence. Such a degree of remoteness between the justification for the sentence and the actual criminal act potentially resulting in disproportionate sentences, influenced by the stigma that attaches to terrorism. In addition, if the criminal element of the preparatory offence is the ideological motivation of the offender rather than the conduct, there is a risk of incoherence when referring to a terrorist act as the basis for sentencing.
23. The International Commission of Jurists Victoria acknowledges that determining culpability for an ideological offence is problematic. The offence entails no actual act of violence and is complete in stages far prior to any conduct that would normally justify criminal responsibility. It is our view, however, that it is inappropriate to refer to the consequences of an imagined terrorist act as the basis for gauging the seriousness of a preparatory offence.

b) Culpability—ideological threat

24. If the criminal element of a terrorism offence is the ideology that is expressed through otherwise non-culpable conduct, then a sentence should refer to the threat inherent in that ideology. Culpability for an ideological offence where the operative elements are intention and motivation is sometimes determined by judicial assessments of the offender's intentions, and how deeply they hold their religious and political views. Since the offence provisions capture an ideological threat, reasoning based on the offender's ideological commitments is more consistent with the nature of the offence. However, care must be taken in determining what elements of an offender's ideology are sufficient to render it culpable. It is never acceptable to sentence someone on the basis of their religious or political beliefs.

³⁴ Ibid [24] (Whealy J).

25. In *Lodhi*, Spigelman CJ clarifies the nature of criminal culpability for a terrorism offence:

The objective acts of the appellant, which did not go beyond collecting materials for future use, did not give rise to any imminent, let alone actual, threat of personal injury or damage to property. Such preparatory acts, even though criminalised, would not at first appear to justify so substantial a penalty. However, the position is different in the light of his Honour's clear and justifiable findings of fact that the appellant has not resiled from the extremist intention with which these acts were performed.³⁵

26. This passage suggests that 'extremist intention' forms the basis of culpability for a preparatory offence. Reference to the offender's intentions formed the basis for determining culpability in the trial judgment of the same case. It is not clear how a court is to determine whether an intention is 'extremist' or not. Justice Whealy in *R v Lodhi* refers to an ideology that is

held with great vigour and firmness. They were the consequence of a deeply fanatical, but sincerely held, religious and worldview based on his faith and his attitude to the extreme dictates of fundamentalist Islamic propositions.³⁶

27. Justice King in *R v Fattal* determined the intention of Mr Fattal by reference to the offender's Muslim faith³⁷ and 'ferveat Islamic beliefs',³⁸ his opposition to Australia's deployment of troops in Iraq,³⁹ and his strong views against the Australian people.⁴⁰ Nayeel el Sayed and Stanley Aweys were culpable partly on the basis of harbouring anti-Australian sentiments.⁴¹ Khaled Cheiko, in *R v Elomar*, was culpable partly for showing 'absolute contempt for the Australian government'.⁴²

28. Such bases for sentencing risks violating fundamental human rights including freedom of religion, opinion and expression. Individuals must never be sent to

³⁵ *Lodhi v R* (2007) 179 A Crim R 470 at [83] (Spigelman CJ); see also [229]–[230] (Price J).

³⁶ *R v Lodhi* [2006] NSWSC 691 (14 February 2006) at [49] (Whealy J).

³⁷ *R v Fattal* [2011] VSC 681 (16 December 2011) at [51], [53] (King J).

³⁸ *Ibid* [54] (King J).

³⁹ *Ibid* [52] (King J).

⁴⁰ *Ibid* [14] (King J).

⁴¹ *Ibid* [63], [70] (King J).

⁴² *R v Elomar* [2010] NSWSC 10 (15 February 2010) at [106] (Whealy J).

prison on the basis of their political views or religious beliefs. A distinction must be made by the courts as to the nature of the threat that the criminal law is protecting society against: the threat should not be characterised in terms of an individual's faith. Rather, the threat posed by extremist intentions and ideologies should be limited to evidence of an ideological commitment to violence, and an assessment should be made as to how deeply that commitment is held. To do this fairly, the courts must distinguish between Islamic beliefs, political beliefs that are critical of the government, and a principled and committed intention to hurt or kill people. The offender's religion or politics are not generally relevant to an assessment of their intention to engage in violence, unless there is a specific religious doctrine, such as the doctrine of *takfir*, that specifically justifies terrorist violence.

c) Protecting society—rehabilitation

29. Imposing lengthy and punitive sentences on individuals on the basis of their religion and political views is not an effective means of mitigating an ideological threat to society. Such reasoning, and the discrimination it institutionalises, feeds into a social perception that Muslim people are under threat in Australian society, which risks promoting. Perpetuating the social discord that underlies radicalisation is counter-productive to the goal of protecting society. Protecting society from an ideological threat requires a strategy of engagement with vulnerable offenders and communities through programmes that serve to reinforce values of social harmony, not undermine them.

30. The International Commission of Jurists Victoria advances the position that, given the broad reach of the criminal law and the ideological nature of terrorism offences, rehabilitation should be a significant focus of the criminal justice system in administering sentencing. Courts must have access to material that enables a proper determination an individual's particular prospects for rehabilitation based on comprehensive and impartial assessments, but without reference to the consequences of a particular act of violence.

31. The remainder of this submission examines means and justification for rehabilitation, reintegration and prevention programmes that should be implemented to augment the conventional criminal justice approach to countering violent extremism.

III. Rehabilitation and Re-integration Programmes

A. Post-conviction programmes

32. The longest running prison-based and preventive deradicalisation programme worldwide was introduced by the Government of Saudi Arabia in 2003. This programme has served as a model for many other Muslim countries facing the threat of violent extremism, and has influenced programmes in non-Muslim countries, such as the United Kingdom. Although the model may not be directly transferrable to Australia, key insights can be derived from an examination of this programme. First, as a Muslim country, the programme applies a nuanced distinction between religious faith and violent extremism; and secondly, even in light of the very prominent threat posed by the close proximity of Islamic State of Iraq and Al-Sham (ISIS) and Al-Qaida, the Saudi government has determined that a 'soft' approach is more effective to protect society from radicalisation than exclusive reliance on the criminal law.

1. 'Hard' versus 'Soft' Approach

33. After the attacks in the United States on 9/11, Saudi Arabia took a 'hard' approach to combatting the threat of terrorism, relying on vast deployment of law enforcement and conventional security measures in attempt to eliminate terrorism from society. Thousands of people were arrested, questioned, extradited, and some Al-Qaida leaders were killed.⁴³ However, after the 2003 terrorist bombing in Riyadh, these methods were determined to be ineffective. Consequently, the Saudi Government has shifted its strategy towards 'softer' methods of deradicalisation that operate in conjunction with the criminal law,

⁴³ Abdullah F Ansary, 'Combating Extremism: A Brief Overview of Saudi Arabia's Approach' (2008) 15 *Middle East Policy* 111.

focussing on prevention, rehabilitation and reintegration prior to, within and beyond the criminal justice system.⁴⁴ The 'soft' approach sought to protect the community from the ideology that formed the basis of violent extremism.

34. The 'soft' rehabilitation method designed and implemented by the Saudi Government utilises religious re-education, psychological assessment, and intervention into the personal and family life of the radicalised individual.⁴⁵ The goal of the intervention is that the individual will repudiate a misguided interpretation of the Muslim faith, and reintegrate into social life in a non-violent way.⁴⁶ In order to carry this out, the Government requires cooperation across several ministries and agencies, and the participation of society, including schools, mosques, social service providers and media.

2. Prison-based programme

35. The Saudi prison-based deradicalisation programme is one aspects of a comprehensive programme that also includes prevention and aftercare. The deradicalisation initiative is rooted in a counselling programme administered by the Ministry of Interior, and composed of several subcommittees responsible for: religious re-education administered by Islamic clerics; family support programmes designed to pre-empt any further radicalisation by family members especially when the main bread-winner is imprisoned; psychological assessment of the offender at the beginning and end of the programme; and security assessments directed largely towards assessing the offender's level of risk to society and educating them with regards to the law.
36. Following release from the Saudi prison where they have been detained, or Guantanamo Bay, the after-care stage of the programme is an eight to twelve week stay at the Mohammed Bin Nayef Centre for Counselling and Advice. Here, individuals receive vocational training and education in family values, and

⁴⁴ Andreas Casptack, *Deradicalisation Programmes in Saudi Arabia: A Case Study* (10 June 2015) Middle East Institute, <http://www.mei.edu/content/deradicalization-programs-saudi-arabia-case-study#_ftn25>.

⁴⁵ See generally, Christopher Boucek, 'Saudi Arabia's 'Soft' Counter-terrorism Strategy': Prevention, Rehabilitation and Aftercare' (Carnegie Endowment for International Peace, No 97, September 2008).

⁴⁶ Christopher Boucek, 'Counter-Terrorism From Within: Assessing Saudi Arabia's Religious Rehabilitation and Disengagement Programme' (2008) 153(6) *The RUSI Journal* 60.

engage in therapeutic activities including art and sport. The goal is to ease the transition back in society and pre-empt the feelings of alienation and frustration that initially led to radicalisation.

37. While there are many factors that distinguish the Saudi context from the Australian context for deradicalisation, there are certain notable aspects of the Saudi programme that are relevant for Australia. Firstly, Saudi programmes are informed by research into the demographics and causes of radicalisation. It has been found that most of the radicalised people are young men from lower income families. Many of these people are drawn into extremist circles seeking to learn more about their religion and are motivated by a desire to do good while they perceive that their faith is under attack. However, individuals with extremist beliefs have been found to be generally lacking formal religious instruction and are often socially isolated. This leads to greater susceptibility to recruitment tactics and misinformation about the interpretation of Islam.
38. With an awareness of the social and individual circumstances of individuals who develop extremist beliefs, the rehabilitation programme is designed to address these issues through effective and nuanced interventions and guidance. At the heart of the rehabilitation project is the understanding that radicalisation is fundamentally a social problem, and thus must take social circumstances into account in order to generate a remedy. This method avoids the assumption that extremism is rooted in an individual's deeply held commitment to a particular religious ideology or their unwavering commitment to the idea that violence is inevitable or necessary.
39. Another element of note regarding the Saudi deradicalisation programme lies in the method of religious re-education, conducted by upstanding religious leaders. One core component of religious re-education lies in the style of communication: re-education is conducted through dialogue, not didactic teaching methods; the particular relationship between an independent cleric and the participant is emphasised, ensuring that there is a good 'fit' between the individual and the cleric, and that the cleric treats the individual 'like a brother'; in addition, the dialogue does not focus on the offence and is not carried out on

behalf of the state to find information or to lead to further prosecutions.⁴⁷

40. Religious re-education is entirely focussed on theological matters and textual interpretation. This is to distinguish traditional Islamic doctrine from 'false' concepts and lines of authority that preach intolerance and justify violence. It targets key concepts that underpin extremist ideologies, and emphasises conventional systems of religious authority to de-legitimise the calls to violent jihad issued by terrorist organisations. Such a method of religious re-education applies a critical distinction between violence and religion, drawing on an individual's inclination towards the Muslim faith as a means of rehabilitation. Whereas Australian courts and the general public have conflated religion and violence, the Saudi programme, being based in a Muslim country, encourages religious practice while delegitimising an undesirable ideology of violence.

3. The programme's success

41. The Saudi programme is successful in part because of the religious authority held by the Saudi Government and the availability of reputable religious leaders who are concerned to propagate a traditional, non-violent interpretation of Islam. In Australia, the Government and the courts lack the moral and religious authority to provide a convincing counter-narrative to someone who believes they are sanctioned by a higher authority to engage in ideological violence. It is to be expected that the convention means of criminal justice will be unlikely to elicit displays of remorse or contrition, and that hard-line tactics will be counter-productive in reducing the threat of extremist ideology. Instead, alternative programmes and systems must be put into place that can operate alongside the criminal justice system to re-direct individuals towards more legitimate sources of religious authority.

42. As Australian courts have noted, criminal sanctions are unlikely to operate as effective means of rehabilitation and deterrence. It is incorrect, however, to conclude that this is because the people implicated in these offences cannot be

⁴⁷ Christopher Boucek, 'Saudi Arabia's 'Soft' Counter-terrorism Strategy': *Prevention, Rehabilitation and Aftercare* (Carnegie Endowment for International Peace, No 97, September 2008),12.

rehabilitated. It must instead be understood that people can be rehabilitated when the circumstances enable it. The Australian Government has a duty to provide resources to those individuals, groups, agencies and communities who are in a position to provide effective means of support, education and counselling for individuals convicted of terrorism offences.

B. Pre-Trial programmes

43. Courts also have a duty to ensure that the criminal justice system functions to protect the community and protect the rights of individuals under its authority. Courts currently have inadequate means at their disposal to mitigate the antagonistic dynamic between individuals and the State, which is exacerbated by the current 'hard' approach based on punishment and denunciation. ICJV recommends that a unique pre-trial rehabilitation and counselling programme be developed, that will serve both to re-integrate individuals who have entered the criminal justice system but may be acquitted of any terrorism charges, or to guide sentencing for those who are convicted.

44. The United Kingdom is another country that has made efforts to implement a comprehensive approach to countering the threat of violent extremism. The masthead of UK interventions is the 'Preventing Violent Extremism' ('Prevent') programme.⁴⁸ The Prevent programme addresses the ideological threat posed by terrorism, and recognises that 'the ideology of extremism and terrorism is the problem; legitimate religious belief emphatically is not.'⁴⁹ The focus is on responding to this threat; preventing people from being drawn into extremist networks and beliefs; and working with the community and a wide range of institutions to mitigate the risk of radicalisation, especially among youths.⁵⁰ The programme is based on research supporting the view that radicalisation derives from feelings of isolation or alienation experienced largely by young Muslims who feel discriminated against in society, and who come largely from lower

⁴⁸ See, *Prevent Strategy*, Presented to Parliament by the Secretary of State for the Home Department, June 2011.

⁴⁹ *Ibid* 1.

⁵⁰ *Ibid* [3.21].

socio-economic backgrounds.⁵¹ The Prevent strategy also acknowledges other forms of terrorist violence, such as violence relating to Northern Ireland,⁵² and also extreme right-wing violence directed against minority groups.⁵³

45. Although the British programme draws upon a broad understanding of the causes and factors underlying violent extremism, it does not address the role of the criminal justice and law enforcement systems in perpetuating political tensions that reinforce radical ideas. The risks inherent in bringing at-risk individuals into the criminal justice system is perhaps more of a concern in Australia where there is no prevention programme. Instead, individuals at risk are targeted by law enforcement and the Australian Security and Intelligence Organisation (ASIO), subjected to surveillance and questioning, potentially arrested at any stage prior to engaging in violence. Given the broad powers of detention accorded to law enforcement, individuals can, and have been detained without charge under the Preventive Detention regime. Once charged, individuals are classified as AA prisoners and held under arduous conditions in detention, including isolation and 23-hour lockdown. Even when charges are dropped, law enforcement retain the power to impose control orders.
46. This treatment of individuals at risk of violent extremism generates problematic and undesirable outcomes. A notable example began with the shooting death of 18 year-old Numan Haider in 2014 by police outside a police station. Haider, associated with the Al-Furqan mosque and community centre, had been called in for questioning by police, and was shot dead after wielding a knife against two officers outside the police station. Subsequently, five other teenagers who had been associated with Al-Furqan were later arrested for allegedly planning a terror attack on ANZAC day national holiday. Harun Causevic was one of the teenagers arrested and charged. After being held in isolation for four months, the terrorism charges against Causevic were dropped by the Prosecution on the basis of insufficient evidence. After pleading guilty to a minor weapons offence and released from custody, Causevic was subjected to stringent control orders.

⁵¹ Ibid [5.22].

⁵² Ibid [5.39]–[5.41].

⁵³ Ibid [5.42]–[5.46].

47. When the criminal justice system operates as the first line of defence against the threat of violent extremism, and the offence provisions capture preparatory conduct at the very early stages of engagement before any physical threat presents, there is a real risk that individuals will be apprehended prior to developing a strong commitment to radical ideology. The intensity of the criminal justice response enables two potentially detrimental outcomes: if the individual is acquitted or charges are dropped, their treatment by the State is likely to reinforce the individual's experience of alienation and exacerbate a sense of enmity between individuals and the State. This generates or entrenches extremist ideas in individuals already susceptible. In this way, engagement with the criminal justice system creates or exacerbates a risk rather than mitigates one.
48. The second risk is that if the individual is convicted, the court cannot issue a proper sentence because the strength of the offender's commitment to violent ideology is unknown. The current counter-terrorism strategy captures equally individuals who harbour deeply held conviction in religious violence, as well as vulnerable or misguided individuals who are easily co-opted by charismatic leaders and an inclusive ideology. There should be a mechanism in place to enable courts to distinguish degrees of ideological commitment in order to facilitate more appropriate sentencing reasons, if the trial results in conviction.
49. The International Commission of Jurists Victoria recommends that Australia be the first country to develop a pre-trial rehabilitation and reintegration programme to be implemented as a condition of bail for individuals charged with terrorism offences. Such a programme could be composed of counselling, psychological assessment and non-incriminating dialogue-based religious engagement. The purpose of the programme would be to re-educate youths at risk of radicalisation, who may have been considering engaging in acts of violent extremism prior to arrest; and also to provide material that would be used by the courts in determining prospects of rehabilitation post-conviction. Such a programme would help to assess an individual's long-term prospects of rehabilitation. Through the engagement of trained and informed clerics, the

court can be assisted in differentiating between the individual's religious conviction and their proclivity to engage in violence. This would provide a more accurate basis upon which a court can gauge the threat posed to the community by the individual. However the programme is structured, it must be carried out in a way that is non-incriminating, confidential and, ideally, outside of prison.

C. Prevention Programmes

50. The International Commission of Jurists Victoria submits that an effective and comprehensive strategy to counter the threat of violent extremism must include a prevention strategy directed towards at-risk individuals. The Government's current punitive approaches to counter-terrorism have prompted concern from Muslim community leaders and counter-terrorism experts, as prevention and intervention has been substantially neglected.⁵⁴ The Government has allocated \$630 million over the next four years to address the threat of terrorism in Australia.⁵⁵ While announcing in August 2014 that this would include non-coercive measures,⁵⁶ it appears that the majority of this funding has been allocated to security agencies such as the Australian Federal Police (AFP) and ASIO.⁵⁷ Of the \$630 million the Abbott Government allocated in the 2013-14 budget to counter the threat of terrorism, only \$13.4 million (2%) was directed towards assessing and treating high-risk individuals in the community. Further, only \$1 million has been allocated Australia-wide to Muslim communities to fund local programmes. The Government has claimed that their investment in a

⁵⁴ Emma Reynolds, 'The \$1m Method to Deradicalise Australia's Youth and Prevent a Terrorist Attack' (online, News.com.au, 3 November 2014). <<http://www.news.com.au/national/the-1m-method-to-deradicalise-australias-youth-and-prevent-a-terrorist-attack/story-fncynjr2-1227111391412>>.

⁵⁵ Jo Hockey (Treasurer) and M Cormann (Minister for Finance), Mid-year economic and fiscal outlook 2014-15 (MYEFO 2014-15).

⁵⁶ Prime Minister and Attorney-General, 'Counter-Terrorism Measures for a Safer Australia', (press release, 26 August 2014) <<https://www.pm.gov.au/media/2014-08-26/counter-terrorism-measures-safer-australia-0>>.

⁵⁷ Ibid. As part of its \$630 million counter-terrorism package the Government will invest \$13.4 million to strengthen community engagement programmes in Australia with an emphasis on preventing young Australians from becoming involved with extremist groups; \$6.2 million to establish a new Australian Federal Police Community Diversion and Monitoring Team for returning foreign fighters and those who support them; \$32.7 million for a multi-agency national disruption group to investigate, prosecute and disrupt foreign fighters and their supporters; and \$11.8 million for the Australian Federal Police to bolster its ability to respond to the threat of foreign fighters at home and abroad including local and regional Liaison Officers and two new investigative teams to help reduce the threat of extremists leaving Australia.

counter-terrorism strategy will be tripled over the next four years,⁵⁸ but it is worth noting that their investment in intelligence and law enforcement agencies is substantially higher.

51. Investing heavily in law enforcement as the predominant way to mitigate the threat of terrorism is counter-productive. Law enforcement operations have been carried out in militaristic and highly visible fashion, and have repeatedly applied excessive force. On 18 September 2014, 800 police officers were deployed in Sydney and Brisbane, leading to 15 people being detained on Preventive Detention Orders, two being charged, only one of which was charged with a terrorism offence. On 18 April 2015, 200 state and federal officers conducted pre-dawn raids of homes around Melbourne. The operation led to the arrest of five individuals, two of whom were subsequently released, and only one of whom is currently charged with a terrorism offence, after the prosecution dropped the terrorism charges against Harun Causevic. These raids caused extensive damage to the Causevic family home and trauma to family members, including the father and a nine-year-old boy who were held at gunpoint by armoured law enforcement agents. Allegations have been made of broken bones, being kicked in the face, and being subjected to racial abuse.

52. Instead of militaristic law enforcement operations and unnecessary arrests as the first line of engagement with suspected persons, the Government should be funding preventive programmes that are accessible and non-intimidating. A model prevention programme has already been drafted in Australia, based on the German Hayat programme and developed by People Against Violent Extremism and Dr Anne Aly from Curtin University. Such a programme is founded on the idea that family support and community networks provide a better means of deradicalisation than fear and intimidation by the Government. Increased resources should be directed towards such preventive programming, to pre-empt any kind of engagement with the criminal justice system.

⁵⁸ George Brandis (Attorney-General), *Attorney-General's portfolio budget measures 2015-16*, (media release, 12 May 2015) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3828187%22>>.

IV. Conclusion and Recommendations

53. Pursuant to the *Berlin Declaration*, the International Commission of Jurists Victoria is committed to act for the protection of a high standard of human rights and administration of justice relating to terrorism offences. ICJV reiterates that states have a duty under international law to protect society and communities from the threat of terrorism.
54. International Commission of Jurists Victoria notes with concern the risks and limitations of the current counter-terrorism strategy of the Australian Government. Using the criminal justice system to combat an antisocial ideology rather than criminalising an actual threat of violence poses a severe risk of discriminatory application of the law. It generates social division that leads to further violence and unrest. Other risks present in the adjudication of criminal offence provisions defined according to motivation and intention. Such risks include determining culpability on the basis of religious and political beliefs, and unjustly sentencing individuals according to unattempted acts of violence, even when such an act could not be proved or identified with any specificity, or would not in all likelihood have eventuated.
55. In order to better protect the community from violent extremism, ICJV recommends that supplementary programmes be introduced into the criminal justice system that are better equipped to combat the unique challenges raised by an ideological threat. Such programmes should be administered pre-trial as a condition of bail, and post-conviction. These programmes should have as their primary objective rehabilitation, re-education and re-integration into the community as non-radicalised individuals.
56. It is recommended that funding be made available to researchers and community organisations to generate a deeper understanding of the causes of radicalisation. This research will be of assistance in developing prevention programmes, and to ensure a more appropriate administration of criminal justice. Greater insight into the causes of radicalisation and the nature of the

ideological threat that the laws are protecting against, will provide much needed information to enable a sentencing judge to better determine an appropriate sentence.

For these purposes, the International Commission of Jurists Victoria makes the following recommendations:

- I. ICJV reminds the Australian Government of their obligation to uphold principles of human rights in their efforts to combat the threat of terrorism. As emphasised by the UN Secretary-General, human rights are essential to the fulfilment of an effective counter-terrorism strategy.⁵⁹ A counter-terrorism strategy must respect and protect the principles of non-discrimination, and freedom of religion, expression and opinion of all people, including those suspected of, charged with or convicted of terrorism offences. Such obligations are complementary to a duty to protect the public from the threat of terrorism, not superseded by it.**
- II. ICJV seeks to remind the judiciary to consider the challenges inherent in the adjudication of an undefined ideological threat, and of the importance to maintain a high standard of criminal justice, ensuring that the law is applied clearly, consistently and rationally.**
- III. A counterterrorist response based exclusively or excessively on criminal law enforcement and administration is not an adequate response to the threat of violent extremism. Instead, the strategy must be augmented by alternative programmes that take a 'soft' approach, focussing on prevention, rehabilitation and reintegration. Such programmes must be funded by the Government, and designed and implemented by community**

⁵⁹ Report of the Secretary-General, *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, General Assembly, 60th session, Agenda items 46 and 120, UN Doc A/60/825 (27 April 2006), [118].

organisations, and, where appropriate, in partnership with police.

- IV. **Comprehensive research into the social causes of radicalisation must be used as the basis of any intervention or prevention strategy. A counter-terrorism strategy that targets a segment of the population based on religious belief is discriminatory, and violates the principle of equality before the law.**

- V. **Rehabilitation and re-education programmes must be part of the criminal justice system pre-trial and post-conviction. A pre-trial programme would serve the double benefit of assisting an individual who is subsequently acquitted of any terrorism charge to re-adjust to an integrated life; as well as assisting the Court in making an appropriate determination for sentencing, based on real prospects of reintegration.**

- VI. **For the purposes of sentencing, the courts must be clear about the ideological nature of the crime for which an offender is being sentenced, and apply sentencing principles that demonstrate a nuanced understanding of the particular criminal element of the crime. It is not appropriate to sentence people on the basis of religious or political beliefs. It is also not appropriate to sentence offenders on the basis of the severity of consequences of a crime that was not committed.**

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