



Law Council  
OF AUSTRALIA

# Supplementary submission to the review of Australian Federal Police Powers

Parliamentary Joint Committee on Intelligence and Security

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
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- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council gratefully acknowledges the contribution of members of its National Criminal Law Committee to the preparation of this supplementary submission.

## Introduction

1. The Law Council of Australia thanks the Committee for the opportunity to appear before its public hearing of the above inquiry on 25 September 2020.
2. In response to questions from the Shadow Attorney-General, the Hon Mark Dreyfus QC MP, the Law Council offered to provide a supplementary submission commenting on suggestions made in the submission of the Australian Federal Police (**AFP**) (submission 2) for amendments to the control order (**CO**) regime in Division 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).
3. The AFP submission indicated that the AFP's 'increased use of these orders has identified a number of challenges to law enforcement in applying for, monitoring and enforcing the orders'.<sup>1</sup> The AFP suggested amendments pertaining to case management powers for CO applications, rules concerning *ex parte* CO applications, the conditions able to be imposed in COs, the maximum duration of COs, the variation of CO conditions, removal of certain requirements for the service of documents, and the removal of certain requirements of proof in confirmation proceedings.<sup>2</sup>
4. Most of the recommended amendments would significantly reduce important safeguards presently forming part of the CO regime. The AFP submission does not provide concrete evidence of problems arising in control order applications, and contains only limited explanation, at a theoretical level, of the perceived problems.
5. The Law Council considers that there is not a compelling case for implementing the majority of the AFP's recommended amendments.
6. There are, however, two recommended amendments to which the Law Council does not object. They are the rules governing the hearing of applications on an *ex parte* or *inter partes* basis; and a proposal to enable temporary suspensions of CO conditions, but subject to necessary statutory safeguards (as detailed below).

## AFP suggestions to which the Law Council does not object

### Rules governing *ex parte* applications

7. The AFP submission observes that Division 104 of the Criminal Code was 'drafted with the assumption that an interim control order hearing will always proceed on an *ex parte* basis', which does not reflect the AFP's practice of proceeding on an *inter partes* basis other than in exceptional circumstances. The submission notes that this has led to 'inconsistency in the approach taken by different courts in relation to the role of respondents in these hearings, with some respondents being afforded more opportunity than others to make submissions'.<sup>3</sup>
8. The Law Council notes that the first Independent National Security Legislation Monitor (**INSLM**), Mr Bret Walker SC, identified this problem in the provisions of Division 104 in 2012. Regrettably, the failure to implement the former INSLM's

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<sup>1</sup> AFP, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of AFP powers*, (August 2020), 5 at [16].

<sup>2</sup> *Ibid*, 5-8 at [20]-[32].

<sup>3</sup> *Ibid*, 7-8 at [31].

recommendation to address this issue appears to have led to the emergence of the problems now identified by the AFP.

9. Mr Walker recommended, in effect, that the default position in Division 104 should be that CO applications must proceed on an *inter partes* basis. He recommended that applications should only be able to be made *ex parte* if it is 'reasonably necessary to avoid an unacceptable risk of a terrorism offence being committed if the respondent was notified before a CO is granted'.<sup>4</sup>
10. The Law Council considers that the issues identified by the AFP with respect to the conduct of *inter partes* CO applications make it essential for the former INSLM's outstanding recommendation to be implemented as a matter of priority.

### AFP power to temporarily suspend CO conditions

11. The AFP submission appears to seek a new power for the AFP to unilaterally and temporarily vary a condition of a CO, if it is satisfied that there would be no risk to the community in doing so. For example, the submission describes circumstances in which a controlee is subject to a curfew condition under a CO, but has been asked to work a one-off night shift, and the AFP considers that this would not cause a significant risk to community safety. The AFP states that it presently manages these circumstances by relying on an 'informal' exception.<sup>5</sup> The Law Council understands this to mean a decision not to enforce the offence for breaching a condition of a CO.
12. The Law Council acknowledges that it would be desirable for the CO regime to provide a mechanism for fast and flexible temporary variations, which are sought by the CO subject, and provide legal protections for the CO subject from exposure to criminal liability in these circumstances. Given the serious inadequacies in legal financial assistance for CO subjects, it may be preferable to consider a non-judicial mechanism.
13. However, strong safeguards and clear limits would be crucial, given that such a proposal would place the AFP in the position of being the sole arbiter of whether a temporary variation of a CO would present a risk to the community. The Law Council considers that such temporary variations:
  - should only be able to be issued at the request of the CO subject;
  - must be issued by a Deputy Commissioner or Commissioner of the AFP, unless such person is not readily available or contactable, in which case the variation may be issued by a senior member of the AFP who has been authorised by the Commissioner to issue variations in such circumstances;
  - must be issued in writing, which must also set out the terms of the temporary variation. The CO subject must be given a copy of the instrument of variation, and the officer issuing the variation must take reasonable steps to ensure that the CO subject understands the temporary variation;
  - should be subject to an express exception to the offence in section 104.27 for contravening a condition of a CO, to remove any risk that a CO subject may be exposed to criminal liability for acting in accordance with a temporary variation, and reliant solely on executive discretion not to enforce the offence;

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<sup>4</sup> Bret Walker SC, INSLM, *Declassified Annual Report 2012* (December 2012), recommendation II/2.

<sup>5</sup> *Ibid*, 6 at [23].

- should be subject to statutory record-keeping and notification requirements, in which the AFP Deputy Commissioner or Commissioner must:
    - record, in writing, the reasons for their decision on a request for variation;
    - notify the CO subject of the outcome and reasons; and
    - notify the Minister for Home Affairs and Commonwealth Ombudsman;
  - should trigger a mandatory assessment obligation on the AFP Commissioner, in relation to whether the condition that is temporarily varied should remain part of the substantive CO. The Commissioner must:
    - consider whether the relevant condition remains necessary and proportionate to the risk presented by the person, and whether an application should be made for the variation of the CO to remove or vary the condition for as long as the CO remains in force; and
    - comply with equivalent record-keeping and notification requirements to those set out in the previous point; and
  - should be subject to an annual reporting requirement as part of the reports prepared and tabled under section 104.29, and requirements to notify the Home Affairs Minister and Commonwealth Ombudsman of each temporary variation.
14. In addition, the Law Council emphasises that a mechanism for the temporary variation of CO conditions should be seen as a 'last resort' for unforeseen circumstances that arise urgently (for example, a CO subject is asked to work a night shift the day before). This mechanism is no substitute for properly funding legal assistance for CO respondents, so that they can defend an interim or confirmation application and ensure that the conditions are appropriately tailored, and to seek variation (including obtaining legal advice on a potential variation) while a CO is in force.

## Other amendments suggested by the AFP

### Case management powers for COs

15. The AFP has noted that issuing courts do not have explicit case management powers for CO applications, in the nature of powers to hold case management hearings, and to deal with timetabling and other procedural matters. It has suggested amendments to Division 104 of the Criminal Code to confer specific, statutory case management powers on issuing courts.<sup>6</sup>
16. The Law Council notes that such amendments would not be legally necessary to ensure that issuing courts have case management powers. Such powers already exist under the general jurisdiction of the courts to effectively regulate their own proceedings. The Law Council considers that any efforts to improve consistency of judicial approaches to case management in CO proceedings is capable of being regulated effectively by the issuing courts themselves (for example, under rules of court). This is preferable to legislative intervention, which risks undermining judicial independence or inadvertently limiting the inherent powers of the courts.

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<sup>6</sup> AFP, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of AFP powers*, (August 2020), 7 at [29].

## Extension of the maximum duration of COs

17. The AFP submission comments that the resources involved in applying for, and monitoring compliance with, COs are significant, 'however, the order can only be imposed for 12 months'. If this comment is intended as a suggestion for amendments to Division 104 of the Criminal Code, to prescribe a longer maximum duration for COs, the Law Council would strongly oppose any such amendments.
18. No evidence has been provided about inadequacies in the maximum duration of 12 months, which have created a risk to public safety. The Law Council notes that there is no statutory limitation on the number of consecutive COs that can be sought and issued, following the expiry of a CO. It is notable that none of the COs issued to date appear to have been the subject of subsequent applications by the AFP for consecutive orders after their expiry.
19. Importantly, if a subsequent CO is sought against a person after the expiry of a prior CO against that person, the issuing court must be satisfied that the statutory issuing thresholds are met. These thresholds require an assessment of the person's future risk, and the proportionality of the proposed controls to the management of that risk.
20. In any circumstances in which the AFP considers there is a need to subject an individual to the significant obligations, conditions and prohibitions available under a CO for longer than 12 months, the present maximum duration of 12 months provides an important safeguard. It effectively requires the assessment *de novo* (that is, anew) of the issuing criteria every 12 months, for as long as the AFP seeks to restrain the movements and activities of the controlee within the community. An assessment *de novo* is a critical safeguard in the context of the prolonged imposition of significant limitations of a person's human rights.
21. Importantly, the limitations on a controlee's rights do not merely arise from the conditions, obligations and prohibitions in the CO itself. They also arise from the exposure of the person to criminal liability for contravention of the conditions of the CO, which attracts a maximum penalty of five years' imprisonment. Additionally, a controlee is liable to intrusive surveillance, such as telecommunications interception, electronic surveillance and search powers, for the purpose of monitoring their compliance with a CO. Those surveillance powers can be exercised by the AFP for the purpose of assessing whether a person is compliant with the CO, and generally do not require suspicion that the person is non-compliant. They are additional to surveillance powers available to investigate a suspected breach of a CO.
22. The effect of a longer statutory duration for a CO would be to shift the burden from the AFP (in applying for a consecutive CO, upon the expiry of a prior CO after 12 months of operation) to the controlee to make an application to the court for a variation of a CO of a longer maximum duration (such as two or three years) to remove or modify certain conditions that are no longer necessary or proportionate.
23. This creates a risk that, if a controlee is unaware of their rights or is otherwise unable to make a variation application, some conditions will remain in force longer than is necessary and proportionate. This in turn, creates a risk that the continuation of unnecessary and disproportionate controls may inhibit the person's rehabilitation, and in fact enlarge rather than diminish their risk of engaging in terrorism-related activities. For example, the imposition of a requirement on a controlee to wear an ankle bracelet to track their movements for a prolonged period of time, which exceeds the present maximum of 12 months, may significantly limit

the person's prospects of employment, harm their mental health, and consequently hinder their rehabilitation.

24. The Law Council emphasises that arguments based on convenience, efficiency or cost savings for a law enforcement agency, do not justify the further limitations to the human rights of a controlee that would result directly from any extension of the maximum duration of a CO.

### **Extension of the conditions, limitations and prohibitions able to be imposed by COs**

25. The AFP has indicated that it believes the existing range of 12 conditions or 'controls' able to be imposed under subsection 104.5(3) of the Criminal Code are inadequate to enable courts to impose appropriately tailored conditions to manage the risk an individual controlee presents to the community.<sup>7</sup>
26. However, its submission provides no evidence of risk to the community arising from its stated concerns about inadequacies in the range of available conditions. Nor has it specified the additional controls that it considers are needed to enable the conditions of COs to be better tailored to manage the risks presented by individual respondents to CO applications. In the absence of evidence, the Law Council considers that there is no credible case for any expansion of the already broad range of existing controls.

### **Variation of interim COs without the consent of the subject**

27. The AFP submission notes that the power to vary an interim control order in section 104.11A of the Criminal Code may only be done with the consent of the controlee. The AFP states that, while it can seek to amend controls at the confirmation stage, there may be significant delays in confirmation proceedings, in the nature of months after the issuing of an interim CO, and more urgent variation of the interim CO may be necessary. The examples identified in the AFP submission include moving to a new house, and changes to education and employment.<sup>8</sup>
28. The Law Council notes that section 104.11A of the Criminal Code was enacted in 2018, to implement a recommendation of the third INSLM, Dr James Renwick SC, who supported a suggestion of the AFP and the Law Council for such a power to be conferred. That suggestion was limited to variations with consent of the controlee. It appears that the AFP is now seeking to extend that power to non-consensual variations, which are supported by the AFP but not the controlee.<sup>9</sup>
29. The Law Council is concerned that the need for this power is not established. In all of the hypothetical scenarios described in the AFP submission, it is impossible to envisage any rational circumstances in which a controlee would not consent to a variation of an interim CO. The controlee would be exposed to criminal sanction, including a maximum penalty of five years' imprisonment, if they did not comply with the outdated CO conditions, which became outdated because of the controlee's change of personal circumstances. This is a self-evident incentive for a controlee to

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<sup>7</sup> Ibid, 5-6 at [20]-[22].

<sup>8</sup> Ibid, 6 at [25].

<sup>9</sup> *Counter-Terrorism Legislation Amendment Act 2018* (Cth). See further, Dr James Renwick SC, *Report on the review of Divisions 104 and 105 of the Criminal Code*, (September 2017), 63 at [8.63](b).

seek, or agree to, variation of the interim CO. No evidence has been provided of any case in which a controllee has withheld their consent in such circumstances.

## **Removal of requirements to serve certain documents**

30. The AFP submission also appears to support amendments to Division 104 that would remove existing obligations on the AFP to serve certain documents on a respondent to a CO application.<sup>10</sup> The Law Council is concerned that there is no clear and compelling evidence base for these proposals, which could reduce the ability of a respondent to understand the case against them and therefore issue instructions to their legal representatives in responding to the application.

## **Service of CO applications—supporting documents**

31. The AFP submission states that the requirement in subparagraph 104.12A(2)(a)(ii) of the Criminal Code for the AFP to serve application documents (including a statement of facts and grounds) on a respondent ‘could inadvertently require the service of extremist material to the subject of the control order’.<sup>11</sup>
32. There appears to be a concern that, where the respondent is nearing the end of their sentence of imprisonment and the CO is sought to manage their impending release, the respondent could share this information with other prisoners.<sup>12</sup> The AFP submission comments that there is a ‘lack of alternative options’ for serving such material in an application.<sup>13</sup> The submission does not identify the kinds of ‘alternative options’ that are sought, or explain how the issue has been managed to date, especially in the nine ‘post-sentence’ COs obtained in 2019 and 2020.
33. The Law Council considers that limitations on the subsequent dissemination of materials should be managed in practice within correctional facilities, by removing the opportunity for a CO respondent to make such disclosures, and to remove the ability for recipients to retain any materials that may have been inappropriately disclosed by the CO respondent. Further, there is already an ability in paragraph 104.12A(3)(d) of the Criminal Code for the AFP to withhold information from a CO respondent, if it would put at risk the safety of the community or law enforcement officers.
34. In the absence of any evidence that such practical steps have been exhausted, or that it has not been possible to rely on the existing ability to withhold information on community safety grounds, the service requirements should not be reduced, given the risk of reducing or removing the ability of the respondent to know the case against them, and instruct their lawyers.

## **Service of interim CO applications**

35. The AFP submission states that, ‘in practice, Division 104 contains a duplicative requirement’ which obliges the AFP to serve an interim CO application twice – that is, once before the AFP applies for the interim order, and again if it elects to confirm it.<sup>14</sup> The submission appears to suggest that the service requirement should be

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<sup>10</sup> AFP, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of AFP powers*, (August 2020), 7 at [26]-[27].

<sup>11</sup> *Ibid*, 7 at [26].

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*, [27].

removed at the confirmation application stage. The submission does not identify a coherent basis for seeking such amendments, nor does it identify any significant burden or delays arising from the existing requirements. It is possible that the concerns that have prompted this suggestion may have arisen from the volume of materials that comprise an interim CO application.

36. In the absence of evidence of any need for such amendments, the Law Council considers that there is no credible basis to justify a departure from the ordinary requirement that a respondent to an application must be given all of the relevant information on which the applicant seeks to rely and has placed before the court.

### **Other ‘enhanced procedural efficiencies’**

37. The AFP submission recommends a number of amendments to achieve what is described as ‘enhanced procedural efficiencies’ in the process for issuing COs.<sup>15</sup>
38. As several of these proposals would effectively reduce or remove existing safeguards, the Law Council urges caution in adopting them, especially in the absence of a rigorous evidence base establishing a clear need.

### **Timing of contested control order applications**

39. The AFP submission comments that subsection 104.5(1A) of the Criminal Code, which requires the date for the confirmation proceeding to be specified as soon as practicable but at least seven days after the interim order is made, may conflict with the duty to afford procedural fairness to the respondent.<sup>16</sup> No further details are given of instances in which this issue has arisen in CO applications made to date, and no suggestions are made for the specific amendments to subsection 104.5(1A) that the AFP considers would address the perceived problem.
40. The Law Council would not support the removal of the ‘as soon as practicable’ requirement in subsection 104.5(1A). This requirement is important to ensure that a person is not subjected to the conditions of an interim CO for any longer than is necessary for a confirmation application to come before the court, or for the court to decide to revoke or declare void the interim order, under paragraph 104.5(1)(e).
41. In the absence of explanation in the AFP submission, the Law Council considers that the ordinary meaning of the expression ‘reasonably practicable’ in subsection 104.5(1A) includes a period of time that is reasonably necessary for the prepare their case in reply, which is an essential component of procedural fairness. That is, a hearing date for a confirmation application under paragraph 104.5(1)(e) could not reasonably be considered to be the first ‘reasonably practicable’ date for such a hearing, if it failed to give the respondent adequate time to prepare their case. There is no apparent reason for reading down the words ‘reasonably practicable’ to exclude a significant component of procedural fairness to a respondent.

### **Confirmation proceedings**

42. The AFP submission states that ‘the current process for confirming the terms of a control order is unnecessarily complicated and requires the court to make another

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<sup>15</sup> Ibid, 7 at [28]-[30].

<sup>16</sup> Ibid, 7 at [28].

order and repeat its satisfaction of the matters listed in s 104.16 (which has already occurred at the interim stage)<sup>17</sup>.

43. The Law Council supports the retention of the requirements governing confirmation proceedings in section 104.16. Significantly, paragraph 104.16(1)(a) requires a confirmed control order to state that the court is satisfied that the issuing criteria in paragraphs 104.4(1)(c) and (d) are met. These criteria provide that the court must be satisfied that making the order would substantially assist in preventing a terrorist act, or that the person has engaged in certain terrorism-related activities; and that each of the conditions in the order would be proportionate to the purpose of protecting the public from terrorism or foreign incursions-related activities.
44. It is important that the court, in deciding to confirm an interim CO, is required to assess and be satisfied of these matters at the time of the confirmation application, and does not merely rely on its prior assessment as part of the interim CO application. This reflects that the confirmation process is not a mere formality to enable the 'rubber-stamping' of the interim CO, following the election of the AFP to seek confirmation.
45. Rather, the purpose of the confirmation process is to require the court to consider the issuing criteria for the order at the point in time at which confirmation is sought, with a view to assessing whether the order should be confirmed (and therefore continue for a total of up to 12 months from the issuance of the interim CO, including with any variations), or whether the interim CO should be revoked or declared void.
46. This additional assessment, at the time confirmation is sought, is a critical safeguard. It is not a procedural duplication that is suitable for removal or dilution out of a desire to enhance procedural efficiencies for the AFP as applicant.

## Law Council comments on further issues

### VERA-2R risk assessment tool

47. The Law Council's submission and oral evidence to the Committee on 25 September 2020 identified concerns about a lack of empirical support for the risk assessment framework contained in the VERA-2R, which the Australian Government has identified as its preferred tool for the purpose of Division 105A of the Criminal Code.
48. Further to these remarks, the Law Council notes its additional concern that the VERA-2R does not appear to have been internationally recognised and accepted as a best practice standard in risk assessment in relation to violent extremism or terrorism-related offending. Indeed, the Government of the Netherlands, which is leading work in the development of and training in the VERA-2R, has identified that, among other limitations in the VERA-2R, '[its] predictive validity is problematic due to the low base rate of terrorists and violent extremists'<sup>18</sup>. The Law Council is also aware that, in a recent comparative study of various risk assessment tools, the International Centre for Counter-Terrorism identified that basis for the development

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<sup>17</sup> Ibid, 7 at [30].

<sup>18</sup> Custodial Institutions Agency, Ministry of Justice and Security, Government of the Netherlands, *VERA-2R: strengths and limitations*, <<https://www.vera-2r.nl/vera-2r-instrument/strengths-and-limitations/index.aspx>>.

of the VERA-2R has been literature alone, to the apparent exclusion of actual cases.<sup>19</sup>

49. It is therefore important that the Government provides an explanation of the reasons it has selected the VERA-2R as the preferred risk assessment tool in relation to the continuing detention order regime.
50. The evident lack of international consensus about the reliability of, and empirical basis for, the VERA-2R also increases the importance of implementing the Law Council's recommendations in its primary submission to strengthen statutory safeguards in the issuing threshold and process for continuing detention orders. This is especially important in relation to the standard of proof and the classes of persons eligible to be appointed as 'relevant experts'.

### **Typographical corrections to Law Council submission**

51. Finally, the Law Council wishes to make two typographical corrections to its primary submission of 17 September 2020, which are as follows:
  - recommendation 14 at page 38—the word 'reduction' should be replaced with 'increase' (consistent with the heading to that recommendation and supporting discussion); and
  - recommendation 32 at page 64—the word 'convention' should be replaced with 'conviction'.

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<sup>19</sup> Liesbeth van der Heide, Marieke van der Zwan, and Maarten van Leyenhorst, International Centre for Counter-Terrorism, *The practitioner's guide to the galaxy – a comparison of risk assessment tools for violent extremism*, research paper, (September 2019), 12.