



**Victoria Police submission**

Victorian Law Reform Commission

# Stalking

August 2021

## Chapter 2

## Recognising and reporting stalking

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**What are the factors which influence whether people who experience stalking report their experiences to police? Are there barriers to reporting that need to be addressed? (Q1)**

To report stalking, a person first needs to be aware that they are being stalked and that they should report the stalking behaviour to the police. Stalking behaviours are difficult for victims to identify and difficult for victims to articulate. There is limited publicly available information on stalking for victims and their families. Greater access to clear, relevant information to support people to identify stalking behaviours, including greater guidance on reporting stalking to police (including types of information that can assist a stalking investigation) would assist victims in telling their story. This is equally as important as ensuring that victims can easily access and navigate the processes involved in seeking civil intervention, such as a Family Violence Intervention Order (FVIO), or Personal Safety Intervention Order (PSIO).

In practice, stalking can often occur over a prolonged period, including the period of time when the victim is not aware that it is occurring. Where a victim is interacting with the offender (such as in the workplace, or in a range of other settings) it can be very difficult to recognise the level of risk that the offender's behaviour presents. Without having visibility of the stalker's motivations, intent, or full pattern of offending behaviours, a victim or others who witness the behaviour may interpret the behaviour as harmless.

This presents challenges to victims when reporting matters to police. For example, a victim may not typically record or retain details of interactions they have had with their stalker or otherwise retain certain physical or digital evidence that can later be used to illustrate a pattern of behaviour.

Legislative barriers exist for police in acquiring evidence from third parties (such as dating apps, and social media platforms), and the vulnerability of these platforms for use to engage in technology-enabled offending creates an over-reliance on victims to retain certain forms of valuable evidence. Critically, this information is what is often needed to assist victims in articulating their story to police, and for investigators to use to identify predatory, escalating patterns of behaviour by stalkers, towards their victims.

Not all victims understand what stalking is, what constitutes an offence, or when they can report it to police. Victims may not be aware of the information police do and do not have access to, and their perception of risk may not accurately reflect the level of risk an offender's behaviour may pose.

Noting this, victims often seek help and choose to report stalking to police at a point in time when behaviours towards them have already escalated, and they are in fear of their physical or mental safety. This can be after other strategies victims have self-implemented have not worked, or when someone they disclose the offender's behaviour to prompts an urgent decision to take action.

Police members are trained to respond to allegations of stalking and are cognisant of the variety of forms it can take. As is the case with all crime types, individual police member experience in receiving reports and investigating stalking cases will vary. Victoria Police acknowledges that stalking cases do require significant professional judgement to help a victim identify inappropriate behaviours and to identify motivational factors, and that this can be challenging in some cases because stalking behaviours can be so varied and are very contextual.



Stalking offences are predominantly reported to and investigated by general duties police, often in combination with a range of other offences that may or may not be family violence related. Avenues exist for members to seek advice from more experienced members when presented with an allegation of stalking that they are having difficulty assessing. Specialist police units generally only become involved due to serious related offending such as sexual assaults or serious crimes against the person or if the stalking behaviour itself is significant or unusual and it is determined to require a specialist police response.

Victoria Police's submission to this reference explores in detail the way victims can be impacted by procedural and legislative barriers which, in combination, present significant barriers for victims and discourage many from coming forward. Reform is necessary for a number of key policing and justice processes, to remove these barriers for victims, and to ultimately bring civil and criminal justice responses closer in line with what the community would reasonably expect.

Opportunities exist in the civil, criminal, and post-release offender management processes to support victims by addressing and removing barriers to reporting stalking, and to prevent re-offending.

## Chapter 3

# Understanding and responding to stalking

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## Risk identification and establishing an offender's course of conduct

**Should a risk assessment framework be developed to help police and courts identify the course of conduct and manage risk of serious harm in the context of stalking? (Q2)**

**What else might help agencies to identify the risk of serious harm in a stalking situation? (Q3)**

**What approaches or techniques should be used by law enforcement agencies when investigating stalking complaints? (Q4)**

Victoria Police is actively exploring a number of opportunities to enhance its risk identification and assessment capabilities, having recently commissioned a strategic review following the tragic death of a young woman from a stalking incident. Victoria Police is currently considering a range of individual risk assessment tools and models, including tools and models used by other jurisdictions, designed to assist both general duties and specialist police to identify risk factors more easily and consistently. By assessing the responses to a series of questions about particular behaviours, such tools would help our members to prioritise their immediate response and consider any ongoing risk mitigation strategies.

In particular, Victoria Police notes that investment in tools to better identify patterns of behaviour indicative of an escalation (or continuation) of an offender's behaviour would provide useful support to police, victims and other agencies when considering risk, and any need for immediate interventions. Victoria Police proposes to trial any tools and models that appear to be relevant.

When considering any assessment model for determining risk, it is important to acknowledge that the risk and impact to a victim's mental wellbeing is something that may not correspond with the risk to their physical safety. At a practical level, a victim who may be assessed as being at no physical risk from their offender, may be at significantly heightened risk of mental harm, including self-harm.

Police and courts require information on risk for different purposes. Victoria Police notes the cross-application of results from certain tools used by police to determine a person's level of risk would be entirely unsuitable for interpretation and use at later stages, for example at sentencing, or for decisions regarding an offender's suitability for parole. Similarly, it will be different again for the agencies police refer victims to, or those which operate therapeutic intervention programs which a court may order an offender to undertake.

While Victoria Police recognises the theoretical value in a comprehensive, or combined risk assessment tool that has an inter-agency application (such as a risk assessment tool, where the finding could inform both police and the courts), agency-specific assessment and triage tools, complemented by professional judgment risk assessments tailored to various stages of police and justice system process would be more appropriate.

Victoria Police notes that ultimately, an accurate point-in-time assessment is needed to inform specific decisions made by a court or another agency. Risk is a complex interaction between an individual's history (static risk factors), psychological problems (dynamic risk factors) and current life circumstances (contextual risk factors). These assessments would ultimately need to contemplate very different factors, beyond the information police may have initially gathered for an investigation or relied upon at charge and prosecution stage.

The level of risk an offender presents can also shift significantly over time. This is influenced by a broad range of factors, such as the introduction of supports to prevent an individual's re-offending, or the success of therapeutic interventions. The risk posed by an offender's fixations can also vary greatly, depending on the degree of free movement an offender has at that point in time.

#### **As a practical example:**

An offender who is stalking a Member of Parliament and holds political or ideological fixations presents different risks to those of an offender who is stalking a former partner as a form of intimacy seeking or whose motivation may be to intimidate their victim as a way of stopping them from entering into a new romantic relationship. Similarly, an offender whose stalking involves vexatiously litigating their victim through abusing civil and legal processes and who is fixated on financially ruining their victim, again will have an entirely different risk profile. Therefore, different risk assessment considerations may be necessary in each such scenario.

#### **In the family violence intervention order system, information sharing is allowed. Should there be a similar framework for information sharing between agencies providing services for stalking? If so, how should it work? (Q5)**

As a prescribed Information Sharing Entity (ISE) under both the Family Violence Information Sharing Scheme (FVISS) and Child Information Sharing Scheme (CIS), Victoria Police is permitted to share confidential information with other prescribed entities either proactively, or in response to a request. In limited circumstances, these schemes allow for Victoria Police and other ISEs to discreetly share relevant risk information with victim-survivors and caregivers if doing so is necessary in order to manage their safety.

There is merit in exploring how a similar information sharing scheme could operate, to assist in the investigation of stalking that is occurring in a non-family violence context, and with the management of associated risk. If this were to occur, detailed consideration would need to be given as to what limited information prescribed ISEs would be authorised to share, and in what circumstances. This would need to include consideration around the nature of a perpetrator's criminal history and the threat they pose; balancing this with the need to consider the perpetrator's privacy and impact of that information provision.

### *Necessary limitations*

Sharing of identifying information about an offender with members of the public may disclose the identity of other current, or previous victims. Examples of how this might eventuate is if the offender is well known in the community, or where identifiable public associations exist between the offender and their victim.

Noting the breadth of the type of offenders who may commit stalking, and the potential that certain offenders may be (for example) Registered Sex Offenders, maintaining appropriate restrictions on the availability of particular information would be essential to mitigating potential risks to the community, and in particular to support the management and supervision of certain offenders in the community.

Restrictions on the disclosure of certain offender information is integral to a number of safeguards that currently protect the privacy of victim-survivors; while also assisting in the safe housing and management of certain offenders to support rehabilitation and manage risks of re-offending.

### **Should there be a specific police Code of Practice for reports of stalking. If so, what should it cover? (Q6)**

It is not the preference of Victoria Police that there be a separate code of practice for reports of stalking.

A separate code of practice may create confusion about intervention options. Stalking is often associated with other defined types of criminal offending, many of which are already supported by considerable operational guidance and tailored investigatory practice direction for members who are both investigating and supporting the victims of these crimes.

For example, stalking is commonly associated with family violence<sup>1</sup> and sexual offending.<sup>2</sup> Specially developed codes of practice are already in place for each and statutory obligations, such as those contained within the *Victims' Charter Act 2006*, are embedded and enlivened in operational policy via the Victoria Police Manual (VPM)<sup>3</sup> which details the individual and collective legal and responsibilities of Victoria Police employees and sets the behavioural, operational and administrative standards for the organisation. It applies to Victoria Police employees of all ranks and employment types.

Division 2 of Part 2 of the *Victoria Police Act 2013* (VPA) provides the mechanism through which the Chief Commissioner of Police has responsibility to make operational decisions, specifically those relating to protocols, use of discretion, and the adoption of investigatory techniques.

### **Should there be an option under the *Personal Safety Intervention Order Act 2010* (PSIO Act) for police to issue the equivalent of a Family Violence Safety Notice (FVSN)? (Q7)**

This would be consistent with the policy intent of FVSNs and afford equal statutory protections to victims of stalking that occurs in a non-family violence context, by allowing police the ability to separate parties or prohibit behaviours.

<sup>1</sup> Victoria Police, State of Victoria, *Code of Practice for the Investigation of Family Violence* (2019) 31

<sup>2</sup> Victoria Police, State of Victoria, *Code of Practice for the Investigation of Sexual Crime* (2016) 3

<sup>3</sup> Issued under the authority of s 60 of the VPA



## Chapter 4

## The personal safety intervention order system

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### Should a person making an application for a personal safety intervention order be able to do so online? If yes, in what circumstances? (Q8)

Victoria Police acknowledges that victims and the courts are best placed to comment on the potential advantages, and suitability of establishing a tool for allowing victims seeking to make a PSIO application, to do so online.

Noting the propensity for many stalkers to monitor their victims online, Victoria Police offers for the VLRC's consideration that if a perpetrator were to be monitoring their victim online, and either had or could later gain access to any receipt of an application made online (such as via a push notification appearing on a person's mobile device), this event could lead to an escalation in the perpetrator's behaviour.

In the time between an application being lodged and being considered or granted by a court, a perpetrator being alerted to the application and receiving confirmation that they have secured the attention of their victim could result in an escalation of an offender's behaviour, at a time when the applicant does not yet have the protections of a PSIO in place. Early consideration of whether such risks could be mitigated; including ensuring that online applications do not offer victims a false sense of security, would be necessary.

### Should respondents be prevented from personally cross-examining an affected person in some personal safety intervention matters? If so, in what circumstances? (Q9)

The mental harm inflicted on victims of stalking, a targeted and highly predatory act, can have devastating impacts on victims and their families. This can occur regardless of whether a victim is stalked in a family violence, or a non-family violence context. As acknowledged by then Attorney-General, Hon Jill Hennessy MP in referring these matters to the VLRC, a direct outcome of stalking can be that a victim will take their own life.<sup>4</sup>

While Victoria Police acknowledges the challenges expressed in banning personal cross-examination in PSIO matters,<sup>5</sup> it considers the fact a stalking victim can expect no protection under the PSIO Act from being cross-examined by their perpetrator as a significant barrier to reporting and appropriate victim protection in the context of this type of alleged offending.

Under a two-stream model (FVIOs and PSIOs) where PSIOs remain the only form of civil intervention order available for stalking victims in a non-family violence context, Victoria Police considers reform to establish protected witness provisions within the PSIO Act to be both necessary, and appropriate.

#### *Necessary limitations*

Victoria Police acknowledges that any reform designed to install statutory protections for victims (such as, to mirror the provisions at s 70(3) the *Family Violence Protection Act 2008* (FVIO Act) within the PSIO Act), may need to come with limitations, in order to ensure the provisions are not vulnerable to being used as a procedural tool for purposes that are inconsistent with the spirit in which they were intended.

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<sup>4</sup> Hennessy J, Attorney-General, reference under s 5 of the *Victorian Law Reform Commission Act 2000* (2020)

<sup>5</sup> Victorian Law Reform Commission, *Stalking*, Consultation Paper (2021) 28 [4.21]

Specifically, any provisions would need to balance the assumption that the victim genuinely requires protection, with ensuring that the provisions do not create a procedural tool vulnerable to being abused for retaliatory purposes.

**Should courts be able to order respondents to personal safety intervention order applications to attend treatment programs? If so, what kinds of programs and in what circumstances? (Q10)**

Victoria Police believes that there is an ongoing community safety risk when persons who have allegedly committed stalking but have not necessarily been charged with stalking-related offences don't have access to intervention and diversion programs. Currently, there are challenges for a person who is at risk of offending to access affordable or funded early intervention programs, that would support the prevention of their re-offending.<sup>6</sup>

It is not uncommon for a victim of stalking and harassment at the time of seeking an intervention order to express a genuine desire that they wish the offender could 'get the help they need'. While this in no way lessens the need for the victim to receive the protection of an intervention order, anecdotally this observation is often expressed to police where the victim has prior knowledge of, and/or relationships with, the offender. In these circumstances, the victim can be sensitive to the perpetrator's personal situation (e.g. if they are known to be suffering from ongoing mental health issues).

If a court is satisfied that a perpetrator's behaviour set out in a PSIO application is indicative of fixated, intimacy seeking or predatory behaviours, the court should have power to apply conditions to a PSIO that would provide offenders with access to therapeutic intervention. This may assist to address underlying factors (such as drug and alcohol dependence and/or mental health issues) which may have contributed to the offending. If not addressed, other supportive factors would likely be undermined thereby increasing a person's risk of reoffending.

Victoria Police notes that a respondent being ordered to participate in a treatment program is more likely to be viewed favourably by victims and the community in instances where the respondent has demonstrated their remorse and accepted responsibility for their actions, however this option will not always be appropriate for certain types of offending.

**Opportunities for reforms - Personal Safety Intervention Orders Act 2010**

Similarities in the dynamics and characteristics of stalking are often observed in both a family violence, and non-family violence context. Stalking by-proxy; inconsistent community and victim perceptions of risk; and the added complexities of affected persons and an offender sharing historical or combined familial, business or professional relationships, affords victims an inconsistent level of protection, and provides inadequate recognition of the harm inflicted on victims outside of a family violence context.

An example of this is limitations in the law to apply conditions that would improve a perpetrator's prospects of compliance with a PSIO (see also the response to **Chapter 4, Q10**). If the same behaviour had occurred in a family violence context, conditions of this nature could be applied.

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<sup>6</sup> Victoria Police, *Improving the Response of the Justice System to Sexual Offences*, Submission to the Victorian Law Reform Commission, Issue Paper E (2021) 5 [Question 3]

**Should there be additional offences in the PSIO Act to address more serious breaches? If so, what should they cover? (Q11)**

Victoria Police considers reform to establish additional offences in the PSIO Act to address more serious breaches that involve stalking (mirroring those at s 123A and s 125A of the FVIO Act) to be both necessary and appropriate. Establishment of such provisions would offer similar protections to victims of stalking in either context. Note, this response assumes a two-stream model where PSIOs remain the only form of civil intervention order available for stalking victims in a non-family violence context.

**Should the restrictions on the publication in the PSIO Act be expanded to cover adults? (Q12)**

Yes. Publication of information about PSIO incidents, such as via media articles, may provide offenders with perverse affirmation as to their offending, potentially increasing the risk of reoffending and may lead to other types of more serious offending. Furthermore, publication may be perceived by some offenders as having gained additional power over their victim.

## Chapter 5

# Criminal law responses to stalking

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**Can the criminal law response to stalking be improved? (Q16)**

*S 21A of the Crimes Act 1958 (Crimes Act)*

No substantive issues have been identified during Victoria Police's internal consultations regarding the construction of the stalking offence at s 21A of the Crimes Act. As indicated in this submission, the most difficult aspect is gathering sufficient evidence to charge and then particularise and prove the offence (including demonstrating a course of conduct). This can be challenging due to difficulties for victims and others in identifying stalking behaviours, and difficulties in victims retaining evidence of interactions which, together, would demonstrate a course of conduct. Gathering evidence is also often a huge undertaking for police for stalking cases, particularly when it involves conduct online.

Victoria Police would be welcome the opportunity to discuss the operability of s 21A with the VLRC in the future, if required.

*Image-based sexual abuse (IBSA)*

Image-based sexual abuse which can include the non-consensual taking, distribution or threats to distribute explicit images or footage of another person (also referred to as revenge porn) is an offending behaviour with devastating and long-lasting impacts on victim-survivors and their families. Motivations for image-based sexual abuse vary, noting that threatening to commit image-based abuse is a common means of maintaining coercive control over an individual, both in a family violence setting, and by offenders to discourage their victim-survivors from reporting sexual offending.

The summary nature of these offences in Victoria (unlike in most other Australian jurisdictions where IBSA offences are indictable) has implications for Victoria Police's search and arrest powers, limiting the investigative and enforcement abilities of police.



The potential evidentiary benefit lost in investigations due to the summary nature of these offences directly restricts police's ability to gather evidence necessary to lay charges, which Victoria Police notes has been attributed by the Sentencing Advisory Council to the attrition between recorded and sentenced offences.

Given the commonality of IBSA and its links to stalking, family violence, sexual offending and child sexual abuse, Victoria Police considers there to be merit in IBSA offences, and their application being formally reviewed, to ensure police are sufficiently empowered to investigate and enforce these crimes.

**Should the court be able to request specialist risk assessment reports for stalking? If yes, in what circumstances? (Q19)**

Refer to Victoria Police's response to **Chapter 3, Q2-Q4**.

**Should electronic monitoring be introduced to monitor people who have been assessed as posing a high risk of ongoing stalking behaviour? If yes, in what circumstance? (Q20)**

There are significant risks in using electronic monitoring for one party (the offender) in the absence of understanding where the other party at risk of violence may be located. While potentially useful in a fixed location (for example, an offender's residence), this capability cannot prevent freedom of movement.

Victoria's electronic monitoring program is managed by Corrections Victoria to assist in the monitoring and management of Community Correction Orders, Parole Orders and post-sentence Supervision Orders. Victoria Police forms a part of the response model with regard to breaches of electronic monitoring conditions, however, are not the custodians of the electronic monitoring system or operating model. Implementation of electronic monitoring conditions pre-sentence or in a civil setting without charge would be a significant departure from the current model.

## Chapter 6

# Responding to people who experience stalking

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Refer to Victoria Police's responses to **Chapter 2 (Q1)**, **Chapter 3 (Q 2-4, 5, 7)** and **Chapter 5**.

## Chapter 7

## Responding to people who commit stalking

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System responses that aid support and the rehabilitation and reintegration of offenders

How responsive are rehabilitation and reintegration interventions to the diverse needs of people who commit stalking? (Q24)

Could some specialist courts and programs help address some of the issues that may co-occur alongside stalking behaviour? (Q25)

How well are prison and post-prison rehabilitation or reintegration measures working for people who have committed stalking? How can they be improved? (Q26)

Are there relevant learnings from the reforms to the family violence system that could be applied to the way the system responds to people who commit stalking? (Q27)

The primary challenge faced in successful reintegration of offenders post sentence, and in preventing recidivism, is offenders who are not motivated to engage in necessary treatments, or to advance their rehabilitation and reintegration prospects. While a person convicted of stalking would gain access to therapeutic and other programs, earlier interventions are needed to assist offenders to address and manage the underlying factors which may contribute to their offending.

The behavioural and motivational factors which can be associated with an offender's stalking behaviour are complex, with stalking often only one component of a person's offending. Interventions which seek to address an offender's primary offending (such as sexual offending) provide the broadest benefit to community safety.

Opportunities are available to align system responses to offenders who commit stalking, by providing mechanisms within the Act to empower the court to apply conditions in PSIO matters that would provide offenders with access to therapeutic interventions; a critical tool in maintaining protective factors to enhance an individual's prospects of rehabilitation and prevent recidivism.

### *Specialist courts*

Victoria Police notes there may be merit in considering introducing specialist courts, however, a number of opportunities already exist to extract similar benefits in mainstream courts through improving training and understanding about stalking related offending and through improvements to the evidentiary process and design of court facilities.

Importantly, fragmentation of key police and justice system responses including court processes may create confusion as stalking is often associated with other defined types of criminal offending. The breadth of investigations which may occur as a result of, or are inclusive of offending that involves stalking, can involve matters ranging from family violence, to non-family violence including matters where an offender expresses political or ideological fixations.

## Chapter 8

## Responses to cyberstalking

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Technology-enabled crime, and growing opportunities for victims to be targeted

**What are the barriers that some victim survivors experience when seeking help for cyberstalking? (Q28)**

**If a person suspects that they are being kept under surveillance using cyberstalking, what kind of help do they need to ensure that they are safe? (Q29)**

**In what ways can apps and smart devices be used to facilitate stalking? What controls could be put in place to prevent apps and smart devices being used to facilitate stalking? (Q30)**

Opportunities exist to improve the criminal law response to stalking, and for ensuring offences associated with stalking are fit-for-purpose, considering among other things, rapid advancements in technology. Earlier this year, Victoria Police highlighted to the VLRC the significant gaps in regulation which allow predatory offenders to avoid identification by police, in particular through the use of unregulated third-party platforms (such as dating apps, and image sharing services).<sup>7</sup> Victoria Police considers technology-facilitated offending to be one of several key policing areas in need of legislative reform, given that the popularity and widespread commercial availability of encrypted technology presents a significant opportunity for offenders to avoid detection, and for victims to be targeted.

The same challenges that occur in the context of sexual offending apply equally to other forms of fixated and predatory offending including stalking, which is often facilitated through what are otherwise legal, and increasingly encrypted consumer products. Reform is necessary to ensure that police can obtain required information from third party platforms in a timely manner.

Consideration should be given to enforceable responsibilities on these providers to support police investigations, as occurs to support other forms of cybercrime investigations, and to ensure that online services cannot profit from facilitating a platform that provides opportunities for offenders to commit fixated and predatory criminal offending.

Currently, the level of accountability for platforms does not provide an incentive to cooperate with police investigations or to prevent the platforms being used to commit offences or express behaviours such as stalking, pursuing an ideological fixation, image-based abuse; and facilitating the exchange and production of child abuse material.

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<sup>7</sup> Victoria Police, *Improving the Response of the Justice System to Sexual Offences*, Submission to the Victorian Law Reform Commission, Issue Paper I (2021)



Victoria Police has also recently highlighted at Commonwealth level, the difficulties faced by law enforcement agencies in obtaining evidentiary material involving forms of encrypted communication, as well as from overseas based social media providers such as Facebook and Twitter.<sup>8</sup> These concerns are often also expressed at a Commonwealth level, including recently by the Department of Home Affairs, Department of Foreign Affairs and Trade and Attorney-General's Department<sup>9</sup> when they described the malicious use of encrypted technology to have '*...significantly degraded the capacity of Australian national security and law enforcement agencies to access communications, conduct investigations and prevent crimes...*'.

Victoria Police welcomes the opportunity to participate in further consultation on this topic.

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<sup>8</sup> Victoria Police, *Parliamentary Joint Committee on Intelligence and Security, Inquiry into Extremist Movements and Radicalism in Australia* (Cth), Submission (2021)

<sup>9</sup> Department of Home Affairs, *Parliamentary Joint Committee on Intelligence and Security Inquiry into extremist movements and radicalism in Australia* (Cth), Submission (2021)