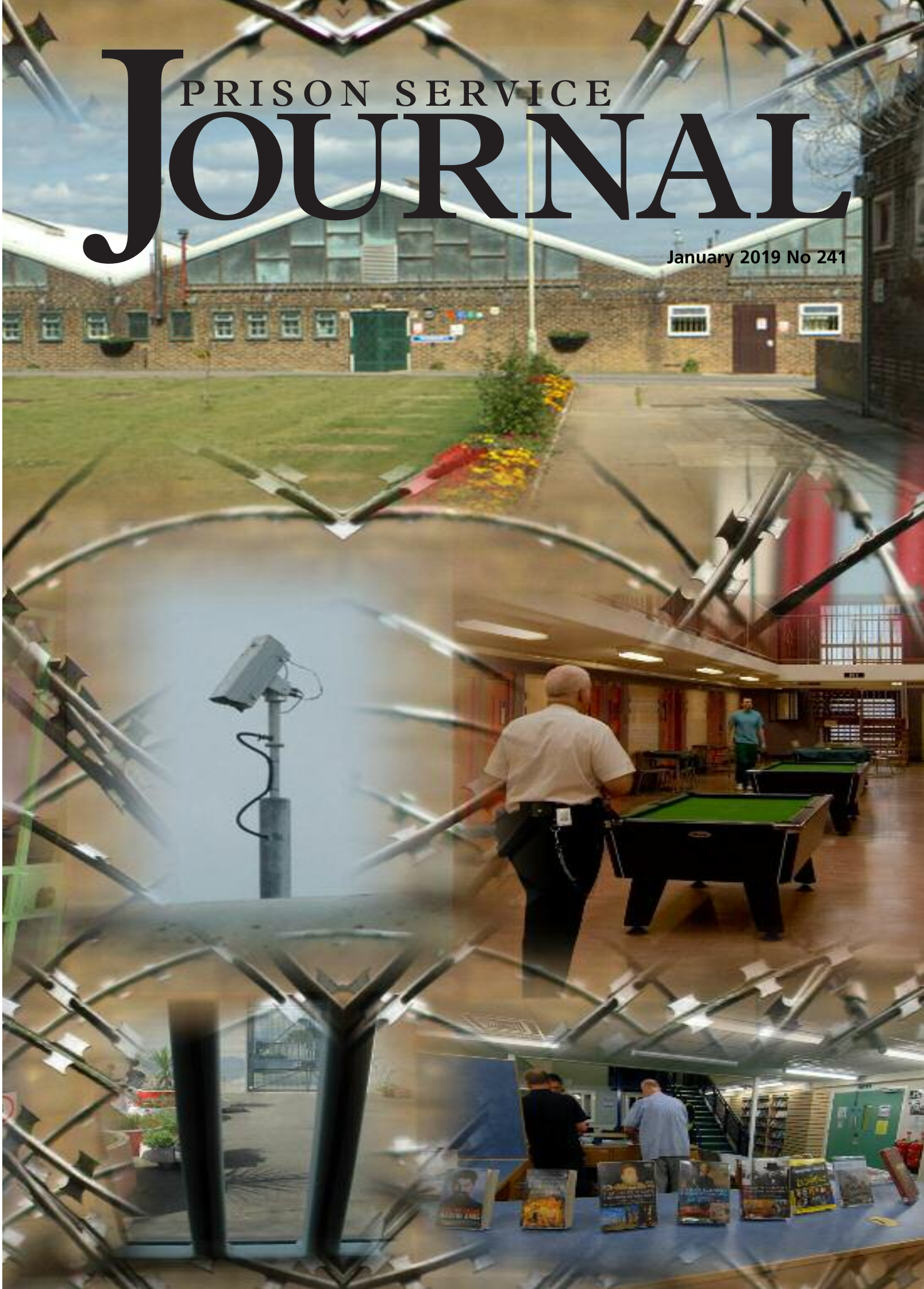


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# Preventing radicalisation in Danish prisons

## Human rights and due process rights of prisoners

**Peter Vedel Kessing**, LLM and PhD, works as a senior researcher at the Danish Institute for Human Rights and as an external associate professor at the Faculty of Law, University of Copenhagen. Member of the Danish NPM visiting places of detention since 2009. **Lisbeth Garly Andersen** is an anthropologist and works as a chief advisor at the Danish Institute for Human Rights.

### Introduction, method and sources

**On 14 and 15 February 2015, Copenhagen was hit by two terrorist attacks.<sup>1</sup> Two members of the public were killed and six police officers were wounded. The attacker, a Danish-born Palestinian, was subsequently killed in an exchange of gunfire with the police.**

The perpetrator had only recently been released from Vestre Prison in Copenhagen, where he is assumed to have been (further) radicalised. Due to this, the Danish government decided to implement a number of measures to consolidate efforts to combat radicalisation and extremism in Danish prisons and detention centres. One such measure was to introduce an obligation on prison staff to report prisoners suspected of being radicalised to the Danish Security and Intelligence Service (PET), and upon release to the relevant local police and municipality.

In 2016, a number of organisations, including the Danish Prison Officers' Union and the Danish Bar and Law Society, expressed concern regarding the more rigorous reporting scheme, and as a result, following a dialogue with the Directorate of Prisons and Probation, the Danish Institute for Human Rights decided to conduct a study of the scheme, with the aim of assessing its consequences for due process and human rights.

Denmark is not the only country concerned to address the issue of radicalised prisoners. Several other countries also face this issue and it is becoming no less

important over time. The number of prisoners prepared to commit violence is growing across Europe with increasing terrorist convictions and returning fighters facing prosecution for having participated in ISIS combat in Syria or Iraq. In addition to this there have been several examples in Europe of prisoners radicalised in prisons who have gone on to commit or attempt to commit terrorist attacks after their release.<sup>2</sup>

This development has spurred considerable international research in recent years on radicalisation and violent extremism in prisons.<sup>3</sup> Are prisons 'schools for terroris'? Considerable attention has been directed at examining what prison authorities can do to prevent and counter radicalisation, including sectioning radicalised prisoners, placing them in solitary confinement; monitoring religious practices and preaching in prisons; introducing de-radicalisation programmes; and reporting potentially radicalised prisoners to the police and intelligence services.

Nevertheless, virtually no international research has explored the impact of these restrictive interventions. Prisoners have the same human rights as everyone else—with the obvious limitations that follow from being detained—and any violation of these basic rights may lead to (further) radicalisation and extremism, see section 9 below. This is the first study of this kind. It analyses how anti-radicalisation initiatives have affected the human rights and due process guarantees of prisoners in six different Danish prisons.

1. The incident led to debate in the Danish media about whether the act was an act of terrorism or whether it was a hate crime. On 27 September 2016, the Copenhagen district court ruled that Omar El-Hussein's acts committed at Krudttønden, a café in Copenhagen, on 14 February 2015, and at the city's central synagogue on 15 February 2015 were acts of terrorism. The ruling can be found here (in Danish): <http://www.domstol.dk/KobenhavnsByret/nyheder/domsresumeeer/Pages/Enigt%C3%A6vningetingfrikenderfirem%C3%A6ndformedvirkentilterrorisme.aspx>.

2. To illustrate two of the three Charlie Hebdo attackers in Paris got their education in radical Islam in the French prison system. So did Fabien Clain, one of the planners of the Bataclan mass shooting in November, 2015. For further examples see <https://www.bloomberg.com/view/articles/2017-03-27/how-to-produce-fewer-terrorists-in-prison>

3. See e.g. Margaret A. Zahn, *Prisons: Their Role in Creating and Containing Terrorists*, in *The Handbook of the Criminology of Terrorism* 2017; Clarke R Jones, *Are prisons really schools for terrorism? Challenging the rhetoric on prison radicalization*, *Punishment & society*, January 7, 2014; Andrew Silke, *Prisons, terrorism and extremism: critical issues in management, radicalisation and reform*, Routledge Taylor & Francis Group, 2014. Anne Speckhard, *Prison and Community Based Disengagement and De-Radicalization Programs for Extremists Involved in Militant Jihadi Terrorism Ideologies and Activities*, NATO publication, 2011; Hannah, Clutterbuck, Rubin. *Radicalisation or rehabilitation: understanding the challenge of extremist and radicalized prisoners* 2008; Mark Hamm, *The spectacular few: Prisoner radicalization and the evolving terrorist threat*, New York University Press: New York, 2013; Linda M. Merola and Heather Vovak, *The Challenges of Terrorist and Extremist Prisoners: A Survey of U.S. Prisons*, *Criminal Justice Policy Review* 24(6) 735–758, 2012.

As part of our research we have reviewed a number of international recommendations concerning the prevention of radicalisation in prisons, as well as Danish legislation and regulation of this area. To understand how the reporting scheme works in practice, we have also conducted a number of qualitative interviews with prison officers and prisoners, and we have reviewed a large number of confidential, anonymised reports of concern.

In total, we conducted 22 interviews: eight with prisoners in different prisons, eleven with prison staff, two with employees at the Directorate of Prisons and Probation, and one with the chairman of the Danish Prison Officers' Union. The Directorate of Prisons and Probation selected the prisons<sup>4</sup> and interviewees included in the study based on their assessment of who was knowledgeable about the area, and who had expressed an interest in participating in the study. In addition, we contacted a prison ourselves and secured more interviewees. The interviews with the prisoners and prison staff were conducted face-to-face in the prisons. In addition, we reviewed 259 confidential reports of concerns. All reports were anonymised and contained information about the background on which the report is based and a short description of the situation. Some only included a very brief description, whereas others were more detailed.<sup>5</sup>

In this article we present the primary conclusions and recommendations of the study. In section 2 we provide an overview of international guidelines on the prevention of radicalisation in prisons. Sections 3-5 describe how the reporting scheme works, including how many prisoners have been reported and the consequences of being reported. In section 6 we discuss how radicalisation and extremism are defined in the Danish prison system. In sections 7 and 8, we discuss the consequences of the Danish reporting scheme with regard to due process and human rights. Finally, in section 9 we sum up our findings and present our recommendations for revising the reporting scheme.

### **International guidelines on prevention of radicalisation and violent extremism in prisons**

It is well-known that prisoners, who are often in a vulnerable situation, are susceptible to influence and

may therefore be easy victims for other prisoners that promote extremism. It therefore comes as no surprise that international guidelines have been developed. It is surprising though that as many as seven sets of international guidelines for the prevention of radicalisation and violent extremism in prisons have been produced over the course of the past few years, including four in 2016. These are:

- ❑ Council of Europe: Guidelines for prison and probation services regarding radicalisation and violent extremism (2016)<sup>6</sup>
- ❑ *United Nations Office on Drugs and Crime (UNODC): Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons* (2016)<sup>7</sup>
- ❑ EU, Radicalisation Awareness Program (RAN), *Dealing with radicalisation in a prison and probation context*, Ran P&P Practitioners working paper (March 2016)<sup>8</sup>
- ❑ The International Committee of the Red Cross (ICRC), *Radicalization in detention—the ICRC's perspective* (June 2016)<sup>9</sup>
- ❑ International Institute for Justice and the Rule of Law: *Prison Management Recommendations to Counter and Address Prison Radicalization* (2015)<sup>10</sup>
- ❑ Global Counterterrorism Forum: *Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders* (2012)<sup>11</sup>
- ❑ International Centre for Counter-Terrorism: *The Hague Core Principles and Good Practices Paper on the Rehabilitation and Reintegration of Violent Extremist Offenders* (2012).<sup>12</sup>

Even though the standards in these guidelines are not legally binding, but solely serve as soft law, they also include reference to good practice with regard to detecting and countering radicalisation and violent extremism in prisons. It is noteworthy that every single one of these guidelines stresses that:

- ❑ Violating human rights and disregarding of process guarantees in prisons can lead to greater risk of radicalising prisoners, and

4. Nyborg, Jyderup, Ringe, Horserød, Søbysøgård and Vestre prisons.

5. For more information, see the report (in Danish) from the Danish Institute for Human Rights by Lisbeth Garly Andersen and Peter Vedel Kessing: *Forebyggelse af radikalisering i fængsler*, 2017: <https://menneskeret.dk/udgivelser/forebyggelse-radikalisering-faengsler>

6. [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c1a69](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a69)

7. [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_VEps.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_VEps.pdf)

8. [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation\\_awareness\\_network/ran-news/docs/ran\\_p\\_and\\_p\\_practitioners\\_working\\_paper\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-news/docs/ran_p_and_p_practitioners_working_paper_en.pdf)

9. <https://www.icrc.org/en/document/responding-radicalization-detention-icrc-perspective>

10. <https://theijj.org/wp-content/uploads/Prison-Recommendations-FINAL-1.pdf>

11. <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rome-Memorandum-ENG.pdf>

12. <https://www.icct.nl/download/file/ICCT-Background-Paper-Rehab-Core-Principles-Good-Practices.pdf>



□ Efforts to prevent radicalisation and extremism must (therefore) remain within the boundaries of international human rights law.<sup>13</sup>

### Reporting scheme

Even before the February 2015 terrorist attacks in Denmark, a reporting scheme on radicalised prisoners was in use by the Danish Prison and Probation Service, but after this date the scheme was tightened in a guideline issued by the Directorate in July 2015, amended and updated in March 2016 and in January 2017.<sup>14</sup> The most recent guideline includes definitions of the terms radicalisation and extremism, and<sup>15</sup> describes the procedure for reporting concerns, the different categories of concern, the opportunities to withdraw a report, and the consequences of being reported.

In accordance with this guideline, prison officers report to the Directorate of Prisons and Probation. Reports need not—as was previously the case—first be presented to a superior for approval or be assessed/screened by other prison staff. Thus, the individual prison officer submits a report directly to the Directorate. Following the submission of a report, the prison or detention centre must follow up on the report with relevant security or social measures. Five categories of concern range from 0 to 4, where 4 is the most serious and 0 is the least serious.<sup>16</sup> On receiving a report, the Directorate assesses the prisoner to determine whether he or she should be moved to a new category of concern.

All reports are forwarded to the Danish Security and Intelligence Service. Once a report is filed, the prison must always consult the police/the Danish Security and Intelligence Service before any form of leave (e.g. weekend leave) or parole can be granted. Moreover the relevant municipality must also be notified when the prisoner is released, with the exception of prisoners in category 0. As a consequence of the tightening of the reporting scheme, the authority do decide whether a prisoner should be granted the right to leave or parole has been effectively transferred from the prison authorities to the Danish Security and Intelligence Service. If a report of concern has been issued for an individual, this may also determine where they serve

their sentence, including whether they are transferred to a maximum security prison ward.

Moreover, the report continues to apply throughout the entire period of imprisonment/ remand and cannot be rescinded or changed by either the prison itself or the Directorate of Prisons and Probation.<sup>17</sup> The report remains in place even after the prisoner is released, with the exception (from June 2016) of those in categories 0, 1, and 2 which are rescinded on release; though it can be reactivated if the prisoner is imprisoned again within a certain time period<sup>18</sup> Reports of concern in category 3 and 4, which are the most serious categories, remain in place even after a prisoner has been released from prison, and are reactivated if the prisoner is imprisoned again.

### Total number of reports of concern

The number of reported concerns regarding radicalisation in prisons increased after the terrorist attacks in Copenhagen in February 2015. In 2015, 51 reports were submitted to the Danish Security and Intelligence Service, whereas only six were submitted in 2013 and 17 in 2014. Thirty reports alone were submitted in the month following the attack. On 9 June 2017 the Directorate of Prisons and Probation reported that:

- In the period from February 2015 up to and including April 2017, they had received and forwarded 348 reports of concern to the Danish Security and Intelligence Service.
- On this date, 77 prisoners / detainees in prisons and detention centres had a report of concern.
- Of these, 19 were assigned to category 0, 28 to category 1, 18 to category 2, and 10 to category 3. Categorisation of two referrals was still pending.<sup>19,20</sup>

### Consequences of being reported

These can be severe. During the imprisonment period the prisoner may suffer several consequences: the right to leave or parole may be delayed or refused, or the prisoner may be placed in a maximum security ward or prison. The interviews with prison officers and prisoners

13. For a more detailed description of these issues and relevant quotations, see the Danish Institute for Human Rights report, *supra* note 27, pp. 14-16 (in Danish).

14. The Danish Prison and Probation Service, *Voldelig ekstremisme og radikalisering – Vejledning til håndtering og indberetning af bekymrende adfærd*, 31 January 2017 (in Danish). When we refer to the Danish Prison and Probation Service guideline in this article, we are referring to the most recent version from January 2017.

15. See more in section 6 below.

16. It should be noted that category 0 was not introduced at the same time as the other categories; it was first introduced by the Directorate on 1 August 2016. See more about this in the Danish Institute of Human Rights report, *supra* note 47, pp. 20-21.

17. In the following, when we refer to imprisonment, prison time, etc., this not only refers to prisoners in prisons but also to remand prisoners in detention centres.

18. See the DIHR report, *supra* note 47, p. 21.

19. See The Legal Affairs Committee (REU) 2016-17, REU final reply to question 20, 4 November 2016.

20. As a prisoner can be the subject of several reports and can be moved from one category of concern to another during imprisonment the number of reports does not equal the number of prisoners with a report.

indicate that a report of concern can also affect the prisoner's right to engage in education/training courses. There is also a risk that those who have been reported are de facto isolated because other prisoners are afraid of interacting with them and attract attention to themselves. A report of concern may also have consequences after release, because the relevant municipality and the police and Danish Security and Intelligence Service must be notified about it. Even though being the subject of a report of concern may have significant negative consequences for the individual, the Danish Prison and Probation Service does not systematically monitor the numbers being reported, or the consequences, making it difficult to assess whether reporting is necessary and justifiable from a human rights perspective (see section 8 below). Neither are the prisoners themselves clear about the consequences of being reported, including any procedural guarantees.

### **The terms radicalisation and (violent) extremism in prisons**

It almost goes without saying that identifying extremist and radicalised prisoners can be very challenging for prison staff. It is important to try to clarify the terms.

### **Definition of radicalisation and violent extremism in an international context.**

Despite several attempts at the international level to define extremism and radicalisation, no agreement has been reached and they remain vague and imprecise.<sup>21</sup> The UNODC handbook on violent extremism in prisons (2016) stresses the importance of distinguishing between extremist opinions/ thoughts and extremist actions, and provides this definition:

**Extremists:** Can be characterized as people who tend to reject equality and pluralism in society. Extremists strive to create a homogeneous society based on rigid, dogmatic ideological tenets; they seek to make society conformist by suppressing all opposition and subjugating minorities.

**Violent extremist:** Someone who promotes, supports, facilitates or commits acts of violence to achieve ideological, religious, political goals or social change.

Despite this clear and important distinction, echoed in The Council of Europe guideline on radicalisation and violent extremism (2016) no such distinction is made in the Danish definition.

### **The Danish definition of extremism and radicalisation.**

The current Danish government national action plan to prevent and counter radicalization defines its terms as:

**Extremism** refers to persons or groups that commit or seek to legitimise violence or other illegal acts, with reference to societal conditions that they disagree with. The term covers e.g. for example left-wing extremism, right-wing extremism and militant Islamism.

**Radicalisation** refers to a short- or long-term process where persons subscribe to extremist opinions or legitimise their actions on the basis of extremist ideologies.<sup>22</sup>

In contrast the Danish Prison and Probation Service's definition is broader and includes extremist opinions as well as actions:

□ The Danish Prison and Probation Service should give special attention to clients with extremist opinions such as:

- simplistic views of the world and of 'the enemy', in which particular groups or aspects of society are seen as a threat,
- intolerance and lack of respect for other people's views, freedom and rights,
- rejection of fundamental democratic values and norms, or non-acceptance of democratic decision-making processes,
- use of illegal and possibly violent methods to achieve political/religious ideological goals.<sup>23</sup>

### **Understanding and using the terms in practice**

A review of the 259 reporting forms indicates that, in practice, there has been a great deal of uncertainty about what warrants reporting a prisoner as radicalised or extremist, and that such reporting is based on very different types of observation. Interpreting what is often

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21. See, for example, *Report of the Special Rapporteur on human rights and counter-terrorism*, A/HRC/31/65, 22 February 2016, para. 11.

22. See *supra* note 16. The Danish Government, Preventing and countering extremism and radicalisation, National Action Plan, October 2016, p.7.

23. See The Danish Prison and Probation Service guideline from 2017, *supra* note 16.

a short description can be difficult, and the numbers involved are reported with some caution. Furthermore the written reports do not stand alone; additional information about the prisoner is included in the overall security assessment and the assessment of which category of concern the prisoner should be assigned to. However, overall the reporting forms confirm that—in accordance with the guidelines issued by the Danish Prison and Probation Service and the Danish Ministry of Justice—not only are threats of violence or other illegal behaviour reported, but also—and more often—extreme, but lawful utterances or lawful religious behaviour are reported. Only approximately 10 per cent (28 reports) of the reports reviewed identified signs of readiness to commit violent acts in the form of actual threats of violence or illegal methods to force others to accept extreme opinions. Several concerned albeit extreme, but lawful utterances, for example expressions of sympathy for a terrorist organisation such as ISIS. Some seemed to rest on ideological beliefs, but others seemed to have been expressed in anger by a prisoner exhibiting no other signs of radicalisation. Several of the reports (23) concerned material found in the prisoner's cell. Most often this was graffiti or literature (books, pamphlets, noticeboards, etc.). A number concerned critical comments about democracy or violent comments about Denmark or the country's involvement in armed conflicts, etc. Examples are:

*During a break in the prison yard, the prisoner reported that he was sympathetic to ISIS and supports the most recent terrorist attack in Belgium.*

*Copy of letter confiscated from the prisoner's cell enclosed as an appendix. Part of the letter is in Arabic and part of it in Danish—Jihad is mentioned in some of the quotes.*

*After attacking another prisoner, he was assigned to solitary confinement, and on his way there, he lifted his right arm with a clenched fist and one finger pointing to the sky in a manner that resembled the hand gesture used by ISIS.*

*During examination of the clients room on (...), he was found to be in possession of a t-shirt (see enclosed photo) with the following text in*

*Arabic: I support the resistance movement in Gaza, the Al Aqsa movement.*

*Graffiti above door to cell: Hard times will pass. Sufferings will end. Just don't fail. In Allahs test.*

*'When clearing out the prisoner's room in connection with a move, pictures were taken of his noticeboard that seemed 'very Muslim' in appearance.*

*Confiscation of literature about Sharia law and other written material about Hizb-ut-Tahrir.*

*The client has borrowed the following books from the prison library: 1. 'Gangster' by Brian Sandberg, 2. 'I Hellig Krig' by Omar Nasri.*

*During conversations with the prisoner, he expresses that he is sympathetic to the terrorists that participated in the Paris attacks.*

## Several other reports concern lawful religious conduct where there was no indication of readiness to commit violence or use illegal methods

Several other reports concern lawful religious conduct where there was no indication of readiness to commit violence or use illegal methods (see section 8.3 about the right to freedom of religion). The interviews with

prisoners and staff showed that extreme, yet lawful utterances and opinions are being reported, and that several prisoners refrained from expressing themselves freely so as to avoid this. There were several examples of prisoners who refrained from engaging in political discussions or from commenting on terrorist attacks that have taken place. As one explained *'When there are discussions about, for example, Charlie Hedbo, I don't get involved. I don't want to get involved in the discussion.'* According to several prison officers, prisoners should be careful about criticising NATO missions, and they should refrain from making negative comments about, for example, Jews or from praising attacks carried out by Islamic State. If a prisoner makes these kinds of comments, he risks being reported.

### Summary and recommendations

International guidelines for the prevention of violent extremism and radicalisation in prisons agree that it is crucial to establish a precise definition of the terms 'extremism' and 'radicalisation', and they make a

crucial distinction between extremist actions (i.e. the implementation of extremist opinions) and extremist opinions. Whereas the current Danish government action plan for preventing extremism and radicalisation solely focuses on preventing violent extremism and radicalisation, the Danish Prison and Probation Service includes both extremist actions (violent extremism) and extremist opinions (extremism). This review of submitted reports of concern, and the interviews, show that in practice prison staff were very unsure of this distinction. On balance the reports examined more often focussed on lawful utterances made by prisoners that expressed sympathy for a terrorist organisation, or religious behaviour, with no reference to a readiness to commit violence or use illegal methods.

Here, it is also important to note that a broader definition of extremism—one that requires that lawful opinions/expressions of being sympathetic to a cause and legal religious practices are also reported—entails greater risk of conflict with the prisoners' right to freedom of expression, privacy and freedom of religion (see section 8 below). For this reason, we recommend that the definition is limited to violent extremism, i.e. that is extremist actions, and does not include extremist opinions.

### **Procedural protection guarantees**

To limit the risk of both over-reporting and under-reporting, and the risk of abuse of sensitive personal data, it is vital that the reporting scheme includes adequate procedural guarantees.

### **Identifying radicalised prisoners**

The international guidelines on preventing violent extremism and radicalisation include a number of precise recommendations on the procedure that should be followed to ensure that prisons correctly identify and report prisoners who show signs of violent extremism and radicalisation. It is crucial that the prison staff who carry out the risk assessment know the prisoner very well, and have received training in identifying signs of violent extremism and radicalisation, and that the risk assessment is carried out by a multidisciplinary team.

In some crucial areas, Danish regulation and practice differs from international recommendations: a single prison officer assesses the prisoner and submits

a report of concern; prison staff have often felt unsure of whether they were reporting correctly and expressed a wish for more training and resources in the area. On the basis of this, we recommend that risk assessment is always conducted by prison staff in a multidisciplinary team who have been trained to identify signs of violent extremism and radicalisation and who know the prisoner well. Moreover, prison staff should be able to seek guidance from a qualified staff member with special knowledge about radicalisation processes.

### **Procedural guarantee for prisoners**

The international guidelines on the prevention of violent extremism and radicalisation do not state whether the reported party should be informed of the grounds for the report, nor whether they should have the opportunity to question these grounds before the report is submitted. However, they do state that prisoners who have been reported should be able to challenge the report. The Danish Prison and Probation Service's guideline from 2017 is unclear about whether a prisoner should *'be informed of the grounds for the report and should have access to question these grounds'* and be included in a hearing of parties. The guideline only states that the prisoner

*'should be presented with the concern and should be given the opportunity to address the concern.'* On the other hand, the guideline states that prisoners who have been reported must be provided with guidance on how to appeal (or challenge) the report and should be informed of the regulations about withdrawal of the report of concern. Interviews with the reported prisoners show that several of them had not been informed of the grounds for the report—or at least in their view they have not been satisfactorily informed. Similarly, several were critical about the fact that they had not been given the opportunity to question it or in any other way *'defend themselves'* against the charges. However, it should be noted that the reasons for this could be *'overriding considerations to public or private interests'*.

We recommend that the procedural guarantees for prisoners are improved. For example, prisoners should be notified in writing about the grounds for the report and they should be given the opportunity to

The international guidelines on preventing violent extremism and radicalisation include a number of precise recommendations on the procedure that should be followed...

question these before a report is registered unless ‘overriding considerations to public or private interests’ speak against this.

### ***Clear and precise rules for the handling of sensitive information***

Reports of concern about radicalization contain highly sensitive personal information about the reported prisoner. Therefore, it is important to have clear and precise regulation for how the involved authorities register, use, exchange, delete and correct reports of concern

We recommend that Danish reporting practice is changed to ensure that an individual needs assessment is always carried out prior to prisons/the Prison and Probation Service transferring information to the police, the Danish Security and Intelligence Service and the relevant municipality.

#### **Human rights consequences**

In this section we examine the consequences of the Danish reporting scheme for prisoners in Danish prisons with regard to their human rights.

#### ***The right to privacy***

##### *International standards*

How authorities handle and exchange information concerning an individual's strictly personal matters, including the individual's religious or political opinions and ideologies, is protected by the right to privacy as stated in Article 8 of the European Court of Human Rights (ECHR).

However, as mentioned in section 8.1., the right to privacy can be restricted based on an assessment, providing that it is in accordance with the law and is deemed necessary and proportionate to achieving a legitimate aim as described in Article 8(2)<sup>24</sup>. The need to maintain good order in the prison or the need to prevent crime can be legitimate reasons for restricting prisoner's the right to privacy.<sup>25</sup> The ECHR has found it may constitute a violation of the right to privacy if the police

register sensitive personal data on a weak basis, without providing the individual the right to correct the information. In the *Khelili* case, the Court ruled that the Swiss police's use of the word ‘prostitute’ in its records for a woman over a period of several years on the basis of vague allegations constituted a violation of Article 8.<sup>26</sup>

With regard to the police registration of criminal acts, including warnings regarding criminal acts, the ECHR has stipulated that legislation must provide adequate procedural guarantees for the protection of the individual, including clear and detailed regulation about its collection, registration, storage and exchange, how long it may be kept in the police records and how it should be deleted.<sup>27</sup>

Prisoners' right to privacy is also stressed in the international guidelines on violent extremism. The UNODC handbook states, among other things:

## Reports of concern about radicalization contain highly sensitive personal information about the reported prisoner.

*Any cooperation and exchange of information with the police or other law enforcement agencies must be based on strict and clear procedures in terms of privacy and data protection. Confidentiality and privacy issues can hinder multi-agency cooperation.*<sup>28</sup>

The Council of Europe guidelines on violent extremism in prisons contain an almost identical section.<sup>29</sup>

#### ***Summary and recommendations***

The Danish Ministry of Justice assesses that when prisons and the Danish Prison and Probation Service transfer information about radicalised prisoners to the relevant municipality and the police (and presumably also to the Danish Security and Intelligence Service), this constitutes an interference to the right to privacy as laid down in Article 8, (see section 7.3). However, this interference is deemed legitimate for three reasons: 1) it is in accordance with the law (section 115 of the Administration of Justice Act); 2) it serves to achieve a legitimate aim, i.e. that is the prevention of crime; and 3)

24. Article 8(2) states: There shall be no interference by a public authority with the exercise of this right [right to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of *national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.* (Italics added).

25. Or any of the other legitimate reasons stated in Article 8(2).

26. See ECHR, *Khelili v. Switzerland* 18/10 2011.

27. See ECHR, *M.M. v. The United Kingdom* 13/11 2012, para. 199

28. The UNODC handbook from 2016 on the management of violent extremism and prevention of radicalisation in prisons, *supra* note 10, p. 121.

29. See Council of Europe guidelines from 2016, *supra* note 8, section III, b, para. 3.



it always requires a specific assessment of whether it is necessary and proportionate to exchange information between the Danish Prison and Probation Service, Social Services and Police (KSP collaboration partners) with a view to preventing crime.

Nonetheless, questions can be raised as to whether the three conditions are always met. Especially with regard to the third condition. The Ministry of Justice's precondition that the interference in the right to privacy is proportionate based on the grounds that a specific needs assessment is always carried out before information is exchanged can no longer be upheld following the 2015 terrorist attacks that led to a change of practice. Now reports of concerns and some types of sensitive personal information must always be exchanged.

Automatic exchange of sensitive personal information from the Danish Prison and Probation Service to the police, the Security and Intelligence Service and the relevant municipality, without first conducting a specific needs assessment, is a violation of the prisoners' right to privacy. Therefore we recommend that the reporting scheme is amended so that a specific and individual assessment of whether it is necessary and proportionate—with regard to preventing crime or maintaining good order—to transfer sensitive personal information about radicalised prisoners to other authorities in the KSP collaboration, including the relevant municipality and the Danish Security and Intelligence Service.

### **The right to freedom of religion** ***International standards***

The right to freedom of religion is protected in Article 9 of the ECHR and includes the right to set up, organise and actively participate in religious communities, including participating in prayer services and attending religious service meetings. This right also includes the right to observe religious rituals and wear clothing and symbols for religious reasons.

This right can be restricted provided that such restriction is in accordance with the law and is necessary and proportionate for the protection of public order or the rights and freedoms of others, see Article 9(2).<sup>30</sup> Prisoners also have the right to religious freedom, though the deprivation of liberty may in itself render it difficult for prisoners to fully practise their religion, for example, to congregate with others who share the same religious belief. Access to practising one's religion is also protected in the European prison rules of 2006 and the UN prison rules of 2015 (the Mandela rules). Furthermore several of the international guidelines on the prevention of violent extremism and radicalisation in prisons emphasise that manifestation of religious practices must not be misinterpreted as radicalisation and violent extremism. The UNODC handbook from 2016 issues caution with regard to this risk of misinterpretation, and stresses that religion can help many prisoners.<sup>31</sup>

Similarly, the European Radicalisation Awareness Network (RAN) working paper from 2016 also stresses that a distinction should be made between religious practice and radicalisation.<sup>32</sup> The organisation EuroPris,<sup>33</sup> an NGO consisting of practitioners from European Member States who deal with the conditions in prisons, prepared a guideline in August 2016 concerning religious staff in prisons and prevention of radicalisation (Prison Chaplaincy and Deradicalisation).<sup>34</sup> The guideline stresses, for example, that religion serves an important role with regard to preventing radicalisation in prisons and that:

*Prisoners should also have the right to hold religious objects in their cells, pertaining to their specific faith—as long as these objects present no danger to other prisoners, prison staff or the public. The State is neutral and must not favour any religious group or denomination. Nevertheless the State and its prison service must guarantee a prisoner's right to religious assistance.*<sup>35</sup>

## The UNODC handbook from 2016 issues caution with regard to this risk of misinterpretation, and stresses that religion can help many prisoners

30. The provision reads as follows: 2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, *for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.* (Italics added).

31. See The UNODC handbook from 2016, *supra* note 9, p. 16.

32. See European Commission, RAN, working paper from 2016, *supra* note 10, p. 3.

33. See the organisation EuroPris, Promoting Professional Prison Practice <http://www.europris.org/>

34. Can be found on the EuroPris website, see *ibid.*

35. *Ibid.*

## Danish regulation

Freedom of religion is protected in section 67 of the Danish Constitution that stipulates: 'The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.' Section 35 of the Danish Sentence Enforcement Act further stipulates that all prisoners in prisons and detention centres have the same freedom of religion as everyone else. The Danish Prison and Probation Service's guideline from July 2015 on preventing violent extremism and radicalisation included a specific section on religion. This section established that all prisoners have a right to practice their religion. The 2015 guideline stresses that practising religious beliefs and/or converting to another faith does not necessarily entail radicalisation. However, this section has been deleted in the most recent guideline from 31 January 2017.

### Freedom of religion in practice — reports and interviews

Our review of the 259 reports shows that information about the religious practice of the prisoners is included in many reports (44 reports, corresponding to approx. 17 per cent of all reports). These reports seldom include other signs of radicalisation or extreme behaviour. The following reported activities illustrate this point:

*XX has more than 10 books about Islam in his room. The background image on his computer is an overview of prayer times, and he has a prayer rug on the floor.*

*I saw the prisoner with prayer beads [in his cell] (...) It's not usual to see the prisoner with prayer beads. The prisoner is a Danish citizen, was born in Denmark and has a normal Danish family background.*

*He himself is worried that he might be seen as being radicalised, and he's even cut his beard to signal that he's not. He's just trying to be a little bit more serious about his religion in here. But as I said, he seems to be aware of the fact that he needs to be careful about how he does this.*

*I've noticed that the prisoner has let his beard grow, and I've asked him directly whether it has anything to do with radicalisation, but he said no.*

*(...) told staff that the prisoner had suddenly borrowed a lot of books about Islam. She was very surprised by this sudden interest in Islam by the prisoner who has a Danish background.*

*When the prisoner's possessions were inspected, it was seen that he had a long tunic and a knitted white cap like the one an imam wears. And the prisoner has grown his beard a bit longer. He was very keen on knowing whether the meat was halal.*

*I think it's notable that the client has suddenly grown a beard. And started wearing a certain kind of clothes (Muslim clothing).*

In addition to prisoners having the right to freedom of religion as described in the above, research in prison environments and radicalisation shows that religion can play an important role in the lives of prisoners.<sup>36</sup> Religion can offer prisoners comfort, both spiritually and mentally, and can also sometimes even help at a physical and materialistic level. As such religion can help counter some of the harmful effects of

serving time in prison.

The question is whether prisoners impose restrictions on themselves with regard to practising religion because they are concerned that they will be reported for religious radicalisation.

### Summary and recommendations

In accordance with both international and Danish standards, prisoners have a right to freedom of religion. It is not uncommon that prisoners become more religious and make use of the opportunity to listen and speak to a religious representative. The Danish Prison and Probation Service is focused on ensuring prisoners have the right and opportunity to practise their religion, and is aware that religious practices can be misinterpreted as signs of extremism or radicalisation. Reporting a prisoner's religious practices may in fact be an interference of the right to religious freedom,

Section 35 of the Danish Sentence Enforcement Act further stipulates that all prisoners in prisons and detention centres have the same freedom of religion as everyone else.

36. Hannah, Clutterbuck, Rubin. *Radicalisation or rehabilitation: understanding the challenge of extremist and radicalized prisoners* 2008, p. 10. See also Linda Minhke Kjær, *Fængslets indre liv*, 2012.

especially where the reported religious practice is linked to a subsequent negative sanction, such as denying the prisoner the right to leave or parole.

The reviewed reports and interviews indicate that a number of prisoners have been reported for their religious practices alone. Several of the interviewed prisoners and prison staff also described how prisoners imposed certain restrictions on their own religious practices, for example not talking to the prison imam, because they were afraid they would be reported.

The prisoners' right to freedom of religion can be restricted, providing this is necessary and proportionate with regard to achieving a legitimate aim, including the need to maintain good order in the prison. Narrowing the scope of the definition of extremism to solely refer to violent extremism, as recommended in section 6 above, would minimise the risk of an unjustifiable violation of prisoners' freedom of religion in that the focus would be clearly on reporting actions that may be criminal, that is on preventing crime.

### **The right to equal treatment International standards on equal treatment**

Human rights law includes a general prohibition of discrimination. The prohibition of discrimination based on ethnicity is explicitly protected in the UN Convention on Racial Discrimination, the ECHR, the EU Charter on Fundamental Rights and the UN International Covenant on Civil and Political Rights.

Discrimination can both be direct and indirect based on ethnicity. Indirect discrimination is when a neutral action or lack of action places persons with another ethnic background at a specific disadvantage, and this differential treatment is not objective or proportional.<sup>37</sup> Several of the international guidelines on the prevention of violent extremism and radicalisation stress that discrimination can lead to risk of further radicalisation. Thus the Council of Europe guidelines from 2016 state that:

*While not necessarily sufficient in themselves to trigger radicalisation—violence, racism, islamophobia and other forms of discrimination—generate resentment and provide the ground for radicalising narratives to take root.*<sup>38</sup>

37. For more about indirect discrimination see, e.g. the ECHR *DH v. Czech Republic* 13/11 2007.

38. Council of Europe guidelines from 2016, *supra* note 89, para. 9

39. ICRC guidelines from 2016, *supra* note 11, pp. 4-5

42. See p. 6 of the guidelines.

The guidelines also underline the importance of ensuring prison staff receive training in how to avoid differential treatment of prisoners, for example on the basis of their ethnic or religious backgrounds, and that they are aware of this. The International Committee of the Red Cross guidelines from 2016 state that:

*Unskilled staff lack the capacity and credibility to address questions of religion or any other ideology. In addition, staff who are insufficiently aware of cross-cultural perspectives or whose prejudices or discriminatory attitudes towards certain ideologies or religions are uncurbed, undermine 'de-radicalization' efforts and are met with suspicion and rejection. This can lead to entrenching detainees in negative or violent attitudes.*<sup>39</sup>

The question is whether prisoners impose restrictions on themselves with regard to practising religion because they are concerned that they will be reported for religious radicalisation.

### **Danish regulation**

Section 3 of the Danish ethnic equality act stipulates that 'no person may subject another person directly or indirectly to unequal treatment on the basis of their or a third party's race or ethnic origin.'

If a person can demonstrate facts that indicate that they have been subject to direct or indirect differential treatment, the authorities (the other party) are responsible for proving that the principle of equal treatment has not been disregarded. In this type of situation there is a so-called reversed burden of proof, (see section 7).

As regards reports of concerns and equal treatment of prisoners, the Danish Prison and Probation Service guidelines from July 2015 stressed that 'militant Islamism constitutes the greatest threat right now. However, it is also important to be aware of *right- and left-wing extremist groups*,' and several examples of such groups are mentioned, including Red Army Faction (Rote Armé Fraktion), Combat 18 and the National Socialist Movement of Denmark (DNSB).<sup>40</sup> The passage mentioned here has not been included in the most recent guidelines from January 2017.

The 259 reporting forms reviewed show that almost all concern Muslim prisoners. By far the majority of the prison staff interviewed think that the Danish Prison and Probation Service primarily focuses its efforts on identifying radicalisation among Muslims. One prison officer explained that prison officers have only been asked to keep an eye out for militant Islamism, and another prison officer elaborated on this by saying that they ‘definitely’ focus on Muslims. Commenting on this one-sided focus on Muslims, another prison officer said, ‘Nothing else is mentioned [than that officers should keep an eye out for religious radicalisation]. When you are given some information, you focus on that one thing.’

Several prison officers believe that the reporting scheme unfairly focuses on Muslim prisoners. For example, a prison officer reports that with regard to Muslims, the prison officers are much quicker to think that this is a case of radicalisation ‘*without having substantial documentation.*’ A number of prison officers believe that, with its current direction of focus, the Danish Prison and Probation Service would fail to identify right-wing extremists. A prison officer explains, ‘*I wouldn’t be able to spot [a] Breivik [...]. I don’t have the tools to do that. It’s part of the same system, but I don’t think like that (...). We’re so focused on ethnic origin.*’ Another prison officer also explains that a character like Anders Breivik [a Norwegian convicted for terrorist action] would not have been reported because ‘*his name was what it was and he didn’t have that religion [wasn’t a Muslim].*’

This one-sided focus on Muslims also means that the same utterances are interpreted differently, depending on whether they are made by a Muslim or by a non-Muslim. For example, if a Muslim prisoner says that he wants to ‘drop a bomb’, this would be taken much more seriously than if it was said by a Dane. Thus, Muslim prisoners have a higher risk of being reported. The prisoners also feel that Muslims are specifically targeted in prisons. For example, a prisoner described this targeting of Muslims in the following manner: ‘*Christians also do stuff. And Jews also do stuff. But right now, it’s only Islam that does stuff.*’

According to international standards and Danish regulations, there must be no direct or indirect differential treatment of prisoners, for example reporting efforts may not focus solely on prisoners with a Muslim background. In addition, the Danish Prison and Probation Service guidelines from July 2015 also state that even though militant Islamism currently constitutes a prominent threat, focus should also be given to right-wing and left-wing extremist groups. In practice, however, the reviewed reports showed that almost all reports of concerns were about prisoners with a Muslim background. Similarly, most of the prisoners who were interviewed believed that only Muslim prisoners were reported.

We therefore recommend that the prisons and the Prison and Probation Service have a strong focus on avoiding any direct or indirect discrimination when identifying and reporting radicalised prisoners.

**Conclusion and recommendations**

Experience from Denmark and comparable countries shows that it is necessary to focus on preventing violent extremism and radicalisation in prisons. As is seen in the interviews with the prison officers, it seems often to be particularly challenging for the individual prison officer to

identify radicalised prisoners or those at risk of becoming radicalised. On one hand it is clearly important that prisoners who are violent extremists or radicalised should be subject to reporting, and that under-reporting should be prevented. On the other hand, as described in section 5, it is important to be aware that being reported may have very negative consequences for a prisoner both during and after serving a prison sentence. International guidelines on the prevention of violent extremism and radicalisation in prisons, and research in the field, highlights that incorrect reports, and reports that jeopardize prisoner’s fundamental human rights entail a risk that the prisoner will become (further) radicalised.

For this reason, it is also important to ensure that concerns are not over-reported. The Danish Prison and Probation Service may decide to err on the side of caution by submitting reports even in cases of doubt. However, unfounded and undocumented reports

As regards reports of concerns and equal treatment of prisoners, the Danish Prison and Probation Service guidelines from July 2015 stressed that ‘militant Islamism’ constitutes the greatest threat right now.

should be avoided. The risk of incorrect reporting and its potential negative consequences should be minimised to the greatest possible extent. Statistics show that since the terrorist attack in Denmark in February 2015, the number of prisoners reported due to concerns of radicalisation increased dramatically; suggesting a degree of over-reporting in the months following the terrorist attack.

Overall, the study shows that the definition of extremism and radicalisation used by the Danish Prison and Probation Service is broad in scope; *that* there has been and still is uncertainty about who should be reported; *that* reporting often disregards the basic legal safeguards of the prisoner; and *that* there is a risk that the prisoner's right to privacy, freedom of religion and equal treatment will be violated.

In order to ensure that future reporting is as correct as possible, and to limit potential negative consequences of reporting, we recommend that the Danish Prison and Probation Service:

- ❑ Routinely record and monitor the consequences that reported concerns have for individual prisoners, e.g. for example as regards refused temporary release and probation.
- ❑ Clarify and restrict the definition of extremism such that it applies solely to violent extremism.
- ❑ If the Ministry of Justice/Directorate of Prisons and Probation considers it necessary to use a broader definition of extremism that includes extremist opinions, then the Ministry/ Directorate should explain in more detail why this is necessary, and consider the negative consequences of such a broader reporting scheme, including the human rights consequences for prisoners.
- ❑ Ensure that there is a satisfactory procedure for reporting concerns that includes ensuring that assessment is carried out by a specially trained multidisciplinary team with knowledge about radicalisation working as closely as possible with the prisoner.
- ❑ Ensure that reported prisoners are protected by due-process guarantees, including communicating grounds, the right to question

these grounds, as well as providing appeals procedures and appeals guidelines.

- ❑ Pursuant to section 115(4) of the Danish Administration of Justice Act, the Danish Prison and Probation Service only disclose reported concerns to the police, the Danish Security and Intelligence Service and relevant municipalities on the basis of a specific needs assessment. The Danish Security and Intelligence Service may, on the basis of a specific assessment (suspicion), request information pursuant to section 4 of the Danish Security and Intelligence Service Act.
- ❑ Ensure that there are clear and precise rules governing how the Danish Prison and Probation Service manages reported concerns.
- ❑ Maintain continual focus on potential negative impacts on prisoners' human rights as a consequence of being reported.

It is noteworthy that in 2016 alone, four international organisations developed guidelines for preventing radicalisation in prisons, namely the Council of Europe; the UNODC; RAN (European Commission); and the International Committee of the Red Cross. These guidelines that describe best practices for the area were very useful with regard to assessing national Danish regulation and practice. All guidelines emphasize that measures to counter violent extremism in prisons must respect human rights obligations, including in particular the right to privacy, religious freedom and equal treatment. However they do not provide guidance on how prison staff can secure these human rights in practice, or when these rights can legitimately be restricted (see above).

It is also noteworthy that the international guidelines virtually disregard the due process issues inherent in the reporting system. These relate to important procedural guarantees regarding, for example, the prisoner's right to receive adequate grounds for being reported and to question these grounds. If and when the international guidelines referred to here are revised, it would be appropriate for them to include these due process concerns and describe in more detail the human rights issues that arise in connection with preventing violent extremism in prisons.