



Australian
Human Rights
Commission

Review into Division 105A of the Criminal Code (post sentence orders)

Submission to the Independent National Security Legislation
Monitor

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Independent National Security Legislation Monitor (INSLM) in relation to its Review into Division 105A of the Criminal Code.
2. Division 105A deals with the imposition of post-sentence orders (PSOs) on terrorist offenders. These orders may be either continuing detention orders (CDOs) or extended supervision orders (ESOs). This submission draws on previous submissions of the Commission, including the following:
 - a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), which introduced Div 105A and CDOs¹
 - a submission to the INSLM in relation to its 2017 statutory deadline reviews, which considered (in section 8.3) the interaction between the control order regime and Div 105A²
 - a submission to the PJCIS in relation to its recent comprehensive review of counter-terrorism powers, including Div 105A³
 - a submission to the PJCIS in relation to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), which introduced ESOs.⁴
3. In the current review, the INSLM has indicated it will be considering issues such as:
 - whether Div 105A is proportionate to threats of national security;
 - if the provisions are consistent with Australia's international obligations to combat terrorism;
 - if the provisions are consistent with Australia's human rights obligations;
 - whether the provisions currently provide adequate procedural fairness and/or safeguards for high-risk terrorist offenders;
 - the interaction of these provisions with similar State post-sentence detention regimes; and

- the interaction of Div 105A with other provisions of the Criminal Code, such as Divs 104 & 105.
4. The INSLM also asked the Commission a number of specific questions which the Commission has attempted to address throughout the body of this submission.

2 Summary

5. Given the grave risks to the community posed by terrorism, an appropriate post-sentence regime, with effective protections against unjustified detention and other human rights infringements, can be a reasonable and necessary response. However, the regime itself imposes very severe restrictions on liberty outside the parameters of the ordinary criminal justice system. The proportionality of the regime is heavily dependent on the ability to accurately assess the future risk posed by terrorist offenders, and to properly target remedies to that risk.
6. There have been two cases decided under Div 105A and its constitutional validity has been upheld by the High Court. These cases provide insight into how the regime could appropriately be amended. In particular, it is important that the future risk sought to be avoided is tied directly to the potential for harm to the community, rather than merely to the risk of commission of one of a wide range of offences including preparatory and inchoate offences.
7. Further, in order to justify the extraordinary nature of the regime, there must be a substantial risk that the anticipated harm will in fact occur. The Commission considers that the current threshold does not strike an appropriate balance by permitting orders for continuing detention to be imposed where the risk of future harm is slight.
8. The Commission welcomes the introduction of ESOs because they provide a less restrictive way of effectively managing the risk to the community of terrorist recidivism than resort to the CDO regime alone. Where such a risk is proven to exist, and the Court considers that the community can be protected through conditions imposed on an offender after they are released, this should be preferred to continued detention because it is a more proportionate response. It is also consistent with the general principle of criminal law that an offender

should be released from custody after serving the sentence of imprisonment imposed by the Court for their offence.

9. However, in order to ensure that detention is in fact being used as a last resort, the Court should have the ability to consider whether there are *any* less restrictive alternatives that would be effective in preventing the future risk of harm. The recent limitation on alternatives that can be considered by the Court is inconsistent with Australia's human rights obligations.
10. Post-sentence orders based on anticipated harm can only be justified where there is cogent and compelling evidence of future risk. It is clear from experience in a number of cases that the primary tool relied on by expert witnesses in PSO matters, VERA-2R, is not sufficiently reliable for this purpose. The Commission urges the INSLM to inquire into the use of this tool. The Commission makes a number of recommendations to ensure that courts have the best available evidence in relation to risk while also having all relevant information about limitations to that evidence.
11. If CDOs are imposed, detainees must be placed in facilities that are separate from those used for prisoners. The Commission makes a number of comments about the minimum standards for housing of people detained under the CDO regime and mechanisms for the oversight and inspection of conditions of detention, including recommendations to ensure that Australia is complying with its obligations under OPCAT in relation to places where people are detained under a CDO.
12. While the Commission welcomes the introduction of an ESO regime, it continues to have concerns about a number of aspects of it, including some that depart from the model recommended by the third INSLM and recommendations made by the PJCIS. In particular:
 - (a) an ESO requires a lower standard of proof (satisfaction on the balance of probabilities) than is required to obtain a CDO (satisfaction to a high degree of probability), which puts the Commonwealth regime at odds with every other comparable regime in Australia
 - (b) the conditions that may be imposed pursuant to an ESO extend beyond the conditions that may be imposed pursuant to a control order and, for example, could require:

- a person to comply with directions given by a 'specified authority', which is not limited to law enforcement authorities and could be any other person in Australia
 - the compulsory participation in de-radicalisation and other programs in a way that is counterproductive to efforts to counter violent extremism
 - a person to give consent to entry into their home by a 'specified authority' in circumstances where that consent was not truly voluntary and where alternatives, such as the use of warrants, are readily available
- (c) safeguards in control order proceedings, requiring the personal circumstances of the respondent to be taken into account, have not been included in relation to ESO proceedings.
13. The Commission has made a number of recommendations about the way in which breaches of an ESO are dealt with. These recommendations are designed to ensure that those responsible for monitoring compliance with ESOs have a discretion to deal appropriately with minor breaches. Experience with Commonwealth control orders and ESOs made under the two current regimes in New South Wales demonstrates that a framework like this is necessary to avoid prosecution and imprisonment for trivial conduct. In addition, there should be an explicit defence of 'reasonable excuse' built into each of the relevant offence provisions.
14. Finally, now that an ESO regime is in place, the Commission considers that there is no need for the control order regime and that it should be repealed. Since 2019, the control order regime has been used almost exclusively in relation to convicted terrorist offenders and the ESO regime is more appropriate for this cohort. In the alternative, the control order regime should be narrowed to clearly distinguish it from the ESO regime, by ensuring that it is not available in relation to people on the basis that they have engaged in terrorism-related conduct in the past.

3 Recommendations

15. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of ‘terrorist offender’ in s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted of such an offence is not liable for a post-sentence order.

Recommendation 2

The Commission recommends that the INSLM give consideration to whether s 105A.3 of the Criminal Code should be amended to limit the application of the post-sentence order regime to an offender who has been sentenced to a minimum term of imprisonment.

Recommendation 3

The Commission recommends that s 105A.7(1)(b) of the Criminal Code be amended to provide that a continuing detention order may only be made if the Court is satisfied, to a high degree of probability, on the basis of admissible evidence, that:

- (a) the offender poses an unacceptable and probable risk of committing, providing support for or facilitating a terrorist act; and
- (b) making the order is reasonably necessary to prevent the offender from committing, providing support for or facilitating a terrorist act.

Recommendation 4

The Commission recommends that s 105A.7(1)(c) of the Criminal Code be amended so that the Supreme Court may only make a continuing detention order if it is satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk of the offender committing, providing support for or facilitating a terrorist act.

Recommendation 5

The Commission recommends that a report prepared by an expert appointed under ss 105A.6 or 105A.18D of the Criminal Code be required to contain details of:

- (a) any limitations on the expert's assessment of:
 - (i) the likelihood of the offender committing, providing support for or facilitating a terrorist act if the offender were released into the community,
 - (ii) the magnitude of possible harm to the community that would result, and
- (b) the expert's degree of confidence in those assessments.

Recommendation 6

The Commission recommends that the INSLM seek an update from the Department of Home Affairs about the following matters in relation to the post sentence order regime in Div 105A of the Criminal Code:

- (a) the development of a risk assessment tool
- (b) steps taken to validate any tool for Australian circumstances, and any independent evaluation of the reliability of this tool in Australia and/or other comparable jurisdictions
- (b) the identification, training and qualification of relevant experts

and publish the responses to the full extent possible that is consistent with the requirements of national security.

Recommendation 7

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts' as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools

- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

Recommendation 8

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under ss 105A.6 or 105A.18D of the Criminal Code.

Recommendation 9

The Commission recommends that s 105A.18D of the Criminal Code, dealing with the power of the AFP Minister to direct an offender to be assessed by an expert chosen by the Minister, be removed from the Bill.

Recommendation 10

In the alternative to Recommendation 9, the Commission recommends that:

- (a) s 105A.18D of the Criminal Code be amended to confirm that the offender is not required to attend an assessment with an expert chosen by the AFP Minister; and
- (b) s 105A.6B of the Criminal Code be amended to remove the requirement for the Court to take into account the level of the offender's participation in any assessment under s 105A.18D.

Recommendation 11

The Commission recommends that s 105A.4(1)(a) of the Criminal Code, which provides that the management, security or good order of a prison can justify treating a person detained under a continuing detention order in a way that is inconsistent with their status, be repealed.

Recommendation 12

The Commission recommends that the INSLM seek an update from the Department of Home Affairs about the following matters in relation to the post sentence order regime in Div 105A of the Criminal Code:

- (a) the minimum standards for housing people detained under the continuing detention order regime

- (b) the mechanisms for oversight and inspection of conditions of detention for people detained under the continuing detention order regime
- (c) the steps taken to develop rehabilitation programs to reduce the risk of reoffending.

Recommendation 13

The Commission recommends that the Criminal Code be amended to require public reporting requirements on the use and implementation of Division 105A, including:

- (a) details of housing arrangements for individuals subject to a continuing detention order
- (b) use of rehabilitation programs (pre and post-release)
- (c) use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.

Recommendation 14

The Commission recommends that relevant National Preventative Mechanisms and the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment be authorised to conduct inspections wherever individuals are detained under a continuing detention order, and that information sharing with these bodies is facilitated.

Recommendation 15

The Commission recommends that the AFP Minister be required to notify the Commonwealth Ombudsman, as NPM Coordinator, as soon as practicable after a continuing detention order is made, and that this notification include details of the place where the person is being detained.

Recommendation 16

The Commission recommends that the threshold for making an extended supervision order in s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court be 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act'.

Recommendation 17

The Commission recommends that the definition of 'specified authority' in s 100.1(1) of the Criminal Code be limited to police officers and public authorities responsible for corrections.

Recommendation 18

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

Recommendation 19

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be repealed on the basis that they are not necessary, given the existing range of monitoring warrants.

Recommendation 20

The Commission recommends that s 105A.7C of the Criminal Code be amended to set out the parameters for decision making by a specified authority in relation to an application for an exemption. This should include:

- (a) the considerations that the specified authority must take into account in making its decision
- (b) the timeframe for a decision by the specified authority
- (c) a requirement that the specified authority provide written reasons for its decision
- (d) clear review rights for an applicant.

Recommendation 21

The Commission recommends that ss 105A.7A(2), 105A.9A(5), 105A.9C(2) and 105A.12A(5) of the Criminal Code be amended to ensure that a Court hearing an application for the making or variation of an extended supervision order or interim supervision order, or conducting a review of an extended supervision order, is required to

take into account the impact of the proposed conditions on the person's circumstances, including their financial and personal circumstances, for the purpose of determining whether the condition is reasonably necessary and reasonably appropriate and adapted.

Recommendation 22

The Commission recommends that the Criminal Code be amended to remove the ability of the AFP Minister to apply for a variation of an interim supervision order to add conditions prior to the hearing of an application for a continuing detention order or an extended supervision order.

Recommendation 23

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should be given statutory discretion to allow them to respond appropriately to different kinds of breaches, including by warning the offender, or deciding not to take action, in relation to minor breaches.

Recommendation 24

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should publish a policy providing guidance as to how it will exercise the discretion referred to in Recommendation 23.

Recommendation 25

The Commission recommends that the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to a control order or an ESO (ss 104.27A and 105A.18B) be subject to a defence of reasonable excuse.

Recommendation 26

The Commission recommends that the existing control order regime be repealed.

Recommendation 27

In the alternative to Recommendation 26, the Commission recommends that the existing control order regime be amended to focus only on orders for preventative purposes, as recommended by the PJCIS in 2016, leaving the extended supervision order regime to apply to post-sentence orders. This should be done by:

- (a) repealing ss 104.2(2)(b) and (d) of the Criminal Code
- (b) repealing ss 104.4(1)(c)(ii)-(v) and (vii) of the Criminal Code
- (c) making any other necessary consequential amendments.

4 International obligations

4.1 Preventing terrorism and protecting human rights

16. The terms of reference for this inquiry require consideration of two sets of international obligations held by Australia: obligations to combat terrorism, and obligations to recognise and protect the human rights of all people within Australia's territory and subject to its jurisdiction.
17. Ensuring community safety is one of the most important tasks of government. Taking steps to prevent the commission of terrorist acts, and to prosecute those responsible for committing terrorist acts, promotes the human rights of members of the Australian community⁵ and is an obligation of Australia under international law.⁶
18. International law also requires that the steps taken to prevent the commission of terrorist acts are themselves consistent with human rights.⁷ As the UN General Assembly has said:

[T]he promotion and protection of human rights for all and the rule of law is essential to all components of the [United Nations Global Counter-Terrorism] Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.⁸
19. When assessing the impact of counter-terrorism laws, the rights of two groups of people are particularly relevant: first, people who are at risk of being victims of terrorist attacks; secondly, people who are accused of involvement in terrorist acts or who are otherwise affected by its prevention or investigation.⁹
20. In terms of the first group, the most important of the human rights sought to be protected are the right to life (article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR))¹⁰ and the right to liberty and security of the person (article 9(1) of the ICCPR), including the right to bodily integrity. We must have comprehensive and

effective measures in place in order to protect the lives of all those who live in Australia from the threat of terrorism.

21. Because terrorism is ideologically or politically motivated, an essential strategy in countering the extremism that breeds terrorism is to win 'the contest of ideas' by rigorously defending the basic human rights and freedoms which form 'the bedrock of dignity and democracy that make our societies worth protecting'.¹¹
22. Winning the contest of ideas becomes much more difficult if counter-terrorism laws, or the way that they are used, undermine basic human rights standards. That is one reason why it is necessary that the human rights of those in the second group are also safeguarded.
23. But we must protect the human rights of people who are accused or suspected of involvement in terrorist acts, not merely to demonstrate to others the strength of our values, but because we recognise those values as intrinsically important in a 'free and confident society'.¹²

4.2 National security threats

24. The National Terrorism Threat level is 'PROBABLE' and is unchanged since November 2015.¹³ This means that there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia.
25. The Australian Government has assessed that the primary terrorist threat in Australia currently comes from people motivated by Islamist extremist ideology.¹⁴ This threat was heightened in September 2014 by a number of factors, including the return to Australia of people who had been fighting in Syria and Iraq,¹⁵ and the call by the terrorist organisation Islamic State for a war against the West.¹⁶
26. Since the significant counter-terrorism raids conducted in Sydney and Brisbane in September 2014, 137 people have been charged as a result of 65 counter-terrorism related operations across the country.¹⁷
27. In addition, there is a growing threat posed by Ideologically Motivated Violent Extremist groups, particularly racist and nationalist violent extremists.¹⁸

4.3 Post-sentence restrictions and human rights

28. Personal liberty is recognised as among the most fundamental common law rights.¹⁹ Justice Fullagar described it as ‘the most elementary and important of all common law rights’.²⁰ In *Williams v The Queen*, Mason and Brennan JJ referred to Blackstone’s *Commentaries* for the proposition that personal liberty was ‘an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England “without sufficient cause”’.²¹
29. Loss of liberty is ‘ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide’.²² The adjudgment and punishment of criminal guilt, through a sentence of imprisonment, is a function that is exclusively judicial in character.²³
30. A person who has been sentenced to a period of imprisonment following conviction for a criminal offence is ordinarily entitled to be released at the expiration of that period. The question raised by post-sentence orders is whether further detention, or other restrictions, can be justified once a person has completed their sentence. As discussed further below, this will crucially depend on the certainty and predictability of the regime and the reliability of future predictions of risk.
31. Article 9(1) of the ICCPR provides that everyone has the right to liberty. In particular, it provides that no one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. This means that any detention of a person must be lawful.
32. In addition, article 9(1) provides that laws which provide for detention must not be arbitrary. This extends beyond a requirement of lawfulness and requires in addition that detention not be inappropriate or unjust and that it be predictable. Lawful detention may become arbitrary when a person’s deprivation of liberty is not necessary or proportionate to achieving a legitimate aim such as ensuring community safety. One aspect of proportionality is assessing whether less restrictive alternatives to detention were available that could achieve the particular objectives said to justify detention. Detention should not continue for longer than can be justified in this way.²⁴

33. The Human Rights Committee has considered that a post-sentence detention regime may be justified, but only subject to a number of strict conditions:
- When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.²⁵
34. Most of this submission is directed to the key requirements identified by the Human Rights Committee of necessity (that is 'compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future') and proportionality (ensuring detention is the last resort, having regard to less restrictive alternatives, and that any conditions imposed are justified). The submission also deals in section 9 with the conditions of detention. Div 105A provides for periodic reviews of PSOs.²⁶ It appears that only one such review has been conducted to date and the Commission is not yet aware of any publicly available information about it.

5 Australian regimes

5.1 Commonwealth regime

35. Division 105A of the Criminal Code provides for a regime of post-sentence orders (PSOs) for people who have been convicted of certain terrorism related offences and who would pose an unacceptable risk of committing a serious terrorism offence if released into the community.
36. There are two kinds of PSOs: a continuing detention order (CDO) and an extended supervision order (ESO). The provisions of Div 105A relating to ESOs commenced on 9 December 2021.²⁷

37. A CDO requires that the offender continue to be detained at the expiration of their sentence for a period of up to three years at a time. An ESO permits the offender to be released into the community, subject to conditions, again for periods of up to three years at a time. Multiple PSOs may be made in relation to the same person.
38. The AFP Minister (currently the Minister for Home Affairs) has the option of applying to the Supreme Court of a State or Territory for either a CDO or an ESO.²⁸ An application may only be made within 12 months of the end of the offender's sentence of imprisonment.²⁹
39. If the Minister applies for a CDO, the Supreme Court has the option of either:
 - making a CDO, or
 - making an ESO:
 - if the threshold for making a CDO was not met, or
 - as a less-restrictive measure than a CDO that would be effective in preventing the unacceptable risk, or
 - dismissing the application.³⁰
40. In those circumstances, the first step by the Court is to ask whether it is 'satisfied to a high degree of probability ... that the offender poses an unacceptable risk of committing a serious Part 5.3 offence'.³¹
41. If the answer to that question is 'no', the Court cannot make a CDO, but would then need to consider whether it was satisfied of such a risk to a lower degree of confidence (balance of probabilities), which would permit it to make an ESO.
42. If the answer to that first question is 'yes', the Court must then consider whether there is a less restrictive alternative, namely the making of an ESO or the making of a control order, that would be effective in preventing the unacceptable risk.
43. If the Court is called on to consider whether to make an ESO, it is required to seek material from the Minister to assist it in determining whether to make an ESO. This material includes:
 - a copy of the proposed conditions that would be sought for an ESO
 - an explanation as to why each condition should be imposed
 - a statement of any facts relating to why any of the conditions should not be imposed.³²

44. In assessing whether to make an ESO, the Court would consider whether it was 'satisfied on the balance of probabilities ... that the offender poses an unacceptable risk of committing a serious Part 5.3 offence'.³³ This is a lower threshold than required for making a CDO, and is contrary to the recommendation of the third INSLM. This issue is discussed in more detail below.
45. The Court would also consider whether it was satisfied, on the balance of probabilities, that each of the proposed conditions (and all of the conditions in combination) was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk. This is substantially the same test that currently exists for control orders (subject to the assessment of the conditions against the different purposes of each regime).
46. In each kind of application, the onus is on the Minister to satisfy the Court to the relevant standard.
47. The Court may appoint one or more experts to conduct a risk assessment of the offender.³⁴ There is a broad, inclusive definition of 'relevant expert'.³⁵
48. The period for a CDO must be limited to a period that the Court is satisfied is reasonably necessary to prevent the unacceptable risk, and any single CDO must be no longer than three years (noting that a further CDO can be applied for within 12 months of the expiry of a previous CDO).³⁶
49. Because a CDO is a civil order, a person detained under a CDO must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements necessary to maintain:
 - the management, security or good order of the prison
 - the safe custody or welfare of the offender or any prisoners
 - the safety and protection of the community.³⁷
50. The Supreme Court must conduct a review of each PSO at least annually (or on application if there are changed circumstances) for the purpose of determining whether it should continue in force. The Court may affirm the order only if, at the time of the review, the Court is satisfied that the grounds for making the order remain and, in the case

of a CDO, there are no less restrictive alternatives (either an ESO or a control order) that would be effective in preventing the unacceptable risk.³⁸

51. The Court must give reasons for any decision making, affirming, varying or revoking a PSO and provide a copy to the parties,³⁹ and these decisions can be the subject of an appeal.⁴⁰
52. The PSO regime was made subject to a 10-year sunset provision from the date it was first introduced into the Criminal Code. Unless extended, it will expire on 7 December 2026.⁴¹

5.2 State and Territory regimes

53. At the time the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (HRTTO Bill) was introduced in 2016, there was a range of post-sentence preventative detention regimes in operation in Australia. New South Wales and South Australia had regimes that covered both sex offenders and violent offenders.⁴² Queensland, Victoria, Western Australia and the Northern Territory had regimes that covered sex offenders only.⁴³ Tasmania and the Australian Capital Territory did not have post-sentence preventative detention regimes, although in Tasmania the Supreme Court had the power to make a 'dangerous criminal declaration' which could result in indefinite detention.⁴⁴
54. Since 2016, there has been an expansion in State and Territory post-sentence detention regimes, including:
 - the *Terrorism (High Risk Offenders) Act 2017* (NSW), which introduced a separate regime dealing with people convicted of: being a member of a terrorist organisation under s 310J of the *Crimes Act 1900* (NSW); a serious indictable offence committed in a 'terrorism context'; or any indictable offence by a person who had engaged in certain 'terrorism activity' at any time
 - the insertion of s 5A into the *Criminal Law (High Risk Offenders) Act 2015* (SA) to include 'terror suspects' within the scope of the regime
 - the *Serious Offenders Act 2018* (Vic), which replaced the previous regime dealing only with sex offences, and now deals with people convicted of a serious sex offence or a serious violence offence
 - the *High Risk Serious Offenders Act 2020* (WA), which replaced the previous regime dealing only with sex offences, and now deals with

people convicted of a serious sex offence or a serious violence offence

- the *Dangerous Criminals and High Risk Offenders Act 2021* (Tas), which replaced the regime in the *Sentencing Act 1997* (Tas) for making a declaration that an offender is a ‘dangerous criminal’ (permitting post-sentence detention). Previously, a declaration could only be made by the sentencing judge. Under the new Act, an application for a declaration can be made by the DPP to the Supreme Court at any time in relation to an offender convicted of a crime involving violence. A separate regime for ‘high risk offenders’ permits orders in the nature of ESOs to be made in relation to people convicted of a broader range of offences.

55. The current position for post-sentence orders at the State and Territory level is as set out in the following table:

Jurisdiction	Offence types	CDO	ESO
New South Wales	Terrorism Violent offences Sex offences	Yes	Yes
South Australia	Terrorism Violent offences Sex offences	Yes	Yes
Victoria	Violent offences Sex offences	Yes	Yes
Western Australia	Violent offences Sex offences	Yes	Yes
Tasmania	Violent offences Sex offences	Yes	Yes
Queensland	Sex offences	Yes	Yes
Northern Territory	Sex offences	Yes	Yes

Jurisdiction	Offence types	CDO	ESO
Australian Capital Territory	None	No	No

6 Use of continuing detention orders

56. It appears that there have been only two cases in which a CDO has been made under s 105A of the Criminal Code.
57. On 24 December 2020, Tinney J in the Supreme Court of Victoria ordered that Mr Abdul Nacer Benbrika be subject to a CDO for a period of three years.⁴⁵ There was also a parallel proceeding for an interim control order,⁴⁶ which was granted but will not ultimately apply to Mr Benbrika because the control order will expire by the time his CDO comes to an end.⁴⁷
58. In the case of Mr Benbrika, there were three subsequent sets of proceedings:
- a constitutional challenge, with the validity of Div 105A ultimately upheld by the High Court⁴⁸
 - an appeal against the making of the CDO, dismissed by the Court of Appeal of the Supreme Court of Victoria⁴⁹
 - an application by the Minister for Home Affairs for review of the CDO (required within 12 months of the CDO coming into force),⁵⁰ which it appears may have been heard in late 2021 but not yet determined.⁵¹
59. On 15 December 2021, Walton J in the Supreme Court of New South Wales ordered that Mr Blake Nicholas Pender be subject to a CDO for a period of one year commencing on 13 September 2021.⁵² In a parallel proceeding in the Federal Court an application for an interim control order was granted on 7 October 2021, which will not come into effect until Mr Pender is released from detention in custody under the CDO.⁵³ It appears that the interim control order is listed for a confirmation hearing in April 2022.
60. It appears from a general review of cases that warnings are being given by Courts under s 105A.23 when a person is convicted of an offence to which Div 105A could apply.

61. The Commission is aware of a significant number of cases since Div 105A was introduced where a person convicted of a relevant terrorism offence has been released at the end of their sentence without a CDO being applied for. As at the date of this submission, the Commission is aware of nine cases where the Australian Federal Police (AFP) instead sought and obtained control orders in relation to those offenders at or around the time that they were released.⁵⁴
62. Each of these control order proceedings was prior to the introduction of the ESO regime which commenced on 9 December 2021. The Commission expects that since the introduction of ESOs, they will be used in favour of control orders in these circumstances.

7 Continuing detention orders

63. There are three elements that must be satisfied in order for a CDO to be made:
 - the person must be a ‘terrorist offender’
 - the Court must be satisfied, to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence
 - the Court must be satisfied that there is no less restrictive measure available under Part 5.3 that would be effective in preventing the unacceptable risk.
64. Each of those elements involve policy decisions about the scope of the regime. The Commission considers that amendments should be made to each element in order to improve the consistency of the regime with human rights.

7.1 Definition of ‘terrorist offender’

(a) *Type of offence*

65. The regime applies to people who have committed certain kinds of terrorism-related offences.⁵⁵ The scope of offences referred to is broad.
66. The Commission submits that the list of relevant offences that qualify a person for the regime should be limited to only those offences where

the nature of the offence gives rise to an inference that there would be a high risk to community safety once a person is released after serving their term of imprisonment.

67. The PJCIS accepted a submission from the Commission as part of its 2016 inquiry that the regime should not apply to people convicted of offences in s 119.7(2) and (3) of the Criminal Code relating to publishing certain advertisements. Those offences were ultimately removed from the definition of 'terrorist offender' in the Bill before it was passed.
68. At the same time, the Commission submitted that the regime should not apply to people convicted of the offence in s 119.2 of the Criminal Code, dealing with entering, or remaining in, declared areas. This is one of a range of 'declared area provisions'. The particular offence in s 119.2 does not require any intent to engage in terrorist activity, or any other insurgent or violent activity. There is a list of legitimate purposes for which a person may enter or remain in a declared area in s 119.2(3), but this list is limited. For instance, the list of legitimate purposes does not include visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs. It includes making a news report, but only if the person is 'working in a professional capacity as a journalist'. It does not include undertaking religious pilgrimage.
69. As a result, there are likely to be many innocent reasons a person might enter or remain in a declared area that would not bring a person within the scope of the exception in s 119.2(3). Further, in order to come within the exception, a person is required to show they were in the zone solely for one or more of the limited specified purposes. So, for instance, if a person travelled to a declared area to visit their parents (a 'legitimate purpose'), and also to attend a friend's wedding (not a 'legitimate purpose'), they would not be protected by the exception.
70. Given the scope and nature of this offence, the Commission considers that there is not a sufficient basis for it to be included in a post-sentence preventative detention regime. Satisfaction of the elements of this offence does not give rise to an inference that a person poses a risk to community safety. In any event, the breadth of this offence provision means that there are many situations in which a convicted person would not pose a relevant risk to community safety.

71. As at September 2020, there was only one person due for release in the following five years who had been convicted of an offence against s 119.2. This person had also been convicted of an offence under s 119.1(2) (incursions into foreign countries with the intention of engaging in hostile activities).⁵⁶ The offence under s 119.1(2) was the principal offence for which this offender was convicted and he was sentenced to 3 years and 8 months imprisonment. In relation to the separate offence under s 119.2, the sentencing judge rejected the submission of the Crown that merely being in the declared area represented 'additional criminality that should be reflected in the sentence imposed for the principal offence'.⁵⁷ This judgment is generally consistent with the submission of the Commission that the offence of merely being in a declared area is not sufficiently independently serious to trigger a person's eligibility for the CDO regime.
72. The offence in s 119.2 has the same maximum penalty as the offences in s 119.7(2) and (3) which were previously removed from the relevant list of offences to which the CDO regime could apply.
73. The Commission made a separate submission to the PJCIS in relation to its inquiry into the declared areas provisions which deals with these provisions in more detail.⁵⁸

Recommendation 1

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of 'terrorist offender' in s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted of such an offence is not liable for a post-sentence order.

(b) Gravity of offence

74. As noted above, s 105A.3 limits the definition of 'terrorist offender' to a person who has committed an offence of a particular type. The Commission agrees with submissions previously made by the Law Council of Australia that it should also be a requirement to qualify for the PSO regime that the person's individual offending was sufficiently serious.⁵⁹ That could be done by also requiring the person to have been sentenced to a term of imprisonment of a particular length.

75. Given the breadth of the offences listed in s 105A.3, the conduct of those who have been convicted of an offence will vary in its gravity. Some offenders who qualify for the PSO regime have been convicted of conduct that is objectively less serious than a range of conduct that does *not* qualify for the PSO regime.
76. For example, Ms Alo-Bridget Namoa was convicted of a conspiracy to carry out ‘a street robbery on non-Muslims’ (see the case study at paragraph [249] below). The robbery was not ultimately carried out because one or more of the people involved decided against it. The nature of her offending meant that her sentence was at the lower end of the range: she was sentenced to three years and nine months imprisonment. The *type* of offence meant that she qualified for the PSO regime, whereas someone who actually carried out a more serious non-ideologically based street robbery would not have qualified for the PSO regime.
77. The case of Ms Zainab Abdirahman-Khalif (see paragraph [82] below) raises similar issues. Her offending did not involve any plan or intention to commit an act of violence and this was reflected in her sentence of three years imprisonment. There are many more serious offences that do not qualify for the PSO regime.
78. What these cases indicate is that it should not be enough that an offence falls into a particular category for the offender to qualify for the PSO regime. Regard should also be had to the nature of the offending, so that the extraordinary interferences with liberty involved in the PSO regime are reserved for only the most serious offences.
79. Identifying a particular sentencing threshold is ultimately a matter of policy. The Commission does not contend for a particular threshold.

Recommendation 2

The Commission recommends that the INSLM give consideration to whether s 105A.3 of the Criminal Code should be amended to limit the application of the post-sentence order regime to an offender who has been sentenced to a minimum term of imprisonment.

7.2 Risk of future harm

(a) Requirement to link risk to anticipated harm

80. In *Benbrika*, the High Court was divided about whether the CDO regime was constitutional. Five Justices held that the regime was valid, while Gageler and Gordon JJ would have held that the regime was unconstitutional, either in whole or in part.
81. The key concern of the two dissenting Justices related to the breadth of the conduct sought to be prevented.⁶⁰ The regime applies to a broad range of offences of various degrees of seriousness, and includes a range of inchoate offences that are far removed from an anticipated risk of actual harm.
82. For example, Ms Zainab Abdirahman-Khalif was convicted of intentionally having taken a step to become a member of a terrorist organisation, contrary to s 102.3(1) of the Criminal Code. This falls within the definition of a 'serious Part 5.3 offence' because it carries a maximum penalty of 10 years imprisonment (although Ms Abdirahman-Khalif was sentenced to 3 years imprisonment). The prosecution made clear at her trial that it was not any part of their case that she was involved in any way in any act of violence, or that she was planning or intending to commit any act of violence.⁶¹ The conduct that formed the basis for her conviction was an attempt to travel from Australia to Turkey in order to 'engage' with Islamic State with the intention of becoming a nurse or a bride.⁶² Further details of her case are set out in a previous submission of the Commission.⁶³ Significantly, for present purposes, the future risk of engaging in this kind of conduct could currently form the basis for a CDO.
83. The concern of Gordon J in *Benbrika* was that, unlike the regimes for control orders and preventative detention orders, the CDO regime was not sufficiently tailored to its stated purpose of ensuring the safety and protection of the community.⁶⁴ This was because the regime was focused on the prospect of offences of particular types being committed, rather than harm of particular seriousness being caused.
84. In the words of Gageler J, it would be legitimate for Parliament to establish a regime of preventative detention where the harm sought to be prevented was 'grave and specific'.⁶⁵ In his Honour's view, this could be done if the making of a CDO was limited to circumstances where

there was an unacceptable risk of the occurrence of a terrorist act or support for or facilitation of a terrorist act.⁶⁶

85. Justices Gageler and Gordon were in the minority in *Benbrika*. The majority held that the regime was constitutional. However, there is a significant difference between whether the regime is one that *could* validly be made, and whether the regime is one that *should* be made. In the Commission's view, it would substantially increase public confidence in the regime if it were amended in a way that accords with the reasons of all members of the High Court in *Benbrika*. Further, it would substantially improve the consistency of the regime with relevant human rights standards by linking the further detention to compelling reasons arising from the likelihood of anticipated grave conduct.⁶⁷

(b) *Likelihood of risk of harm occurring*

86. The PSO regime requires the Supreme Court to make an assessment about whether the offender poses an 'unacceptable risk' of engaging in future terrorism-related conduct.
87. This is a standard that is used in a range of State and Territory laws. The appellant in *Fardon* claimed that the test was 'devoid of practical content'.⁶⁸ The Court in that case,⁶⁹ and subsequent cases,⁷⁰ held the test to be capable of judicial application. However, the fact that a test is *capable* of being applied does not mean that it reaches an appropriate balance between the protection of the community and the right to individual liberty.
88. The Commission agrees with criticism expressed by Gordon J in *Benbrika* that the legislation does not identify what degree of risk of committing a Part 5.3 offence is to be considered 'acceptable'.⁷¹ The result is the real potential to deem even small risks as 'unacceptable', with the result that a person is subject to continuing detention on the basis of a future event that is unlikely to occur.
89. Justice Edelman explained that the test requires the Supreme Court to assess both:
- the likelihood of the commission of a relevant offence; and
 - the magnitude of possible harm to the community that would result.⁷²

90. The same equation has been used in relation to State and Territory regimes.⁷³ However, it is clear from decided cases in relation to Div 105A and related State and Territory regimes that the test may be satisfied even if the risk of the commission of a relevant offence is slight.
91. The New South Wales Court of Appeal, in a case dealing with that State's regime for continuing detention of terrorism offenders, suggested that a 'slim probability' of the commission of an offence may be sufficient:

It is entirely possible that the Court might be very comfortably satisfied (ie to the requisite high degree of probability) that there is a slim probability of an unsupervised defendant committing a terrorist act, and that that risk is unacceptable having regard to the consequences of the act, even if the probability of the risk eventuating is less than 50%.⁷⁴
92. The Court in that case noted that the relevant New South Wales legislation explicitly provided that in determining whether a risk of committing a relevant terrorism offence was unacceptable, it was not necessary for the Court to determine that it was 'more likely than not' that the offence would occur.⁷⁵ However, the Court said that this result would flow from the use of the word 'unacceptable' in any event. This interpretation has been endorsed in relation to the interpretation of Div 105A.⁷⁶
93. In assessing whether there is any minimum level of risk that must be demonstrated, regard may be had to another New South Wales case that held that a Court should not be required to consider a risk that was 'insignificant'.⁷⁷ That is a particularly low threshold.
94. The Commission discusses in more detail below the way that risk was assessed at first instance in the *Benbrika* proceedings. An expert engaged by the Minister for Home Affairs in that case did not seek to quantify her assessment that Mr Benbrika was a 'high risk' of violent extremism, but she accepted that the 'base rate' for violent extremism, meaning the number of people who are assessed as being at risk who go on to commit an offence, was between 1.6 and 6%.⁷⁸
95. The Commission is concerned about the quality of predictive risk assessments made in CDO proceedings and the real potential for people to be subject to long periods of administrative detention after they have already completed a sentence of imprisonment, notwithstanding the fact that their chance of recidivism is low. Any

preventative detention regime can only be justified on the basis of cogent and compelling evidence of future risk.

96. The Commission recommends that the 'unacceptable risk' test be modified in order to ensure a person is only subject to preventative detention when there is a sufficient likelihood of future harm occurring. There is a range of possible thresholds that could be adopted for this purpose, but the one proposed by the Commission is that the risk of future harm be both 'unacceptable and probable'. This would direct the Court's attention to the requirement that the likelihood of risk/magnitude of harm equation cannot be satisfied based on risks that are vague or insubstantial.

Recommendation 3

The Commission recommends that s 105A.7(1)(b) of the Criminal Code be amended to provide that a continuing detention order may only be made if the Court is satisfied, to a high degree of probability, on the basis of admissible evidence, that:

- (a) the offender poses an unacceptable and probable risk of committing, providing support for or facilitating a terrorist act; and
- (b) making the order is reasonably necessary to prevent the offender from committing, providing support for or facilitating a terrorist act.

7.3 Less restrictive alternatives

97. It is clear that a preventative detention regime can only comply with human rights when it is used as a 'last resort'.⁷⁹ Given the high value placed on the right to liberty, detention must be demonstrably necessary and there must be no other option available that would achieve the relevant preventative purpose in a way that is less restrictive of the human rights of the subject.
98. The most recent General Comment by the United Nations Human Rights Committee on arbitrary detention deals specifically with the requirements of 'security detention', including administrative detention regimes:

To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such

detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, *the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures*, and that burden increases with the length of the detention.⁸⁰

(emphasis added)

99. The continuing detention regime for high-risk terrorist offenders is an extraordinary regime. It permits the continued detention of a person after they have served a sentence of imprisonment and would ordinarily be released into the community. One of the key aspects of the regime when it was first introduced, that was designed to ensure that it would be consistent with human rights, was the requirement that the Court first form a view that there are no other less restrictive measures that could achieve the protective purpose of the legislation. When the regime was first proposed, this requirement was described by the Government as an ‘important safeguard’.⁸¹
100. When the Bill that provided for ESOs was introduced in 2020, the Government reiterated that this safeguard was one of a number included in the regime ‘to ensure that detention is not arbitrary’ and that the regime would ‘address the considerations set out by the United Nations Human Rights Committee’.⁸² In particular, the Government emphasised that detention would be ‘a last resort where no less restrictive measure (*such as* a control order, or an ESO once introduced) would be sufficient to manage the risk posed by a high-risk terrorist offender’ (emphasis added).⁸³ It was clear that control orders and ESOs were merely examples of potentially less restrictive measures and not the only measures that may need to be considered.
101. The breadth of the original provision was referred to with approval by the majority of the High Court in *Benbrika* in the course of finding that the regime was constitutional.⁸⁴ For example, Edelman J said that it ‘expressly requires minimal intrusion into the liberty of the terrorist offender’.⁸⁵
102. However, this standard in s 105A.7(1)(c) was narrowed in a last-minute amendment to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth).⁸⁶ The Supplementary

Explanatory Memorandum confirmed that the change would ensure that 'ESOs and control orders are the only measures that may be considered' when deciding whether or not there is a less restrictive alternative.⁸⁷ The Supreme Court is now not authorised to consider any less restrictive alternative that is not an ESO or a control order.

103. The Government explained this change by saying that, without narrowly defining the term 'less restrictive measure', it would be open to the Supreme Court to 'potentially consider any measure or action (or combination of measures or actions) that it considers less restrictive'.⁸⁸ However, the Commission stresses that this is precisely what is required of Australia pursuant to its human rights obligations.
104. The only plausible rationale for this amendment was the reliance by Mr Benbrika, in the first CDO proceeding determined under Div 105A, on other potentially less restrictive alternatives, and a desire by the Government to prevent this occurring in future CDO proceedings.
105. During the first instance proceeding in the Supreme Court of Victoria, Mr Benbrika asked the Court to take into account other measures which he submitted would be effective in preventing risk.⁸⁹ One of those alternatives was the prospect of Mr Benbrika's visa being cancelled, with the result that he would be taken into immigration detention and removed from Australia.
106. The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs has issued guidelines to delegates in his department responsible for making decisions about whether or not to cancel a person's visa on character grounds. In those guidelines, the Minister says:

The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns.⁹⁰
107. A person may fail the 'character test' if they have engaged in criminal conduct in the past, or if the Minister is satisfied that there is a risk that the person will engage in criminal conduct, including a serious Part 5.3 offence, in the future.⁹¹
108. Removal of a person from Australia may or may not be an available alternative that would be effective in preventing an offender from committing, providing support for or facilitating a terrorist act. However, the Supreme Court should be permitted to consider *any*

available alternative that would be effective and less restrictive of the offender's human rights.

109. Since these amendments were proposed (but before they were enacted), there was a second case under Div 105A which also raised the potential for other factors to be taken into account when considering the availability of less restrictive alternatives. The Supreme Court of New South Wales considered that consideration of less restrictive alternatives might also encompass consideration of:
- the potential for orders to be made by a tribunal (such as a community treatment order), and
 - the potential for support services to be delivered by government to persons recently released from custody.⁹²
110. Preventing the Court from even considering some legitimate less restrictive alternatives would fetter the Court's ability to fulfil its role in a way that is consistent with international human rights law—namely, to identify the most appropriate risk-prevention response in respect of an individual that the Government considers poses a threat to the Australian community, while impinging no more than is necessary on that individual's human rights.

Recommendation 4

The Commission recommends that s 105A.7(1)(c) of the Criminal Code be amended so that the Supreme Court may only make a continuing detention order if it is satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk of the offender committing, providing support for or facilitating a terrorist act.

8 Risk assessment

111. For any system of preventative detention or supervision to be justifiable, it must be possible to make robust predictions about both the likelihood and magnitude of future risk. Experience in similar areas has shown that this is a very difficult thing to do.⁹³
112. In *Fardon*, Kirby J (in dissent) noted:

Experts in law, psychology and criminology have long recognised the unreliability of prediction of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:

'[A]n obstacle to preventative detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate [Ashworth, *Sentencing and Criminal Justice*, 3rd ed (2000), p 180]. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.'

Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.⁹⁴

113. In order to make assessments of the two elements identified by Edelman J: the likelihood of an offence being committed and the magnitude of possible harm to the community as a result (see paragraph [89] above), the Court must have the benefit of expert evidence about each of them, and also a proper understanding of the limits of such expert evidence. The Commission has considered the structure of the test earlier in this submission. In this section, the Commission focuses on the quality of evidence presented to the Court.

8.1 Assessment of risk by experts

114. There is a range of methods that are often used to predict risk. These include:
- a clinical opinion by a professional in psychology or psychiatry based on interviews with the subject
 - actuarial tools based on large data sets that identify characteristics of offenders that are associated with recidivism
 - a combination of these two approaches, sometimes called Structured Professional Judgment, where an actuarial tool is used to guide, but not determine, a professional opinion that can also take into account factors particular to the individual including protective factors that may decrease risk.
115. Research reviewed by Sentence Advisory Councils in both Victoria and New South Wales indicates that the predictive accuracy of unguided clinical assessments is typically only slightly above chance. Further, this

research suggests that clinicians have a tendency to 'over-predict' violence, resulting in a large number of 'false positives'.⁹⁵

116. Actuarial risk assessment tools are more accurate than clinical assessments alone and can increase predictive accuracy into the moderate range, but with very broad margins of error.⁹⁶
117. It appears that the most accurate available means of making such predictions involves a combination of structured tools based on reliable actuarial data and individualised expert clinical assessment, but that there are still significant limitations in this approach.⁹⁷
118. Regardless of the methodology, there is a risk that the results from a formal risk assessment tool may be treated as being more reliable than they actually are. This is particularly the case for tools, such as VERA-2R (discussed below) which is not based on actuarial data and does not claim to have any predictive validity.
119. In recent years, Australian courts have heard a growing number of applications for orders, under relevant State and Territory legislation, to detain or otherwise restrict the liberty of individuals because those individuals present an unacceptable risk of future criminal behaviour. Some of that State and Territory legislation is directed towards the risk of terrorism offences; other legislation is directed towards the risk of sexual offences; and a third category of legislation is directed towards the risk of violent offences. The Commission urges the INSLM to review some of these cases, because they demonstrate the difficulty in accurately assessing the risk of future serious criminal behaviour.
120. One such case involved an interim supervision order sought by the State of New South Wales against Mr Trent Scrusse (formerly known as Trent Wainwright) under the *Crimes (High Risk Offenders) Act 2006* (NSW).⁹⁸ Mr Scrusse had previously been convicted of a serious violent offence, and the State alleged that he posed an unacceptable risk of committing another serious offence if not kept under supervision in the community, pursuant to s 5B of the NSW Act.
121. In determining whether or not to make an extended supervision order under the NSW Act, the Supreme Court must have regard to: 'the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious offence'.⁹⁹ The Crown tendered a risk assessment report from a forensic psychologist employed by Corrective Services NSW, which set out risk ratings for Mr Scrusse

derived from four different risk assessment tools. However, the Crown conceded that the Court should give 'little weight' to this evidence.¹⁰⁰

122. The Court was highly critical of the evidence and gave it little weight, with Payne J noting that the tools were 'certainly not the product of "actuarial" expertise as I understand that field of discourse'.¹⁰¹ Among the problems identified with these tools, his Honour noted that:
- while one tool, the Level of Service Inventory – Revised (LSI-R), was regularly used in applications under the NSW Act, a Corrective Services NSW Research bulletin described a 'paucity of rigorous evaluations' establishing its validity in Australia
 - the three other tools, the Violence Risk Scale (VRS) the Violence Risk Appraisal Guide – Revised (VRAG-R) and the Domestic Violence Risk Appraisal Guide (DVRAG), were all based on specific cohorts of offenders in Canada and had not been subject to 'repeated empirical evaluation with client groups that differ in demographic characteristics'
 - both the VRS and the VRAG-R had been the subject of a warning in a meta-analysis of risk assessment tools that they 'should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy, such as preventative detention'.¹⁰²
123. The ratings derived from these tools were only one of a large number of relevant factors in Mr Scrusse's case, but ultimately the interim supervision order made in relation to him was revoked.¹⁰³
124. In this case, the Court was in the fortunate position to have material before it that critically engaged with the reliability of the risk assessment tools relied on by the State. That may not always be the case. In order for a Court to properly evaluate whether there is an 'unacceptable risk' of future harm, it is essential that attention is drawn to any limitations in the assessment by expert witnesses of the likelihood and magnitude of future risk. Currently, an expert report provided to the Court under Div 105A of the Criminal Code is not required to include any discussion of the limitations on the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if released into the community. The Commission recommends that such a mandatory requirement be included in s 105A.6 (dealing

with experts appointed by the Court) and, if this provision is retained, s 105A.18D (dealing with experts appointed by the Minister for Home Affairs).

125. There are good rule of law reasons for requiring an expert's report on risk to identify any limitations in that assessment. First, the respondent in proceedings under Div 105A may not be represented and may not be in a position to question the validity of risk assessment tools. Secondly, the potential outcomes in such proceedings are severe and quasi-criminal, particularly if a continuing detention order is made.
126. In a criminal proceeding, the prosecutor has both a statutory¹⁰⁴ and common law duty¹⁰⁵ to disclose to a defendant all of the evidence upon which the prosecutor intends to rely at trial, along with any exculpatory material in their possession. A similar obligation is reflected in the control order regime which, like the CDO regime, is civil but imposes significant restrictions on a subject's human rights. In control order proceedings, the AFP member applying for a control order must provide both the Minister for Home Affairs and the Court with a statement of facts relating to why any of the restrictions sought in the order should *not* be imposed.¹⁰⁶ Each of those statements must then be served on a person subject to an interim control order prior to the confirmation hearing.¹⁰⁷
127. In a CDO proceeding, the expert's risk assessment is likely to be a crucial piece of evidence in the Court's determination of whether there is a high degree of probability of an unacceptable risk of future offending. It is important that the respondent is provided with details of any limitations in that expert assessment.

Recommendation 5

The Commission recommends that a report prepared by an expert appointed under ss 105A.6 or 105A.18D of the Criminal Code be required to contain details of:

- (a) any limitations on the expert's assessment of:
 - (i) the likelihood of the offender committing, providing support for or facilitating a terrorist act if the offender were released into the community,

- (ii) the magnitude of possible harm to the community that would result, and
- (b) the expert's degree of confidence in those assessments.

8.2 Risk assessment tools

128. The CDO regime in Div 105A was passed into law without the existence of any risk assessment tool for terrorist offenders that had been validated for Australian conditions. At the time, the Attorney-General's Department (AGD) said that it had formed an Implementation Working Group to progress a number of issues, including the development of risk assessment tools. The PJCIS recommended that the Attorney-General provide it with a 'clear development and implementation plan' by the time of the second reading debate in the Senate, and a timetable for the implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017.¹⁰⁸ Responsibility for these issues now lies with the Minister for Home Affairs.
129. Officers from the AGD and, later, the Department of Home Affairs with responsibility for Counter Terrorism Policy and the Countering Violent Extremism Centre, met with the Commission in December 2017 and May 2018 respectively to discuss their progress on implementation. Among other things, the Commission asked about:
- the development of a risk assessment tool, and steps taken to validate any tool for Australian circumstances
 - the identification, training and qualification of relevant experts
 - the minimum standards for housing people detained under the CDO regime, noting that this will be civil rather than criminal detention
 - the mechanisms for oversight and inspection of conditions of detention for people detained under the CDO regime, and the interaction with OPCAT
 - the steps taken to develop rehabilitation programs to reduce the risk of reoffending

- the steps taken to ensure that control orders, or ESOs, were available as an alternative to the CDO regime.
130. It will be important for the INSLM to understand how that work has progressed as part of this review of Div 105A.
131. A joint-agency submission to the PJCIS in 2020 noted that the Australian Government has ‘identified the VERA-2R as the most appropriate tool currently available’ to assess risk of people engaging in terrorism related conduct.¹⁰⁹ VERA-2R is an acronym for ‘Violent Extremism Risk Assessment (version 2, revised)’.¹¹⁰ The agencies note that other kinds of risk assessment tools ‘have been validated statistically against large populations of offenders’ and revised over a number of decades. However, it does not appear that there has been any independent statistical validation of VERA-2R for Australian circumstances.
132. The Commission recognises that there can be difficulties in the validation of a terrorism-specific tool because, fortunately, there are comparatively few people who have committed acts of terrorism who could be the subject of an actuarial analysis. At the same time, the scarcity of the data means that the predictive power of these kinds of tools is limited. In any event, while validation of a tool such as VERA-2R would be challenging, it is imperative. Without that information, it would be difficult, if not impossible, for a Court to properly conclude that evidence derived from an assessment made using VERA-2R is sufficiently reliable to form the basis for a determination of whether to issue a CDO.
133. The VERA-2R website itself contains the following warning about the limitations of the tool:
- Predictive validity is problematic due to the low base rate of terrorists and violent extremists. Moreover, extremists and terrorists may change their strategies, make unexpected decisions and use unpredictable triggers. Unpredictable and dynamic factors such as events at a personal, local or global level can also trigger unexpected violent acts. Due to such triggers and other dynamic factors, risks are time and context sensitive and are not able to be predicted with certainty. For each evaluation, limitations in the assessment must be clearly identified.¹¹¹
134. This warning reinforces the importance of Recommendation 5 above about expert reports identifying the limitations in their assessments.

135. The VERA-2R is described as a structured professional judgment tool. However, while it may provide a framework for decision making, unlike other structured professional judgment tools in the area of violent offending and sexual offending, it does not appear to be based on any actuarial data. In 2017, the Victorian Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers noted that VERA-2R 'has only been developed relatively recently and lacks a strong and validated body of evidence as to its efficacy' in the context of assessing risk and managing post-sentence high risk terrorist offenders.¹¹²
136. The developers of this tool, and the previous iteration known as VERA-2, have warned that it is 'not a silver bullet of prediction' and is 'not intended to serve as a definitive predictive instrument for those who have offended but rather provides some indicators as to a measure of the likeliness of danger'.¹¹³ The Department of Home Affairs has confirmed that the outputs from VERA-2R are qualitative and not quantitative. In response to questions from the PJCIS, the Department said that VERA-2R 'is not a predictive tool and does not provide a statistical risk output or quantum'.¹¹⁴ Instead, it is one input into the formation of a clinical opinion about future risk. As described earlier, such opinions in the absence of any real population-based data are notoriously unreliable.
137. Around 200 people in Australia have been trained in the use of VERA-2R since 2017, mostly government employed psychologists. In most cases, VERA-2R is used for assessing the suitability of offenders for disengagement and rehabilitation programs in the community and in prisons.¹¹⁵ The Commission has no concerns about the use of the tool in those contexts because the consequences of making a wrong decision based on the tool are less grave.
138. In December 2020, the Department of Home Affairs identified 13 cases, apparently involving 10 different offenders in New South Wales, where the Supreme Court had relied on a VERA-2R assessment in making orders under the *Terrorism (High Risk Offenders) Act 2017* (NSW).¹¹⁶
139. The Commission has not been able to review all of these cases, but notes the following judgments from the Supreme Court of New South Wales that considered the use of tools to predict the risk of terrorist offences.
140. In a first instance proceeding in which a continuing detention order sought in relation to Mr Mohamed Naaman was refused, the Court

provided the following description of the evidence provided by a forensic psychiatrist appointed by the Court to examine the defendant:

[The expert] acknowledged that actuarial tools for assessing risks of religion-based and ideology-based terrorist violence are 'unlikely to be effective'. She said that due to lack of available research such protocols as have been developed for assessing the risk of a particular person committing a terrorist offence are in the nature of 'investigative template(s)' and have not reached the standard of reliable professional judgment tools. She said that one author who had reviewed a decade of empirical research focused on Islamic terrorism found that it had 'largely failed to find valid nontrivial risk factors for terrorism'.¹¹⁷

141. This evidence was also considered in some more detail by the New South Wales Court of Appeal in dismissing an appeal by the State.¹¹⁸

142. In a first instance proceeding involving Mr Ricky White, in which an extended supervision order was made, a risk assessment report prepared by a psychologist called by the State made the following concessions about VERA-2R:

[The expert] used the [VERA-2R] but cautioned that the sample size of people who actually engage in terrorist acts is not large enough to allow statistical prediction of risk. Rather, such risk assessments rely substantially on clinical judgment.¹¹⁹

143. In a first instance proceeding involving Mr Wassim Fayad, in which an extended supervision order was made, a forensic psychologist appointed by the Court gave the following evidence:

Risk assessment in the area of terrorist activity or extremist violent offending is in its infancy and is hampered by the fact that research into this kind of behaviour is developing and that much of this research does not explore the individual or psychological factors that motivate such action. Given the extant state of knowledge in this field, we cannot anchor an assessment of risk in actuarial measures that provide statistical expressions of likelihood. Further to this, the focus is on dynamic factors that relate primarily to the individual's circumstances and specifically, their ideology, which is understood as the motivating drive for the actions of interest.¹²⁰

144. In the first instance *Benbrika* proceeding, evidence was given by a forensic psychologist engaged by the Minister for Home Affairs, who used two tools: VERA-2R and a Level of Service/Case Management Inventory (LS/CMI). This expert had experience in using VERA-2R as an expert in four cases under the New South Wales regime.¹²¹ The results

of the LS/CMI indicated that the defendant's risk rating for general offending was low.¹²² Based on VERA-2R and her professional judgment, the expert rated the defendant as a 'high risk of violent extremism'.¹²³ As to the use of VERA-2R, the Court said:

[The expert] freely admitted in cross-examination that the VERA-2R is not a predictive tool, unlike those used for some other sorts of offending. There are no predictive tools for violent extremism. The VERA-2R is not an actuarial risk assessment. Rather, as she put it:

It's a framework that is used to organise the information which has been empirically linked within the research to terrorist behaviour. So it is a structured professional-judgment framework that – essentially, the answer to the referral question, in terms of is Mr Benbrika at risk of committing a violent extremist offence, does not lie within the VERA, it lies within the evidence, and the VERA is a structured professional-judgment framework that assists me to come to my clinical judgment of his risk.¹²⁴

145. The expert did not quantify what was meant by 'high risk'. However, she acknowledged that the 'base rate' for violent extremism, meaning the number of people who are assessed as being at risk who go on to commit an offence, was 'distinctively low', between 1.6 and 6 per cent.¹²⁵ The expert was not prepared to say, in the absence of any actuarial evidence, whether Mr Benbrika was more or less likely to re-offend than indicated by the base rate.¹²⁶
146. The Court gave the following account of the expert's evidence of how the tool was used:

She stated that whilst the tool did not have predictive validity, that did not mean that it was not a useful tool in the way it was used. It allowed her as an assessor to think about the process, and think about where the defendant might be in the radicalisation process. When asked how the use of the tool differed from a gut-feeling, she said:

Because the actual items are based on evidence. So the entire tool might not have predictive validity because of the nature of the population that it's on, but gut feeling would be just having a talk with somebody and saying, 'I feel as though that's – they're at risk.' This is looking at the things that are known to be related through the evidence to be related with violent extremist behaviours.¹²⁷

147. A second forensic psychologist engaged by the Minister also considered that Mr Benbrika was at 'high risk' of violent extremism following the use of the VERA-2R tool. This expert agreed that this

rating 'could be likened to the proposition that violent extremist offending was a realistic possibility'.¹²⁸

148. The evidence of a risk expert engaged by the defendant was described in the following way:

In respect of the VERA-2R, [the expert] said he was not necessarily critical of the development of the tool, but the problem was it has no current validation beyond face validity and 'remarkably little in the way of peer-reviewed publications for an instrument that is ostensibly being used by so many practitioners'. As he put it, 'at best, it should be viewed as a series of tentative hypotheses awaiting research of some description'. He noted the ongoing efforts of the authors to develop an instrument with some utility, but went on to opine:

no matter how good it may eventually be found to be in identifying terrorism offenders that pose an elevated risk relative to other terrorism offenders, the extremely low base rate for reoffending means that there is no way to avoid the fact that the vast majority of people deemed to be high risk will not commit another offence.¹²⁹

149. The low base rate meant that the tool 'will identify far more false positives than true positives'.¹³⁰
150. The defendant's expert was provided with a copy of the manual for the VERA-2R tool. He noted that 'no guidance was provided as to how to make the final judgment of low, moderate or high risk, and no definition [was] provided as to the meaning of each classification'.¹³¹
151. Ultimately the Court considered that 'the shortcomings of the VERA-2R, which were openly acknowledged by each of the plaintiff's expert witnesses, do not mean that it is not a useful tool for use in an overall assessment of risk'.¹³² The Court accepted the assessments of the experts for the Minister based on their clinical judgment,¹³³ and reached the conclusion that there was an unacceptable risk of Mr Benbrika committing a serious Part 5.3 offence.¹³⁴ This finding was upheld on appeal.¹³⁵
152. Following its review of Div 105A, including evidence given by the Department of Home Affairs, the PJCIS said in October 2021 that it 'was not entirely convinced on the basis of the evidence provided to the inquiry that the VERA-2R tool is the most appropriate tool to determine the level of risk posed by a convicted terrorist offender'. It recommended an independent review of VERA-2R and alternatives be undertaken, with findings reported to Parliament.¹³⁶ The Government

agreed that the Department of Home Affairs would commission an internal review but was silent about whether the findings would be reported to Parliament.¹³⁷

153. Ultimately, great caution needs to be applied in relying on any such tool in the context of applying for, or making, a CDO. It is not enough that a particular tool or methodology is, relatively speaking, better than other comparable tools or methodologies. Rather, before a tool is used in this context, it should be shown to produce *objectively* reliable evidence, to a standard that is commensurate with the gravity of the decision making. That standard ought to be high: where a CDO is wrongly made, it would severely infringe an individual's human rights, almost always amounting to arbitrary detention under the ICCPR.

Recommendation 6

The Commission recommends that the INSLM seek further information from the Department of Home Affairs about:

- (a) the ongoing development of VERA-2R
- (b) steps taken to validate VERA-2R or any other tool for Australian circumstances as a measure of either or both of
 - (i) the likelihood of the commission of a relevant offence
 - (ii) the magnitude of possible harm to the community that would result
- (c) any independent evaluation of the reliability of VERA-2R in Australia or other comparable jurisdictions
- (d) information about the extent to which Courts have been informed of the limitations of VERA-2R in proceedings in which it has been used.

8.3 Training and accreditation of experts

154. At present, the definition of 'relevant expert' is broad, vague and does not guarantee sufficient training or independence. There are no minimum requirements for training or accreditation.

155. When this issue was considered by the New South Wales Sentencing Council, it recommended that:
- risk assessment should be undertaken independently of the corrections system in order to avoid any apprehension of bias as a result of the involvement of the executive in the process; and
 - in order to be eligible to be appointed as a relevant expert, the expert should be accredited by an independent authority.¹³⁸
156. The Council said that establishing an independent risk management body would facilitate best practice in relation to risk-prediction by:
- setting out best-practice risk-assessment and risk-management processes and developing guidelines and standards with respect to such processes
 - validating new risk assessment tools and processes
 - providing for rigorous procedures by which practitioners become accredited for assessing risk
 - providing education and training for practitioners
 - increasing the pool of experts available to give evidence in matters which require risk-prediction
 - facilitating risk assessment by an independent panel of experts
 - developing an individual risk-management plan when an offender likely to become subject to post-sentence restraints enters custody.¹³⁹
157. The Commission considers that the recommendations made by the New South Wales Sentencing Council should also be adopted in relation to Div 105A in order to improve the process for assessing risk and the quality and reliability of evidence provided to the Supreme Court in PSO matters.

Recommendation 7

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming ‘relevant experts’ as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools
- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

Recommendation 8

The Commission recommends that ‘relevant experts’ be required to be accredited by the independent risk management body in order to be appointed under ss 105A.6 or 105A.18D of the Criminal Code.

8.4 Duplication of mandatory expert assessment requirement

- 158. The Supreme Court can appoint an independent expert to conduct an assessment of the offender’s risk of committing a Part 5.3 offence and provide a report of that assessment to the Court.¹⁴⁰ The offender is required to attend the assessment.¹⁴¹ The offender is not required to participate in the assessment, but the Court must have regard to the offender’s level of participation (including a refusal to participate) in deciding whether it is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence.¹⁴²
- 159. While the Minister and the offender can nominate an expert to carry out this task, ultimately the decision on which expert (or experts) to appoint is one for the Court.
- 160. The fact that the Court selects the person it considers to be the most appropriate expert does not preclude either the Minister or the offender from calling expert evidence from an expert of their choosing at the hearing.¹⁴³
- 161. The amendments to Div 105A made in December 2021 duplicated this expert assessment requirement by giving the Minister the power to

direct the offender to also attend assessments with an expert nominated by the Minister.¹⁴⁴ The mandatory assessments by the Minister's expert can take place before any application for a PSO is made or while a PSO is in force.¹⁴⁵ There is no limit to the number of sessions the offender may be required to attend with the Minister's expert.¹⁴⁶ The decision by the Minister to direct an offender to attend an assessment with the Minister's expert is not subject to merits review, or judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).¹⁴⁷

162. Significantly, in deciding whether to make a PSO, the Court *must* have regard to the report from the Minister's expert, and the level of the offender's participation in the assessments by the Minister's expert, in the same way as that of the independent expert or experts chosen by the Court.¹⁴⁸ This means that if an offender refuses to participate in assessments by the Minister's expert, this fact can be later held against them.
163. The Commission considers that this additional provision is not warranted and has a significant adverse impact on the fairness of PSO proceedings. It is inconsistent with the general requirement that the onus is on the AFP Minister to prove that the person poses an unacceptable risk to the community.¹⁴⁹
164. It is a fundamental principle of criminal law proceedings, also reflected in the *Evidence Act 1995* (Cth), that a defendant is not competent, and cannot be compelled, to give evidence as a witness for the prosecution.¹⁵⁰ This is a protection that cannot be waived.¹⁵¹ It is a protection recognised in international law, including in article 14(3)(g) of the ICCPR. While the offender here has the right not to participate in the assessment by the Minister's expert, the offender must attend any assessments and failure to participate must be taken into account by the Court hearing the PSO proceeding.
165. The relevant Statement of Compatibility with Human Rights asserts that article 14(3) of the ICCPR is not applicable because PSO proceedings are civil and not criminal.¹⁵² Further, it asserts that the fact that the Court must take into account the offender's level of participation 'does not create a de facto obligation to participate'.¹⁵³
166. These justifications are insufficient. The human rights restrictions that may be imposed via a PSO are extensive, and include detention. That those restrictions are imposed pre-emptively, as distinct from the more

conventional situation where restrictions are imposed as punishment for the commission of a criminal offence, does not lessen their impact on the individual concerned. The Commission's view is that these proceedings have a quasi-criminal character because the decision making turns on the risk of a person committing a criminal offence in the future, and the outcomes for a respondent include orders such as detention and restrictions on liberty that are commonly made by criminal courts.

167. Moreover, the only reason for including a provision requiring the Court to take into account a failure to participate in an assessment is so that a negative inference could be drawn against a respondent as a result. Given the nature of these proceedings, the Commission considers that the obligations on an offender in relation to the Minister's expert are contrary to longstanding common law and human rights principles designed to ensure that proceedings are conducted fairly.

Recommendation 9

The Commission recommends that s 105A.18D of the Criminal Code, dealing with the power of the AFP Minister to direct an offender to be assessed by an expert chosen by the Minister, be removed from the Bill.

Recommendation 10

In the alternative to Recommendation 9, the Commission recommends that:

- (a) s 105A.18D of the Criminal Code be amended to confirm that the offender is not required to attend an assessment with an expert chosen by the AFP Minister; and
- (b) s 105A.6B of the Criminal Code be amended to remove the requirement for the Court to take into account the level of the offender's participation in any assessment under s 105A.18D.

9 Separate treatment of detainees

168. While the CDO regime has a quasi-criminal character in substance, it is important to recognise that it is formally a civil regime of administrative detention and that those subject to it should be treated accordingly. Those subject to a CDO need to have previously committed a relevant offence, but they are being detained not because

of their past offending but because of the risk of future offending. CDO proceedings are determined in accordance with the rules and procedures applicable in civil matters.¹⁵⁴

169. Article 10(2)(a) of the ICCPR provides that:
- Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status.
170. When Australia ratified the ICCPR on 13 August 1980, this was done subject to a reservation in relation to article 10(2)(a) that ‘the principle of segregation is accepted as an objective to be achieved progressively’. It has now been more than 40 years since that reservation, subject to progressive realisation, was made.
171. The Commission considers that persons who are subject to administrative detention, like accused people who are as yet unconvicted, should be subject to separate treatment appropriate to their status.
172. One reason why the Human Rights Committee in *Fardon* found that the regime in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was inconsistent with Australia’s human rights obligations in relation to him was that following the expiration of his 14 year sentence he continued to be detained in the same prison and was subject to the same conditions of imprisonment.¹⁵⁵ The Committee considered that this resulted in Mr Fardon’s detention being arbitrary, contrary to article 9(1) of the ICCPR.
173. Section 105A.4 of the Criminal Code provides that an offender detained under a CDO must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment. However, that obligation is qualified by a number of matters including any ‘reasonable requirements’ necessary to maintain the management, security or good order of the prison. The Commission considers that this exception is overly broad and does not amount to a legitimate basis to depart from the general requirement to ensure that detainees are treated in accordance with their status. If a detention facility is unable to properly accommodate a detainee under a CDO in a way that sufficiently and appropriately distinguishes them from prisoners, then it should not be used for that purpose.

Recommendation 11

The Commission recommends that s 105A.4(1)(a), which provides that the management, security or good order of a prison can justify treating a person detained under a continuing detention order in a way that is inconsistent with their status, be repealed.

174. In evidence given to the PJCIS in late 2020, the Department of Home Affairs said that facilities for the detention of people subject to a continuing detention order were available in Victoria and that an agreement was signed between the Commonwealth and Victoria in September 2020 to support the CDO application made in the *Benbrika* proceeding.¹⁵⁶ The Department said that the Commonwealth was working with the Victorian Department of Justice and Community Safety to finalise an enduring housing agreement that governs housing for all HRTO-eligible offenders subject to a CDO in the State of Victoria.
175. As noted above, of the two CDOs that have been made to date, one was made in relation to an offender in Victoria (Mr Benbrika) and one was made in relation to an offender in New South Wales (Mr Pender).
176. The PJCIS made two recommendations in its 2020 report dealing with this issue. Recommendation 18 was in the following form:

The Committee recommends that the Department of Home Affairs coordinates with relevant State and Territory Departments to source appropriate accommodations to facilitate interim and confirmed continuing detention orders. The Committee recommends coordination with New South Wales on appropriate accommodation should start as soon as possible, noting the number of eligible offenders due to be released in the next five years.
177. Recommendation 19 of the PJCIS was in the following form:

The Committee recommends that the *Criminal Code Act 1995* be amended to require public reporting requirements on the use and implementation of Division 105A, including:

 - details of housing arrangements for individuals subject to a continuing detention order;
 - use of rehabilitation programs (pre and post-release); and
 - use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.
178. It does not appear that the Government has yet responded to these recommendations of the PJCIS. The Commission encourages the

INSLM to seek information from the Department of Home Affairs about the arrangements made in New South Wales, and reiterates the recommendation of the PJCIS as to public reporting.

Recommendation 12

The Commission recommends that the INSLM seek an update from the Department of Home Affairs about the following matters in relation to the post sentence order regime in Div 105A of the Criminal Code:

- (a) the minimum standards for housing people detained under the continuing detention order regime
- (b) the mechanisms for oversight and inspection of conditions of detention for people detained under the continuing detention order regime
- (c) the steps taken to develop rehabilitation programs to reduce the risk of reoffending.

Recommendation 13

The Commission recommends that the Criminal Code be amended to require public reporting requirements on the use and implementation of Division 105A, including:

- (a) details of housing arrangements for individuals subject to a continuing detention order
- (b) use of rehabilitation programs (pre and post-release)
- (c) use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.

179. Australia's obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) include ensuring that relevant National Preventive Mechanisms (NPMs) and the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) are authorised to conduct inspections and that information sharing with these bodies is also authorised.¹⁵⁷ It is important to ensure that these mechanisms for oversight and inspection of conditions and treatment of detainees are available to individuals detained under a CDO.
180. The Commonwealth Ombudsman is the NPM for federal places of detention and has been appointed as the 'NPM Coordinator'.¹⁵⁸

181. Individuals detained under a CDO may, under current arrangements, be detained in a State or Territory correctional facility. To ensure consistency in the overall application of OPCAT mechanisms, the AFP Minister should be required to notify the NPM Coordinator, as soon as practicable, after a CDO is made. This notification should include details of the place where the person is being detained.

Recommendation 14

The Commission recommends that relevant National Preventative Mechanisms and the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment be authorised to conduct inspections wherever individuals are detained under a continuing detention order, and that information sharing with these bodies is facilitated.

Recommendation 15

The Commission recommends that the AFP Minister be required to notify the Commonwealth Ombudsman, as NPM Coordinator, as soon as practicable after a continuing detention order is made, and that this notification include details of the place where the person is being detained.

10 Extended supervision orders

182. The third INSLM, Dr James Renwick CSC SC, recommended that there be a separate ESO regime to operate alongside the CDO regime. The INSLM made a number of specific recommendations about how the ESO regime should operate. In particular, he recommended that:
- State and Territory Supreme Courts be authorised to make an ESO as an alternative to a CDO on application by the relevant Minister
 - the conditions that may be imposed on a person pursuant to an ESO should be the same as the conditions that could be imposed on a person pursuant to a control order under s 104.5(3)
 - the threshold for making an ESO should be the same as the threshold for making a CDO, namely that the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community

- the Court should only make a CDO if satisfied that an ESO would not be effective in preventing the identified risk
 - the period of any ESO be up to three years at a time
 - the same controls and monitoring regime be available for an ESO as for control orders
 - the Government should consider making the special advocate regime currently available for use in relation to control orders also available for applications under Div 105A.¹⁵⁹
183. The INSLM's recommendations were supported by the PJCIS during its 2018 review of counter-terrorism provisions.¹⁶⁰ The Australian Government also agreed with the INSLM's recommendations in its response to the report of the PJCIS.¹⁶¹ However, the ESO regime ultimately adopted in 2021 departs in material respects from the model recommended by the third INSLM in 2017 and endorsed by the PJCIS and the Australian Government in 2018.¹⁶²
184. Key differences relate to:
- the 'balance of probabilities' standard for making an ESO
 - the range of conditions that may be imposed under an ESO
 - the lack of a requirement to consider the impact of an ESO on the circumstances of the person in respect of whom the ESO is made (which is required for control orders)
 - rules in relation to the variation of the ESO, which also differ from control orders.
185. These differences, along with a discussion about the consequences of a breach of an ESO, are considered in more detail below.

10.1 Standard of proof

186. A lower standard of proof applies in relation to an application for an ESO than is required to obtain a CDO.
187. This issue was given detailed consideration by the third INSLM who recommended that the threshold for making an ESO should be the same as the threshold for making a CDO, namely, that the Court be 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a

serious Part 5.3 offence if the offender is released into the community' without the order being made.¹⁶³

188. However, the legislation departs from this recommendation by providing that an ESO can be made on the ordinary civil standard of 'balance of probabilities'.¹⁶⁴
189. There is little explanation in the Explanatory Memorandum for why this standard of proof was chosen. The EM notes that a balance of probabilities standard applies in control order proceedings and that an ESO is a less restrictive measure than a CDO.¹⁶⁵ However, the INSLM specifically considered, and rejected, the option of using the balance of probabilities standard of proof, as applies to control orders, in respect of ESOs, noting that the difference in standards and associated assessments 'is consistent with the differing nature of the risk that the respective regimes are designed to address'.¹⁶⁶
190. Ordinarily, a Court will punish an individual, by ordering that they be detained or in some other way restricting their rights, only following proof that the individual committed a relevant offence on the basis of the exacting criminal standard—'beyond reasonable doubt'. The criminal standard of proof is difficult to satisfy, because in our liberal democratic system the prospect of an innocent person being wrongly punished is rightly condemned. The criminal standard of proof offers an important protection against wrongful conviction and punishment.
191. Where detention or other restrictions are imposed on a person for reasons other than punishment following conviction for an offence, then a lower standard of proof typically applies. However, whether imposed as punishment for commission of an offence or for another reason, the effects of detention and other such restrictions are severe, and so it remains vital that such restrictions are not imposed wrongly. Lowering the standard of proof increases the risk of error; the more the standard is lowered, the greater that risk.
192. It is important that a Court be very confident in the correctness of any decision to impose a PSO on an offender at the end of their criminal sentence. While there may be pragmatic reasons to support a lower standard of proof than beyond reasonable doubt, the standard chosen for a PSO should reflect the seriousness of the decision making and the consequences of error. This is true regardless of whether a PSO leads to the individual being detained or to the imposition of conditions on what the individual may do in the community.

193. In every other jurisdiction in Australia, with the exception of South Australia, there is a consistent standard of proof for the making of PSOs, regardless of whether the PSO will lead to detention or some other restriction.¹⁶⁷ All of those jurisdictions require satisfaction to a 'high degree of probability' and apply this standard to the making of both CDOs and ESOs. (South Australia has a unique regime where a person can only be subject to a CDO if they breach a term of an ESO while in the community, and they may only be detained for the remainder of the period of the ESO.)¹⁶⁸
194. The Commission considers that the balance of probabilities standard for ESOs does not give sufficient weight to the significant restrictions on liberty imposed by the ESO regime. This is a quasi-criminal regime that, as presently drafted, can impose restrictions on all areas of a person's life, based on an assessment of their risk of engaging in future criminal activity. Those restrictions may be imposed for up to three years at a time. It is appropriate that a standard higher than the usual civil standard be applied for the imposition of such extensive restrictions. The Commission recommends that the same standard apply as for a CDO, namely, satisfaction to a 'high degree of probability'. This standard remains lower than the criminal standard (beyond reasonable doubt), and so is less difficult to satisfy than would ordinarily be the case in criminal proceedings that could result in an individual being detained or otherwise subject to punishment.
195. Once that standard is met for the application of the regime to a particular offender, the Commission agrees that the imposition of particular conditions should be subject to the balance of probabilities test. That is, the Court should be satisfied on the balance of probabilities that each of the conditions to be imposed on the offender by the order (and the combined effect of all the conditions) is reasonably necessary, and reasonably appropriate and adapted (or proportionate), for the purpose of protecting the community from that unacceptable risk.¹⁶⁹
196. This change would have some impact on the making of an ISO. The relevant threshold for making an ISO is that the Court is satisfied that there are reasonable grounds for considering that an ESO will be made in relation to the offender.¹⁷⁰ If the standard of proof for making an ESO is amended as recommended by the Commission, then a Court considering whether to make an ISO would need to be satisfied that

there were reasonable grounds for considering that an ESO based on that higher standard would be made.

Recommendation 16

The Commission recommends that the threshold for making an extended supervision order in s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court be ‘satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act’.

10.2 Conditions of an extended supervision order

197. The third INSLM recommended that if an ESO regime were incorporated into Div 105A, ‘the conditions to which such an order may be subject should be the same as the terms of s 104.5(3)’.¹⁷¹ In making that recommendation, the INSLM had regard to the kinds of conditions that could be imposed on a person under State and Territory legislation dealing with post-sentence regimes for high-risk or serious sex offenders.
198. However, the kinds of conditions that may be imposed under the ESO regime are not limited to the conditions that may be imposed under the control order regime. Instead, any kind of condition may be imposed under the ESO regime, provided the Court making the order is satisfied, on the balance of probabilities, that the condition is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.¹⁷²
199. Two non-exhaustive lists of possible conditions, significantly more extensive than the conditions that may be imposed in relation to a control order, are set out.¹⁷³
200. Some of these conditions are broadly equivalent to conditions that may be imposed under a control order. In relation to the first list in s 105A.7B(3), these are conditions in paragraphs (a)(i) and (ii), (b), (c), (d), (h)(i) and (ii), (i), (j), (k) and (l). In relation to the second list in s 105A.7B(5), these are the conditions in paragraphs (b), (c), (d) and (f)(i).
201. Other conditions extend significantly beyond the conditions that may be imposed under a control order.

202. As noted above, the two lists are not exhaustive. The Explanatory Memorandum makes clear that the lists merely contain ‘examples’ of conditions that could be imposed and that, in practice, an ESO ‘may include a very broad range of conditions directed at all aspects of an offender’s life’.¹⁷⁴
203. The fact that the range of possible conditions is ‘at large’ provides a risk that over time they may become more onerous. Without some legislative limit on these kinds of orders, it will be left to courts to determine the appropriate upper threshold of what are, in essence, civil obligations.
204. Further, there are real concerns about some of these new specified conditions.
- (a) Discretions granted to a ‘specified authority’
205. Many of the new conditions would permit a Court to give power to a ‘specified authority’ to do certain things. For example, conditions may be imposed that allow a ‘specified authority’ to:
- determine an area or place where the offender may not be present
 - grant or withhold permission to the offender to move residence
 - take possession of the offender’s passport
 - grant or withhold permission to the offender to engage in training or education
 - direct the offender to attend and participate in treatment, rehabilitation or intervention programs or activities
 - direct the offender to undertake psychological or psychiatric assessment or counselling
 - direct the offender to attend and participate in interviews and assessments
 - test the offender in relation to the possession or use of specified articles or substances
 - photograph the offender
 - take impressions of the offender’s fingerprints.¹⁷⁵
206. A condition may also be made that the offender comply with any other reasonable direction given by a ‘specified authority’.

207. The definition of the new term 'specified authority' is drafted inclusively and could be a police officer, but could equally be 'any other person or class of person'.¹⁷⁶ It need not be an 'authority' at all, in the way that word is usually understood. There is a requirement that the Court be satisfied that the person 'is appropriate in relation to the requirement or condition'. However, in practice, it could be any person in Australia.
208. If a condition is imposed in the terms of s 105A.7B(3)(r), which allows a 'specified authority' to give other binding directions to a person, there are few limits on the kind of directions that the 'specified authority' could give. The directions must be:
- 'reasonable'
 - in relation to another condition (which are not limited in type)
- and the person giving the direction must be satisfied that the direction is reasonable in all the circumstances to give effect either to the condition or to the objects of the Division.
209. It is a criminal offence, punishable by up to five years imprisonment, to contravene a condition of an ESO, including a condition that is dependent on a power exercised by a 'specified authority'.
210. The Commission considers that the definition of 'specified authority' is too broad. It should not be an available option to nominate any person in Australia, who may give onerous directions to a person the subject of an ESO, with criminal consequences if the person fails to comply with them. The definition should be much more closely targeted so that it is properly limited to police and public authorities responsible for corrections.

Recommendation 17

The Commission recommends that the definition of 'specified authority' in s 100.1(1) of the Criminal Code be limited to police officers and public authorities responsible for corrections.

- (b) Compulsory engagement in de-radicalisation programs and other activities
211. Some of the new specified conditions permit people to be forced to participate in various kinds of programs against their will.
212. Under the control order regime, one of the conditions that may be imposed is a requirement that the person participate in specified

counselling or education.¹⁷⁷ However, this obligation is expressly limited to situations of voluntary participation. A person can only be required to participate in counselling or education if they agree to participate at the time of the counselling or education.¹⁷⁸ The way in which such conditions have been imposed in practice is to require the person to ‘consider in good faith participating in counselling or education’ relating to particular matters.¹⁷⁹

213. Evaluations of programs aimed at countering violent extremism have identified a number of essential elements: religious rehabilitation, education and vocational training, psychological rehabilitation, social and economic support, family rehabilitation and post-release support to assist in reintegration.¹⁸⁰
214. During a 2020 hearing of the PJGIS, the First Assistant Secretary, Integrity and Security, Attorney-General’s Department, agreed with a proposition made by Senator Abetz that trying to force a person to be de-radicalised would be counterproductive, saying:
- Yes, that’s essentially the reasoning as to why that hasn’t been the case in the past. For somebody who is not willing to participate, there’s little benefit in compelling that person to do so.¹⁸¹
215. The Department of Home Affairs said in response to questions on notice that it was not aware of any State or Territory legislation that mandates participation in such programs while offenders are in prison.¹⁸² For example, the Proactive Integrated Support Model (PRISM) is a program aimed both at prison inmates and those on parole in New South Wales who have a terrorist conviction or who have been identified as at risk of radicalisation. PRISM has been delivered by Corrective Services NSW since 2016 and operates on a voluntary basis.¹⁸³
216. The approach taken by the States and Territories is consistent with research in this area which finds that:
- in order for individuals to be disengaged, they must first be willing to hear alternate ideas and accept the support on offer. Forced participation is unlikely to achieve either the desired results or positive outcomes and, in many cases, may harden the radical views of those forced to participate.¹⁸⁴
217. The Act now departs from that principle by permitting conditions to be imposed on an ESO that would force a person to:
- attend and participate in treatment, rehabilitative or intervention programs or activities

- undertake psychological or psychiatric assessment or counselling
 - participate in interviews and assessments.¹⁸⁵
218. None of these conditions is subject to the existing, appropriate safeguard in the control order regime that they be voluntary.
219. Whether a person is prepared to voluntarily engage in particular programs or activities may be a factor that the Court properly takes into account in determining whether an ESO would be effective in preventing an unacceptable risk to the community. However, the Commission considers that there is little value in compelling participation in circumstances where it is not voluntary, and that this may in fact be counterproductive.

Recommendation 18

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

(c) Entering the home of a person subject to an order

220. Once a control order or an ESO is made, it permits police and other relevant authorities to use a wide range of investigatory tools including warrants and tracking devices to monitor compliance with the order. As the second INSLM, the Hon Roger Gyles AO QC, noted:

Monitoring compliance seems a reasonable concept, but reading these schedules [ie the schedules of the Bill that introduced the current control order monitoring powers] brings home forcibly the extent of intrusion into life and liberty by the making of a control order. The mere existence of the order is a trigger for monitoring. The details of the potential monitoring blur, if not eliminate, the line between monitoring and investigation. The case for control orders is weakened if control orders are of little utility without such far reaching surveillance. It is difficult to imagine such provisions being applied to an accused on bail. The significance for present purposes is to emphasise the seriousness of the impact upon a person of the grant of a control order if these changes come into force and the consequent necessity for proper safeguards of the interests of a potential controlee.¹⁸⁶

221. The relevant warrants are available under a range of legislation beyond Div 105A and may be outside the scope of the present review.
222. In addition to these extensive monitoring powers, Div 105A indicates that an ESO may be made subject to conditions that *require* the offender to consent to a range of things including entry into their home. The Commission objects to these requirements on the basis that they sidestep the requirement to obtain one of the (already extensive) existing warrants.
223. In particular, conditions may be made *requiring* a person to consent to:
- visits at specified premises (including their own home) from a 'specified authority' at any time for the purpose of ensuring compliance with a curfew condition
 - entry to specified premises (including their own home) by a 'specified authority' at any time for the purposes of ensuring compliance with a curfew condition
 - entry to the person's home by a 'specified authority' at any reasonable time for any purpose relating to electronic monitoring (this provision applies to both control orders and ESOs)¹⁸⁷
 - providing a 'specified authority' with a schedule setting out their proposed movements, and complying with that schedule (noting that any deviation from the schedule would be a criminal offence, subject to penalties of imprisonment)
 - entry to specified premises (including their own home) by a police officer for the purposes of:
 - searching the person
 - searching the person's residence
 - searching any other premises under the person's control
 - seizing any item found during those searches (whether or not connected to any offence) including to allow the item to be examined forensically
 - providing a police officer with passwords and access to:
 - electronic equipment or technology owned or controlled by the person
 - any data held on, or accessible from, such equipment or technology

and allowing the equipment or data to be seized.

224. Police officers are authorised to use reasonable force to enter a person's home to install, repair, fit or remove an electronic monitoring device if the person did not give consent to that action.¹⁸⁸
225. The Commission's view is that these conditions should be removed from Div 105A because they unnecessarily restrict human rights. If a police officer monitoring compliance with an ESO wants to search the person, enter their premises, or carry out some task in relation to an electronic monitoring device, they can do so either:
- with the *actual* consent of the person; or
 - pursuant to a warrant where the proposed conduct must be justified before an independent decision maker.
226. Warrantless entry to premises clearly engages the right to privacy under article 17 of the ICCPR. This right is also recognised at common law. Every unauthorised entry onto private premises, whether by police officers or anyone else, amounts to a trespass.¹⁸⁹
227. In the absence of permission from the lawful owner or occupier, a police officer may normally only enter private premises pursuant to a warrant. Legislation provides for warrants to be issued by justices or magistrates and to be subject to conditions, in order to 'balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property'.¹⁹⁰
228. The requirements to provide 'consent' effectively circumvent the already extensive warrant provisions and the requirement for judicial oversight of these intrusive powers on a case-by-case basis.

Recommendation 19

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be repealed on the basis that they are not necessary, given the existing range of monitoring warrants.

(d) Exemptions

229. The Court making an ESO may specify certain conditions to be 'exemption conditions'.¹⁹¹ Such conditions permit an offender to apply

to a 'specified authority' for a temporary exemption. The 'specified authority' has a discretion about whether to grant or refuse the exemption.

230. One example of where an exemption could apply is if a person subject to an ESO had been asked by their employer to work a night shift that conflicted with a curfew condition under the ESO.¹⁹² If the curfew condition was specified to be an 'exemption condition', then the person could seek permission for an exemption from that condition so that they could work the night shift.
231. The Commission supports the ability for ESO conditions to be subject to temporary exemptions. However, s 105A.7C appears to give an unconstrained discretion to a 'specified authority' to either grant or refuse an exemption application. There is no detail about how the 'specified authority' is to make its decision, what factors it should take into account, when the decision should be made, whether reasons should be provided and how the applicant could seek review of any adverse decision.
232. There needs to be a framework for decision making that ensures that any decision about whether or not to grant an exemption application is fair. The Commission made recommendations to the PJCIS about the elements that should be included in the legislation.¹⁹³ The PJCIS agreed that the development of a decision-making framework would support consistency in the application of the discretion and recommended that the Department of Home Affairs develop a framework as part of the implementation process for the new ESO regime. It recommended that this framework provide guidance to a specified authority of:
- the considerations that must be undertaken by a specified authority in deciding whether to grant an exemption
 - the timeframe for a decision under an exemption
 - the record-keeping requirements of a decision made under an exemption condition.¹⁹⁴
233. In October 2021, the Government accepted the recommendation of the PJCIS and said that it was 'finalising the HRTO Implementation Framework' along with operational implementation plans that will provide guidance to specified authorities.¹⁹⁵ The Commission commends the Government for agreeing to this recommendation from the PJCIS. It recommends that the INSLM seek a copy of this framework and the implementation plans.

234. The Commission remains of the view that these elements should be included in primary legislation and include a requirement for reasons and clear review rights. For these reasons, it reiterates the recommendation it made to the PJCIS.

Recommendation 20

The Commission recommends that s 105A.7C of the Criminal Code be amended to set out the parameters for decision making by a specified authority in relation to an application for an exemption. This should include:

- (a) the considerations that the specified authority must take into account in making its decision
- (b) the timeframe for a decision by the specified authority
- (c) a requirement that the specified authority provide written reasons for its decision
- (d) clear review rights for an applicant.

10.3 Consideration of personal circumstances

235. The ESO regime does not require the Court to take into account the impact of proposed conditions on the circumstances of the offender. By contrast, in control order proceedings this is a mandatory consideration. It is an important protection against disproportionate decision making.
236. When a Court is considering making or confirming an interim control order, it must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of achieving the objects of Div 104.¹⁹⁶ In carrying out this assessment, the Court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances, including the person's financial and personal circumstances.¹⁹⁷
237. This requirement has been part of the control order regime since it was first introduced in 2005. The rationale given by the Australian Government for including this provision at the time was:
- to ensure an obligation that would, for example, have an adverse impact on the ability of person to earn a living and support his or her family must

be taken into account before the obligation, prohibition or restriction is imposed.¹⁹⁸

238. There is no such protection in relation to imposing conditions in an ESO. The Explanatory Memorandum confirmed that the omission was deliberate, but did not provide a convincing justification.¹⁹⁹
239. While a Court generally has a discretion to take into account matters that it considers relevant when making decisions, it is striking that this is not a mandatory consideration, particularly given the existing control order model. The Commission submits that this missing protection should be inserted into the provisions dealing with:
- making an ESO
 - making an ISO
 - varying an ESO or ISO
 - varying an ESO after review.

Recommendation 21

The Commission recommends that ss 105A.7A(2), 105A.9A(5), 105A.9C(2) and 105A.12A(5) of the Criminal Code be amended to ensure that a Court hearing an application for the making or variation of an extended supervision order or interim supervision order, or conducting a review of an extended supervision order, is required to take into account the impact of the proposed conditions on the person's circumstances, including their financial and personal circumstances, for the purpose of determining whether the condition is reasonably necessary and reasonably appropriate and adapted.

10.4 Variation of interim supervision orders

240. Under the control order regime, once an interim control order is made, it can be varied by the Court before the confirmation hearing if there is consent between the AFP and the person subject to the control order.²⁰⁰ However, it cannot be varied to *add* any obligations, prohibitions or restrictions.²⁰¹ This provision for variations followed recommendations of both the third INSLM in 2017 and the PJCIS in 2018. The rationale for this provision was that there may be a delay between an interim control order being made and a confirmation hearing and it was reasonable to provide for a process to remove conditions that were no longer appropriate.²⁰²

241. Similarly, at a confirmation hearing, the Court may confirm and vary the order by removing one or more conditions, but it may not add new conditions.²⁰³ Once a confirmed control order is in force, the AFP Minister may apply to the Court to vary the order, including by adding conditions.²⁰⁴ In those circumstances, the new conditions must be justified on the same basis as the original conditions.
242. A different approach has been taken in relation to ESOs and ISOs. A Court may make an ISO if it is satisfied that:
- an offender will be released from custody or no longer subject to a relevant order before the application for a CDO or ESO can be determined, and
 - there are reasonable grounds for considering that an ESO will be made in relation to the person.²⁰⁵
243. Unlike the case for interim control orders, the AFP Minister may apply to the Court to vary an ISO without the consent of the person who is the subject of the order, and it may be varied to *add* conditions to the ISO before the Court hears the application for a CDO or ESO.²⁰⁶
244. When this issue was considered by the PJCIS, it said:
- Given how closely related the proposed ESO scheme is to the existing control orders scheme, the Committee recommends that the protections in place for interim control orders be replicated in the ESO scheme. Therefore, the Committee recommends that an ISO not be permitted to add new conditions prior to confirming the ESO, and that conditions be amended with the consent of both parties.²⁰⁷
245. This substantially adopted a recommendation made by the Commission. Although this recommendation was made unanimously by the PJCIS, it was not accepted by the Government.²⁰⁸ The Commission reiterates this recommendation.

Recommendation 22

The Commission recommends that the Criminal Code be amended to remove the ability of the AFP Minister to apply for a variation of an interim supervision order to add conditions prior to the hearing of an application for a continuing detention order or an extended supervision order.

10.5 Penalties for contravening an ESO or control order

246. It is an offence to contravene an ESO, and an offence to interfere with a monitoring device that a person is required to wear pursuant to an ESO.²⁰⁹ The maximum penalty for each offence is imprisonment for five years. The offences are substantially the same as the offences in relation to control orders.²¹⁰
247. The Commission is concerned that the structure of these offences, the penalties available, and the way in which breaches have been enforced in practice are more severe than those relating to offences for breach of parole conditions. It is important to make amendments to these provisions in order to prevent disproportionate outcomes.
248. The Commission is aware of four people who have been charged with a breach of a control order: Mr MO, Mr Ahmad Saiyer Naizmand, Ms Alo-Bridget Namoa and Mr Belal Saadallay Khazaal. The cases of Mr MO and Mr Naizmand were described in case studies 2 and 3 in a 2020 submission of the Commission's to the PJCIS.²¹¹ In summary:
- Mr MO was prosecuted for using a public telephone on two occasions, and using an unapproved mobile phone on one occasion, contrary to the requirements of the control order made in relation to him. It was common ground that the content of the phone calls was 'trivial' and did not relate to any criminal activity. He pleaded guilty and was sentenced to two years imprisonment.²¹²
 - Mr Naizmand was prosecuted for watching on YouTube three short videos that contained extremist material. At the time, he was 22 years old. The videos were publicly available, and he was permitted to have a phone and use the internet, but the terms of his control order prohibited him from watching material of this nature. Two of the videos he watched twice. As a result, he was charged with five counts of breaching the control order made in relation to him and sentenced to four years of imprisonment in the highest security prison in New South Wales.²¹³
249. A more recent case study is set out below.

Case study: Ms Alo-Bridget Namoa

Ms Alo-Bridget Namoa was convicted with a co-offender of conspiring to do acts in preparation for, or planning, a terrorist act (ss 11.5(1) and 101.6(1) of the Criminal Code), namely a plan to carry out ‘a street robbery on non-Muslims’ which ultimately was not carried out because one or more of the people involved decided against it.²¹⁴ At the time of the conspiracy, each of the offenders was 18 years old.²¹⁵ Ms Namoa was sentenced to three years and nine months imprisonment. She was released from custody on 22 December 2019, subject to an interim control order²¹⁶ that was later confirmed.²¹⁷

On 25 July 2020, Ms Namoa was arrested and charged with seven counts of contravening a control order and three counts of attempting to contravene a control order.²¹⁸ Each count is punishable by a maximum of five years imprisonment. The alleged offences reportedly included allowing someone else to use her phone, using a phone other than the one permitted by the AFP, and asking someone to contact another person on her behalf.²¹⁹ At the time of her arrest, the AFP reportedly said that no specific or impending threat to the community had been identified in relation to the alleged misuse of her phone.²²⁰

In December 2020, the Supreme Court of New South Wales considered whether bail should be granted. Justice Rothman observed that the alleged breaches of the control order did not give rise to a threat or danger to the safety of any individual or the community at large, nor was the applicant a flight risk.²²¹ Under ordinary principles, her continued incarceration on remand would be unjustified.²²² However, a breach of a control order comes within the definition of a ‘terrorism offence’.²²³ As a result, there is a presumption against bail, unless ‘exceptional circumstances’ can be shown.²²⁴ His Honour considered that this was the kind of case that would regularly be expected to occur and that the Court was therefore required to refuse bail, regardless of whether this was a ‘just’ outcome.²²⁵

Ms Namoa pleaded guilty to some charges and the remainder were withdrawn.²²⁶ She remained in custody until sentencing on 29 November 2021, just over 16 months after her initial arrest. She was sentenced to 16 months imprisonment backdated to the date of her arrest and released.²²⁷ When she was released, this was subject to a second control order made prior to her sentencing hearing.²²⁸

250. The fourth proceeding in relation to a breach of a control order has not yet been determined. Mr Belal Saadallay Khazaal was arrested on 30 April 2021 and charged with three counts of contravening a control order.²²⁹ The AFP applied for, and obtained, a variation to the control order so that Mr Khazaal would not be required to comply with it while he was in custody awaiting the hearing of those charges.²³⁰ In November 2021, Mr Khazaal was granted bail, although the Court reportedly delayed formally making the order pending a Crown appeal.²³¹ By this date, the control order had expired. The Commission is not aware of whether the appeal against the granting of bail has been heard.
251. The penalties imposed to date for breaches of a control order have been severe and arguably disproportionate to the seriousness of the breach. There is a real risk in cases like these of a blanket approach being taken that treats all conduct constituting a violation of a control order as intrinsically serious by reason of the fact that it is a breach of a control order, and that one of the purposes of control orders is to protect the public from a terrorist act.²³² This draws a false equivalence between a failure to comply with control order (or ESO) conditions and an act of terrorism.
252. By way of example, Mr Naizmand, who had never been convicted of any substantive terrorism offence, spent either the same period or more time in prison for the breach of his control order than seven other terrorist offenders recently released from prison. Those offenders are:

Offender	Offence	Term of imprisonment
Ms Zainab Abdirahman-Khalif	Taking steps to become a member of a terrorist organisation	3 years
Ms Alo-Bridget Namoa	Conspiring to do an act in preparation for a terrorist act	3 years and 9 months

Offender	Offence	Term of imprisonment
Mr Murat Kaya	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	3 years and 8 months
Mr Shayden Jamil Thorne	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	3 years and 10 months
Mr Paul Dacre	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years
Mr Kadir Kaya	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years
Mr Antonino Granata	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years

253. Experience in New South Wales shows that breaches of ESO conditions imposed under the two State regimes are also punished severely.
254. The High Risk Offender Unit within Legal Aid NSW is a specialist team that represents offenders subject to applications for CDOs and ESOs under the *Crimes (High Risk Offenders) Act 2006* (NSW) and the *Terrorism (High Risk Offenders) Act 2017* (NSW). In a submission to the PJCIS in 2020, Legal Aid NSW described its experience of penalties imposed under these regimes in New South Wales:

ESOs carry heavy penalties for breach, notwithstanding the conduct that gives rise to the breach would in normal circumstances be lawful. In our experience, a zero tolerance approach is taken by supervising agencies to even relatively minor or technical breaches of ESOs which are dealt with by criminal punishment, namely, incarceration. This is in stark contrast to

the approach taken to parole orders, where warnings are routinely utilised as an alternative management strategy for less serious breaches. For example, we are aware of offenders under ESOs imposed under the [*Terrorism (High Risk Offenders) Act 2017* (NSW)] being charged and/or incarcerated, for shaving their beard, deviating from a movement schedule, drinking alcohol and sending/receiving messages from a dating app.²³³

255. The comparison with parole is apt. Parole is a system that allows a person who has been convicted of an offence to be released before the end of their sentence, subject to conditions imposed for the protection of the community. Parole is generally available in relation to all sentences, regardless of the degree of seriousness of the offence (other than very short sentences—eg, less than six months—and sentences of life imprisonment without parole).
256. In New South Wales, the relevant legislation explicitly provides discretion to community corrections officers about how to deal with breaches of parole conditions.²³⁴ This allows the response to be tailored to the seriousness of the breach. If a community corrections officer is satisfied that an offender has failed to comply with the offender's obligations under a parole order, the officer may:
- record the breach and take no action
 - give an informal warning to the offender
 - give the offender a formal warning that further breaches will result in referral to the Parole Authority
 - give a reasonable direction to the offender relating to the kind of behaviour by the offender that caused the breach
 - impose a curfew on the offender of up to 12 hours in any 24 hour period
 - in the event of a serious breach, refer the breach to the Parole Authority and make a recommendation as to the action the Parole Authority may take in respect of the offender.
257. This legislative framework was introduced in 2018 and is supported by a policy developed by Corrective Services NSW that sets out the circumstances in which a breach will trigger a report to the Parole Authority.
258. The new framework responded to a 2015 report of the New South Wales Law Reform Commission (NSW LRC) on parole, which

recommended a system of graduated sanctions for breaches of parole, which should be applied in a way that ensures a 'proportionate, swift and certain response'.²³⁵ The NSW LRC described the goals of a breach and revocation system in the following way:

The goals of managing risk and ensuring compliance are closely linked in a breach and revocation system. The system is strongest if responses to breaches serve both purposes simultaneously.

A breach and revocation system should allow Community Corrections and SPA [the State Parole Authority] to be responsive and flexible in dealing with breaches. Breaches should attract clear and proportionate consequences so that the practice of attaching conditions to parole remains meaningful. It should be clear to stakeholders in the system what is expected for a parolee to complete parole successfully.

The best way to manage the risk and behaviour of offenders on parole is to impose a proportionate sanction as soon as possible after a breach. A recent review of 20 studies of case management programs for substance abusing offenders in the US concluded that case management has a greater effect when coupled with sanctions that are swift and certain, and that swiftness and certainty of punishment has a larger deterrent effect than severity. ...

In a system aimed at providing proportionate, swift and certain sanctions, Community Corrections should perform a function over and above reporting breaches to SPA and SPA does not need to receive notification of all breaches. In our view, in order for Community Corrections to carry out professional and effective case management it must have the discretion to respond to minor, non-reoffending breaches of parole.²³⁶

259. The Commission considers that officers responsible for monitoring compliance with control orders and ESOs should be given equivalent legislative discretions to allow them to respond appropriately to different kinds of breaches. While the Court may specify certain conditions in an ESO from which an offender may apply for a temporary exemption,²³⁷ this is not sufficient to deal with the issues identified above because:
- some conditions may not be made subject to exemptions, and
 - the temporary exemption regime is only effective if an exemption is applied for in advance—it does not give officers flexibility to deal with minor breaches after they have occurred.
260. Following a recommendation made by the Commission,²³⁸ the PJCS unanimously recommended that Div 105A make clear that a specified

authority can apply discretion to whether a minor or unintentional breach of an extended supervision order or interim supervision order be subject to prosecution.²³⁹ In response, the Government agreed in principle with this recommendation, but said that law enforcement agencies already had operational discretion as to whether to investigate and charge a person for breaching an order.²⁴⁰ No amendment was made to Div 105A.

261. Given the way in which breaches of control orders and ESOs have been handled in practice, as described in this section, the Commission considers that there would be additional value in taking the course adopted by New South Wales in relation to breaches of parole conditions described in paragraph [256] above. This would provide greater visibility and clarity in relation to the exercise of such discretions.
262. Further, the Commission submits that there should be changes to the substantive offence provisions themselves to insert a defence of reasonable excuse. This would ensure that offenders are not prosecuted for trivial breaches for which a reasonable excuse was available.

Recommendation 23

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should be given statutory discretion to allow them to respond appropriately to different kinds of breaches, including by warning the offender, or deciding not to take action, in relation to minor breaches.

Recommendation 24

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should publish a policy providing guidance as to how it will exercise the discretion referred to in Recommendation 23.

Recommendation 25

The Commission recommends that the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to a control order or an ESO (ss 104.27A and 105A.18B) be subject to a defence of reasonable excuse.

11 Relationship with control orders

263. Now that an ESO regime has been introduced, Div 104 of the Criminal Code, dealing with control orders, should be repealed.
264. Control orders permit particular kinds of obligations, prohibitions and restrictions to be imposed on a person, based on the person's past conduct or anticipated future involvement in terrorism activity. These orders can be sought in a range of situations. They can be sought:
- (a) as an alternative to prosecution—for example, where a person cannot be arrested because there is no reasonable basis to suspect that they have been involved in a terrorist act, or where they have been arrested but the CDPP has advised that there is no reasonable prospect of conviction
 - (b) as a 'second attempt' following an unsuccessful prosecution—for example, where a person has been tried and acquitted
 - (c) once a terrorist offender has been released from prison, in circumstances where they still pose an unacceptable risk to the community.
265. The Commission provided detailed submissions to the PJCIS about why the use of control orders in categories (a) and (b) could not be justified, particularly in light of the availability of more appropriate alternatives including surveillance, arrest and prosecution for those reasonably suspected of having engaged in criminal conduct.²⁴¹ If there is insufficient evidence to ground a 'reasonable suspicion' of criminal conduct, including preparatory offences such as planning a terrorist act, then the significant restrictions involved in a control order cannot be considered to be a proportionate response. If a person has been tried and acquitted of a criminal offence, then the use of control orders based on the same evidence, but a lower standard of proof, raises serious concerns from a rule of law perspective.
266. However, where a convicted terrorist offender can be demonstrated, through cogent and reliable evidence, to still pose an unacceptable risk to the community at the end of their sentence, then continuing controls, which are reasonable, proportionate and necessary to manage that risk, can be justified. In recent times, control orders have been used overwhelmingly in the post-conviction context. In the first decade after control orders were introduced, only six control orders were made. There was then a period of several years when no control

orders were made at all. Since January 2019, there have been 19 control orders made in relation to 15 different people. With one exception,²⁴² all these people had been convicted of a terrorism offence and the initial control orders were sought at the point in time when they were being released into the community. **Appendix A** contains a list of what the Commission understands to be all 25 control orders made to the end of January 2022.

267. An ESO regime is a better way of dealing with people in category (c) above. This is because:
- the regime is appropriately targeted to people who have a demonstrated history of having committed a terrorism offence and who have been shown to pose an unacceptable risk to the community
 - as a result, the degree to which the conditions imposed limit the human rights of the person subject to the regime would be more likely to be proportionate to the purpose for their imposition
 - it avoids problematic aspects of the control order regime, including *ex parte* applications for interim orders based on hearsay evidence, and long delays prior to confirmation hearings
 - instead, the evidence in support of an application could be properly tested in court proceedings when an order is first sought.
268. The Commission recommends that the control order regime be repealed.
269. If the Commission's primary recommendation is not accepted and control orders are retained, there should at least be a clear delineation between 'preventative' orders made under the control order regime, and post-sentence orders made under Div 105A. Control orders should not continue to be available as an alternative form of post-sentence order now that the ESO regime has been introduced.
270. The desirability of such a split was recommended by the PJCIS as early as 2016. In its report on the HRTTO Bill, the PJCIS noted that control orders could be made for a range of different purposes. It went on to note:
- Given these differing purposes, an appropriate solution to the interoperability issue could be that, in the first instance, the application processes for the existing control order regime be retained for preventative cases. In addition, a separate application process could be

introduced for post-sentence control orders that aligns more closely to the CDO regime. The Committee suggests that consideration be given to these options.²⁴³

271. At the least, this would involve amending s 104.4(1)(c) of the Criminal Code to remove those grounds for making a control order that are based on *past* conduct involving a conviction, or conduct that could be the subject of a conviction, and leaving only those grounds that relate to the prevention of *future* terrorist acts.
272. If a person has engaged in conduct that could be the subject of a prosecution, they should be prosecuted rather than having a control order imposed. In substance, all of the conduct described in ss 104.4(1)(c)(ii), (iii) and (vii) could be the subject of a criminal prosecution.²⁴⁴
273. If a person has been convicted of a terrorist offence but does not pose an unacceptable risk to the community on release, they should not be subject to a control order (see s 104.4(1)(c)(iv)).
274. If, as recommended by the PJCIS, control orders were limited to preventative purposes, each of the grounds for control orders other than ss 104.4(1)(c)(i) and (vi) could be repealed.

Recommendation 26

The Commission recommends that the existing control order regime be repealed.

Recommendation 27

In the alternative to Recommendation 26, the Commission recommends that the existing control order regime be amended to focus only on orders for preventative purposes, as recommended by the PJCIS in 2016, leaving the extended supervision order regime to apply to post-sentence orders. This should be done by:

- (a) repealing ss 104.2(2)(b) and (d) of the Criminal Code
- (b) repealing ss 104.4(1)(c)(ii)-(v) and (vii) of the Criminal Code
- (c) making any other necessary consequential amendments.

Appendix A: Control orders made

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
1.	Jack Thomas	27 August 2006	Not confirmed	After acquittal for terrorism offences
2.	David Hicks	21 December 2007	19 February 2008	After controversial conviction in the US for a terrorism offence (which was ultimately set aside on 18 February 2015 by the United States Court of Military Commission Review)
3.	Mr MO	17 December 2014	Not confirmed	After conviction for an undisclosed offence
4.	CO4	17 December 2014	Not confirmed	Unknown
5.	Mr Ahmad Saiyer Naizmand (#1)	5 March 2015	30 November 2015	After conviction for a passport offence and while released on recognisance to be of good behaviour
6.	Mr Harun Causevic	10 September 2015	8 July 2016	Investigation stage: after CDPP had decided there was no reasonable prospect of conviction
7.	Mr EB	30 January 2019	22 February 2019	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
8.	Ms Zainab Abdirahman-Khalif (#1)	22 November 2019	17 July 2020	After initial acquittal for terrorism offence (subsequently overturned) and while appeal to High Court pending
9.	Ms Alo-Bridget Namoa (#1)	19 December 2019	3 February 2020	After conviction for a terrorism offence: conspiring to do acts in preparation for a terrorist act (ss 11.5(1) and 101.6(1) of Criminal Code)
10.	Mr Murat Kaya	22 January 2020	29 July 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
11.	Mr Ahmad Saiyer Naizmand (#2)	27 February 2020	Not confirmed*	After conviction for terrorism offence: breach of first control order (s 104.27 of Criminal Code)
12.	Mr Shayden Jamil Thorne (#1)	6 March 2020	17 August 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
13.	Mr Paul James Dacre (#1)	14 May 2020	3 June 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
14.	Mr Kadir Kaya	28 May 2020	31 August 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
15.	Mr Antonino Granata	29 May 2020	25 September 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
16.	Mr Belal Saadallay Khazaal	26 August 2020	7 October 2020	After conviction for a terrorism offence: making a document connected with assistance in a terrorist act (s 101.5(1) of Criminal Code)
17.	Mr Abdul Nacer Benbrika	1 December 2020	Not confirmed	After conviction for terrorism offences: being a member of a terrorist organisation and directing the activities of a terrorism organisation (ss 102.3(1) and 102.2(1) of Criminal Code) Continuing detention order in force for three years from 24 December 2020
18.	Mr Radwan Dakkak	31 December 2020	Not confirmed	After conviction for terrorism offences: associating with terrorist organisations (s 102.8(1) of Criminal Code)
19.	Mr Shayden Jamil Thorne (#2)	5 March 2021	9 June 2021	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
20.	Ms Zainab Abdirahman-Khalif (#2)	4 May 2021	22 December 2021	After conviction for a terrorism offence: intentionally taking steps to become a member of a terrorist organisation (s 102.3 of Criminal Code)

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
21	Mr Paul James Dacre (#2)	12 May 2021	8 July 2021	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
22	Mr Adam Mathew Brookman	6 July 2021	31 January 2022	After conviction for a terrorism offence: performing services in support or promotion of a foreign incursion offence (s 7(1)(e) of the then <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i> (Cth))
23	Mr Mehmet Biber	29 July 2021	Not yet confirmed	After conviction for a terrorism offence: entering a foreign state (Syria) with the intent to engage in hostile activity (s 6(1)(a) of the then <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i> (Cth))
24	Mr Blake Pender	7 October 2021	Not yet confirmed	After conviction for a terrorism offence and another offence: possessing a thing (a knife) connected with terrorism (s 101.4(1) of Criminal Code) and threatening a judicial officer (s 326(1)(b) of the <i>Crimes Act 1900</i> (NSW)) Continuing detention order in force for one year from 13 September 2021
25	Ms Alo-Bridget Namoa (#2)	24 November 2021	2 December 2021	After conviction for a terrorism offence: conspiring to do acts in preparation for a terrorist act (ss 11.5(1) and 101.6(1) of Criminal Code)

* Court records suggest that this matter was finalised on 20 May 2020 without a confirmed control order being made.

Endnotes

- ¹ Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCIS, 12 October 2016, at <https://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693>.
- ² Australian Human Rights Commission, *Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review*, submission to the Acting INSLM, 15 May 2017, at <https://www.inslm.gov.au/sites/default/files/11-australian-human-rights-commission.pdf>.
- ³ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- ⁴ Australian Human Rights Commission, *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, submission to the PJCIS, 20 October 2020, at <https://www.aph.gov.au/DocumentStore.ashx?id=dccdea26-8e64-433f-8cdd-51430e028cf3&subId=695306>.
- ⁵ For example, the right to life (article 6 of the ICCPR) and the rights to bodily integrity (an aspect of article 7 of the ICCPR) and security of person (article 9(1) of the ICCPR).
- ⁶ United Nations Security Council, *Resolution 1373* (2001), UN Doc S/RES/1373 (2001), paras 2(b) and (e).
- ⁷ Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <http://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#fnB8>.
- ⁸ United Nations General Assembly, *Resolution 60/288 The United Nations Global Counter-Terrorism Strategy*, UN Doc A/RES/60/288 (2006), p 9.
- ⁹ Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, 7 September 2017, at [5.5].
- ¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force generally 23 March 1976, entry into force for Australia (except Article 41) 13 November 1980, article 41 came into force for Australia on 28 January 1993).
- ¹¹ The Hon John von Doussa QC, *Security and Human Rights in Australia: Australia's counter-terrorism response*, Beijing Forum on Human, 21–23 April 2008, quoting Professor David Feldman, *The roles of Parliament in Protecting Human Rights: A view from the UK*, address at the Human Rights and Legislatures Conference, Melbourne University (20–22 July 2006).
- ¹² *Thomas v Mowbray* (2007) 233 CLR 307 (Gummow and Crennan JJ) at [61].
- ¹³ Independent National Security Legislation Monitor, *Annual Report 2020–21*, at [47].
- ¹⁴ Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency submission – Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime (Review of AFP Powers)*, submission to the PJCIS, 4 September 2020, p 3, at <https://www.aph.gov.au/DocumentStore.ashx?id=a7b77fd7-2a24-4d94-8177-59d38a55d085&subId=691389>. See also Independent National Security Legislation Monitor, *Annual Report 2020–21*, at [48]–[49].
- ¹⁵ Independent National Security Legislation Monitor, *Annual Report 2014–15*, pp 2–4.

- ¹⁶ Dylan Welch, 'Islamic State: Militant group calls on supporters to kill Australians 'in any possible way' *ABC News*, 22 September 2014, at <https://www.abc.net.au/news/2014-09-22/islamic-state-calls-on-supporters-to-kill-australians/5761502>.
- ¹⁷ Independent National Security Legislation Monitor, *Annual Report 2020–21*, at [48].
- ¹⁸ Independent National Security Legislation Monitor, *Annual Report 2020–21*, at [52]. See also *CDPP v Galea* [2020] VSC 750, which the INSLM describes as the first successful prosecution of a right wing terrorist in Australia (see *Annual Report 2020–21*, pp 25–26).
- ¹⁹ *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523 (Brennan J); *Michaels v The Queen* (1995) 184 CLR 117 at 129 (Gaudron J); *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61] (Kirby J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 (Totani) at 155-156 [423] (Crennan and Bell JJ).
- ²⁰ *Trobridge v Hardy* (1955) 94 CLR 147 at 152.
- ²¹ *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ).
- ²² *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 178-179 [56] (Kirby J).
- ²³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
- ²⁴ Human Rights Committee, *General comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), at [11]–[12].
- ²⁵ Human Rights Committee, *General comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), at [21].
- ²⁶ *Criminal Code* (Cth), ss 105A.10–105A.12.
- ²⁷ *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth).
- ²⁸ *Criminal Code* (Cth), s 105A.5(1).
- ²⁹ *Criminal Code* (Cth), ss 105A.5(1)–(2).
- ³⁰ *Criminal Code* (Cth), s 105A.6A(1).
- ³¹ *Criminal Code* (Cth), s 105A.7(1).
- ³² *Criminal Code* (Cth), s 105A.7(2).
- ³³ *Criminal Code* (Cth), s 105A.7A(1)(b).
- ³⁴ *Criminal Code* (Cth), s 105A.6.
- ³⁵ *Criminal Code* (Cth), s 105A.2.
- ³⁶ *Criminal Code* (Cth), ss 105A.7(5) and (6), and 105A.5(2)(b).
- ³⁷ *Criminal Code* (Cth), s 105A.4.
- ³⁸ *Criminal Code* (Cth), ss 105A.10–105A.12.
- ³⁹ *Criminal Code* (Cth), s 105A.16.
- ⁴⁰ *Criminal Code* (Cth), s 105A.17.
- ⁴¹ *Criminal Code* (Cth), s 105A.25.
- ⁴² *Crimes (High Risk Offenders) Act 2006* (NSW) and *Criminal Law (High Risk Offenders) Act 2015* (SA).
- ⁴³ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act* (NT).
- ⁴⁴ *Sentencing Act 1997* (Tas), s 19.
- ⁴⁵ *Minister for Home Affairs v Benbrika* [2020] VSC 888.

- ⁴⁶ *Lee v Benbrika* [2020] FCA 1723.
- ⁴⁷ *Criminal Code* (Cth), ss 104.5(1)(f) and 104.16(1)(d).
- ⁴⁸ *Minister for Home Affairs v Benbrika* [2021] HCA 4.
- ⁴⁹ *Benbrika v Minister for Home Affairs* [2021] VSCA 303.
- ⁵⁰ *Criminal Code* (Cth), s 105A.10(1A).
- ⁵¹ *Minister for Home Affairs v Benbrika (No 2)* [2021] VSC 684.
- ⁵² *Minister for Home Affairs v Pender* [2021] NSWSC 1644.
- ⁵³ *Booth v Pender*, Federal Court proceeding NSD993/2021, interim control order made on 7 October 2021. *Criminal Code*, ss 104.5(1)(d), (1D) and (1E).
- ⁵⁴ *McCartney v EB (No 2)* [2019] FCA 184 (Wigney J); *Booth v Murat Kaya* [2020] FCA 25 (Anastassiou J); *Booth v Namoa (No 2)* [2020] FCA 73 (Rares J); *Booth v Thorne* [2020] FCA 445; *Booth v Dacre* [2020] FCA 751 (White J); *Booth v Granata* [2020] FCA 768 (White J); *Booth v Kadir Kaya (No 2)* [2020] FCA 1119 (Anastassiou J); *Booth v Khazaal (No 2)* [2020] FCA 1528 (Wigney J); *Booth v Biber* [2021] FCA 871 (Nicholas J). For a list of HRTO eligible offenders due to be released to the end of 2025, see Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency supplementary submission – Review of AFP Powers – Division 105A*, submission to the PJCIS, 4 September 2020, Attachment B.
- ⁵⁵ *Criminal Code* (Cth), s 105A.3.
- ⁵⁶ Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency supplementary submission – Review of AFP Powers – Division 105A*, submission to the PJCIS, 4 September 2020, Attachment B.
- ⁵⁷ *R v Betka* [2020] NSWSC 77 at [38]–[41] (Harrison J).
- ⁵⁸ Australian Human Rights Commission, *Review of the 'declared areas' provisions*, submission to the PJCIS, 28 August 2020 at [7]. At <https://www.aph.gov.au/DocumentStore.ashx?id=17e06008-e0f9-491e-98f0-1913b835392a&subId=691220>.
- ⁵⁹ Law Council of Australia, *Review of Australian Federal Police powers: control orders; preventative detention orders; stop, search and seizure powers; and continuing detention orders*, submission to the PJCIS, 17 September 2020, pp 61–62, at <https://www.aph.gov.au/DocumentStore.ashx?id=0f763c4e-577f-4f65-86b3-dd1192863b83&subId=691812>.
- ⁶⁰ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [64] and [93] (Gageler J), [163] (Gordon J).
- ⁶¹ *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [23].
- ⁶² *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [56] (Gageler J).
- ⁶³ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at [170] (case study 5) <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- ⁶⁴ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [163] (Gordon J).
- ⁶⁵ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [79] (Gageler J).
- ⁶⁶ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [100] (Gageler J).
- ⁶⁷ Human Rights Committee, *General comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), at [21]; United Nations Human Rights Committee, *Rameka v New Zealand*, Communication No. 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003), at [7.3].

- ⁶⁸ *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 593 [22] (Gleeson CJ).
- ⁶⁹ *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 593 [22] (Gleeson CJ), 597 [34] (McHugh J), 616–617 [97]–[98] (Gummow J), 657 [225] (Callinan and Heydon JJ).
- ⁷⁰ *Thomas v Mowbray* (2007) 233 CLR 307 at 327–329 [15]–[16], 334 [28] (Gleeson CJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 246 [57], 250–251 [66]–[68], 252–254 [73]–[75], 258–260 [84]–[89] (Bell, Keane, Nettle and Edelman JJ); *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [11] (Kiefel CJ, Bell, Keane and Steward JJ).
- ⁷¹ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [174] (Gordon J).
- ⁷² *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [192]–[193] and [236] (Edelman J).
- ⁷³ *Eg, Nigro v Secretary to the Department of Justice* [2013] VSCA 213 at [6] considering the same test in the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). See also at [124] considering the importance of both qualitative and quantitative evidence required for this exercise.
- ⁷⁴ *State of New South Wales v Naaman (No 2)* [2018] NSWCA 328 at [29] (Basten, Macfarlan and Leeming JJA).
- ⁷⁵ *Terrorism (High Risk Offenders) Act 2017* (NSW), s 21.
- ⁷⁶ *Minister for Home Affairs v Pender* [2021] NSWSC 1644 at [45].
- ⁷⁷ *State of New South Wales v Ceissman (No 2)* [2018] NSW SC 1237 at [33] (Rothman J).
- ⁷⁸ *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [147].
- ⁷⁹ Human Rights Committee, *General comment No. 35 – Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), at [21].
- ⁸⁰ United Nations Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, UN Doc CCPR/C/GC/35, at [15].
- ⁸¹ Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, at [104].
- ⁸² Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [53].
- ⁸³ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [52].
- ⁸⁴ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [47] (Kiefel CJ, Bell, Keane and Steward JJ), [192], [194], [226] and [235] (Edelman J).
- ⁸⁵ *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [192] (Edelman J).
- ⁸⁶ Government amendment sheet PZ101, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, item 36, at https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6593_amend_596687d1-4879-4e9a-b5f3-48d327209130/upload_pdf/PZ101.pdf;fileType=application%2Fpdf.
- ⁸⁷ Supplementary Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Amendments to be Moved on Behalf of the Government, at 7 [19].
- ⁸⁸ Supplementary Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Amendments to be Moved on Behalf of the Government, at 20 [35].
- ⁸⁹ *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [337]–[345], [357]–[358] and [466]–[469].
- ⁹⁰ The Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No 90, Visa refusal and cancellation under section 501 and*

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- revocation of a mandatory cancellation of a visa under section 501CA, 8 March 2021, 5.2(3) at <https://immi.homeaffairs.gov.au/support-subsite/files/ministerial-direction-no-90.pdf>.
- ⁹¹ *Migration Act 1958* (Cth), s 501(6)(a) and (d)(i).
- ⁹² *Minister for Home Affairs v Pender* [2021] NSWSC 1644 at [57].
- ⁹³ Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 11–16, at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/High_Risk_Offenders_Final_Report.pdf; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 20–29, at http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf.
- ⁹⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623 [124]–[125] (most footnotes omitted).
- ⁹⁵ Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), [2.2.11]–[2.2.12], at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/High_Risk_Offenders_Final_Report.pdf; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), [2.72]–[2.73], at http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf.
- ⁹⁶ Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), [2.2.13]–[2.2.20], at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/High_Risk_Offenders_Final_Report.pdf; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), [2.74]–[2.78], at http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf.
- ⁹⁷ NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), [2.79]–[2.101], at http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf.
- ⁹⁸ *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603.
- ⁹⁹ *Crimes (High Risk Offenders) Act 2006* (NSW), s 9(3)(d).
- ¹⁰⁰ *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [40].
- ¹⁰¹ *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [51].
- ¹⁰² *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [51].
- ¹⁰³ *State of New South Wales v Wainwright (Final)* [2020] NSWSC 104.
- ¹⁰⁴ For example, *Criminal Procedure Act 1989* (NSW), s 62(1)(b)–(c), which is picked up for the prosecution of federal offences in New South Wales as a result of the *Judiciary Act 1903* (Cth), s 68.
- ¹⁰⁵ For example, *AJ v The Queen* (2010) 32 VR 614 at [22]–[28] (Weinberg and Bongiorno JJA, Buchanan JA agreeing); *Mallard v The Queen* (2005) 224 CLR 125; *Grey v The Queen* [2001] HCA 65.
- ¹⁰⁶ *Criminal Code* (Cth), ss 104.2(3)(aa)(ii), 104.3(d)(ii).
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- ¹¹⁸ *State of New South Wales v Naaman (No 2)* [2018] NSWCA 328 at [92]–[93] (Basten, Macfarlan and Leeming JJA).
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- ²³⁰ *Commissioner of the Australian Federal Police v Khazaal* [2021] FCA 781 (Wigney J).
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- ²⁴² The exception relates to the first control order made in relation to Ms Zainab Abdirahman-Khalif which was sought after she had been acquitted on appeal to the Supreme Court of South Australia. This acquittal was overturned on further appeal to the High Court. The second control order made in relation to Ms Abdirahman-Khalif was made after she had completed her sentence.
- ²⁴³ PJCIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.182].
- ²⁴⁴ Conduct described in (ii) is prohibited by s 101.2 of the Criminal Code, provided that the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act and the person knows or is reckless as to the existence of the connection; conduct described in (iii) is prohibited by s 119.1(2) of the Criminal code; conduct described in (vii) is prohibited by ss 11.2, 119.1(2) and 119.4 of the Criminal Code.