Law Council
OF AUSTRALIA

Supplementary Submission: Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth)

Parliamentary Joint Committee on Intelligence and Security

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Acknowledgements

We gratefully acknowledge the contribution of the Law Council's National Criminal Law Committee to this submission.

Introduction

1. The Law Council appreciated the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) at its public hearing, held on 14 March 2024.

2. During the hearing, we were asked to elaborate on the current arrangements for rehabilitation of high-risk terrorism offenders as well as whether current resourcing is adequate to meet the objectives of rehabilitation. In this regard, Mr Hill MP asked:[1]

> *… if there is anything in particular in addition to terrorist offenders beyond what I would agree are you're pretty powerful normative points, it would be very useful to hear it. It might just be that we should take it that it's a very tiny cohort and that an additional level of case management and investment, given the impact on the community of reoffending with these kinds of offenders is so significant, is maybe what we take from it.*

3. Deputy Chair, Mr Wallace MP then added:[2]

> *When you're thinking about a design … [of] the rehabilitation and reintegration, how does that work practically? Are you looking to tap into current state-based rehabilitation systems? We're not going to create a whole new bureaucracy for CDO [Continuing Detention Order] offenders who are under this regime.*

4. The purpose of this supplementary submission is to provide a consolidation of our views, expressed in various parliamentary and independent reviews across recent years, about the rehabilitation of offenders convicted of a terrorism offender under Part 5.6 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**). This submission also contains practical observations regarding the adequacy of existing rehabilitation programs directed to this cohort of offenders—these observations are drawn from practitioners with experience of these matters as well as academic experts. We encourage the Committee to explore these topics in further detail with appropriately qualified experts and government agencies.

5. To provide further context for the areas of focus in this submission, we make three observations about the context for rehabilitation measures directed at countering religiously motivated violent extremism.

   - The Law Council refers to the ongoing grassroots work of Islamic organisations, such as the Board of Imams Victoria, in providing effective counselling and diversionary interventions within their communities. For instance, the Board of Imams Victoria works in collaboration with Victoria Police to deliver the Community Integration Support Program (discussed further below). The Board explained in a recent submission that this program 'has demonstrated the effectiveness of early engagement with individuals vulnerable to violent extremism and referral to effective intervention and community supports'.[3] However, based on the feedback we have received, we acknowledge that this type of collaboration is not without difficulty, requires

[1] Parliamentary Joint Committee on Intelligence and Security, Proof Committee Hansard—Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth) (Thursday, 14 March 2024) 21.
[2] Ibid.
[3] See further, Joint Submission of Board of Imams Victoria and Victoria University's Applied Security Science Partnership, Submission no. 16 to the Victorian Legislative Council Legal and Social Issues Committee, Inquiry into Extremism in Victoria (Submission 23 May 2022), 16.

progressive evaluation, and underlines the importance of maintaining independence from law enforcement authorities in order to build therapeutic relationships.

- Investment in the preventative element of community-based interventions currently delivered by organisations like the Board of Imams Victoria has resulted in considerable dividends. In this regard, Sheikh Sarakibi representing the Board of Imams Victoria said: '[w]e have found that not only are we contributing to social cohesion in general … we are getting through to some of these individuals earlier before things evolve into something that becomes an offence or something that becomes a level of terrorism'.[4]
- Although this submission focusses on the context of religiously motivated violent extremism including radical Islamic ideologies, we are mindful that the there is an increasing trend towards politically motivated violent extremism including from 'Neo-Nazis' and white supremacists.[5] We have given some consideration to the proper scope of the criminal law to regulate these threats in two recent submissions.[6] We suggest that all rehabilitation measures should be continuously evaluated to ensure that they remain adapted to the changing profile of the cohort of high-risk terrorist offenders.

CDOs are not designed to serve rehabilitative objectives

6. As we have explained in our primary submission to this inquiry, the Law Council recommends that Division 105A should be amended to abolish Continuing Detention Orders (**CDOs**), or alternatively that the CDO regime should not be renewed beyond its current sunset date of 7 December 2026.[7]

7. Our view is that both rehabilitation and community safety objectives would be better achieved by the managed release of offenders, who continue to pose an unacceptable risk after the completion of their maximum sentence, under a more proportionate form of the Extended Supervision Order (**ESO**) regime. We support the amendments proposed by the fourth Independent National Security Legislation Monitor, Mr Grant Donaldson SC, that are directed to strengthening the proportionality of the ESO regime.[8]

[4] Victorian Parliament, Legislative Council Legal and Social Issues Committee, Transcript—Inquiry into Extremism in Victoria (Melbourne, Tuesday, 14 June 2022), 30.
[5] Australian Government, Current National Terrorism Threat Level (Online, 28 November 2022).
[6] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into extremist movements and radicalism in Australia (Submission, 22 January 2021). Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023).
[7] Law Council of Australia, Submission no. 14 to the Parliamentary Joint Committee on Intelligence and Security, Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth) (Submission, 17 July 2023). ('***Law Council's 2023 Submission***')
[8] See especially, Law Council's 2023 Submission, 17-23 (regarding amendments to the making of, and conditions available under, ESOs) and 13-18 (regarding amendments to other procedural safeguards in the division).

Treatment of persons detained under CDOs

8. Section 105A.21 of the Criminal Code empowers the AFP Minister to make arrangements with State and Territory governments for the detention of persons subject to CDOs in State and Territory prisons.

9. We have consistently argued there should be greater transparency about arrangements that are made under section 105A.21.[9] This should include greater public and Parliamentary scrutiny of the adequacy of the steps taken by the AFP Minister to ensure that any State and Territory prison accommodation will be compatible with the requirements in section 105A.4 for the CDO subject to be treated in a manner that is appropriate to their status as a person who is not serving a sentence of imprisonment. International human rights law requires that, for preventative detention to be legitimate, detention conditions be non-punitive and aimed at detainees' rehabilitation.[10]

10. We share Legal Aid NSW's concern that subjects of a CDO may currently be housed in conditions unsuited to rehabilitation. For instance, Legal Aid NSW observes that '[m]any terrorism offenders, or other inmates identified and classified as an Extreme High-risk Restricted (EHRR)/ National Security Identified (NSI) are held at Goulburn High-risk Management Correctional Centre …' and that '[t]here is almost no publicly available information about the policies and procedures applied to management of these inmates …'[11]

11. The Attorney-General's Department has submitted to this review that:[12]

> *… housing agreements established between the Commonwealth and states and territories outline the treatment and management of offenders detained under a CDO to ensure compliance with legislative requirements. In entering these agreements, the Commonwealth is able to monitor the detention conditions of an individual subject to a CDO through regular, periodic reporting, ad-hoc incident reporting from the relevant state authorities and ongoing engagement with states and territories through HRTO governance arrangements.*

12. However, without publication of those housing agreements with states and territories, we have found it difficult to assess whether there are sufficient safeguards and oversight mechanisms in place to ensure detention conditions are non-punitive. Accordingly, we maintain our previous recommendations to strengthen transparency of housing arrangements made by the AFP Minister to house subjects of CDOs.[13]

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[9] See further, Law Council of Australia, Submission no. 10 to Parliamentary Joint Committee on Intelligence and Security, Review of Australian Federal Police powers (control orders; preventative detention orders; stop, search and seizure powers; and continuing detention orders) (Submission, 17 September 2020), 71 Recommendation 42. ('***Law Council's 2020 Submission***')

[10] See further, Law Council of Australia, Policy Statement on Principles Applying to Detention in a Criminal Law Context (22 June 2013), 8 Principle 6(g). See further, *International Covenant on Civil and Political Rights*, Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 9(1); UN Human Rights Committee, General comment No 35 on Article 9, liberty and security of person (2014); and INSLM's Report, 58-65.

[11] Legal Aid NSW, Submission no. 9 to the Parliamentary Joint Committee on Intelligence and Security, Review of Post-Sentence Terrorism Orders under Division 105A of the Criminal Code Act 1995 (Cth) (Submission, June 2023), 15.

[12] Attorney-General's Department and Department of Home Affairs Joint Submission, Submission no. 11 (Attachment 4) to the Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission to the Independent National Security Legislation Monitor's Review into Division 105A of the Criminal Code Act 1995, (Supplementary Submission, September 2022), 2-3.

[13] Law Council's 2020 Submission, 71 Recommendation 42.

Recommendation 1: Publication of arrangements with States and Territories

- **Section 105A.21 of the Criminal Code should be amended to require the AFP Minister to make a notifiable instrument, within the meaning of the *Legislation Act 2003* (Cth), about the making of any arrangements with State and Territory government for the detention of persons subject to CDOs:**
  - **the notifiable instrument should provide details of the relevant arrangement (ideally a copy of a written agreement unless disclosure of certain parts would be likely to cause serious harm to security interests); and**
  - **in the interim, existing housing agreements with states and territories should be published in the AFP Minister's annual report to the maximum degree possible, taking into account security concerns.**

Preconditions to Minister's power to make agreements

13. For reasons we have previously set out, we reiterate our recommendation that the power of the AFP Minister to make agreements with States and Territories under section 105A.21 for the detention of people who are subject to a CDO in State and Territory facilities should be subject to greater restriction.[14] That power under section 105A.21 should be restricted to circumstances where the Minister is satisfied, on reasonable grounds, that the person's conditions of detention will be compatible with Australia's human rights obligations. This should include requirements to be satisfied about:

    - the establishment, adequacy and accessibility of custodial rehabilitative programs;
    - the adequacy of arrangements to ensure that people who are subject to a CDO will be treated in a manner appropriate to their status as persons who are not serving criminal sentences of imprisonment; and
    - the adequacy of independent oversight (including consideration and redress of complaints).

14. We reiterate our recommendation that section 105A.4 should be amended to remove one of the exceptions to the obligation to treat people who are subject to a CDO in a way that is appropriate to their status as a person who is not serving a criminal sentence.[15] This is the exception in paragraph 105A.4(1)(a) for the 'management' or 'good order' of the prison.

15. We maintain our view that if a prison facility cannot accommodate a CDO subject in a way that is compatible with their status, it should not be permitted to detain the person under the CDO. Further, as we have recommended above, the Commonwealth should not be permitted to enter into an arrangement with a State or Territory to detain a CDO subject, unless satisfied on reasonable grounds that the State or Territory prison can meet the 'appropriate treatment' obligation in subsection 105A.4(1). We agree with Mr Donaldson that maintaining these broadly framed exceptions could

[14] Law Council's 2020 Submission, 69 Recommendation 39.
[15] Ibid, Recommendation 40.

mean that 'a defendant could readily and easily be detained in conditions that are not appropriate to his or her status'. In this regard, Mr Donaldson said further:[16]

> *Whether any such decisions would be reviewable in any meaningful way is doubtful. That defendants held in facilities in different States and Territories could be treated differently is inevitable.*

16. We strongly agree with Mr Donaldson's observation that further reform is needed to ensure independent oversight of compliance with section 105A.4 to ensure proposed detention arrangements for CDO subjects are non-punitive and adapted to the rehabilitation of the offender. We agree that '[i]t could never be accepted that people subject to CDOs in different States be detained in circumstances and conditions that are significantly different'.[17] The Law Council agrees with Mr Donaldson that a proposed new ESO Authority would be best placed to provide independent oversight of proposed detention arrangements as well as 'actual arrangements throughout the term of detention to ensure that defendants are treated in a manner appropriate to and consistent with their status'.[18]

Recommendation 2: Human rights preconditions to making arrangements

- **Section 105A.21 of the Criminal Code should be amended to provide that the power of the AFP Minister to make agreements for detention of persons subject to CDOs in State and Territory prisons should be subject to a requirement that the Minister is satisfied, on reasonable grounds, that the person's conditions of detention will be compatible with Australia's human rights obligations, including adequate access to custodial rehabilitative programs.**
- **The role of an independent ESO Authority should include both approval and verification of proposed detention arrangements as well as actual arrangements throughout the term of detention to ensure that defendants are treated in a rehabilitative manner.**

Inadequacy of rehabilitation programs available in custody

17. For the reasons outlined in this submission, we are not persuaded of the adequacy of rehabilitation options available to members of the high-risk terrorism offender cohort while they remain in custody. In short, we think these programs are underutilised by offenders because of a perception that they lack independence and are not conducive to forming therapeutic relationships.

18. We have previously highlighted the importance of a high-risk terrorism offender having access to rehabilitation programs as soon as possible after their sentence commences, and for them to be held in detention facilities that encourage an environment of rehabilitation.[19] A delay in the provision of rehabilitation programs until shortly before an offender becomes eligible for parole is not sufficient.

19. We support legislative amendment to require an early assessment of an offender as soon as possible after sentencing, so that an appropriate rehabilitation program can be put in place promptly. This may assist in reducing the need for CDOs to be sought and issued, and may assist in ensuring that any remaining level of risk that the person may present is capable of being managed within the community.

[16] INSLM's Report, 148 [509].
[17] Ibid, 148 [510].
[18] Ibid.
[19] Law Council's 2020 Submission, 66-67 [264] – [265].

Recommendation 3: Post-sentencing assessments and referrals

Section 105A.23 (warning to persons sentenced for serious terrorism offences) should be amended to require that:

- **a preliminary risk assessment is be undertaken in relation to a person who is convicted of, and sentenced to imprisonment for, a serious terrorism offence (and who is therefore liable to a CDO) for the purpose of a referral to a custodial rehabilitation program; and**
- **a duty is imposed on the Minister for Home Affairs to take all reasonable steps, as soon as reasonably practicable after the person is sentenced, to ensure that an appropriate custodial rehabilitation program is identified based on the person's risk assessment, and the person is referred to it.**

Absence of parole as a rehabilitation tool during sentence

20. Releasing offenders conditionally on parole into the community—with access to rehabilitation programs and case management support—is an important tool to support an offender's reintegration into the community prior to the expiry of their maximum sentence. We consider that the absence of parole as a rehabilitation tool is likely to be a significant constraint on the opportunity for rehabilitation of terrorism-related offenders.

21. Section 19AG(1)(b) of the *Crimes Act 1914* (Cth) already restricts a sentencing judge's discretion, in respect of terrorism offenders, because it states that the court must fix a non-parole period of at least 75 per cent of the sentence. In practice, apart from one or two very rare exceptions, terrorism offenders are not released on parole even after the completion of their non-parole period. An offender who is subject to a CDO will remain in detention after their sentence expires, and could be subject to multiple consecutive CDOs.

22. The Law Council considers that one of the difficulties of the current system for federal parole is the arbitrary refusal of offenders convicted of certain types of offences, such as terrorism offences. We have previously expressed concern that, based on available evidence, between 2018 and November 2021 no federal terrorism offender had been granted parole.[20] We understand that only one or two have been released since then.

23. Courts have noted that treatment of terrorism offenders where an offender may be subject to a long custodial sentence—without an opportunity for conditional release on parole and phased reintegration into the community—is not conducive to continuing rehabilitation.[21]

24. The Law Council recommends that this Committee indicate its support for establishing an independent federal parole authority for the reasons set out in the Law Council's position paper.[22] We also recommend that the community-based rehabilitation programs outlined below, such as the NSW Engagement and Support Program, be expanded to support a more balanced approach to parole of terrorism offenders.

[20] Law Council of Australia, Principles underpinning a federal parole authority (Position Paper, November 2022), 20 citing Attorney General's Department, Documents Released Under Freedom of Information to NSW Legal Aid, (2021) FOI 21/233. ('***Law Council's Federal Parole Authority Position Paper***')
[21] *Attorney-General of the Commonwealth of Australia v Ghazzawy (Final)* [2024] NSWSC 208, [66].
[22] Law Council's Federal Parole Authority Position Paper.

Recommendation 4: Establishing an independent federal parole authority

- **An independent federal parole authority should be established for the reasons outlined in the Law Council's Position Paper.**

Evaluation of custodial and community-based rehabilitation

International literature on countering violent extremism related rehabilitation programs

25. As a general point, there is limited evidence to draw firm conclusions about the effectiveness of interventions aimed at countering violent extremism. However, commentators have highlighted the importance of building trust between members of the high-risk terrorism offender cohort and those administering rehabilitation services.[23] One recent scoping study of the international literature on countering violent extremism programs highlighted the 'importance of so-called soft approaches by building trust and resilience among violent extremist clients, and facilitating their prosocial engagement'.[24]

26. Compared to other cohorts of offenders, high-risk terrorism offenders are more likely to require 'greater investment in trust building due to their mistrust of mainstream society and state representatives in particular'[25] and further that:[26]

> *Prison and probation management may facilitate trust by ensuring humane conditions, fair treatment, safe environments and, for Muslim [violent extremist clients], respect for religious practices. A common view is that trust is a requisite to promote positive change or counteract radicalisation.*

27. In a study about mandatory participation in interventions to counter violent extremism—requested by the Department of Home Affairs and tabled in Parliament—the authors concluded that mandating participation in countering violent extremism interventions may not offer greater benefits overall compared to voluntary participation.[27] However, the authors found that legislative schemes that mandate countering violent extremism program participation in prisons or in the community should consider matters such as: '[h]ow target groups will respond to being forced to participate'; '[e]nsuring quality therapeutic relationships can be developed between clients and intervention providers', and '[a]voiding an emphasis upon simply enforcing compliance, control and surveillance'.[28]

28. In the course of preparing this response, we spoke to Dr Anne Speckhard, who is an internationally recognised expert in this area and has interviewed over 800 terrorists, violent extremists and supporters around the world including Europe, Central Asia, the Soviet Union and the Middle East.[29] These include 273 ISIS defectors, returnees from

[23] See for example, Johan Axelsson, Leni Eriksson & Lina Grip, 'Managing Violent Extremist Clients in Prison and Probation Services: A Scoping Review,' *Terrorism and Political Violence* (2023), 8-10.
[24] Ibid, 14.
[25] Ibid, 8.
[26] Ibid, 8.
[27] Adrian Cherney, Kathleen De Rooy, Elizabeth Eggins & Lorraine Mazerolle, Mandatory participation in CVE interventions (15 February 2021, Tabled House 11 May 2023; Senate 14 June 2023) Document number: 2023-001444.
[28] Ibid, 4.
[29] See generally, Anne Speckhard, *Talking to Terrorists: Understanding the Psycho-Social Motivations of Militant Jihadi Terrorists, Mass Hostage Takers, Suicide Bombers & Martyrs* (Advances Press, 2012); Anne

prisons as well as 16 Al-Shabaab members. It is a matter of public record that Dr Speckhard has been approved by the Government to provide an assessment in one notable case of a CDO subject. Dr Speckhard has indicated an interest in providing evidence to this review and we are grateful for her advice and expertise.

29. Dr Speckhard, based on her survey of successful rehabilitation programs across international jurisdictions, recommends consideration of the following features of successful countering violent extremism rehabilitation program.[30]

- **The need for a tailored approach**—a successful program must 'identify prisoners or detainees according to their level of radicalization' and be 'tailored to address the process of engagement in the movement; original and current motivators; and the level or current engagement …'[31] For example, dealing with a person who is deeply versed in Islam and committed to social change to redress injustice will be different from a person who has a superficial or internet-informed view of Islam, and is looking for a sense of belonging. In this regard, Dr Speckhard observes:[32] '*For the program to work well the militant jihadis must be approached contextually, addressing the issues that are important to them (anger over occupation, violation of sacred values, trauma, desire for revenge, search for meaning, need for belonging, need for a father figure, marginalization, discrimination, etc.). Motivational incentives that address their needs and motivations for having become involved work the best'.*

- **The need for a multidisciplinary approach combining psychological and religious expertise**—there should be productive collaboration between religious experts and psychologists in delivering successful countering violent extremist rehabilitation programs. In her practice, she conducts joint interviews with a person who is well-read in Islamic doctrine, she pointed out their complementary skills work well together: the Islamic scholar can correct misreading or misinterpretations of the Koran while the psychologist can use interview techniques to explore and challenge the person's thought process and belief systems. In this regard, she observes:[33] '… *the road to radicalization involves many group dynamics and individual vulnerabilities that are best addressed using psychological methods in conjunction with imam involvement. Many psychological tools (cognitive therapy, guided imagery, etc.) can be used to help militant jihadi prisoners envision restoring themselves to a non-violent stance, rebuilding to engage with their social environment positively'.*

- **The quality of religious mentors**—the charisma, authority, experience and age of mentors providing religious guidance is a critical determinant of success. It is vital to ensure that the rehabilitation is tailored to the original and current motivators of the offender in question. In this regard, Dr Speckhard observed:[34] '*in the case of religious challenge it is important to realize that hard core militant jihadis who know their Koran well will likely demand a very highly trained imam*

Speckhard and Ahmet S Yayla, *ISIS Defectors: Inside Stories of the Terrorist Caliphate* (Advances Press, 2016); Anne Speckhard, *Homegrown Hate: Inside the Minds of Domestic Violent Extremists* (Advances Press, 2023).

[30] See especially, Anne Speckhard, 'Prison and Community Based Disengagement and De-Radicalization Programs for Extremists Involved in Militant Jihadi Terrorism Ideologies and Activities' in Prison and Community Based Disengagement and De-Radicalization Programs for Extremists Involved in Militant Jihadi Terrorism Ideologies and Activities' in Laurie Fenstermacher, Anne Speckhard (eds), *Social Sciences Support to Military Personnel Engaged in Counter-Insurgency and Counter-Terrorism Operations: Report of the NATO Research and Technology Group* (NATO Science Series, 2011). ('***Speckhard 2011***')

[31] Ibid, 11-11.

[32] Ibid.

[33] Speckhard 2011, 11-11.

[34] Ibid.

> *to speak with them and are unlikely to respect anyone other than a Salafi scholar. Likewise when sectarian violence is a huge issue as it has been with al Qaeda in Iraq it may be difficult to use Shia staff for Sunni prisoners because they may be rejected or threatened'.*

30. Finally, we submit that the extremely low recidivism rates of terrorism offenders should be kept in mind in any evaluation of the effectiveness of deradicalisation related programs.[35] Studies generally suggest that 'reported recidivism is in the low single or double digits'.[36]

Addressing lack of engagement with custodial rehabilitation programs

31. With that context in mind, we consider that the effectiveness of current rehabilitation programs available in custody may be diminished by a perceived lack of independence from law enforcement authorities. This perception may prevent the formation of therapeutic relationships that are critical to engagement of high-risk terrorism offenders with rehabilitation services.

32. In practice, currently available rehabilitation programs countering violent extremism often involve religious guidance about Islam. In this context, we underline the importance of ensuring providers of this guidance are appropriately qualified, independent, and well-respected within the Muslim community. We support the fourth Independent National Security Legislation Monitor, Mr Grant Donaldson SC's recommendation to establish an independent statutory body—the Extended Supervision Order Authority (the **ESO Authority**)—because it is likely to have greater credibility in auditing the quality of such interventions and ensuring continuous evaluation in consultation with the Muslim community.[37]

33. In NSW, when a high-risk terrorism offender is in custody as a part of their custodial sentence or because of a Continuing Detention Order (**CDO**), they may elect to voluntarily engage with the Proactive Integrated Support Model (**PRISM**) or Proactive Assessment and Intervention Service (**PRAXIS**). PRAXIS is also available in the community as part of a terrorism related post-sentence order, in that case participation may be mandatory, for example, if participation in a specified rehabilitation program is required under a condition of an ESO.

34. PRISM is a disengagement intervention delivered by Corrective Services NSW aimed at prison inmates who have a conviction for terrorism or have been identified as at risk of radicalisation. The program provides tailored intervention plans to address the psychological, social, theological and ideological needs of radicalised offenders to redirect them away from extremism and help them transition out of custody.[38]

35. Evaluations of the effectiveness of PRISM have generally found benefits but have also identified implementational challenges arising from the difficulty in establishing trusting

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[35] See further, Law Council's 2023 Submission, 9 [12](d).
[36] O Hodwitz, 'The Terrorism Recidivism Study: an Update on Data Collection and Results' (2021) 15 *Perspectives on Terrorism* 27, 28 cited by INSLM's Report 96 [316].
[37] Commonwealth of Australia, Independent National Security Legislation Monitor, Mr Grant Donaldson SC, Review of Division 105A (and related provisions of the Criminal Code (Report, 2022), 14 [33]; regarding role of ESO Authority in evaluating rehabilitation services, 148 -149 [511] – [513]. ('the ***INSLM's Report***')
[38] See for example, Adrian Cherney, 'Evaluating interventions to disengage extremist offenders: a study of the proactive integrated support model (PRISM)' (2020) 12(1) *Behavioral Sciences of Terrorism and Political Aggression* 17-36. ('***Adrian Cherney 2020***')

relationships.[39] Crucially, in a 2018 evaluation of PRISM, Professor Adrian Cherney identified the difficulty in winning the trust of offenders as a key implementational challenge for PRISM finding:[40]

> *The process of gaining consent can be time consuming given that many offenders are suspicious about the aims of the intervention and can initially be distrustful of PRISM staff, which is compounded by the general distrust of institutional authorities amongst the extremist cohort … For offenders, some of the key concerns of participating in PRISM revolved around such issues as how it would impact on any future decision about their release, if anything said during a PRISM session would be used against them in the future, and if family members would know about their involvement.*

36. That finding is consistent with feedback we have received from Legal Aid NSW that the absence of confidential therapeutic relationships undermines engagement with rehabilitation programs like PRISM.

37. In the case of one high-risk offender in NSW—who was eligible to participate in PRISM and PRAXIS and had expressed a general willingness to participate in rehabilitation programs—the offender refused to participate in these programs while in custody. The court referred to evidence that he had 'expressed concerns that his engagement in these programs could result in information being used against him, and that the psychologists are not properly trained to be able to understand the issues discussed (citations omitted)'.[41]

38. Similarly, in Victoria, the Community Integration Support Program (the **CISP**) suffers from similar dampened engagement because of a perception of a lack of independence. While the CISP is not only targeted at terrorism offenders and is intended to be an early intervention program to support individuals assessed as being vulnerable to religiously motivated violent extremism, it 'also provides services to convicted terrorists for the purpose of assisting with their rehabilitation and reintegration'. Victoria Police is responsible for administering the program and has described its intended focus in its Counter Terrorism Strategy.[42]

39. The Law Council has received feedback from Victorian practitioners that the perceived lack of independence and transparency of CISP has hampered its effectiveness for similar reasons to the issues encountered in NSW.

40. The Law Council is concerned by certain grave examples where Victoria Police have adopted a punitive approach to the engagement of offenders with rehabilitation programs. For instance, in a recent case involving a vulnerable child with a fixation in relation to ISIS, a permanent stay was granted because of the contribution of law enforcement officials to the offender's re-radicalisation because of online chats by a covert officer—these actions were contrary to the ongoing engagement of the offender and their family in the CISP program.[43] In that case, it was found that the actions of

[39] See for example, Adrian Cherney 2020; see also, Adrian Cherney & Emma Belton 'Assessing intervention outcomes targeting radicalised offenders: Testing the pro integration model of extremist disengagement as an evaluation tool' (2020) *Dynamics of Asymmetric Conflict* 13(3) 193-211. The Law Council notes that a more recent systematic review is due to published: James Lewis, Sarah Marsden, Adrian Cherney, et al PROTOCOL: Case management interventions seeking to counter radicalisation to violence: A systematic review of tools and approaches (2023) *Campbell Systematic Reviews* 19(1) 1-35.
[40] Adrian Cherney 2020, 24.
[41] *Attorney-General of the Commonwealth of Australia v Amin (Final)* [2023] NSWSC 1586, [51].
[42] Victoria Police, Counter Terrorism Strategy 2022-2025 (January 2023).
[43] *CDPP v Carrick (a pseudonym)* [2023] VChC 2

law enforcement officials had 'completely and inevitably undermined the therapeutic process'.[44]

41. In contrast to the constraints in building trust faced by religious figures perceived as closely connected with custodial authorities, for example, in the context of PRISM—prison chaplains, providing access to well-respected religious guidance in the community may be a more effective mechanism to promote engagement. In *Gaughan v Causevic* (No. 2) [2016] FCCA 1693—which was an application for the confirmation of an interim control order made under Division 104 of the Criminal Code—it was accepted by both parties to the order that the respondent's compliance with an obligation requiring contact with a well-respected moderate Imam would be a protective influence on the respondent.[45]

42. Dr David Neal SC, senior counsel for the respondent in that application, noted that the moderate Imam in that case was very experienced, the leader of a prominent local Mosque, and well-respected in the local community—this was conducive to a relationship of trust and influence between the respondent and the Imam.

43. Additionally, the benefit of combined engagement with both a psychologist and religious expert was confirmed in that case. Dr Neal noted that Mr Causevic reported considerable benefit and comfort from sessions with an Imam from his local mosque (someone who had been approved by the AFP) and a psychologist (also approved by the AFP). The Iman deepened Mr Causevic's knowledge of Islam which had previously been based primarily on material obtained from the internet, and the psychologist worked on his general problems in his personal circumstances.

44. We suggest that this Committee should endorse Mr Donaldson's recommendation that, within the next three years, the Attorney-General's Department publish a report about establishing an ESO Authority.[46] The Law Council agrees with Mr Donaldson that the functions of such an authority should include oversight of the availability, resourcing and effectiveness of rehabilitation and reintegration services provided to subjects of CDOs and ESOs. Part of that oversight should include ensuring that the countering violent extremism related rehabilitation programs are delivered independently of law enforcement and custodial authorities.

45. In the absence of an ESO Authority, there should be greater independence between law enforcement and custodial authorities and delivery of countering violent extremism rehabilitation measures. This is more likely to occur in a community-based context, with access to well-respected religious guidance and wrap-around social, welfare and employment supports, as can be seen in the NSW Engagement and Support Program, described further below.

46. The incentive to participate in countering violent extremism related rehabilitation programs may be enhanced by maintaining orthodox safeguards protecting the right to silence. For reasons outlined in a previous submission, the Law Council expresses caution about conditions under post-sentence orders, for example under an ESO,[47] that would require a person to make potentially prejudicial disclosures in the course of mandatory rehabilitation activities without adequate safeguards regarding the direct use and derivative use of that information.[48] We consider that this problem is partly

[44] Ibid, [81].
[45] *Gaughan v Causevic* (No. 2) [2016] FCCA 1693, [141].
[46] INSLM's Report, 14 [33].
[47] See for example, Criminal Code, s. 105A.7B(3)(n)(i) (the court may impose conditions relating to the offender 'attend and participate in treatment, rehabilitation or intervention programs or activities')
[48] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism and Other Legislation Amendment Bill 2023 (13 October 2023), 20 – 21 [51] – [55]

addressed by establishing an ESO Authority that is independent of law enforcement agencies, we also support inserting direct use and derivative use immunities in relation to adverse material disclosed during a subject's participation in rehabilitation, psychological or similar counselling programs.

Recommendation 5: Improving engagement with custodial rehabilitation

- **Within the next three years, the Attorney-General's Department should publish a report about establishing an ESO Authority. Its functions should include ensuring that countering violent extremism-related rehabilitation programs are delivered independently of law enforcement and custodial authorities.**
- **Alternatively, if an ESO authority is not established, there should be strengthened safeguards specifying proportionate thresholds for adverse information to be shared by persons administering rehabilitation programs to law enforcement agencies.**
- **Division 105A should be amended to insert direct use and derivative use immunities in relation to adverse material disclosed during a subject's participation in rehabilitation, psychological or similar counselling programs referred to in the Division.**

Resourcing of custodial and community-based rehabilitation and related reporting

47. It is critical that the Commonwealth, states and territories properly fund rehabilitation programs for detainees both:[49]

    - in custody, as part of their custodial sentences, and in post-sentence detention under CDOs); and
    - in the community, for persons who are released into the community (both those who are released after completing their curial sentences without being made subject to a CDO, and those who are released after being detained for a further period under a CDO or multiple CDOs).

48. The 2023–24 budget indicates that the Commonwealth makes payments to the states to support services under the Commonwealth High-risk Terrorist Offender Regime ($11.6 million in 2023/24 and $14.2 million in 2024/25).

49. The 2023–24 budget also included an additional $130.1 million over two years from 2023–24 for a measure described as 'Strengthening Australia's Arrangements for High-risk Terrorist Offenders' allocated to enforcement agencies such as the Australian Federal Police, Attorney-General's Department, the Australian Security and Intelligence Organisation and the Department of Home Affairs for the purpose of 'assessment of ongoing risks and seeking and implementing post-sentence supervision orders after the completion of custodial sentences'.[50]

50. The Law Council considers it likely that the significant increase in resources for enforcement and monitoring may result in greater demand for rehabilitation services for offenders subject to a post-sentence order under Division 105A. As a general point, we are concerned that there is a widening discrepancy between the increase in resources allocated for monitoring, enforcement and bringing new post-sentence

[49] Law Council's 2020 Submission, 67 Recommendation 37.
[50] Commonwealth of Australia, Budget 2023-24, Budget Measures Budget Paper No. 2 (2023), 63.

orders under Division 105A, and the existing programs to support rehabilitation of offenders.

51. The Australian Government has two funding arrangements with states and territories related to countering violent extremism initiatives: the '*High-risk Extremist De-radicalisation Program*' ($3.3 million in each of 2023–24 and 2024–25) and the '*Living Safe Together Intervention Program*'[51] ($5.6 million in each of 2023–24 and 2024–25). The former program is directed to providing funding to states and territories to support de-radicalising high-risk violent extremists in their custody. However, it is difficult to assess adequacy without reporting about the number of high-risk offenders accessing support. As explained below, the latter program incorporates several objectives, such as building community awareness including in regional and remote Australia, and the proportion of that program that is allocated to the rehabilitation of terrorism offenders in the community is unclear.

52. Currently, the absence of information breaking down Commonwealth expenditure on resourcing of monitoring and enforcement as against rehabilitation programs under the scheme limits informed scrutiny. This Committee has underlined the need for legislative amendment to ensure greater transparency about the use and implementation of Division 105A including the provision of rehabilitative and therapeutic services.[52]

53. In this regard, we are pleased to note that, in line with our previous advocacy,[53] section 105A.22(2A)—inserted by the *Counter-Terrorism and Other Legislation Amendment Act 2023* (Cth)—now requires the AFP Minister's annual report to include information about:

    (a) the detention arrangements that applied, during the year, to terrorist offenders who were subject to a continuing detention order at any time during the year;

    (b) the rehabilitation or treatment programs that were made available, during the year, to terrorist offenders who were subject to a post-sentence order at any time during the year (it is intended this information will include the availability, type and nature, as well as the costs of making available rehabilitation or treatment programs, including therapeutic services, to the cohort subject to a post-sentence order);[54] and

    (c) funding for the administration of this Division during the year (it is intended this will identify rehabilitation, legal assistance, and enforcement costs).[55]

Recommendation 6: Resourcing of custodial and community-based rehabilitation programs

- **Commonwealth, states and territories should properly fund rehabilitation programs for detainees both:**

[51] That funding is directed to support at-risk individuals radicalising to violent extremism, by increasing the reach of countering violent extremism intervention services to younger Australians, including in regional and rural Australia, and online.
[52] Parliamentary Joint Committee on Intelligence and Security, Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime (Report, 2021), 91 Recommendation 19.
[53] See further, Law Council's 2020 Submission, 14.
[54] See further, Explanatory Memorandum, Counter-Terrorism and Other Legislation Amendment Bill 2023 (Cth), 66-67 [147].
[55] Ibid, 67.

- **in custody, as part of their custodial sentences, and in post-sentence detention under CDOs); and**
- **in the community, for persons who are released into the community (both those who are released after completing their curial sentences without being made subject to a CDO, and those who are released after being detained for a further period under a CDO or multiple CDOs).**

- **In determining what information is necessary to publish to meet the strengthened reporting obligations in section 105A.22(2A), weight should be given to the need for transparent reporting to ensure that the accommodation, treatment programs, legal assistance and other therapeutic services provided to offenders support the scheme's objectives.**

The benefits of community-based rehabilitation

54. The Law Council supports greater resources for community-based wrap-around programs (that can provide case-managed assistance in areas like education, health, mental health, and housing) similar to the NSW Engagement and Support Program (**ESP**). The ESP is delivered by the NSW Department of Communities and Justice, and forms part of the national 'Living Safe Together' program.

55. The ESP is described in the following terms:[56]

> *The ESP is not a 'de-radicalisation' program and does not directly attempt to alter beliefs of an individual. Rather, it provides a range of tailored support services that address their vulnerabilities and build positive connections to help the client.*
>
> *Our team comprises of experienced case managers and a senior specialist psychologist, working alongside experts from other government agencies. The focus of ESP is to build resilience and develop a positive sense of identity, belonging and selfworth in the individual.*

56. The Law Council has received positive feedback, including from Legal Aid NSW, regarding the effectiveness of the ESP in supporting reintegration of offenders.

57. Currently, the ESP is partly funded by the NSW Counter-Terrorism Strategy and the Federal funding agreement for the Living Safe Together Intervention Program Expansion. That agreement encompasses a total financial contribution from the Commonwealth to NSW of $3.761 million across three years.[57] However, as stated above, the estimated total budget under the Living Safe Together Intervention Program Expansion does not separately identify the amount of money allocated to building awareness (for example, part of the expansion targets increasing awareness of violent extremism in regional and remote Australia) and the delivery of community-based wrap-around rehabilitation services for terrorism related offenders. Accordingly, we again highlight the importance of greater transparency in public reporting of the resourcing allocated to rehabilitation services.

[56] New South Wales, Department of Communities and Justice, ESP Information Sheet (Online, 19 January 2024).
[57] See further, NSW Schedule—Living Safe Together Intervention Program Expansion—Federation Funding Agreement: Affordable Housing, Community Services and Other 2022-25 (30 August 2023).

Recommendation 7: Resourcing of NSW Engagement and Support Program

- **The component of funding under the Federal funding agreement for the *Living Safe Together Intervention Program* directed to rehabilitation of terrorism offenders should be increased.**
- **That increased funding should also consider scope for supporting a more balanced approach to granting parole to terrorism offenders (as highlighted in Recommendation 4).**
- **The Federal funding agreement for the *Living Safe Together Intervention Program* should separately list the funding allocated to wrap around services for rehabilitation of offenders and other activities such as strengthening community awareness.**

Reservations regarding the premise of countering violent extremism related rehabilitation

58. We consider that the issues arising from the perceived lack of independence of rehabilitation programs are amplified because of the focus of countering violent extremism-based programs on the renunciation of extremist views rather than renunciation of violence as an acceptable method to further those extremist views.

59. We express caution that there is no reliable, validated indicator of who will transition from exposure to extremist ideology (which, especially with the online world, is commonplace) to violence (which is very rare). In other words, as Liberty Victoria observes, the underlying assumption that supports these pre-emptive policies is that there is a 'radicalisation process' often described as a 'conveyer belt' in which individuals become 'increasingly entrenched in their radical ideas and ultimately transition from cognitive extremism to behavioural (violent) extremism'. However, this transition is 'not linear or predictable'.[58]

60. The Law Council has long argued that the focus of the criminal law should be on identifying individuals who are engaged in preparing for an attack and not individuals who express affinity for extremist beliefs. In this regard, we have said:[59]

> *Criminalisation should not be conceived as a primary tool through which to prevent radicalisation and extremism from propagating, or to facilitate behavioural change by disaffected individuals. The imposition of serious criminal sanctions, and other major restrictions on a person's activities within the community, can readily have the opposite effect. Prolonged incarceration risks placing an individual in a learning environment for further crime, and isolating them from positive influences and support systems within the community.*

61. We consider that rehabilitation programs directed to changing extremist views should be non-punitive in nature and address the wider range of social, individual factors driving alienation and grievance. In this regard, Liberty Victoria and the Muslim Collective observed:[60]

> *A more holistic approach should be taken rejecting the focus on ideology as a root cause and censorship and proscription as primary defence,*

[58] Joint Submission by Muslim Collective and Liberty Victoria, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into Extremist Movements and Radicalism in Australia (Submission, 19 February 2021) 8 [30]. ('***Joint Submission by Muslim Collective and Liberty Victoria***')
[59] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into Extremist Movements and Radicalism in Australia (Submission, 22 January 2021) 3 [10]-[11].
[60] Joint Submission by Muslim Collective and Liberty Victoria, 12 [46] – [47].

> *which does not address the actual drivers that lead people to search for 'alternative facts' and become vulnerable to conspiracy theories.*
>
> *The prevention of violent terrorism should be disassociated from the prevention of extremism. These are two very different problems, the former being highly individualised and requiring the engagement of police and intelligence services and the latter being a societal and structural problem requiring serious reflection on the dramatic and rapid cultural changes that have occurred over the past few decades… Primarily the focus needs to be on identifying and addressing any shared grievances and working towards constructing a harmonious collective identity.*

62. The inherent difficulty for terrorism offenders in successful engagement with a rehabilitation program that is premised on renunciation of extremist views is another reason why we consider the NSW ESP (which is focussed on providing wrap-around community-based social, employment and wellbeing supports) a more promising mechanism for rehabilitation of terrorism offenders.