To: Parliamentary Joint Committee on Intelligence and Security

From: Isabelle Skaburskis, Partner, Doogue + George Lawyers

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

Date: 30 June 2023

It is respectfully requested that this submission remain confidential pending the finalisation of matters before the Supreme Court of Victoria: *Benbrika v Attorney-General (Cth)* S ECI 2022 05118 and *Attorney-General (Cth) v Benbrika* S ECI 2023 00855

1. I am grateful for this opportunity to make a submission to the PJCIS Review of post-sentence orders under Division 105A *Criminal Code Act 1995* (Cth) ('**Div 105A**'). I make these submissions in my personal capacity, drawing on my experience as the principal solicitor who has acted for Mr Benbrika in all proceedings brought under Div 105A in which he was a party, and surrounding litigation. Those matters are:
    a. *Minister for Home Affairs v Benbrika* (SCV) S ECI 2020 03527—Original CDO proceedings. CDO to expire on 24 December 2023;
    b. *Lee v Benbrika* (FCA) VID 670/2020—Control order proceedings;
    c. *Minister for Home Affairs v Benbrika* (HCA) M112 of 2020—Constitutional challenge of Div 105A;
    d. *Benbrika v Minister for Home Affairs* (VSCA) S EAPCI 2021 0003—Appeal of CDO;
    e. *Minister for Home Affairs v Benbrika* (SCV) S ECI 2021 03214—First annual review of CDO;
    f. *Benbrika v Minister for Home Affairs & Anor* M90/2022—Constitutional challenge to s 36D of the *Australian Citizenship Act 2007* (Cth) (judgment reserved);
    g. *Benbrika v Attorney-General (Cth)* S ECI 2022 05118 and *Attorney-General (Cth) v Benbrika* S ECI 2023 00855—Review brought by Mr Benbrika on basis of new facts and circumstances and in the interest of justice; and new application for an ESO brought by the Attorney-General. Proceedings running concurrently with one another (judgment reserved);
    h. *Benbrika v Minister for Home Affairs* VID 438/2023—Judicial review of decision to cancel ex-citizen visa (ongoing).

2. Mr Benbrika was the first person to be subject to a Continuing Detention Order. He is the only person to date who has appealed a CDO decision, defended himself in an annual review and initiated his own review under the Division.

3. Mr Benbrika is currently detained in the Piper Unit at Barwon Prison. Whilst the Attorney-General does not seek to have the CDO against Mr Benbrika affirmed or extended, he will remain there until judgment is handed down by the Supreme Court of Victoria in the proceedings currently before the court. The Court will make an Extended Supervision Order, although the terms of the order are in dispute.

4. This submission addresses concerns about the operation of Div 105A, in particular the CDO regime. The concerns arise from my experience working with this legislation, and witnessing its effect on my client. These submissions will address shortcomings in the statute as drafted, the manner in which the matters are litigated by the Commonwealth, and issues which reflect systemic problems with the administration of the scheme.

5. In brief, the most urgent concerns with Div 105A are as follows:
    a. **CDOs must be abolished;**
    b. **Rehabilitation must be identified as a principal objective of the scheme;**
    c. **Deradicalisation programmes must be available, independent, transparent and effective;**
    d. **Parole must be made available to terrorist offenders;**
    e. **Defendants must be guaranteed sufficient time and funding to properly defend themselves;**
    f. **There must be an inquiry into the use of the VERA-2R by the Commonwealth Government and the circumstances of the non-disclosure of the Corner report.**

A. CDOs must be abolished

6. I was involved in the drafting of the submission filed by Liberty Victoria and the NSW Council for Civil Liberties (NSWCCL). In that submission, we outlined principled argument as to why CDOs must be abolished. In sum:
    a. There is no validated or reliable way of assessing risk, and risk is at the heart of the regime;

b. The statutory test allows CDOs to be made even if the court is satisfied that the defendant is likely to not reoffend. It allows for detention even in cases where there is only a small chance that they will commit an offence, and that offence is unlikely to cause any actual harm;
c. Important safeguards are unenforceable;
d. In all the circumstances, a CDO will always amount to arbitrary detention.

7. I add a further argument here based not on the drafting or construction of the legislation, or legal principles. My argument for the abolishment of CDOs is based on the unjustifiable suffering that a CDO causes. I refer to my experience as a solicitor in support of this submission.

8. The concept of liberty may be meaningful as a principle even to those who have never been imprisoned. And it may be recognised that a complete deprivation of liberty is an extreme measure that must be reserved only for the most serious cases when no less restrictive measure is appropriate. But beyond the principle of liberty is a lived experience of detention that causes harm.

9. Mr Benbrika endured his sentence of imprisonment without complaint. He has openly acknowledged on multiple occasions that he felt his sentence was justified as a consequence of the terrible things he said in 2004-5. But even after fifteen years in prison, he has been unable to tolerate the conditions of the CDO. I have been working with Mr Benbrika since 2018. What I have observed since December 2020 can only be described as a man being tortured.

10. From January 2021, after the first Order was made, my office received frequent phone calls from Mr Benbrika. He was suicidal and incoherent. He did not understand why a detention order had been made, or what was required of him to be released. He wanted to know what he needed to do or change, and he asked his religious mentors who failed to give him an answer.

11. Mr Benbrika has been warehoused in a custom-designed unit inside the walls of a maximum-security prison. He lives in a cell with a courtyard. He has access to a videoconference room as required and a hallway. He is still subject to prison regulations, including strip-searches that trigger in him a trauma response, before and after any visit or medical appointment. He has

been abused by private security guards contracted by Corrections Victoria. He is "locked down" in his cell every afternoon and night, or when a code is called in the main prison.

12. He has certain privileges, like a kitchen and a computer. He can make tea and cook. He can do his own laundry. He can grow strawberries. He can request access to cologne and henna kept in his secure property. He can choose his own clothing, so long as it is not blue.

13. What he can't have is company. He is not allowed to mix with other prisoners. His visitors' list has been limited to immediate family. He is not allowed access to common areas. He is not allowed to work, or go to the library or gym, or pray in a group. He used to walk to keep fit, but now has no access to open spaces.

14. His only company have been Corrections officers who take fastidious notes of their every interaction with him—notes that become part of the brief against him at the next CDO hearing. His jokes, his cooking, his questions, his moods, his requests, and the times he collapses onto the floor of his cell in grief and despair, are captured in the prison guards' notes.

15. He is invited to speak with a psychologist to help manage the strain of his environment but the Corrections psychologists are not bound by confidentiality. Files notes on the content of their sessions also appear in court, and are available to the public. Psychologists advise him to do breathing exercises to manage the horror of his life.

16. The conditions that he lives in have exacerbated his depression, and other stress-related conditions like ulcerative colitis. He has experienced dissociative states, self-harmed and more recently has begun to experience stress-induced auditory hallucinations. The breathing exercises have not helped, although he has tried.

17. At first, Mr Benbrika sought to be returned to Hoya unit of Barwon prison. Despite this being expressly permitted under s 105A.4(2)(b) of the Code, he was told it could not be arranged. I assisted Mr Benbrika in advocating for access to other prisoners. After twelve months, and intervention by the office of the Victorian Ombudsman, he was given permission to meet with one other person, once time per week, in a room with two guards, unless that week Corrections could not accommodate it. After 24 months, he was allowed to pray with others on Friday. More recently, I have assisted him to access a private psychologist. After his previous

treating psychologist gave evidence against him in the first CDO hearing, his trust in Corrections staff disintegrated.

18. The High Court has found that post-sentence detention for a terrorism offender is not punitive but preventative. And yet Mr Benbrika's conditions have been far more onerous post-sentence than they were in the protection unit of Barwon where he lived before, for years, without incident. The rules of his new unit have been unclear and inconsistent. The damage that has been done to Mr Benbrika's mental health has been severe.

19. It has become clear that the 2020 trial against Mr Benbrika miscarried. The risk assessment methodology that the court relied upon is now known to be worthless. It was administered by experts who were not knowledgeable in Islamic theology. The risk specification accepted by the court is vague. Mr Benbrika's genuine desire to be out of prison and comply with Australian law has been dismissed as a fabrication, which I truly believe it is not.

20. The suffering that this 63-year-old man has endured cannot be said to have been necessary for the protection of the community. He is detained under a scheme that enables imprisonment without proof that the person is likely to commit violence, or harm any individual, or damage any property. There is no reason to think that others would not be harmed in the same way, should this power be used again. This detention scheme shames us as a nation.

B. Rehabilitation as a purpose of the scheme

21. Restricting a person's liberty under a CDO or an ESO without a requirement to invest in their rehabilitation is problematic for three reasons. Firstly, requiring rehabilitation as an essential criterion for making a restrictive order creates an avenue of accountability that reduces the possibility of the scheme becoming oppressive. Secondly, effective rehabilitation and reintegration interventions would lead to fairer and more efficient outcomes.

22. Finally, it must be remembered that the goal of protecting the community, and the goal of reintegration and rehabilitation are not at odds with one another. Both objectives are equally necessary to ensure a safe and fair society. Community protection and minimising recidivism is enabled not by the long-term deployment of police officers into homes and

neighbourhoods, or by locking up people in prisons and detention facilities. It is enabled by ensuring that former offenders successfully abandon their anti-social habits and create meaningful social connections and set achievable life goals.

Avenue of accountability

23. If rehabilitation were a purpose of the legislation, then the Court would be bound to consider the conditions of a person's detention and the manner of enforcement of any supervision order. Such a purpose would not lead to unduly lenient conditions. It would, however, allow the courts to review a condition that was being enforced in a way that undermined the person's efforts to deradicalize and exit the post-sentence system. It would allow the Court to hear submissions on the impact of detention on a person's capacity to engage meaningfully in treatment.

24. Drafting into the legislation a requirement that the court consider the impact on a person's rehabilitation creates an avenue whereby a defendant can raise with a Court the manner in which an ESO condition is being enforced, or the impact it is having on their capacity to reintegrate. It would ensure, for example, that a person on an ESO was not being subjected to unnecessary police intervention at work; or overly attentive curfew checks at odd hours of the night. Police attending a place of business unnecessarily,"just to check up" may cause a person to lose their job. Police conducting curfew checks on a home at 3 AM, five days a week, knocking on the door or phoning the landline, disrupts family life and creates strain on the most important social connections a person has.

25. Equally, a statutory purpose recognising rehabilitation would reduce the likelihood that police would habitually charge for minor, insignificant and inadvertent breaches. Considering the implications of such a charge—being remanded in custody, required to prove exceptional circumstances for bail, and face trial by jury to contest the charge—an arrest for breach is a significant interruption in a person's life. Police have not demonstrated an interest in exercising their enforcement discretion with sense and restraint in other situations involving post-sentence orders for terrorist offenders, either under control orders or under the NSW scheme.

26. Proper statutory recognition for the importance of rehabilitation would also minimise the prospect of unnecessary and extraordinary shows of police force, like six armed officers attending a family residence to take someone into custody for questioning as to why they were

an hour late to report to the local police station. It would do so by ensuring that a defendant could raise in court the method of enforcement. If the Court was satisfied that the method of policing was oppressive, the Commonwealth would risk losing the condition.

Fairer and more efficient outcomes

27. These examples of heavy-handed police intervention cannot be said to be necessary for the protection of the community. They target conduct that is benign. They ensure that an already vulnerable person remains stigmatised, marginalised and hopeless.

28. Over-zealous policing practices, or conditions in custody that are intolerable serve only to keep a person ensconced in the post-sentence system. Arrests for minor infractions of an ESO are easily used to support submissions that a person is unwilling to comply, even when that is not the case. Expressions of anger or frustration at perceived injustices in custody generate records that re-emerge in a Review or a further post-sentence order application as proof of grievance, and thus risk that they may act on that grievance.

29. These minor or forgivable missteps are used by authorities to justify further restrictions. These trivial breaches or intolerable conditions are used to generate a sense of fear—fear of non-compliance; fear of motivation to retaliate; fear that the person will not be controlled. That fear shapes the ways that the court assesses evidence and weighs possibilities.

30. As this system of post-sentence detention and supervision is extremely resource intensive, increasing the chances of a person remaining inside the system does not seem like a socially beneficial outcome. It would be cost effective and more efficient use of resources to enable a person to exit the post-sentence regime and resume a normal life in society.

31. We must stop imagining worst-case scenarios to justify any and all expressions of extraordinary force. We must stop being so unnecessarily fearful and reactive in making legislation, reviewing legislation and enforcing legislation. We must start to act with reason and principle. Creating a mechanism whereby a defendant can bring to light their experience of oppression and abuse for consideration by a court, is only reasonable. It is entirely unreasonable to deprive a person of such recourse.

C. Deradicalisation programmes must be available, independent, transparent and effective.

32. As terrorism offences are by definition offences based on a person's commitment to a violent extremist ideology, it is important to allow a terrorist offender access to resources that can enable them to change their ideas.

33. Further, if a court is being asked, in a post-sentence order application, to assess the risk of a person for committing ideologically-based offending in the future, it is imperative that the Court is given reliable and clear evidence of what that person's ideological commitments are, and how they either align with or diverge from a violent extremism ideology.

34. In Victoria, the only information about a person's ideology that the Court has access to—and indeed, that the expert conducting a risk-assessment has access to—are notes from the deradicalisation programme run through Victoria Police.

35. I am prevented from addressing the details of this programme or the nature of the evidence, on account of suppression orders made in the Benbrika proceedings.

36. But, having spoken with other prisoners, I am aware that there are grave problems with the Victoria Police deradicalisation programme. I have heard multiple complaints from participants that the programme is ineffective. Prisoners who engage with the programme are doing so voluntarily, but they are not being provided with material they find to be convincing, challenging or useful. If they complain about the programme, engage too strenuously in debate, ask questions that the mentors do not know answers to, or choose not to participate, this can be (and is) used to against them in any post-sentence or parole application.

37. I have also spoken with people in the Muslim community who have knowledge of the Victoria Police programme, who are not offenders. I understand that imams who work as mentors in this programme are not given any training. There are widespread suspicions that the programme is not administered in a manner that promotes transparency and accountability. I personally am aware of how guarded and controlled information is about all aspects of the programme.

38. Effective, independent and transparent offending behaviour programmes ought to be made available to people who commit terrorism offences, just as they are available to others in the

criminal justice system. A "deradicalisation" or re-education programme should not be shrouded with secrecy. There should not be a monopoly on who provides the service. It should not be run by the police. The quality of such a programme is especially important when a person's liberty rests so squarely on its results.

39. There should be funding directed towards research in this area, and there should be established a system of independent oversight and accountability. The operation of any deradicalisation programme must be transparent, not kept from public view through the use of suppression orders. They must be treated as therapeutic interventions, not security operations.

D. Parole must be available to terrorism offenders

40. The Commonwealth government recently amended the *Crimes Act 1914* (Cth) to restrict the availability of parole for terrorism offenders to "exceptional circumstances".

41. The purpose of parole is to promote rehabilitation in prison, and to create a motivation for reform. It allows for a gradual transition back into society, with particular security measures in place and the risk of re-imprisonment in case of breach. The parole board has extremely broad discretion to impose any conditions necessary to manage a person's risk in the community.

42. At the time a person is sentenced, the court gives consideration to the purposes of punishment and prospects of rehabilitation. In doing so, the Court sets a head sentence and a minimum non-parole period. The purpose of the non-parole period is to ensure that the sentence is sufficiently onerous to satisfy the requirements of retribution and denunciation. The parole period reflects a person's prospects of rehabilitation. At the time of sentence, in other words, the court is deciding that after a certain period, the person should be fit for a gradual and supervised reintroduction into society.

43. Post-sentence schemes undermine this sentencing process—a process that already contemplates reintegration and reform, as well as just punishment. Parole is not a bonus or a reduction of sentence. It is an important part *of the sentence*—the part that contemplates the

challenges of life after prison, the need to minimise reoffending and that the best way of doing that is to offer supported and supervised reintegration.

44. Removing the possibility of parole after a court has found that a parole period is warranted, and then creating a system of post-sentence deprivation of liberty that refers to the parole refusal as a risk factor, is perverse. Supervision orders, as control orders before them, are simply replacing parole. A post-sentence order will inevitably refer to the fact that a person has not proven themselves to be compliant *in the community*, and therefore the Court cannot take any comfort that the person's compliance in prison is indicative of what their attitude will be once free. Therefore, they say, release must be supervised. In effect, the ESO simply extends the sentence.

45. Parole should be allowed on the basis of an assessment by the parole board, as for any other offender. The sole purpose of parole is to create a motivation for reform. Replacing parole with a post-sentence order replaces an otherwise efficient and functional part of the penal process with a complicated, costly Court process. There is no reason why access to parole should be artificially limited, and there is good reason to keep the system of incentive and reward available to people motivated to rehabilitate.

E. Further safeguards

46. I refer to the submission filed by Liberty Victoria and NSWCCL for discussion of the importance of the duty of disclosure by the Commonwealth. It has been noted that this safeguard is of fundamental importance to the integrity of the regime. However, not only is it unenforceable, but there has already been demonstrated disregard for this duty by the Commonwealth.

47. There is a further measure that must be inserted as a necessary safeguard for any Div 105A application. The legislation currently requires that an application be made by the Commonwealth within the last 12 months of a person's sentence. There is no guarantee, however, that an application will be made and served in a timeframe that gives a defendant adequate time to prepare their defence.

48. The CDO application brought against Mr Benbrika in 2020 was issued two months before his release date. Mr Benbrika had no funding for legal representation and could not brief counsel.

The first four weeks of that period were lost as he was compelled to wait for responses from Victoria Legal Aid and the Commonwealth funding body. After both of those avenues for funding were refused, he made an application to the Court. Indeed, I made that application to the Court on his behalf, as I was not able to brief counsel without a guarantee of remuneration. Finally, a limited costs order was made, and ultimately a full costs order was made.

49. The following year, the Commonwealth initiated a review of the CDO, as per the statutory requirement. The Court proposed a date for the initial directions hearing. It was indicated that Mr Benbrika was not funded to retain counsel and therefore not prepared to proceed. The Commonwealth indicated that a costs order could not be made until they filed their originating applications and proceedings were formally commenced. They did not rush to file their originating documents. They then opposed the costs order. A further seven weeks of preparation time was lost as Mr Benbrika attempted to secure funding through legal aid. Finally, the court made a costs order.

50. Given the conduct of the Commonwealth in other regards, namely deliberately withholding critical evidence in the proceeding, it is not unreasonable to infer that delay is a tactic deployed deliberately to frustrate a defendant's ability to properly prepare their case.

51. Division 105A should require that an application is served no less than 6 months from the date an order must be made (ie, before the end of a person's sentence). If CDOs remain in the statute books at all, the time limit for bringing a CDO application should be absolute. If the application is for an ESO, then the requirement to file with sufficient time could be waived if exceptional circumstances are proved – for example, if, at the time a person is sentenced, only a very short period remains until it expires, as was the case for Ms Sa'dat Khan.

52. Finally, costs orders should be granted automatically. Legal aid applications are considered on an ad hoc basis and can take months to assess. If an application is "successful", the grant is grossly inadequate for the work required. Denying access to proper funding ensures that post-sentence orders will not be properly implemented and supervised by the Courts, simply because it will be impossible for a defendant to put their case forward in any meaningful way due to inadequate legal representation and resources.

F. Inquiry into the circumstances of the non-disclosure of the Corner report

53. I reiterate the point made in the submission filed by Liberty Victoria and NSWCCL that there must be an inquiry into the non-disclosure of the Corner report. The Supreme Court of Victoria has indicated that it will make findings in relation to the non-disclosure to Mr Benbrika. But, the non-disclosure extends much further than that and it behoves the Government, indeed the PJCIS, to determine the causes of that non-disclosure, and assure that such a failure of duty not be allowed to happen again.

Conclusion

54. It is perhaps unsurprising that I, the defence lawyer for Mr Benbrika and other terrorist offenders and accused, would advocate for more human and less punitive treatment of people convicted of terrorism offences. But my submissions are not insensitive to the need for community protection. What I urge is a system that relies less on fear and speculation, and more on reason in assessing what is an appropriate response to terrorism that does not cause us to compromise our own social values.

55. Continuing Detention Orders defy reason. They are unreasonably cruel and baseless. They turn us, as a society, into monsters deliberately causing harm and unnecessary suffering.

56. “Terrorism” is not a pathology. People commit terrorism offences for many different reasons and in many different ways. Sometimes it is indistinguishable from ordinary offending. Sometimes it stems from a person’s deep conviction that they are pursuing the will of God. But it is wrong to assume that a terrorist offender, prima facie, cannot or will not change. It is wrong to treat them as political enemies to be tortured and made to suffer. In my experience, people who have committed terrorism offences, and been punished and imprisoned for it, would much prefer to live normal, community-oriented lives, even if they struggle to do so. It would not be monstrous of us to help them find a way to live with us in peace.