# Submission to the Parliamentary Joint Committee on Intelligence and Security review into the operation, effectiveness and implications of Division 105A of the Criminal Code

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*This submission does not reflect a single Australian Strategic Policy Institute (ASPI) perspective. It is the opinion of the three individual authors.*

## Background

On 15 May 2023, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) commenced a review into the operation, effectiveness and implications of post-sentence terrorism orders provided for in Division 105A of the Criminal Code Act 1995 (Criminal Code). This document is a formal submission to that review.

Australia is not immune to the insidious threat of terrorism, and nor has it been spared tragedy. Since 2014, there have been 12 terrorist attacks on Australian soil and 21 significant terror plots "detected and disrupted". At present, ASIO assesses the current National Terrorism Threat as POSSIBLE. Despite this, Australia's counter-terrorism responses can, compared to many other western liberal democracies, be characterised as a success. Australia's overall counter-terrorism success is not about luck: although sometimes, in individual circumstances, this does play a role. The success is a direct result of the efforts of our intelligence and law enforcement agencies, comprehensive legislative frameworks and the resilience and unity of the Australian people.

The continued detention of convicted terrorist Abdul Nacer Benbrika has dominated the public policy debate on the provisions of Division 105A: particularly continued detention orders (CDO). In 2008, Benbrika was found guilty of intentionally being the leader of a terrorist organisation. Benbrika completed his sentence on 5 November 2020. However, based on risk assessments, the federal government applied to the Victorian Supreme Court for a CDO under Section 105A of the Criminal Code. Following the application, the Victorian Supreme Court appointed an expert to assess the risk of allowing the terrorist offender into the community and provide a report of this assessment to the Court, the AFP Minister, and the offender. In Benbrika's case, the Victorian Supreme Court agreed to a CDO after considering the expert's report, the safety and protection of the community and the offender's participation, or lack thereof, in treatment and rehabilitation. The current CDO is set to expire in December 2023 but a series of events have intervened in the

period since the imposition of the first CDO. In 2020, the Morrison government cancelled Algerian-born Benbrika's Australian citizenship on the basis he was a dual citizen. Then, just last month, the Albanese government revoked his no-citizen visa under section 501 of the Migration Act 1958 because he failed the character test to remain in Australia. Should these decisions hold, it would appear that Benbrika is unlikely to represent any future threat in Australia (although, as we have seen previously, terrorists do not need to be in Australia to pose a threat to our nation or our citizens). Importantly, however, this outcome relating to Benbrika, in which further CDOs are not required, does not mean that they or any other Division 105A provisions are unnecessary. While it is common to consider the Division as the “Benbrika law”, it should not be forgotten that there are unfortunately a considerable number of convicted terrorists in Australian prisons and we have seen the rise, fall and rise again of terrorist cells and groups over a long period of time.

The central thesis of this submission is that Australia’s community safety directly results from our national security strategy, which includes a comprehensive legislative framework able to address the full range of threats, not just those which are most common, likely or current. Australia’s security strategy and framework has adapted as the capacity and capability of those who would do us harm has evolved, clearly focusing on ensuring national preparedness for, and resilience to, future threats. After all, the point of countering many threats, including terrorism, is to prevent such acts from happening, not only to manage the after-effects. Therefore, while this review, and our submission, are focused on Division 105A of the Criminal Code, both must consider the examination within the context of a comprehensive framework and not consider the Division in isolation.

Division 105A of the Criminal Code provides a sophisticated legal framework for the post-sentence management of convicted terrorists. Like any legislative framework, it should be regularly reviewed. While repealing outdated provisions and abolishing no longer necessary powers should always be considered, this review should focus on reforming and updating the provision to reflect current and changing circumstances. This is the most effective way to balance individual rights and the broader Australian community’s right to safety and security. This balance cannot, and should not, be assessed on the terror threat level of the day (which is not static and has changed twice in the last ten years) but focused on ensuring future resilience and preparedness.

This submission offers three recommendations relevant to the PJCIS review of the operation, effectiveness and implications of Division 105A:

1. The review of Division 105A should consider how the legislation fits within the broader counter-terrorism legislative framework, national security strategy, and counter-terrorism arrangements.

2. The review should consider Division 105A beyond the context of the threat assessment of the day by considering legislative preparedness for future threats.

3. Any change to Division 105A should be an evolutionary reform rather than devolutionary abolition.

## Division 105A and our national security strategy and legislative framework

Countering terrorism (and other threats) while preserving essential freedoms and holding together a stable and harmonious community is not an easy task. However, it has been managed effectively by successive Australian governments and their agencies – not by asking what freedoms need to be restricted to increase security but what security is required to maintain our freedoms. The Albanese government's focus on national resilience to provide greater assurance to Australians in the face of rising global uncertainty is vital. It combines objectives such as security, diversity and prosperity to increase our preparedness to withstand crises or incidents without turning on each other. The committee's review should take a similar position.

Australia's counter-terrorism and national security measures evolved as a 'system of systems' that integrate to create a functional framework. Neither Division 105A nor Australia's broader counter-terrorism legislative framework is a conflation of disparate measures. It is a carefully crafted framework that provides intelligence agencies, law enforcement and the courts with the necessary powers to proportionately manage alleged and convicted terrorist offenders on a case-by-case basis. The repatriation of women and children from Syria earlier this year was a prime example, relying on the expertise of security agencies, police and community leaders to manage risks and assuage understandable community concerns. In this field – whether repatriating citizens from terrorist zones, preventing terrorist attacks or determining the balance between deterrence, punishment and rehabilitation – there is no zero-risk approach. Risk must be managed, not ignored. As such, legislation should not be a zero-sum game either. Removal of Division 105A would neither reduce risk to the Australian community nor increase individual human rights. It would simply reflect the easiest short-term approach. Reform is usually challenging but, more often than not, the best method, particularly where it is based on practical experience.

Foremost among the questions facing the committee's review is what to do with continuing detention orders, or CDOs, which enable a court to order that a prisoner be detained beyond their sentence if they are deemed to pose an unacceptable ongoing risk.

In March 2023, the Independent National Security Legislation Monitor, Grant Donaldson, released a report that questioned whether the assessment tools used by the courts in deciding CDOs predicted risk accurately. Donaldson argued that CDOs should be abolished and non-custodial measures such as extended supervision and preventive orders used instead.

The monitor's role is part of the comprehensive system of checks and balances integral to Australia's security. Our laws do need regular review. However, in this case, the INSLM failed to recognise how specific provisions of Division

105A integrate into the broader framework. In our view, concerns about an element of a provision, such as the assessment tool, should result in determining whether the assessment tool itself is in need of improvement, change or removal and not a leap to the abolition of the entire Division.

We are concerned that this specific INSLM report took a moment in time (2022-23) judgment on terrorism in Australia, which does not reflect that terrorism is constantly evolving. This is best highlighted by the INSLM's statement in his report that: “It is my judgment that CDOs are not proportionate to the threat of terrorism and are not necessary”. This judgment would appear to take the perspective that the recent reduction in the terrorism threat level (made during the course of the INSLM’s review) is permanent rather than a moment-in-time assessment, as highlighted by Director-General Security Mike Burgess in his 2023 threat assessment. And just as it is vital that we review existing laws, so too is recognising past mistakes in which governments and bureaucracies have based national security strategies, policies and laws on current events and the status quo rather than both learning from history and adapting to emerging threats that lie ahead.

The justice system can rehabilitate radicalised terrorist offenders, but recidivism unfortunately occurs, and the consequences can be catastrophic. Monitoring by security agencies is not a replacement for imprisonment or CDOs, as argued by the INSLM. The case of Ahamed Samsudeen in New Zealand illustrates this. Regarded as a terrorism risk, Samsudeen was under surveillance by New Zealand Police. That didn’t stop him from entering an Auckland supermarket on 3 September 2021 and grabbing a knife. It only took the police surveillance team one minute to realise he was launching an attack and a further 30 seconds to shoot him dead. But, in that time, he injured eight people.

In 2018, convicted terrorist Usman Khan was released from UK prison. Khan was considered a success story for terrorist rehabilitation. On 29 November 2019, Khan, fitted with an ankle tracking device, attended an offender rehabilitation conference at Fishmongers' Hall in London. A short time later, he threatened to detonate what turned out to be a fake suicide vest. He then started attacking people with knives taped to his wrists, killing two conference participants before being shot dead.

Surveillance and supervision, as well as rehabilitation, are essential. But these measures must be part of a comprehensive framework that also includes deterrence, prevention and punishment. The INSLM’s latest report fails to recognise that Australian communities are made safer, including from terrorism, through the combined effect of a systematic approach to managing threats, not a piecemeal approach of abolition and introduction based on the level of threat we face today. CDOs should remain a part of that systematic, comprehensive framework.

One of the INSLM's significant concerns regarding Division 105A post-sentence orders relates to the validity of tools used to undertake risk assessments for convicted terrorist offenders. This concern is based on the findings of Dr Emily Corner’s and Dr Helen Taylor’s report “*Testing the Reliability, Validity and Equity of Terrorism Risk Assessment Instruments*”. The INSLM rightfully raised

concerns regarding the lack of transparency surrounding the availability of the Corner-Taylor Report. The authors of this submission believe that lack of transparency, while of concern, served as a catalyst for disproportionate opposition to the whole provision. In our view, if the Commonwealth had released the report proactively, it would have been of less impact in the INSLM's review as it was not just the views expressed in the report but the secrecy that was considered problematic.

Corner and Taylor raised concerns about the VERA-2R and Radar risk assessment tools currently used. Such reports and views are important and help ensure agencies are aware of alternate and latest thinking. And this report raised relevant issues associated with the assessment tool. But it is important to note that Corner and Taylor were not assessing the benefits of the CDO regime nor the impacts on Australian community safety following the release of convicted terrorist offenders. And Corner and Taylor clarify that "*risk assessments have informed research and practice in a variety of disciplines and for a range of applications*".

In 2022, in contrast to Corner and Taylor's perspectives, an Australian Institute of Criminology Consultancy report by Dr Timothy Cubitt and Dr Heather Wolbers found VERA-2R and ERG 22+ to be the most suitable risk assessment tools for Division 105A post-sentence orders. They also found that the Structured Professional Judgment approach is widely accepted in the literature as the most appropriate risk assessment framework for violent extremism.

In our view, the underlying message from both reports is not the abandonment of CDOs, but that ongoing work should be done to find and use suitable instruments for risk assessments. If there is a problem with the risk assessment process, this should be dealt with, and the answer is not a broad deletion of the entire law.

The committee should focus their review findings on promoting continued research of assessment tools and accept that it is an assessment of probability like any actuarial approach. Moreover, the committee should consider that, as in other crime types, some criminal offenders represent an unacceptable risk to community safety in terms of physical violence. In the case of terrorism, the consequences of a successful attack, and the limits of supervision orders, make CDOs a necessary legislative measure. The application of CDOs should focus on maintaining detention until the stage at which an offender is viewed as rehabilitated or where other mechanisms, such as Extended Supervision Orders (ESOs), are assessed by the law enforcement and judicial community as effective to mitigate the risk to Australia's communities sufficiently. The availability of rehabilitation mechanisms or other supervision tools do not in themselves remove the need for CDOs to be available, even if they are rarely used.

## A preparedness focus

Australia's security, intelligence and law enforcement agencies were no strangers to counter-terrorism before 11 September 2001. However, the scale

and scope of the problem were substantially different. Since then, over 50 pieces of anti-terror legislation have been introduced into the Australian parliament. While some of this legislation represents understandable responses to sudden increases in the terrorism threat environment and practical gaps identified during counter-terrorism operations, most relate to a deliberate effort to establish a framework of legislation and powers to improve and maintain Australia's preparedness for emerging and future threats. The point of Australia's terror laws is to provide a system-wide approach.

With the reduction in the national terrorism threat level in 2022 from PROBABLE to POSSIBLE, there is a temptation to consider winding-back powers and legislation. With terrorist groups seemingly in retreat, the argument is that we no longer face extraordinary threats, so extraordinary powers are no longer needed. Such thinking is wrong and could see Australia ill-prepared for sudden future changes in the terrorism threat level, scope and scale. We must learn from history and our past misjudgements. In the January 2013 National Security Strategy, the government signalled the end of the era of terrorism—only for the world to be shocked by the rise of ISIL within the year.

From a legislative perspective, Australia's control orders present an illustrative case in point. In Australia, Division 104 of the Criminal Code, which governs control orders, was enacted after the London terrorist attacks in July 2005. The federal government used an interim control order in the case of Jack Thomas. And in 2007, in the matter of David Hicks. Control orders then became unused for several years. By 2013, members of Australia's legal fraternity were calling for the abolition of control orders on the basis that they were no longer needed as the terror threat had reduced and the powers were not being used. In contrast, in 2013, the Council of Australian Governments reviewed Australia's Counter-Terrorism Legislation. In doing so, the committee, led by Hon. Anthony Whealy QC, recommended not to abolish the Division but to reform and update the broad suite of counter-terrorism legislation, including control orders. As ISIL's rise was gathering momentum, in 2014, law enforcement agencies worked with the then Attorney-General, and in a bipartisan way with the PJCIS, to reform the control order regime. With the unfortunate reality of counter-terror operations in Australia, practical gaps and limitations were identified resulting in further changes in 2015 to ensure the regime was fit for purpose. Today, control orders are an invaluable terrorism threat mitigation and disruption power. In 2020-21 alone, six interim and seven confirmed control orders were made in Australia. It would have been a misjudgement to abolish the control order regime in 2013 on the basis that such powers had not been used for a relatively short period of time. In fact, such periodic usage reveals that these powers are only sought by law enforcement and security agencies, and approved by authorities, when they are needed.

In its deliberations, we urge the committee to ensure that Australia's terrorism legislation in general, and Division 105A specifically, provide the necessary degree of preparedness for sudden and unforeseen terrorism developments. Having such provisions as CDOs on the legislative books means updating to reflect changes in circumstances is always easier than starting from scratch in an environment where laws are abolished and introduced only due to current

events. A philosophy of continuous reform is more effective than one of starting and stopping.

## Conclusion

The reduction in the national counter-terrorism threat assessment level understandably created a temptation to remove some powers designed to deal with the most malicious of terrorist offenders and groups who, for the moment, are in retreat or with reduced capacity. And, as highlighted in the previous sections, Australia's counter-terrorism legislation must continue to evolve. However, terrorist (like all aggressive) intent and capability does not remain static and devolving the legislative framework through wholesale removal of powers would be injurious to community safety by unnecessarily restricting the number of options available to those agencies whose mission it is to keep Australians safe, in this case to mitigate post-sentence risk management of convicted terrorist offenders.

Of course, this does not mean that security laws and powers should be unlimited or outside the rule of law. It is important to note that the High Court has previously upheld the legality of CDOs. And law enforcement and security agencies see these powers as key to managing Australia's terrorism threat. Given their legality, the expressed need for them by our security and law enforcement agencies and the actual examples in Australia and abroad of recidivism and continued threats, it would seem an oddity to repeal the entire provision – particularly when the key argument for not having the Division is that it is disproportionate to the current threat level, which is subject to change. Communities don’t stop having access to tools to mitigate climate disasters just because the current fire, flood or earthquake risk is low. Policies for houses, buildings, vehicles etc should all still include the options for dealing with these threats.

In the case of terrorism, the underlying issue here is that the risk presented by some offenders is simply too great. It is both an unnecessary and dangerous risk to not have the option of seeking ongoing detention of a convicted terrorist offender who is assessed to be of continued risk to the community. The removal of this power would remove the opportunity to keep a convicted terrorist who remains radicalised in jail and away from the unsuspecting public. The Division does not act as a silver bullet and will not stop all terrorist plots and attacks, but it is one tool in the broader toolkit that can be sought when considered appropriate. Should a convicted terrorist be released from jail and commit a further attack, the mandatory review into those events should include a focus on why the terrorist was viewed no longer to be a risk and released, not on why the convicted terrorist known still to be a terrorist threat was released into the community because a law that could have kept them in prison was removed during a time of lower (but not no) terrorism risk.

Rather than throwing out the provisions altogether, a better approach would be to improve and reform them. For example, if transparency is considered lacking, increase it. It is in the public interest, and rights of the convicted terrorist, to know the basis on which such decisions are made. Without better tools,

actuarial and structured professional judgements should continue to be used. As such, the committee should promote the need for ongoing research and development of these tools.

The Strengthening Democracy taskforce has highlighted the need for a "new generation of initiatives" to build public trust and confidence in countering extremism. Evolving post-sentencing powers in meaningful ways, without diminishing options for relevant agencies, is an important step in that process. Two key areas should be considered:

- Improved usage of available tools (CDOs): Government tends to apply late for CDOs risking the missing of application deadlines: as happened in the cases of Pender and Benbrika. Section 105A.5 stipulates that applications should not be made more than 12 months before the end of a sentence or before the end of an existing CDO order. Including and enforcing a timeframe for an application that would not result in an interim detention order (IPO) should be considered, for example, six months before a sentence's end.

- Transparency: There are obvious challenges for the Commonwealth in presenting nationally classified material in a court of law that may compromise sources and capabilities. While security and law enforcement agencies have become more comfortable and experienced in doing so, efforts to ensure transparency are needed. Government should be a 'model litigant' and transparency that does not compromise sources and capabilities is actually a powerful tool for governments and agencies. It is the best method to bring the public along with the realities of the threats, and it removes an easy criticism and cynicism that comes with being seen to be overly and unnecessarily secretive.

Notwithstanding the reduced terrorism threat level for now, Australia has 20 convicted terrorists due for release between now and 2027. CDOs, and Division 105A, provide law enforcement and the courts with a broad suite of powers that can be applied on an individually assessed risk-management basis.

It is also relevant to note that the removal of CDOs would not be a zero-sum game. Should such a decision be reached, then commensurate resources would need to be provided to intelligence and law enforcement agencies to meet the additional challenges of the management of high and medium-risk convicted terrorist offenders released into our community. Such monitoring is resource-intensive. The only decision worse than placing an unnecessary burden on our security agencies (given all the threats they must grapple with) is to ask them to do more with fewer resources.

Australia's culture is not based on a compromise between security and freedom but on the resilience and cohesion that comes from the trust in the complementary combination of security and freedom. Our resilience depends on a carefully balanced national security strategy that considers individual rights and community protection. A community is stronger if it feels the government is making difficult but necessary decisions to keep people safe. That means maintaining a comprehensive framework that includes enforcement to punish

wrongdoers, rehabilitation to reintegrate offenders, and prevention and deterrence to stop crimes. All are necessary for community trust, resilience and safety. While rehabilitation should always be a central goal of our justice system, the committee, government and parliament must continue prioritising community safety. Division 105A does precisely that.