Australian Government
Attorney-General's Department

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Attorney-General's Department Supplementary Submission

Independent National Security Legislation Monitor's Review into Division 105A of the Criminal Code

Contents

Introduction

1. The Attorney-General's Department (the department) welcomes the opportunity to provide a supplementary submission to the Independent National Security Legislation Monitor's (the INSLM) Review into Division 105A of the *Criminal Code Act 1995* (Cth) (the Criminal Code). This submission explains the policy intention underlying the current legislative provisions and existing practices in managing High Risk Terrorist Offender (HRTO) matters.

2. This submission is supplementary to the joint public submission that the department and the Department of Home Affairs previously provided to the INSLM on 31 January 2022 (Joint Agency Submission), and the Australian Federal Police (AFP) response to questions from the INSLM's office in February 2022.

3. The submission addresses points raised by the INSLM, Mr Grant Donaldson SC, at a public hearing on 23 June 2022. In particular, the submission addresses issues within the responsibilities of the Attorney-General's portfolio in relation to:

   - the objects of Division 105A of the Criminal Code and the compatibility of the Division with Australia's international human rights obligations
   - eligibility criteria and the procedure for determining conditions under post-sentence orders (PSOs)
   - access to justice, procedural fairness and appropriate representation in PSO proceedings, and
   - the admissibility and appropriateness of relevant expert evidence.

4. In preparing this submission, the department consulted the Department of Home Affairs and the AFP. The Department of Home Affairs has provided a separate supplementary submission, which addressed the Department of Home Affairs' role as licensee for training and accreditation in the Violent Extremist Risk Assessment Second Revision (VERA-2R) tool and national consistency in the treatment of offenders subject to PSOs.

5. As a result of machinery of government changes following the 2022 Federal Election, responsibility for law enforcement policy and operations, including administration of the *Australian Federal Police Act 1979* (Cth), moved from the Home Affairs portfolio to the Attorney-General's portfolio. The Attorney-General also gained policy responsibility for the Criminal Code while retaining administrative responsibility for the Criminal Code. As a result, the Attorney-General became the AFP Minister under the Criminal Code, and has responsibility for making applications for PSOs under Division 105A.

6. The department thanks the INSLM for an opportunity to provide a supplementary submission on these issues. The department looks forward to the Review's completion and the opportunity to support the Government to respond to the Review's recommendations in due course.

Part 1: Objects and foundation of Division 105A

Objects of the Division

7. The object of Division 105A is to protect the community from serious Part 5.3 offences by providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to a continuing detention order (CDO) or extended supervision order (ESO).

8. The original object of Division 105A, as introduced by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), was "to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community." The objects clause, section 105A.1, was repealed and replaced by the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) as a result of ESOs being included in the definition. The object remains preventative and protective in nature.

9. The primary object of the HRTO scheme is to protect the community from terrorism, and is not punitive. The High Court considered the constitutionality of the scheme, finding it remains constitutional because it does not rely on a punitive purpose. As Kiefel, Bell, Keane and Steward found in relation to the CDO provisions:

> The object of Div 105A, set out earlier in these reasons, is plainly directed to the protection of the community from harm. The fact that the Parliament has chosen not to pursue this object by a more extreme measure that is not conditioned on the subject being a "terrorist offender" does not gainsay that the object of the continuing detention order is community protection and not punishment. Nor does the fact that the detention for which Div 105A provides is in a prison detract from the conclusion that its purpose is protective and not punitive. That protection is its purpose is reinforced by the requirement that a person detained under a continuing detention order, as far as reasonably possible, is to be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment.[1]

10. Nonetheless, rehabilitation and reintegration are, and will continue to be, important parts of the HRTO regime, as the rehabilitation and reintegration of offenders will contribute to the safety and protection of the community in the longer term. To that end, a court can impose conditions under an ESO requiring the offender to attend treatment, rehabilitation or intervention programmes or activities. The treatment and rehabilitation of the offender is also something a court may consider as part of an expert assessment report when determining whether to make an ESO or CDO. However, the participation of a person subject to a CDO in any rehabilitation initiative is voluntary.

[1] *Minister for Home Affairs v Benbrika* [2021] HCA 4; 95 ALJR 166 at [39] (Kiefel CJ, Bell, Keane and Steward JJ).

Australia's international human rights obligations

11. Australia's international obligations to combat terrorism stem from a range of sources. These include a variety of treaties ratified by Australia that are aimed at supressing specific forms of terrorism, as well as United Nations Security Council resolutions, which Australia is under an international obligation to 'accept and carry out' by virtue of Article 25 of the *UN Charter*.[2]

12. Detention for the purpose of protecting the community is consistent with the terms of Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which requires that administrative post-sentence detention only be used as a last resort, and where no other less restrictive measure may meet the legitimate purpose for which it is imposed. Preventative detention is a commonly recognised method of protecting the community against certain serial offenders, and is practised in many other jurisdictions including the United Kingdom, the United States, Canada and New Zealand.

13. As part of the development of both the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* and *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021*, the department carried out human rights compatibility assessments and prepared statements of compatibility in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In relation to both Acts it was concluded that while they engage a range of human rights, they are compatible with those human rights because they promote some rights and, to the extent that they limit other rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.[3]

Requirement that post-sentence detention only be used as a last resort

14. As noted by the INSLM at the public hearing on 23 June 2022, the 2014 United Nations Human Rights Committee has stated that in order to avoid arbitrariness and comply with Article 9 of the ICCPR, States:

> ...should only use such post-sentence detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.[4]

15. The Australian Human Rights Commission (AHRC) is of the view that, because under Division 105A a court can consider only ESOs or control orders as alternatives to CDOs,[5] Division 105A restricts the scope of available alternatives to detention in a way that is inconsistent with Australia's human rights obligations.[6]

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[2] See Joint Agency Submission at pages 26-27 [121]-[124] for further detail on the Division's consistency with Australia's international obligations.
[3] See Joint Agency Submission at pages 27-30 [125]-[134] for further detail on the Division's consistency with Australia's human rights obligations.
[4] UNHRC, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, [21].
[5] While a state or territory Supreme Court will be able to make an ESO as a less restrictive measure in the alternative to a CDO, only the Federal Court of Australia or the Federal Circuit Court of Australia can make a control order.
[6] Australian Human Rights Commission, submission to INSLM Division 105A Review, page 33 [110].

16. Prior to the introduction of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021*, the term 'less restrictive measure' was not defined in the Criminal Code. This meant a court could potentially consider any measure or action (or a combination of measures or actions) that it considered less restrictive. The *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* clarified that ESOs and control orders are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a CDO that would be effective in preventing the unacceptable risk posed by an offender.

17. This is appropriate as the conditions of ESOs and control orders can be tailored to meet the specific risks posed by an individual offender, and are subject to the safeguard that the court must be satisfied that each condition is reasonably necessary, and reasonably appropriate and adapted, for the purpose of that order. The court also retains discretion as to whether to make a CDO if it is satisfied that the offender poses an unacceptable risk and that there are no less restrictive measures that would be effective in preventing the unacceptable risk of the offender committing a serious Part 5.3 offence.

18. These requirements ensure that post-sentence detention is only used as a last resort.

Requirement that post-sentence detention be subject to regular periodic reviews

19. Detention may become arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.[7]

20. In the case of *Rameka et al v New Zealand*, which involved a similar scheme of preventative detention for community safety, the United Nations Human Rights Council (UNHRC) outlined the necessary elements to satisfy the requirements of Article 9(1):

> The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for the purposes of protection of the public.[8]

21. Division 105A provides for compulsory annual review by an independent body (being a court) to determine whether post-sentence detention is still justified in all the circumstances. In addition to the requirement of an annual review under section 105A.10, section 105A.11 provides for review on application by a terrorist offender or their respective legal representatives. These requirements ensure Division 105A meets the requirements of Article 9(1).

[7] UNHRC, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, [12].
[8] UNHRC, *Rameka v New Zealand, Communication No. 1090/2002*, Geneva, 15 December 2003, [7.3].

Requirement for conditions in post-sentence detention to be distinct from the conditions for convicted prisoners serving a punitive sentence

22. Where individuals undergoing administrative detention are detained in prison (as opposed to a rehabilitative or therapeutic facility) the UNHRC has expressed the view that this will amount to 'a fresh term of imprisonment'.[9] In *Fardon*, the UNHRC identified a number of implications which would flow from administrative detention being penal in nature, including that:

    - detention would constitute retrospective punishment, which is prohibited under Article 15 and would be necessarily arbitrary contrary to Article 9(1),[10] and
    - the process leading to detention would be required to provide for criminal due process rights in accordance with Article 14.[11]

23. In accordance with the requirement that post-sentence detention be distinct from the conditions for convicted prisoners serving a punitive sentence, section 105A.4 of the Criminal Code sets out the minimum standards of treatment that must be afforded to an offender who is detained under a CDO. This includes that:

    - the offender must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment subject to any reasonable requirements necessary to maintain:
        i. the management, security or good order of the prison; and
        ii. the safe custody or welfare of the offender or any prisoners; and
        iii. the safety and protection of the community;[12]
    - the offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment unless:
        iv. it is reasonably necessary for the rehabilitation, treatment, work, education, general socialisation or other group activities; or
        v. it is necessary for the security or good order of the prison or safe custody or welfare of the terrorist offender or any other prisoners; or
        vi. it is necessary for the safety and protection of the community; or
        vii. the offender elects to be so accommodated or detained.[13]

24. Offenders subject to a CDO are housed in state and territory prisons under separate arrangements made in respect of each individual offender under section 105A.21. The Commonwealth monitors the detention conditions of an individual under a CDO through regular engagement with relevant state and territory authorities, including receiving ad-hoc incident reporting and monitoring through the HRTO governance arrangements. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) made recommendations on this matter, as discussed further at paragraphs 136 to 138 of this submission.

25. For further detail on current housing arrangements for individuals subject to continuing detention orders, please see the Department of Home Affairs' supplementary submission.

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[9] *Fardon v Australia*, CCPR/C/98/D/1629/2007, UNHRC, 10 May 2010, [7.4(1)].
[10] Ibid [7.4(2)].
[11] Ibid [7.4(3)].
[12] S 105A.4(1).
[13] S 105A.4(2).

Part 2: Eligibility and conditions under the post-sentence order regime

Definition of 'unacceptable risk'

26. As outlined above, the object of Division 105A is to protect the community from serious Part 5.3 offences by providing that terrorist offenders who pose an unacceptable risk of committing these offences are subject to a CDO or ESO. The term 'unacceptable risk' is not defined within the Criminal Code, and has been deliberately left open to the court to apply flexibly on an individual basis.[14] In *Minister for Home Affairs v Benbrika*,[15] the plurality's reasoning was supportive of the unacceptable risk test (Kiefel CJ, Bell, Keane and Steward JJ at [46]).[16]

27. A Supreme Court of a state or territory may make a CDO where they are satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence and there is no less restrictive measure that would be effective in preventing the unacceptable risk.[17]

28. In its submission to the INSLM review, the AHRC recommended that paragraph 105A.7(1)(b) be amended to provide that a CDO may only be made if the court is satisfied, to a high degree of probability, on the basis of admissible evidence, that:

    - the offender poses an unacceptable and probable risk of committing, providing support for or facilitating a terrorist act; and
    - making the order is reasonably necessary to prevent the offender from committing, providing support for or facilitating a terrorist act.[18]

29. The AHRC submitted that the test be modified in order to ensure a person is only subject to preventative detention when there is a sufficient likelihood of future harm occurring, and noted that a range of possible thresholds could be adopted for this purpose. They suggest that the 'unacceptable and probable' standard would direct the court's attention to the requirement that the likelihood of risk/magnitude of harm equation cannot be satisfied based on risks that are vague or insubstantial.[19]

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[14] Revised Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*, page 28 [163].
[15] [2021] HCA 4.
[16] See Joint Agency Submission at pages 21-23 [99]-[106] for further discussion of the unacceptable risk test in Australian case law.
[17] S 105A.7(1).
[18] Australian Human Rights Commission, submission to INSLM Division 105A Review, page 8 [15].
[19] Ibid page 30 [96].

30. At the public hearing on 23 June 2022, the INSLM queried whether providing greater definition to the term 'unacceptable' in relation to 'unacceptable risk' would address the AHRC's recommendation. The department does not consider that it is necessary to define the term 'unacceptable' in order to ensure the court considers the likelihood of the risk, as evidenced in the court's consideration of this issue in *Benbrika*.

31. As High Court Justice Edelman outlined in *Benbrika*, the unacceptable risk test already requires a court to assess the likelihood of the commission of a relevant offence, in addition to considering the magnitude of possible harm to the community that would result. Justice Edelman observed that:

> A level of risk which is not high, concerning an offence that would not greatly threaten the safety and protection of the community (and hence might not imperil the object of Division 105A), might not be unacceptable although the same level of risk for an offence that greatly threatens the safety and protection of the community might be unacceptable. The need to consider both the likelihood of the commission of the offence and the magnitude of possible harm to the community when assessing whether a risk is "unacceptable" is reinforced by the mandatory considerations required when the court exercises the evaluative judgment of "acceptability" of the risk of a terrorist offender committing a serious Pt 5.3 offence. ... Naturally, the greater the potential harm to the community from commission of the offence and the more likely that harm is to occur, the more likely it is that the court will conclude that the risk is unacceptable.[20]

32. This aligns with the department's view that the unacceptable risk test does not require further definition.

33. The current threshold and framing of the CDO regime is appropriate. CDOs ensure that the Commonwealth is able to protect the community from serious harm by effectively managing offenders where there is an unacceptable risk of them committing a serious terrorism offence.

Eligibility for the post-sentence order regime

34. The same eligibility criteria under section 105A.3 applies for both CDOs and ESOs. Section 105A.3 provides that a PSO may be made in relation to a person convicted of an offence specified in paragraph 105A.3(1)(a), where the individual is at least 18 years old at the time the sentence ends. The offences specified in paragraph 105A.3(1)(a) are:

- an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices); or
- a serious Part 5.3 offence; or
- an offence against Part 5.5 (foreign incursions and recruitment), except an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements); or
- an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*, except an offence against paragraph 9(1)(b) or (c) of that Act (publishing recruitment advertisements).

[20] *Minister for Home Affairs v Benbrika* [2021] HCA 4 [192]–[193] (Edelman J).

35. These offences broadly reflect the definition of 'terrorism offence' at subsection 3(1) of the *Crimes Act 1914* (Cth)(Crimes Act). To ensure that the scheme is appropriately targeted, the scheme only applies to the most serious Part 5.3 (terrorism) offences, namely those which carry a maximum penalty of seven or more years imprisonment.

36. An ESO application can also be made independently of a CDO application, and is not dependent on a CDO application being made. CDOs and ESOs are appropriately adapted to address different levels of risk in respect of the same cohort of offenders.

Consideration of sentence length as an integer for eligibility

37. At the public hearing, the INSLM queried whether a more appropriate integer for eligibility for a PSO would be conviction of one of the offences specified, where a sentence of a particular length is imposed.

38. The policy intent underlying the Division is that the length of the sentence imposed on a convicted terrorist offender should not have a bearing upon their eligibility for a PSO. The decision of a court to impose a PSO is based on an assessment of future risk, rather than as punishment for past conduct.

39. A practical example of why sentence length is an inappropriate integer is the case of Mr Blake Pender.[21] While Mr Pender was sentenced to a four-years imprisonment, the court was still satisfied to a high degree of probability, based on admissible evidence, that he posed an unacceptable risk of committing a serious terrorism offence, and that no less restrictive measure would be effective in preventing that risk. A minimum sentence threshold may have meant Pender was not eligible for a CDO.

Consideration of different eligibility for CDOs against ESOs

40. The INSLM also queried whether there would be a benefit in having a different integer for eligibility for the CDO and ESO schemes.

41. Having the same eligibility criteria for both CDOs and ESOs is appropriate as the ESO scheme is intended to complement the CDO scheme, as it enables a court to make an ESO as a less restrictive alternative to a CDO to manage the risk an offender poses to the community at the end of their custodial sentence.

42. The current policy underpinning Division 105A is that CDOs and ESOs should have the same eligibility criteria, as they are intended to apply to the same cohort of people – that is, serious terrorist offenders who pose an unacceptable risk to the community at the end of their custodial sentence. Having different eligibility criteria for CDOs and ESOs would interfere with the interoperability of the two schemes.

43. Eligibility is linked to the category of offending (i.e. serious terrorism offending). Whether a CDO or less restrictive ESO is imposed is based on the level of risk posed by the terrorist offender. It may not be appropriate to differentiate between types of serious terrorism offending/sentences with regards to eligibility for CDOs and ESOs, given the objective is to mitigate risk to the community of the commission of a terrorism offence. Thus, the department considers that eligibility should continue to be based on risk posed.

[21] *Minister for Home Affairs v Pender* [2021] NSWSC 1644.

Procedure for determining conditions under an ESO

44. Subsection 105A.7B(1) provides that under an ESO, a court may impose any conditions that it is satisfied, on the balance of probabilities (based on admissible evidence), are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.

45. Without limiting the operation of subsection 105A.7B(1), subsection 105A.7B(3) lists a number of general conditions that a court may impose on an offender. These have been informed by operational experience under the control order scheme, as well as state and territory schemes.

46. These general conditions are permissive, and do not impede the compilation of ESO conditions that satisfy the requirements under paragraph 105A.7A(1)(c) that each condition and the total effect of the conditions be reasonably necessary, reasonably appropriate, and adapted.

47. Currently, if a court is persuaded that a person poses an unacceptable risk of committing a serious terrorism offence, but is not persuaded that there is no less restrictive measure available that would prevent that risk, a court may make an ESO. At the public hearing, the INSLM queried whether this process necessarily results in a starting point of analysis for an ESO that entails consideration of significant conditions being imposed, and working back from that point. The INSLM requested the Government consider whether a better starting point for determining conditions would be for the defendant to propose conditions to the court to ameliorate the risk, rather than the AFP Minister proposing conditions.

48. The department considers that it is most appropriate for the AFP Minister to propose the ESO conditions in the first instance. This is because operational agencies are best placed to advise which of the range of available conditions would be most appropriate to manage the risk posed by the offender. Additionally, the department, in consultation with relevant state and territory agencies, has access to a large range of information sources that make it well placed to identify and manage the therapeutic needs of an offender.

49. An offender is unlikely to propose sufficiently restrictive conditions that may otherwise be appropriate. Neither are they likely to have the experience to do so to any practical extent. Further, this would require the offender to obtain expert evidence regarding their risk and draft detailed evidence to support conditions they may propose. The burden of proving ESO conditions as 'reasonably necessary, appropriate and adapted', should be on the party applying for the order not the subject of the order in the interests of justice. It remains the responsibility of the court to determine which of the recommended conditions should be imposed.

50. In considering a potential application for an ESO the department consults with legal advisers and relevant stakeholders, including the AFP, state police and corrective services, in preparing draft conditions that are tailored to the particular offender's individual needs based on risk and mitigation of risk. The department takes into account a range of information including an assessment of the risk posed by that offender undertaken by a relevant expert. In drafting ESO conditions, the department and stakeholders are conscious of ensuring that each condition and the combined effect of all the draft conditions are reasonably necessary, and reasonably appropriate and adapted to protect the community from the risk posed by the individual offender.

51. During the first ESO application made by the AFP Minister, to ensure all conditions individually and collectively were proportionate and effective at managing the risks posed by the offender, the AFP Minister and the department considered advice received from legal advisers, the AFP and state corrections and law enforcement agencies, and expert witnesses to develop an evidence-based rationale behind each individual condition, and the conditions as a whole.

52. The conditions are developed based on specialised law enforcement expertise having regard to the expert risk assessment. AFP deponents, based on their specialised experience and knowledge, prepare supporting evidence to justify the proposed conditions. Conditions that relate to the therapeutic case management are developed by drawing upon specialist expertise, for example treating psychologists, and are tailored and targeted to an individual's particular risk. They are developed in consultation with relevant state and territory agencies.

53. Once an order has been made, sections 105A.9B and 105A.9C provide that either the offender or the AFP Minister may subsequently apply to vary the ESO or interim supervision order (ISO) at any time. Subsection 105A.9B(1A) provides that the AFP Minister must make an application to the court to remove or vary an ESO condition if they are satisfied that the condition is no longer reasonably necessary, or reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence. The court can then vary the ESO or ISO by adding, varying or removing conditions.

Operation and availability of conditions under an ESO

54. The Commonwealth is responsible for administering the national HRTO regime outlined in Division 105A. The Commonwealth is supported by state and territory agencies in the regime's implementation, for example, by corrective services and police authorities.

55. The Commonwealth, in collaboration with state and territory governments, has developed an implementation framework to support the effective operation of the HRTO regime. The framework contributes to effective coordination, national consistency and interoperability amongst and between jurisdictions and systems, including through an understanding of the capabilities, roles and responsibilities of the Commonwealth, state and territory agencies associated with the HRTO regime implementation. This framework is under review following the machinery of government changes in June 2022.

56. The AFP are the lead partner agency responsible for enforcing and monitoring all ESO conditions imposed on the offender that relate to enforcement and compliance activities around the ESO in respect to the offender's conduct, consistent with section 105A.7B of the Criminal Code. While other entities will have different roles in the implementation of the ESO regime, the AFP has overarching oversight of offenders post-release. The process of enforcement and compliance will involve ongoing consultation and engagement by AFP with partners to ensure the impacts of any non-compliance are understood against the totality of the risk posed by an offender and that any enforcement action taken is duly considered.

57. ESO conditions that impose obligations on the offender in respect of treatment, rehabilitation, intervention programs etc. (therapeutic case management conditions) will be operationalised as agreed to by states and territories in the HRTO regime Implementation Framework. For example, in NSW, Corrective Services NSW will manage the therapeutic case management conditions, whereas in Victoria, department will manage those conditions, with support coming from relevant Victorian Government agencies. All ESO conditions, including therapeutic case management conditions, are developed on a case-by-case basis with close reference to an offender's personal circumstances.

Consistency across jurisdictions

58. The Commonwealth is taking steps to ensure a nationally consistent approach to the implementation of the ESO scheme. The department leads the policy and the management of litigation under Division 105A. The department works in close collaboration with the AFP, who maintains national coordination of enforcement and compliance, and AFP personnel involved in the development, compliance and enforcement of ESO conditions operate in line with nationally agreed practices. The jurisdictional governance forums established under the HRTO Regime Implementation Framework are chaired by the same departmental and AFP personnel, providing nationally consistent processes and governance.

59. A HRTO Memorandum of Understanding is being developed that will provide national consistency in information sharing and working arrangements across Commonwealth and state and territory partners. While there will be jurisdictional nuances, processes will be largely consistent across jurisdictions.

60. The department and the AFP engage extensively with state and territory agencies to settle arrangements and implementation activities in respect of offenders who may be subject to a PSO.

61. State and territory legislation is taken into account when consulting and negotiating on specific arrangements relating to the management of offenders subject to PSOs. State and territory agencies have their own, well-established legislation, policies and procedures for the management of offenders.

62. While each jurisdiction's legislation, policies and procedures differ (in various capacities), the management of offenders is consistent with national standards and incorporates the legislative requirements of Division 105A. The department, the Department of Home Affairs, and the AFP are committed to ensuring that national arrangements as part of the HRTO Regime Implementation Framework create consistent, overarching risk management principles and practices for offenders regardless of different state and territory administrative processes.

63. The consultations and arrangements for the management of an individual offender in a particular state while subject to a CDO or ESO is tailored to the individual offender and the risk they pose, as well as the particular therapeutic case management arrangements agreed with the relevant jurisdiction in respect of that offender.

Need for control orders

64. The department acknowledges the INSLM's comments that ESOs are to be the preferred management option for relevant offenders upon release from prison at the end of a custodial sentence, as opposed to the existing control order regime. There may nevertheless be some situations where a control order is the more appropriate option. The decision whether to apply for an ESO or a control order remains a matter that must be considered on a case-by-case basis.

65. The former INSLM and the PJCIS of the 46th Parliament recommended the creation of an ESO scheme to complement CDOs in Division 105A. This was primarily to address the lack of interoperability between CDOs and control orders, given that CDOs and control orders are issued by different courts in separate proceedings.

66. Following the introduction of the ESO scheme, control orders remain as a risk mitigation measure, including for the management of individuals of counter-terrorism interest who in their current circumstances would not be eligible for a PSO. For example:

- individuals who have been convicted of terrorism offences but are not eligible for a CDO or an ESO, such as where a person is convicted of associating with a terrorist organisation that does not meet the threshold for a serious Part 5.3 offence; or individuals who are released shortly after sentencing for reasons that do not reflect their risk (for example, time served provisions)
- individuals who have previously been convicted of terrorism offences and subject to a PSO, but who are assessed as posing a risk to the community at a future point in time following the expiry of their order
- individuals who have not been convicted of terrorism offences but are assessed as posing a terrorism-related risk, and
- individuals convicted of terrorism offences but not sentenced to a period of imprisonment, or taken to have served their sentence while on remand.

67. Control orders remain necessary for both PSO eligible and PSO ineligible offenders. However, in the PSO regime, the AFP would only consider a control order in exceptional circumstances. For example, where an offender is sentenced to time served and released, and it is not possible to apply for an ISO or ESO.

68. The ESO scheme does not prevent the AFP Minister from consenting to an interim control order (ICO), or a Federal Court or Federal Circuit Court from making that ICO, while PSO proceedings are on foot in a state or territory Supreme Court in relation to the same offender. However, the Criminal Code includes safeguards to ensure that a person is not simultaneously subject to a control order and an ESO. Specifically:

- a control order cannot begin to be in force while an offender is detained in custody in a prison (serving a sentence or subject to a CDO), or while an ESO is in force – the control order would only commence when the person is released from custody and is not subject to an ESO,[22] and
- if an offender is subject to a control order (i.e. a control order has been issued by the court and served on the person), and a CDO or an ESO is made, in relation to the offender, then the control order immediately ceases to be in force.[23]

[22] S 104.5(1D).
[23] S 104.17A.

Part 3: Access to justice, procedural fairness and appropriate representation in post-sentence order proceedings

Timing of post-sentence order applications

69. Under subsection 105A.5(2), the AFP Minister may apply to the court for a CDO or ESO to be made in relation to an eligible offender within 12 months of the date they are due to be released into the community. During the public hearing, the INSLM queried whether Division 105A should include a requirement that applications be commenced no less than 6 months prior to the expiration of the offender's sentence, noting that in both CDO proceedings to date applications were commenced less than six months prior to the expiration of the sentence.

70. Case planning by the Commonwealth aims for a PSO to be filed with the relevant jurisdictional Supreme Court at least 6 months prior to an offender's sentence expiry. This is to provide the court with sufficient time to consider the application before the offender's sentence expiry.

71. There are, however, circumstances that necessitate the Commonwealth maintaining its ability to file a PSO application inside 6 months of the offender's sentence expiry, including up until the date of that expiry.

72. These circumstances include where an offender has spent significant time on remand awaiting trial and sentencing, and where that time spent on remand is taken into account upon sentencing. This can mean the offender may only be eligible for a PSO for a short period of time, given that an offender only becomes eligible for a PSO once they are sentenced and detained in custody in a prison serving a sentence of imprisonment (the offender is not eligible while they are on remand).

73. For example, on 23 June 2021, Mr Adam Brookman was sentenced to 6 years and 8 months imprisonment, with a non-parole period of 5 years, after pleading guilty to the charge of performing services in Syria in support or promotion of the commission of an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Mr Brookman was released into the community late on the evening of 23 June 2021. The time between sentencing and Mr Brookman's release was a matter of hours. Following his release, the AFP obtained a control order in respect of Mr Brookman.

74. Amending Division 105A to require an application to be filed no less than 6 months before sentence expiry may prevent the Minister from seeking a PSO in respect of that offender. This includes where there is evidence that may support a view that the offender poses an unacceptable risk of committing a serious terrorism offence on release.

75. The department acknowledges there are benefits to commencing PSO proceedings as early as possible. It provides greater certainty and reduces reliance on interim orders. AFP generally commences investigations ahead of time. However, there may be exceptional circumstances that necessitate applications to be made close to the offender's release date. The department and AFP are working towards co-location in Sydney, Melbourne and Canberra, establishing a multi-agency case management model. Joint teams will assist greater collective understanding and collaboration on the workload, and a collective understanding of the risk, evidence and litigation timelines.

Threshold for interim orders

76. The INSLM also queried whether a higher standard should be required for the AFP Minister to establish that an interim order should be made. The INSLM noted the low standard for the making of interim orders, and commented that it would be unsatisfactory if an assumption existed that interim orders would be made as a matter of course, as this would give rise to delay in proceedings.

77. Interim orders go to the object of Division 105A, as they protect the community from the unacceptable risk of an offender committing a serious Part 5.3 offences while proceedings are on foot.

78. Under section 105A.9, the court may make an interim detention order (IDO) if an application has been made to the court for a CDO in relation to the offender. Before granting the interim order, the court must also be satisfied that there are reasonable grounds for considering that a CDO will be made in relation to the offender. The period of an IDO should be the period, of no more than 28 days, that the court is satisfied is reasonably necessary to determine the application for the CDO. Consecutive IDOs may be made, but the total period of all IDOs must be less than three months, unless exceptional circumstances apply. The effect of the order is to commit the offender to detention in a prison.

79. Under section 105A.9A, the court may make an ISO pending the determination of an ESO application, or as an alternative to an IDO in connection with a CDO proceeding. The period of an ISO should be the period, of no more than 28 days, that the court is satisfied is reasonably necessary to determine the application for the ESO or CDO. Consecutive ISOs may be made, but the total period of all ISOs must be less than 3 months, unless exceptional circumstances apply.

80. The INSLM's proposal of 'no IDO unless there are exceptional circumstances' would create a significant barrier to be overcome. Whether exceptional circumstances exist would depend on the facts of each case. However, it is unlikely that the Minister not filing in sufficient time to allow the CDO to be determined before the offender's release would constitute such an exceptional circumstance (unless, for example, the offender only became eligible shortly before their release date).

81. There are clear advantages to starting the application process for PSOs as early as possible. Pre-release investigations ideally commence as early as 24 months prior to release, but not before an offender has been sentenced. However, it should be noted that offender eligibility can change over time and as new information comes to light that reveals they pose a greater risk to the community than previously thought. Additionally, in some circumstances, short sentences may see eligible offenders convicted, sentenced and released within a short timeframe, preventing the application process commencing at an earlier stage. These circumstances may lead to applications for PSOs having to be made closer to the release date than would ideally be the case. IDOs are essential in these situations.

82. Interim orders are intended to mitigate the risk of an offender committing a serious terrorism offence, while a PSO is being determined. It can take several months for a Supreme Court to hear and determine a PSO application. In the meantime, the offender's term of imprisonment may expire. An interim order enables the offender to be detained in custody, or presented with a list of conditions which they must adhere to (and thus ensure the safety of the community) prior to the court delivering its judgment. Given the length of time it takes to prepare for an application, including the time it takes to hear and determine an application, if interim orders are not available, there would be no power to detain or impose limitations on offenders in the intervening period between their sentence expiring and the determination of the proceedings (IDOs were granted in the *Benbrika* proceedings).

83. As outlined in further detail below under the heading 'Commencement of continuing detention orders', IDOs were made in both the *Benbrika* and *Pender* matters. There was no dispute in either case as to the making of the interim orders. Further, as noted by Legal Aid NSW based on their experience of the NSW ESO scheme, interim hearings can provide an important procedural fairness safeguard by giving offenders an opportunity to demonstrate compliance with interim conditions on an ISO before final orders are made.[24]

Commencement of continuing detention orders

84. When the court makes a CDO, the order must specify the period during which it is in force.[25] The order may be suspended during the period that it is in force if the offender is detained in custody in a prison other than as a result of the order (see section 105A.18C), and the period must be a period of no more than three years. The court may also make successive CDOs in relation to a terrorist offender, which begin to be in force immediately after a previous CDO in relation to the offender ceases to be in force.

85. At the public hearing on 23 June 2022, the INSLM queried whether, in the event that a CDO is made by the court after the expiration of an offender's sentence (as was the case in *Benbrika* and *Pender*), the CDO should commence at the expiration of the offender's sentence rather than the date that the CDO is made.

86. Mr Benbrika's original effective sentence of 15 years' imprisonment expired on 5 November 2020. The Minister for Home Affairs (as the then AFP Minister) applied for a CDO in relation to Mr Benbrika on 4 September 2020. While this application was proceeding, the Supreme Court of Victoria made an order for an IDO, commencing on 5 November 2020, with a further IDO coming into effect on the expiry of the first IDO. The CDO application was decided on 24 December 2020, with the Court making a CDO to be in force for a period of three years commencing that day (24 December 2020) and concluding on 23 December 2023.[26]

87. Mr Pender's original effective sentence of four years' imprisonment expired on 13 September 2021. The Minister for Home Affairs (as the then AFP Minister) applied for a CDO in relation to Mr Pender on 5 July 2021. While this application was proceeding, the Supreme Court of New South Wales made successive orders for IDOs, commencing on 13 September 2021 and expiring on 9 November 2021, when the CDO application was decided. The Court made a CDO to be in force for a period of one year, from 13 September 2021.[27]

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[24] Legal Aid NSW, submission to INSLM Division 105A Review, page 13.
[25] S 105A.7(4).
[26] *Minister for Home Affairs v Benbrika* [2020] VSC 888.
[27] *Minister for Home Affairs v Pender* [2021] NSWSC 1644.

88. As evidenced by the decision in Pender, there is nothing in the legislation to prevent the court from making a CDO to commence at the expiration of the offender's sentence, rather than the date the CDO is made. The department therefore does not consider it necessary to amend Division 105A to provide that a CDO is to commence is the end of the sentence period. Ultimately, the period during which a CDO is in force is for the court to determine, with the caveat that the period must be a period of no more than 3 years, that the court is satisfied is reasonably necessary to prevent the unacceptable risk.[28]

Funding of post-sentence order proceedings

89. Given their unique nature, the CDO and ESO schemes include specific features to ensure that offenders have a reasonable opportunity to present their cases and are not otherwise at a disadvantage, in accordance with the principle of 'equality of arms'. These safeguards apply in addition to the usual rules of evidence and procedure applicable in civil matters.

90. Section 105A.15A provides that if an offender is, due to circumstances beyond their control, unable to engage legal representation, the court may make an order:

    - staying the proceeding for such period and subject to such conditions as the court thinks fit, and/or
    - requiring the Commonwealth to bear, in accordance with the regulations (if any), all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding.

    The PJCIS made recommendations on this matter, as discussed further at paragraphs 136 to 138 of this submission.

91. This provision ensures that an offender is appropriately represented during PSO proceedings and ensures procedural fairness.[29]

92. The Commonwealth accepts responsibility for funding reasonable costs incurred by Legal Aid Commissions (LACs) for litigation of PSO matters, including in-house and external legal fees and disbursements, and the Expensive Commonwealth Criminal Cases Fund (ECCCF) is the appropriate mechanism to do that. The department monitors demand on the ECCCF, which will help to inform Government's consideration of future funding needs.

93. Costs incurred in PSO revocations, variations or appeals not initiated by the Commonwealth Director of Public Prosecutions or the AFP, are only eligible to be funded if counsel provides certification that there are reasonable prospects of success. Similarly, if funding can be obtained from other sources, including another (state or territory) government or where costs could be sought under the *Proceeds of Crime Act 2002* (Cth), ECCCF funding may not be granted.

[28] S 105A.7(5).
[29] See Joint Agency Submission at pages 17-19 [71]-[77] and [83]-[85] for further detail on Commonwealth funding for PSO proceedings.

94. PSO matters were included in the ECCCF from 1 July 2021 but funding was not provided to LACs until September 2021 due to the need to implement a grants application process. This affected the decision in the *Benbrika* matter (even though the department provided assurances to LACs as to the availability of funding). The department will continue to work with LACs to ensure the ECCCF works as intended in relation to provision of funding for representation in PSO matters.

Post Sentence Authority Model

95. Following the public hearing, the INSLM queried whether a model similar to the Victorian Post Sentence Authority (PSA) could be replicated at the Commonwealth level in relation to Division 105A.

96. In Victoria, the *Serious Offenders Act 2018* (Vic) enhances the protection of the community by allowing a court to impose supervision orders or detention orders for serious sex and violent offenders who have completed their sentence, and present an unacceptable risk of harm to the community, and provides for the establishment of the PSA.

97. Under section 291 of the Act, the PSA is responsible for independent monitoring of serious offenders on PSOs, and oversight of Victoria's post-sentence scheme. The PSA:

- reviews and monitors the progress of offenders on supervision orders or detention orders
- monitors offender compliance with the conditions of supervision orders
- gives directions and instructions to offenders — for example, a direction about where the offender can live
- makes recommendations to the Secretary of the Department of Justice and Community Safety about reviewing the conditions of supervision orders
- enquires into alleged breaches of supervision orders and makes recommendations to the Secretary of the Department of Justice and Community Safety about commencing legal proceedings against offenders
- monitors the overall administration of the post-sentence scheme
- oversees the coordination of service delivery to offenders by government agencies, and
- publicly reports on the performance and administration of the post-sentence scheme.[30]

The PJCIS made recommendations on this matter, as discussed further at paragraphs 136 to 138 of this submission.

98. In the 2020-21 financial year, the PSA conducted 182 serious offenders' hearings, and was responsible for monitoring 142 serious offenders.[31]

[30] https://www.postsentenceauthority.vic.gov.au/what-we-do, accessed 13 July 2022.

[31] Post Sentence Authority Annual Report 2020-21, pages 6-7.

99. The department leads the policy and implementation of the management of litigation under Division 105A, and is responsible for the operation of therapeutic conditions in ESOs (which includes leading therapeutic case management in Victoria). The department works closely with the AFP, who has responsibility for managing the enforcement and compliance of HRTOs in the community. Were a PSA model to be adopted at the Commonwealth level, there would need to be a clear delineation of responsibilities between the PSA and other Commonwealth agencies in order to avoid legislative and operational issues. For example, having multiple authorities responsible for providing instructions to offenders may create confusion and conflicting advice for offenders, which could in turn generate legal uncertainty around whether someone has been complying with a condition or not.

100. The INSLM also queried whether a PSA at the Commonwealth level could function as a replacement for 'specified authorities'. Under Division 105A, a court may impose conditions in an ESO which give authority to, or confer some discretion on, a 'specified authority'. A specified authority may be a police officer or class of police officer, a person, or class of person, who is involved in electronically monitoring the subject of an order, or any other person, or class of person that the court considers is appropriate in relation to a particular ESO condition.

101. The role of the specified authority will be determined by the court. For example, a court may impose a condition that the offender wear a monitoring device and comply with directions given by a specified authority in relation to electronic monitoring. The order could identify Company A, a provider of monitoring services, as the specified authority. This would mean specified staff of Company A could direct the offender to periodically charge a monitoring device. Importantly, a specified authority only becomes so when expressly specified in relation to a condition imposed by the court.

102. The category of persons who may be designated as a specified authority in an order is intentionally broad so that the court making the order has sufficient flexibility, noting there are a range of conditions that may be imposed under a control order or an ESO.[32] This flexibility allows for therapeutic case managers to be identified as specified authorities for the purposes of an ESO made by the court. Restricting the category of persons to those already a part of a potential Commonwealth PSA could restrict this flexibility.

103. Given the existing structures in place and the overlap in functions between the department and the AFP, and any potential Commonwealth PSA, were a Commonwealth PSA to be introduced, the implications would need to be carefully considered, and a clear delineation of responsibilities would be required.

[32] Revised Explanatory Memorandum to the ESO Bill at page 44 [29].

Part 4: Relevant expert evidence and risk assessment of conditions

Admissibility of relevant expert evidence

104. During the public hearing, the INSLM queried the definition of 'relevant expert' under Division 105A, and relatedly, the admissibility of relevant expert risk assessments. In particular, the INSLM queried whether there was a policy intention that courts must have regard to expert risk assessor's reports, regardless of whether or not those reports would be admissible in the ordinary course of proceedings.

105. Section 105A.6B sets out the matters that a court must have regard to in making a PSO, which include any report of an assessment from a relevant expert, as well as the offender's level of participation in the assessment. Under section 105A.2, a relevant expert means any of the following persons who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence:

- a person who is registered as a medical practitioner under a law of State or Territory, and a fellow of the Royal Australian and New Zealand College of Psychiatrists;
- any other person registered as a medical practitioner under a law of a State or Territory;
- a person registered as a psychologist under a law of a State or Territory; or
- any other expert.

106. Crucially, any relevant expert must be competent to assess the risk of a terrorist offender committing a serious offence under Part 5.3. The definition provides the court with the flexibility to appoint 'any other expert' provided they are competent to assess the risk of a terrorist offender committing a serious offence under Part 5.3.[33]

107. The department accepts that experts must be qualified as experts under the ordinary rules of evidence in addition to meeting the definition of an expert in section 105A.2 of the Criminal Code. The requirement that the court must have regard to any report of an assessment by a relevant expert is subject to the qualification that the court must apply the rules of evidence and procedure for civil matters during a PSO proceeding.[34] This includes the hearsay and opinion rules in the Uniform Evidence Acts. Any question regarding the admissibility of the risk assessment reports as expert opinions is one that would be resolved by judicial consideration.

108. A court may only be satisfied that the legal thresholds for a PSO have been met on the basis of admissible evidence.[35] As such, any expert report filed in the proceedings by the AFP Minister would necessarily need to satisfy the rules of evidence for the court to rely on that report, and to make a finding that (for example) the offender posed an unacceptable risk of committing a serious Part 5.3 offence.

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[33] Revised Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*, page 24 [135]-[136].
[34] S 105A.6B(3) and s 105A.13.
[35] S 105A.7(1)(b) and s 105A.71(b).

109. In CDO applications filed to date, the Department of Home Affairs has proceeded to qualify the experts as a 'relevant expert' for the purposes of section 105A.2. Risk assessment reports from these experts have been admitted in CDO proceedings in relation to *Benbrika* and *Pender*. In *Benbrika*, for example, the expertise of Dr Mischel and Ms Dewson was ultimately considered by the Victorian Supreme Court:

> … there is no doubt that Ms Dewson and Dr Mischel are highly qualified and very experienced experts in the field of risk assessment for violent extremist offending. That there is such a field is clear enough, albeit that the particular field is a relatively new one.[36]

> … looking logically at the evidence of Ms Dewson and Dr Mischel, it is apparent that quite aside from the results of the VERA-2R each of them administered, each had access to a vast array of material which, in their expert hands would be capable of throwing real light on the question of the risk posed by the defendant of future extremist offending.[37]

110. The admissibility of 'relevant expert' evidence was affirmed in the first annual review of Mr Benbrika's CDO, in which the Court agreed that Dr Dewson is a highly qualified and experienced expert in the field of risk assessment for violent extremist offending.[38]

111. The department acknowledges the importance of risk assessments for the purposes of Division 105A proceedings, including the need to ensure independence of experts, as well as appropriate transparency, while also protecting the integrity of risk assessments.

Appropriateness of relevant expert evidence

112. During the hearing, the INSLM also raised the issue of relevant experts providing advice on the risk of a person committing a serious Part 5.3 offence. In particular, he noted the distinction between an assessment as to the risk of certain behaviour or conduct occurring in the future, and as assessment as to whether that behaviour or conduct constitutes, or would constitute, an offence under Part 5.3.

113. Experts are appointed by the court or the Government to conduct an assessment of the offender's risk of committing a serious Part 5.3 offence.[39] This framing – as opposed to an expert conducting an assessment of an offender's risk of committing particular actions or exhibiting particular behaviour – aligns with the approach of state and territory post-sentence schemes, which informed the development of the Commonwealth scheme.

[36] *Minister for Home Affairs v Benbrika* [2020] VSC 888 [442].
[37] Ibid [447].
[38] *Minister for Home Affairs v Benbrika (First review)* [2022] VSC 169 [320].
[39] S 105A.6 and s 105A.18D.

114. For example, New South Wales' scheme requires applications for PSOs to include a relevant expert report that assesses the likelihood of the eligible offender committing a serious terrorism offence.[40] Similarly, the South Australian scheme provides that before determining whether to make an extended supervision order in relation to a terror suspect, the court must direct a prescribed health professional to provide an assessment of the likelihood of the respondent committing a terrorist offence, or otherwise being involved in a terrorist act, or committing a serious offence of violence.[41]

Relevant expert assessment of conditions

115. The INSLM also raised the extent to which expert risk assessments should deal with the efficacy of conditions to deal with the risk posed by an offender.

116. As outlined above, the court may make a CDO where they are satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence and there is no less restrictive measure that would be effective in preventing the unacceptable risk.[42] The only less restrictive measure a court can consider are orders under Part 5.3 of the Criminal Code, such as an ESO. The conditions of such orders are subject to the safeguard that the court must be satisfied that each condition is reasonably necessary, and reasonably appropriate and adapted, for the protective purpose of the relevant order.

117. The department considers that it is appropriate that relevant experts provide evidence as to the efficacy of conditions to deal with the risk posed by an offender, noting that the court retains discretion as to the weight to be assigned to any expert report. Ultimately, it is for the court to be satisfied that each condition is reasonably necessary, and reasonably appropriate and adapted, for the protective purpose of the relevant order.

118. In *Benbrika*, expert evidence was led in relation to the availability or utility of proposed ESO conditions. As part of Dr Dewson's evidence, she considered whether less effective measures would be effective in mitigating the risk assessed. Dr Dewson concluded that although Mr Benbrika would be at a materially lower risk of committing a serious Part 5.3 offence if he were on an ESO than if he was in the community without any supervision, she did not regard that as reducing her overall risk assessment of 'moderate-high'.[43]

[40] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 23(3)(b) and s 37(4)(b).
[41] *Criminal Law (High Risk Offenders) Act 2015* (SA) s 7(3)(c).
[42] S 105A.7(1).
[43] *Minister for Home Affairs v Benbrika (First review)* [2022] VSC 169 at [520].

119. In *Pender*, expert forensic psychiatrist Dr Eagle was asked to consider whether the information briefed to her was sufficient for her to express an opinion on whether there are any measures other than a CDO (e.g. conditions or restrictions imposed upon Mr Pender) that would reduce the risk of Mr Pender committing a serious Part 5.3 offence. Dr Eagle concluded that although Mr Pender's risk of committing a serious Part 5.3 offence would potentially be reduced if he were directed to engage community mental health treatments and the imposition of various restrictions - restrictions and prohibitions alone would be unable to prevent the behaviours that may be considered Part 5.3 offences. Dr Eagle further noted that the effectiveness of supervision regimes in preventing offending is arguably reduced in relation to persons with severe mental health disorders due to the limited potential effect of deterrence in that population.[44]

Scope of exculpatory material within Division 105A

120. Subsections 105A.5(2A) and (3) require that an application for a CDO or ESO must include any report or document that the applicant intends to rely upon (inculpatory information), and all material or facts of which the AFP Minister is aware that would reasonably be regarded as supporting a finding that the order should not be made (exculpatory information). This does not include any exculpatory information, material or facts that are likely to be protected by a public interest immunity (PII) claim (section 105A.14C outlines the procedure for PII claims).

121. The AFP Minister must ensure reasonable inquiries are made to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that an order should not be made. If the application is for a CDO, the AFP Minister must ensure there are inquiries in relation to whether a CDO or an ESO should be made. If the application is for an ESO, the AFP Minister must ensure there are inquiries in relation to whether an ESO should be made. While it would ordinarily be expected that exculpatory material would be relevant to both types of PSOs, this ensures that if there is exculpatory material that specifically relates to whether detention or supervision is not warranted then it will be sought.

122. Subsection 105A.12(6A) requires the AFP Minister (or a legal representative of the AFP Minister) to provide to a court conducting a review any material or a statement of any facts that the AFP Minister is aware of that could reasonably be regarded as supporting a finding that the order should not be affirmed, or should not be affirmed in the terms in which it is made. If a court is considering making an ESO under subsection 105A.12(5) after reviewing a CDO, then the AFP Minister must provide any information or facts that support a finding that an ESO should not be made.

123. Any exculpatory information produced as a consequence of the Minister's decision to direct the offender to attend an expert assessment, should the offender participate, must be included as part of any post-sentence order application under paragraph 105A.5(3)(aa).

[44] *Minister for Home Affairs v Pender* [2021] NSCSC 1644 at [170].

124. Paragraph 105A.5(3)(aa) requires the Minister to include any material in their possession that would reasonably be regarded as supporting a finding that a PSO should not be made in respect of the offender (unless that material is likely to be protected by PII). This is commonly referred to as exculpatory material. The Minister is also required to include a statement of any exculpatory facts that they are aware of at the time the application is filed. A copy of the PSO application must be provided to the offender.

125. The Minister's obligation to disclose exculpatory material is not necessarily limited to 'facts'. It may also require the Minister to disclose information, opinions and assessments that are in the Minister's possession at the time the application is filed. The Minister is guided by legal advice as to whether information in their possession is exculpatory material that must be disclosed in the PSO application (subject to any PII claim). The Minister would seek legal advice on whether the paper was material that must be included in a PSO application pursuant to subsection 105A.5(3A) of the Criminal Code. Whether or not material is exculpatory in respect of a particular offender is necessarily considered on a case-by-case basis. Whether the disclosure of exculpatory facts would involve interlocutory matters such as PII claims or suppression orders would depend on the particular information that was held by the Commonwealth agency, the circumstances of the particular case and the way in which the Minister puts his case. This includes the way in which a relevant expert has been briefed and provide their report.

126. Examples of information, material or facts that may reasonably be regarded as supporting a finding that a CDO or ESO should not be made include:

- evidence that an offender no longer adheres to violent extremist beliefs
- the absence of evidence or information that the offender intends to carry out any terrorist acts or encourage others to do so, or
- an assessment or opinion held by a relevant agency that the offender could be managed through less restrictive measures than a CDO.

127. Regarding the INSLM's example of a paper that is highly critical of the efficacy of the VERA-2R tool, the Minister would need to disclose that paper to the offender if they were advised, or formed a view, that the paper was captured by paragraph 105A.5(3)(aa). The Minister would also need to disclose the paper if the Minister intended to rely on that paper as part of the PSO application (see paragraph 105A.5(3)(a)).

An accreditation body of relevant experts

128. As noted above, the department acknowledges the importance of risk assessments for the purposes of Division 105A proceedings, including the need to ensure the independence of experts and the integrity of their assessments.

129. Since 2017, Dr. Elaine Pressman, the VERA-2R author, has licensed the Department of Home Affairs to oversee VERA-2R[45] training and certification within Australia and New Zealand.

[45] The VERA-2R is a structured professional judgement tool which assists an individual analyst or clinician to make a risk judgement based on evidence. It is not a predictive tool and does not provide a statistical risk output or quantum. The VERA-2R does not produce a stand-alone assessment and the risk assessment is made by the analyst or clinician exercising their professional judgement.

130. The Department of Home Affairs is supported by a Community of Practice (CoP) that provides advice on the management and operation of VERA-2R assessments in Australia, including eligibility for training and certification, requirements for proficiency and quality of practice, and peer review and supervision.

131. The current eligibility, training and certification guidelines, developed by the Department of Home Affairs and the CoP, require an individual seeking VERA-2R training to be employed by a Commonwealth, state or territory government agency, and to hold a mandate from their agency to undertake violent extremism risk assessments. As such, the majority of VERA-2R users are government professionals in law enforcement and corrections.

132. Dr. Pressman has trained a small number of private psychologists and psychiatrists in NSW to support *Terrorism (High Risk Offender) Act 2017* (NSW) post-sentence order matters. Some of these private experts have also been engaged in Division 105A matters. At present, neither the Department of Home Affairs nor the department accredit experts for the purposes of Division 105A PSO proceedings, beyond the Department of Home Affairs' provision of accreditation for use of VERA-2R.

133. The INSLM noted at the public hearing that Scotland has a Risk Management Authority, which is responsible for ensuring that robust risk assessment and risk management practices are in place to reduce the risk of serious harm posed by violent and sexual offenders.[46] The INSLM queried whether a similar independent body, that would accredit experts for the purpose of Division 105A, would be beneficial in Australia.

134. An expert appointed for Division 105A proceedings must be established to the satisfaction of the court as a person who is competent to assess risk. To establish this, evidence must be provided to the court that demonstrates relevant professional qualifications, study and training, academic research and papers and, potentially their clinical/practical experience. This may include demonstrated use and understanding of the methodology of risk assessment generally (or specific tools, including VERA-2R), experience with individuals radicalised to violent extremism, and demonstrated understanding of criminal recidivism. As outlined above, relevant expert opinions must also satisfy the rules of evidence.

135. The department therefore does not consider that an accreditation body for relevant experts for Division 105A proceedings is necessary, beyond the existing structures in place to accredit users of the VERA-2R tool.

[46] https://www.rma.scot/about/, accessed 7 September 2022.

Additional matters

Recommendations of the PJCIS

136. The PJCIS conducted a statutory review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime during the term of the last Parliament and presented its report in October 2021.[47] The Committee unanimously supported the extension of these powers subject to certain amendments, including the introduction of additional safeguards.

137. We draw the INSLM's attention to the following recommendations of the PJCIS which are relevant to the issues which have been discussed in this submission:

- Recommendation 13: The Committee recommends that the Attorney-General's Department:
    - investigate the cost of providing legal aid for those subject to proceedings under Division 104 of the *Criminal Code Act 1995*, including continuing detention orders and control orders, on the basis that people subject to the most rights-restrictive powers should receive assistance to ensure adequate representation provided the costs to the Commonwealth are reasonable; and
    - provide a report to the Parliamentary Joint Committee on Intelligence and Security within the 12 months of the tabling of this report.[48]
- Recommendation 18: The Committee recommends that the Department of Home Affairs coordinates with relevant State and Territory Departments to source appropriate accommodations to facilitate interim and confirmed continuing detention orders. The Committee recommends coordination with New South Wales on appropriate accommodation should start as soon as possible, noting the number of eligible offenders due to be released in the next five years.[49]
- Recommendation 19: The Committee recommends that the *Criminal Code Act 1995* be amended to require public reporting requirements on the use and implementation of Division 105A, including:
    - details of housing arrangements for individuals subject to a continuing detention order;
    - use of rehabilitation programs (pre and post-release); and
    - use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.[50]

138. The department is considering the PJCIS report in consultation with the Australian Federal Police and other interested Commonwealth, state and territory agencies, noting the Government's intention to finalise and implement a comprehensive response to all 19 of its recommendations in due course. The department encourages the INSLM to consider the Government's response to this review when it becomes available.

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[47] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (Report, October 2021).
[48] Ibid [3.81-3.83].
[49] Ibid [5.80-5.83].
[50] Ibid [5.85-5.86].