e:
t:

LIBERTY VICTORIA AND NSW COUNCIL FOR CIVIL LIBERTIES ADDENDUM TO SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

REVIEW OF POST-SENTENCE TERRORISM ORDERS: DIVISION 105A OF THE CRIMINAL CODE ACT 1995

1 JULY 2024

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties and Liberty Victoria acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

http://www.nswccl.org.au
office@nswccl.org.au
Correspondence to: PO Box A1386, Sydney South, NSW 1235

About Liberty Victoria

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community.

Contact Liberty Victoria

http://libertyvictoria.org.au/home
info@libertyvictoria.org.au
Correspondence to: GPO Box 3161

Liberty Victoria and the NSW Council for Civil Liberties (**NSWCCL**) thank the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for the opportunity to provide this addendum the submission of NSWCCL and Liberty Victoria relating to the Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* dated 30 June 2023 (**the submission**).

1. Part III of the submission referred to the non-disclosure of critical evidence in the proceedings brought against Nacer Benbrika under Div 105A. The submission highlighted the persistent failure of the Minister for Home Affairs to comply with its statutory obligation to disclose all exculpatory evidence in the course of these proceedings. Paragraph 71 of the submission outlines a number of other situations where the Department of Home Affairs failed to disclose the existence of a critical report on the VERA-2R, including to the Parliamentary Joint Committee on Intelligence and Security in the course of two reviews in 2021. In paragraph 73 of the submission, NSWCCL and Liberty Victoria called for a full investigation into the non-disclosure of the Corner Report from its finalisation in 2020 to its revelation in November 2022.

2. This addendum revisits the issue of the non-disclosure in light of the recent judgment delivered on 5 June 2024 by the Honourable Justice Hollingworth of the Supreme Court of Victoria in the matter of *Benbrika v Attorney-General (Cth*) [2024] SCV 265. This addendum will outline the concerns that arise from the findings of Justice Hollingworth in relation to the conduct of Home Affairs, and issues that arise in light of the referrals made by the Court to the INSLM to conduct a further review.

3. This addendum argues that the statutory safeguards have proven inadequate to mitigate against the high risks of arbitrary detention. Whilst in this case, the miscarriage of justice was ventilated, it did nothing to prevent Mr Benbrika from spending three years in prison that need not have happened. It offers no accountability for wrongdoing on the part of the Plaintiff.

4. Given the risks if misuse apparent in the manner in which these proceedings have show, there can be no justification for the continued use of Continuing Detention Orders (**CDOs**). The recent findings support the widely held view that the power to make CDOs should be abolished.

5. We strongly urge the PJCIS to focus on this case and use it to force answers from the Minister for Home Affairs and to hold the Minister to account for what occurred in her name.

The findings of Justice Hollingworth

6. The written judgment from Hollingworth J describes the conduct of Home Affairs in the course of the proceedings against Mr Benbrika as “extremely concerning”. Her Honour based her findings on the content of nine affidavits that were provided to the Court by the defendant in the proceedings, the office of the Attorney-General (Cth). Despite the large amount of material tendered, the Court was resolute that “Home Affairs’ critical role in the non-disclosure … has not been satisfactorily explained to the court.”[1]

7. In describing the content of the material provided to the Court, Her Honour draws attention to certain key information:

    a. iI was known to the government lawyers and the litigation lawyers prior to commencement of proceedings that the VERA-2R was a significant vulnerability in the plaintiff’s case against Benbrika;[2]

[1] *Benbrika v Attorney-General (Cth)* [2024] SCV 265, [249].

[2] Ibid [267].

b. Government lawyers and litigation lawyers became aware of the Corner report prior to the commencement of the first Benbrika proceedings in 2020, and it was a subject of considerable discussion whether the report would be caught by their disclosure obligations under the relevant sections of the legislation;[3] and

c. The question about disclosure was purportedly resolved at a meeting on 18 August 2020, with a decision not to disclose. There were 13 people in attendance at that meeting.[4] Of the 9 affidavits provided to the Court to explain the non-disclosure, only one affidavit was deposed by a person who was present at the meeting, which was AGS solicitor Rachel Deane. Ms Deane, who was the leading solicitor in the first and second Benbrika trials, claimed not to have any memory of the meeting,[5] or the substance of any other conversation about the non-disclosure.[6] No minutes of that meeting were produced; no formal advice about the disclosure requirements was recorded; and nobody else who attended that meeting was approached for the purposes of giving evidence.[7]

d. An apology for a "system failure" was proffered to the Court, which was rejected as "disingenuous".[8] The explanation given for the non-disclosure of the Corner report was rejected, with Her Honour finding that "Home Affairs decid[ing] not to disclose a highly damaging report because of informal, unconsidered, oral advice, given by one AGS lawyer at the 18 August teleconference, which was never subsequently mentioned in any file note, email or letter, seems highly improbable for so many reasons."[9]

e. The material provided to the Court to explain the non-disclosure was no only inadequate but seemingly deliberately so. Her Honour notes that "No affidavit was filed on behalf of anybody in Home Affairs who had personal knowledge of any of the relevant meetings, communications or decisions" about the non-disclosure of the Corner report.[10] And "Nobody in Home Affairs with actual knowledge of such a highly unusual decision [not to disclose clearly exculpatory material] has explained when, why or by whom the decision was made not to disclose the Corner report."[11]

f. In addition to the failure to disclose the Corner report at any stage since 2020, the Commonwealth government failed to disclose four other reports previously unpublished, that were critical of the VERA-2R risk assessment tool, and were "clearly exculpatory".[12] Three of those reports were disclosed two weeks before the 2023 trial. One was disclosed following the conclusion of evidence and before closing addresses in the 2023 trial.[13]

---

3 Ibid [268] – [282].
4 Ibid [289].
5 Ibid [290].
6 Ibid [293].
7 Ibid [296].
8 Ibid [252], [299].
9 Ibid [303].
10 Ibid [250].
11 Ibid [286].
12 Ibid [310].
13 Ibid [305] – [314].

8. Her Honour acknowledges that the failure to disclose extended beyond the Benbrika proceedings. Her Honour noted that "the AFP Minister has engaged in similar non-disclosure in relation to other terrorist offenders."[14]

9. Justice Hollingworth calls the failure to disclose these five reports as "a serious interference with the administration of justice."[15] Her Honour remarked that "the accepted validity of VERA-2R was absolutely fundamental to the decisions to impose and continue the CDO. … the earlier proceedings have all been tainted to varying degrees by the non-disclosure."[16]

Accountability

10. In her recent remarks, Justice Hollingworth addressed the importance of the disclosure obligations. She held:

> *The statutory requirements that the AFP Minister disclose exculpatory material is a fundamental safeguard to ensure the proception of individual liberty under was is very unusual and draconian legislation.*
>
> *What happened in this case should never have happened, and should not be repeated in the case of Mr Benbrika or any other person the subject of a post-sentence order application.*[17]

11. Her Honour ultimately found that due to the lack of information provided to the court – which she roundly criticised – she was not in a position to make adverse findings[18] of bad faith, contempt, or referrals to professional oversight bodies. She did refer the matter back to the INSLM to investigate further "should he think it appropriate to do so."[19]

12. It will have been known to the Court that there is no power under the INSLM Act for a court to refer a matter to the INSLM for investigation. For the INSLM to conduct an investigation, the matter would have to be self-referred, referred by the PJCIS, the Prime Minister, or by the Attorney-General. As the Attorney-General is potentially implicated in the investigation, it seems unlikely that he would make the referral.

13. We take the view that the non-disclosure of the Corner Report has already been investigated by the previous INSLM. Concerns about the non-disclosure, and an opinion on the impact of that non-disclosure on the workability of the CDO legislation, has already been examined, published and is currently before the PJCIS in this inquiry.[20]

14. Whilst the previous report did not deal with the non-disclosure of the four other reports, that information is available to the PJCIS by virtue of this submission and the published reasons of Hollingworth J.

15. As such, the PJCIS is already seized of the matter by virtue of s 29(1)(bbaaa) of the *Intelligence Services Act 2001* (**ISA**). It would be open for the PJCIS to recommend to the INSLM, or for the INSLM to consider, the extend of non-disclosure of the Corner reports in other proceedings. It

---

14 Ibid [320].
15 Ibid [317].
16 Ibid [326].
17 Ibid [315] – [316].
18 Ibid [304].
19 Ibid.
20 Grant Donaldson, 4th INSLM, Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth), March 2023.

would also be open for there to be scrutiny over the systemic failures which led to the non-disclosure in a number of proceedings.

16. As the PJCIS has now been advised of the findings of the Supreme Court of Victoria in relation to a significant interference in the administration of justice that may have led to the unwarranted detention of a man in prison for three years, it behoves the Committee to undertake a course of action that will restore faith in the government's capacity to administer this legislation.

17. Such a course of action by the PJCIS ought to include a call for the abolishment of Continuing Detention Orders in the course of this Inquiry, given:
    a. the findings of the INSLM,
    b. the impossibility of assessing risk of future offending, and
    c. the inadequate statutory safeguards contained in the legislation, which can easily be breached, and have been breached, by government and over which there is no accountability or enforcement mechanism.

18. Further, the PJCIS is empowered under s 29(1)(baa) and (bab) ISA to monitor and review the performance by the AFP in relation to its functions under Part 5.3 of the *Criminal Code*; and to report to both Houses of the Parliament, with such comments as it thinks fit, upon *any matter appertaining to the AFP or connected with the performance of its functions under Part 5.3 of the Criminal Code to which, in the opinion of the Committee, the attention of the Parliament should be directed.*

19. The PJCIS should undertake to investigate the circumstances and implications of the non-disclosure of the five reports that were not previously disclosed, with a view to making findings on whether or not government lawyers acted in bad faith; and how to ensure that disclosure obligations are properly adhered to in subsequent proceedings.

20. What happened to Mr Benbrika should never happen again. The PJCIS, at this moment, has the opportunity to recommend that meaningful systemic change occur, if it chooses to do so.

Yours sincerely,

[redacted]

Michelle Bennett
President
Liberty Victoria

[redacted]

Lydia Shelly
President
NSW Council for Civil Liberties

Contact in relation to this submission: [redacted], NSWCCL
Email: [redacted]