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LIBERTY VICTORIA AND NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

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

30 JUNE 2023

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).

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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.

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

I. INTRODUCTION

1. Liberty Victoria and the NSWCCL acknowledge the importance of protecting the community from acts of terrorism. Terrorism and the threat of terrorism violate the rights to life and security of innocent people. Terrorism is regarded as a crime apart from others as it threatens the very fabric of liberal democracy by utilising violence and fear to further, often fundamentally illiberal, political, religious or ideological goals.

2. The Australian Government has done much in the last twenty years to ensure that security agencies are equipped with powers of surveillance, detention and control to minimise the risk of an act of terrorism.[1] Terrorism offences in the Criminal Code are exceptional insofar as they criminalise conduct that may lead to harm, rather than conduct that has caused harm.[2] The purpose is to ensure that harm is prevented, not just punished after the fact.

3. The task currently before the PJCIS is to evaluate, in light of the recent INSLM report, the operation and merit of Div 105A, with a view to whether amendment may be necessary, and, if reform is required, what form such amendment should take. In assessing the merit and necessity of any security measure, a balance must be struck between the need to ensure security, and the need to protect the values that are lie at the heart of our democracy—values of liberty, justice, tolerance, and social cohesion.

4. Disproportionate and unjust security measures fail to serve the desired objective of protecting individuals in a democratic and liberal society. The measures themselves become instruments of injustice and oppression. The measures themselves reach a point where they subvert the very fabric of liberal democracy that they purportedly seek to protect.

5. Div 105A of the *Criminal Code* constructs a regime which allows for Continuing Detention Orders (**CDOs**) and Extended Supervision Orders (**ESOs**) to be made after a person's sentence for terrorism related offences has expired. Liberty Victoria and the NSWCCL assert that CDOs are a disproportionate and dangerous infringement upon fundamental values of liberty and justice, and are incompatible with the tenets of a democratic society. They do not protect the community; they inflict unnecessary harm upon individuals and undermine the values of justice and liberty which are central to our democracy.

6. We submit that in order to preserve a sense of security and a society based on reason, principle and justice, CDOs must be abolished[3] for the following reasons:

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[1] In September 2019, leading scholars in the field determined that Australia has passed 82 anti-terrorism related laws since 2001, see Nicola McGarrity and Jessie Blackbourn, 'Australia has enacted 82 anti-terror laws since 2001. But tough laws alone can't eliminate terrorism' *The Conversation* https://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521.

[2] *Lodhi v R* (2006) 199 FLR 303, [66]; see also *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, [55]-[56].

[3] NSWCCL (jointly with the Sydney Institute of Criminology) made a public submission to this effect in the Inquiry before the Independent National Security Legislation Monitor (INSLM): Andrew Dyer and Josh Pallas, 'NSWCCL and SIC Submission: Independent National Security Legislation Monitor Review into Division 105A of the Criminal Code (Cth) (1 September 2021), https://www.inslm.gov.au/sites/default/files/2022-10/1-NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf. One of the writers of this submission has also argued for the abolition of CDOs elsewhere: Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) is incompatible with human rights (and what to do about it)' (2022) 33 *Public Law Review* 61.

a. **It can never be acceptable to deprive a person of liberty for what they might do in the future, when there is no valid or reliable way of assessing the likelihood of future re-offending;**

b. **The threshold for granting a CDO has been reduced to a very low bar and fails to provide any safeguard against unnecessary and punitive detention;**

c. **The statutory scheme cannot guarantee a fair trial. The very first instance of a CDO – the case of *Benbrika* – has revealed the ways in which the intended safeguards failed to protect a defendant;**

d. **In light of the above, a CDO will almost inevitably constitute arbitrary detention and run contrary to Australia's international legal obligations.**

7. This submission does not endeavour to provide a full review of Div 105A,[4] nor does it advocate for the abolition of ESOs. We do express concern however, that the entire scheme relies heavily on a risk assessment tool called the VERA-2R. There are serious problems with the VERA-2R in both its formulation and its use in Australia.

8. In addition to our primary submission that CDOs be abolished, we further urge the PJCIS to recommend that there be an independent inquiry into the use of the VERA-2R, including an investigation into the circumstances surrounding the non-disclosure of the Corner report to defendants in Div 105A proceedings, to the NSW government, to the Independent National Security Legislation Monitor (**INSLM**), and to the PJCIS in 2021.

9. Our modest submission, however, should not be taken to mean that we consider the entirely of Div 105A to otherwise be acceptable and proportionate. To be clear, Div 105A is fundamentally illiberal in nature and a matter of concern. We have chosen to focus our attention on the worst parts of Division 105A, but at Appendix A to this document sketch out our fuller views in response to the INSLM's recent report. One of the INSLM's primary recommendations was also for the abolition of CDOs.

II. CONTINUING DETENTION ORDERS MUST BE ABOLISHED

10. In the criminal jurisdiction, imprisoning a person is the most severe punishment known to the law. The criminal law has developed a sophisticated procedural framework to ensure that a person is not deprived of their liberty unless:

    a. the charges are proven beyond reasonable doubt on the basis of admissible evidence; and,
    b. there is no reasonable alternative to imprisonment as a suitable response to the offending.

11. The principles and practices of criminal justice reflect the high value we, as a society, place on life and liberty. Embedded in the practices of criminal justice is a recognition that a person's liberty is an inalienable right, and the state has the power to deprive a person of it only in stringent and principled circumstances.

[4] The INSLM has already conducted such a review. NSWCCL and the Sydney Institute of Criminology's submission to the INSLM review provides a more comprehensive review of Div 105A: Andrew Dyer and Josh Pallas, 'NSWCCL and SIC Submission: Independent National Security Legislation Monitor Review into Division 105A of the Criminal Code (Cth) (1 September 2021), https://www.inslm.gov.au/sites/default/files/2022-10/1-NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf.

12. Although the High Court has found that post-sentence detention on the basis of a prospect of future offending is not punishment, it remains the case that a CDO does entail a complete deprivation of a person's liberty by means of incarceration in a maximum-security prison for up to three years, renewable indefinitely. In our view, the effect is indistinguishable from a serious punishment. In fact, the effect could be considered worse than a serious punishment, because the person subjected to such detention had already completed a sentence for the crime that they committed, only to be incarcerated further without another conviction and potentially for an indeterminant term.

13. Despite a CDO being fundamentally the same as serving a term of imprisonment under the criminal law, the ways that a CDO differs from punishment for a crime are many. While it entails the total deprivation of liberty, it is not on the basis of what a person has done. The judicial processes which lead to the making of a CDO are fundamentally different in character to criminal proceedings. We say that these differences fall into three broad categories:

    a. **Risk**: A CDO deprives a person of liberty on the basis of what they may do in the future, in circumstances where there is no validated or reliable way to assess risk of future behaviour.

    b. **Standard of proof*:*** Whilst punishment for a crime is only legitimately administered when past conduct is proven beyond reasonable doubt on the basis of admissible evidence, Div 105A has reduced the standard of proof to a virtually meaningless threshold that requires the Court to draw heavily on hypotheticals and imagination.

    c. **Inadequate safeguards**: Whereas criminal procedure seeks to offset the inherent power imbalance between an individual and the state, no such safeguards exist where a person's liberty is at stake in a post-sentence regime. Perhaps the most crucial safeguard—that the Minister for the AFP provide all material in its possession that may be exculpatory for the Defendant—is unenforceable and contingent upon the good will of the applicant. Such good will cannot be guaranteed, and any breaches are to the significant detriment of any defendant.

14. These anomalies are not lost on the judiciary, which has implemented similar state-based regimes more frequently over a longer term, leading to Justice Beech-Jones (as his Honour then was) remarking that such regimes work "by co-opting the judicial arm of the government into the process of prospective risk assessment".[5]

15. Each of these reasons will be elaborated upon below, to show that detention under a CDO will always be arbitrary and thus illegitimate and unjustifiable. Australia would be a fairer, more just and safer place if this regime was abolished.

A. Risk assessment for violent extremism in Div 105A

Risk and Division 105A

16. An assessment of risk lies at the heart of the scheme created by Div 105A. The test for making a continuing detention order under s 105A.7(1) is that:

> (b) after having regard to matters in accordance with section 105A.6B, the Court is 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,

[5] *State of New South Wales v Baldwin* [2019] NSWSC 1883, [92].

(c) the Court is satisfied that there is no less restrictive measure available under this Part that would be effective in preventing the unacceptable risk.

17. The matters at s 105A.6B include:

a. Consideration of a report received under s 105A.6, which is a report of a court-appointed expert assessing "the risk of the offender committing a serious Part 5.3 offence";[6] and
b. "any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment";[7] and,
c. "any other information as to the risk of the offender committing a serious Part 5.3 offence."[8]

18. Section 105A.18D, which was inserted into the Division in 2021, give the plaintiff in these proceedings the power to compel the defendant to attend a risk assessment for the purposes of obtaining their own report. Whilst the provision does not require the defendant to participate in the assessment, s 105A.6B(1)(c) requires the Court to take into account the offender's level of participation in any such assessment.

19. Finally, Tinney J in the first CDO judgment relied on the passage in the case of *Nigro*:[9]

> Predicting the prospect of a person committing a criminal offence in the future is notoriously difficult. The Act recognises that the prediction of risk is in large part a matter for expert opinion which obliges the court to take into account any assessment report filed. The making of a prediction requires expertise which judges do not have. It calls for observation and assessment of those who commit the particular type of offence and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending. The necessary expertise combines the ability to make a qualitative assessment of the individual and the ability to utilise the available quantitative risk assessment instruments. A risk assessment report would ordinarily be at the centre of any court evaluation of the level of risk.

Parliamentary Joint Committee on Intelligence and Security—previous inquiries into risk assessment

20. Recognising that a risk assessment for violent extremism is at the heart of Div 105A, the PJCIS turned their mind to the question of risk assessment in two previous inquiries.

21. In September 2021, the PJCIS published an Advisory Report following a review into the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020* (Cth), that included consideration of the risk assessment tool. It received evidence from the Department of Home Affairs (**DHA**) about the use of the VERA-2R. It also received evidence from the Law Council of Australia that raised concerns about the validity of this tool.[10]

22. After considering the evidence before it, the PJCIS recommended an independent review of risk assessment tools for violent extremism:

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[6] *Criminal Code Act 1995* (Cth), s 105A.6(4)(a).
[7] *Criminal Code Act 1995* (Cth), s 105A.6B(1)(c)
[8] *Criminal Code Act 1995* (Cth), s 105A6B(1)(i)
[9] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [407] citing *Nigro v Secretary to the Dept of Justice* (2013) 41 VR 359 at [124].
[10] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill* 2020, September 2021, Canberra, [3.37]-[3.42]

> The Committee recommends that an independent review of the range of risk assessment tools used, including the Violent Extremism Risk Assessment Version 2 Revised (VERA-2R) framework and alternatives, be conducted and findings reported to the Parliament. The independent review should consider the existing assessment framework, alternative tools, improvements which could be made and the effectiveness of mandating participation in deradicalisation programs.[11]

23. One month after the release of that Advisory Report, in October 2021 the PJCIS published a further report, *Review of police powers in relation to terrorism, the control order regime, the preventive detention order regime and the continuing detention order regime*. The PJCIS considered the opinions of several sources about the effectiveness, appropriateness of the VERA-2R.[12] The PJCIS re-iterated its concern about the tool and the recommendation made in the September 2021 Advisory Report:

> The Committee was not entirely convinced on the basis of the evidence provided to the inquiry that the VERA-2R tool is the most appropriate tool to determine the level of risk posed by a convicted terrorist offender. The Committee recommended in its *Advisory Report on the Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020* that an independent review of VERA-2R and alternatives be undertaken, with findings report to the Parliament.[13]

24. In addition to the scrutiny of the PJCIS, the Independent National Security Legislation Monitor,[14] the Supreme Court of Victoria,[15] and the NSW Courts,[16] have turned their minds to the question of whether or not there exists a validated and reliable tool that can offer legitimate guidance on the question of risk.

25. Despite this, there has not yet been an Inquiry into the use of VERA-2R for the purposes of criminal and post-sentence regime purposes.

Current research on the validity and reliability of the VERA-2R

26. Over the course of the recent INSLM review of Div 105A, it has been revealed that there is a report authored by Dr Emily Corner and Dr Helen Taylor that provides a comprehensive, independent analysis of the VERA-2R and RADAR risk assessment tools.[17] The circumstances of this revelation will be addressed further below. The immediate relevance is what the Corner report reveals about the VERA-2R.

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[11] Ibid, [3.124].

[12] Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventive detention order regime and the continuing detention order* regime, October 2021, Canberra, [5.39]-[5.57],

[13] Ibid, [5.90].

[14] Grant Donaldson, 4th INSLM, *Review into Division 105A (and related provisions) of the* Criminal Code Act 1995 *(Cth)*, March 2023, [240]-[287].

[15] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [439]-[462].

[16] *State of New South Wales v Naaman (No 2)* [2018] NSWCA 328, [85]-[94] (Basten, Macfarlan, Leeming JJA); *State of New South Wales v White (Final)* [2018] NSWSC 1943, [76]; [82]; [161] (N Adams J); *State of New South Wales v Fayad (Final)* [2021] NSWSC 294, [147]; [153]; [168] ; [178]-[173]; [321] (Wright J); *State of NSW v XX (Final)* [2023] NSWSC 59, [92] (Fagan J): "I am not prepared to place any significant weight upon the risk rating for terrorism offending that has been produced by application of the VERA-2R tool."

[17] Emily Corner and Helen Taylor, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments*, July 2020. ('The Corner Report')

27. The Corner report provides persuasive evidence that the VERA-2R is not just unfit for purpose, but also has the capacity to give rise to serious injustice when used in Div 105A proceedings. Below are some relevant extracts from the report:

- This research project undertakes a holistic and impartial analysis of the VERA-2R and Radar to demonstrate the extent to which these risk assessment instruments accurately classify offenders or overestimate or underestimate the risk they pose. In doing so, this research project also provides the most comprehensive overview of the state of the empirical knowledge of the causes of radicalisation and terrorism to date. The findings from this project should be used to inform the development of policy and practice in Australia's response to countering radicalisation and violent extremism;[18]

- The overall outcomes of this research have identified that both the VERA-2R and Radar lack a strong theoretical and empirical foundation, and have poor inter-rater reliability and questionable predictive validity;[19]

- The lack of evidence underpinning both instruments has potentially serious implications for their validity and reliability. Without a strong theoretical and empirical basis for factor inclusion, it is not reasonable to anticipate that the instruments are able to predict their specified risk with anything other than chance. If an instrument with a weak evidence base is employed as a predictive instrument by practitioners, it is not possible to determine if individuals who pass through assessment processes would ever be suitable for the management plan as determined by the risk decision outcome made on the instrument;[20]

- The analyses demonstrated that both instruments have significant weaknesses across the assessment criteria. Much of these weaknesses span from the evidence base that underwrites the instruments. This has significant implications for the validity, reliability, and equity of the instruments;[21]

- Both instruments purport to follow the SPJ [structured professional judgment approach to risk assessment. However, when the protocols were scrutinised, this does not appear to be the case. SPJ instruments follow a strict six-stage format that includes a structured process for gathering case information, an evaluation of the relevance of factors, scenario planning, risk mitigation scenarios, and the use of all of these elements to formulate a final risk decision. These elements of the SPJ structure are not present in the VERA-2R or Radar;[22]

- This analysis has demonstrated that the VERA-2R has, at best, weak theoretical support, as the theoretical work that it is cited has not yet been empirically validated;[23]

- The authors cite numerous investigations that demonstrate a wide range of forms of validity and reliability. There are some concerns over some of the purported types of validity, as many examples are either not recognised forms of validity, or are miscited and incorrect;[24]

- In task 1 it was identified that the empirical evidence base for the factors within the instruments was at best moderate. However, this task has revealed that this conclusion should be reassessed to poor. The studies identified in the SR [Systematic literature Review] span 67 years, and although a proportion of those were published after the development of the instruments, it is concerning that neither instrument cites the majority of these studies as

[18] Ibid, 1.
[19] Ibid, 2.
[20] Ibid, 4.
[21] Ibid, 81.
[22] Ibid.
[23] Ibid, 82.
[24] Ibid.

evidence for inclusion of the factors within. In the case of the VERA-2R, there is a reasonable proportion of studies that support the risk factors, and yet these are not included in the justifications for the risk factors. This suggests that the literature review that underpins the instrument was not particularly rigorous, and this lack of rigour has the potential to impact the validity, reliability, and equity of the instrument;[25]

- Employing instruments that have not statistically demonstrated validity has major implications for the security practice. Without assessing validity, it is not known whether instruments accurately identify those at risk of conducting terrorism offences;[26]

- Much like the outcomes for the other performance indicators, the VERA-2R's predictive validity for violent outcomes is extremely low. With a value of 0.510 ($p > 0.1$ (CI: 0.361, 0.658), the VERA-2R's ability to predict violence borders on worthless";[27]

- The average $\propto$ value for all assessed cases was 0.242. This indicates that inter-rater reliability of the VERA-2R is extremely low (values below 0.67 are considered worthless, values between 0.68 and 0.8 are considered poor, and values above 0.8 are considered good);[28]. and,

- If instruments in the terrorism domain are not assessed for their ability to predict what they specify to predict, any outcomes from such instruments cannot be reasonably expected to represent what an assessor is seeking to identify. This has two major implications: Incorrectly classifying an individual as high-risk and going on to deprive them of their liberty and rights; or incorrectly classifying an individual as low-risk, who subsequently goes on to commit an act of terrorist violence. It is possible, however, that instruments with poor predictive validity are still of use to practitioners. These instruments still have value for helping design risk formulations, management strategies, and scenario planning.[29]

28. More recently, the Australian Institute of Criminology published its own report on the suitability of certain risk assessment tools for use in Div 105A and Div 104 proceedings, *Review of violent extremism risk assessment tools in Division 104 control orders and Division 105A post-sentence orders*.[30]

29. This report found that the VERA-2R was the most suitable tool for use in Div 105A proceedings. However, the conclusion is heavily qualified:

> By simple elimination, it appears that the VERA-2R is the better of the available risk assessments for use as part of the HRTO scheme. However, questions remain regarding the validity of the tool. There does not appear to be sufficient independent research into any of these four tools. Indeed, there is a lack of research generally. For reasons outlined elsewhere in this review, including lack of independence of the studies and lack of availability of the data, some of the findings from this research must be viewed carefully. With this in mind, and noting the need for further research into its validity, the VERA-2R remains the most suitable tool for informing decisions relating to Divisions 104 and 105A of the Criminal Code.[31]

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[25] Ibid, 106.
[26] Ibid, 118.
[27] Ibid, 136.
[28] Ibid, 138.
[29] Ibid, 152.
[30] There are serious limitations to the value of this report, given that it did not engage with the findings of the Corner report in any way.
[31] Timothy Cubitt and Heather Wolbers, *Review of violent extremism risk assessment tools in Division 104 control orders and Division 105A post-sentence orders* (Australian Institute of Criminology, 2022), 35.

30. It is difficult to reconcile this conclusion that the VERA-2R "remains the most suitable tool" with the intermediary findings in the same report, and other observations and comments. Relevantly, the report finds that the tool should not be used to form a prediction of future risk—

> In reviewing the literature on violent extremism risk assessment, and undertaking interviews with experts in the field, it was immediately clear that there is a paucity of information on the efficacy of these risk assessments. … there is exceptionally little research supporting the validity of others, including the VERA-2R. Pivotally, where research is undertaken into these risk assessment tools, it has almost universally been authored by the creators of those tools, or the colleagues of the tool developers. This presents a significant issue for the field of violent extremism risk assessment.
>
> Further, there is little evidence that these tools are accurate. Where research has been undertaken, the sample sizes are often small and the research is certainly insufficient to be considered generalisable. Ultimately, when making decisions that have considerable ethical implications for the judicial process, there should be an expectation that the tools used to inform those decisions be robust and highly effective. At present, the extent to which these risk assessments demonstrate validity for the measurement of risk for violent extremism to the threshold required for this type of decision is unclear.[32]

31. And further—

> The VERA-2R should not be considered a predictive risk assessment tool, and should not be implemented solely in an attempt to forecast the risk that an individual will commit a terrorist act (whether for the first time or as a repeat offender). Rather, it forms part of an overall assessment made by the relevant expert. It is for this reason that we do not recommend that the VERA-2R be assessed for its predictive validity based on its current use.[33]

32. The findings of the AIC that the VERA-2R is suitable for use in Div 105A proceedings is not explained beyond the assertion that it is better than other non-validated tools.

33. In circumstances where:

    a. the test for making a Continuing Detention Order centres on an assessment of risk of future offending; and,
    b. case law dictates that an expert's opinion on risk lies at the heart of the Court's analysis, because the Court is not generally equipped to make such an assessment on its own; and
    c. the VERA-2R is the best tool *available*; and,
    d. the current state of the research strongly indicates that the VERA-2R is of no value in assessing the likelihood of future offending,

    it can be concluded that there is no safe way for the Court to be guided in its task by recourse to this, or any, risk assessment tool.

34. The test for a CDO requires an assessment of future behaviour – the likelihood of committing a serious Part 5.3 offence. There is no acceptable scientific method of assessing that likelihood. There is no valid way of guiding the Court's assessment of the defendant's future behaviour. This leaves the ultimate decision of whether to deprive a person of their liberty up to chance.

[32] Ibid, 45.
[33] Ibid, 46.

35. While the focus of our concerns with VERA-2R have presently been grounded in technical literatures from psychology, it's important to flag that concerns come from outside of these disciplines as well. For example, Carolyn McKay a criminologist, has summarised some of the key problems for litigants in a trial where a VERA-2R score is being relied upon, in the following way:

> [I]s it possible to question the exact weighting applied to various risk factors to understand if the weighting is excessive or disproportionate to other factors? How can individuals respond to the case brought against them, challenge the accuracy of the algorithm and defend themselves against an adverse determination?[34]

36. In our view the use of VERA-2R is unjust in the extreme and ought to be remedied by the abolition of CDOs, the most extreme deprivation of liberty under this regime, and by conducting a formal review of VERA-2R and its use in these proceedings.

B. The statutory threshold for making a Continuing Detention Order

37. A further failure of the CDO scheme is that the statutory test has been construed in such a manner as to render it overly broad. It fails to ensure that only the most serious and dangerous people who are considered by the state to be terrorists will be captured by the legislation. The test even goes so far as allowing for the detention of people in circumstances where the Court can be satisfied that there is a high likelihood that they will *not* reoffend.

Standard of proof

38. The first limb of the statutory test if that the court must be satisfied to "a high probability of an unacceptable risk of committing a serious Part 5.3 offence." It was submitted in the first CDO proceeding[35], that this was to be understood as higher than the normal civil standard of the balance of probabilities, and approaching the criminal standard. This was rejected by the Court and it was accepted that a lower threshold applied.[36] Despite the fact that these proceedings determine the liberty of an individual, like a criminal trial, the defendant is not afforded the same or comparable standard of protection.

Serious Part 5.3 offence

39. Further the qualification that the risk must be a risk of committing a serious Part 5.3 offence poses little constraint. This is because the plaintiff need not identify what serious Part 5.3 offence they allege. There can be a risk of committing any kind of terrorism offence. It can be committed directly, or indirectly. In the *Benbrika* proceedings, reliance was placed on the risk that Mr Benbrika will encourage other radicalised people, and further, included the risk of exerting a radicalising influence.[37]

40. The Supreme Court of Victoria found in the 2020 decision of *Benbrika* that the contemplated offending need not be imminent.[38]. The test was amended in 2021 to remove the qualification that the court must be satisfied of a risk "if released into the Australian community".[39] It is sufficient for

[34] Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2020) 32(1) *Current Issues in Criminal Justice* 22, 191.
[35] *Minister for Home Affairs v Benbrika* [2020] VSC 888.
[36] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [291].
[37] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [349] and [464].
[38] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [458].
[39] The statutory test for making a CDO was amended to remove the phrase "if released into the community" as a qualification of risk.

the purpose of making the order that the Court be satisfied of a risk that may arise anywhere in the world, at any point in time. The number of possible futures that the Court can imagine is almost infinite.

Unacceptable risk

41. The phrase "unacceptable risk" has been construed in an irrational manner given its application to any "serious Part 5.3 offence". The test articulated by the Victorian Court of Appeal in *Nigro* has been applied to the test in Div 105A:[40]

> Whether a risk is unacceptable depends upon the degree of likelihood of offending and the seriousness of the consequences is the harm eventuates. There must be a sufficient likelihood of the occurrence of the risk which, when considered in combination with the magnitude of the harm that may result and any other relevant circumstances, makes the risk unacceptable.

42. To be clear, serious Part 5.3 offences, aside from s 101.1, are preparatory offences:

> s 101.2 – Providing or receiving training connected with terrorist acts;
> s 101.4 – Possessing things connected with terrorist acts;
> s 101.5 – Collecting or making documents likely to facilitate terrorist acts;
> s 101.6 – Other acts done in preparation for, or planning, terrorist acts;
> s 102.2 – Directing the activities of a terrorist organisation;
> s 102.3 – Membership of a terrorist organisation;
> s 102.4 – Recruiting for a terrorist organisation;
> s 102.5 – Training involving a terrorist organisation;
> s 102.6 – Getting funds to, from or for a terrorist organisation;
> s 102.7 – Providing support to a terrorist organisation;
> s 103.1 – Financing terrorism; and,
> s 103.2 – Financing a terrorist.

43. None of these offences concern the perpetration of a terrorist act. Indeed to prove the offences, there needn't even be an actual terrorist attack in contemplation. As Spigelman CJ found in *Lodhi*:

> Each of the offence sections is directed to the preliminary steps for actions which may have one or more effects. By their very nature, specific targets or particular effects will not necessarily, indeed not usually, have been determined at such a stage.
> …
> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.[41]

44. Terrorism offences are "special, and in many ways unique". Whereas normally criminal offences serve to capture and punish conduct that is harmful to society, these offences stand apart. Their uniqueness lies in the fact that they exceed the conventional boundaries of the criminal law by

[40] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [402] citing *Nigro v Secretary to the Dept of Justice* (2013) 41 VR 359 at [6].
[41] *Lodhi* (2006) 199 FLR 303, 318 [65], [66]

criminalising conduct that contemplates harm rather than conduct that causes direct harm to people and property. The very purpose of these offences is to prevent the contemplated harm from ever occurring. Whereas the ordinary role of the criminal law is to punish harmful conduct that has occurred.

45. While the exceptional nature of terrorism offences must be acknowledged, it is an error to attribute the same harm that would result from an actual terrorist attack to conduct that merely contemplates it in abstract and unspecified terms.

46. To put the position plainly: possessing a thing in connection with a terrorist act causes no pain, damage or suffering. It is criminal because it raises the prospect of harm (which may never occur), and may demonstrate an ideological disposition or interest in causing harm.

47. The error mentioned above is the error that befalls the test in Div 105A. The way that "unacceptable risk" has been applied in the context of CDOs is to accept that the harm of any serious Part 5.3 offence is catastrophic. Therefore, even a slight risk of the commission of such an offence may justify removing a person's liberty.

48. This interpretation fails to grapple with the exceptional nature of Part 5.3 offences, and the fact that their very purpose is neutralise a threat of real harm being caused to people and property. But it further, fails to grapple with the proportionality of such a measure being adopted in light of the consequences – serious deprivation of liberty and the labelling of a person as a "high risk terrorist offender" without the laying of further criminal charges. In this way, we say that the true harm is the harm done by such draconian legislation to the very fabric of our democracy.

High degree of probability

49. The first part of the test gives the impression that the court may only act on a certain high degree of satisfaction that the order is necessary. However, for the reasons explained above, this threshold has been interpreted in a manner that diminishes it from providing any real protection to defendants. A CDO is not limited to circumstances where there is proven to be a high probability of committing an act of terrorism. Nor is the making of a CDO contingent upon the Court's satisfaction to a high degree of probability that the defendant, or another person with the defendant's encouragement, will commit a preparatory offence. The making of a CDO is contingent upon there being found to be a high probability of the person being an "unacceptable risk" or engaging in a relevant offence, which in reality includes even a low risk of committing a preparatory offence.

Conclusion

50. Continuing Detention Orders go well beyond protecting the community from harm. The current scheme under Div 105A justifies imprisoning people even where they are likely to cause no harm at all. Combined with a deeply flawed risk assessment tool, there is simply no empirical basis for the making of an order.

51. Permitting a person to be detained in a prison even in circumstances where there is a high likelihood that no harm will eventuate by their release is a disgrace. It offends our liberal democratic values and must be remedied through the abolition of CDOs.

C. Inadequate safeguards

52. Division 105A includes a number of important safeguards to ensure that a Defendant receives a fair trial and appropriate treatment in detention. However, it has been demonstrated that the statutory safeguards are inadequate to prevent the risk of abuse. The treatment of Mr Benbrika alone in the course of his CDO proceedings and detention is sufficient to warrant the immediate termination of the CDO regime.

Requirement to provide exculpatory material

53. An application for a CDO must include a:

(i) a copy of any material in the possession of the applicant; and,

(ii) a statement of any facts that the applicant is aware of; that would reasonably be regarded as supporting a finding that the order or orders mentioned in paragraph (2A)(a) or (b) (as the case requires) should not be made, except any information, material or facts that are likely to be protected by public interest immunity (whether the claim for public interest immunity is to be made by the AFP Minister or any other person);

54. This requirement is essential to the fair operation of the legislation. In any criminal proceedings, the police informant is under an obligation to conduct a fair and impartial investigation and include in a brief of evidence all relevant evidence, not only that which is inculpatory. The prosecutor has a duty to present that material to the Court or jury for them to decide whether or not the charges are proven beyond reasonable doubt. The prosecutor, at the end of the day, is required to act in the public interest and is a servant of justice, first and foremost.

55. As CDO proceedings are civil in nature, they pit two personally-interested parties against one another—one being a Minister for the Commonwealth Government with extensive resources available to it, the other, a person who is incarcerated with very limited time and resources to prepare their case. The duty of fairness integral to criminal proceedings does not apply in CDO proceedings. In circumstances where most of the relevant material is in possession of state agencies and accessible only to the plaintiff, and in circumstances where the time and resources of the state vastly exceed what may be available to the defendant, it is imperative that the plaintiff has an obligation of disclosure. There is simply no other way for the defendant to be properly equipped to prepare their case.

56. It has already been demonstrated, though, that the mere existence of a statutory obligation is insufficient to ensure its effective operation. It relies upon the plaintiff interpreting for itself whether or not material is the kind of material that enlivens the obligation, and then deciding whether or not to disclose it to the defendant and/or their legal reprsentatives.

57. On 21 November 2022, the Independent National Security Legislation Monitor revealed the existence of the report by Dr Emily Corner and Dr Helen Taylor, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments*. The content of this report has been referred to at length above. This report had been commissioned by the Department of Home Affairs and was in its possession before the first application was made under Div 105A.

58. **Please note we would ask that paragraphs [58]-[60] not be published until after the *Benbrika* proceeding has concluded**. The first trial to be run under Div 105A was the application brought against Mr Benbrika in 2020. His defence was built on a challenge to the risk assessment methodology relied upon by the Plaintiff. However, the Department of Home Affairs, the plaintiff in those proceedings, chose not to disclose the existence of the Corner report.

59. It came to light in the recent Review proceedings brought by Mr Benbrika that the Commonwealth was, in fact, in possession of at least three other reports equally critical of the VERA-2R—none of which had been disclosed.

60. The decision by the Minister to withhold critical exculpatory information had the effect that Mr Benbrika was detained in a prison for almost three years, without having had the benefit of a fair trial. But for the INSLM inquiry, the report would have remained unknown and unavailable to him and others. In light of such a significant and persistent breach of the statutory obligation, it is simply implausible to suggest that such disregard for the law will never happen again. This essential safeguard cannot be guaranteed.

D. Arbitrary detention

61. We continue to assert, as NSWCCL and the Sydney Institute of Criminology did before the INSLM Review, that Div 105A's CDO regime constitutes a significant breach of Australia's international human rights obligations. Australia should be ashamed of this breach, and take urgent steps to remedy it.[42]

62. Some argue that any form of detention which does not arise as a consequence of conviction for a criminal offence will always necessarily breach human rights and constitute arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights.* [43] We have great sympathy for this view.

63. Andrew Dyer and one of the authors of this submission, have recently set out the human rights standards that have been applied elsewhere to regimes of detention which do not arise from criminal conviction in an article recently published in the *Public Law Review*.[44] Such principles have arisen because some argue that failure on the part of the state to detain individuals who are likely to commit serious offences infringes on the rights of the community to life in safety.[45]

64. Dyer and Pallas summarised the principles in the following way:

> [R]egimes providing for [post-sentence] detention will be compatible with human rights only if they: (1) apply to persons who have been convicted in the past of an offence involving serious violence; (2) permit post-sentence preventive detention only if no less restrictive alternative would deal adequately with the relevant threat; and (3) provide that detainees serve such detention in non-punitive conditions, and not within the prison system.[46]

65. To apply these principles succinctly:

    a. Persons who are eligible to be placed on CDOs will, at times, fall short of committing offences involving serious violence;

[42] Andrew Dyer and Josh Pallas, 'NSWCCL and SIC Submission: Independent National Security Legislation Monitor Review into Division 105A of the Criminal Code (Cth) (1 September 2021), https://www.inslm.gov.au/sites/default/files/2022-10/1-NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf.

[43] Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) is incompatible with human rights (and what to do about it)' (2022) 33 *Public Law Review* 61, 69; see also Stephen J Schulhofer, 'Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws' (1996) 7 *Journal of Contemporary Legal Issues* 69, 90-96.

[44] Ibid.

[45] Ibid, 59.

[46] Ibid, 70.

b. The determination of the risk posed by an individual is so indeterminant that it is near impossible to pinpoint a 'relevant threat' with any certainty, let alone whether less restrictive measures can apply. Nonetheless, expansive alternative measures are available, control orders for pre-crime risk, ESOs for post-sentence risk, and Part 5.3 offences themselves for conduct which falls well short of acts of terrorism. Even if risk could be adequately determined, there is a plethora of less restrictive options which fall short of full time incarceration available to the state.
c. Persons subject to a CDO are held in full time custody in prisons.

66. It should therefore be clear, that the current regime falls well short of acceptable human rights standards.

67. For the avoidance of doubt, the regimes on which Div 105A is based have already been considered by the United Nations Human Rights Committee in *Fardon v Australia* and *Tillman v Australia* and found to impose arbitrary detention, principally because individuals were incarcerated in prisons.[47]

68. If Australia is serious about its commitment to international human rights law, it must abolish CDOs.

III. INQUIRY INTO THE USE OF THE VERA-2R AND CIRCUMSTANCES OF ITS NON-DISCLOSURE

69. <u>As noted below we would ask that this part of the submission not be published until after the *Benbrika* proceeding has concluded.</u>

70. Liberty Victoria and NSWCCL condemn the failure of the previous Government not to publish the report of Dr Emily Corner and Dr Helen Taylor, or at the very least to disclose them to defendants in Div 105A proceedings. In circumstances where the Government has given itself extraordinary powers to detain individuals at risk of terrorism offending in accordance with Div 105A, Div 104 Control Orders, pre-charge Detention Orders, and extraordinary criminal offence provisions, it is deeply alarming to see that it has utilised these powers with anything less than impeccable integrity.

71. The repercussions of the non-disclosure of the Corner report in the *Benbrika* proceedings is currently before the Court. In those proceedings, the Attorney-General has maintained that the non-disclosure to Mr Benbrika was on account of error and inadvertence. The Court has indicated that it does not accept this position, but the Court's judgment is reserved.

72. What is not before the Supreme Court of Victoria, though, is the persistent failure to disclose the Corner report far beyond the *Benbrika* proceedings:

a. The PJCIS has twice turned its attention to the use of the VERA-2R by security agencies in the exercise of extraordinary counter-terrorism powers. It has explicitly recommended an independent report assessing the suitability of the VERA-2R and other tools—a recommendation that would no doubt be satisfied by the Corner report. In each of those inquiries, Home Affairs made submissions about its reliance on the VERA-2R and in particular the suitability of the tool, despite being in possession of a report that is clearly inconsistent with that position.

[47] Ibid, 71-72.

b. In purported response to the Recommendation of the PJCIS requesting an independent report into the suitability of the VERA-2R, a report was commissioned from the Australian Institute of Criminology. It has been stated that the AIC was provided with the Corner report. However, there is no reference to the Corner findings in the AIC final report; there is no attempt by the authors of the report to grapple with the Corner research; but there are statements in the body of the AIC report that positively suggest that the Institute had no knowledge of the Corner report at the time the report was written. It is unclear whether or not the Corner report was in fact disclosed to the AIC, and if it was, whether it was disclosed prior to the report being completed.

c. Home Affairs made several submissions to the INSLM in the course of his inquiry into Div 105A. The INSLM was clearly interested in the use of the VERA-2R and addressed it in the earlier public inquiries in June 2023. Home Affairs consistently failed to make any reference to the Corner report in its written and oral submissions, and only revealed it following an order to produce issued by the INSLM. Even then, the report came with a notice that owing to it containing operationally sensitive material, the existence of the report should not be made public. The INSLM has been adamant that this is not the case. Now that the Corner report has been made public, it is clear that such a claim was completely unsubstantiated.

d. The Corner report was not disclosed in any Control Order proceedings under Div 104, including the application against Mr Benbrika in 2020. Division 104 also contains a requirement to disclose all exculpatory material. Applications for Control Orders are brought by the AFP with the Minister's consent, and rely on VERA-2R assessments. For example, Home Affairs and the current Attorney-General's department failed to disclose the Corner report in the case of Pender, and the case of Sa'dat Khan.

e. It is still unclear, whether, and at what point the Corner report became known to the New South Wales government, which continued to rely on VERA-2R assessments in the implementation of its HRTO regime. Clearly the report should have been disclosed to the NSW government at the earliest opportunity.

73. There is prima facie evidence that the decision to conceal the existence of the Corner report was deceptive and sustained. The consequences have been significant.

74. Liberty Victoria and NSW Council for Civil Liberties call for a full investigation into the circumstances of the non-disclosure of the Corner report from 2020 to its ultimate revelation in late 2022.

75. If the Commonwealth Government intends to continue to rely on the VERA-2R, we demand a thorough assessment of the circumstances of the tool's use, including the implications of Home Affairs being the sole license holder for the VERA-2R, the regulation around its training, certification and re-certification processes.

76. If the Commonwealth Government intends to rely on another risk assessment tool, we call for a commitment from the Government to make sure that access to certification and training processes, and research into its validity, remain transparent, accessible and independent.

This submission was prepared by Isabelle Skaburskis from Liberty Victoria and Josh Pallas from the NSW Council for Civil Liberties.

We trust this this submission is of assistance and consent to its publication **subject to redaction of contact details, paragraphs [58]-[60], and the entirety of "Section III – Inquiry into the use of the VERA-2R and circumstances of its non-disclosure" until after the conclusion of the *Benbrika* proceeding**. We would be pleased to assist further, if that would be useful to the Committee.

Yours sincerely,

[redacted]

Michael Stanton
President
Liberty Victoria

[redacted]

Josh Pallas
President
NSW Council for Civil Liberties

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

Appendix A: Schedule of INSLM recommendations with Liberty Victoria and NSWCCL comments

I recommend that Div 105A be amended to abolish continuing detention orders.

We support this recommendation.

If CDOs are retained, then Division 105A should be amended to reflect that interim detention orders can only be made in 'exceptional circumstances'.[48]

I recommend that the objects of Div 105A be amended to include, as an express object of the Division, rehabilitation and reintegration of the subjects of a post-sentence order back into the community.

We support this this recommendation. If this recommendation is implemented it is incumbent on the INSLM and PJCIS to continue to closely monitor the implementation of Div 105A to ensure that this new object is being properly fulfilled.

To the extent that CDOs may be retained (and we think they should not be), this must necessarily include ensuring that people subjected to CDOs are confined in non-punitive detention facilities that appropriately recognise their status as not serving punishment for a crime, and where reintegration and rehabilitation is the goal of the facility.

I recommend that Div 105A.5 be amended to reflect the following:

- **First, s 105A.5(2A) should be amended to expand the class of those to whom the AFP Minister must inquire beyond Commonwealth law enforcement officers or intelligence or security officers. Those to whom inquiries are to be directed must include all departments and agencies of the Commonwealth that the AFP Minister believes may hold information relevant to supporting a finding that a post-sentence order should not be made. Where the AFP Minister believes that applicable material may be in the possession of a third party, the AFP Minister is to advise the defendant of this and provide details of the third party and the nature of the material.**

- **Second, the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under s 105A.5(2A).**

- **Third, one week prior to any final hearing of the application, the AFP Minister or a legal representative of the AFP Minister ought to file and serve on the defendant details of the inquiries made since the last affidavit to ensure compliance with the Minister's obligations under s 105A.5(2A).**

- **Fourth, there should be new provisions of Div 105A, to the following effect:**

  The Minister shall disclose to the defendant all information of which the Minister is aware that is in the form of an expert opinion, scientific evidence or research, which differs from such evidence to be relied upon by the Minister, or which in some way casts doubt on the opinions or evidence on which the Minister intends to rely. In particular, the Minister shall disclose to the defendant all expert opinion, scientific evidence or research relevant to assessment of the risk of the defendant committing a serious Pt 5.3 offence in the future including research in respect of tools used by relevant experts in forming their opinions.

- **Fifth, the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under this new provision.**

[48] Dyer submission

We support these recommendations.

I recommend that the definition of 'relevant expert' in s 105A.2 be repealed.

AND

I recommend that a new definition of 'relevant expert' replace it and be in a form that reflects the following: 'relevant expert' means persons with expertise in and who are qualified to express opinions as to the risk, and means of ameliorating the risk, of a defendant committing terrorist acts.

We support these recommendations.

I recommend that s 105A.7A(1) be amended, and all other provisions of the Division consequentially so, to make plain that any reports or evidence of relevant experts can only be admitted to evidence if admissible by the applicable laws of evidence.

AND

I recommend that Div 105A be amended to remove the requirement for a court to have regard to any opinion evidence of any witness that is not admissible.

We support these recommendations. The applicable law of evidence should not be ousted by the regime.

I recommend that s 105A.6B(1) be amended to provide that in making a decision under s 105A.7A(1) the court must have regard to the objects of Div 105A and may have regard to the other matters provided for in s 105A.6B(1)(b)–(i).

We support this recommendation.

I recommend that s 105A.7A(1)(b) be amended to delete the words 'after having regard to matters in accordance with section 105A.6B'.

AND

I recommend that s 105A.7A(1)(c) be amended to provide that, when a court considers whether proposed conditions of an ESO are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk', the court also consider whether they provide adequately for rehabilitation and reintegration of the defendant into the community.

We support these recommendations.

I recommend that s 105A.7(2) be deleted and that s 105A.7(1) be amended to reflect the following:

- **(b) the court is satisfied on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence; and**
- **(c) the court is satisfied on the balance of probabilities that:**
    - **(i) each of the conditions; and**
    - **(ii) the combined effect of all of the conditions;**

      to be imposed on the offender by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community

from that unacceptable risk and to aid the defendant's rehabilitation and reintegration into the community.

We support this recommendation, subject to the following two amendments:

1. The court should at least be required to satisfy the higher threshold of 'to a high degree of probability' that exists under the current regime. It is unclear as to why the mere civil standard should be adopted in relation to the making of ESOs when the conditions can effectively allow for people to be detained in a state of house arrest.

2. Additionally, we continue to adopt the position of NSWCCL and the Sydney Institute of Criminology before the INSLM proceedings that a serious risk of committing any serious Part 5.3 offence casts the net too widely. We continue to propose that only offences that involve 'the doing, or the supporting, or the facilitating, of a terrorist act' should be included as eligible offences to enliven the court's jurisdiction to make an ESO.[49]

I recommend that s 105A.7E be repealed.

We support this recommendation.

I recommend that within the next 3 years the Attorney-General's Department publish a report responding to the following provisional recommendation:

- **That Div 105A be amended to effect the following:**
    - **An independent statutory body**
    - **the ESO Authority will be created.**
    - **The ESO Authority will comprise members with skills suited to its functions. One member should be a senior legal practitioner.**
    - **The ESO Authority will oversee specified authorities to ensure that ESOs are administered uniformly and consistently throughout the Commonwealth.**
    - **The ESO Authority will oversee the provision of services that are to assist subjects of ESOs with their rehabilitation and reintegration into their communities.**
    - **At every review by the court of every ESO, the ESO Authority will report on the specified authority's exercise of delegated powers by the specified authority in respect of the person the subject of review.**
    - **At every review by the court of every ESO, the ESO Authority will report on subjects' compliance with conditions of ESOs and on the provision of services that are to assist with rehabilitation and reintegration of the subject into their community.**
    - **At every review by the court of every ESO, the ESO Authority will, if requested to do so by the court, provide any assistance requested but in particular on whether the ESO conditions are achieving their purpose and if not suggest changes.**

We support this recommendation.

I recommend that s 105A.15A and reg 9 of the Criminal Code Regulations 2019 be repealed.

AND

[49] NSWCCL and SIC submission p. 4.

I recommend that they be replaced by provisions to the following effect:

- **If a post-sentence order proceeding is before a Supreme Court of a State or Territory, the Commonwealth will bear the reasonable costs and expenses of the offender's legal representation for the proceeding which includes costs of engaging expert witnesses if required.**

- **Prior to the preliminary hearing to be held pursuant to s 105A.6 the Commonwealth and the defendant's solicitor or, if none has been appointed, the defendant, will confer to agree the quantum or the bases for charging of such fees and expenses and the manner in which they will be paid by the Commonwealth.**

- **If at the preliminary hearing there is no agreement, the court will convene a hearing to be held as soon as practicable thereafter to enable the court to make orders as to the quantum or the bases for charging of such fees and expenses and the manner in which they will be paid by the Commonwealth.**

We support these recommendations.