Australian Government
Attorney-General's Department
Department of Home Affairs

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Attorney-General's Department and the Department of Home Affairs Joint Agency Submission

Parliamentary Joint Committee on Intelligence and Security review of post-sentence terrorism orders: Division 105A of the Criminal Code

Contents

Introduction

1. The Attorney-General's Department and the Department of Home Affairs welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review into the operation, effectiveness and implications of Division 105A of the Criminal Code,[1] and any other provision of the *Criminal Code Act 1995* (Cth) as it relates to that Division.

2. This submission is divided into three main parts. Part 1 of the submission provides an overview of the current object and policy intent of Division 105A. Part 2 addresses the current legislative framework for the High Risk Terrorist Offenders (HRTO) regime in Division 105A, which includes the continuing detention order (CDO) scheme and the extended supervision order (ESO) scheme. Part 3 discusses the implementation and operation of the CDO and ESO schemes to date.

3. In preparing this submission, the departments consulted the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). The AFP will provide a separate submission to this review.

[1] *Criminal Code Act 1995* (Cth) sch 1 ('Criminal Code').

Part 1: Overview

Object and policy intent

4. The HRTO regime in Division 105A in Part 5.3 of the Criminal Code, which includes CDOs and ESOs, forms part of Australia's robust national security and counter-terrorism framework. 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 CDO or an ESO.[2]

5. The CDO scheme enables the continued detention of eligible terrorist offenders after the conclusion of their custodial sentence. A state or territory Supreme Court (the Court) may impose a CDO if satisfied to a high degree of probability, based on admissible evidence, that the eligible offender poses an unacceptable risk of committing a serious Part 5.3 offence.[3] A decision to grant a CDO also requires the Court to be satisfied that no other less restrictive measure available under Part 5.3 of the Criminal Code would be effective in preventing the unacceptable risk to the community.[4] If the Court is not satisfied that a CDO should be made, then the Court must consider whether to make an ESO.[5]

6. The ESO scheme complements the CDO scheme by enabling the Court to make an ESO as a less restrictive alternative to a CDO. ESOs enable the Court to impose a broad range of conditions that can be tailored to address the specific circumstances and specific risk posed by an offender. The Court must be satisfied, on the balance of probabilities, that each of the conditions and the combined effect of all of the conditions, to be imposed on the offender is 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.[6]

7. Since the CDO scheme commenced in June 2017, two CDOs have been made—one in respect of Mr Abdul Nacer Benbrika and one in respect of Mr Blake Pender. Since the ESO scheme commenced in December 2021, two ESOs have been made—one in respect of Ms Hadashah Sa'adat Khan and the other in respect of Mr Pender. Further information about these matters and related proceedings are provided in Part 3 of this submission.

[2] Criminal Code s 105A.1.
[3] Criminal Code s 105A.7(1)(b).
[4] Criminal Code s 105A.7(1)(c).
[5] Criminal Code s 105A.7(2).
[6] Criminal Code s 105A.7A(1).

Threat environment[7]

8. Australia's current National Terrorism Threat Level is POSSIBLE, which was lowered from PROBABLE on 28 November 2022.[8] As the Director-General of Security stated during his Annual Threat Assessment on 21 February 2023:

> ASIO assesses that Australia remains a potential terrorist target, but there are fewer extremists with the intention to conduct an attack onshore than there were when we raised the threat level in 2014. This does not mean the threat is extinguished. Far from it. When making the announcement, I said it remained entirely plausible there would be a terrorist attack in Australia within twelve months, and that our biggest concern was individuals and small groups who could move to violence without warning, using weapons such as guns.[9]

9. Since 2001, 105 people have been convicted of terrorism-related offences. Since September 2014, when the national terrorism threat level was raised to PROBABLE, 159 people have been charged as a result of 85 counter-terrorism operations around Australia; there have been 12 terrorist attacks; and there have been 21 major disruption operations in relation to imminent terrorist attack planning in Australia.[10]

10. As a result of successful prosecutions over the past two decades, there is a substantial cohort of convicted terrorist offenders in Australia. Some of those convicted offenders may continue to pose a significant risk to the Australian community after they are released from prison. As at 13 June 2023, there is a total of 53 terrorist offenders currently serving a sentence of imprisonment who may be eligible under the HRTO scheme. Of these 53 offenders, 17 are due for release between 2023 and 2027 (**Attachment A**). A further 19 people are currently before courts on Commonwealth terrorism charges.[11]

11. Experiences in other countries have demonstrated that convicted terrorist offenders returning to the community following their sentences can continue to pose a threat to the community. For example, the 2019 London Bridge and 2020 Streatham attacks in the United Kingdom (UK) were committed by convicted terrorist offenders who had been released into the community after serving sentences for terrorism-related offences. Similarly, the 2020 Vienna attack was committed by a convicted terrorist offender following his release into the community. The terrorist attack in Auckland, New Zealand, in September 2021, was also carried out by an individual who had been sentenced for possessing Islamic State propaganda and detained for 3 years.

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[7] Please refer to the separate submission by the AFP to this PJCIS review for more detail on the threat environment.
[8] 'Current National Terrorism Threat Level'*, Australian Security Intelligence Organisation,* (Web Page, 28 November 2022) <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>.
[9] 'Director-General's Annual Threat Assessment', *Australian Security Intelligence Organisation,* (Web Page, 21 February 2023) <https://www.asio.gov.au/director-generals-annual-threat-assessment-2023>.
[10] Figures current as at 13 June 2023.
[11] Ibid.

12. While Australia has not had a terrorist attack committed by offenders released into the community on a Division 105A post-sentence order, there have been instances of re-offending by convicted terrorist offenders whilst in custody – one of these instances involved the commission of a further terrorist act.[12] This, along with the experience of other countries, highlights the importance of having effective measures in place to manage the risk posed by convicted terrorist offenders returning to the community. This includes to manage the risk of those offenders re-engaging with contacts who may place them at risk of further radicalisation and offending.

Legislative history of Division 105A

13. On 1 April 2016, the Council of Attorneys-General agreed that the Commonwealth should draft legislation to introduce a nationally consistent post-sentence preventative detention scheme, with appropriate protections, for high risk terrorist offenders. In response, the then Government introduced the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (HRTO Bill) on 15 September 2016 to create a CDO scheme for high risk terrorist offenders in Division 105A of the Criminal Code.

14. The PJCIS of the 45th Parliament reviewed the HRTO Bill and presented its report on 4 November 2016.[13] The PJCIS unanimously supported passage of the HRTO Bill, subject to certain amendments, including the introduction of additional safeguards and a provision that the CDO scheme be subject to an initial sunset period of 10 years after passage of the Bill.[14] On 30 November 2016, the then Government released its response to the PJCIS Advisory Report accepting all 24 recommendations.

15. The HRTO Bill passed both Houses of Parliament on 1 December 2016 and received the Royal Assent on 7 December 2016. The provisions which created the CDO scheme commenced in June 2017.

16. On 3 September 2020, the then Government introduced the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (Cth) (ESO Bill) to create an ESO scheme in Division 105A of the Criminal Code.

17. The introduction and enactment of ESOs in the Criminal Code were informed by the 2017 report of the then Independent National Security Legislation Monitor (INSLM), Dr James Renwick AM CSC SC, entitled *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detentions Orders* (the 2017 INSLM Report) and the PJCIS's 2018 report, *Review of Police Stop, Search and Seize Powers, the Control Order Regime, and the Preventative Detention Order Regime*.

[12] See *R v Shoma (No 2)* [2021] VSC 797. Momena Shoma was convicted and sentenced for engaging in a terrorist act and being a member of a terrorist organisation whilst serving an existing sentence of imprisonment for a serious terrorism offence.
[13] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (Report, November 2016) ('PJCIS Advisory Report').
[14] PJCIS Advisory Report 121 [4.76]. Section 105A.25 of the Criminal Code provides that a post-sentence order, and an interim post-sentence order, cannot be applied for, affirmed or made, after 7 December 2026.

18. Both the INSLM and the PJCIS recommended the creation of an ESO scheme as an addition to CDOs in Division 105A, primarily to address the lack of interoperability between CDOs and control orders in Division 104 of the Criminal Code.

19. In his 2017 INSLM Report, the INSLM found that the CDO and control order schemes gave rise to the need for different applicants to make separate applications in different courts, seeking to satisfy different tests for the same offender. The INSLM noted this added a level of complexity that is not in the interests of the applicants, the courts or the offender. The PJCIS similarly noted that the CDO and control order schemes created duplication in effort and noted the financial and time costs in running two separate proceedings in different courts. The PJCIS supported the ESO model recommended by the INSLM, noting the need for regular reviews of those orders.

20. The *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (ESO Act) implemented the then Government's response to recommendations from the INSLM and the PJCIS, and made amendments to Divisions 104 and 105A to improve the interoperability between control orders and CDOs. It drew on the experience of Australian states and territories with comparable regimes, and for this reason, departed from some of the INSLM and PJCIS recommendations about specific details of an ESO scheme. Broadly, the ESO Act departed from the 2017 INSLM Report recommendations by:

    - providing for more extensive conditions to be imposed under an ESO than under a control order
    - setting a lower threshold for the imposition of an ESO than a CDO in relation to satisfaction of unacceptable risk, and
    - not requiring the AFP Minister (being the Attorney-General) to refrain from consenting to a request for an interim control order (ICO) while proceedings are underway for a CDO or an ESO.[15]

21. The ESO Bill passed both Houses of Parliament on 22 November 2021 and received the Royal Assent on 8 December 2021.

Interaction of this review with other recent reviews and inquiries

22. Australia's counter-terrorism and national security laws are reviewed regularly to ensure Australia's legal frameworks remain appropriate and continue to adapt to the evolving threat environment.

[15] Additional detail about the departures from recommendations of the INSLM and PJCIS of the 46th Parliament are included at page 6 of the joint submission of the Attorney-General's Department and Department of Home Affairs to the PJCIS review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021.

23. During the 46th Parliament the PJCIS conducted statutory reviews, pursuant to ss 29(1)(bb)(i),(ii), (iii) and (cb) of the *Intelligence Services Act 2001* (Cth), into the operation, effectiveness and implications of:

- Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (Crimes Act) (which provides for police powers in relation to terrorism) and any other provision of the Crimes Act as it relates to that Division
- Divisions 104 and 105 of the Criminal Code (which provide for control orders and preventative detention orders in relation to terrorism) and any other provision of the Criminal Code as it relates to those Divisions, and
- Division 105A of the Criminal Code (which at the time of the review, provided for CDOs) and any other provision of the Criminal Code as far as it relates to that Division.

24. The PJCIS completed these reviews as one inquiry and presented its report to the Parliament in October 2021 (AFP Powers Report).[16] The PJCIS unanimously supported the extension of the sunset date of the emergency stop, search and seizure powers in Division 3A of Part IAA of the Crimes Act and the control order and preventative detention order regimes in Divisions 104 and 105 of the Criminal Code respectively, subject to certain amendments, including the introduction of additional safeguards. The PJCIS also made the following recommendations relating to Division 105A:

- Recommendation 17: The Committee recommends that section 29 of the *Intelligence Services Act 2001* be amended to provide that the Committee may conduct a further review into the operation, effectiveness and implications of the continuing detention order regime in Division 105A of the *Criminal Code Act 1995* prior to the sunset date.[17]
- 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 5 years.[18]
- 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

[16] Parliamentary Joint Committee on Intelligence and Security (PJCIS), 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) ('AFP Powers Report').
[17] AFP Powers Report 89 [5.79].
[18] AFP Powers Report 90 [5.84].

- use of rehabilitation programs (pre and post-release), and
- use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.[19]

25. The Parliament passed the *Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Act 2022* on 27 October 2022. This Act extended the sunset date of the relevant AFP powers (that were due to sunset on 7 December 2022) by a further 12 months to 7 December 2023. The Attorney-General's Department is working to finalise the Government's response to the AFP Powers Report, including recommendations 17-19 above.

26. The current provisions of Division 105A (and related provisions) of the Criminal Code were most recently reviewed by the current INSLM, Mr Grant Donaldson SC. The report of the INSLM was published on 30 March 2023 (INSLM HRTO Report).[20] The INSLM recommends a number of significant changes to Division 105A, including the abolition of the CDO scheme. A list of the recommendations made by the INSLM in his report are contained in **Attachment B** of this submission.

27. The PJCIS's current review follows the INSLM's review and subsequent publication of the INSLM HRTO Report. The statutory requirement for the PJCIS to conduct the current review under subsection 29(1)(bbaaa) of the *Intelligence Services Act 2001* (Cth) was inserted by the ESO Act in response to a recommendation by the PJCIS in its Advisory Report on the ESO Bill.[21]

28. The Government will prepare a consolidated response to the INSLM's HRTO Report and the PJCIS's current review when the report for the latter is tabled.

Examples of post-sentence schemes in states and territories

29. All Australian states and the Northern Territory have established post-sentence schemes designed to manage the risk posed by certain high risk offenders. For example, in New South Wales, the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act) provides for CDOs and ESOs in relation to NSW offenders who are in custody or under supervision while serving a sentence of imprisonment for a NSW indictable offence, or who are under an existing supervision order. In Victoria, the *Serious Offenders Act 2018* (VIC) provides for CDOs and ESOs in relation to serious sexual and violent offenders. In South Australia, the *Criminal Law (High Risk Offenders) Act 2015* (SA) provides for ESOs for 'terror suspects' who are serving a term of imprisonment for a state offence, as well as sexual and violent offenders. However, a 'terror suspect' does not include a terrorist offender covered by the Commonwealth HRTO regime.

[19] AFP Powers Report 91 [5.87].
[20] Independent National Security Legislation Monitor (INSLM), Commonwealth of Australia, *Report into the operation, effectiveness and implications of Division 105A of the* Criminal Code Act 1995 *(Cth) and any other provision of that Code as far as it relates to that Division* (Report, March 2023) ('INSLM HRTO Report').
[21] PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020* (Report, September 2021) ('AFP Powers Report').

30. The Commonwealth HRTO regime was designed with reference to these state and territory post-sentence schemes. In particular, it was informed by the NSW THRO Act, which has been specifically designed to reduce radicalisation and risk escalation by non-sentenced individuals and sentenced offenders.

Examples of legislative schemes in other countries

31. Other countries have legislated schemes that allow for the imposition of conditions as a means of addressing the risk posed by convicted terrorist offenders. For example, the UK's *Terrorism Prevention and Investigation Measures Act 2011* (UK) permits UK authorities to impose almost identical restrictions to Australian control orders on an individual suspected of preparing to commit terrorism offences.[22] New Zealand's *Terrorism Suppression (Control Orders) Act 2019* (NZ), as amended by the *Counter-Terrorism Legislation Act 2021* (NZ), authorises the imposition of a range of prohibitions and restrictions as part of a control order in respect to those who have engaged in terrorism related activity overseas or those convicted of terrorism related offences in New Zealand.[23]

32. Some countries also have measures that allow for the detention of some categories of offenders beyond regular sentencing. For example, the UK can apply extended determinate sentences[24] or life sentences on persons convicted of terrorism offences, applied at the time of sentencing.[25] Further, legislation introduced in 2021 removed discretionary early release for the most serious terrorist offenders who receive an extended determinate sentence where the offence attracts a maximum penalty of life.[26] Canada and New Zealand have adopted 'dangerous offender'[27] and 'public protection order' regimes,[28] respectively, which allow for continued detention of serious sexual or violent offenders on a preventative basis. However, these schemes do not apply to terrorism offences. United States courts can order continued detention in a secure civil treatment facility for serious sexual offenders.[29]

[22] *Terrorism Prevention and Investigation Measures Act 2011* (UK) ss2-3, Sch 1.
[23] *Terrorism Suppression (Control Orders) Act 2019* (NZ), Part 2.
[24] Determinate prison sentences involve the court setting a fixed length for a prison sentence, which includes time spent in custody and time released into the community on licence to serve the remainder of their sentence. UK courts can impose extended determinate sentences for certain offences, including terrorism, where the court has found an offender is dangerous and amended measures are required to protect the public from serious harm. These offenders spend a larger proportion of their sentence in prison, and once released into the community on licence, can be subject to restrictions and supervision to reduce the risk of them committing further offences: 'Determinate prison sentences', *UK Sentencing Council*, (Web Page, 2023) <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/determinate-prison-sentences/>.
[25] *Counter-Terrorism and Sentencing Act 2021* (UK), Part 1.
[26] *Counter-Terrorism and Sentencing Act 2021* (UK), Part 2, ss 27-31.
[27] *Criminal Code*, RSC, 1985, C-46, ss 752-753.
[28] *Public Safety (Public Protection Orders) Act* 2021 (NZ).
[29] 10 18 USC §4248 (2018).

Part 2: Division 105A legislative framework

Eligibility for post-sentence orders

33. Section 105A.3 of the Criminal Code provides that a post-sentence order (a CDO or an ESO) may be made in relation to a person who has been convicted of an offence specified in paragraph 105A.3(1)(a) where the person will be at least 18 years old at the time their sentence ends, and provided that one of the preconditions listed under section 105A.3A applies to that person. The same eligibility criteria under section 105A.3 applies for both CDOs and ESOs, as these orders are intended to apply to the same cohort of people—that is, convicted terrorist offenders who pose an unacceptable risk to the community of committing serious terrorism offences upon release.

34. Further background on the eligibility of offenders for post-sentence orders and the policy intention underlying the current provisions is at paragraphs [34] to [43] of the supplementary submission of the Attorney General's Department to the INSLM's review of Division 105A at **Attachment C**.

Applications for post-sentence orders

35. Under subsection 105A.5(2), the AFP Minister or their legal representative may apply to the court for a CDO or an 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 or, if a post-sentence order is already in force in relation to the person, within 12 months of the date the post-sentence order ceases to be in force. The proposed timeframe for commencing applications under the HRTO Bill was originally within 6 months of the eligible offender's sentence expiry, but was amended to 12 months following a recommendation of the PJCIS.[30]

AFP Minister's disclosure obligations and contents of applications

36. The disclosure obligations imposed on the AFP Minister under Division 105A provide important safeguards to ensure procedural fairness for an offender.[31] The AFP Minister is obliged to make reasonable inquiries of any Commonwealth law enforcement officer or intelligence or security officer to produce documents and a statement of any facts that the AFP Minister is aware of that would reasonably be regarded as supporting a finding that the post-sentence order should not be made, or affirmed on review.[32] A Commonwealth law enforcement officer means a person who is a member or employee of the AFP, the Australian Criminal Intelligence Commission, the Australian Border Force and the Australian Commission for Law Enforcement Integrity.[33] An intelligence or security officer means a person who is a member or employee of the Office of

[30] PJCIS Advisory Report 53 [3.19].
[31] Criminal Code ss 105A.5(2A) and (3).
[32] See for example, ss 105A.5(2A) and 105A.5(3)(aa) of the Criminal Code.
[33] Criminal Code s 105A.2(1) (definition of 'Commonwealth law enforcement officer').

National Intelligence, the Australian Signals Directorate, the Australian Secret Intelligence Service, the Defence Intelligence Organisation and ASIO.[34]

37. Further information on the current scope of the disclosure obligations of the AFP Minister in post-sentence order proceedings is at paragraphs [120] to [127] of the supplementary submission of the Attorney-General's Department to the INSLM's review of Division 105A at Attachment C.

38. The INSLM made recommendations on this matter in his report (see recommendations 3A-3E in Attachment B). The INSLM's recommendations propose legislative amendments to expand the scope of reasonable inquiries by the AFP Minister regarding information that supports a finding that a post-sentence order should not be made, and to include related procedural requirements in the legislation. In making these recommendations, the INSLM referred to the report by Dr Emily Corner and Dr Helen Taylor from the Australian National University to assess the validity of the Violent Extremism Risk Assessment 2 Revised (VERA-2R) and RADAR violent extremism risk assessment tools.

Non-disclosure of the 'Corner Report'

39. In May 2018, the Department of Home Affairs commissioned a report by Dr Emily Corner and Dr Helen Taylor from the Australian National University to assess the validity of the VERA-2R and RADAR violent extremism risk assessment tools. The report titled "Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments" (the Corner Report) was received by the Department of Home Affairs in May 2020.

40. The Corner Report criticised elements of the tools, including in relation to their predictive validity. The overall findings of the report indicate that VERA-2R and RADAR lack a theoretical and empirical foundation, and have poor inter-rater reliability and predictive validity. At present, however, no violent extremism risk assessment tool has predictive validity due to the statistically small cohort of violent extremists when compared to other types of crimes. Additionally, the report makes no recommendation or finding against the use of VERA-2R; and makes recommendations to assist in maturing the tool for future use.

41. Relevant agencies have acknowledged that the Corner Report should have been disclosed in previous post-sentence order proceedings, and that the failure to do so was an error. The circumstances of that error are detailed in affidavits filed in the Supreme Court of Victoria in current proceedings involving Mr Benbrika.

42. After becoming aware of the Corner Report in November 2022, the Attorney-General provided the report to relevant legal representatives in all previous post-sentence order proceedings in relation to Mr Benbrika, Mr Pender and Ms Sa'adat Khan.

43. In May 2023, the Department of Home Affairs released the Corner Report in response to a Freedom of Information request. The report that was released included minor redactions to protect the integrity of the VERA-2R and RADAR tools, including at the request of the tools' authors. In June 2023 the unredacted Corner Report was tendered into evidence in the Benbrika

[34] Criminal Code s 105A.2(1) (definition of 'intelligence or security officer').

court proceedings.

44. The Department of Home Affairs is committed to supporting the full range of violent extremist risk assessment tools used by countering violent extremism (CVE) practitioners nationally. The Department of Home Affairs' Centre of Excellence for CVE Research, Risk Assessment and Training will continue to commission research into the validity and reliability of risk assessment tools in support of the ongoing improvement of these instruments.

Expert assessments and rules of admissibility for proceedings

45. Following the filing of an application for a post-sentence order, the Court must hold a preliminary hearing to determine whether to appoint one or more relevant experts under section 105A.6. The AFP Minister, the offender or their legal representative may nominate one or more experts for this purpose. A Court-appointed expert must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community, and provide a report of that assessment to the Court, AFP Minister and offender.

46. For information on the definition of 'relevant expert', and the admissibility requirements for relevant expert risk assessments in post-sentence order proceedings, please refer to paragraphs [104] to [119] in Attachment C.

47. The INSLM recommends legislative changes to replace the current definition of 'relevant expert' in section 105A.2 and to clarify the admissibility requirements for expert and opinion evidence in his INSLM HRTO Report (see recommendations 4 and 5 in Attachment B).

Risk assessment

48. The Attorney-General's Department and the Department of Home Affairs acknowledge the importance of risk assessments for the purposes of Division 105A proceedings, including the need to ensure the independence of experts, as well as appropriate transparency, while also protecting the integrity of risk assessments.

49. The AFP Minister does not mandate that experts appointed under Division 105A use a specific risk assessment tool. Rather, the expert is to provide their opinion relying on the information made available to them and using the tools they deem suitable, to determine the risk of an offender committing a serious Part 5.3 offence. It is a matter for the appointed expert to determine which, if any, violent extremism assessment and psychological instruments are used in accordance with the expert's understanding of the offender's particular circumstances.

Report of the Australian Institute of Criminology

50. In September 2021, the PJCIS tabled the report (*Report on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*). In that Report the PJCIS recommended (Recommendation 2) that an independent review of the range of risk assessment tools used

under Division 104 (control orders) and Division 105A (post sentence orders) of the Criminal Code, including the VERA-2R, be conducted and the findings reported to the Parliament. The independent review was to consider the existing assessment framework, alternative tools, improvements that could be made and the effectiveness of mandating participation in diversion and disengagement programs. The then Government accepted the recommendation.

51. In February 2022, the Department of Home Affairs engaged the Australian Institute of Criminology (AIC) to conduct a review, which it undertook at no cost to the Department of Home Affairs. The subsequent AIC Report, which the Attorney-General tabled in March 2023, made a number of findings and recommendations. This included a recommendation that the VERA-2R remains the most suitable risk assessment tool for use with Division 104 control orders and Division 105A post-sentence orders and should continue to be used, in conjunction with other suitable tools as appropriate, but must be subjected to further scrutiny and, in particular, validation.

52. In response to the AIC Report recommendation, the Department of Home Affairs will commission a comprehensive and fully independent validation study of VERA-2R in the 2023–24 financial year. The Department of Home Affairs will continue to work closely with state and territory practitioners to facilitate the sharing of case data to support ongoing research into risk assessment tools and their application, as well as supporting broader violent extremism related research.

VERA-2R

53. Since 2017, Dr Elaine Pressman, the author of the VERA-2R risk assessment tool, has licensed the Department of Home Affairs to oversee the VERA-2R training and certification within Australia and New Zealand. In doing so, the Department of Home Affairs is advised by a Community of Practice, which comprises experienced VERA-2R practitioners from a range of Australian agencies across the Commonwealth, states and territories. The VERA-2R is one of the assessment instruments used to assist an expert to assess the likelihood of an offender committing a serious Part 5.3 offence under the Criminal Code.

54. The VERA-2R is a structured professional judgement tool used in law enforcement, correctional and intervention program contexts in Australia and internationally to assess the likelihood of a person's risk of engaging in violent extremism. It is one of the tools that has been used and relied on by experts to assess individuals for Division 105A proceedings. As part of a contemplated CDO or ESO application, the AFP Minister may appoint a relevant expert (e.g. a forensic psychologist) to undertake a risk assessment of an eligible terrorist offender's likelihood of committing a serious Part 5.3 offence using appropriate tools, which may include the VERA-2R. For additional information on the Department of Home Affairs' administration of the VERA-2R, please refer to paragraphs [9]-[11] of its supplementary submission to the INSLM's review of Division 105A of the Criminal Code, at **Attachment D**.

Considerations for the Court in deciding whether to make a post-sentence order

55. Subsection 105A.6B(1) lists matters that the Court must have regard to in determining whether an eligible offender poses an unacceptable risk of committing a serious Part 5.3 offence. The matters include the safety and protection of the community from serious Part 5.3 offences, any reports of an assessment from a relevant expert and the level of the offender's participation in the assessment by the expert.

56. Importantly, subsection 105A.6B(2) clarifies that this list is non-exhaustive and does not prevent the Court from having regard to any other matter the Court considers relevant. It is also a matter for the Court to determine what weight it gives each of the matters it considers relevant.

57. The INSLM recommends legislative changes to section 105A.6B to make the object of Division 105A a mandatory consideration and the other listed matters discretionary considerations for the Court in deciding whether to make an ESO (see recommendations 8 and 9 in Attachment B).

58. The INSLM also recommends a number of legislative changes to section 105A.7A to require the Court to also consider the rehabilitation and reintegration of the offender when determining whether proposed ESO conditions are reasonably necessary, and reasonably appropriate and adapted (see recommendations 9, 10 and 11 in Attachment B). In relation to ESO conditions, the INSLM recommends repealing section 105A.7E of the Criminal Code, which sets out obligations for electronic monitoring (see recommendation 12 in Attachment B).

Access to justice, procedural fairness and appropriate representation in proceedings

59. There are a range of protections and safeguards in Division 105A to enhance access to justice and procedural fairness in post-sentence order proceedings. In addition to those mentioned above, these include:

- the offender has the opportunity to lead evidence (including by calling witnesses or producing material) and/or make submissions[35]
- the Court may stay proceedings or require the Commonwealth to pay all or part of an offender's legal costs if an offender is unable to obtain legal representation due to circumstances beyond their control[36]
- the AFP Minister bears the onus of satisfying the Court of the relevant thresholds for the

[35] Criminal Code s 105A.14.
[36] Criminal Code s 105A.15A.

making of the order[37]

- the Court retains a discretion as to whether to make an order or not, and what the terms of the order are[38]

- the Court must give reasons for its decision,[39] and the offender has the right to appeal the decision by way of rehearing[40]

- the AFP Minister must apply to the Court to review the order on an annual basis, or sooner on application of the offender, if the Court is satisfied there are new facts or circumstances to justify the review or it is otherwise in the interests of justice to review the CDO or ESO,[41] and

- the AFP Minister must, as soon as practicable after 30 June each year, cause a report to be prepared and tabled before each House of the Parliament about the operation of Division 105A during the year ended on that 30 June.[42]

60. There are also a number of other safeguards and accountability mechanisms that apply to the ESO scheme, including:

    - the Court must be satisfied that each of the proposed conditions, and the combined effect of all of the proposed conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk[43]

    - the Court must take into account whether the person is also subject to a post-sentence order under state or territory legislation, as well as the cumulative impact on the person of multiple orders—this includes any type of post-sentence order scheme within a state or territory and is not limited to those relating to counter-terrorism,[44] and

    - the Court cannot order an offender to remain at a specified premises for more than 12 hours in a 24 hour period. This is to ensure that an ESO or interim supervision order (ISO) does not impose conditions akin to detention.[45]

61. For additional information on safeguards around the timing of post-sentence order applications, please refer to paragraphs [69] to [75] in Attachment C.

62. For information on the funding of post-sentence order proceedings, please also refer to paragraphs [89] to [94] in Attachment C. The INSLM made recommendations on the funding of

[37] Criminal Code ss 105A.7(3) and 105A.7A(3).
[38] Criminal Code ss 105A.7(1) and 105A.7A(1).
[39] Criminal Code s 105A.16.
[40] Criminal Code s 105A.17.
[41] Criminal Code s 105A.11.
[42] Criminal Code s 105A.22.
[43] Criminal Code s 105A.7A(1)(c).
[44] Criminal Code s 105A.6B(1)(ha) and (1A).
[45] Criminal Code s 105A.7A(2A).

post-sentence order proceedings in the INSLM HRTO Report (see recommendations 14 and 15 in Attachment B). The INSLM considers that the Commonwealth must directly and adequately fund offenders' costs of post-sentence order applications (including legal representation and expert witnesses, if required) in a timely manner. As such, the INSLM recommends that Regulation 9 of the *Criminal Code Regulations 2019* and section 105A.15 of the Criminal Code be repealed and replaced with a new provision that would require the Commonwealth to bear those costs in all cases.

Special advocates

63. Special advocates may be appointed by the Court in circumstances where court-only evidence is being considered in control order or ESO proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). The appointment of special advocates is intended to ensure that the offender receives a fair hearing. Special advocates represent the offender's interests during the parts of a hearing in which the offender and their ordinary legal representative are excluded.

Australia's international human rights obligations

64. 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 suppressing 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.

65. For additional information on Australia's international human rights obligations, please refer to paragraphs [11] to [25] in Attachment C.

Part 3: Implementation of the HRTO regime

HRTO Regime Implementation Framework

66. The Commonwealth is responsible for administering the national HRTO regime outlined in Division 105A. The Government has provided $130.1 million over two years from 2023–24, and ongoing funding in the contingency reserve, to strengthen Australia's arrangements for managing high risk terrorist offenders and countering violent extremism. This critical funding will enable agencies to continue to implement the HRTO regime.

67. The Commonwealth, in collaboration with state and territory governments, has developed a HRTO Regime Implementation Framework (RIF) to support effective coordination, national consistency and interoperability among 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 implementation of the HRTO regime.

68. The Department of Home Affairs, through the Counter-Terrorism Coordination Centre, has responsibility for managing the coordination and delivery of counter-terrorism capability and funding to state and territories to ensure agencies are equipped to address the terrorist threat at a tactical and operational level, with a nationally consistent and interoperable approach. This is achieved through the national HRTO RIF, capability building and development initiatives, and funding arrangements with states and territories. For additional information on the role of the Department of Home Affairs in supporting the HRTO regime, please refer to paragraphs [5]-[8] of its supplementary submission to the INSLM's review of Division 105A at Attachment D.

69. Under the auspices of the Australia-New Zealand Counter-Terrorism Committee (ANZCTC), the HRTO Working Group supports the national implementation of the HRTO Regime by facilitating cooperation and engagement between the Commonwealth, states and territories. The HRTO Working Group has representation from state and territory police, justice and corrections agencies. Working Group meetings are scheduled quarterly, with Secretariat support provided by the Department of Home Affairs.

70. In June 2023, the HRTO Working Group agreed to a Work Plan. Priority lines of effort include the review of the HRTO RIF, Federation Funding Agreements with states and territories and capability mapping. These are outlined further below.

Review of the HRTO Regime Implementation Framework

71. In 2021, the Department of Home Affairs led the development of the national HRTO RIF. The RIF sets out the implementation arrangements for the national HRTO regime and was developed in consultation with Commonwealth, state and territory agencies.

72. On 26 November 2021, the ANZCTC endorsed the RIF, with the requirement that a review be undertaken within 12 months following endorsement. The purpose of the review, which commenced in 2022–23, is to ensure the RIF accurately represents national HRTO regime collaboration. The review does not intend to change the intended purpose and principles of the RIF.

Federation Funding Agreements (FFA)

73. The Commonwealth relies on the states and territories to support the management of offenders under the national HRTO regime. As part of this arrangement, the Commonwealth provides funding to the states and territories to deliver this support. Outputs, payments and reporting requirements are set out in FFAs agreed between the Commonwealth and jurisdictions.

74. The jurisdictions of New South Wales and Victoria have a current HRTO caseload. The Commonwealth has been working with New South Wales and Victoria to finalise their 2022–23 FFAs, which are expected to be agreed in 2023. As other jurisdictions are expected to have a HRTO caseload in future years, FFAs require a nationally consistent approach.

75. To date, FFAs have been entered into on an annual basis. Subject to future funding arrangements, the Commonwealth will work with jurisdictions to consider multi-year funding arrangements. Consultation on future FFAs is underway.

Capability Mapping

76. On 26 November 2021, the ANZCTC noted the Commonwealth's commitment to work closely with jurisdictions to support the implementation of the HRTO RIF. This included a commitment to undertake capability mapping and support capability development based on jurisdictional needs.

77. Capability mapping aims to identify existing capabilities and gaps within jurisdictions with an anticipated HRTO caseload to ensure HRTO schemes can be implemented in their jurisdiction, as required.

78. Capability mapping will aim to provide an important evidence base to inform future budget considerations including requests for further financial support to manage the HRTO cohort nationally. It will also aim to identify current capabilities that could be leveraged to support HRTO regime implementation across jurisdictions and identify service gaps that could impact the implementation of the HRTO regime.

Governance arrangements

79. The implementation of the HRTO regime is underpinned by strong governance arrangements which are designed to facilitate effective and timely cooperation between relevant agencies across policy, program, information sharing and operational activities. The governance arrangements include the Terrorist Offender Review Committees (TORC) and Rehabilitation, Compliance & Enforcement Groups (RCEG).

80. Broadly, a TORC is a senior-level forum responsible for strategic oversight of HRTO-eligible offenders and a RCEG is responsible for the operational oversight, management and decision-making regarding HRTO-eligible offenders within the relevant jurisdictions.

Terrorist Offender Review Committee

81. The Terrorist Offender Review Committee (TORC) ensures effective strategic oversight of the HRTO regime at a senior level. Membership is comprised of senior executive officials from the relevant Commonwealth, state and territory agencies. TORCs are co-chaired by the Attorney-General's Department and the AFP. TORC recommendations assist in informing ministerial decision-making about individual HRTO-eligible offenders and the operation of the HRTO regime. TORCs are established on a jurisdictional basis unless broader establishment is considered necessary (e.g. review of national trends or where a HRTO offender raises cross-jurisdictional issues).

Rehabilitation, Compliance and Enforcement Group

82. Rehabilitation, Compliance and Enforcement Groups are responsible for the operational oversight and management of HRTO-eligible offenders within the relevant jurisdiction. The RCEG complements ongoing information exchange practices that are established at the operational level between the partners who are engaging directly with the offender

83. As with the TORC, RCEG is co-chaired by the Attorney-General's Department and the AFP, and its membership comprises officials from the relevant Commonwealth, state and territory agencies. The RCEG membership allows 'holistic' consideration of an offender in the pre-release and post-release context – including law enforcement and rehabilitation responses – to inform risk-based decisions on appropriate risk mitigation pathways. Law enforcement responses refers to the exercise of police functions and support to ESO conditions such as those that restrict a person from certain activities. Rehabilitative responses refer to case management, housing, health services, social programs and other therapeutic activities.

Rehabilitation

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

85. ESO conditions that impose obligations on the offender in respect of treatment, rehabilitation, and intervention programs (i.e. therapeutic case management conditions) will be operationalised as agreed to by states and territories in the HRTO RIF.

86. For additional information on the operation and availability of ESO conditions, please refer to the AFP's separate submission to this review. Please also refer to paragraphs [44]-[57] in Attachment C for additional information on this matter, including the procedure for determining conditions for a potential ESO and steps by the Commonwealth to ensure a nationally consistent approach to implementation of the ESO scheme.

Commonwealth support for countering-violent extremism

87. The Department of Home Affairs administers the CVE High Risk Rehabilitation and Reintegration (HRRR) Program to support the rehabilitation and reintegration of high risk violent extremists.

88. The HRRR Program will enable jurisdictions to decide those aspects of their respective CVE high risk capability that require development or strengthening, while working towards a nationally consistent approach – taking into account the specific caseloads, environments, risk settings, priorities and internal CVE policies that might impact their approach.

89. Once implemented, the HRRR Program will support interventions for high risk violent extremists across a range of settings including:

- convicted terrorist offenders who do not meet the requirements for the HRTO regime
- offenders in prison or subject to community-based orders identified as violent extremists
- offenders remanded for terrorism offences
- high risk violent extremists in the community
- foreign terrorist fighters returning from overseas, and
- family members of foreign fighters, where appropriate.

90. Similar to other CVE intervention programs, participation in the HRRR Program will be voluntary; however mandatory participation in the HRRR Program may be sought where there are appropriate legal mechanisms in place.

Consistency across jurisdictions

91. The Attorney-General's Department, the Department of Home Affairs, and the AFP are committed to ensuring that HRTO arrangements create consistent, overarching risk management principles and practices for offenders regardless of different state and territory administrative processes. A HRTO Memorandum of Understanding 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.

92. The consultations and arrangements for the management of an individual offender in a particular state while subject to a CDO or an 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.

93. The INSLM made a recommendation regarding this matter in his report – specifically, that within the next 3 years the Attorney-General's Department publish a report regarding the creation and proposed functions of an independent statutory authority that provides oversight of compliance with ESO conditions and services provided to assist them with their compliance (see recommendation 13 in Attachment B). As the Attorney-General's Department noted in its supplementary submission to the INSLM's review of Division 105A (see paragraphs [95]-[98] in Attachment C), if an independent statutory authority were to be adopted (similar to the Victorian Post-Sentence Authority) at the Commonwealth level, there would need to be a clear delineation of responsibilities between this authority and other Commonwealth agencies in order to avoid legislative and operational issues.

Post-sentence order proceedings

Benbrika proceedings (CDO)

94. Mr Benbrika was convicted of serious terrorism offences in September 2008 and sentenced in the Supreme Court of Victoria to 15 years' imprisonment on 3 February 2009, with a non-parole period of 12 years. On 24 December 2020, the Supreme Court of Victoria made a CDO in relation to Mr Benbrika for a period of 3 years. This was the first application made for a CDO since the HRTO regime came into force in 2017.

95. On 21 January 2021, Mr Benbrika commenced an appeal in the Victorian Court of Appeal against the decision of the Supreme Court to make a CDO, but this was unanimously dismissed by the Court on 19 November 2021. On 12 May 2022, following the required periodic review under section 105A.10 of the Criminal Code, the Supreme Court of Victoria made formal orders affirming Mr Benbrika's CDO without variation.

96. On 13 December 2022, Mr Benbrika's legal representatives filed for an application for review of his current CDO in the Supreme Court of Victoria on the basis that new material had been made available to Mr Benbrika (the Corner Report). On 27 February 2023, the Attorney-General made an application to the Court for an ESO in respect of Mr Benbrika. A substantive review hearing concluded on 20 June 2023 and Mr Benbrika's CDO will remain in force pending the outcome of the proceedings.

Pender proceedings (CDO and ESO)

97. On 9 November 2021, the Supreme Court of NSW made a CDO in relation to Mr Blake Pender for the period of one year commencing on 13 September 2021. This CDO was the first to be made in the state of NSW. The AFP Minister applied for a CDO for a period of 3 years, and was successful in obtaining an order for one year. On 28 January 2022, Mr Pender applied for a review of the

CDO and sought orders that the CDO be revoked, that an ESO be made, and in the alternative, that the CDO be varied to six months from 13 September 2021. On 19 April 2022, Mr Pender was charged with one count of affray contrary to subsection 93C(1) of the *Crimes Act 1900* (NSW), following an incident in custody. As a consequence, on 9 June 2022, the NSW Supreme Court discontinued Mr Pender's application for review of the CDO, following an application made by Mr Pender's legal representatives.

98. On 9 September 2022, the Attorney-General filed an ISO and an ESO application in the Supreme Court of NSW ahead of the expiry of Mr Pender's CDO on 13 September 2022. On 28 September 2022 Mr Pender pleaded guilty to assault occasioning actual bodily harm in company pursuant to subsection 59(2) of the *Crimes Act 1900* (NSW). The affray charge was withdrawn. On 7 October 2022 the Court made an ISO in respect of Mr Pender. Mr Pender was sentenced on 10 October 2022 and received a fix term of 6 months' imprisonment to date from 19 April 2022 to 18 October 2022. On 18 October 2022 Mr Pender was released from custody subject to the ISO.

99. On 7 November 2022, approximately three weeks after he was released from custody on an ISO, the AFP arrested Mr Pender and charged him with four counts of contravening conditions of his ISO contrary to subsection 104A.18A(1) of the Criminal Code. On 21 December 2022, the Supreme Court of NSW, pursuant to subsection 105A.7A(1), ordered that Mr Pender be subject to an ESO for a period of 3 years, expiring on 20 December 2025. Mr Pender is currently in custody on remand due to the ongoing criminal proceedings in relation to these alleged contraventions.

Sa'adat Khan proceedings (ESO)

100. On 10 June 2022, Ms Hadashah Sa'adat Khan was sentenced to a term of imprisonment for serious terrorism offences in the Supreme Court of Victoria. On 26 August 2022, Ms Sa'adat Khan was released from custody on an ISO. The Supreme Court of Victoria subsequently made two ISOs in respect of Ms Sa'adat Khan on 23 September 2022 and 17 October 2022. On 8 November 2022, the Supreme Court of Victoria imposed an ESO on Ms Sa'adat Khan for a period of 18 months.