



THE UNIVERSITY OF
SYDNEY

Andrew Dyer
Senior Lecturer, University of Sydney Law School
Director, Sydney Institute of Criminology

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Dear Ms Spencer

**Submission to the Parliamentary Joint Committee on Intelligence and Security's
Review of Post-sentence Terrorism Orders: Division 105A of the *Criminal Code Act
1995***

I am an academic employed by the University of Sydney Law School and, in 2021-2, I co-authored, on behalf of the Sydney Institute of Criminology and the NSW Council for Civil Liberties, two submissions to the Independent National Security Legislation Monitor ('INSLM') concerning Division 105A of the *Criminal Code Act 1995* (Cth) ('the Criminal Code'). I also gave oral evidence before the INSLM on 22 June 2022; and I was the lead author of an article, published at (2022) 33(1) *Public Law Review* 61-82, in which my co-author and I advocated: (a) the abolition of terrorist continuing detention orders ('CDOs'); or, alternatively, (b) the enactment of various reforms to the Division 105A CDO scheme, to make that scheme more compatible with the *International Covenant on Civil and Political Rights* ('ICCPR'). I have annexed to this submission the article (**Appendix A**) and the two written submissions just noted (**Appendices B and C**), as well as a transcript of my oral evidence to the INSLM (**Appendix D**); and I shall make reference to each of these documents at various points below. I shall also refer extensively to the INSLM's *Report into the Operation, Effectiveness and Implications of Division 105A of the Criminal Code Act 1995 (Cth) and Any Other Provisions of the Code As Far As It Relates to that Division*, which was tabled in Parliament by the Commonwealth Attorney-General on 30 March 2023. As will become clear, I maintain the position that my co-author and I advocated in the *Public Law Review* piece noted above; and I largely support the recommendations of the INSLM. With respect, his Report is an incisive and thoughtful one; and the Commonwealth government should adopt many of the proposals contained in it.

More specifically, the Commonwealth government should:

- abolish CDOs or, if it is unwilling to do this: (a) ensure that Division 105A detention is *truly* non-punitive¹; and (b) amend the Code in such a way as to make a CDO possible only where the State has proved on the basis of admissible evidence that, in the absence of such detention, it is more probable than not (i.e. there is a greater than 50% chance) that the offender will be responsible, either as a perpetrator or a secondary or passive participant, for a 'terrorist act'²;

¹ Cf *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97-103 [36]-[47] '*Benbrika*').

² See *Criminal Code Act 1995* (Cth) s 101.1(1) – and see also s 100.1(1) (definition of 'terrorist act').

University of Sydney Law School
Rm 520, Building F10
University of Sydney
NSW 2006 Australia

T +61 2 8627 8507
F +61 2 9351 0200
E andrew.dyer@sydney.edu.au

ABN 15 211 513 464
CRICOS 00026A



- amend s 105A.1 of the Code, so as to provide that an express object of the Division is the rehabilitation and reintegration into the community of those subject to extended supervision orders ('ESOs') – and, if they remain, CDOs;
- abolish control orders³;
- retain ESOs, but delete s 105A.7(2) of the *Criminal Code* and amend s 105A.7(1) in such a way as to ensure that an ESO can be imposed on an individual only if the State proves beyond reasonable doubt that: (a) he or she poses an unacceptable risk of being responsible, either as a perpetrator or as a secondary or passive participant, for a 'terrorist act'; and (b) each of the conditions and the combined effect of all the conditions imposed on the offender by the ESO 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;
- ensure, as far as is possible, that there is no repetition of the government's failure to disclose to defendants in Division 105A applications a report such as that prepared by Dr Emily Corner – which, as the INSLM has explained,⁴ casts doubt on the efficacy of the VERA-2R risk assessment tool for terrorist offenders. More specifically, the government should amend Division 105A essentially in the manner proposed at pp. 115-6 [390] of the INSLM's Report;
- amend the definition of 'relevant expert' in s 105A.2 of the *Criminal Code* in the manner recommended by the INSLM at p. 121 [407]-[408] of his Report; and amend Division 105A in such a way as to make it clear that reports or evidence of 'relevant experts' may be admitted into evidence in Division 105A proceedings only if they are rendered admissible by the laws of evidence⁵;
- amend s 105A.6B(1) of the *Criminal Code* to provide that, when deciding whether to impose an ESO on an individual, the Court must have regard to the objects of Division 105A and *may* have regard to the other matters referred to in s 105A.6B(1);
- substitute the word 'may' for the word 'must' wherever it appears in s 105A.7E(1)-(2) of the *Criminal Code*;

³ See *Criminal Code Act 1995* (Cth) Division 104. While the INSLM refrained from making any recommendation about control orders, he referred without disapproval to previous INSLMs' recommendations that the government should repeal the Division 104 control order scheme: Independent National Security Legislation Monitor, 'Review into Division 105A (and related provisions) of the *Criminal Code Act 1995* (Cth) (3 March 2023) 108 [354] and 108 [357]. Moreover, at a public hearing on 22 June 2022, he stated that it was 'difficult for [him] ... to see why both [ESOs and control orders] are required' and that the Australian Human Rights Commission was 'walking through an open door' in submitting to him that the control order scheme should be repealed: Transcript of Proceedings, Independent National Security Legislation Monitor: Review into Division 105A of the *Criminal Code Act 1995* (Cth), Public Hearing, Day 1, 22 June 2022, 10.

⁴ Independent National Security Legislation Monitor, n 3, 83-5 [279]-[282].

⁵ See *ibid* 121 [409]-[410].



- comply with the INSLM’s recommendation to publish a Report that responds to his provisional recommendation to set up an ESO Authority – which, if it were created, would perform the functions noted by the INSLM at pp. 132-3 [461] of his Report;
- repeal s 105A.15A of the *Criminal Code* and regulation 9 of the *Criminal Code Regulations 2019* (Cth) and replace them with provisions of the sort contemplated by the INSLM at pp. 138-9 [475] of his Report: i.e. provisions that, among other things, require the Commonwealth to bear the reasonable costs and expenses of the offender’s legal representation at the Division 105A proceedings;
- (in the event that the government does not abolish CDOs) insert a provision into Division 105A that allows an interim detention order (‘IDO’) to be made only in ‘exceptional circumstances’;⁶ and
- insert a provision into Division 105A that allows an interim supervision order (‘ISO’) to be made only in ‘exceptional circumstances’.

I shall now deal briefly with each of these matters.

Abolish CDOs or, alternatively, render the CDO scheme more human rights-compliant

In the article that comprises **Appendix A** to this submission, my co-author and I argued that CDOs should be abolished.⁷ I adhere to the reasoning that we deployed in support of that conclusion. In other words, while I accept that there would be a place for a – truly non-punitive – CDO scheme if there were terrorist offenders whom the state could prove would probably cause, or facilitate the commission of, grave harms, even if they were subject to an ESO, it seems that at the moment the State could never supply such proof. That is for two reasons. First, as the INSLM has shown, the tool that is used to assess whether a terrorist offender poses an unacceptable risk of ‘serious Part 5.3’ offending, the VERA-2R tool, is not a validated tool and has not been established to have ‘predictive validity’⁸ (in fact, it might well lack any such validity). Secondly, even if it were possible to predict reliably that certain terrorist offenders posed a high risk of being responsible for a grave harm if released unconditionally into the community, it is hard to believe that such offenders would pose such a risk once an ESO was imposed on them. The, non-exhaustive, list of possible ESO conditions is extremely lengthy.⁹ Many of the possible conditions, if imposed, would significantly curtail the liberty of those upon whom they were imposed. Perhaps certain persons so circumstanced might still pose some risk of

⁶ See Transcript of Proceedings, Independent National Security Legislation Monitor: Review into Division 105A of the *Criminal Code Act 1995* (Cth), Public Hearing, Day 1, 22 June 2022, 38-40.

⁷ 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(1) *Public Law Review* 61, 73-5.

⁸ Independent National Security Legislation Monitor, n 3, 87 [287]. See also 70-1 [245], 78-9 [263]-[264], 83-87 [279]-[287].

⁹ See *Criminal Code Act 1995* (Cth) s 105A.7B(3).



being responsible for a 'terrorist act'. But that risk would seemingly always be so limited as to make it improper for the State to detain that person on the basis of it.

If the government is not minded to abolish CDOs, however – and it should be noted that, if it were to retain the CDO scheme, it would place itself at odds with the carefully reasoned recommendations of the INSLM¹⁰ – it should at least ensure that Division 105A detention operates as consistently as possible with Australia's (voluntarily assumed) human rights obligations. It would do this by taking two steps.

First, the government should ensure that, as the UN Human Rights Committee has put it, the conditions in such detention are 'distinct from the conditions for convicted offenders serving a punitive sentence' – and that the detention is 'aimed at the detainee's rehabilitation and reintegration into society'.¹¹ This is not so at the moment. Section 105A.4(1) of the *Criminal Code Act* does provide that a 'terrorist offender who is detained in custody in a prison under a continuing detention order must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment'. And s 105A.4(2) does state that such an offender 'must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment.' But these requirements are subject to broad exceptions;¹² and, as the INSLM has pointed out, the Minister's decision that particular custodial conditions *are* appropriate to a detainee's status as a non-prisoner, seems 'in effect' to be unreviewable.¹³ Accordingly, while it might have been accurate for him to have said that s 105A.4 'reflects'¹⁴ Australia's ICCPR obligations, it does not *comply* with those obligations. Compliance would be possible only if the section required detention to occur in a place other than a prison;¹⁵ and only if 'special provision'¹⁶ were made in Division 105A for the treatment and rehabilitation of detainees. My co-author and I argued as much at pp. 75-8 in the article that appears in **Appendix A**; and I stand by that reasoning.

Secondly, as my co-author and I also essentially argued – see pp. 78-82 of the article that appears in **Appendix A** – the government should alter s 105A.7(1) of the *Criminal Code*, to make it clear that a CDO can only be made if the State is able to prove, on the basis of

¹⁰ Independent National Security Legislation Monitor, n 3, chapter 8.

¹¹ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/c/GC/35 (16 December 2014) [21].

¹² See *Criminal Code Act 1995* (Cth) s 105A.4(1)-(2). The INSLM has rightly criticised this state of affairs: Independent National Security Legislation Monitor, n 3, 148 [508]-[509].

¹³ Independent National Security Legislation Monitor, n 3, 148 [507]. See also 147 [506]-[507].

¹⁴ *Ibid* 145 [498].

¹⁵ Human Rights Committee, *Views: Communication No 1629/2007*, (8th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 8 [7.4] ('*Fardon v Australia*').

¹⁶ *Benbrika* (2021) 272 CLR 68, 99 [39].



admissible evidence, that, without the order, it is *more probable than not* that the offender will be responsible, either as a perpetrator or as a secondary or passive participant, *for a 'terrorist act'*. In other words, contrary to the current position, a person should not be able to be detained on the basis of an 'unacceptable risk'¹⁷ of 'prophylactic'¹⁸ offending. Rather, detention should be possible only if the State is able to prove that, without it, actual harm will probably result. This view is further substantiated at pp. 78-82 of the **Appendix A** article; and I stand by the reasoning there. I do understand why some hold the view that a person should be capable of being placed in detention if the State if it can prove that, without such detention, that person poses a real risk of being responsible for a 'terrorist act'.¹⁹ Accordingly, I submit that, if CDOs are retained, and if the government is unwilling to create a CDO test of the kind just proposed, it should at least provide in s 105A.7(1) that a CDO can only be made if the State can prove beyond reasonable doubt, on the basis of admissible evidence, that, without the order, there is an *unacceptable risk* that the offender will be responsible, either as a perpetrator or as a secondary or passive participant, for a 'terrorist act'. Consistently with what I have argued above, however, when account is taken of (a) the questionable efficacy of the VERA-2R tool and (b) the large array of conditions that can be imposed on an offender pursuant to an ESO, it is difficult to believe that the State could ever satisfy even this lesser standard.

The objects of Division 105A

In his Report, the INSLM noted that the 'objects of Div 105A are limited.'²⁰ He was right. Indeed, there is just one object of the Division, namely, '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) a continuing detention order; or (b) an extended supervision order.'²¹ The INSLM was critical of this. He noted that 'international human rights norms to which Australia adheres'²² requires preventive detention to have a rehabilitative and reintegrative orientation. He also noted that 'logic,

¹⁷ *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹⁸ *Benbrika* (2021) 272 CLR 68, 105 [56], 119 [95] (Gageler J).

¹⁹ I sympathise much less with the view that a person should be able to be detained because he or she poses a risk, however high, of engaging in *preparatory* offending. Cf *Independent National Security Legislation Monitor*, n 3, 141 [487]. In other words, it is hard to see how it could ever be morally justifiable to place a person in state detention to prevent him or her from performing conduct that is not at all harmful, but has instead been criminalised because it might lead to harm. No doubt, Australians are risk-averse (see *Independent National Security Legislation Monitor*, n 3, 7 [1], 94 [311], 100 [326]); but, even by Australian standards, it seems over-cautious to detain a person to prevent him or her from committing an offence that itself exists purely for preventive reasons.

²⁰ *Independent National Security Legislation Monitor*, n 3, 66 [230].

²¹ *Criminal Code Act 1995* (Cth) s 105A.1.

²² *Independent National Security Legislation Monitor*, n 3, 66 [232].



common sense and decency ... require that an object of post-sentence orders be or include defendants' rehabilitation and reintegration into society.²³ Again, he was right. It is probably common enough for people to think that terrorist offenders are 'animal[s]' who cannot be reasoned with or rehabilitated, and who may therefore be treated as 'mere object[s] of the executive's power'.²⁴ But, as the INSLM's Report powerfully demonstrates, such views are unduly cynical and pessimistic. After discussing recent research that bears on this question, the INSLM concluded that 'rates of recidivism of violent offenders are astonishingly low'.²⁵ Given that this is so, there is every reason why s 105A.1 should be amended to provide that the Division's objects are *both* to protect the community from 'terrorist acts by providing that terrorist offenders who pose an unacceptable risk of being responsible for such acts are subject to an extended supervision order'²⁶ *and* to rehabilitate and reintegrate into the community those subject to an ESO.²⁷ Apart from anything else, such objects are complementary. For, as has often been pointed out, the rehabilitation of those who have previously been responsible for criminal wrongdoing is one obvious way of protecting the community.²⁸

Abolition of control orders

In its written submission to the INSLM's Review, the Australian Human Rights Commission stated that, '[n]ow that an ESO regime has been introduced, Div 104 of the Criminal Code, dealing with control orders, should be repealed'.²⁹ I agree. If a person is imprisoned for a qualifying terrorist offence and, near the end of his or her sentence, the State can prove that he or she poses a sufficiently high risk of being responsible for a 'terrorist act' unless he or she is placed under supervision, then it seems acceptable to place that person under supervision pursuant to an ESO. And the same applies if such a person continues to pose such a risk upon the expiry of an ESO that he or she has

²³ Ibid 66 [233].

²⁴ *Öcalan v Turkey (No 2)* (European Court of Human Rights, Second Section, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014) [8] (Judge Pinto du Albuquerque).

²⁵ Independent National Security Legislation Monitor, n 3, 97 [317].

²⁶ Note that the language here differs from that which currently appears in s 105A.1. Such new language would be necessary if the government were to abolish CDOs and effect the other changes to Division 105A that I advocate in this submission.

²⁷ As the INSLM indicates (Independent National Security Legislation Monitor, n 3, 66 [230]), the objects clause is a matter of no little practical importance, because, when making a Division 105A post-sentence order, the Court must have regard to the objects of the Division. *Criminal Code Act 1995* (Cth) s 105A.6B(1)(a).

²⁸ See Transcript of Proceedings, Independent National Security Legislation Monitor: Review into Division 105A of the *Criminal Code Act 1995* (Cth), Public Hearing, Day 1, 22 June 2022, 44-5.

²⁹ Australian Human Rights Commission, 'Submission to the Independent National Security Legislation's Review into Division 105A of the Criminal Code (post-sentence orders)' (4 February 2022) 74 [263].



served.³⁰ But, as the law now stands, a court may impose a control order on certain persons who are neither currently imprisoned for terrorist offending nor living under an ESO.³¹ It is submitted that this is unnecessary and undesirable. No doubt, there are people in the community who pose a risk of terrorist offending. But in a case where the state could prove on the balance of probabilities: (a) one of the matters in s 104.4(1)(c) of the *Criminal Code*; and (b) that certain control order conditions were ‘reasonably necessary, and reasonably appropriate and adapted’ for one of the purposes listed in s 104.4(1)(d) of the *Criminal Code*,³² it would normally also be able to prove the elements of one of the many preparatory Part 5.3 offences beyond reasonable doubt. And, where it could not, it would seem unnecessary to place any restrictions on that individual’s liberty. When account is taken of the ‘rigorous policing’ of suspected terrorists, and the state’s ‘extensive investigative and surveillance powers’,³³ it would seem that the state could instead safely wait until it did have sufficient evidence of such a person’s Part 5.3 offending before seeking a coercive order against him or her (i.e. by prosecuting him or her for such offending). In other words, the extensive range of preparatory offences in Part 5.3 of the *Criminal Code* seem more than adequate to deal with non-detainees who pose a risk of terrorist offending.

Retain ESOs, but make certain amendments to ss 105A.7 and 105A.7A of the Criminal Code

In his Report, the INSLM did not recommend the repeal of Division 105A³⁴ and concluded that ‘ESO’s should remain’.³⁵ However, he recommended that certain amendments be made to ss 105A.7 and 105A.7A of the *Criminal Code*. The effect of these amendments would be that an ESO would be able to be made upon the court’s being 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 that ‘each of the conditions ... and ... 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.’³⁶

I agree with the INSLM’s recommendation that ESOs be retained, as well as with his proposal that the State should be required to show that there is a mere ‘unacceptable risk’

³⁰ See *Criminal Code Act 1995* (Cth) s 105A.3A(6).

³¹ Note the terms of *Criminal Code Act 1995* (Cth) s 104.4.

³² In other words, where it could satisfy a court that a control order must be imposed on an individual.

³³ Independent National Security Legislation Monitor, n 3, 108 [354].

³⁴ *Ibid* 105 [344].

³⁵ *Ibid* 109 [359].

³⁶ *Ibid* 128 [444].



of relevant terrorist offending should the order not be made. That said, I agree with these proposals only somewhat reluctantly. *Regarding the retention of ESOs*: the large number of preparatory offences in Part 5.3 does make one wonder whether those offences alone are not sufficient to protect the community from terrorist offenders who remain dangerous following the completion of their respective sentences. *Regarding the unacceptable risk standard*: this is a lower threshold for the state to meet than the one that I have proposed above for CDOs (if they remain). However, if s 105A.7 is amended to provide that all ESO conditions must be proportionate to the purpose, not just of protecting the community, but also of reintegrating the offender back into that community, ESOs will at least be aimed at rehabilitating those upon whom they are imposed. And an 'unacceptable risk' threshold seems less objectionable for ESOs than it is for CDOs, given that, when it comes to ESOs, nothing quite so severe as involuntary detention is at issue.

Nevertheless, I respectfully disagree with two of the INSLM's recommendations regarding s 105A.7. In my submission, it should not be enough for the state to prove *on the balance of probabilities*: that the offender poses an unacceptable risk of *committing a serious Part 5.3 offence*; and that each of the conditions and the combined effect of all of the conditions imposed on the offender by the ESO 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 into the community. Rather, an ESO should only be possible if the state is able to prove *beyond reasonable doubt*: that the offender poses an unacceptable risk of *being responsible, either as a perpetrator or as a secondary or passive participant, for a 'terrorist act'*; and that each of the conditions and the combined effect of all of the conditions imposed on the offender by the ESO 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 into the community. This recommendation is consistent with that which my co-author and I proposed in our Updated Submission to the INSLM, dated 23 June 2022, which can be found in **Appendix B** to this submission (see p. 4).³⁷

The INSLM's proposed risk threshold – proof on the balance of probabilities that the offender poses an unacceptable risk – accords with the risk threshold that is currently provided for by s 105A.7A(1)(b) of the *Criminal Code*. But it is submitted that that risk threshold is complex and confusing. Instead of requiring the court to deal with two risk questions – i.e. is it (a) more probable than not (b) that an unacceptable risk exists? – the *Criminal Code* should require it to deal merely with one. That is, the court should simply have to ask itself whether it is sure – i.e. whether it has been proved beyond reasonable doubt – that the offender poses an unacceptable risk of relevant offending. An added advantage of adopting that approach is that it would be more protective of individual

³⁷ See also my evidence to the INSLM in **Appendix D**: Transcript of Proceedings, Independent National Security Legislation Monitor: Review into Division 105A of the *Criminal Code Act 1995* (Cth), Public Hearing, Day 1, 22 June 2022. 45-50.



liberty than the current arrangement is, *without having any capacity to compromise the safety of the community*. The person who could be proved to pose a mere ‘unacceptable risk’ of relevant terrorist offending would still be able to be placed under supervision. And if such a person, or any other person with a record of terrorist offending, were to commit one of the many preparatory offences in Part 5.3 of the *Criminal Code*, he or she could be prosecuted. Preventive responses of this kind seem more than sufficient to ensure, as far as possible, that no actual terrorist violence occurs.

The INSLM stated that a ‘most difficult matter’ was ‘whether the task for the court in s 105A.7(1) should continue to be determining unacceptable risk of a defendant *committing a serious Pt 5.3 offence*, or whether this ‘object of risk’ should be narrowed.’³⁸ He concluded that he ‘should not recommend any change to this formulation of committing a serious Pt 5.3 offence in s 105A.7A(1).’³⁹ I respectfully disagree with the INSLM about this matter. For while, according to him, ‘[t]here is no compelling logical reason why the ‘object of risk’ should be the same for CDOs and ESOs’,⁴⁰ in the case of both CDOs and ESOs restrictions are placed on a person for preventive reasons. To prevent a person from committing a preparatory offence is to prevent him or her from performing conduct that is harmless in itself and which has been criminalised purely because of the risk that, if it is *not* criminalised, the actor or a third party will go on to cause actual harm. It is submitted that this is unnecessary. The preparatory offence protects the community sufficiently against such actual harm. That said, the position is different where a person can be proved to pose an unacceptable risk of being responsible for a ‘terrorist act’ unless an ESO is imposed on him or her. In this latter case, because the feared crime is not a prophylactic offence, but instead involves real harm to person or property, there is a far stronger case for a preventive order such as an ESO.

To be completely clear, then, I submit that the government should amend the *Criminal Code* to provide that an ESO can be made only if:

the court is satisfied beyond reasonable doubt, on the basis of admissible evidence, that (a) the offender poses an unacceptable risk of being responsible, either as a perpetrator or as a secondary or passive participant, for a terrorist act; and (b) 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 that unacceptable risk and to aid the defendant’s rehabilitation and reintegration into the community.⁴¹

³⁸ Independent National Security Legislation Monitor, n 3, 126 [434].

³⁹ Ibid 126 [435].

⁴⁰ Ibid.

⁴¹ Cf Ibid 128 [444]. Note that there seems to be every reason to have a ‘beyond reasonable doubt’ threshold for the (b) question as well as the (a) one. Only if the court is sure that restrictive conditions are proportionate to the aims of protecting the community and of aiding the offender’s rehabilitation, should it limit his or her freedom in the applicable way.



Disclosure of material to defendants

In his Report, the INSLM noted that, in May 2020, Dr Emily Corner delivered to the Department of Home Affairs a report about, among other things, the reliability of terrorism risk assessment tools.⁴² He stated that, while Dr Corner's report cast grave doubt on the efficacy of the VERA-2R risk assessment tool for terrorist offenders,⁴³ the government had not seen fit to disclose it to any defendant in a Division 105A proceeding.⁴⁴ He thought that this was a matter of 'very great concern'⁴⁵, and 'deeply troubl[ing]'.⁴⁶ Indeed, the INSLM went so far as to say that it was 'shocking that orders have been made, and are being sought, with parties being unaware that Dr Corner's report exists'.⁴⁷

The INSLM was clearly right to express such concerns.

As the INSLM showed, people have been detained in prison following proceedings where psychologists have given evidence that was based on their use of the VERA-2R tool.⁴⁸ As he indicated, it is not at all obvious that such detention would have been ordered had the applicable courts been provided with Dr Corner's report.⁴⁹ 'The freedom of individuals in our society should not be decided by lazy plausibility'.⁵⁰ Rather, the grave consequence of preventive detention in state custody should be imposed only after the state has provided *rigorous* proof of a person's dangerousness. Accordingly, the INSLM was essentially right to recommend that Division 105A.5 of the *Criminal Code* be amended in the manner noted at 115-116 [390] of his Report. I say 'essentially' only because of the appearance of the word 'ought' at two places on p. 116. While there might be reasons for the obligations there proposed to be directory rather than mandatory, I find it difficult to see why the Minister should not be *required*: (a) to file with his or her application for a post-sentence order 'an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under [proposed new] s 105A.5(2A)'; and (b) 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 [proposed new] s 105A.5(2A)'.⁵¹

⁴² Ibid 81 [270].

⁴³ Ibid 83-5 [279]-[282].

⁴⁴ Ibid 81 [271].

⁴⁵ Ibid 88 [289].

⁴⁶ Ibid 113 [380].

⁴⁷ Ibid 88 [290].

⁴⁸ See especially ibid 69-71 [241]-[245].

⁴⁹ See especially ibid 89 [294].

⁵⁰ Ibid 79 [263].

⁵¹ Ibid 116 [390].



'Relevant experts' and their evidence

Section 105A.2 of the *Criminal Code* provides an excessively lengthy⁵² and 'inapt'⁵³ definition of the term 'relevant expert.' The INSLM proposed that that definition be replaced 'and be in a form that reflects the following':⁵⁴

'relevant expert' means persons with expertise in and who are qualified to express opinions as to the risk, and the means of ameliorating the risk, of a defendant committing terrorist acts.

I support a definition of this type, which is far more pithy than the current definition and focusses more directly than the current definition does on the ability of the witness to express an expert opinion about risk. Likewise, the INSLM seems clearly right to have expressed the concern he did about 'the notion that some of what has been presented to courts in Div 105A applications as relevant expert opinions would not be admissible as opinion evidence if laws providing for the admissibility of opinion evidence applied.'⁵⁵ Like him, 'I can conceive of no justification for requiring a court to have regard to ... opinions ... [that] are not admissible'.⁵⁶ Accordingly, Division 105A should be amended in the manner proposed at 121 [409]-[410] of the INSLM's Report.

Amend s 105A.6B of the Criminal Code

Section 105A.6B of the *Criminal Code* provides that, when deciding whether the State has proved that an offender poses 'an unacceptable risk of committing a serious Part 5.3 offence',⁵⁷ the Court *must* have regard to the object of Division 105A⁵⁸ and a number of other specified matters.⁵⁹ On the assumption that the objects clause in Division 105A is reformed in the manner in which the INSLM proposed it should be,⁶⁰ the INSLM recommended that the Court continue to be required to have regard to the objects of the Division when dealing with the 'unacceptable risk' question.⁶¹ I agree. And I agree also with the INSLM's recommendation⁶² that s 105A.6B should be reformed to provide that the Court *may* have regard to the matters to which s 105A.6B(1)(b)-(i) currently make

⁵² See *ibid* 117 [394].

⁵³ *Ibid* 117 [393].

⁵⁴ *Ibid* 121 [408].

⁵⁵ *Ibid* 117 [395].

⁵⁶ *Ibid*.

⁵⁷ *Criminal Code Act 1995* (Cth) ss 105A.7(1)(b) and 105A.7A(1)(b).

⁵⁸ *Criminal Code Act 1995* (Cth) s 105A.6B(1)(a).

⁵⁹ *Criminal Code Act 1995* (Cth) s 105A.6B(1)(b)-(i).

⁶⁰ As to which, see above text accompanying nn 20-28.

⁶¹ Independent National Security Legislation Monitor, n 3, 121 [413].

⁶² *Ibid* 124 [425].



reference.⁶³ Take, for example, the matters referred to by s 105A.6B(1)(g) and (h). The INSLM regards it as ‘uncontroversial’⁶⁴ that these factors – prior convictions for terrorist offending and the sentencing judge’s remarks when sentencing the offender for terrorist offending – might sometimes assist the Court to assess whether the offender continues to pose an ‘unacceptable risk’ of crimes of this sort. But it appears that, in many cases, the offender’s actions years before, and what a judge said years before about those actions, would have no real capacity to inform the Court about the risk posed by that offender *now*. It follows that the Court should not be *required* to take such material into account. Rather, it should be *permitted* to do so – and it *should* do so only in a case where that material helped it to decide the ‘unacceptable risk’ question.

Amend s 105A.7E of the Criminal Code

Section 105A.7E(1) of the *Criminal Code* provides that, if a Court makes an ESO or an interim supervision order (‘ISO’) containing a condition that a terrorist offender wear a monitoring device, then: ‘the condition must require the offender to wear the monitoring device at all times’;⁶⁵ the order must contain certain other conditions;⁶⁶ and the Court must authorise ‘one or more specified authorities’ to perform certain actions.⁶⁷ ‘In my opinion,’ the INSLM said in his Report, ‘there is no sensible reason for a 105A.7E. If the matters set out in that section are reasonably necessary and reasonably appropriate and adapted to the relevant purpose, a court will be persuaded to make them.’⁶⁸ He accordingly recommended that s 105A.7E be repealed.⁶⁹

Like the INSLM, I cannot see why, in all cases where a Court requires a person subject to an ESO or ISO to wear a monitoring device, that Court should be *obliged* to impose the conditions of which s 105A.7E(1)(b)-(c) speaks, or include in the order the authorisations to which s 105A.7E(2) refers. But there might be cases where such conditions should be imposed and/or such authorisations granted. Accordingly, it seems that, rather than repealing s 105A.7E, it might be better to provide that, where an ESO or ISO provides that the person wear a monitoring device, the order ‘may’ also include the s 105A.7E(1)(b)-(c) conditions and the s 105A.7E(2) authorisations.

⁶³ Though see *ibid* 122 [419].

⁶⁴ *Ibid* 123 [422]-[423].

⁶⁵ *Criminal Code Act 1995* (Cth) s 105A.7E(1)(a).

⁶⁶ *Criminal Code Act 1995* (Cth) s 105A.7E(1)(b)-(c).

⁶⁷ *Criminal Code Act 1995* (Cth) s 105A.7E(2).

⁶⁸ Independent National Security Legislation Monitor, n 3, 129 [446].

⁶⁹ *Ibid* 129 [447].



An ESO Authority

It should go without saying that ESOs are extremely intrusive orders, which place major constraints on the liberty of those who are subject to them. And it is concerning that ‘some government bodies administering such schemes’ appear to ‘have a mindset of setting people up to fail’: i.e. by prosecuting individuals for ‘trivial and often accidental or unavoidable’ contravention of ESO conditions.⁷⁰ Because of the effect that ESOs have on individual liberty, and because of the desirability of ESO schemes being administered intelligently and fairly – not ‘belligerent[ly]’⁷¹ – the INSLM was right to express his in principle support for the creation of ‘a body independent of the AFP Minister’⁷² that would supervise the operation of ESO schemes, ensuring as far as possible that ‘ESOs are ... administered properly and fairly throughout the Commonwealth.’⁷³ Accordingly, I entirely support the recommendations that appear at p. 132 [461] of the INSLM’s report.

Defendant’s costs

The INSLM was critical of s 105A.15A of the *Criminal Code*, which relevantly provides that, if, due to circumstances beyond his or her control, a defendant to a post-sentence order proceeding is unable to obtain legal representation,⁷⁴ the Court may make an order ‘requiring the Commonwealth to bear ... all or part of the reasonable costs and expenses of the offender’s legal representation for the proceeding.’⁷⁵ He was also critical of regulation 9 of the *Criminal Code Regulations 2019* (Cth), which lists matters that a Court may take into account when determining whether circumstances ‘are beyond an offender’s control in relation to a continuing detention order proceeding.’ One of those matters is ‘the offender’s financial circumstances.’ ‘A number of things are plain’, the INSLM argued:

Virtually all defendants who will be subject to Div 105A applications will not be able to afford representation. All will have been in prison for many years before the application is made. To place a burden on the defendant to prove their financial position just wastes time.

To make a defendant apply for legal aid funding and await a response just wastes time. State and Territory legal aid bodies will not provide funding for Commonwealth matters such as this and if they can provide anything will be inadequate.⁷⁶

⁷⁰ Ibid 130 [453].

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 131 [456].

⁷⁴ See *Criminal Code Act 1995* (Cth) s 105A.15A(1)(b).

⁷⁵ *Criminal Code Act 1995* (Cth) s 105A.15A(2)(b).

⁷⁶ Independent National Security Legislation Monitor, n 3, 138 [470]-[471].



In my evidence to the INSLM on 22 June 2022 (see **Appendix D** at pp. 41-2), I indicated my support for such reasoning; and nothing has happened between then and now to cause me to change my mind. Accordingly, I support the INSLM's recommendation that s 105A.15A of the *Criminal Code* and regulation 9 of the *Criminal Code Regulations* be repealed.⁷⁷ I also support the INSLM's recommendation that the Commonwealth be required to bear 'the reasonable costs and expenses of the offender's legal representation' in post-sentence order proceedings, 'which includes costs of engaging expert witnesses if required'.⁷⁸ And I support the further recommendations that appear at p. 139 [475] of the INSLM's report.

IDO's and ISO's Should Only Be Made in 'Exceptional Circumstances'

In both of our written submissions to the INSLM, my co-author and I expressed concern about IDOs (see **Appendix B** at pp. 4-5 and **Appendix C** at pp. 25-6). Under such orders, a terrorist offender may be held in detention for as long as 3 months – and longer in 'exceptional circumstances'⁷⁹ – if a Court is satisfied that: (i) his or her term of imprisonment (etc) will end before the State's application for a continuing detention order against him or her has been determined;⁸⁰ and (ii) there are reasonable grounds for considering that a continuing detention order will be made in relation to [him or her].⁸¹ In the end, our reasoning was that a person should generally not be deprived of his or her liberty on the basis of a Court's satisfaction that mere 'reasonable grounds' exist for believing that, ultimately, a detention order will be made against him or her. And we also argued that some incentive should be provided to the government to ensure that CDO applications are made as early in the final year of a terrorist offender's prison sentence (etc) – so as to ensure that detention in prison pursuant to an IDO occurs as infrequently as possible. See **Appendix B** at pp. 4-5.

When I gave evidence to the INSLM, he agreed with our concerns. See **Appendix D** at pp. 39-40. Further, he seemed to indicate (consistently with our Updated Written Submission to his Review: see **Appendix B** at pp. 4-5) that he was also concerned about ISOs – under which a person's liberty can be severely restricted if a Court is satisfied, among other things, that 'there are reasonable grounds for considering that an extended supervision order will be made in relation to the offender'.⁸² He asked me whether I could see anything wrong with amending the *Criminal Code*, so as to have it provide that an interim order may be made only in 'exceptional circumstances' (see **Appendix D** at p. 39). I said that I could see nothing wrong with that (see **Appendix D** at p. 40). I still cannot. Accordingly, I submit that the government should amend the *Criminal Code* so as

⁷⁷ Ibid 138 [474].

⁷⁸ Ibid 138-9 [474].

⁷⁹ *Criminal Code Act 1995* (Cth) s 105A.9(6).

⁸⁰ *Criminal Code Act 1995* (Cth) s 105A.9(2)(a).

⁸¹ *Criminal Code Act 1995* (Cth) s 105A.9(2)(b).

⁸² *Criminal Code Act 1995* (Cth) s 105A.9A(2)(c).



it provides that a person may have an IDO or ISO imposed upon him or her only in 'exceptional circumstances.'

Thank you for considering this submission. I am available to give oral evidence to the Committee about it or any aspect of it.

Yours sincerely

[Redacted signature]

Andrew Dyer

Senior Lecturer, University of Sydney Law School
Director, Sydney Institute of Criminology
University of Sydney
Sydney NSW 2006

P: +61 2 8627 8507
E: andrew.dyer@sydney.edu.au

APPENDIX A

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights (and What to Do about It)

Andrew Dyer and Josh Pallas*

The Independent National Security Legislation Monitor, Grant Donaldson SC, has recently announced that he will be reviewing Div 105A of the Criminal Code Act 1995 (Cth), which allows continuing detention orders to be made against certain terrorist offenders whom the state can prove would pose an unacceptable risk of committing particular terrorist offences if they were to be released from prison (even if extended supervision orders were imposed on them). In this article, we argue that, because the Div 105A scheme seems unnecessary, it should be abolished. Alternatively, if that scheme remains in force, the government should ensure that it operates as consistently as possible with Australia's human rights obligations. The reasoning of certain High Court Justices recently in Minister for Home Affairs v Benbrika tends to expose Div 105A's incompatibility with human rights – and this situation should not be allowed to continue.

I. INTRODUCTION

“While a majority of states and territories, as well as international counterparts including the United Kingdom and New Zealand, have enacted post-sentence preventative detention regimes dealing with high risk sex and/or violent offenders”, the then Commonwealth Attorney-General, George Brandis, told the Senate on 15 September 2016, “there is no existing Australian regime for managing terrorist offenders who may continue to pose an unacceptable risk to the community following the expiry of their sentence.”¹ “Law enforcement agencies can seek to rely on control orders to manage the risk of terrorist offenders” once their respective sentences have concluded, the Attorney-General proceeded to explain.² But, he said, “there may be some circumstances” where a person would pose too great a risk to the community if s/he were “to be released from prison”, even if s/he were subject to a control order.³ The Bill that Senator Brandis was introducing into Parliament, the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (Cth), aimed to remove the problem that he had identified. “[M]odelled closely”⁴ on the State and Territory legislation to which he had referred, the Bill would insert a new Division, Div 105A, into the *Criminal Code Act 1995* (Cth) (the *Criminal Code*).⁵ Division 105A's central purpose would be to grant the Supreme Court of each Australian State and Territory the power to impose continuing detention orders on certain adult terrorist offenders whom the state could prove would pose “an unacceptable risk” of committing any terrorist-related offence contained in Pt 5.3 of the

* Andrew Dyer: Senior Lecturer, University of Sydney Law School, Director, Sydney Institute of Criminology. Josh Pallas: PhD Candidate, University of Sydney Law School, Member, Sydney Institute of Criminology. This research was supported by an Australian Government Research Training Program (RTP) Scholarship. ORCID: 0000-0003-2694-2082. We thank the referee for his/her fair and helpful comments about a draft of this article.

¹ Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1034 (Senator Brandis, Attorney-General).

² Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1034 (Senator Brandis, Attorney-General).

³ Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1034 (Senator Brandis, Attorney-General).

⁴ Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1035 (Senator Brandis, Attorney-General).

⁵ Similar measures have since been adopted in New South Wales – see *Terrorism (High Risk Offenders Act) 2017* (NSW) and Josh Pallas, “Heed the Call: The Implied Freedom of Political Communication and the Terrorism High-Risk Offenders Regime” (2022) (1) *Current Issues in Criminal Justice* 1 – and they have been in force since 2015 in South Australia: see *Criminal Law (High Risk Offenders) Act 2015* (SA).

Dyer and Pallas

Criminal Code with a maximum penalty of at least seven years' imprisonment, if they were released from custody at the end of their respective prison sentences (even under supervision).⁶

Now that Div 105A has been in force for about five years, the Independent National Security Legislation Monitor, Grant Donaldson SC, has announced⁷ that he will be reviewing that Division.⁸ Among the matters that he will consider is whether Div 105A is "consistent with Australia's human rights obligations".⁹

In this article, we argue that Div 105A clearly does not comply with such obligations, and that the Commonwealth government should not allow this situation to continue. In other words, if the Div 105A detention scheme in force – and we do not think that it should – the Commonwealth government ought to reform this scheme to make it as consistent as possible with the *International Covenant on Civil and Political Rights*.¹⁰ Detainees should not continue to be "detained in ordinary prisons, albeit [often] in separate wings".¹¹ They should be detained in far less punitive conditions than this, and the state should make extensive efforts to reintegrate them into the community as soon as possible.¹² Moreover, while it is sometimes said that a Court may only currently make a continuing detention order if the state is able to discharge a very high standard of proof,¹³ this is not quite true.¹⁴ It should not be enough, as it is currently, for the state to prove to a high degree of probability that a terrorist offender poses an *unacceptable risk of prophylactic offending* in the absence of such an order.¹⁵ Rather, for so long as Div 105A remains in force, that Division should allow for continuing detention orders to be made only where the state can prove that it is *more likely than not* that, without such an order, the person will either *inflict a grave harm* him/herself, or will "support ... or facilitat[e]"¹⁶ the infliction of such a harm by another person.

This article proceeds as follows. In Part II, we briefly consider the specifics of the Div 105A detention scheme, as well as the reasoning of the High Court of Australia (HCA) in the recent case of *Minister for Home Affairs v Benbrika (Benbrika)*¹⁷ – where a majority held that that scheme was valid in its entirety because, contrary to Benbrika's submission, the power it confers on State and Territory Supreme Courts is part of "the judicial power of the Commonwealth" within the meaning of s 71 of the *Commonwealth Constitution*. In Part III, we argue that Gageler, Gordon and Edelman JJ's respective reasoning in *Benbrika* tends to expose the human rights incompatibility of Div 105A; and we state precisely why the Division is contrary to human rights standards. In Part IV, we explain our recommendations for the reform of Div 105A. As we have already noted, all such recommendations aim to ensure that the Division, if it continues to exist, operates as compatibly as possible with the ICCPR. In Part V, we make some brief concluding remarks.

⁶ Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1034 (Senator Brandis, Attorney-General). See also *Criminal Code Act 1995* (Cth) s 105A.7(1).

⁷ INSLM, *Review into Division 105A of the Criminal Code* <<https://www.inslm.gov.au/node/205>>.

⁸ See *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(a)–(b).

⁹ INSLM, n 7. See also *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b)(i).

¹⁰ *International Covenant on Civil and Political Rights*. Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹¹ *M v Germany* [2009] VI Eur Court HR 169, 214 [127].

¹² See *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018), where the European Court of Human Rights (ECtHR) held that the relevant German post-sentence preventive detention scheme was now compatible with the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). This was partly because: "Treatment aimed at reducing the threat these persons pose to the public to such an extent that the detention may be terminated as soon as possible is now at the heart of that form of detention": [223].

¹³ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 16 December 2016, 3911 (Senator Brandis, Attorney-General).

¹⁴ See Christopher Slobogin, "Legal Limitations on the Scope of Preventive Detention" in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 37, 39.

¹⁵ *Criminal Code Act 1995* (Cth) s 105A.7(1).

¹⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 30 [93] (Gageler J); [2021] HCA 4.

¹⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1; [2021] HCA 4.

II. DIVISION 105A AND THE HCA'S DECISION IN BENBRIKA

A. Division 105A

Division 105A's stated object is to "protect the community from serious Pt 5.3 offences by providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to: (a) a continuing detention order; or (b) an extended supervision order".¹⁸ Within the final 12 months¹⁹ of an adult²⁰ offender's sentence for certain terrorist offending,²¹ the relevant Minister may apply to a Supreme Court of a State or Territory for a continuing detention order to be imposed on the prisoner.²² The Court may²³ then make such an order if, after considering the non-exhaustive²⁴ list of matters in s 105A.6B(1) of the *Criminal Code*, it is satisfied: (1) "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";²⁵ and (2) no "less restrictive measure" – such as an extended supervision order²⁶ – "would be effective in preventing the unacceptable risk".²⁷ The maximum term of such an order is three years,²⁸ though a further continuing detention order can be made upon the expiry of any previous continuing detention order²⁹ (in other words, detention pursuant to a continuing detention order is indefinite). There must be a review of the continuing need for such an order every 12 months.³⁰ When deciding whether to renew or revoke³¹ a continuing detention order, or to make a further continuing detention order, the Supreme Court will consider whether the state has proved that the offender remains dangerous in the sense just explained.³²

We must elaborate on two aspects of the Div 105A scheme.

First, we have seen that that scheme applies to those who are proved to pose an unacceptable risk of committing "a serious Part 5.3 offence" if released. But what is a "serious Part 5.3 offence"? Section 105A.2 of the *Criminal Code* states that a "serious Part 5.3 offence" is any offence against Pt 5.3 for which there is a maximum term of at least seven years' imprisonment. The important point for present purposes is that almost all of these offences are "prophylactic"³³ in nature: they criminalise conduct that is harmless in itself – such as, for example, collecting or making a document connected with preparation for a terrorist act,³⁴ being a member of a terrorist organisation³⁵ and providing funds to,

¹⁸ *Criminal Code Act 1995* (Cth) s 105A.1.

¹⁹ *Criminal Code Act 1995* (Cth) s 105A.5(2)(a).

²⁰ *Criminal Code Act 1995* (Cth) s 105A.3(1)(c).

²¹ *Criminal Code Act 1995* (Cth) s 105A.3(1)(a). The Minister may also apply for a continuing detention order to be made against other persons, including those who: (1) have been in continuous custody since being convicted of one of the terrorist offences referred to in s 105A.3(1)(a) (even though they are now imprisoned for separate offending); or (2) are currently detained under an interim detention order (see s 105A.9) or a continuing detention order: *Criminal Code Act* s 105A.3A(2) and (3)(b)(i).

²² *Criminal Code Act 1995* (Cth) s 105A.5(1).

²³ *Criminal Code Act 1995* (Cth) s 105A.7(1).

²⁴ *Criminal Code Act 1995* (Cth) s 105A.8(2).

²⁵ *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

²⁶ Note 2 to *Criminal Code Act 1995* (Cth) s 105A.7(1)(c) provides that "an example of a less restrictive measure ... is an extended supervision order".

²⁷ *Criminal Code Act 1995* (Cth) s 105A.7(1)(c).

²⁸ *Criminal Code Act 1995* (Cth) s 105A.7(5).

²⁹ *Criminal Code Act 1995* (Cth) s 105A.7(6).

³⁰ *Criminal Code Act 1995* (Cth) s 105A.10(1A)–(1).

³¹ Concerning revocation, see *Criminal Code Act 1995* (Cth) ss 105A.7A(6), 105A.12(5).

³² *Criminal Code Act 1995* (Cth) ss 105A.7(1), 105A.12(4)(a).

³³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 30 [93] (Gageler J); [2021] HCA 4.

³⁴ *Criminal Code Act 1995* (Cth) s 101.5(1)–(2).

³⁵ *Criminal Code Act 1995* (Cth) s 102.3(1).

Dyer and Pallas

or receiving funds from, a terrorist organisation³⁶ – because such conduct is thought to carry the risk of leading to future harm. That is, Div 105A allows for the detention of those who are proved to pose an unacceptable risk of mere preparatory or like wrongdoing. We shall return to this point.³⁷

Second, a person detained under a continuing detention order serves that detention in prison.³⁸ It is true that s/he “must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment”.³⁹ It is also true that s/he must not be detained in the “same area or unit of the prison” as those who are serving such sentences.⁴⁰ But even these requirements are subject to exceptions;⁴¹ and Div 105A does not require the state to make any rehabilitative resources available to detainees beyond those provided to ordinary prisoners.⁴²

B. Benbrika

On 3 February 2009, in the Supreme Court of Victoria, Bongiorno J sentenced Abdul Nacer Benbrika to a total term of imprisonment for 15 years, with a non-parole period of 12 years, for two offences: intentionally being a member of a terrorist organisation and intentionally directing the affairs of a terrorist organisation.⁴³ He was never granted parole; indeed, shortly before Benbrika’s sentence expired, the Minister for Home Affairs instead applied to the Supreme Court for a continuing detention order to be made against him.⁴⁴ On 24 December 2020, Tinney J granted such an order, committing Benbrika to prison for a further three-year period.⁴⁵ But on 8 October 2020, his Honour had made another order. On that date, Tinney J had reserved for the consideration of the Victorian Court of Appeal (VCA) the question of whether the power that Div 105A purportedly confers on Supreme Courts to make continuing detention orders is within “the judicial power of the Commonwealth”.⁴⁶ If not, the Commonwealth Parliament would have failed validly to confer such a function on State and Territory Supreme Courts. That is because of the well-established proposition that that Parliament may only authorise a Court mentioned in s 71 of the *Commonwealth Constitution* to exercise federal judicial power (and functions that are ancillary or incidental thereto).⁴⁷ On 30 October 2020, the question reserved was removed into the HCA.⁴⁸

Three matters must be noted.

First, it is now settled⁴⁹ that, as Brennan, Deane and Dawson JJ contended in *Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)*,⁵⁰ the “exceptional cases” of non-punitive detention aside, “the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial

³⁶ *Criminal Code Act 1995* (Cth) s 102.6(1).

³⁷ See text accompanying nn 146–152.

³⁸ *Criminal Code Act 1995* (Cth) s 105A.4(1).

³⁹ *Criminal Code Act 1995* (Cth) s 105A.4(1).

⁴⁰ *Criminal Code Act 1995* (Cth) s 105A.4(2).

⁴¹ *Criminal Code Act 1995* (Cth) s 105A.4(1)–(2).

⁴² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 15 [39]; [2021] HCA 4.

⁴³ *R v Benbrika* (2009) 222 FLR 433, [247]; [2009] VSC 21.

⁴⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 33 [104]–[105]; [2021] HCA 4.

⁴⁵ *Minister for Home Affairs v Benbrika* [2020] VSC 888, [478]–[480].

⁴⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 4 [5]–[6]; [2021] HCA 4.

⁴⁷ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275–276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Attorney-General (Cth) v The Queen* [1957] AC 288, 311–314.

⁴⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 4 [6]; [2021] HCA 4.

⁴⁹ See, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 341 [16] (Kiefel CJ, Bell, Keane and Edelman JJ); [2018] HCA 2.

⁵⁰ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

function of adjudging and punishing criminal guilt.” In other words, apart from cases such as pre-trial, mental illness, quarantine⁵¹ and migration⁵² detention, Commonwealth legislation can only validly authorise a *Chapter III court* to detain an individual; and, then, only after that court has found that that person has breached a positive legal command in the past.⁵³

Second, however, it is also clear that the “exceptional cases” are not “a closed set”.⁵⁴ That is, while the courts will be cautious when extending the categories of non-punitive detention,⁵⁵ those categories *can* be extended by analogy to the existing categories.⁵⁶ When a Court decides whether such an extension should occur, it must be satisfied of course that the detention *is* non-punitive. But what test does the Court apply? In *Falzon v Minister for Immigration and Border Protection (Falzon)*, the HCA stated that the question is one of purpose.⁵⁷ If the detention is “reasonably capable of being seen as necessary”⁵⁸ for the non-punitive purpose that Parliament has identified,⁵⁹ it will be non-punitive. But if the detention “goes further than to achieve that limited purpose ... it may be inferred that the law has a purpose of its own, a purpose to effect punishment”.⁶⁰

Third, in *Fardon*, Gummow J, in obiter dicta with which Kirby J⁶¹ agreed, held that detention of the sort now authorised by Div 105A – the committal to prison of a person whom the state has proved poses an unacceptable risk of serious offending – is not analogous to any of the existing categories of non-punitive detention.⁶² “[I]t is not suggested”, his Honour said, “that the detention of the mentally ill for treatment is of the same character as the incarceration of those ‘likely to’ commit certain classes of offence.”⁶³ Moreover, he continued, “detention by reason of apprehended conduct ... is of a different character”⁶⁴ from both an order of indefinite detention made at the time of sentencing⁶⁵ and pre-trial detention⁶⁶ – both of which he seemed to view as “detention as a consequence of judicial determination of engagement in past conduct”.⁶⁷ Therefore, his Honour thought, the Commonwealth Parliament could not validly

⁵¹ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28.

⁵² *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32.

⁵³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 24 [69] (Gageler J); [2021] HCA 4.

⁵⁴ Peter Gerangelos, “Separation of Powers in the Australian Constitution: Themes and Reflections” (2017) 29 *Singapore Academy of Law Journal* 903, 914.

⁵⁵ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 654 [217]; [2004] HCA 46.

⁵⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613 [83] (Gummow J), 634 [154] (Kirby J), 647 [196] (Hayne J), 653 [214] (Callinan and Heydon JJ); [2004] HCA 46.

⁵⁷ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 342–344 [24]–[33] (Kiefel CJ, Bell, Keane and Edelman JJ); [2018] HCA 2.

⁵⁸ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [26]–[27]; [2018] HCA 2.

⁵⁹ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 342 [24]; [2018] HCA 2.

⁶⁰ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 [29]; [2018] HCA 2.

⁶¹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 631 [145]; [2004] HCA 46.

⁶² *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613–614 [83]–[84]; [2004] HCA 46. That said, his Honour favoured re-formulating the *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 principle to remove any reference to punishment: *Fardon v Attorney-General (Qld)* 612–613 [80]–[82]; see also *Al-Kateb v Godwin* (2004) 219 CLR 562, 611–613 [135]–[138] (Gummow J); [2004] HCA 37. As suggested above, the Court has not subsequently accepted this re-formulation; it has instead accepted the *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 principle as originally stated.

⁶³ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613 [83]; [2004] HCA 46.

⁶⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613 [84]; [2004] HCA 46.

⁶⁵ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613 [83]; [2004] HCA 46.

⁶⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 613 [83]; [2004] HCA 46.

⁶⁷ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 609–610 [70]–[73], 613 [83]; [2004] HCA 46. Compare Andrew Dyer, “Can Charters of Rights Limit Penal Populism?: The Case of Preventive Detention” (2018) 44(3) *Monash University Law Review* 520, 525–526.

Dyer and Pallas

authorise a Chapter III court to order such detention:⁶⁸ such an order, in other words, is outside “the judicial power of the Commonwealth”.

In *Benbrika*, the HCA had to consider whether Gummow J was right.⁶⁹ *Benbrika* submitted that his Honour was – and that Tinney J was therefore acting contrary to the requirements of Ch III of the *Commonwealth Constitution* when his Honour ordered *Benbrika*’s current detention. But six Justices disagreed, five of their Honours holding that Gummow J was wholly⁷⁰ or almost wholly⁷¹ wrong, and another, Gageler J, ruling that his Honour’s statement of principle required qualification.⁷²

Kiefel CJ, Bell, Keane and Steward JJ observed that the mental illness and infectious disease exceptions to the *Lim* principle “share a purpose of protecting the community from harm”.⁷³ Their Honours also contended that Gummow J in *Fardon* had failed to “explain why an appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose is incapable of coming within an analogous exception”.⁷⁴ For their Honours, such detention *is* analogous to mental illness and quarantine detention.⁷⁵ That is because, like those forms of detention, it has a “protective purpose”⁷⁶ and is therefore non-punitive.⁷⁷ Strangely, when defending this last conclusion, the plurality did not refer to the established test for determining whether detention is punishment – namely, whether the detention can reasonably be seen as necessary to achieve the relevant non-punitive objective.⁷⁸ Their Honours therefore did not explain why detention *in prison* could be seen as going no further⁷⁹ than was necessary to protect the community. Why would detention in truly non-punitive conditions not achieve this aim just as well?⁸⁰

Justice Gageler’s reasoning differed from the plurality’s in only one way. His Honour accepted that a power to order that a current prisoner remain in prison past the expiry of his/her retributive sentence, *can in some circumstances* be reasonably capable of being seen as necessary to achieve a legitimate non-punitive protective aim – and *can* therefore fall within “the judicial power of the Commonwealth”.⁸¹ There will be no constitutional problem, Gageler J thought, so long as such a power can be exercised only against those who can be proved to pose an unacceptable risk of causing, or supporting or facilitating, a “serious harm”⁸² if released (even under supervision).⁸³ Difficulties will arise, however, his Honour

⁶⁸ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 608 [68], 614 [85]; [2004] HCA 46.

⁶⁹ At least two Justices in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46, and probably three, thought that Gummow J was wrong: *Fardon v Attorney-General (Qld)* 596–597 [34] (McHugh J), 654 [217] (Callinan and Heydon JJ). Compare *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 65 [214] (Edelman J); [2021] HCA 4.

⁷⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 13–19 [31]–[47] (Kiefel CJ, Bell, Keane and Steward JJ); [2021] HCA 4.

⁷¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [182], 54 [185] (Edelman J); [2021] HCA 4.

⁷² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28–29 [85]–[88]; [2021] HCA 4.

⁷³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 13 [32]; [2021] HCA 4.

⁷⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 13 [32]; [2021] HCA 4.

⁷⁵ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 14 [36]; [2021] HCA 4.

⁷⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 14 [36]; [2021] HCA 4.

⁷⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 15–16 [39]–[41]; [2021] HCA 4.

⁷⁸ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [26]–[27]; [2018] HCA 2.

⁷⁹ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 [29]; [2018] HCA 2.

⁸⁰ As argued below, the HCA’s denial that the “reasonably capable” test involves proportionality testing – *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [28], 344 [30]–[32]; [2018] HCA 2 – is unpersuasive. See, eg, Gabrielle Appleby and Stephen McDonald, “Punishment and Chapter III of the Constitution” in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: A Tribute to Leslie Zines* (Federation Press, 2020) 64, 77–78; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 289; Stephen McDonald, “Involuntary Detention and the Separation of Judicial Power” (2007) 35 *Federal Law Review* 26, 47–48.

⁸¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28–29 [86]–[88]; [2021] HCA 4.

⁸² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 30 [93]; [2021] HCA 4.

⁸³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28–29 [85]–[88], 30–32 [92]–[102]; [2021] HCA 4.

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

continued, if a Commonwealth law purports to authorise a Chapter III court to order the preventive detention in gaol of a prisoner who poses a risk of performing criminal conduct that, by itself, neither causes a grave harm nor supports/facilitates the causing of such harm by another person.⁸⁴

Like Gordon J,⁸⁵ who held similarly – though her Honour expressly refrained from stating that the Commonwealth Parliament could ever validly authorise a Ch III court to order preventive detention of the kind under consideration⁸⁶ – Gageler J justified this view by pointing to the liberal underpinnings of Ch III.⁸⁷ “Trial of an individual for an offence at the instigation of the executive”, his Honour observed, is the epitome of judicial power.⁸⁸ In other words, once the Commonwealth executive has presented an individual for trial, it is undoubtedly for the judiciary alone to determine whether s/he has, in the past, committed an offence created by “positive law”.⁸⁹ And, if such a determination is made, it is also only the judiciary that may sentence the offender – perhaps ordering that s/he be deprived of his/her liberty.⁹⁰ *Why* is it that only a Ch III court may adjudge and punish criminal guilt? Gageler J observed that it is simply because this protects the subject against arbitrary executive detention.⁹¹ The executive may not convict or imprison an individual itself. Only an independent court can do that, after providing the individual with a fair procedure.⁹² Liberty is further protected, his Honour continued, by the rule that the judiciary may only order punitive detention for a past breach of a written law.⁹³ The person who breaches a law of which s/he has been notified in advance⁹⁴ has been given a “fair opportunity to do otherwise”.⁹⁵ There is no affront to individual liberty, Gageler J suggests, when we punish those who have freely chosen to expose themselves to this consequence.

Gageler J acknowledged that, exceptionally, Commonwealth detention will be constitutionally acceptable, though a judge has not ordered it as punishment for past guilt.⁹⁶ And, as suggested above, he accepted that detention of an individual in gaol because of what s/he might do is such an exceptional case – provided that the feared harm “is grave and specific”.⁹⁷ According to Gageler J, however, the problem with the scheme under consideration was that it authorised judges to commit persons to prison because of fears that they would otherwise perform conduct that, while criminal, was “many steps removed from doing or supporting or facilitating any terrorist act”.⁹⁸ “If liberty is protected by a constitutional structure which limits detention in custody to the penal consequence of an offence determined by a court to have been committed in the past”, Gageler J said, “then liberty would be subverted by an exception to the operation of that limitation cast in terms which would authorise detention in custody to prevent”⁹⁹ prophylactic offending.

⁸⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 22 [64], 28 [85], 31–32 [92]–[97]; [2021] HCA 4.

⁸⁵ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 39–42 [130]–[141]; [2021] HCA 4.

⁸⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 52 [177]–[178]; [2021] HCA 4.

⁸⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 24–25 [69]–[74], 28 [85]; [2021] HCA 4.

⁸⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 24 [69]; [2021] HCA 4.

⁸⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 24 [69]; [2021] HCA 4.

⁹⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 24 [69]; [2021] HCA 4.

⁹¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 25 [72]; [2021] HCA 4.

⁹² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 25 [72]; [2021] HCA 4.

⁹³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 25 [72]; [2021] HCA 4.

⁹⁴ Though see *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

⁹⁵ HLA Hart, “Negligence, Mens Rea and Criminal Responsibility” in *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP, 2008) 136, 153.

⁹⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 25 [73]; [2021] HCA 4.

⁹⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 27 [79]; [2021] HCA 4.

⁹⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 30 [93]; [2021] HCA 4.

⁹⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28 [85]; [2021] HCA 4.

Dyer and Pallas

Like the plurality, the final member of the Court, Edelman J, held that Div 105A was wholly valid.¹⁰⁰ That said, his reasoning differed significantly from that which the plurality Justices deployed.

Edelman J, correctly in our view, held that Div 105A detention is punitive.¹⁰¹ “Transparency and constitutional fidelity” required this to be recognised, he held.¹⁰² “Deception or false labelling” should be avoided.¹⁰³ Although, like the plurality, Edelman J failed to mention the “reasonably capable” test – in this context anyway¹⁰⁴ – he pointed out that detention that (solely) has a protective aim might still be punishment.¹⁰⁵ The plurality, he rightly thought, had committed a “category error”¹⁰⁶ when holding differently. That said, Edelman J held that it is within “the judicial power of the Commonwealth” to punish a person for what s/he might do, as opposed to what s/he has done – so long as two conditions are satisfied. Those conditions are that the relevant power is judicial in form¹⁰⁷ – which the Div 105A power *is*, though it creates new rights¹⁰⁸ – and is “exercisable judicially”.¹⁰⁹ Justice Edelman held that the power at issue satisfied this second condition. That is because Div 105A detention can only be ordered: (1) where a less restrictive alternative would not achieve the desired protective result;¹¹⁰ and (2) to prevent the commission of offences that, in Edelman J’s view, Parliament was entitled to regard as serious enough to justify detention.¹¹¹

Benbrika must be accepted. That said, it is hard to think of a case that more clearly illustrates the fallacy of the view that “anything that is held constitutional must therefore also be unobjectionable”.¹¹² In other words, whether or not Div 105A is constitutionally valid,¹¹³ the detention scheme it creates is contrary to human rights – and we shall now develop that argument more fully. We shall then argue that, if Parliament retains the Div 105A scheme, it should reform that Division in certain ways. In so arguing, we will, to an extent, draw on the respective reasoning of Gageler, Gordon and Edelman JJ in *Benbrika*. That is because each of their Honours provided useful insights into Div 105A’s failure to protect human rights.

III. DIVISION 105A’S INCOMPATIBILITY WITH HUMAN RIGHTS

Scholars have given detailed consideration to the types of restraints that should be placed on preventive detention regimes if they are to be compatible with human rights. Indeed, some scholars have denied that preventive detention – whether ordered at sentencing (indefinite detention) or only once a person is

¹⁰⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [182]; [2021] HCA 4.

¹⁰¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 59–61 [200]–[204] (Edelman J); [2021] HCA 4.

¹⁰² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [182]; [2021] HCA 4.

¹⁰³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 74 [239]; [2021] HCA 4, quoting Douglas Husak, “Preventive Detention as Punishment? Some Possible Obstacles” in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP, 2013) 178, 179.

¹⁰⁴ Compare *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 68 [225] (Edelman J); [2021] HCA 4.

¹⁰⁵ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53–54 [183]; [2021] HCA 4. See too, eg, HLA Hart, “Prolegomenon to the Principles of Punishment” in Hart, *Punishment and Responsibility* (OUP, 2008) 1, 5–6.

¹⁰⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [183]; [2021] HCA 4.

¹⁰⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185]; [2021] HCA 4.

¹⁰⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 66–67 [220]–[221], 71–72 [232]–[233]; [2021] HCA 4.

¹⁰⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185], 67 [222]; [2021] HCA 4.

¹¹⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 72–73 [235]; [2021] HCA 4.

¹¹¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185], 69 [226], 69–70 [228]–[229], 73 [237]; [2021] HCA 4.

¹¹² Greg Taylor, “Conceived in Sin, Shaped in Iniquity – The Kable Principle as Breach of the Rule of Law” (2015) 34(2) *University of Queensland Law Journal* 265, 265–6. See also, generally, Gabrielle Appleby, “The High Court and Kable: A Study in Federalism and Rights Protection” (2014) 40 *Monash University Law Review* 673.

¹¹³ One of us has recently discussed the merits of the constitutional reasoning in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1; [2021] HCA 4: Andrew Dyer, “Minister for Home Affairs v Benbrika and the Capacity of Chapter III of the Commonwealth Constitution to Protect Prisoners’ Rights” (2022) *UNSW Law Journal* (forthcoming).

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

already imprisoned (post-sentence preventive detention¹¹⁴) – can ever operate compatibly with human rights standards.¹¹⁵

This latter view is to an extent reflected in the *Lim* principle,¹¹⁶ as well as in the United States Supreme Court’s similar contention, in *Foucha v Louisiana*, that, under “our present system ... with only very narrow exceptions and aside from permissible confinements for mental illness”, the state may incarcerate “only those who are proved beyond reasonable doubt to have violated a criminal law”.¹¹⁷ According to this view, the liberal, human rights-respecting state must *reason with* offenders and prospective offenders. For, when it uses other methods, it ceases to be a liberal, human rights-respecting state.¹¹⁸ No matter how likely a person is to offend in the future, the state must wait until s/he does before it detains him/her. Until then, it must rely simply on the criminal law’s threats and moral appeals, to *persuade* the prospective offender not to misconduct him/herself.¹¹⁹ Moreover, even once the person has committed an offence, the state must still reason with him/her. The punishment that it imposes on that person must be proportionate to the seriousness of his/her offending.¹²⁰

According to this philosophy, detention of the mentally ill and dangerous is permissible, but detention of the merely dangerous is not. Because the mentally ill actor is irrational, the state need not attempt to reason with him/her.¹²¹ Because the merely dangerous person is an autonomous actor, however, the state is not excused from its reasoning responsibilities.¹²²

The difficulty with this view is this. What if there is a person whom the state can prove is highly likely to commit a very serious offence if s/he is released from custody – even under supervision? If the state were to decline to detain this individual, might it not breach the human rights of this person’s prospective victim(s)? The European Court of Human Right (ECtHR) has held that there would indeed be a breach of the human rights of such potential victims in these circumstances (at least where the harm in prospect is death or very serious injury).¹²³ That said, the question at the beginning of this paragraph does contain a number of “ifs”. As we argue further below, our acceptance of preventive detention is predicated on there *in fact* being offenders whom the state can reliably prove are more likely than not to commit serious acts of violence even if they are under state supervision in the community after their release. As we note in that discussion, there are real questions about whether a less restrictive measure than detention will ever fail to reduce to a tolerable level the risk that a demonstrably dangerous person poses to the community. The latter must be especially doubtful in the case of the Div 105A scheme, given that the alternative, less restrictive measure (an extended supervision order) can place extremely significant restrictions on individual freedom.¹²⁴

¹¹⁴ This terminology is used by Bernadette McSherry, Patrick Keyzer and Arie Freiburg, “Preventive Detention for “Dangerous” Offenders in Australia: A Critical Analysis and Proposals for Policy Development” (Report to the Criminology Research Council, December 2006) 10–11.

¹¹⁵ See, eg. 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.

¹¹⁶ See *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

¹¹⁷ *Foucha v Louisiana*, 504 US 71, 83 (1992). As one of us has noted elsewhere – Dyer, n 67, 522, fn 21 – other USSC case law shows the exceptions to be less narrow than *Foucha* claims: see, eg. *Kansas v Hendricks*, 521 US 344 (1997).

¹¹⁸ See Alice Ristroph, “Proportionality as a Principle of Limited Government” (2005) 55 *Duke Law Journal* 264, 331.

¹¹⁹ See, eg. Stephen J Morse, “Neither Desert Nor Disease” (1999) 5 *Legal Theory* 265, 270.

¹²⁰ See, eg. Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate Sentences as Human Rights Violations” (2004) 67(4) *Modern Law Review* 541.

¹²¹ See, eg. Morse, n 119, 269.

¹²² See, eg. Michael Louis Corrado, “Sex Offenders, Unlawful Combatants and Preventive Detention” (2005) 84 *North Carolina Law Review* 77, 101.

¹²³ See, eg. *Mastromatteo v Italy* [2002] VIII Eur Court HR 151, 165–166 [68]–[69].

¹²⁴ See, eg. Jeffrey Gordon, “Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-criminal Detention” (2012) 36 *Melbourne University Law Review* 41, 99.

Dyer and Pallas

Like a number of liberal theorists,¹²⁵ Ashworth and Zedner accept that preventive detention is justified in limited circumstances. Concerning post-sentence preventive detention, they indicate that the following principles apply when assessing whether such detention is compatible with human rights:

1. In principle, every citizen has a right to be presumed harmless, and this presumption of harmlessness can be rebutted only in exceptional circumstances (set out in (2) and (4)).
2. The state's duty to protect people from serious harm may justify depriving a person of liberty if that person has lost the presumption of harmlessness by virtue of committing a serious violent offence and is classified as dangerous.
3. Deprivation of liberty should not be considered unless it is the least restrictive appropriate alternative.
4. Any judgment of dangerousness in this context must be approached with strong caution. It should be a judgment of this person as an individual, not simply as a member of a group with certain characteristics and with an overall probability rating. The state should bear the burden of proving that the person presents a significant risk of serious harm to others and the required level of risk should vary according to the seriousness of the predicted harm. Decision-makers should bear in mind the contestability of judgments of dangerousness and the scope for interpretation that they leave and individuals should have the rights of challenge and appeal.
5. If it is decided to add time to the proportionate sentence in response to a judgment of dangerousness, in principle that additional time should be the shortest period necessary to respond to the anticipated danger, and the time should be served under different conditions (see (9) below).
- ...
9. Any preventive detention going beyond the proportionate sentence should be served in non-punitive conditions with restraints no greater than those required by the imperatives of security. Where possible, detention that is purely preventive and not punitive should take place in a separate facility, not part of the prison system.¹²⁶

We have three observations to make about this.

First, we largely agree with Ashworth and Zedner regarding the circumstances in which post-sentence preventive detention will comply with human rights standards. In particular, we agree that regimes providing for such 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.

Second, we observe that courts around the world have held that post-sentence preventive detention regimes will breach human rights unless they observe limitations of the kind just noted.¹²⁷ In *M v Germany (M)*,¹²⁸ for example, the applicant had been convicted of serious offences in 1986. A German court imposed a term of imprisonment on him; and the sentencing judge also ordered that, once M's sentence expired, he was to remain in preventive detention for so long as he remained dangerous,¹²⁹ but for no longer than 10 years (the then statutory maximum term of preventive detention¹³⁰). By the time that M's 10-year period of preventive detention expired in 2001, however, the German government had passed legislation that allowed for the indefinite prolongation of such detention.¹³¹ When the German authorities then extended M's detention, M successfully applied to the ECtHR for a determination that

¹²⁵ See, eg, CR Williams, "Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case" (1990) 16(2) *Monash University Law Review* 161, 180–182; Harry Hobbs and Andrew Trotter, "Lessons from History in Dealing with Our Most Dangerous" (2018) 41(2) *UNSW Law Journal* 320, 351.

¹²⁶ Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP, 2014) 168–169.

¹²⁷ Note, however, that in *Grasskopf v Germany* (2011) 53 EHRR 7, the ECtHR held that Germany had not breached the ECHR by placing the applicant, an habitual burglar, in preventive detention. Ashworth and Zedner have rightly criticised this decision (Ashworth and Zedner, n 126, 166), which breaches their principle 2 quoted above: see text accompanying n 126.

¹²⁸ *M v Germany* [2009] VI Eur Court HR 169.

¹²⁹ *M v Germany* [2009] VI Eur Court HR 169, 177–178 [12].

¹³⁰ *M v Germany* [2009] VI Eur Court HR 169, 187 [52].

¹³¹ *M v Germany* [2009] VI Eur Court HR 169, 187–188 [53]–[54].

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

Germany had breached Art 5(1) of the ECHR¹³² – which provides that a person may be detained only in narrow circumstances – and Art 7(1)¹³³ – which provides that the state may impose on an offender no heavier penalty than that which applied when s/he offended.

Crucial to the Court’s conclusion was that those in preventive detention were detained in prison, albeit in different wings from sentenced prisoners.¹³⁴ And it noted also that, “there appear to be no special measures, instruments or institutions in place, other than those available to long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting their detention to what is strictly necessary in order to prevent them from committing further offences.”¹³⁵ The Court has subsequently stated¹³⁶ that post-sentence preventive detention regimes will comply with the ECtHR only if the detention they authorise: (1) applies to those with a “mental disorder”;¹³⁷ and (2) is served in facilities that focus on the treatment of such persons, so as to reduce the threat that they pose “to such an extent that the detention may be terminated as soon as possible”.¹³⁸ If these requirements are satisfied, there will be “lawful detention of ... persons of unsound mind” within the meaning of Art 5(1)(e),¹³⁹ which will not amount to a “penalty” for the purposes of Art 7(1).¹⁴⁰

Third, we note that the Div 105A scheme does not comply with Ashworth and Zedner’s limitations. In other words, it breaches human rights. Indeed, as much has been made clear by the United Nations Human Rights Committee (UNHRC) in its *Fardon v Australia* and *Tillman v Australia* communications. In those communications, the UNHRC found, respectively, that the post-sentence preventive detention scheme provided for by the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (*DPSOA*), and a similar New South Wales statute, imposed arbitrary punishment on detainees, contrary to Art 9(1) of the *ICCPR*.¹⁴¹ This was for a number of separately sufficient reasons, one of which was that, under the impugned schemes, detainees were detained *in prison*.¹⁴² The UNHRC held in this regard that the state had not established that *imprisonment* – as opposed to a less restrictive measure, such as supervision in the community or non-punitive detention – was the least intrusive way of achieving the relevant preventive purpose.¹⁴³ And, similarly to the ECtHR’s ruling in *M*, the UNHRC also held that the state had

¹³² *M v Germany* [2009] VI Eur Court HR 169, 206 [105].

¹³³ *M v Germany* [2009] VI Eur Court HR 169, 217 [137].

¹³⁴ *M v Germany* [2009] VI Eur Court HR 169, 214 [127].

¹³⁵ *M v Germany* [2009] VI Eur Court HR 169, 214 [128].

¹³⁶ *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018).

¹³⁷ We do not argue that, to comply with human rights, post-sentence preventive detention must apply only to those with such a disorder. This requirement seems nothing more than an attempt by the ECtHR to squeeze post-sentence preventive detention within the exhaustive list of cases of “lawful” detention recognised by *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Art 5(1). In other words, like the USSC in *Kansas v Hendricks*, 521 US 344 (1997), the ECtHR has presented such detention as being no different from the detention of the mentally ill and dangerous, to uphold preventive detention schemes for which governments believe there is a pressing need, but which do not seem to comply with constitutional/human rights limitations that were previously thought to exist. *In reality*, such schemes seem to apply to those who are merely dangerous, not just to those who are mentally ill and dangerous; and we believe this is morally permissible, provided that the state observes the limitations to which we refer above.

¹³⁸ *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [223].

¹³⁹ *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [135]–[141], [164]–[168].

¹⁴⁰ *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [210]–[235], [236].

¹⁴¹ Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) [7.4] (*Fardon v Australia*); *Tillman v Australia*, *Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) [7.4].

¹⁴² *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, [7.4]; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007, [7.4].

¹⁴³ *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, [7.4]; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007, [7.4].

Dyer and Pallas

imposed on Fardon and Tillman a heavier penalty than was available when they had offended (contrary to Art 15(1) of the *ICCPR*).¹⁴⁴

Because the Commonwealth government modelled Div 105A on the DPSOA and other similar State laws,¹⁴⁵ it is unsurprising that this Commonwealth regime bears many of the human rights vices that these State schemes do. In other words, because those detained under Div 105A serve such detention in prison, such detention is arbitrary within the meaning of Art 9(1) of the *ICCPR*. And because this scheme is (1) punitive and (2) came into force after Benbrika began serving his sentence, it imposes on him a heavier penalty than was available when he offended, contrary to Art 15(1) of the *ICCPR*.

Indeed, it would seem that the Div 105A scheme breaches human rights for further reasons. The scheme does not only apply to those who have been convicted of a *serious offence of violence* in the past.¹⁴⁶ It instead applies to those who have committed any of the offences referred to by s 105A.3(1) of the *Criminal Code*, including “a serious Part 5.3 offence”¹⁴⁷ and most of the foreign incursion and recruitment offences created by Pt 5.5.¹⁴⁸ As noted in Part II, the vast bulk of “serious Part 5.3 offences” are prophylactic – and the same is true of the Pt 5.5 offences (examples are entering a declared area in a foreign country¹⁴⁹ and preparing to enter a foreign country with the intention of engaging in hostile activity in that country¹⁵⁰). Likewise, a Court is not restricted to imposing continuing detention orders on those whom the state can prove “present ... a significant risk of serious harm to others”.¹⁵¹ It is merely necessary for the state to prove that the person poses an unacceptable risk of committing any of the Pt 5.3 offences just mentioned.¹⁵²

Furthermore, while a Court may only impose a continuing detention order on an individual if it is satisfied that “no less restrictive measure ... would be effective in preventing the unacceptable risk”,¹⁵³ the Div 105A scheme seems to allow for the imposition of continuing detention orders where an extended supervision order could reduce the risk posed by the relevant individuals to a tolerable extent. In short, because extended supervision orders can lead to a person being placed in conditions similar to house arrest,¹⁵⁴ it is difficult to imagine circumstances where a person subject to such an order would remain more likely than not to be responsible for a grave harm.

This last observation points to the final human rights problem with the Div 105A scheme (though not one that Ashworth and Zedner would recognise). As we argue at greater length below, the “high degree of probability ... that the offender poses an unacceptable risk” threshold,¹⁵⁵ is not so demanding a requirement as it might seem. It allows a court to make a continuing detention order, not merely where there is a *high probability* that, without such an order, the offender will commit a “serious Part 5.3 offence”. It is enough that it is highly probable that s/he poses an *unacceptable risk* of committing such an offence. In other words, while Ashworth and Zedner argue that “the state should bear the burden of proving that the person presents a *significant risk* of serious harm to others”,¹⁵⁶ we contend that the

¹⁴⁴ *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, [7.4]; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007, [7.4].

¹⁴⁵ See Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1035.

¹⁴⁶ Compare Ashworth and Zedner’s principle 2: see text accompanying n 126.

¹⁴⁷ *Criminal Code Act 1995* (Cth) s 105A.3(1)(a)(ii).

¹⁴⁸ *Criminal Code Act 1995* (Cth) s 105A.3(1)(a)(iii).

¹⁴⁹ *Criminal Code Act 1995* (Cth) s 119.2(1).

¹⁵⁰ *Criminal Code Act 1995* (Cth) s 119.4(1).

¹⁵¹ Compare Ashworth and Zedner’s principle 4: see text accompanying n 126.

¹⁵² *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹⁵³ *Criminal Code Act 1995* (Cth) s 105A.7(1)(c). Note Ashworth and Zedner’s principle 3: see text accompanying n 126.

¹⁵⁴ See *Thomas v Mowbray* (2007) 233 CLR 307, 430 [354] (Kirby J); [2007] HCA 33. See the below discussion of some of the restrictions that may be placed on a person subject to an extended supervision order: at text accompanying nn 166–170.

¹⁵⁵ See *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹⁵⁶ See Ashworth and Zedner’s principle 4 above: see text accompanying n 126. (emphasis added)

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

state should have to prove that, without a continuing detention order, the person *is more likely than not* to inflict a grave harm (or support or facilitate its commission).¹⁵⁷ It is undoubtedly true that, when the state devises the standard of proof, it must consider the magnitude of the feared harm.¹⁵⁸ But it must also be cognisant of the fact that continuing detention orders are imposed on people, not because they have committed an offence, but instead because they might offend in the future. Given this, and given the unreliability of risk predictions,¹⁵⁹ preventive detention regimes operate too broadly when they apply to those who merely pose a “significant” or “unacceptable” risk of serious violent offending in the future.

In the next section, we set out our recommendations for the reform of the Div 105A continuing detention order scheme. In making these recommendations, we aim to ensure that this scheme, if it is to operate at all, operates consistently with the human rights standards just identified.

IV. WHICH REFORMS SHOULD BE MADE TO DIVISION 105A?

A. Continuing Detention Orders Should Be Abolished

Are Div 105A continuing detention orders necessary? We do not believe that they are. Or, to put the same point in a different way, and as indicated above, extended supervision orders are seemingly sufficient to deal with the threat posed by terrorist offenders who remain dangerous at the conclusion of their respective prison sentences. To explain such views, we must deal with two matters. First, we must consider the circumstances in which a Court can impose an extended supervision order on a terrorist offender who remains dangerous at the end of his/her sentence – and the restrictions it may impose on him/her. Second, we must consider the government’s stated reasons for concluding that, by themselves, extended supervision orders cannot satisfactorily protect the Australian community against such offenders.

The Supreme Court of a State or Territory¹⁶⁰ can impose an extended supervision order on, among other persons, an adult¹⁶¹ who is currently imprisoned for any of the offences that are predicate offences for the purposes of continuing detention orders.¹⁶² The Court may make such an order if, though (a) the state has not applied for a continuing detention order or (b) the Court is not satisfied that a continuing detention order should be made,¹⁶³ it is satisfied on the balance of probabilities that “the offender poses an unacceptable risk of committing a serious Part 5.3 offence”¹⁶⁴ – and “each of the conditions” and “the combined effect of all of the conditions ... to be imposed upon the offender by the order 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.”¹⁶⁵ The range of possible “obligations, prohibitions and restrictions” is extensive. For example, a person upon whom an extended supervision order is imposed can be required to: remain at specified premises for up to 12 hours each day;¹⁶⁶ wear a tracking device;¹⁶⁷ not communicate or associate with particular persons;¹⁶⁸ not access

¹⁵⁷ Note the VCA’s decision in *RJE v Department of Justice* (2008) 21 VR 526; [2008] VSCA 265 (*RJE*). In *RJE*, their Honours held the applicable standard under the *Serious Sex Offenders Monitoring Act 2005* (Vic) to be proof that, without an extended supervision order, the individual was *more likely than not* to commit a relevant offence. Justice Nettle relied on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) when arriving at this conclusion.

¹⁵⁸ See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 56–57 [192]–[193] (Edelman J); [2021] HCA 4.

¹⁵⁹ See, eg. Michael Tonry, “Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again” (2019) 48 *Crime and Justice* 439, 450–451. Tonry notes (451) that currently only “two out of five positive predictions [of future violence] are correct”.

¹⁶⁰ *Criminal Code Act 1995* (Cth) s 105A.7A(1).

¹⁶¹ *Criminal Code Act 1995* (Cth) s 105A.3(1)(c).

¹⁶² *Criminal Code Act 1995* (Cth) s 105A.3(1)(a).

¹⁶³ *Criminal Code Act 1995* (Cth) s 105A.7A(1)(a).

¹⁶⁴ *Criminal Code Act 1995* (Cth) s 105A.7A(1)(b).

¹⁶⁵ *Criminal Code Act 1995* (Cth) s 105A.7A(1)(c).

¹⁶⁶ *Criminal Code Act 1995* (Cth) ss 105A.7B(2A), 105A.7B(3)(c).

¹⁶⁷ *Criminal Code Act 1995* (Cth) s 104A.7B(5)(d).

¹⁶⁸ *Criminal Code Act 1995* (Cth) s 105A.7B(3)(h).

Dyer and Pallas

specified “forms of telecommunication or other technology (including the internet)”;¹⁶⁹ and/or “report to persons” at specified times and places.¹⁷⁰

What were the Commonwealth government’s reasons for holding that a scheme such as this needed to be supplemented by continuing detention orders? As noted in Part I, the then Attorney-General addressed this question in his Second Reading Speech for the relevant Bill. So too did other government members in the ensuing debate in both Houses of Parliament. One of those members was Michael Sukkar.

According to Mr Sukkar, while some “questioned the need for a post-sentence preventive detention regime because we have control orders”,¹⁷¹ such views were misconceived. This, he said, was for the following reasons:

The public evidence from the Australian Federal Police and other agencies is that control orders are extraordinarily expensive both from a human resource perspective and from a financial perspective. Many, many millions of dollars are required to keep an eye on a high-risk offender terrorist offender in the community. Even when a control order is in place ... we cannot provide the community with a 100 per cent assurance of protection. The ... saddest recent example is that of the terrorist offender in France who slit the throat of a priest on the altar, killing that priest and injuring two other people. That person was subject to a French version of a control order.¹⁷²

There are two claims here. Each should be rejected.

The first claim is obviously insupportable and we can dismiss it briefly. Contrary to Mr Sukkar’s views, neither police administrative convenience nor resource considerations can ever justify detaining a person in prison, or anywhere else, for something that s/he has not done. Elsewhere in his remarks, Mr Sukkar stated that those who opposed the “sensible” Bill about which he was speaking were “quite a scary segment” of society.¹⁷³ Much scarier, we say, is the Commonwealth government’s apparent willingness to sacrifice the interests of unpopular minorities because this might achieve some financial benefit.

Mr Sukkar’s second claim is that Div 105A detention is justified because control orders (now, extended supervision orders) cannot provide the community with a “100% assurance” that those subject to such orders will thus be prevented from committing terrorist acts. And, certainly, it is understandable that, when a terrorist offence occurs:

ordinary Australians might say “How come we weren’t able to stop them? It seems so obvious that that person was radicalised. It seems so obvious that that person was embarking on a path of destruction”.¹⁷⁴

The problem, however, is that such people are looking at the matter through the “prism of hindsight”.¹⁷⁵ As suggested above, it is, in fact, rarely obvious that a particular offender will re-offend when s/he is at (conditional) liberty: predictions of future offending continue to be “more often inaccurate than accurate”.¹⁷⁶ Accordingly, the state could only provide the community with a “100% assurance” by detaining people who would be unlikely to offend, and who would not offend, if they were subject to an extended supervision order. In a liberal democracy, this should not happen. While governments should take reasonable measures to prevent people from being exposed to known or obvious risks of fatal or serious violence,¹⁷⁷ it is not reasonable to detain individuals who will probably be prevented from

¹⁶⁹ *Criminal Code Act 1995* (Cth) s 105A.7B(3)(i).

¹⁷⁰ *Criminal Code Act 1995* (Cth) s 105A.7B(5)(f).

¹⁷¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5159. Note that it was only with the coming into force of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) that judges were given the authority to impose extended supervision orders on certain terrorist offenders. Before that date, such offenders could instead be made subject to a control order. See *Criminal Code Act 1995* (Cth) Div 104.

¹⁷² Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5159.

¹⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5158.

¹⁷⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5158 (Michael Sukkar).

¹⁷⁵ *Rosenberg v Percival* (2001) 205 CLR 434, 441 [16] (Gleeson CJ); [2001] HCA 18.

¹⁷⁶ Tonry, n 159, 450.

¹⁷⁷ See, eg, *Mastroratteo v Italy* [2002] VIII Eur Court HR 151, 165–166 [68]–[69].

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

offending by less intrusive restrictions. Even if the detention of such persons would make the community safer than it would otherwise have been, this would come at too high a cost to “personal freedom”.¹⁷⁸

We concede that there would be a place for a continuing detention order scheme if there were terrorist offenders whom the state could prove would probably cause, or facilitate the commission of, grave harms even if they were subject to extended supervision orders. For, again, while the liberal state cannot prevent violent crime altogether, it does have to do what is reasonable to protect citizens from such conduct. But do such offenders exist? Given the extent of the restrictions that an extended supervision order may place on a person’s freedoms, and given the unreliability of risk prediction, it is hard to believe that the state could ever prove that a person subject to such an order was, despite this, more likely than not to perpetrate or support a terrorist act in the future. Indeed, some support for this conclusion is provided by Mr Sukkar’s inability to identify any Australian case where a person subject to a control order had engaged in such offending.

B. If Division 105A Detention Remains, It Should Be Non-punitive

If, contrary to what we have just argued, a continuing detention order scheme is necessary – or if it is not, but the Commonwealth government retains the Div 105A scheme even so – the government should ensure that Div 105A detention is truly non-punitive.

So to argue is of course implicitly to reject the view of the *Benbrika* plurality,¹⁷⁹ with Gageler J’s concurrence,¹⁸⁰ that such detention is already non-punitive. We reject this view for two, related, reasons. First, it “elevate[s] form over substance”.¹⁸¹ Second, such a view can only be reached by ignoring, as the plurality did,¹⁸² or effectively ignoring, as Gageler J did,¹⁸³ the established test for determining whether a particular species of detention is punishment.

The first of these points was made, not only by Edelman J in *Benbrika*,¹⁸⁴ but also in direct and cogent terms by Kirby J in *Fardon*.¹⁸⁵ “Only the most formalistic approach to the continued detention of the appellant *in prison*”, his Honour said, “could result in the pretence that his continued detention was not punishment.”¹⁸⁶ In other words, given that *Fardon*, like *Benbrika*, had been “retained in a penal custodial institution”,¹⁸⁷ and given that, as in *Benbrika*, no provisions appeared in the impugned law for the “care, treatment and rehabilitation” of detainees,¹⁸⁸ it was absurd to suggest that he was not being punished. For *Fardon*, “the normal incidents of punishment” were “precisely the same”¹⁸⁹ as when he was serving his prison sentence. “Simply calling the imprisonment by a different name (detention)”, Kirby J concluded, did “not alter its true character or punitive effect”.¹⁹¹

We agree entirely with this.¹⁹¹ It is impossible to accept that a prisoner held in essentially the same conditions as s/he was in when s/he was serving his/her retributive sentence is, somehow, no longer being

¹⁷⁸ Tonry, n 159, 445.

¹⁷⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 15–16 [38]–[41]; [2021] HCA 4.

¹⁸⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28–29 [86]–[88]; [2021] HCA 4. See also *Pollentine v Bleijie* (2014) 253 CLR 629, 657 [73] (Gageler J); [2014] HCA 30.

¹⁸¹ *Magaming v The Queen* (2013) 252 CLR 381, 407 [81] (Gageler J); [2013] HCA 40.

¹⁸² See text accompanying nn 78–80.

¹⁸³ See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 28–29 [86]–[88]; [2021] HCA 4.

¹⁸⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [182], 74 [239]; [2021] HCA 4.

¹⁸⁵ For academic endorsement of such views, see, eg, Patrick Keyzer, “Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?” (2008) 30(1) *Sydney Law Review* 101, 108–109; Bernadette McSherry, “Indefinite and Preventive Detention Legislation: From Caution to an Open Door” (2005) 29 *Crim LJ* 94, 109–110.

¹⁸⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 642 [176]; [2004] HCA 46 (original emphasis).

¹⁸⁷ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 640 [173]; [2004] HCA 46.

¹⁸⁸ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 640 [173]; [2004] HCA 46.

¹⁸⁹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 641 [173]; [2004] HCA 46.

¹⁹⁰ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 637 [165]; [2004] HCA 46.

¹⁹¹ As of course did the UNHRC in its *Fardon* communication: *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, n 141, [7.4].

Dyer and Pallas

punished. It is true that the state’s reasons for detaining such a person have changed. As the *Benbrika* plurality noted,¹⁹² Benbrika is now in prison, not to punish him *for his past misconduct*, but purely as a “‘measure’ of social protection”.¹⁹³ But, as Edelman J perceived, it is simply wrong to contend that detention is not punitive because it has only a protective aim.¹⁹⁴ Hart decisively rejected such reasoning as a “barren piece of conceptualism”.¹⁹⁵ As that commentator elsewhere stated, the debate between retributivist and utilitarian punishment theorists cannot be settled simply by saying that punishment imposed other than for retributive reasons is, in fact, not punishment.¹⁹⁶

Our second point follows on from the first. We have seen that, in *Fardon*, Kirby J focused on the *effects* of Fardon’s detention, rather than on how the Queensland Parliament had sought to characterise that detention. Such an approach is reminiscent of that taken by the ECtHR in *M*. In that case, consistently with its previous jurisprudence,¹⁹⁷ the Strasbourg Court held that, when determining whether M’s detention was a “penalty” for the purposes of Art 7 of the *ECHR*, the way in which German law characterised that detention, while relevant, was not determinative.¹⁹⁸ Accordingly, while, in Germany, such detention was “not considered as a penalty”, “but to be of a purely preventive nature aimed at protecting the public from a dangerous offender”,¹⁹⁹ the ECtHR declined to be bound by such a classification.²⁰⁰ When it looked beyond the state’s label,²⁰¹ it found that the impugned detention was in fact a “penalty”. Whatever the purpose of the applicant’s detention, there was “no substantial difference” between how it and ordinary prison sentences were executed.²⁰² From the applicant’s point of view, his current detention was relevantly the same as the prison sentence that had preceded it.²⁰³

Justice Kirby’s approach is, however, far less reminiscent of the approach taken by most other Australian judges to the question of when a person is being punished. So, while in *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs*, his Honour thought it arguable that an alien would be punished if subjected to conditions in “immigration detention” that were “inhuman and intolerable”,²⁰⁴ the majority refused to consider the effects of the appellant’s detention when their Honours assessed whether such detention could be viewed as punitive.²⁰⁵ As Callinan J put the matter, the question was whether the detention was “reasonably capable of being seen as necessary for a legitimate [non-punitive] purpose”.²⁰⁶ But, when answering that question, his Honour said, a Court:

cannot be concerned with a qualitative assessment of the conditions of detention. It is concerned with the purpose of the law authorising the detention.²⁰⁷

¹⁹² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 16 [40]; [2021] HCA 4.

¹⁹³ To use Hart’s language: HLA Hart, “Punishment and the Elimination of Responsibility” in Hart, *Punishment and Responsibility* (OUP, 2008) 158, 166.

¹⁹⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 53 [183]; [2021] HCA 4.

¹⁹⁵ Hart, n 193, 158, 166.

¹⁹⁶ Hart, n 105, 1, 5-6.

¹⁹⁷ See, eg. *Welch v United Kingdom* (1995) 20 EHRR 247, [28], [31].

¹⁹⁸ *M v Germany* [2009] VI Eur Court HR 169, 211 [120], 213-214 [125]-[127].

¹⁹⁹ *M v Germany* [2009] VI Eur Court HR 169, 213 [125].

²⁰⁰ *M v Germany* [2009] VI Eur Court HR 169, 213 [126].

²⁰¹ Lucia Zedner, “Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?” (2016) 20(1) *Theoretical Criminology* 3, 11.

²⁰² *M v Germany* [2009] VI Eur Court HR 169, 214 [127].

²⁰³ See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 68 [222] (Edelman J); [2021] HCA 4.

²⁰⁴ *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 528 [122]; [2004] HCA 36.

²⁰⁵ *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 [21] (Gleeson CJ), 507 [53] (McHugh, Gummow and Heydon JJ), 542-543 [174]-[176] (Hayne J), 559 [218] (Callinan J); [2004] HCA 36.

²⁰⁶ *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 559 [218]; [2004] HCA 36.

²⁰⁷ *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 559 [218]; [2004] HCA 36.

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

The difficulty with this reasoning is that the purpose and conditions of detention are by no means entirely separate issues. In other words, for so long as Courts determine what the detention's purpose is by asking themselves the "reasonably capable" question that Callinan J notes, surely they must rationally consider how severe the conditions of such detention are? It is true that the plurality in *Falzon* denied that the "reasonably capable" inquiry involves proportionality testing.²⁰⁸ But, as we have seen, their Honours also stated that, if a law "goes further" than is necessary to achieve the relevant non-punitive purpose, it "may be inferred" that the detention authorised by that law is punitive.²⁰⁹ And in *Re Woolley; Ex parte M276/2003*, McHugh J, who, like the *Falzon* plurality, thought that "questions of proportionality do not arise"²¹⁰ when a Court assesses whether detention is punishment, conceded that solitary confinement of an asylum seeker would be punitive detention.²¹¹ His Honour explained that that was because such detention "would go beyond what [was] ... necessary to prevent the detainee from entering the Australian community" while his/her visa application was being assessed.²¹²

Consistently with Zines's remarks when commenting on McHugh J's solitary confinement example,²¹³ these judicial references to laws that "go further" or "go beyond" what is necessary to achieve the stated non-punitive purpose, show that the relevant question is a proportionality question. And if that question is to be answered properly – if the "reasonably capable" test is to have real content – the Courts must consider more than "the designation of the detention facility and the name on the gate".²¹⁴ If the conditions of detention are harsher than is necessary to achieve the legislative purpose, the detention will be "disproportionate in relation to [that] ... end";²¹⁵ the detention will be punitive. Accordingly, when, in *Benbrika*, the plurality and Gageler J found that Benbrika's detention was non-punitive, they took insufficient account of the fact that such detention was practically identical to detention that follows an orthodox sentence of imprisonment. We have posed the question above,²¹⁶ and we now pose it again. How could it be said that Benbrika's detention was "reasonably capable of being seen as necessary"²¹⁷ to "protect ... the community from harm"²¹⁸ when precisely the same protective effect would have been achieved by detention in a place other than a gaol?

Once it is accepted that Div 105A detention is in fact punitive, it follows, as argued above,²¹⁹ that such detention breaches the human rights of those upon whom it is imposed. The Commonwealth government should not allow this to continue. It should instead ensure that those subject to continuing detention orders are placed in "considerably improved material conditions compared to ordinary prison conditions"²²⁰ and provided with access to specific and targeted rehabilitative measures. Of course, the government might not wish to go to the expense of constructing non-punitive detention facilities in

²⁰⁸ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [28], 344 [32] (Kiefel CJ, Bell, Keane and Edelman JJ); [2018] HCA 2.

²⁰⁹ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 [29]; [2018] HCA 2.

²¹⁰ *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 33 [79]; [2004] HCA 49.

²¹¹ *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, [78]; [2004] HCA 49.

²¹² *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, [78]; [2004] HCA 49.

²¹³ Zines, n 80, 289. See also James Stellios, *Zines's High Court and the Constitution* (Federation Press, 6th ed. 2015) 317.

²¹⁴ *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 528 [123] (Kirby J); [2004] HCA 36.

²¹⁵ Zines, n 80, 289.

²¹⁶ See text accompanying n 80.

²¹⁷ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [26] (Kiefel, Bell, Keane and Edelman JJ); [2018] HCA 2, quoting *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

²¹⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 14 [36] (Kiefel CJ, Bell, Keane and Steward JJ); [2021] HCA 4.

²¹⁹ See text accompanying nn 142–144.

²²⁰ *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018), [220].

Dyer and Pallas

which to house the persons whom Div 105A targets.²²¹ But, if the Div 105A detention scheme remains in force, that is necessary if that scheme is to operate compatibly with human rights.

C. Any Division 105A Detention Scheme Should Apply Far More Narrowly than It Now Does

1. There Should Have to Be a Risk of Grave Harm

We have seen that, in *Benbrika*, Gageler and Gordon JJ held that, because Div 105A allows for the continuing detention of those who pose an unacceptable risk of prophylactic offending without such detention, it clashes with “the core values which underpin the separation of powers – the protection of liberty and the independence of the judiciary”.²²² We have also seen that this characteristic of Div 105A detention is a further reason why it breaches human rights. It follows, in our view, that, if the Commonwealth government retains such detention, it should reform the test that the Minister must satisfy if s/he is to persuade a Court to make a continuing detention order. It should not be enough for the Minister to prove that there is a sufficiently high risk that the offender will commit a “serious Part 5.3 offence” if s/he is released (even if s/he is subject to an extended supervision order).²²³ Rather, the Minister should have to prove that there is a sufficiently high risk that, if the offender is released (even under an extended supervision order), s/he will commit, or facilitate or support the commission of, a “terrorist act”.²²⁴

In *Benbrika*, Gageler J noted²²⁵ that a “remarkable” feature of Div 105A is that, while it allows continuing detention orders to be made where certain terrorist offenders otherwise would pose an unacceptable risk of committing a Part 5.3 offence for which the maximum penalty is seven years’ imprisonment,²²⁶ no Part 5.3 offence has a maximum penalty of seven years’ imprisonment. What was the explanation for this? His Honour thought that Parliament had defined the term “serious Part 5.3 offence” as it had because this was in keeping with how the term “serious sex offence” was defined in certain State legislation²²⁷ that allows for continuing detention orders to be made against particular sexual offenders. The problem, Gageler J observed, was that, whereas these sexual offences involved “inherently harmful conduct”, most of the “serious Part 5.3 offences” did not.²²⁸ In other words, because, consistently with our observations in Part II, the relevant provisions in Part 5.3 criminalise much preparatory conduct,²²⁹ continuing detention orders can be imposed to prevent terrorist offenders from performing conduct that is harmless in itself. An example used by Gageler J to illustrate this point is “the offence of taking steps to become a member of a terrorist organisation”.²³⁰ The state does not intervene because the person who engages in such conduct causes any actual harm. Rather, it intervenes for preventive reasons: it considers his/her conduct to carry a high enough risk of leading to future harmful acts – either by the actor him/herself or by another person or other persons – to warrant its criminalisation.²³¹

²²¹ Though note that, in response to the ECtHR’s decision in *M v Germany* [2009] VI Eur Court HR 169, the German government, “at considerable cost”, built such facilities: *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [222].

²²² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 45 [150] (Gordon J); [2021] HCA 4.

²²³ See *Criminal Code Act 1995* (Cth) s 105A.7(1)(b)–(c).

²²⁴ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 48–49 [163] (Gordon J); [2021] HCA 4.

²²⁵ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 31 [96]; [2021] HCA 4.

²²⁶ *Criminal Code Act 1995* (Cth) ss 105A.7(1)(b), 105A.2 (definition of “serious Part 5.3 offence”).

²²⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 31 [96] (Gageler J); [2021] HCA 4.

²²⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 31 [97]; [2021] HCA 4. Compare 70–71 [230] (Edelman J).

²²⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 50 [166] (Gordon J); [2021] HCA 4. See also, eg, *Lodhi v The Queen* (2006) 199 FLR 303, 318 [66] (Spigelman CJ); [2006] NSWCCA 121.

²³⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 20 [56]; [2021] HCA 4. See *Criminal Code Act 1995* (Cth) ss 102.3, 102.1 (definition of “member”).

²³¹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 20 [56]; [2021] HCA 4.

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

Where a continuing detention order is made to prevent the commission of offences such as this, the following questions come immediately to mind. Should the state detain people to prevent them from committing offences that themselves have a preventive focus? Is it necessary to add an extra layer of prevention? It is hard to see why either question should be answered in the affirmative. To be sure, as the plurality²³² and Edelman J²³³ indicated in *Benbrika*, a Court might in practice be slow to impose a continuing detention order on a terrorist offender unless s/he poses an unacceptable risk of committing, or supporting or facilitating, a terrorist act.²³⁴ That is, perhaps in many cases where such offenders merely pose an unacceptable risk of prophylactic offending, the Court will find that an extended supervision order will reduce the risk “to an acceptable level”.²³⁵ But, even so, the question remains: why should it even be possible for a Court to impose a continuing detention order on a person who poses no risk of inflicting grave harm (either as a principal offender or an accessory)? We believe that it should *not* be, and contend that the Commonwealth government should amend Div 105A to ensure that a Court may make a continuing detention order only if satisfied that there is a sufficiently high risk that, otherwise, the offender will “commit ... a terrorist act ... or ... will aid, abet, counsel or procure another person to commit a terrorist act”.²³⁶

Are there difficulties in identifying the precise offences that should be qualifying offences for the purposes of the Div 105A scheme? In *Benbrika*, Gageler J stated that no “bright line can be drawn around those Part 5.3 offences unacceptable risk of commission of which can be taken to indicate an unacceptable risk of the occurrence of a terrorist act or support for or facilitation of a terrorist act”.²³⁷ However, in our view, because most offences in Part 5.3 criminalise conduct that is harmless in itself, only a minority of the offences in that Part satisfy the relevant criteria. Clearly, the offence created by s 101.1 of the *Criminal Code* – engaging in a terrorist act – should be a qualifying offence. But even most of the very serious crimes in that Part are prophylactic offences. Take the offence created by s 102.2(1): intentionally directing the activities of a terrorist organisation, knowing it to be a terrorist organisation (punishable by 25 years’ imprisonment). If a terrorist offender presents a high enough risk of committing this offence if released, even under supervision, would a continuing detention order be warranted? In such a case, there would be a risk of a risk. That is, there would be a risk that this person would perform conduct that carries a risk of facilitating a terrorist act. It is hard to see how the risk of the ultimate harm – a terrorist act – would ever be high enough in such a case as to warrant a continuing detention order.

The same comments apply to many of the other very serious offences in Part 5.3, for example:

- (i) providing or receiving training, knowing that the training is connected with preparation for (etc) a terrorist act (an offence created by s 101.2(1) of the *Criminal Code*);
- (ii) possessing a thing, knowing that the thing is connected with the preparation for (etc) a terrorist act (an offence created by s 101.4(1) of the *Criminal Code*);
- (iii) collecting or making a document that is connected with the preparation for (etc) a terrorist act, knowing of such a connection (an offence created by s 101.5(1) of the *Criminal Code*);
- (iv) doing an act in preparation for, or planning, a terrorist act (an offence created by s 101.6(1) of the *Criminal Code*);
- (v) intentionally being a member of a terrorist organisation, knowing it to be a terrorist organisation (an offence created by s 102.3(1) of the *Criminal Code*);
- (vi) intentionally recruiting a person to join (etc) a terrorist organisation, knowing it to be a terrorist organisation (an offence created by s 102.4(1) of the *Criminal Code*);
- (vii) intentionally providing (etc) training to a terrorist organisation, while being reckless to whether it is a terrorist organisation (an offence created by s 102.5(1) of the *Criminal Code*);

²³² *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 19 [47] (Kiefel CJ, Bell, Keane and Steward JJ); [2021] HCA 4.

²³³ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 56–57 [192]–[195]; [2021] HCA 4.

²³⁴ Compare *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 52 [176] (Gordon J); [2021] HCA 4.

²³⁵ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 57 [195] (Edelman J); [2021] HCA 4.

²³⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 51 [173] (Gordon J); [2021] HCA 4.

²³⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 32 [100]; [2021] HCA 4.

Dyer and Pallas

- (viii) intentionally making funds available to (etc) a terrorist organisation, knowing it to be a terrorist organisation (an offence created by s 102.6(1) of the *Criminal Code*);
- (ix) intentionally providing support (etc) to a terrorist organisation, knowing that it is a terrorist organisation (an offence created by s 102.7(1) of the *Criminal Code*);
- (x) intentionally providing or collecting funds, being reckless as to whether those funds will be used to facilitate or engage in a terrorist act (an offence created by s 103.1(1) of the *Criminal Code*, liability for which can attach even if the terrorist act does not occur²³⁸ and even if the funds will not be used to facilitate a specific terrorist act²³⁹); and
- (xi) intentionally making funds available to a person (etc), being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (an offence created by s 103.2(1) of the *Criminal Code*, liability for which can attach, as with the s 103.1(1) offence, even if the terrorist act does not occur²⁴⁰ and even if the funds will not be used to facilitate a specific terrorist act²⁴¹).

All of these offences capture conduct that is remote from the commission of a terrorist act. We are therefore skeptical as to whether the risk of any of them should provide a sufficient basis for a continuing detention order. Again, if a person poses a high enough risk of performing conduct that is not by itself harmful, but instead creates a risk of harmful conduct occurring in the future, can the risk of the ultimate harm ever be high enough to warrant preventive detention?

B. The Risk Threshold Should Be Raised

We have just stated that, before a Court may make a continuing detention order, the Minister should be required to prove that there is a “sufficiently high risk” that an offender will commit a terrorist act, or support or facilitate the commission of such an act. But what do we mean by “sufficiently high risk”? In our view, Div 105A, if it is to continue to authorise preventive detention, should state that a judge may make a continuing detention order only if s/he is satisfied that, without such an order, there is a *greater than 50% chance* that the offender will perform a terrorist act, or support or facilitate the commission of such an act.²⁴²

Currently, as we have seen, the Minister must prove to a high degree of probability that an offender poses an unacceptable risk of committing a “serious Part 5.3 offence”.²⁴³ And it might be thought that this is a very demanding standard of proof. Certainly, Senator Brandis asserted as much in the relevant Second Reading Debate. Such a standard, he said, “sits between the traditional civil standard of proof, which is on the balance of probabilities or ... ‘more likely than not’ and the criminal standard, which is beyond reasonable doubt.”²⁴⁴ That statement, however, is misleading. That is because it tends to direct our attention to the “high probability” requirement and downplay what the Minister must prove is highly probable. The Minister need not prove that it is highly probable that the offender will commit a “serious Part 5.3 offence” if released. S/he must merely prove that there is a high probability of an *unacceptable risk* of the offender’s commission of such an offence. By requiring proof that there is, say, a 75% probability of a 10% risk that an offender will commit certain conduct if released, s 105A.7(2) does not place as great a burden on the Minister as Senator Brandis seemed to suggest.

At this stage, three things must be noted.

²³⁸ *Criminal Code Act 1995* (Cth) s 103.1(2)(a).

²³⁹ *Criminal Code Act 1995* (Cth) s 103.1(2)(b).

²⁴⁰ *Criminal Code Act 1995* (Cth) s 103.2(2)(a).

²⁴¹ *Criminal Code Act 1995* (Cth) s 103.2(2)(b).

²⁴² The Law Council of Australia has recently expressed its support for a “more likely than not” risk threshold: Parliamentary Joint Committee on Intelligence and Security, “Review of Police Powers in Relation to Terrorism, the Control Order Regime, the Preventative Detention Order Regime and the Continuing Detention Order Regime” (October 2021) 80 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024517/toe_pdf/Reviewofpolicepowersinrelationtoterrorism,thecontrolorderregime,thepreventivedetentionorderregimeandthecontinuingdetentionorderregime.pdf;fileType=application%2Fpdf>.

²⁴³ *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

²⁴⁴ Commonwealth, *Parliamentary Debates*, Senate, 1 December 2016, 3911 (Senator Brandis, Attorney-General).

Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights

The first is that the *Benbrika* litigation seems to confirm that, as we have just contended, the state can prove that a person poses an “unacceptable risk” of committing a “serious Part 5.3 offence” without establishing that *it is more likely than not* that s/he will commit such an offence in the absence of a continuing detention order. At first instance in those proceedings, Tinney J accepted that, as the VCA had held in *Nigro v Secretary to the Department of Justice (Nigro)*, “the concept of unacceptable risk is a flexible one.”²⁴⁵ His Honour also adopted the *Nigro* statement that, in an individual case, a number of factors will be taken into account when assessing whether the risk is “unacceptable”.²⁴⁶ Those factors are: the type of offence that the person might commit; the likelihood of that offence occurring; and the nature and gravity of harm that might be caused.²⁴⁷ In other words, whether there is an “unacceptable risk” hinges not only on questions of probability, but also on the gravity of the feared harm. The graver the harm, the less probable that harm must be for the risk of its occurrence to be “unacceptable.”

In the HCA, Edelman J expressed a similar view. “Whether a risk of commission of a Pt 5.3 offence is ‘unacceptable’, his Honour held, “is not limited to the likelihood of the commission of the offence.”²⁴⁸ The seriousness of the feared harm, he continued, is also an important consideration.²⁴⁹ Accordingly, Edelman J concluded, a risk might be “unacceptable”, where, even though that risk is “not high”, the offence that the person might commit is one that “threatens the safety and protection of the community”.²⁵⁰

The second point is essentially a response to those who would defend the current standard of proof. Why, it might be said, should the state have to wait until a person is more likely than not to involve him/herself in an act of terrorist violence, before it may detain him/her on preventive grounds? Why should it not be enough for the state to prove that such a person poses an “unacceptable risk” of conducting him/herself in such a way unless s/he is placed in detention?

To an extent, we have addressed this matter above;²⁵¹ but we shall briefly restate our reasons for opposing the “unacceptable risk” standard. It is understandable that some sections of the community consider that, if an offender poses, say, a 10% chance of committing a terrorist act if s/he is released, the state should be entitled to detain that person. But it must also be remembered that there is a 90% chance that s/he will not offend in such a way. The necessary price of living in a liberal democracy is that we cannot be protected against all risks. Accordingly, unless a court can be fairly sure that an offender will offend again seriously in the future, it should not detain him/her until s/he does so.

The third point, on the other hand, is a response to those who would dissent from our proposal on the basis that it – like the “unacceptable risk” threshold – allows for preventive detention to be ordered too easily. We have just said that, for a continuing detention order to be justified, a court should have to be *fairly sure* that, otherwise, an offender will be responsible for a grave harm in the future. But, it might be said, why not remove the adverb? In other words, should such detention only be possible if a court can be *sure* that, without it, the person will perpetrate or facilitate such violence?

Meyerson has indicated some support for the view that, if preventive detention is to be ordered, the state should be required to prove *beyond reasonable doubt* that, without such detention, the individual will offend very seriously.²⁵² This is what is required at a criminal trial, she observes, so why should a lower standard of proof be enough where the detention at issue is purely “forward-looking”?²⁵³ Many of us, she

²⁴⁵ *Minister for Home Affairs v Benbrika* [2020] VSC 888, [400], quoting *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 404 [165]; [2013] VSCA 213.

²⁴⁶ *Minister for Home Affairs v Benbrika* [2020] VSC 888, [401], quoting *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 391 [117]; [2013] VSCA 213.

²⁴⁷ *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 404 [165]; [2013] VSCA 213.

²⁴⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 56 [192]; [2021] HCA 4.

²⁴⁹ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 56 [192]; [2021] HCA 4.

²⁵⁰ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 56–57 [192]; [2021] HCA 4.

²⁵¹ See text accompanying nn 174–178.

²⁵² Denise Meyerson, “Risks, Rights, Statistics and Compulsory Measures” (2009) 31 *Sydney Law Review* 507, 523–524. That said, she concludes that proof of a high degree of likelihood is the appropriate threshold: 533.

²⁵³ Meyerson, n 252, 524.

Dyer and Pallas

notes, have “strongly-held intuitions that the state’s negative obligations not to violate rights are more important than its positive obligations to prevent harm”.²⁵⁴ Why should such intuitions not be reflected in the standard of proof that the state must discharge when it seeks to detain for *either* past or future crimes?

Consistently with what one of us has argued elsewhere,²⁵⁵ while we applaud Meyerson’s liberal instincts, and while we sympathise with her suspicion of preventive detention, there are good reasons for not requiring the state to prove *to the criminal standard* that a person will offend seriously in the future in the absence of a continuing detention order. The main such reason concerns the different nature of the criminal trial from proceedings in which the state seeks a continuing detention order. The purpose of a criminal trial is to test the Crown’s allegation that the accused offended in the past. There being no allegation that the accused will engage in criminal wrongdoing in the future, it would be wrong for the state, when devising the standard of proof, to balance the accused’s liberty interest against the community’s interest in being protected from what s/he may do. The purpose of continuing detention order proceedings, on the other hand, is to ascertain whether, as the government alleges, a person who has offended in the past is too dangerous to be released. Given this purpose, it seems reasonable for the state, when assessing what the standard of proof should be, to balance the respondent’s interest in avoiding detention without guilt, against the interests of those who might in the future be victimised by him/her. This is not to say that the respondent’s liberty interest is weak. Meyerson is right to argue that it is very strong. It is merely to say that, in the face of proof that such a person will probably cause serious harm in the future if s/he is not placed in detention, it seems that the state should detain that person (in conditions that are non-punitive). If it were to do otherwise, it would seemingly not be taking reasonable measures to protect the community from violent crime.

V. CONCLUSION

In *Benbrika*, Edelman J referred repeatedly to the “individual injustice”²⁵⁶ suffered by those in Div 105A detention; and, in this article, we have argued that such persons do suffer such an injustice. Because such people have been “imprison[ed] ... for something that they ... might do”,²⁵⁷ they *are* being punished – and to punish a person in such circumstances is to deprive him/her “of the rights of a human being”.²⁵⁸

How do we remove the “individual justice” to which Edelman J referred? Our primary contention here is that the Div 105A detention scheme should be abolished. But if that scheme is retained, it should be altered so as it operates compatibly with human rights standards. Courts should not be able to impose a continuing detention order on a terrorist offender who poses an *unacceptable risk* of *prophylactic* offending. They should only be able to make such an order upon proof that, without it, the offender is more likely than not to commit, or support or facilitate, actual terrorist violence. And the resulting detention should not take place in gaol, as it does at the moment, but in conditions that are non-punitive.

²⁵⁴ Meyerson, n 252, 524.

²⁵⁵ Dyer, n 67, 529.

²⁵⁶ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185], 67 [222], 68 [224]; [2021] HCA 4.

²⁵⁷ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185] (Edelman J); [2021] HCA 4 (emphasis added).

²⁵⁸ *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; 388 ALR 1, 54 [185] (Edelman J); [2021] HCA 4, quoting CS Lewis, ‘The Humanitarian Theory of Punishment’ (1953) 6 *Res Judicatae* 224, 225.

APPENDIX B

NSW Council for Civil Liberties ('NSWCCL') and the Sydney Institute of Criminology ('SIC')

Updated Submission to the INSLM's Review of Division 105A of the *Criminal Code*

23 June 2022

Continuing Detention Orders ('CDOs')

Issue 1: Repeal CDOs

The NSWCCL and SIC maintain that the Commonwealth government should give serious consideration to whether the CDO scheme provided for by Div 105A of the *Criminal Code Act 1995* (Cth) ('Criminal Code') is necessary.¹ We concede that there would be a place for a continuing detention order scheme if there were terrorist offenders whom the state could prove would probably cause, or facilitate the commission of, grave harms even if they were subject to extended supervision orders ('ESOs'). But, given the extent of the restrictions that an ESO may place on a person's freedoms,² and given the unreliability of risk prediction,³ we find it difficult to accept that the state could ever prove that a person subject to such an order was, despite this, more likely than not to perpetrate, or support or facilitate, a 'terrorist act'⁴ in the future.⁵

Issue 2: Alternatively, amend the CDO scheme to make it as consistent as possible with human rights

The NSWCCL and SIC maintain that, if the CDO scheme is retained, the Commonwealth government should amend that scheme to ensure that it operates as consistently as possible with human rights. In so arguing, we make several submissions:

- First, the government should alter the test created by s 105A.7(1) of the Criminal Code. A Court should only be able to impose a CDO on an eligible offender if it is satisfied that, in the absence of such an order, there is (a) a greater than 50% chance⁶ (b) that the offender will commit, or support or facilitate the commission of, a 'terrorist act'.⁷
- Secondly, the government should ensure that detention under a CDO is truly non-punitive.⁸ We note in this regard that, in *M v Germany*, the European Court of Human Rights held a German preventive detention scheme to be punitive, on the basis that detainees were 'detained in ordinary prisons, albeit in separate wings'⁹ and there

¹ See NSWCCL and SIC Written Submission, pp. 4 and 16.

² See *Criminal Code Act 1995* (Cth) s 105A.7B.

³ See NSWCCL and SIC Written Submission, pp. 23-5.

⁴ See *Criminal Code Act 1995* (Cth) s 100.1 (definition of 'terrorist act') – and note the offence created by s 101.1(1).

⁵ For a fuller statement of this argument, see 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(1) *Public Law Review* 61, 73-5.

⁶ NSWCCL and SIC Written Submission, pp. 20-3; Dyer and Pallas (n 5) 80-2.

⁷ NSWCCL and SIC Written Submission, pp. 16-20; Dyer and Pallas (n 5) 78-80.

⁸ NSWCCL and SIC Written Submission, p. 17; Dyer and Pallas (n 5) 75-8.

⁹ [2009] VI Eur Court HR 169, 214 [127]. Compare *Criminal Code Act 1995* (Cth) s 104A.4(1)-(2).

were no special rehabilitative resources directed at them.¹⁰ We also note that, in response to *M*, and other decisions like it, the German authorities, at ‘considerable cost’, built special preventive detention centres and provided detainees with access to ‘individual and intensive psychiatric, psychotherapeutic ... [and] socio-therapeutic treatment’.¹¹ If the Commonwealth government is unwilling to go to such expense, it should at least repeal s 105A.4(1)(a) of the Criminal Code, which provides that ‘the management, security or good order of the prison’ is a sufficient reason to treat a person subject to a CDO other than ‘in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment’. The NSWCCCL and SIC support recommendations of the Australian Human Rights Commission (‘AHRC’)¹² and the Law Council of Australia (‘LCA’)¹³ to this effect.¹⁴ We also support the AHRC’s recommendations 12-15 in its submission to this Review and the LCA’s recommendations 36-39 in its submission dated 17 September 2020 to the Parliamentary Joint Committee on Intelligence and Security (which forms part of its submission to this Review).

- Thirdly, the Commonwealth government should remove the matters referred to by, respectively, ss 105A.6B(1)(g) and 105A.6B(1)(h), from the non-exhaustive list of matters to which a Court must have regard when determining whether the statutory tests created by, respectively, ss 105A.7(1)(b) and 105A.7A(1)(b) are satisfied. That is, when deciding to make a CDO – or an ESO – the Court should be required to consider neither the offender’s history of terrorist offending nor the views of the sentencing court when sentencing him or her.¹⁵
- Fourthly, though the SIC and NSWCCCL did not mention this matter in our Written Submission,¹⁶ we agree with the AHRC’s recommendation that the INSLM consider whether s 105A.3 of the Criminal Code should be amended so as to have the CDO scheme apply only to those who have been sentenced to a certain number of years’ imprisonment.¹⁷ We also argue, consistently with the position adopted by Legal Aid

¹⁰ [2009] VI Eur Court HR 169, 214 [128]. Compare *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, 15 [37], 15 [39] (Kiefel CJ, Bell, Keane and Steward JJ). See too Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) (“*Fardon v Australia*”); Human Rights Committee, *Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) (“*Tillman v Australia*”).

¹¹ *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [222].

¹² Australian Human Rights Commission Written Submission, p. 50 (Recommendation 11).

¹³ Law Council of Australia, ‘Review of Australian Federal Police Powers’ (Parliamentary Joint Committee on Intelligence and Security, 17 September 2020) 69 (Recommendation 40).

¹⁴ We acknowledge, too, that there is obvious force in Legal Aid NSW’s submission that the government should amend s 105A.4 to require that a person detained under a CDO not be held, in any circumstances, with sentenced or remanded inmates. See Legal Aid NSW Written Submission, p. 23.

¹⁵ NSWCCCL and SIC Written Submission, p. 25.

¹⁶ Though see NSWCCCL and SIC Written Submission, pp. 12-13 and Dyer and Pallas (n 5) 70, where we argue that, ideally, preventive detention regimes should apply only to those who have been convicted of serious violent offending.

¹⁷ AHRC Written Submission, p. 26 (Recommendation 2). See also Law Council of Australia (n 13), p. 62 (Recommendation 30), where a sentence of 7 years’ imprisonment is mentioned.

NSW,¹⁸ that s 105A.1 of the Criminal Code should be amended to provide that rehabilitation of relevant terrorist offenders is an object of Division 105A.

Issue 3: Relationship with ESOs

As suggested above, the NSWCCCL and SIC recommend that ESOs should act as the only – or, failing that, primary – mechanism for managing a terrorist offender’s risk to the community following the expiry of his or her sentence. That is, ESOs should be retained (although, as argued below, some modifications should be made to the ESO scheme created by Div 105A). We maintain that an ESO scheme *can* operate compatibly with human rights standards,¹⁹ and that the prosecution of those who contravene an ESO *can* be justified²⁰ – though we agree with the AHRC’s concerns about the prosecution of trivial breaches of ESO conditions²¹ and with the AHRC’s Recommendations 23-25 in its Written Submission to this Review.²²

ESO

Issue 1: The NSWCCCL and SIC support all but one of the AHRC’s recommendations regarding ESOs

Since the SIC and the NSWCCCL drafted our Written Submission to this Review, the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) has come into force. As a result, ESOs rather than control orders are now the primary method used by the state to supervise ‘terrorist offenders’²³ who are thought to remain dangerous after the expiry of their respective sentences. The NSWCCCL and the SIC support the bulk of the AHRC’s recommendations regarding ESOs. Specifically, the NSWCCCL and the SIC agree that: (i) the definition of ‘specified authority’ in s 100.1(1) of the Criminal Code should be altered in the manner recommended by the AHRC;²⁴ (ii) the AHRC’s recommendation 18, relating to the *consensual* participation in rehabilitation programmes etc, should be effected;²⁵ and (iii) the AHRC’s recommendations 19²⁶ (relating to the monitoring of those subject to ESOs), 20²⁷ (relating to applications for exemptions), 21²⁸ (relating to the consideration of the effect of proposed ESO conditions on an individual offender’s circumstances) and 22²⁹ (relating to the variations of interim supervision orders (‘ISOs’)), should also be effected. Moreover, as

¹⁸ Legal Aid NSW Written Submission, p. 5 (Recommendation 6).

¹⁹ See NSWCCCL and SIC Written Submission, p. 16.

²⁰ NSWCCCL and SIC Written Submission, p. 29.

²¹ AHRC Written Submission, pp. 67-73.

²² AHRC Written Submission, p. 73.

²³ See *Criminal Code Act 1995* (Cth) ss 105A.2 (definition of ‘terrorist offender’) and 105A.3(1).

²⁴ AHRC Written Submission, p. 58.

²⁵ AHRC Written Submission, p. 60.

²⁶ AHRC Written Submission, p. 62.

²⁷ AHRC Written Submission, p. 64.

²⁸ AHRC Written Submission, p. 65.

²⁹ AHRC Written Submission, p. 66.

indicated above, the NSWCCCL and SIC strongly agree with the AHRC's remarks about trivial contraventions of ESO conditions³⁰ and with the AHRC's recommendations 23-25.³¹

The only, minor, way in which we depart from the AHRC's recommendations concerns s 105A.7A(1)(b) of the Criminal Code. According to the AHRC, s 105A.7A(1)(b) should provide that a Court may only make an ESO if it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act'.³² We agree with the AHRC that a Court should only be able to impose an ESO on an offender if he or she poses a high enough risk of being responsible – either as a principal offender, or as a secondary or passive participant – for a terrorist act. On balance, we also agree with the AHRC that, unlike with CDOs, an ESO should be possible without the state's proving that, in the ESO's absence, the offender is more likely than not to be responsible for such a grave harm. But, given the major restrictions on liberty that an ESO can impose on an individual, we do have reservations about this last conclusion. And we think, on balance, that the state should have to prove *beyond reasonable doubt* that there is an unacceptable risk that the offender will, unless there is an ESO, perpetrate a terrorist act him or herself, or support or facilitate its commission.³³

Issue 2: The NSWCCCL and SIC agree with the AHRC's recommendation that the control order regime, created by Div 104 of the Criminal Code, should be abolished

The NSWCCCL and SIC agrees with the AHRC that, now that the ESO regime is in force, the government should repeal the control order regime for which Div 104 of the Criminal Code provides.³⁴ See also the LCA's similar proposal.³⁵ We agree with the AHRC's reasons for that recommendation.³⁶ In the alternative, we agree with the AHRC that the government should amend the Criminal Code to prevent control orders from being imposed as a post-sentence order.³⁷ Like the LCA, we are concerned about the prospect of the state's being able to make a control order application in a case where its ESO application has not succeeded.³⁸

Interim Detention Orders ('IDOs') and Interim Supervision Orders ('ISOs')

Consider altering the circumstances in which IDOs and ISOs can be made

- While now not wishing to press our submission that the IDO scheme should be repealed,³⁹ and while now acknowledging that preventative detention orders might

³⁰ AHRC Written Submission, pp. 67-73.

³¹ AHRC Written Submission, p. 73.

³² AHRC Written Submission, p. 56.

³³ See Law Council of Australia, 'Review of Division 105A of the *Criminal Code Act 1995* (Cth): Responses to Questions of 6 July 2021' (Independent National Security Legislation Monitor' (11 February 2022) [12].

³⁴ AHRC Written Submission, p. 76 (Recommendation 26).

³⁵ Law Council of Australia, 'Review of Australian Federal Police Powers' (n 13), p. 23.

³⁶ AHRC Written Submission, pp. 74-5.

³⁷ AHRC Written Submission, pp. 75-6.

³⁸ See Law Council of Australia, 'Review of Division 105A of the *Criminal Code Act 1995* (Cth)' (Letter to Mr Grant Donaldson SC of 11 February 2022).

³⁹ NSWCCCL and SIC Written Submission, p. 26.

not always be sufficient to deal with the problem posed by terrorist offenders whose continued dangerousness only becomes apparent in the latter stages of their respective sentences,⁴⁰ the NSWCCCL and SIC remain concerned about IDOs (and, now, ISOs too). In particular, we are concerned that a person may be deprived of his or her liberty, or have his or her liberty severely restricted, for a period of 3 months⁴¹ – or more, in exceptional circumstances⁴² – upon a Court’s being satisfied that reasonable grounds exist for considering that a continuing detention order/continuing supervision order will be made in relation to him or her.⁴³

- The NSWCCCL and SIC contend that amendments should be made to s 105A.9 of the Criminal Code – and also now s 105A.9A – to ensure that IDOs/ISOs are only possible where, in the last six months of an eligible terrorist offender’s sentence, evidence or intelligence suddenly comes to light that requires such an exceptional course to be taken.⁴⁴ We note in this regard the submissions of Legal Aid NSW, which have a similar overall thrust to the position that we are advocating.⁴⁵
- The NSWCCCL and SIC also support the position advocated by the LCA,⁴⁶ namely, that a Court should be prevented from issuing an IDO – or an ISO – unless satisfied that this would be in the public interest. Moreover, we query whether there should be *any* circumstances where an ISO or IDO should be in place for longer than 3 months (we note in this regard that, until the coming into force of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth), an IDO could be in place for no longer than 3 months, whatever the circumstances).

Right to legal representation and equality of arms

- The NSWCCCL and SIC recommend that strong consideration should be given to repealing s 105A.15A(3) (actions the Court may take when a terrorist offender is unable to engage a legal representative).⁴⁷
- Subsection 105A.15A(3) of the Criminal Code allows regulations to prescribe matters that the Court ‘may, must or must not’ take into account when considering whether

⁴⁰ Cf NSWCCCL and SIC Written Submission, p. 26.

⁴¹ *Criminal Code Act 1995* (Cth) ss 105A.9(6), 105A.9A(8).

⁴² *Criminal Code Act 1995* (Cth) ss 105A.9(6), 105A.9A(8).

⁴³ *Criminal Code Act 1995* (Cth) ss 105A.9(2)(b), 105A.9A(4)(c).

⁴⁴ NSWCCCL and SIC Written Submission, p. 26.

⁴⁵ Legal Aid NSW Written Submission, pp. 12-13.

⁴⁶ Law Council of Australia, ‘Review of Australian Federal Police Powers’ (n 13) pp. 64-5.

⁴⁷ NSWCCCL and SIC Submission, pp. 4, 26-27.

an offender's lack of representation is beyond his or her control and/or whether the costs and expenses of the offender's legal representation are reasonable.⁴⁸

- The NSWCCCL and SIC consider there is a strong public interest in ensuring offenders are adequately represented, and ensuring that the administration of justice is not mobilised to marginalise these individuals further, through unequal Court proceedings in which they lack appropriate legal representation.⁴⁹ We also note that the ambit of the power afforded to the executive to make regulations circumscribing the Court's discretion in making orders when an offender is unable to engage legal representation, is troubling. The executive should not be able to dictate to the Court what factors to consider in determining such an important issue.⁵⁰ Rather, the Court is best placed to determine which matters should be considered when determining whether to make orders to stay the proceedings for lack of representation, or that the Commonwealth is to bear certain costs.⁵¹
- While acknowledging that, to date, no such regulations appear to have been made, the NSWCCCL and SIC consider that the capacity for such regulations to be made in the first place poses a risk to civil liberties and is anti-democratic. If there is a strong public interest in having the Court consider, or not consider, particular factors in a given case, then such factors should be stated in Div 105A itself, following proper scrutiny by democratically elected members of Parliament.⁵²

⁴⁸ NSWCCCL and SIC Submission, p. 27

⁴⁹ NSWCCCL and SIC Submission, p. 27

⁵⁰ NSWCCCL and SIC Submission, p. 27.

⁵¹ NSWCCCL and SIC Submission, p. 27.

⁵² NSWCCCL and SIC Submission, p. 27.



NSW Council for Civil Liberties Inc.
PO Box A1386, Sydney South,
NSW 1235, Australia

e: office@nswccl.org.au
t: 02 8090 2952
www.nswccl.org.au

@nswccl
@nswccl

APPENDIX C

NSWCCL AND SIC SUBMISSION

INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

REVIEW INTO DIVISION 105A OF THE CRIMINAL CODE (CTH)

1 September 2021

NSWCCL

INSTITUTE OF
CRIMINOLOGY



THE UNIVERSITY OF
SYDNEY

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.

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

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Phone: 02 8090 2952

Fax: 02 8580 4633

About Sydney Institute of Criminology

The Sydney Institute of Criminology is a research centre based in the Sydney Law School. It specialises in criminology, criminal justice and criminal law, was established in 1966 and is Australia's first criminology research centre. The Institute's objectives are to encourage, promote and support, within the University of Sydney, teaching, research and professional engagement in the areas of criminology, criminal law and procedure, evidence law and related disciplines. It has a diverse membership of criminologists, lawyers and academics from many schools and faculties. Those members strive for meaningful collaborations, contributions to public and professional education, and the reform of the criminal justice system. They advise government and private organisations on matters of crime law and policy, and sit on a range of public sector committees and advisory boards.

Contact Sydney Institute of Criminology

<https://www.sydney.edu.au/law/our-research/research-centres-and-institutes/sydney-institute-of-criminology.html>

law.criminology@sydney.edu.au

Correspondence to: New Law Building F10, Eastern Avenue The University of Sydney

NSW 2006 Australia

Phone: +61 2 9351 0239

Fax: +61 2 9351 0200

1. Introduction

The New South Wales Council for Civil Liberties ('NSWCCL') and the Sydney Institute of Criminology ('SIC') welcome the opportunity to make a submission to the Review into Division 105A of the *Criminal Code Act 1995* (Cth) ('the *Criminal Code*').

At the outset, we wish to make it clear that neither the NSWCCL nor the SIC supports the post-sentence preventive detention scheme for terrorist offenders, for which Division 105A provides. This scheme breaches the fundamental legal principle that a person may only be *imprisoned* upon proof that he or she has, by his or her past conduct, breached a positive legal command.¹ Like many other Australian schemes that allow for preventive detention,² the scheme authorises the punishment³ of individuals for crimes that they have not committed. Further, it targets and breaches the rights of those who are already marginalised within society.

In at least the vast majority of circumstances, once an offender has served his or her lawfully imposed sentence for a past breach of a criminal prohibition, the state should release him or her from custody. Normally, unless such a person re-offends, s/he should not be subject after his or her release to further state interference with his or her freedom; and an offender should only very exceptionally (at most) be placed in preventive detention upon the expiry of his or her retributive sentence. In those rare cases (if they exist at all) where a less restrictive measure than detention cannot reduce to a tolerable level⁴ the risk posed by an offender who has served such a sentence, any detention should certainly not constitute a mere continuation of the individual's prison sentence. Rather, the person should be detained in a place other than a prison,⁵ and the state should make available to him or her extensive rehabilitative treatment and programmes.⁶ The aim should be to restore that person to liberty as soon as possible. The 'individual injustice'⁷ that this person suffers, by virtue of his or her being detained for something that s/he has not done⁸ – and, if s/he had had the opportunity, might *never* have done – should be limited to what is absolutely unavoidable.

In the absence of a constitutional or statutory human rights charter at Commonwealth level in Australia, those who fall within the scope of the Division 105A scheme have little way of challenging their ongoing detention.⁹ This, we believe, makes it all the more crucial that we state our opposition to this scheme (which, as we have noted, breaches the human rights of those subject to it, and abrogates fundamental

¹ See *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, 24 [69], 25 [72]-[73] (Gageler J) ('*Benbrika*').

² See, eg, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

³ We reject the view, expressed recently by a majority of the High Court of Australia ('HCA'), that the Division 105A scheme is non-punitive: see *ibid* 14-16 [37]-[41] (Kiefel CJ, Bell, Keane and Steward JJ); 22 [65], 28-9 [85]-[88] (Gageler J). Consistently with what Edelman J held in that case (at 59-61 [200]-[204]), imprisonment always amounts to punishment; and the majority's contrary finding elevates form over substance: at 53 [182], 74 [239] (Edelman J). See also, eg, *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 634-7 [156]-[165], 640-3 [173]-[179] (Kirby J) ('*Fardon*'); *Attorney-General (Queensland) v Fardon* [2003] QCA 416, [90] (McMurdo P); *Kable v DPP (NSW)* (1996) 189 CLR 51, 98 (Toohey J), 122 (McHugh J), 125, 132, 134 (Gummow J) ('*Kable*'); *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 8 [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) 10 [7.4]; *M v Germany* [2009] VI Eur Court HR 169, 214 [127] ('*M*').

⁴ We state below what we consider a 'tolerable level' to be.

⁵ See, eg, *Veen [No 2] v The Queen* (1988) 164 CLR 465, 495 (Deane J).

⁶ See, eg, *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018), [220]-[221] ('*Ilseher*'), where the European Court of Human Rights ('ECtHR') noted the measures that the German government has taken to ensure that post-sentence preventive detention in that country is non-punitive (and therefore complies with the *European Convention on Human Rights*).

⁷ *Benbrika* (2021) 388 ALR 1, 68 [222] (Edelman J).

⁸ *Ibid* 68 [223] (Edelman J).

⁹ As *Benbrika* (2021) 388 ALR 1 demonstrates.

criminal law principles). The absence of a Commonwealth charter also makes it critical that the Commonwealth government takes the human rights objections to Division 105A seriously. If it does not, it fails to reward the faith expressed by the *Commonwealth Constitution's* framers that that government would 'protect Australian citizens against unwarranted incursions against the freedoms which they enjoy.'¹⁰

We submit that this scheme, if it is to continue to exist at all – and we have serious doubts about the need for it¹¹ – should be made truly non-punitive. Further, whether or not that recommendation is accepted, we submit that the Commonwealth government should make certain reforms to Division 105A, to ensure that it infringes the human rights of those detained under it to the minimum possible extent. More specifically, our recommendations are:

1. consideration should be given to whether there truly is a need for the Division 105A scheme or whether, alternatively, less restrictive measures such as control orders will always reduce to a tolerable level the threat posed by terrorist offenders who have reached the end of their respective sentences and can be proved still to pose a danger to the community;
2. if the Division 105A scheme is to remain in force, the detention for which it provides should not be served in an ordinary prison; rather, detainees should be housed in a place other than a prison, and the state should be required to make extensive efforts to reintegrate those detainees into the community;
3. if the Division 105A scheme is to remain in force, the Minister should be required to prove that there is (a) a *higher than 50% chance* that the offender will commit (b) an offence that involves *the doing, or the supporting, or the facilitating, of a terrorist act* if s/he is released into the community and made subject to a control order under Division 104;
4. if the Division 105A scheme is to remain in force, two matters should be removed from the list of matters to which a Court must have regard when determining whether to make a continuing detention order;
5. if the Division 105A scheme is to remain in force, Parliament should consider repealing s 105A.9, which allows a Court to make interim detention orders; and,
6. If the Division 105A scheme is to remain in force, Parliament should consider repealing s 105A.15A(3).

2. Division 105A of the *Criminal Code* and the HCA's decision in *Benbrika*

(i) Operation of the legislation

Division 105A was inserted into the *Criminal Code* by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth). The Division's stated object is to 'ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community.'¹²

Division 105A allows the Minister responsible for the Australian Federal Police to apply to a State or Territory Supreme Court to order that particular terrorist offenders remain in prison at the conclusion of their respective sentences for certain terrorist offences (such orders are 'continuing detention orders').¹³ To be an eligible terrorist offender, a person must satisfy three conditions. First, s/he must have been convicted of one of the offences enumerated in s105A.3(1)(a) of the *Criminal Code* (the offence that makes the offender eligible to have a continuing detention order imposed on him or her is often referred

¹⁰ *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106, 182 (Dawson J).

¹¹ That is, the control order scheme for which *Criminal Code Act 1995* (Cth) Division 104 provides, seems sufficient to deal with the problem of terrorist offenders who appear to remain dangerous once their sentences have expired.

¹² *Criminal Code 1995* (Cth) s 105A.1.

¹³ *Criminal Code 1995* (Cth) s 105A.5.

to as an 'index offence'). Secondly, s/he must have been in continuous custody between the time of conviction and the time that an application is made.¹⁴ Thirdly, s/he must be at least eighteen years of age at the time of the expiry of his or her sentence.¹⁵

Further, the Minister's application for a continuing detention order must meet a number of formal requirements. The application must be made within the last twelve months of the eligible offender's sentence or period of detention that s/he is serving pursuant to any previous continuing detention order.¹⁶ The Minister must have made reasonable enquiries to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made.¹⁷ The Minister's application must also be accompanied by the evidence and reports that he or she seeks to rely upon in the application.¹⁸

Within twenty-eight days of Minister's filing of an application, the court must hold a preliminary hearing to determine whether expert witnesses should be appointed to assist the court in determining the application.¹⁹ Either party may propose that the Court appoint one or more particular experts.²⁰ Even if the court declines at the preliminary hearing to appoint any experts, it may appoint one or more such experts at a later time in the proceedings.²¹ Appointed experts must conduct an assessment of the offender's risk of committing relevant terrorist offences if released into the community,²² and must provide a report of that assessment to the court.²³ If the Court does appoint experts, either party to the proceedings may still call its own expert in its case.²⁴

Hearings under Division 105A are governed, generally at least,²⁵ by the rules of evidence and procedure for civil matters.²⁶ Where, for reasons beyond the offender's control, s/he is unable to secure his or her own legal representation,²⁷ the court may (i) stay proceedings until such a time as the offender is represented and/or (ii) order the Commonwealth to bear the offender's reasonable costs of representation.²⁸

Once the Court is satisfied that the offender is eligible to have a continuing detention order imposed on him or her, and that the Minister's application complies with the formal requirements noted above, it may make such an order if it is satisfied: (i) '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 if the offender is released into the community'; and (ii) 'that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'²⁹ For the purposes of Division 105A, a 'serious Part 5.3 offence' is a terrorism-related offence created by Part 5.3 of the *Criminal Code*, for which there

¹⁴ *Criminal Code 1995* (Cth) s 105A.3(1)(b).

¹⁵ *Criminal Code 1995* (Cth) s 105A.3(1)(c).

¹⁶ *Criminal Code 1995* (Cth) s 105A.5(2).

¹⁷ *Criminal Code 1995* (Cth) s 105A.5(2A).

¹⁸ *Criminal Code 1995* (Cth) s 105A.5(3)(a).

¹⁹ *Criminal Code 1995* (Cth) s 105A.6(1)-(2).

²⁰ *Criminal Code 1995* (Cth) s 105A.6(3A).

²¹ *Criminal Code 1995* (Cth) s 105A.6(3).

²² *Criminal Code 1995* (Cth) s 105A.6(4)(a). The offender must attend the assessment: *Criminal Code Act 1995* (Cth) s 105A.6(5)

²³ *Criminal Code 1995* (Cth) s 105A.4(b).

²⁴ *Criminal Code 1995* (Cth) s 105A.6(8).

²⁵ See *Criminal Code Act 1995* (Cth) s 105A.13(2).

²⁶ *Criminal Code Act 1995* (Cth) s 105A.13.

²⁷ *Criminal Code Act 1995* (Cth) s 105A.15A(1).

²⁸ *Criminal Code Act 1995* (Cth) s 105A.15A(2).

²⁹ *Criminal Code 1995* (Cth) s 105A.7(1). Note 1 to *Criminal Code Act 1995* (Cth) states that '[a]n example of a less restrictive measure is a control order.'

is a maximum penalty of seven or more years' imprisonment.³⁰ Examples of serious Part 5.3 offences involving *terrorist acts* are:

engaging in a terrorist act; providing or receiving training connected with terrorist acts; possessing things connected with terrorist acts; collecting or making documents connected with preparation for, the engagement of a person in, or assistance in a terrorist act; doing an act in preparation for, or planning, a terrorist act; providing or collecting funds reckless as to whether the funds will be used to facilitate or engage in a terrorist act; and making funds available to another person or collecting funds for, or on behalf of, another person and being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.³¹

But not all 'serious Part 5.3 offence[s]' involve terrorist acts. Some involve *terrorist organisations*. Examples are:

directing the activities of a terrorist organisation; being a member of a terrorist organisation; recruiting a person to join, or participate in the activities of, a terrorist organisation; providing or receiving training to or from [sic] a terrorist organisation; receiving funds from, or making funds available to, or collecting funds for, or on behalf of, a terrorist organisation; and providing resources to a terrorist organisation.³²

If the court considers that the statutory test for making a continuing detention order is satisfied, then it must consider the following non-exhaustive³³ list of factors whether deciding, in fact, to impose a continuing detention order:³⁴

- (a) the safety and protection of the community;
- (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert;
- (c) the results of 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;
- (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by:
 - (i) the relevant State or Territory corrective services; or
 - (ii) any other person or body who is competent to assess that extent;
- (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs;
- (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while:
 - (i) on release on parole for any offence referred to in paragraph 105A.3(1)(a); or
 - (ii) subject to a continuing detention order or interim detention order;
- (g) the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a);
- (h) the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender;
- (i) any other information as to the risk of the offender committing a serious Part 5.3 offence.

³⁰ *Criminal Code 1995* (Cth) s 105A.2.

³¹ *Benbrika* (2021) 388 ALR 1, 17-18 [44] (Kiefel CJ, Bell, Keane and Steward JJ).

³² *Ibid* 18 [45] (Kiefel CJ, Bell, Keane and Steward JJ).

³³ *Criminal Code Act 1995* (Cth) s 105A.8(2).

³⁴ *Criminal Code 1995* (Cth) s 105A.8(1).

An offender is entitled to receive reasons for the decision made³⁵ and has a right of appeal to the relevant Court of Appeal,³⁶ by way of rehearing.³⁷ The maximum period of a continuing detention order is three years.

Within twelve months of the granting of a continuing detention order, the Minister must cause the Court that granted the order to review that order.³⁸ Thereafter, the Minister must cause reviews to commence³⁹ within twelve months of the preceding review.⁴⁰ A detainee may also apply for a review at any time while the continuing detention order remains in place.⁴¹ But the court must dismiss such an application⁴² unless it is satisfied that (i) there are new facts or circumstances that warrant review or (ii) a review would otherwise be in the interests of justice, having regard to 'the purposes of the order and the manner and effect of its implementation'.⁴³ At any review, the question remains whether the Court is satisfied: (a) to a high degree of probability, on the basis of admissible evidence, that the offender remains an unacceptable risk of committing a 'serious Part 5.3 offence' if s/he were released into the community and (b) no other less restrictive measure would be effective in preventing the unacceptable risk.⁴⁴ If the Court is so satisfied, it may renew the continuing detention order⁴⁵ (though it must renew it for a period of less than twelve months if it is satisfied that such a shorter period is all that is 'reasonably necessary to prevent the unacceptable risk'⁴⁶). If the Court is *not* satisfied that the statutory test is still satisfied, it must revoke the continuing detention order.⁴⁷

Division 105A expressly stipulates that a person subject to a continuing detention order 'must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment'.⁴⁸ That said, this requirement is subject to the imperatives of prison security and order⁴⁹ and to 'reasonable requirements necessary to maintain ... the safety and protection of the community'⁵⁰ – and, crucially, the person is to be detained *in a prison*.⁵¹ It is true that, with certain exceptions,⁵² such a prisoner must be detained in a different 'area or unit of the prison' from prisoners serving sentences of imprisonment.⁵³ Nevertheless, as the plurality conceded in *Benbrika*, the Act makes no 'special provision for treatment and rehabilitation of detainees under Div 105A'.⁵⁴

Before we discuss the HCA's decision in that case, we must note one further aspect of the Division 105A scheme. Under that scheme, where the Minister has applied for a continuing detention order in relation to an eligible terrorist offender, he or she may additionally apply to the Court for an interim

³⁵ *Criminal Code Act 1995* (Cth) s 105A.16.

³⁶ *Criminal Code Act 1995* (Cth) s 105A.17(1).

³⁷ *Criminal Code Act 1995* (Cth) s 105A.17(2).

³⁸ *Criminal Code Act 1995* (Cth) s 105A.10(1A)-(1B)(a). The Court then must start the review of the order before the expiry of the twelve-month period: *Criminal Code Act 1995* (Cth) s 105A.10(1).

³⁹ See *Criminal Code Act 1995* (Cth) s 105A.10(1).

⁴⁰ *Criminal Code Act 1995* (Cth) s 105A.10(1B)(b). In the unlikely event that the Minister fails to comply with this obligation, the detainee must be released at the end of the relevant 12 month period: *Criminal Code Act 1995* (Cth) s 105A.10(4).

⁴¹ *Criminal Code Act 1995* (Cth) s 105A.11(1).

⁴² *Criminal Code Act 1995* (Cth) s 105A.11(3).

⁴³ *Criminal Code Act 1995* (Cth) s 105A.11(2).

⁴⁴ *Criminal Code Act 1995* (Cth) s 105A.12(4).

⁴⁵ *Criminal Code Act 1995* (Cth) s 105A.12(4).

⁴⁶ *Criminal Code Act 1995* (Cth) s 105A.12(7).

⁴⁷ *Criminal Code Act 1995* (Cth) s 105A.12(5).

⁴⁸ *Criminal Code Act 1995* (Cth) s 105A.4(1).

⁴⁹ *Criminal Code Act 1995* (Cth) s 105A.4(1)(a)-(b).

⁵⁰ *Criminal Code Act 1995* (Cth) s 105A.4(1)(c).

⁵¹ *Criminal Code Act 1995* (Cth) s 105A.4(1).

⁵² *Criminal Code Act 1995* (Cth) s 105A.4(2)(a)-(d).

⁵³ *Criminal Code Act 1995* (Cth) s 105A.4(2).

⁵⁴ *Benbrika* (2021) 388 ALR 1, 15 [39] (Kiefel CJ, Bell, Keane and Steward JJ).

detention order.⁵⁵ The Court may make such an order, the effect of which is to commit the offender to prison⁵⁶ for a period no longer than 28 days,⁵⁷ if it is satisfied, following a hearing,⁵⁸ that: (a) the detainee's sentence of imprisonment, or period of detention under a continuing detention order or interim detention order, will expire before the Court determines the Minister's application for a (further) continuing detention order; and (b) there are reasonable grounds for considering that the Court will make a continuing detention order in relation to the offender.⁵⁹ Interim detention orders can be renewed,⁶⁰ but a person may not be detained for longer than three months under such orders before the Court determines the relevant application for a continuing detention order.⁶¹

(ii) *Minister for Home Affairs v Benbrika*

In *Benbrika*, the HCA considered the constitutional validity of Division 105A. By majority (Kiefel CJ, Bell, Keane and Steward JJ, with whom Edelman J agreed for different reasons), the Court upheld the validity of the Division in its entirety.⁶² Justices Gageler and Gordon were in dissent and delivered separate judgments. That said, Gageler J held⁶³ that the Division 105A was valid insofar as it allowed for continuing detention orders to be made against offenders whom the State can prove pose an unacceptable risk of *performing terrorist acts, or of supporting or facilitating such acts*, if they were to be released from custody (even under supervision). Justice Gordon thought it unnecessary to state whether a more narrowly drafted scheme than Division 105A would confer 'the judicial power of the Commonwealth' on the State and Territory Courts to which that Division applies (and therefore survive constitutional scrutiny).⁶⁴

The case concerned an application by the Minister for a continuing detention order against Abdul Nacer Benbrika, who had been serving custodial sentences for terrorist offences immediately before he became subject to the continuing detention order. Over the course of the proceedings (which, as just suggested, ultimately resulted in the Victorian Supreme Court making the order sought), the offender made an application for the constitutional validity of Division 105A to be determined by the Victorian Court of Appeal. The Commonwealth Attorney-General moved successfully for this question of validity to be removed into the HCA. The question for that tribunal was whether the powers purportedly conferred by Division 105A on State and Territory Supreme Courts are part of 'the judicial power of the Commonwealth'.⁶⁵ If the Court had returned a negative response to this question, it would have followed that Division 105A was wholly invalid. That is because a Commonwealth law may not validly authorise a Court mentioned in s 71 of the *Commonwealth Constitution* to exercise anything other than 'the judicial power of the Commonwealth' (and functions that are incidental or ancillary thereto).⁶⁶

In *Fardon v Attorney-General (Qld)*,⁶⁷ Gummow J, with whom Kirby J agreed on this point,⁶⁸ expressed the view (in obiter dicta) that a Commonwealth statute could not validly authorise a Chapter III court, in

⁵⁵ *Criminal Code Act 1995* (Cth) s 105A.9(1).

⁵⁶ Although the provisions relating to the treatment of those imprisoned under a continuing detention order apply also to those imprisoned under an interim detention order: *Criminal Code Act 1995* (Cth) s 105A.9(7).

⁵⁷ *Criminal Code Act 1995* (Cth) s 105A.9(3) and (5).

⁵⁸ *Criminal Code Act 1995* (Cth) s 105A.9(1A).

⁵⁹ *Criminal Code Act 1995* (Cth) s 105A.9(2).

⁶⁰ *Criminal Code Act 1995* (Cth) s 105A.9(2).

⁶¹ *Criminal Code Act 1995* (Cth) s 105A.9(6).

⁶² *Benbrika* (2021) 388 ALR 1, 19 [48] (Kiefel CJ, Bell, Keane and Steward JJ), 53 [182], 74 [239] (Edelman J).

⁶³ *Ibid* 28-9 [85]-[88], 30-2 [93]-[102] (Gageler J).

⁶⁴ *Ibid* 52 [177]-[178] (Gordon J).

⁶⁵ See *Commonwealth Constitution*, s 71.

⁶⁶ *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275-6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) v The Queen* [1957] AC 288, 311-4 (Viscount Simonds for the Privy Council).

⁶⁷ (2004) 223 CLR 575, 608-14 [69]-[85] (Gummow J).

proceedings 'detached from the sentencing process',⁶⁹ to commit a person to prison because of concerns about what s/he might do in the absence of such an order. According to his Honour, the 'exceptional cases' aside, Chapter III of the Constitution allows for the involuntary detention of a citizen 'only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.'⁷⁰ (Those 'exceptional cases' of what, in the Court's view,⁷¹ is 'non-punitive detention',⁷² are: (i) pre-trial detention; (ii) mental illness detention; (iii) infectious disease detention; and (iv) migration detention (though the latter of course applies to non-citizens, not citizens)). Justice Gummow accepted that the 'exceptional cases' are not closed.⁷³ And he accepted that Chapter III of the *Constitution* will not be breached if the Commonwealth Parliament confers on a Chapter III court the power, *at sentencing*, to order that certain prisoners be placed in preventive detention in gaol after the expiry of their retributive sentences.⁷⁴ But Gummow J thought preventive detention ordered only once a prisoner is serving his or her sentence, to be qualitatively different from the power just mentioned.⁷⁵ And he held that no analogy could properly be drawn between any of the 'exceptional cases' and post-sentence preventive detention.⁷⁶

It was this last conclusion that the plurality in *Benbrika* primarily took issue with, when their Honours held that a power of the type that Division 105A purportedly confers on the judiciary in fact does fall within 'the judicial power of the Commonwealth.'⁷⁷ According to their Honours, the Commonwealth Parliament had validly conferred the Division 105A power of detention on the judiciary because that detention is: (a) non-punitive and (b) analogous to mental illness detention.⁷⁸ The detention is non-punitive, they found, even though it is served in ordinary prisons, and even though no rehabilitative resources beyond those available to sentenced prisoners are directed to detainees.⁷⁹ 'Detention in prison is prima facie penal or punitive', their Honours conceded, but 'that characterisation [was] ... displaced by [Division 105A's] evident non-punitive purpose.'⁸⁰ Strangely, the plurality did not refer to the established test for determining whether detention is punitive – namely, whether the detention is reasonably capable of being seen as necessary for a non-punitive objective.⁸¹ Their Honours also did not explain why detention *in prison* was reasonably capable of being seen as necessary to protect the community. Surely, detention in non-punitive conditions would always be enough to achieve this aim?⁸²

⁶⁸ Ibid 631 [145] (Kirby J). Justices Callinan and Heydon clearly disagreed (at 654 [217]); McHugh J seemed to disagree (at 596-7 [34] – though see *Benbrika* (2021) 388 ALR 1, 65 [214] (Edelman J); and Gleeson CJ and Hayne J expressly refrained from deciding this question: at 591 [18] (Gleeson CJ) and 647 [196] (Hayne J).

⁶⁹ Ibid 613 [83] (Gummow J).

⁷⁰ Ibid 612 [80].

⁷¹ See, eg, *Falzon v Minister for Immigration* (2018) 262 CLR 333, 341 [16] (Kiefel CJ, Bell, Keane and Edelman JJ); *Benbrika* (2021) 388 ALR 1, 9-10 [18]-[19] (Kiefel CJ, Bell, Keane and Steward JJ); 22 [65] (Gageler J); 39-40 [134] (Gordon J); *Commonwealth v AJL20* (2021) 95 ALJR 567, 576 [22] (Kiefel CJ, Gageler, Keane and Steward JJ).

⁷² Justices Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27, stated that these types of detention are non-punitive, whereas Gummow J thought it unhelpful to express the relevant principle in such terms. See *Al Kateb v Godwin* (2004) 219 CLR 562, 612 [136]-[137] (Gummow J); *Fardon* (2004) 223 CLR 575, 612-3 [81] (Gummow J). As Gageler J noted in *Benbrika* (2021) 388 ALR 1, 28 [84], nothing turns on this: the principle stated by Gummow J has the same scope as that stated by Brennan, Deane and Dawson JJ: cf at 65 [215] (Edelman J).

⁷³ *Fardon* (204) 223 CLR 575, 613 [83].

⁷⁴ Ibid.

⁷⁵ Such a view seems wrong. See Andrew Dyer, 'Can Charters of Rights Limit Penal Populism?: The Case of Preventive Detention' (2018) 44(3) *Monash University Law Review* 520, 525-6. See also, eg, *Benbrika* (2021) 388 ALR 1, 14 [34] (Kiefel CJ, Bell, Keane and Steward JJ).

⁷⁶ *Fardon* (204) 223 CLR 575, 613-4 [83]-[84] (Gummow J).

⁷⁷ *Benbrika* (2021) 388 ALR 1, 13 [32], 14 [36] (Kiefel CJ, Bell, Keane and Steward JJ).

⁷⁸ Ibid 14-16 [36]-[41].

⁷⁹ Ibid 15 [39].

⁸⁰ Ibid 16 [40].

⁸¹ *Falzon* (2018) 262 CLR 333, 343 [26]-[27] (Kiefel CJ, Bell, Keane and Edelman JJ).

⁸² Note, however, that the Court has, rather unpersuasively (see, eg, Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 289), denied that the 'reasonably capable' test involves proportionality testing: *Falzon* (2018) 262 CLR 330, 343-4 [28]-[32] (Kiefel CJ, Bell, Keane and Edelman JJ).

Justice Gageler's reasoning differed from that of the plurality only in that his Honour held that a power to order post-sentence preventive detention, will be reasonably capable of being seen as necessary for a legitimate non-punitive protective aim – and therefore within 'the judicial power of the Commonwealth' – if it applies only to those who can be proved to be an unacceptable risk of causing, or supporting or facilitating, a *grave harm* if they were to be released (even under supervision).⁸³ Like Gordon J,⁸⁴ who was of a similar view – though, as noted above, her Honour expressly refrained from stating that the Commonwealth Parliament could ever validly authorise a Chapter III court to order post-sentence preventive detention⁸⁵ – his Honour justified this view by pointing to the liberal underpinnings of Chapter III of the Constitution.⁸⁶ It is well-established, Gageler J noted, that: (i) punishing criminal guilt is an exclusively judicial function; and that (ii) only exceptionally can the state detain a person 'outside that paradigm'.⁸⁷ Such an arrangement, he said, is protective of individual liberty.⁸⁸ But, he continued, 'liberty would be subverted' if the court were to hold that the Commonwealth Parliament could validly authorise a Chapter III court to commit a person to prison simply upon proof that there was an unacceptable risk that he or she would commit a *criminal offence* – as opposed to causing, facilitating or supporting a grave harm – upon his or her release.⁸⁹ In this connection, Gageler J – and Gordon J⁹⁰ – noted 'the prophylactic approach then to the imposition of criminal liability' in Part 5.3 of the *Criminal Code*.⁹¹ In other words, under the Division 105A scheme, a Supreme Court may impose continuing detention orders on those who pose an unacceptable risk of performing conduct 'many steps removed from doing or supporting or facilitating any terrorist act'.⁹²

As noted above, Edelman J arrived at the same conclusion as the plurality⁹³ – that Division 105A is wholly valid – but by a different route. His Honour, correctly in our view, held that detention under the Division 105A scheme is punitive.⁹⁴ 'Transparency and constitutional fidelity' required this to be recognised, he held.⁹⁵ 'Deception or false labelling' should be avoided.⁹⁶ Although, like the plurality, Edelman J failed to mention the 'reasonably capable' test – in this context anyway⁹⁷ – he pointed out that detention that (solely) 'aims to protect the community by preventing the commission of offences'⁹⁸ is not thereby prevented from being punishment.⁹⁹ The plurality, he thought, rightly, had committed a 'category error'¹⁰⁰ when their Honours had held differently. That said, Edelman J held that it is within

⁸³ *Benbrika* (2020) 388 ALR 1, 28-9 [85]-[88], 30-2 [92]-[102].

⁸⁴ *Ibid* 39-42 [130]-[141].

⁸⁵ *Ibid* 52 [177]-[178].

⁸⁶ *Ibid* 24-5 [69]-[74], 28 [85].

⁸⁷ *Ibid* 25 [73].

⁸⁸ *Ibid* 28 [85].

⁸⁹ *Ibid*.

⁹⁰ *Ibid* 48-52 [163]-[175].

⁹¹ *Ibid* 30 [93].

⁹² *Ibid*.

⁹³ That said, unlike the plurality, Edelman J held that only the judiciary may commit a person to prison because of what s/he might do in the future: *ibid* 54 [185]. That is because, for him, such detention is punitive (as noted below) and the Commonwealth Parliament may only validly authorise the judiciary to punish – whether for past or apprehended conduct. It is well-established, of course, that the punishment of past guilt is an exclusively judicial function: see, eg, *Duncan v New South Wales* (2015) 255 CLR 388, 407 [41] (The Court). On the other hand, the *Lim* principle seems clearly to state that no arm of government may punish for future conduct: *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). Certainly, the *Benbrika* plurality read it in that way and accepted such an approach: *Benbrika* (2021) 388 ALR 1, 14 [36]; cf 65 [215] (Edelman J).

⁹⁴ See especially *ibid* 59-61 [200]-[204] (Edelman J).

⁹⁵ *Ibid* 53 [182].

⁹⁶ *Ibid* 74 [239], quoting Douglas Husak, 'Preventive Detention as Punishment? Some Possible Obstacles in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 178, 179.

⁹⁷ Cf *ibid* 68 [225] (Edelman J).

⁹⁸ *Ibid* 53 [183].

⁹⁹ See in this regard, eg, HLA Hart, 'Prolegomenon to the Principles of Punishment' in *Punishment and Responsibility* (Oxford University Press, 2009) 1, 5-6.

¹⁰⁰ *Benbrika* (2021) 388 ALR 1, 53 [183].

'the judicial power of the Commonwealth' to punish for a person for what s/he might do, as opposed to what s/he has done – so long as two conditions are satisfied. Those conditions are that the relevant power is judicial in form¹⁰¹ – which the Division 105A power *is*, though it creates new rights¹⁰² – and is 'exercisable judicially'.¹⁰³ Justice Edelman held that a power such as the one at issue would only *not* be exercisable judicially if: (i) the protective purpose of the detention could 'always'¹⁰⁴ be 'met to the same extent by reasonable alternatives, such as less restrictive control orders';¹⁰⁵ or (ii) the purpose pursued was 'so slight or trivial that it [could not] ... justify detention.'¹⁰⁶ His Honour held that (i) was not satisfied: Division 105A explicitly states that detention is only to be ordered where a less restrictive alternative would *not* achieve the desired protective result.¹⁰⁷ And he held that (ii) was not satisfied either. Like the plurality,¹⁰⁸ Edelman J emphasised that all of the 'serious Part 5.3 offences' are 'aimed at the very destruction of civilized society.'¹⁰⁹ Moreover, his Honour repeatedly referred to the undesirability of the Court's 'second-guess[ing] Parliament's conclusion that all such offences could ... involve harm to the community sufficient to permit consideration of a continuing detention order.'¹¹⁰

We of course accept the binding nature of the majority's decision in *Benbrika*. But we also submit that it is difficult to think of a case that more clearly illustrates the fallacy of the view that 'anything that is held constitutional must therefore also be unobjectionable.'¹¹¹ In other words, despite the majority's decision in *Benbrika*, the Division 105A scheme is contrary to human rights – and we develop that argument more fully in the next section of this submission. We then make some recommendations for the reform of Division 105A. Some of these recommendations draw on the reasoning of Gageler J, Gordon J and Edelman J in *Benbrika*. That is because each of their Honours provided useful insights into the practical operation of Division 105A and the way in which the current scheme fails properly to protect civil liberties and human rights.

3. In which circumstances, if any, will post-sentence preventive detention schemes be compatible with human rights?

Preventive detention regimes have received significant scholarly attention. Scholars have given particularly detailed consideration to the types of restraints that should be placed on such regimes if they are to be compatible with human rights. Indeed, some scholars have denied that post-sentence preventive detention – or any other type of preventive detention – can ever operate compatibly with human rights standards.

This latter view is reflected in the *Lim* principle,¹¹² as well as in the United States Supreme Court's very similar contention, in *Foucha v Louisiana*, that, under 'our present system ... with only very narrow exceptions and aside from permissible confinements for mental illness', the state may incarcerate 'only those who are proved beyond reasonable doubt to have violated a criminal law.'¹¹³ According to such a view, the liberal, human rights-respecting state must *reason with* offenders and prospective offenders.

¹⁰¹ Ibid 54 [185].

¹⁰² Ibid 66-7 [220]-[221], 71-2 [232]-[233].

¹⁰³ Ibid 67 [222]; see also 54 [185].

¹⁰⁴ Ibid 68 [224].

¹⁰⁵ Ibid 69 [226].

¹⁰⁶ Ibid 69 [226].

¹⁰⁷ Ibid 72-3 [235].

¹⁰⁸ Ibid 18-19 [46]-[47].

¹⁰⁹ Ibid 73 [237].

¹¹⁰ Ibid 70 [230]; see also 54 [185], 69 [226], 69-70 [228]-[229].

¹¹¹ Greg Taylor, 'Conceived in Sin, Shaped in Iniquity – The *Kable* Principle as Breach of the Rule of Law' (2015) 34(2) *University of Queensland Law Journal* 265, 265-6. See also, generally, Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40 *Monash University Law Review* 673.

¹¹² See *Lim* (1992) 176 CLR 1, 27.

¹¹³ 504 US 71, 83 (1992).

For, when it uses other methods, it ceases to be a liberal, human rights-respecting state. No matter how likely it is that a person will offend in the future, the state must wait until s/he does before it detains him or her. Until then, it must rely simply on the criminal law's threats and moral appeals, to *persuade* the prospective offender not to misconduct him or herself. Moreover, even once the person has committed an offence, the state must still reason with him or her. The punishment that it imposes on that person, that is, must be proportionate to the seriousness of his or her offending.

According to this philosophy, detention of the mentally ill and dangerous is permissible, but detention of the merely dangerous is not. Because the mentally ill actor is irrational, the state need not attempt to reason with him or her. Because the merely dangerous person is an autonomous actor, however, the state is not excused from its reasoning responsibilities.¹¹⁴

The difficulty with this view is this. What if there is a person whom the state can prove is highly likely to commit a very serious offence if s/he is released from custody – even if s/he is released under supervision? If the state were to decline to detain this individual, might it not breach of the human rights of this person's prospective victim(s)? The ECtHR has held that there would indeed be a breach of such potential victims' human rights in such circumstances (at least where the harm in prospect is fatal or very serious violence).¹¹⁵ That said, it is necessary to note that the question at the beginning of this paragraph contains a number of 'ifs'. As we argue further below, our acceptance of preventive detention is predicated on there *in fact* being offenders whom the state can reliably prove are highly likely to commit serious acts of violence even if they are under state supervision in the community after their release. As we note in that discussion, there are real questions about (a) the reliability of predictions in this context and (b) whether it is ever the case that a less restrictive measure than detention will fail to reduce to a tolerable level the risk that a demonstrably dangerous person poses to the community. The latter must especially be doubtful in the case of the Division 105A scheme, given that the alternative, less restrictive measure (a control order) can place extremely significant restrictions on individual freedom.¹¹⁶

Like a number of liberal theorists,¹¹⁷ Andrew Ashworth and Lucia Zedner accept that preventive detention is justified in limited circumstances. Insofar as post-sentence preventive detention is concerned, they indicate that the following principles are applicable in assessing whether such detention is compatible with human rights:

1. In principle, every citizen has a right to be presumed harmless, and this presumption of harmlessness can be rebutted only in exceptional circumstances (set out in (2) and (4)).
2. The state's duty to protect people from serious harm may justify depriving a person of liberty if that person has lost the presumption of harmlessness by virtue of committing a serious violent offence and is classified as dangerous.
3. Deprivation of liberty should not be considered unless it is the least restrictive appropriate alternative.
4. Any judgment of dangerousness in this context must be approached with strong caution. It should be a judgment of this person as an individual, not simply as a member of a

¹¹⁴ See, eg, Michael Louis Corrado, 'Sex Offenders, Unlawful Combatants and Preventive Detention' (2005) 84 *North Carolina Law Review* 77, 101.

¹¹⁵ See, eg, *Mastromatteo v Italy* [2002] VIII Eur Court HR 151, 165-6 [68]-[69].

¹¹⁶ As noted by, eg, Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41, 99.

¹¹⁷ See, eg, CR Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16(2) *Monash University Law Review* 161, 180-2; Harry Hobbs and Andrew Trotter, 'Lessons from History in Dealing with Our Most Dangerous' (2018) 41(2) *UNSW Law Journal* 320, 351.

group with certain characteristics and with an overall probability rating. The state should bear the burden of proving that the person presents a significant risk of serious harm to others and the required level of risk should vary according to the seriousness of the predicted harm. Decision-makers should bear in mind the contestability of judgments of dangerousness and the scope for interpretation that they leave and individuals should have the rights of challenge and appeal.

5. If it is decided to add time to the proportionate sentence in response to a judgment of dangerousness, in principle that additional time should be the shortest period necessary to respond to the anticipated danger, and the time should be served under different conditions (see (9) below).

...

9. Any preventive detention going beyond the proportionate sentence should be served in non-punitive conditions with restraints no greater than those required by the imperatives of security. Where possible, detention that is purely preventive and not punitive should take place in a separate facility, not part of the prison system.¹¹⁸

We have three observations to make about this.

First, we largely agree with Ashworth and Zedner as to the circumstances in which post-sentence preventive detention will comply with human rights standards. In particular, we approve of their suggestion that regimes that provide for such detention will be compatible with human rights only if such regimes: (i) apply only to persons who have been convicted in the past of an offence involving serious violence (including sexual violence offences); (ii) permit post-sentence preventive detention only if it is the least restrictive appropriate alternative; and (iii) provide that detainees serve such detention in conditions that are as non-punitive as possible, and not within the prison system.

Secondly, we note that courts around the world have held that post-sentence preventive detention regimes will breach human rights unless they observe the limitations just noted. In *M v Germany*,¹¹⁹ for example, the applicant had been convicted of serious offences in 1986. A German court imposed a term of imprisonment on him; and the sentencing judge also ordered that, once M's sentence expired, he was to remain in preventive detention for so long as he remained dangerous, but for no longer than ten years (the statutory maximum term of preventive detention at that time). By the time that M's ten year period of preventive detention expired in 2001, however, the German government had passed legislation that allowed for the indefinite prolongation of such detention. When the German authorities then extended M's detention, M successfully applied to the ECtHR for a determination that Germany had breached art 5(1) of the ECHR – which provides that a person may be detained only in narrow circumstances – and art 7(1) – which provides that the state may impose on an offender no heavier penalty than was applicable at the time he or she committed his or her offence(s). Crucial to the Court's conclusion was that 'persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings.'¹²⁰ And it noted also that, 'there appear to be no special measures, instruments or institutions in place, other than those available to long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting their detention to what is strictly necessary in order to prevent them from committing further offences.'¹²¹ The Court has subsequently made it clear¹²² that post-sentence preventive detention regimes will comply with the

¹¹⁸ Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 168–9.

¹¹⁹ [2009] VI Eur Court HR 169.

¹²⁰ *Ibid* [127].

¹²¹ *Ibid* [128].

¹²² *Inseher* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018).

ECtHR only if such detention applies only to those with a 'mental disorder'¹²³ – in such a case, the detention will be the lawful detention of persons of unsound mind, and therefore fit within art 5(1)(e) ECHR – and is served in facilities that focus on the treatment of such persons, so as to reduce the threat that they pose to the public 'to such an extent that the detention may be terminated as soon as possible.'¹²⁴ If the latter requirement is met, the detention will be 'lawful' within the meaning of art 5(1)(e), and it will not amount to a 'penalty' for the purposes of art 7(1).

Thirdly, we note that the Division 105A scheme does not comply with the limitations that Ashworth and Zedner identify. In other words, it breaches human rights. Indeed, as much has been made clear by the United Nations Human Rights Committee ('UNHRC') in its *Fardon* and *Tillman* communications.¹²⁵ In those communications, the UNHRC found that, respectively, the post-sentence preventive detention regime for which the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') provides, and a similar NSW scheme, impose arbitrary punishment on detainees, contrary to art 9(1) of the *International Covenant on Civil and Political Rights* ('ICCPR').¹²⁶ This was for a number of separately sufficient reasons, one of which was that, under the impugned schemes, detainees are detained *in prison*.¹²⁷ The UNHRC held in this regard that such detention would only avoid being arbitrary if the state could establish that *imprisonment* – as opposed to a less restrictive measure, such as supervision in the community or non-punitive detention – was the measure that could achieve the state's preventive purpose in the least intrusive way.¹²⁸ The UNHRC also made it clear that, as the German authorities had done in *M*, the state had imposed on Fardon and Tillman a heavier penalty than was available at the time when they had offended (contrary to art 15(1) ICCPR).¹²⁹

The Commonwealth government modelled the Division 105A scheme on the DPSOA.¹³⁰ It is unsurprising, therefore, that the Commonwealth regime bears many of the human rights vices that the DPSOA does. In other words, because those detained under the Division 105A scheme serve such detention in prison, such detention is arbitrary detention within the meaning of art 9(1) of the ICCPR. And because this scheme is (i) punitive and (ii) came into force after Mr Benbrika began serving his sentence, it imposes on him a heavier penalty than was available when he offended, contrary to art 15(1) of the ICCPR.

Indeed, it would seem that the Division 105A scheme breaches human rights for further reasons. The scheme does not potentially apply only to those who have been convicted of a *serious offence of*

¹²³ We do not argue that, to comply with human rights, post-sentence preventive detention must apply only to those with such a disorder. The ECtHR's requirement in this regard seems to amount to nothing more than an attempt by it to squeeze post-sentence preventive detention within the exhaustive list of cases of 'lawful' detention recognized by art 5(1) ECHR. In other words, like the United States Supreme Court in *Kansas v Hendricks* 521 US 344 (1997), the ECtHR has presented such detention as being no different from the detention of the mentally ill and dangerous, so as to uphold preventive detention schemes of the sort to which certain European governments have given effect. *In fact*, such schemes seem to apply to the merely dangerous (as opposed to the mentally ill and dangerous); and in our submission, this is morally permissible, provided that the state observes limitations to which we refer in the text.

¹²⁴ *Ibid* [223].

¹²⁵ *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010); *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010).

¹²⁶ *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 8 [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) 10 [7.4].

¹²⁷ *Ibid*.

¹²⁸ *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 9 [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) [7.4].

¹²⁹ *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 9 [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) [7.4].

¹³⁰ Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1035 (Senator Brandis, Attorney-General).

violence in the past.¹³¹ It also potentially applies to those who have committed any Part 5.3 offence that is punishable by seven years' imprisonment.¹³² Likewise, a Court is not restricted to imposing continuing detention orders on those whom the state can prove 'present ... a significant risk of serious harm to others.'¹³³ It is merely necessary for the state to prove that the person poses an unacceptable risk of committing any of the Part 5.3 offences just mentioned.¹³⁴ As Gageler J was at pains to emphasise in *Benbrika*, many of these Part 5.3 offences 'involve conduct many steps removed' from the commission of any criminal violence.¹³⁵ Justice Gordon, who of course made the same observation, listed many of these 'prophylactic' offences.¹³⁶

Furthermore, while a Court may only impose a continuing detention order on an individual if it is satisfied that 'no other less restrictive measure ... would be effective in preventing the unacceptable risk',¹³⁷ the Division 105A scheme seems, in fact, to allow for the imposition of continuing detention orders in cases where control order could reduce to a tolerable extent the risk posed by the relevant individuals. In short, control orders would seem always to be able to reduce to an acceptable extent the threat posed by a terrorist offender. As suggested above, such orders can lead to a person being placed in conditions similar to house arrest.

This last observation points to the final human rights problem with the Division 105A scheme (though one that Ashworth and Zedner do not recognize). As we argue at greater length below, the 'high degree of probability ... that the offender poses an unacceptable risk' threshold,¹³⁸ is not as demanding a requirement as might seem at first to be so. It seems to allow a court to make a continuing detention order, not merely in circumstances where there is a *high probability* that, without such an order, the offender will commit a 'serious Part 5.3 offence.' It is enough that it is highly probable that he or she poses an *unacceptable risk* of committing such an offence. In other words, while Ashworth and Zedner argue that 'the state should bear the burden of proving that the person presents a *significant risk* of serious harm to others',¹³⁹ we contend that the state should have to prove that, in the absence of a continuing detention order, the person is *more likely than not* to inflict a grave harm (or support or facilitate its commission).¹⁴⁰ It is no doubt true that, when the state devises the standard of proof, it must take account of the magnitude of the feared harm. But it must also be cognisant of the fact that continuing detention orders apply to people, not because they have committed a criminal offence, but instead because they might commit an offence in the future. Given this, and given the unreliability of risk predictions (a point to which we shall return), preventive detention regimes operate too broadly when they apply to those who merely pose a 'significant' or 'unacceptable' risk of serious violent offending in the future.

¹³¹ Cf Ashworth and Zedner's principle 2 above.

¹³² *Criminal Code Act 1995* (Cth) s 105A.3(1)(a)(iii) – and see the definition in s 105A.2 of 'serious Part 5.3 offence'.

¹³³ Cf Ashworth and Zedner's principle 4 above.

¹³⁴ *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹³⁵ *Benbrika* (2021) 388 ALR 1, 30 [93].

¹³⁶ *Ibid* 49 [163].

¹³⁷ *Criminal Code Act 1995* (Cth) s 105A.7(1)(c). Note Ashworth and Zedner's principle 3 above. Note also *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 9 [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) [7.4].

¹³⁸ See *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹³⁹ See Ashworth and Zedner's principle 4 above (Emphasis added).

¹⁴⁰ See in this regard the Victorian Court of Appeal's decision in *RJE v Secretary of the Department of Justice* (2008) 21 VR 526. In that case, their Honours held that the applicable standard under the *Serious Sex Offenders Monitoring Act 2005* (Vic) was proof that, without an extended supervision order, the individual was *more likely than not* to commit a relevant offence. Justice Nettle relied on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) when arriving at this conclusion.

In the next section, we set out our recommendations for the reform of Division 105A. In making these recommendations, our aim is to ensure that this scheme, if it is to operate at all, operates consistently with the human rights standards just identified.

4. Which reforms should be made to the Division 105A scheme?

(i) *The Commonwealth government should consider abolishing the scheme*

Our first recommendation is that the Commonwealth government should give serious consideration to whether the Division 105A is necessary. In other words, why are control orders not sufficient to deal with the threat posed by some terrorist offenders at the conclusion of their retributive sentences?

We note that, in the debate that accompanied the Second Reading of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), which inserted Division 105A into the Criminal Code, Michael Sukkar MP addressed this very question. The Member said that:¹⁴¹

The public evidence from the Australian Federal Police and other agencies is that control orders are extraordinarily expensive both from a human resource perspective and from a financial perspective. Many, many millions of dollars are required to keep an eye on a high-risk offender terrorist offender in the community. Even when a control order is in place ... we cannot provide the community with a 100 per cent assurance of protection. The ... saddest recent example is that of the terrorist offender in France who slit the throat of a priest on the altar, killing that priest and injuring two other people. That person was subject to a French version of a control order.

We submit that, contrary to such views, neither police administrative convenience nor resource considerations can ever justify detaining a person in prison, or anywhere else, for something that s/he has not done. Elsewhere in his remarks, Mr Sukkar stated that, in his view, those who opposed this 'sensible' Bill were 'quite a scary segment' of society.¹⁴² We contend that what is in fact 'scary' is the Commonwealth government's contempt for the views of those who wish to uphold fundamental principles of our law, as well as its willingness to sacrifice the interests of unpopular minorities, because this will allegedly achieve some sort of financial benefit. In any event, given the significant costs associated with any period of incarceration, we would be interested to see detailed cost analyses of continuing detention against that of supervision of a person subject to a control order. We suspect that any financial incentive for the former would only be negligible.

Mr Sukkar's remarks about providing the community with 100% assurance that it will not be victimised by terrorist offenders who are subject to control orders, are also misguided. In truth, if we are to maintain the core features of our liberal democratic political system, we cannot provide members of the community with a 100% assurance that they will remain free of violent crime. All the government can do is take reasonable measures to prevent people from being exposed to known or obvious risks of fatal or serious violence.¹⁴³ It is submitted that the control order regime provided for by Division 104 clearly achieves the necessary protective effect. Indeed, in our view, that regime goes beyond what is reasonable to protect the community against the threat of terrorism.

(ii) *If the Commonwealth government does not abolish the Division 105A scheme, it should make that scheme truly non-punitive*

¹⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5159.

¹⁴² *Ibid* 5158.

¹⁴³ See, eg, *Mastromatteo* [2002] VIII Eur Court HR 151, 165-6 [68]-[69].

Contrary to the view that is currently¹⁴⁴ dominant within the High Court, we submit that Division 105A operates in a punitive manner. In other words, as we indicated above, we consider the *Benbrika* majority's conclusion to the contrary, to be highly formalistic and obviously wrong. Unsurprisingly, we are not the only people to think this. As noted above, similar views have been expressed by Kirby J in *Fardon*, Edelman J in *Benbrika*, the UNHRC in *Fardon* and *Tillman*, and the ECtHR in *M*.

In *Falzon*, four Justices said that, if a power of detention 'goes further than [is reasonably necessary] to achieve' the stated non-punitive purpose, 'it may be inferred that the law has a purpose of its own, a purpose to effect punishment.'¹⁴⁵ Likewise, in *Re Woolley*, McHugh J said that, if a law authorised the unjustified solitary confinement of an asylum seeker, any such solitary confinement would amount to punishment, because it 'would go beyond what [was] .. necessary to [achieve the non-punitive object of] prevent[ing] the detainee from entering Australia.'¹⁴⁶ We submit that, if their Honours in *Benbrika* had applied this established test, rather than ignoring it, they should have reached the same conclusion on the relevant point as did Edelman J (although, for some reason, his Honour also ignored that test). As we argued above, *imprisoning* a person cannot reasonably be seen as necessary to achieve the aim of protecting the community from violence. As the UNHRC indicated in *Fardon* and *Tillman*, a less punitive form of detention would achieve this aim just as well.¹⁴⁷

Of course, the Commonwealth government might not wish to spend large amounts of money on constructing non-punitive detention facilities in which to house the persons whom Division 105A targets.¹⁴⁸ But, supposing that the Division 105A scheme remains in force, that is what is necessary if that scheme is to operate as compatibly as possible with human rights.

(iii) If the Commonwealth government does not abolish the Division 105A scheme, it should ensure that that scheme applies far more narrowly than it does at the moment

(a) The Minister should be required to prove that there is a sufficiently high risk that the offender, if released (even under supervision), will commit, or will support or facilitate, a terrorist act.

We respectfully agree with Gageler J and Gordon J in *Benbrika* insofar as their Honours held that, to use Gageler J's language, there is an insufficiently 'close correspondence between [Division 105A's] ... non-punitive objective of protecting against terrorist acts and the immediate statutory object of preventing serious Part 5.3 offences.'¹⁴⁹ Or, to put the same matter in different terms, the Commonwealth government, if it retains the Division 105A scheme, should reform the test that the Minister must satisfy if s/he is to persuade a Court to make a continuing detention order. It should not be enough for the Minister to prove that there is a sufficiently high risk that the offender will commit a 'serious Part 5.3 offence' if s/he is released (even under supervision).¹⁵⁰ Rather, the Minister should be required to prove that there is a sufficiently high risk that, if the offender is released into the community

¹⁴⁴ Compare that view with the view expressed by three Justices in *Kable* that Kable's detention in gaol was punitive: *Kable* (1996) 189 CLR 51, 97-8 (Toohey J), 122 (McHugh J), 132, 134 (Gummow J). What is it precisely that distinguishes Kable's imprisonment from *Benbrika*'s imprisonment? In both cases, the stated aim of the detention was to protect the community.

¹⁴⁵ *Falzon* (2018) 262 CLR 333, 344 [29] (Kiefel CJ, Bell, Keane and Edelman JJ).

¹⁴⁶ *Re Woolley; Ex Parte Applicants M276/2003* (2005) 225 CLR 1, 33 [78].

¹⁴⁷ *Fardon v Australia, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) [7.4]; *Tillman v Australia, Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) [7.4].

¹⁴⁸ Though note that, in response to the ECtHR's decision in *M* [2009] VI Eur Court HR 169, the German government, 'at considerable cost', built such facilities: *Ilmseher* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [222].

¹⁴⁹ *Benbrika* (2021) 388 ALR 1, 31 [95].

¹⁵⁰ See *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

(even under supervision), s/he will commit a Part 5.3 offence that involves the 'doing or [the] supporting or [the] facilitating [of a] ... terrorist act.'¹⁵¹

As Spigelman CJ observed in *Lodhi v R*, a number of the offences within Part 5.3 extend criminal liability in an extraordinary way:

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.¹⁵²

Justice Gageler in *Benbrika* made a similar point, stating:

Provisions within Pt 5.3 create offences having some connection to actual or potential terrorist acts. The degree of connection varies from offence to offence. At the one end of the spectrum is the offence of engaging in a terrorist act ... At the other end of the spectrum is the offence of associating with a person who is a member of a "terrorist organisation" ...

Most offences within the spectrum are "prophylactic offences" in the sense that "the risk of harm", relevantly from the commission of a terrorist act, "does not arise straightforwardly from the prohibited act" but "only after, or in conjunction with, further human interventions – either by the original actor or by others". An example is the offence of taking steps to become a member of a terrorist organisation, which carries a maximum penalty of imprisonment for ten years. In *R v Abdirahaman-Khalif*, the offence was committed by a young Australian woman who attempted to travel from Australia to Turkey in order to "engage" with Islamic State with the intention of becoming a nurse or a bride.¹⁵³

Preventive detention should not be able to be used against persons who merely pose an appreciable risk of engaging in inchoate offending of the sort to which Spigelman CJ and Gageler J refer in the above extracts. The rationale for such offences is the same as the rationale for preventive detention. The state does not intervene because the person who, say, takes steps to join a terrorist organisation, has caused any actual harm. Rather, it intervenes for preventive reasons: it considers the person's conduct to carry a high enough risk of leading to future harmful acts – either by the actor him or herself, or by another person or persons – to warrant its criminalisation. There is no need for the state to add an extra layer of prevention. If it wishes to prevent an inchoate offender from causing or facilitating terrorism related harm, it should do so by charging him or her with, and prosecuting him or her for, the inchoate offence that s/he has committed. If the person, upon release, continues to commit inchoate offences, the state can prosecute again. Apart from anything else, such an approach has benefits for the state. Repeated conviction will give rise to more significant penalties over time by virtue of consideration of an offender's criminal history and poor prospects of rehabilitation.¹⁵⁴ Periods of continuing detention will not.

Again, if the Commonwealth retains the Division 105A scheme, it should amend it so as to ensure that a Supreme Court of a State or Territory may make a continuing detention order against a person only if the state can prove that there is a sufficiently high risk that that person will commit, or facilitate the commission of, an offence that causes 'an immediate harm to persons or property.'¹⁵⁵ Parliament could specify the qualifying Part 5.3 offences in the Definitions section of Division 105A (currently s 105A.2).

¹⁵¹ *Benbrika* (2021) 388 ALR 1, 30 [93] (Gageler J). See also 48-9 [163] (Gordon J).

¹⁵² *Lodhi v R* (2006) 199 FLR 303, [66].

¹⁵³ *Benbrika* (2021) 388 ALR 1, 20 [55]-[56], quoting Andrew Simester and Andrew von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 79.

¹⁵⁴ See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(d); 3A(d).

¹⁵⁵ *Benbrika* (2021) 38 ALR 1, 50 [169] (Gordon J).

As Gageler J observed in *Benbrika*, no 'bright line can be drawn around those Pt 5.3 offences unacceptable risk of commission of which can be taken to indicate an unacceptable risk of the occurrence of a terrorist act or support for or facilitation of a terrorist act.'¹⁵⁶ But, in our submission, because most offences in Part 5.3 criminalise conduct that is harmless in itself, only a minority of the offences in that Part should qualify. Clearly, the offence created by s 101.1 of the *Criminal Code* – engaging in a terrorist act – should be a qualifying offence. But even most of the very serious offences in that Part are 'prophylactic' in nature. Take the offence created by s 102.2(1): intentionally directing the activities of a terrorist organisation, knowing it to be a terrorist organisation (this offence is punishable by 25 years' imprisonment). If a terrorist offender presents a high enough risk of committing this offence if s/he is released, even under supervision, would a continuing detention order be warranted? In such a case, there would be a risk of a risk. That is, there would be a risk that this person would perform conduct that carries a risk of facilitating a terrorist act. It is hard to see how the risk of the ultimate harm – a terrorist act – would ever be high enough in such a case as to warrant a continuing detention order.

The same comments apply to many of the other very serious offences in Part 5.3, for example:

- (i) providing or receiving training, knowing that the training is connected with preparation for (etc) a terrorist act;¹⁵⁷
- (ii) possessing a thing, knowing that the thing is connected with the preparation for (etc) a terrorist act;¹⁵⁸
- (iii) collecting or making a document that is connected with the preparation for (etc) a terrorist act, knowing of such a connection;¹⁵⁹
- (iv) doing an act in preparation for, or planning, a terrorist act;¹⁶⁰
- (v) intentionally being the member of a terrorist organisation, knowing it to be a terrorist organisation;¹⁶¹
- (vi) intentionally recruiting a person to join (etc) a terrorist organisation, knowing it to be a terrorist organisation;¹⁶²
- (vii) intentionally providing (etc) training to a terrorist organisation, while being reckless to whether it is a terrorist organisation;¹⁶³
- (viii) intentionally making funds available to (etc) a terrorist organisation, knowing it to be a terrorist organisation;¹⁶⁴
- (ix) intentionally providing support (etc) to a terrorist organisation, knowing that it is a terrorist organisation;¹⁶⁵
- (x) intentionally providing or collecting funds, being reckless as to whether those funds will be used to facilitate or engage in a terrorist act¹⁶⁶ (liability for this offence can attach even if the terrorist act does not occur¹⁶⁷ and even if the funds will not be used to facilitate a specific terrorist act¹⁶⁸); and
- (xi) intentionally making funds available to a person (etc), being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act¹⁶⁹ (liability for

¹⁵⁶ *Ibid* 32 [100].

¹⁵⁷ *Criminal Code Act 1995* (Cth) s 101.2(1). Punishable by 25 years' imprisonment.

¹⁵⁸ *Criminal Code Act 1995* (Cth) s 101.4(1). Punishable by 15 years' imprisonment.

¹⁵⁹ *Criminal Code Act 1995* (Cth) s 101.4(1). Punishable by 15 years' imprisonment.

¹⁶⁰ *Criminal Code Act 1995* (Cth) s 101.6(1). Punishable by life imprisonment.

¹⁶¹ *Criminal Code Act 1995* (Cth) s 102.3(1). Punishable by 10 years' imprisonment.

¹⁶² *Criminal Code Act 1995* (Cth) s 102.4(1). Punishable by 25 years' imprisonment.

¹⁶³ *Criminal Code Act 1995* (Cth) s 102.5(1). Punishable by 25 years' imprisonment.

¹⁶⁴ *Criminal Code Act 1995* (Cth) s 102.6(1). Punishable by 25 years' imprisonment.

¹⁶⁵ *Criminal Code Act 1995* (Cth) s 102.7(1). Punishable by 25 years' imprisonment.

¹⁶⁶ *Criminal Code Act 1995* (Cth) s 103.1(1). Punishable by life imprisonment.

¹⁶⁷ *Criminal Code Act 1995* (Cth) s 103.1(2)(a).

¹⁶⁸ *Criminal Code Act 1995* (Cth) s 103.1(2)(b).

¹⁶⁹ *Criminal Code Act 1995* (Cth) s 103.2(1). Punishable by life imprisonment.

this offence, too, can attach even if the terrorist act does not occur¹⁷⁰ and even if the funds will not be used to facilitate a specific terrorist act¹⁷¹).

All of these offences capture conduct that is remote from the performance of a terrorist act. We are therefore skeptical as to whether the risk of any of them should provide a sufficient basis for a continuing detention order. Again, if a person poses a high enough risk of performing conduct that is not by itself harmful but instead creates a risk of leading to harmful conduct in the future, can the risk of the ultimate harm ever be high enough to warrant preventive detention?

(b) The Minister should be required to prove that there is a higher than 50% chance that the offender will commit, or support or facilitate the commission of, a terrorist act if s/he is released into the community (even under supervision)

We have just stated that, before a Court should be able to make a continuing detention order, the Minister should be required to prove that there is a 'sufficiently high risk' that an offender will commit a terrorist act, or support or facilitate the commission of such an act. But what do we mean by 'sufficiently high risk'? In our submission, Division 105A, if it is to remain in force, should clearly state that a judge may make a continuing detention order only if he or she is satisfied that, in the absence of such an order, there is a *greater than 50% risk* that the offender will perform a terrorist act or support or facilitate the commission of such an act.

Currently, as we have seen, the onus rests with the Minister to prove to a high degree of probability that an offender poses an unacceptable risk of committing a serious Part 5.3 offence.¹⁷² And it might be thought at first glance that this is a very demanding standard of proof. Certainly, Senator Brandis asserted as much in the relevant Second Reading Debate. Such a standard of proof, he said, 'sits between the traditional civil standard of proof, which is on the balance of probabilities or ... 'more likely than not' and the criminal standard, which is beyond reasonable doubt.'¹⁷³ That statement, however, is misleading. That is because it tends to direct our attention to the 'high probability' requirement and downplay what the Minister must prove is highly probable. The Minister need not prove that it is highly probable that the offender will commit a serious Part 5.3 offence if released. S/he must merely prove that there is a high probability of an *unacceptable risk* of the offender's committing such an offence. By requiring proof that there is, say, a 75% risk of a 10% risk that an offender will commit certain conduct if released, s 105A.7(2) does not place as great a burden on the Minister as Senator Brandis seemed to suggest. And, as indicated by the authorities that we will now consider, it does seem clear that, in certain circumstances anyway, a continuing detention order could be made even where the ultimate harm was as improbable as this.

The first relevant authority concerning this point is *Benbrika*. While the High Court was not required to consider the standard of proof, Edelman J did consider the meaning of the words 'unacceptable risk'. According to his Honour, '[w]hether the risk of commission of a Pt 5.3 offence is "unacceptable" is not limited to the likelihood of the commission of the offence. It extends also to the magnitude of harm to the community in light of the interest that the terrorist offender has in their liberty.'¹⁷⁴ Justice Edelman further explained that '[a] level of risk which is not high, concerning an offence that would not greatly threaten the safety and protection of the community (and hence might not imperil the object of Div 105A) might not be unacceptable although the same level of risk for an offence that greatly threatens

¹⁷⁰ *Criminal Code Act 1995* (Cth) s 103.2(2)(a).

¹⁷¹ *Criminal Code Act 1995* (Cth) s 103.2(2)(b).

¹⁷² *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

¹⁷³ Commonwealth, *Parliamentary Debates*, Senate, 1 December 2016, 3911 (Senator Brandis, Attorney-General).

¹⁷⁴ *Benbrika* (2021) 388 ALR 1, 56 [192].

the safety and protection of the community might be unacceptable.¹⁷⁵ Put simply, in his Honour's view, when determining whether a risk posed is unacceptable, the court must consider both the extent of the harm that may be caused and its likelihood of occurring. The graver the harm, the less likely it must be, for the risk of its occurrence to be 'unacceptable.'

In the Victorian Supreme Court proceedings against Mr Benbrika, Tinney J did have to consider the proper construction of the standard of proof and the concept of unacceptable risk in the context of Division 105A of the *Criminal Code* (this was the first time a Court had engaged in this exercise).¹⁷⁶ In doing so, his Honour drew on the case law from the *Terrorism (High Risk Offenders) Act 2017* (NSW) and the various State regimes for the continuing detention of serious sex and violence offenders (particularly those in NSW and Victoria). Concerning the 'high probability' standard, his Honour said:

In respect of the test in connection with unacceptable risk, there is, as submitted by Ms Orr [for the Minister], a further modification which needs to be applied to the standard by virtue of the requirement for the Court to be satisfied to a high degree of probability. This, submitted Ms Orr, is a particular species of the civil standard, but whilst a higher civil standard, it is lower than and not to be equated to the criminal standard of proof. I accept those submissions.¹⁷⁷

Consistently with what we have stated above, this is unobjectionable, but should not distract attention from what precisely it is that the Minister must prove to a high degree of probability. Concerning *that* matter – that is, concerning the 'unacceptable risk' requirement – Tinney J quoted extensively from *Nigro v Secretary to the Department of Justice*,¹⁷⁸ in which the Victorian Court of Appeal considered the proper construction of the now repealed and replaced *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). In particular, Tinney J cited with approval the following passage from the joint judgment of Redlich, Osborn and Priest JJA regarding 'unacceptable risk':

The legislature has deliberately selected a threshold test that does not specify a particular degree of risk. Rather, the test requires an assessment of the risk and a consideration of the nature and gravity of the relevant offence and the magnitude of the harm that may result having regard to the manner in which the offender had previously committed such an offence. It is a combination of these factors that will determine whether the risk of occurrence is of a sufficient order to make the risk unacceptable.¹⁷⁹

In another passage cited with approval by Tinney J, their Honours continued:

Whether a risk is unacceptable depends upon the degree of likelihood of offending and the seriousness of the consequences if the risk 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.¹⁸⁰

Justice Tinney also drew support from the leading NSW case of *State of New South Wales v Naaman (No 2)*,¹⁸¹ where the NSW Court of Appeal considered the 'unacceptable risk' requirement set out in *Terrorism (High Risk Offenders) Act 2017* (NSW) ('THRO').¹⁸² In a joint judgment in *Naaman*, Basten, Macfarlan and Leeming JJA stated:

¹⁷⁵ Ibid.

¹⁷⁶ *Minister for Home Affairs v Benbrika* [2020] VSC 888, [397].

¹⁷⁷ *Benbrika* [2020] VSC 888, [392].

¹⁷⁸ (2013) 41 VR 359.

¹⁷⁹ Ibid [117], cited with approval in *Benbrika* [2020] VSC 888, [401].

¹⁸⁰ *Nigro v Secretary to the Department of Justice* (n 55) [6], cited with approval in *Benbrika* [2020] VSC 888, [402].

¹⁸¹ (2018) 276 A Crim R 30.

¹⁸² *Benbrika* [2020] VSC 888, [405].

The Court is then to determine whether that risk is or is not “unacceptable”. It is entirely possible that the Court might be very comfortably satisfied (ie to the requisite high degree of probability) that there is a slim probability of an unsupervised offender committing a terrorist act, and that this risk is unacceptable having regard to the consequences of the act, even if the probability of the risk eventuating is less than 50%.¹⁸³

Later in their judgment, their Honours stated:

A risk which is of a high degree of likelihood but falls short of “really serious violence” might nonetheless be unacceptable. So too, a risk which is relatively unlikely, so much so that it might fall short of being of “significant” probability, might nonetheless in light of the seriousness of its consequences be one which is unacceptable. As much is confirmed by s. 21.¹⁸⁴

Section 21 of the THRO Act states ‘the Supreme Court is not required to determine that the risk of an eligible offender committing a serious terrorism offence is more likely than not in order to determine that there is an unacceptable risk.’ There is no analogue for this provision in Division 105A of the *Criminal Code*. That said, as is made clear by the passage just quoted, s 21 merely *confirmed* the Court’s view that the ‘unacceptable risk’ threshold could sometimes be met without a finding that, in the absence of the relevant preventive restraint, the feared harm was more likely than not to occur.

We finally draw on the widely cited authority of *Lynn v State of New South Wales*,¹⁸⁵ in which the NSW Court of Appeal considered the proper construction of the unacceptable risk requirement contained in the *Crimes (High Risk Offenders) Act 2006* (NSW), which applies to high risk sexual and violent offenders. *Lynn* concerned an application for an extended supervision order, the test for which is analogous to that concerning a continuing detention order under the same legislation. Regarding the nexus between the high degree of probability and the unacceptable risk, Basten JA stated:

The high degree of probability qualifies the state of the judge’s satisfaction, not the degree of the risk. Indeed, satisfaction and risk are likely to work inversely to each other. Thus the lower the required level of risk, the easier it will be for the judge to hold a high degree of satisfaction that it exists; the higher the test of which is unacceptable, the harder it will be to satisfy the judge to a high degree of confidence that it exists.¹⁸⁶

That being said, his Honour acknowledged that the ‘statutory language is not easy to apply’.¹⁸⁷ The leading judgment was written by Beazley P (as her Excellency then was), with Gleeson JA agreeing. The President observed that the phrase ‘unacceptable risk’ should be construed like any other phrase, in accordance with the rules of statutory construction, by first looking at the ordinary meaning of the text and then drawing on context.¹⁸⁸ Her Honour explained:

[B]y reference to dictionary definitions, the word ‘unacceptable’ requires context in which or parameters against which, the ‘unacceptable risk can be measured. Thus, according to the *Macquarie Dictionary*, that which is unacceptable is ‘so far from a required standard, norm, expectation, etc as not to be allowed’. The *Oxford Dictionary* defines the word by reference to its antonym ‘acceptable’. Something is ‘acceptable’ if it is ‘tolerable or allowable, not a cause for concern; within prescribed parameters.

What the court, therefore, must find to be unacceptable is the ‘risk’ that the offender poses ‘of committing a serious violence offence if...not kept under supervision’. The respondent accepted that the precise

¹⁸³ *State of New South Wales v Naaman (No 2)* (2018) 276 A Crim R 30, [29].

¹⁸⁴ *Ibid* [68].

¹⁸⁵ (2016) 91 NSWLR 636 (*‘Lynn’*).

¹⁸⁶ *Ibid* [122].

¹⁸⁷ *Ibid*. Note that similar comments have been made in relation to use of an ‘unacceptable risk’ test in relation to the *Bail Act 2013* (NSW). See, eg, *R v Agang* [2017] NSWSC 138, [17] (Harrison J).

¹⁸⁸ *Lynn* (2016) 91 NSWLR 636, [49]; [52].

parameters of standard or norm against which that determination is to be made are not immediately evident from the text of the provision. That must be so. A determination as to whether something is unacceptable is an evaluative task, and evaluative determinations require a context in which to be made.¹⁸⁹

Returning to this point later in the judgment, Beazley P noted '[t]he further context in which that evaluation is undertaken is provided by s. 5E(2) itself, namely, whether the offender poses an 'unacceptable risk' of committing a serious violence offence, when regard is had to the safety and protection of the community, unless the person is kept under supervision, either by way of making an extended supervision order or an extended detention order.'¹⁹⁰

This review of the authorities seems to demonstrate that, when determining whether it is highly probable that there is the 'unacceptable risk' of which s 105A.7(1)(b) speaks, the Court must consider not just the likelihood of that risk occurring but also its magnitude. Those authorities also seem to make it clear enough that a judge can make a continuing detention order without necessarily being satisfied that it is more likely than not that the offender will commit a 'serious Part 5.3 offence' if he or she is released (even under supervision). As we noted above, we submit that a judge should only be able to make a continuing detention order if he or she is satisfied that it *is* more likely than not that, otherwise, the offender will commit, or will support or facilitate the commission of, a terrorist act. If people can be detained in the absence of such proof, it is practically inevitable – especially given the notorious unreliability of risk assessments (a matter to which we shall now turn) – that there will be the detention of someone who never would have offended if they had been released. It is understandable that some sections of the community consider that, if an offender poses, say a 10 per cent risk of committing a terrorist act if s/he is released, the state should be entitled to detain him. But it must also be remembered that there is a 90 per cent chance that such a person will not offend in such a way. The necessary price of living in a liberal democracy is that we cannot be protected against all risks. Accordingly, unless the state can be more sure than unsure that an offender will offend seriously in the future, it should not detain him or her until s/he does offend.

(iv) Some comments about risk assessment

When making an assessment of the risk posed by offenders, Courts are assisted by evidence from expert psychologists and psychiatrists (some appointed by the Court, others engaged by the parties) who engage in actuarial risk assessments. Actuarial risk assessments differ from clinical methods in this way: they apply statistically developed models in order to predict risk.¹⁹¹ Such assessments usually consider both static (fixed) and dynamic (variable) risk factors, in order to come to an overall assessment of risk.¹⁹² In some cases they are used to augment other clinical methods of assessing risk.

We do not argue that the Division 105A scheme should be reformed so as to prevent Courts from having regard to actuarial risk assessments. But we do wish to emphasise the dangers involved in the use of such tools and the consequent need for judicial caution when considering the results of such risk assessments.

¹⁸⁹ Ibid [50]-[51].

¹⁹⁰ Ibid [55].

¹⁹¹ Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2020) 32(1) *Current Issues in Criminal Justice* 22, 27.

¹⁹² Ibid 28; MT Rowlands, G Palk and R McD Young, 'Psychological and Legal Aspects of Dangerous Sex Offenders: A Review of the Literature' (2017) 24(6) *Psychiatry, Psychology and Law* 812, 817.

By way of example, in *Benbrika*, Tinney J accepted the expert evidence presented by the Minister, and took that evidence into account in the overall risk assessment of Mr Benbrika.¹⁹³ His Honour noted 'what was important in these risk assessments carried out by Ms Dewson and Dr Mischel were not the results spat out by an infallible tool, but the product of their expert clinical judgment upon the vast mass of material at their disposal, including the results of the VERA-2R [actuarial risk measurement tool]'.¹⁹⁴

Justice Tinney did acknowledge the overall limitations of actuarial risk assessments. Nevertheless, he placed great weight on their acceptance and use in other jurisdictions:

As I see it, the shortcomings of the VERA-2R, which were openly acknowledged by each of the plaintiff's expert witnesses, do not mean that it is not a useful tool for use in an overall assessment of risk. Both Ms Dewson and Dr Mischel considered it to be so. It has been accepted as such by numerous judges of the Supreme Court of NSW. In the circumstances, I can see no reason why it was not appropriate for this tool to be used as part of the structured professional judgment which each of Ms Dewson and Dr Mischel considered they had carried out in this case.¹⁹⁵

With respect to Tinney J, however, Courts should be approach actuarial risk assessments with a high degree of circumspection. In Tinney J's overall assessment of Mr Benbrika's 'unacceptable risk' his Honour makes particular mention of reliance on the expert risk assessments.¹⁹⁶ In many judgments that consider the operation of the *Terrorism (High Risk Offenders) Act 2017* (NSW), judges have recognised the limitations of such studies and the need to balance the findings of the experts against the other admissible evidence before the courts.¹⁹⁷

The reliability of such risk assessments is a point of contention amongst legal and clinical scholars.¹⁹⁸ The way in which they are used often lacks transparency, and the reasoning of the clinician using the assessment tool is not often fully exposed. Moreover, clinicians often note in their reports that the studies are unclear as to the reliability of the tools. They note, too, that the tools are based on certain clinical assumptions, which may not be relevant to the particular case under consideration. Carolyn McKay helpfully states a list of key problems arising from the use of actuarial risk assessment tools, in the following passage:

is 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?¹⁹⁹

The ultimate assessment as to whether an offender poses an unacceptable risk is a normative one, which is required to be determined by the court. Judicial officers should not attach excessive weight to actuarial risk assessments, but rather should consider such assessments critically, and should also carefully consider all of the other mandatory statutory factors, when determining whether an offender poses an unacceptable risk. Moreover, judicial officers should consider the degree to which the clinicians conducting such assessments have exposed their reasoning in reaching conclusions about

¹⁹³ *Benbrika* [2020] VSC 888, [452].

¹⁹⁴ *Ibid* [451].

¹⁹⁵ *Ibid* [448].

¹⁹⁶ *Ibid* [463].

¹⁹⁷ *State of New South Wales v Naaman (Final)* [2018] NSWSC 1635, [96]-[98] (Fagan J); *State of New South Wales v White (Final)* [2018] NSWSC 1943, [76]; [82]; [161] (N Adams J); *State of New South Wales v Naaman (No 2)* [2018] NSWCA 328, [85]-[94] (Basten, Macfarlan, Leeming JJA); *State of New South Wales v Fayad (Final)* [2021] NSWSC 294, [147]; [153]; [168]; [178]-[173]; [321] (Wright J)

¹⁹⁸ McKay, n 191; Rowlands, Palk and Young, n 192; Mickael N Bojczenko and Diane Sivasubramaniam, 'A Psychological Perspective on Preventive Detention Decisions' (2016) 23(4) *Psychiatry, Psychology and Law* 629.

¹⁹⁹ McKay, n 191, 31.

individual offender. They should also consider how any opacity in the relevant report affects an offender's ability to challenge the clinician's judgment in cross-examination. In other words, the court must make an independent assessment of the relevance of the actuarial risk assessment and the weight it should be afforded in the court's overall determination of an offender's risk based on the multiplicity of factors contained in the admissible evidence before it.

Courts should also be cautious to not elevate the findings of an actuarial risk assessment over the other evidence given by clinicians. Often the actuarial risk assessment forms only one part of the overall clinical assessment of the offender. Accordingly, the results produced by such risk assessments must be properly seen within their context as but one part of a clinical assessment.

(v) The Commonwealth Parliament should remove from s 105A.8(1) two of the matters to which a Court may currently have regard when deciding to make a continuing detention order

As noted above, s 105A.8 of the *Criminal Code* sets out a non-exhaustive list of matters that a court is required to consider when deciding whether to impose a continuing detention order on an offender. Two of those matters are:²⁰⁰

the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a); [and] ...

the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender

We recommend that, if the Division 105A scheme is to remain in force, these items be removed from the list of matters that a court must consider. That is essentially because the inquiry into an offender's risk of committing a further serious terrorist offence, is 'forward-looking.' It is focussed on what the offender might do in the future, not on what he or she has done in the past. To focus on the offender's past wrongdoing, and judicial officers' views about that wrongdoing, is to risk inflicting double punishment on him or her.

We especially see no reason why the views of sentencing judges about the offender's crime(s) and character should be considered. Most offenders who have committed serious Part 5.3 offences will have spent significant times in custodial settings, and if those custodial settings are doing their job well,²⁰¹ one would expect that the offender's personal circumstances and criminogenic features would have altered in custody such that their circumstances at the time that they committed the offence are no longer relevant. Even if such offenders have not achieved rehabilitation, findings to such an effect should be based not on views expressed by judges long ago, but on assessments conducted by those who have had more recent contact with those offenders.²⁰²

Section 105A.8(1) requires the Court to consider the offender's past treatment and rehabilitation and his or her level of compliance during periods of conditional liberty. When it comes to an offender's past, these are the only factors that the court should be required to consider. To focus also on the offender's past crime(s) carries a real risk of prejudice to him or her.

(vi) Parliament should repeal the power to make interim detention orders

²⁰⁰ *Criminal Code Act 1995* (Cth) s 105A.1(g)-(h).

²⁰¹ While outside the scope of this submission, it is important to note that other critics of preventive detention measures have highlighted that legislation such as Division 105A of the *Criminal Code* will do nothing to remedy the problem of insufficient mental health services in custodial settings, see, eg, Kerri Eagle, Todd Davis and Andrew Ellis, 'Unfit Offenders in NSW: Paying the Price for Gaps in Service Provision' (2020) 27(5) *Psychiatry, Psychology and Law* 853.

²⁰² See, eg, *Fardon* (2004) 223 CLR 575, 586 [2] (Gleeson CJ).

The standard for the making of an interim detention order is unsatisfactorily low. As noted above, the court need only be satisfied 'that there are reasonable grounds for considering that a continuing detention order will be made'.²⁰³ As also noted above, while an interim detention order can be made for no longer than twenty-eight days, it can be renewed for a period of up to a total term of three months. In practice, its purpose is effectively to extend the time available to the parties to prepare for the continuing detention order hearing.

The low bar provides an incentive to the State to leave its preparations for an application until very close to the expiry of an offender's sentence, instead of proceeding with the application for a continuing detention order as early in the final year of the offender's sentence as possible. A person should not be deprived of his or her liberty on such a basis, or on the basis of such a low standard of proof. The risk of arbitrary detention is already high in relation to the making of a continuing detention order. The same risk is only exacerbated by the availability of interim detention orders.

We accept the dynamism of terrorist activity and acknowledge that, in limited circumstances, evidence or intelligence may be gathered in the final weeks or days of an offender's custody which require the filing of a late application. However, this should be the exception and not the norm. Moreover, Division 105 of the *Criminal Code* allows for detention orders to be made on the (even lower) basis of a suspicion held on reasonable grounds that a person 'will engage in a terrorist act' or 'possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act' or 'has done an act in preparation for, or planning, a terrorist attack' and the making of an order is reasonably necessary to 'substantially assist in preventing' the terrorist attack.²⁰⁴ This should capture offenders who present a credible risk of posing terrorism-related harm to the community in the very last days before the expiry of their respective sentences. Accordingly, our primary submission is that s 105A.9 be repealed, as it is not required in light of the availability of detention orders under Division 105. Its presence heightens the risk of human rights abuses being perpetrated through the use of this legislation.

In the alternative, we recommend that s 105A.9(2)(b) be amended to allow an application for an interim detention order to be made only within the last two months before the expiry of an offender's custodial sentence (or any prior continuing detention order), and only where evidence or intelligence has suddenly come to light that has led the state to believe that such an exceptional course is necessary. This small amendment will ensure that the power to make interim detention orders is more consistent with offenders' right to liberty following the conclusion of their criminal sentences. That is, it will ensure that the state is only able to obtain such an order in exceptional circumstances. And it will ensure that the state will pursue continuing detention order applications with appropriate expedition. If this amendment were made, the parties would have a maximum of five months to prepare for a hearing on a final continuing detention order, which in our submission is an appropriate amount of time.

(vi) Parliament should seriously consider repealing s 105A.15A(3)

Section 105A.15A of the *Criminal Code* provides some assurance that an offender who is subject to proceedings brought under Division 105A will be afforded legal representation in any such proceedings. We hope that such provisions are used liberally by the courts when offenders are facing difficulty in obtaining representation. There is of course a strong public interest in the maintenance of confidence in the system administering justice. There is also, relatedly, a strong public interest in ensuring that there

²⁰³ *Criminal Code Act 1995* (Cth), s 105A.9(3).

²⁰⁴ *Criminal Code Act 1995* (Cth) s 105.4(4).

is equality between parties to any proceedings. The latter applies with special force to proceedings that might result in a person being detained in prison beyond the expiry of his or her sentence.

We are, however, troubled by s. 105A.15A(3) of the *Criminal Code*, which allows regulations to prescribe matters that the court 'may, must or must not' take into account when considering whether an offender's lack of representation is beyond his or her control and/or whether the costs and expenses of the offender's legal representation are reasonable. We submit that the court is best placed to determine which matters should be taken into account when determining whether to make orders to stay the proceedings for lack of representation, or that the Commonwealth is to bear certain costs. We make this submission for two primary reasons.

First, as mentioned above, there is a strong public interest in ensuring that offenders are adequately represented in these proceedings. Eligible offenders have completed their lawfully imposed sentences for crimes proved under the criminal law and are presumptively entitled to their liberty and re-entry into society. While there may be a very limited set of circumstances where post-sentence detention is warranted, the ambit of the statutory scheme means that it could easily be used to perpetrate injustice against terrorist offenders. As Division 105A currently stands, many eligible offenders will have served significant sentences for preparatory offending. Such offenders are often from marginalised ethnic backgrounds, are of low socio-economic status and have complex mental health needs. There is a strong public interest in ensuring that the administration of justice is not mobilised to marginalise these individuals further, through unequal court proceedings in which they lack appropriate legal representation. In circumstances where administrative detention can be ordered for up to three years in duration, on the basis of a standard of proof that falls well below the criminal standard, the state must ensure that an offender is adequately represented. If the state has no contradictor, there is an obvious risk of arbitrary detention.

Secondly, the ambit of the power afforded to the executive to make regulations circumscribing the court's discretion in making orders when an offender is unable to engage legal representation, is troubling. Provisions allowing the court to stay proceedings or order the Commonwealth to pay the costs incurred by an offender provide important protections for the rights of offenders who can be made subject to this scheme. We caution against the overuse of delegated legislation, particularly in circumstances where there is potential for it severely to affect the rights of citizens.²⁰⁵ The executive should not be able to dictate to the court what factors to consider in determining such an important issue. If there is a strong public interest in having the court consider, or not consider, particular factors, then such factors should be stated in Division 105A.15A itself, following proper scrutiny by democratically elected members of Parliament. We are fortified in so submitting by the recent report of the Senate Standing Committee for the Scrutiny of Delegated Legislation arising from the Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight, which recommended that there be increased parliamentary oversight and scrutiny of delegated legislation.²⁰⁶

We acknowledge that, to date, no such regulations appear to have been made. However, the capacity for such regulations to be made in the first place poses a risk to civil liberties and is anti-democratic.

We accordingly submit that Parliament should seriously consider repealing s 105A.15A(3). We further submit that, in the event of such repeal and a need arising for Parliament to provide guidance to Courts in relation to how the power under s. 105A.15A should be exercised, consideration might be given to

²⁰⁵ See ['NSWCCL Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight'](#), 8 July 2020.

²⁰⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, ['Final Report of the Inquiry into the exemption of delegated legislation from parliamentary oversight'](#), 16 March 2021.

amending s 105A.15A(3) so as it provides for a list of matters that the Courts may, must and must not consider when making the orders contemplated by s 105A(2).

(vii) Interactions with other regimes

The final matter with which we shall deal is the interaction between Division 105A and other Australian preventive detention regimes. We have already dealt with the interaction of Division 105A with Division 105, particularly in relation to how often interim detention orders truly need to be made under Division 105A.

In NSW (the jurisdiction from which we write), there is a substantial overlap between the operation of Division 105A and the *Terrorism (High Risk Offenders) Act 2017* (NSW). For a number of reasons, we consider Division 105A, despite its flaws, to be a more proportionate means than the NSW Act of managing the risk of serious terrorist acts being perpetrated by those who have already committed serious terrorist offences. The eligibility criteria for the NSW-based regime extend beyond those who have been convicted of serious terrorist offences, and a significant amount of evidence called in proceedings has been obtained using compulsory powers which render the evidence admissible in proceedings. Further, whereas Division 105A explicitly recognises that offenders should be housed separately to sentenced prisoners (though still in prison), no such provisions appear in the NSW Act. We will say no further about the differences between these regimes, though if it would be of benefit to the Review, we can elaborate further on our view that the Commonwealth response is a more proportionate one than that taken by the NSW Act.

The most important area of interaction between this regime and others, is suggested by s 105A.7(1)(c). That provision requires a Court only to make a continuing detention order if it is satisfied that there is no less restrictive measure that would prevent the unacceptable risk of serious Part 5.3 offending. This is referred to sometimes as a 'safety valve' (though Gordon J in *Benbrika* considered it to be a 'padlock'²⁰⁷). As we argue above, it is difficult to imagine circumstances where a control order made under Division 104 of the *Criminal Code*,²⁰⁸ or an extended supervision order made under the *Terrorism (High Risk Offenders) Act 2017* (NSW) for NSW-based offenders, will not be enough to render acceptable any ongoing risk posed by an offender of committing a serious terrorist offence. Certainly, such orders, whatever their flaws, constitute a more proportionate response to the problem that Division 105A seeks to address. We will not provide a comprehensive account of either regime in this submission; but, again, we can do so if this would assist the Review. Suffice to say that the conditions that can be imposed under both regimes are very similar and 'almost unlimited'.²⁰⁹ As with continuing detention orders, the NSW extended supervision order scheme casts the net wider in terms of eligible offenders when compared with the Commonwealth's control order scheme.

²⁰⁷ *Benbrika* (2021) 38 ALR 1, 52 [176].

²⁰⁸ For more on control orders, see, eg, Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 136; Rebecca Welsh, 'Anti-Terror Preventive Detention and the Independent Judiciary' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 137; Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756; Rebecca Ananian-Welsh, 'If at First You Don't Succeed...: Effectiveness and the Evolution of Preventive Organised Crime Measures' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 177; Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing, 2013) 154; Svetlana Tyulkina and George Williams, 'Preventative Detention Orders in Australia' (2015) 38(2) *University of New South Wales Law Journal* 738.

²⁰⁹ *Benbrika* (2021) 388 ALR 1, 57 [194] (Edelman J).

In relation to Mr Benbrika, the state sought a control order in the event that the Court rejected the application for a continuing detention order.²¹⁰ In *Benbrika* Edelman J summarised the conditions to which Mr Benbrika would have been subject had the control order come into force:

he would have been required to do, amongst other things, all of the following: wear a tracking device at all times or, alternatively, report daily to a police officer; remain at a specified premises between 10 pm and 6 am; avoid entering any prohibited places including exclusion zones at airports or ports and the residences of a long list of persons with whom association is also forbidden; not form, join or affiliate with any group, club or organisation without written permission from an Australian Federal Police Superintendent; not form prayer groups in or out of a Mosque, lead prayers, instruct others on leading prayers, or influence any other person in relation to religion in any group; and not access, or allow access on his behalf to, any telephone (other than one provided by the Australian Federal Police subject to strict conditions), computer, tablet or device or email without permission from an Australian Federal Police Superintendent and with any use subject to strict conditions. Breach of any of those requirements would render Mr Benbrika liable to imprisonment for contempt.²¹¹

Indeed, such conduct would not only have exposed Mr Benbrika to the possibility of contempt proceedings. He might also have been charged with the offence contained in s 104.27 of the *Criminal Code*, which carries a maximum term of imprisonment for five years. We do not support the broad scope of conditions that can be imposed under control orders. What we do say is that when such broad-ranging orders can be made, and where an offender is exposed to the possibility of 5 years' imprisonment if s/he breaches such an order, it is very difficult to see why the Division 105A scheme is necessary. Perhaps Edelman J suggested as much in *Benbrika* when he observed that:

[w]ith the extraordinary breadth of possible control order obligations, and assuming the availability of sufficient police resources, it should be possible to reduce to an acceptable level the risk of the commission of many serious Pt 5.3 offences.²¹²

Also of relevance to the current discussion is the panoply of inchoate crimes in Part 5.3 of the *Criminal Code* which already afford the state significant power to prosecute offenders for engaging in conduct that poses a risk of future harm (a point that we have addressed in more detail above).

Moreover, we submit that it would be a more efficient use of the resources of the state, to seek control orders and prosecute breaches thereof – and where necessary seek detention orders under Division 105 of the *Criminal Code* – rather than going to the expense of seeking continuing detention orders under Division 105A and keeping offenders in lengthy periods of ongoing administrative detention requiring annual review of the detention orders. Efficiency of resourcing notwithstanding, such an approach would afford an offender the chance to prove him or herself able to comply with stringent supervision within the community, and would better accord with his or her fundamental right to be at liberty following the expiry of a sentence lawfully imposed for a criminal offence. Ultimately, we submit that when the totality of the Commonwealth's national security legislation architecture (further augmented by state based regimes) is considered, there are more than sufficient (indeed, excessive) options available to the state to monitor and control offenders at risk of committing serious terrorist offences within the community.

We finally note that the Commonwealth's *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill* (2020), which seeks to introduce an extended supervision order regime to the *Criminal Code*, similar in nature to that contained in the *Terrorism (High Risk Offenders) Act 2017* (NSW), remains before the Parliamentary Joint Committee on Intelligence and Security. The Committee

²¹⁰ *Lee v Benbrika* [2020] FCA 1723.

²¹¹ *Benbrika* (2021) 388 ALR 1, 57 [194].

²¹² *Ibid* [195].

has heard evidence and received submissions and is presently in the process of drafting its report on the Bill. If such a scheme were enacted, it would provide yet another tool that the state could use to manager offenders at risk of committing serious terrorist offences in the community.

This submission was prepared by Dr Andrew Dyer and Mr Josh Pallas. We hope it is of assistance to the INSLM and would be pleased to be of further assistance, if required. No part of this submission requires redaction or protection.

Yours sincerely,



Michelle Falstein
Secretary
NSW Council for Civil Liberties



Andrew Dyer
Director
Sydney Institute of Criminology

APPENDIX D

risk assessment tool is developed which can provide that predictive reliability. I think that's an entirely reasonable position to land on.

5 **MR DONALDSON:** Yes. I understand that. All right. Now, Joshua we have time limits on - or I have time limits, unfortunately, and not - well, I have them as a necessity because with everybody who is going to be appearing at these hearings, we could go on all day because people's views are most interesting and these are most interesting topics. But we have reached the end of the time that we have been able to - we have been able to devote to hearing your views, but thank you very much,
10 Joshua, not only for your written submission, but also your appearance this morning. And I should say that I understand that you are a young legal practitioner, and I was greatly assisted by the work that you have put in not only your written work but what you've done today and I'm very grateful for your help. So thank you very much.

15 **MR ANDREWS:** Thank you very much and thank you for the opportunity to appear.

MR DONALDSON: Not at all. All right. So now in the program we are going to have a short break and we will be back - I think that's right, isn't it?
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MR MOONEY: Yes. Morning tea.

MR DONALDSON: Yes. So we are going to have a short break and we will be back in - yes, at 11.30. All right. So everything will be switched off for the time being. Thank you.
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THE PUBLIC HEARING ADJOURNED 10:59 AM

THE PUBLIC HEARING RESUMED 11:30 AM
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SESSION 2: NSW COUNCIL FOR CIVIL LIBERTIES AND THE SYDNEY INSTITUTE OF CRIMINOLOGY

35 **MR DONALDSON:** All right. Thank you very much. So this is the resumption of the first day of the public hearing into Division 105A of the Criminal Code. And so after the two groups that we have heard this morning, next we have Dr Andrew Dyer, who I am delighted and most grateful to see here today. And Andrew is an academic at Sydney University and is Director of the Sydney Institute of Criminology, and the Institute and the New South Wales Council for Civil Liberties have provided an
40 extremely helpful written submission, and which are very graciously supplemented as well.

45 So I'm very thankful to both the council and to the Sydney Institute of Criminology for this report and very grateful to you, Andrew, for making yourself available today. And thanks for coming. So I think you've got an observation or two you wanted to make before we ask you some things?

DR DYER: Yes, I will just briefly set out our position at the start of my evidence. Just mainly because the extended supervision order scheme has come into play since we lodged our original written submission on 1 September last year. I will just set out briefly our six submissions to this review.

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MR DONALDSON: Thank you.

DR DYER: The first of those submissions is that we think that serious consideration should be given to the abolition of the continuing detention order scheme, and we say that essentially because when you look at the range of restrictions that can be placed on a person's liberty pursuant to an extended supervision order and given also the doubtful quality of risk prediction, about which we have heard something this morning, we find it very difficult to imagine the circumstances where the state could prove that an extended supervision order does not remove the risk posed by the offender to a tolerable extent. And we come to what a "tolerable extent" is in just a moment.

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Our second submission is that if the continuing detention order scheme created by Division 105A remains in force, various reforms should be made to that scheme to make sure that it complies as far as possible with the International Covenant on Civil and Political rights. First of all, we say that the test created by section 105A.7(1) should be amended in the same way as the Australian Human Rights Commission this morning said it should be amended.

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We say that detention should only be an available option if the state can prove that it is more probable than not - that's the first part - that the person will commit a terrorist act or be responsible as a secondary or passive participant for such an act in the absence of such an order. Secondly, we say that the scheme should be made truly non-punitive or at least as non-punitive as possible and, in that regard, we support recommendations 11 to 17 that have been urged upon you by the Australian Human Rights Commission, and we also support recommendations 36 to 39 which have been urged upon you by the Law Council of Australia in its submission dated 17 September 2020 to the Parliamentary Joint Committee on Intelligence and Security which forms part of the submission to its review.

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Thirdly, we say that two matters should be removed from the non-exhaustive list of considerations that are taken into account when the state - when a judge determines whether to make a continuing detention order or an extended supervision order: (A) the past terrorist offending and (B) the sentencing judge's statements about that terrorist offending at the time of sentence. We say they are backward-looking considerations that are out of place in a forward-looking exercise.

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And, fourthly, though we did not mention this in our initial written submissions, we support the submission made by the Law Council of Australia and also by the Australian Human Rights Commission that there should be a minimum term of imprisonment that has been imposed on an offender before he or she is susceptible to having a continuing detention order or an extended supervision order imposed upon

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him or her. This is the gateway point that you referred to this morning, Mr Donaldson. Also, we add that the objects of the Division should be widened - this is section 105A.1 to include rehabilitation.

5 Our third submission to this review is that we are - we consider extended supervision orders to be permissible; however, we support the Australian Human Rights Commission's recommendations 16 to 25 concerning extended supervision orders, with the very minor exception that section - recommendation 16 of the Australian Human Rights Commission has a high probability of unacceptable risk standard. We
10 say it should be beyond reasonable doubt that an unacceptable risk exists of a terrorist act or support or facilitation for a terrorist act, and we think that is broadly in line with what is being urged upon you by both the Law Council of Australia and also Legal Aid New South Wales.

15 Our fourth submission is that control orders should be dispensed with, and, of course, this is a matter that has also been ventilated this morning. Our fifth submission is that we are concerned about interim detention orders and interim supervision orders. We are particularly concerned about the low standard of proof there. Somebody can be deprived of his or her liberty for three months or more in exceptional circumstances,
20 merely upon reasonable grounds existing for believing that a final order will be made, and we associate ourselves with the concerns that you expressed this morning about that, Mr Donaldson.

25 And we also support in principle the recommendations of Legal Aid New South Wales at 12 to 13 of its written submissions concerning the amendment of that scheme. Our one doubt about what they have said is that there might be circumstances where it is necessary in the last six months a person's sentence to impose an IDO or an ISO on him or her if intelligence comes to light.

30 And our sixth and final submission concerns section 105A.15A, subsection (3) which creates a regulation-making power in a case where a person is unable to gain effective legal representation. We say this power is undemocratic and if this matter should be regulated, it should be regulated by Parliament, not the executive. So those are our submissions to you.

35 **MR DONALDSON:** Thank you very much for that, Andrew, and for - as I said, for the written submission that you provided. And I am very aware of the difficulty that parties face with the recent introduction of the amendment to the Act introducing the ESO scheme and that a great deal of work went into submissions even before that
40 scheme was introduced. So thank you for clarifying those matters for me today.

45 Could I perhaps deal with the last of the issues that you raised first, which really deals with the process of engaging legal representation for defendants to these applications. And that, I think, marries in, to a degree, with your fifth observation about interim orders as well.

DR DYER: Yes.

5 **MR DONALDSON:** So and the recent - or circumstance of Mr Benbrika, I think, is perhaps illustrative of how the process - well, it's probably the only indication we've got of really how the process currently operates. But in relation to that matter, I think it was the - the application was commenced two months prior to the expiration of his term of imprisonment. I think, on any analysis, nobody could have thought that two months was going to be an adequate time to deal with that.

10 And so whether there is a prescription in the Act for applications to be brought at a particular time or not, I'm not sure about that, because I think there are things that can be done to ensure that these applications are brought at the correct time.

15 But if you start them two months before the term expires, almost necessarily, a person is - or the application is not going to be dealt with before the term expires. And so then, almost inevitably, gives rise to applications for interim orders.

DR DYER: Yes.

20 **MR DONALDSON:** And I think, as you've said, for the threshold for the making of interim orders presently is extremely low. It is, in effect, the court being satisfied that there's a reasonable prospect of a -

DR DYER: Yes -

25 **MR DONALDSON:** A permanent order being made and really nothing else. One thing that I would be interested in your view on - and it's a matter I've given some thought to - is whether the test for the making of interim orders should be that they - no interim order is made other than in exceptional circumstances? And you've indicated that the current process is that interim orders can be made for periods based on that lower standard until three months is reached and then can be extended, but only in exceptional circumstances.

30 It may inspire those who are making these applications to make them in a timely way if the test was that they would only get an extension in exceptional circumstances. Is there any other - is there any - and, of course, exceptional circumstances can mean - there's no clear definition of what they are. But it's certainly a much higher standard than the standard that currently exists. Is there any other way that you think that that problem might be dealt with?

40 And can I preface - sorry, can I also say this, Andrew? I believe it is a very real problem and issue that these applications are not being dealt with prior to the expiration of sentences. People should not be - there should not be an expectation that interim orders will be made because the Minister hasn't been organised enough to make it in a timely way, it seems to me.

45 **DR DYER:** Yes. And that's a point that we've made, as you would have seen in our first written submission

MR DONALDSON: Yes.

5 **DR DYER:** And has also been made articulately by Legal Aid New South Wales in its written submission, as you would be aware. I will say two things. The first thing is a response to your suggestion just now that an interim order only be available in exceptional circumstances. That, to me - it's the first time I've heard it - but that, to me, sounds like quite a sensible way of meeting the types of concerns that we and Legal Aid New South Wales have raised in our written submissions to this review.

10 As you say, exceptional circumstances is not a precise standard, but we say that it should only be in exceptional circumstances that an interim order is capable of being made. Now, your question just now - and this is the second thing I'm going to say - went to, well, are there any other available options? The options stated by Legal Aid New South Wales at 12 to 13 of its written submission, also seems to us to be a sensible way of dealing with this question.

20 And I outlined it just now. In other words, what they seem to be saying is that there should only be the prospect of - let's say - I withdraw that. The only circumstances in which an interim order is capable of being made is before the six months of the sentence has expired, except in exceptional circumstances, which is much the same sort of thing as you seem to be proposing. So we say that that is a sensible way of requiring the state to get its act into gear in these sorts of matters where personal liberty is at stake.

25 **MR DONALDSON:** Well, the other thing that troubles me a bit about the current scheme dealing with the interim orders is they have to - let's deal with an interim detention order. Well, if a court is going to be persuaded to make an interim detention order, then when you get to the final hearing, there are going to be issues as to whether there is a real prospect of a person not being subject to either order.

30 **DR DYER:** Yes.

MR DONALDSON: It seems to me.

35

DR DYER: Yes.

40 **MR DONALDSON:** And that's an undesirable decision for a court to have to make at that low standard, you know, for the making of interim orders, it seems. And then if there are interim supervision orders that are made, well, they would be made on terms and conditions. And again, the longer that goes on, that, if you like, sets the standard for what extended supervision orders might look like if the Crown or the Minister is able to convince the court to make it eventually. And, again, I just think that that's not a particularly desirable thing.

45

When one has regard to the fact of the seriousness of what we are dealing with here, which is - well, with interim detention orders, keeping people in incarceration

beyond the term of their sentence. So, you know, I think it has to be a better way of dealing with it than what seems to have been - well, it is hard to know, of course, because there's been a limited number of these applications, but there can't be a practice - a practice developing whereby the Minister thinks that, "I will make these applications late and just get interim orders, which will give us another three months at least". That's very undesirable.

DR DYER: Yes. I agree fully with those remarks, yes.

MR DONALDSON: And part of the other issue that arises there is the final of the six points that you made, which deals with legal representation. Because the process at the moment, as you know, under the Act and also under the regulations is that a person who is the subject of one of these applications in effect has to satisfy the Commonwealth that the person doesn't have independent means of paying for legal representation or has made applications to, in effect, state legal aid bodies and not been provided with adequate funding via those means.

Well, I think anybody who has had experience with making applications for legal aid funding will know is that there are delays in that process - necessarily so - and I think if you look at the amount of money that would be made available by, you know - so what I would apprehend to be a legal aid authority more making these - for defending such an application, it's unlikely to be adequate. And in any - and further to that, somebody who has been inside prison for, inevitably, an extended period of time serving a sentence is very unlikely to have financial means to enable them to fund this.

And it seems to me - and all of these processes, as I'm sure you can imagine, just delay the process. Because until the person gets adequate legal representation, well, they can't start work. Now, that might take three months if they've got to go through steps of going to the legal aid commission seeking funding and those sorts of things. So a means of dealing with that issue, which would seem to me to perhaps deal with it completely, is that the provision in 15 simply be that the Commonwealth will provide adequate funding for these applications.

DR DYER: 15A, yes, yes. That's right, yes.

MR DONALDSON: Full stop. And, again, although the Commonwealth makes contributions, as I understand it, to state legal aid bodies which deals with providing legal aid funding for prosecution or Commonwealth offences, I think these - because of the extraordinary nature of these applications, it would not be unrealistic to simply say to the Commonwealth, "Well, you are going to bear the financial burden of ensuring that people are adequately represented rather than first having to going to legal aid commissions".

DR DYER: Yes.

MR DONALDSON: Because if you look at these applications, in both of the Benbrika applications, for instance, you know, there were very lengthy hearings. There was an enormous amount of work done by experts at - in both matters, plainly. If people can't get started on that work very early in the piece, there is absolutely no way that they are going to be dealt with within a realistic period of time. So it seems to me that a fairly easy way of dealing with that is to simply say to the Commonwealth, well, if you're going to bring on one of these applications - which, obviously, you are perfectly entitled to do - the defendant knows that their reasonable costs are going to be met.

DR DYER: Yes, well, we say given the liberty interests that are at play here, that that is a perfectly reasonable suggestion. And the only other thing that I can add to what you're saying is that when you read the Legal Aid submission, the comments that you have made about the Benbrika proceedings are equally applicable to the Pender proceedings.

MR DONALDSON: Yes. Oh, absolutely. No, I was just using Benbrika because it's been the most recent one.

DR DYER: Yes.

MR DONALDSON: But - and, again, I think it rather highlights that if an application is brought two months before the end of the sentence, there's just - it's difficult to see that there is a realistic prospect that that could ever be dealt with in that timeframe. And so delays in obtaining adequate funding - both for legal representation and other expert assistance that's required - can't be an excuse. There is an easy way to deal with it, it seems to me.

So I think that might be - well, I will be interested to hear - I will be interested to hear eventually what the Government's view is on any sort of recommendation along those lines. But that's something that you think might solve the problem?

DR DYER: Yes, I do, yes.

MR DONALDSON: All right. I was also very interested in your views in relation to the - as it were, broadening the objects of Division 105A. And, as you know, the provision or the Division prior to the recent amendments had much broader objects, and it was those objects, really, that was the focus of the judgments of Justices Gageler and Gordon in the Benbrika decision.

DR DYER: Yes.

MR DONALDSON: But now the objects have been narrowed, really, to the object is - or the object is simply to ensure the safety - protection and safety of the community by providing for continuing detention orders. So it effectively just reproduces the terms of the legislation. In many of the - or in a number of the human rights - the international human rights materials that we've looked at, they make plain

that processes of post-sentence detention should be geared, at least in part, to rehabilitation or reintegration of offenders into the community. I take it that you would accept that that should be an object of this part?

5 **DR DYER:** Yes, certainly, I do accept that. And your reference to international legal materials brings to mind a lot of European Court of Human Rights jurisprudence in particular that places heavy emphasis on reintegration and rehabilitation, and in the post-sentence preventative detention context, of course, the leading cases, as you would be aware, are *M v Germany* and *Ilseher v Germany* decided in 2009 and
10 2018 respectively. But, yes, I agree with that, yes.

MR DONALDSON: Yes. So *M v Germany* is a most - is an interesting decision. And one of the matters that is of interest, I think, is that it does, well, I suppose, highlight that these schemes do exist in a number of European countries.

15

DR DYER: Yes.

MR DONALDSON: And that, I think, provides an interesting context to the - well, the desirability or availability of these sort of posting - post-sentence detention
20 schemes in Australia because they are widespread now.

DR DYER: Yes, they are. And as we've said in our initial written submission to this review and as I heard the Australian Human Rights Commission saying this morning, we accept that, in very limited circumstances, post-sentence preventive
25 detention is morally acceptable and compatible with human rights. However, if you come back to rehabilitation, one of the things that we say must be there, if this is to be human rights compliant, are non-punitive detention conditions or at least attempted conditions that are as non-punitive as possible. And so the focus, we say, has to be on the treatment of offenders, for example.

30

MR DONALDSON: And I would have thought another factor or an aspect of that is really that if you keep a person in - if you keep a person who at the end of a lengthy sentence poses a risk under the legislation, you keep them in detention and don't provide any sort of rehabilitation service or function or make any effort toward
35 eventually reintegration of that person into the community, well, they are never going to get out.

DR DYER: That's exactly right.

40 **MR DONALDSON:** Logically.

DR DYER: Yes, and there are two European Court of Human Rights cases that make exactly that point, namely, you are no doubt aware of these cases, *James v the United Kingdom* and then there is also the life sentence case of *Murray v the Netherlands* where this bloke is just left in detention without any treatment, and,
45 therefore, without any way of getting out of detention. So, yes, we agree.

5 **MR DONALDSON:** Yes. And I think in some of the submissions that I've received, there are suggestions that there should, in fact, be a limit on the number of continuing detention orders that can be made in respect of an individual. Now, there seems to be an obvious difficulty with that, that is, that a person may pose an extraordinary risk of committing a very serious offence if they are released, and if there is an arbitrary limitation on that, well, it's difficult to see how that risk could be accommodated.

10 So I'm not - I must say I'm not presently particularly enthused about that. But it may be that if there is no - if there is no process in place for rehabilitation or an attempted reintegration, the only option other than simply forgetting about these people in detention is to impose an arbitrary limit, perhaps.

15 **DR DYER:** Yes. I would have the same misgivings as you're indicating about that sort of an option because there are a small number of offenders, we would say, who are incorrigible, and there is the danger of arbitrariness that you suggest just now. We say that a better way of dealing with this problem is to have rehabilitation right from the start of the offender's sentence and also for any period of continuing detention to be focused on rehabilitation and reintegration into the community. And that would be the way in which we think the problem should be addressed. Yes.

20 **MR DONALDSON:** Yes. And even if a person has, say, served a lengthy term of imprisonment and still the view is formed that the person - I use this term in a non-pejorative way - has not been rehabilitated.

25 **DR DYER:** Yes.

30 **MR DONALDSON:** That's still no reason or excuse to then say, well, there's no point going forward with this during a period of non-punitive detention. In fact, probably all the more reason, I would have thought.

35 **DR DYER:** Yes, that's right. Well, one thing that stood out about the Benbrika decision was the statement by the court - and they are just saying what is the case about Division 105A - that is, that there's nothing in there that focuses on special rehabilitation measures for people in these detention facilities. And yet, as you're saying, they are not in there for retributive reasons and so the focus has got to be on getting them out into the community as soon as possible, and that's only going to happen if they are rehabilitated or if efforts are made to rehabilitate them, I should say.

40 **MR DONALDSON:** And I would have thought that that - if you think that the object of these provisions as it used to be is really protection of the community -

45 **DR DYER:** Yes.

MR DONALDSON: - I'm not sure that the community is being protected by providing - or making no effort of rehabilitation of people with a view that - with - a

5 defendant with a view that that defendant is likely to spend the rest of their life in this sort of detention. I'm not sure that that ultimately is a great protection to the community, because maybe if people know that that's what - that that's what confronts me if I'm convicted of some of these offences, well, offending might be more serious than it would otherwise be. Perhaps.

DR DYER: Yes. We would say that the best way of protecting the community is rehabilitating offenders. We agree with what you're saying there.

10 **MR DONALDSON:** Does it seem odd to you that it doesn't seem to be an object of the Division at all? It just seems odd to me.

15 **DR DYER:** Yeah, we think it is wrong. We think that given the Australian Government's casual approach to human rights protection recently - and it's - both - not making a partisan remark there, either. I think both sides of politics are guilty of this sort of indifference. We don't necessarily think it's odd in the sense of being unexpected, but we - yes, we think that certainly that should be in there. As it is in certain state legislation of this nature, off the top of my head, I am almost certain this is in the Dangerous Prisoners (Sexual Offenders) Act (Queensland), for
20 example, and it should be there, in our submission.

MR DONALDSON: All right. Thank you for that. Can I just ask you some questions about some of the other opening observations you made today that are reflected in your submissions? Can you explain this - in it a little more detail if you
25 can - this suggestion about imposing a standard of proof of beyond reasonable doubt? Now, I understand that to be the submission is in relation to the making of an extended supervision order.

DR DYER: Yes.

30

MS LUU: 105A.7A.

MR DONALDSON: Yes, 7A, isn't it? That what you said?

35

MS LUU: Yes.

MR DONALDSON: Yes, 7A. Sorry.

DR DYER: 7A is -

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MR DONALDSON: That's why I can't find it, because I'm looking at the old version of the legislation. All right. So it's 7A. So where in 7A it would be inserted -

MS LUU: (1)(b).

45

DR DYER: (1)(b). That's the provision that relates to the standard of proof.

MR DONALDSON: So the way that this would operate is - so this would be in relation to an application simply made for an extended supervision order or also in the alternative?

5 **DR DYER:** Also in the alternative. Wherever an extended supervision order is in prospect, we say the state should have to prove beyond reasonable doubt that an unacceptable risk of a terrorist act or the support or facilitation of a terrorist act must exist.

10 **MR DONALDSON:** So that would follow, then, that if an application was brought for a continuing detention order, now there can be an extended supervision order made in the alternative?

DR DYER: Yes.

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MR DONALDSON: Well, you don't even have to make it in the alternative; it's available to be made.

DR DYER: Yes.

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MR DONALDSON: So the Minister makes an application for a continuing detention order under the terms of 105A.7, the court has to be satisfied that - satisfied to a high degree of probability that the offender poses an unacceptable risk of committing the offence and then has to be satisfied that there is no less restrictive measure. So you have a standard of proof of less than beyond reasonable doubt for the making of a detention order. Let's say the court accepts (b), that is, satisfied that the offender poses an unacceptable risk but is not satisfied in terms of (c), that is, is satisfied that there would be less restrictive means available.

25

30 **DR DYER:** Yes

MR DONALDSON: So that's an extended supervision order.

DR DYER: Yes.

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MR DONALDSON: So then the parties come back to argue about here are the terms of the extended supervision order. And the task for the court then would be to be satisfied beyond reasonable doubt, what, in (b).

40 **DR DYER:** Yes. Now, this submission that I'm making has to be read with or considered with our proposals for the standard of proof in continuing detention order proceedings. What we are saying the standard should be in continuing detention order proceedings is proof to a high degree - sorry, proof on the balance of probabilities that there is a more likely than not risk of terrorist offending, a terrorist act or support or facilitation of a terrorist act, in the absence of the order. So that's a little bit different from the standard that we find currently in Division 105A for continuing detention orders.

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MR DONALDSON: I see. So -

DR DYER: So -

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MR DONALDSON: Sorry to interrupt.

DR DYER: No, not at all.

10 **MR DONALDSON:** Does it then follow that when you look at 7A(1)(b), you are not actually suggesting any change to the terms that the offender - or the defendant poses an unacceptable risk of committing -

DR DYER: That's right, yes.

15

MR DONALDSON: I see.

DR DYER: Yes. What we are saying is that when it comes to extended supervision orders, we accept that a lower -

20

MR DONALDSON: I see.

25 **DR DYER:** - threshold may exist, unacceptable risk rather than a greater than 50 per cent chance, but that this should be proved beyond reasonable doubt. And we are saying this essentially because there's sometimes some confusion about this high probability standard, in our submission. People look at this high probability and think, oh, well, there's got to be high probability of the final outcome. It's not right, of course, because there only has to be a high probability of an unacceptable risk.

30 We are saying you should be sure - state the courts have to be sure there is an unacceptable risk of a terrorist act or support or facilitation of a terrorist act if an extended supervision order is to be made. So to be sure of an unacceptable risk is not to be sure in our submission.

35 **MR DONALDSON:** I now understand, because I wasn't aware that you were actually proposing - or that there was a differentiation between what the ultimate risk is of.

DR DYER: Yes, that's right, yes.

40

45 **MR DONALDSON:** I do understand that now. But I suppose that that highlights the other - or another issue, which is if you go back to continuing detention orders, if you are going to replace risk of committing a serious Part 5.3 offence with something else, it has to be a very clear definition of what that something else is, (1), and (2) a very clear, principled understanding of why it is that formulation and not as it currently exists.

DR DYER: Yes.

MR DONALDSON: And I have read very carefully what you have suggested there. But it's premised on a differentiation between the nature of offending in serious Part
5 5.3 offences, obviously.

DR DYER: Yes.

MR DONALDSON: And is the criterion of the differentiation the actual
10 commission of an act of violence?

DR DYER: Yes, it is.

MR DONALDSON: The criterion of differentiation in a nutshell.
15

DR DYER: Yes. Oh, I think - I'm not sure that --

MR DONALDSON: Or extremist violence, if I can put it that way?

DR DYER: I might not be understanding you correctly. But we say that the
20 difference between extended supervision orders and -

MR DONALDSON: No, no. Sorry, I think I have misled you there.

DR DYER: Okay.
25

MR DONALDSON: If you just look at CDOs -

DR DYER: Yes.
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MR DONALDSON: - you say that the criterion in (b), 7(1)(b), on what the court has got to be satisfied about.

DR DYER: Yes.
35

MR DONALDSON: So the court has to be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious Part 5.3 offence. You are saying those words should be amended.

DR DYER: Yes, we are. Yes. We are saying the offender poses a greater than 50 per cent chance of committing a terrorist act or being responsible as a secondary or passive participant for those acts. Something along those lines, yes.
40

MR DONALDSON: Yes. And so what that is saying is that there is a difference
45 between that formulation and commission of a serious Part 5.3 offence.

DR DYER: Yes.

5 **MR DONALDSON:** And so there's a distinction drawn. And what I'm trying to - and I understand that and a number of people have made a similar observation. And, in many instances, it derives from - perhaps not derives, but consistent with what Gageler J said, for instance, in Benbrika.

DR DYER: It is, yes.

10 **MR DONALDSON:** But what I'm trying to understand is what is the - is there a precise criterion that differentiates what should be in there from what is currently in there, which is committing a serious Part 5.3 offence? And is the criterion of difference between what you're putting forward and what is currently there that it focuses on the risk of commission of a violent act?

15 **DR DYER:** We say that the fact that this applies to part - all serious Part 5.3 offences, is a matter of concern and that it should just apply to terrorist acts. And we would say that we also - we are also saying that the terrorist act should be more likely than not, roughly for the reasons given by the Australian Human Rights Commission this morning, that if you have this unacceptable risk test, then it might
20 be a five or a 10 per cent chance, ultimately, of a terrorist act occurring.

Now, in the alternative we would say that an unacceptable risk standard, unacceptable risk of a terrorist act or a support or facilitation of a terrorist act is a better standard than the one at the moment, and that, of course, brings into play what
25 was said by Gageler and Gordon JJ in Benbrika in their respective dissents on this issue.

MR DONALDSON: So, again, if I can - sorry to seem dull, but if I can just go back to (b). So you would be saying that the way the provision would operate is the court
30 is satisfied to a higher degree of probability that the offender poses a more likely than not risk of committing -

DR DYER: No, just satisfied that the person poses a greater than 50 per cent chance. So we are not --

35 **MR DONALDSON:** More probable than not.

DR DYER: Yes.

40 **MR DONALDSON:** Anyway, greater - so poses a greater than 50 per cent chance of committing X.

DR DYER: Yes.

45 **MR DONALDSON:** And so the court then decides whether it's satisfied to a high degree of probability as to another probability, that is, whether it is greater than 50 per cent.

DR DYER: No, we don't think that the high degree of probability should be in there as well.

5 **MR DONALDSON:** That comes out as well.

DR DYER: Yes, that comes out. Yes. That's right.

MR DONALDSON: I just want to clarify that.

10

DR DYER: Yes.

MR DONALDSON: So you are saying - right. So it is satisfied that the offender poses - let's just say greater than 50 per cent chance, greater than 50 per cent risk of committing X.

15

DR DYER: Yes, that's right. Yeah. And we say that an added benefit of that is that it is - it's simpler than the current formulation, as you've just suggested now. In other words, it's not a risk of a risk anymore; it's a straightforward -

20

MR DONALDSON: No, I understand. Yes. So there's only one risk assessment.

DR DYER: Yes.

25 **MR DONALDSON:** And would that still apply in relation to ESOs under 7A(1)(b) or would you say there - well, again, you've really got that - satisfied on balance of probability that -

DR DYER: Well, what we say -

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MR DONALDSON: That they will commit a serious Part 5.3 offence.

DR DYER: What we would say when it comes to ESOs is that given that they place fewer restrictions on an individual's liberty than detention, a more relaxed standard of proof is warranted. And so the state should be required to prove beyond reasonable doubt that an unacceptable risk of a terrorist act exists. So we say that unacceptable risk is enough there. On balance, we say this, because we don't have detention in prospect. You've just got these restrictions, however extensive, on a person's liberty.

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40

MR DONALDSON: I understand that. Thank you, Andrew. Can I just touch on this that arose out of your last answer there, which is that extended supervision orders by their nature pose fewer restrictions than detention? That's logically correct and obvious, I suppose?

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DR DYER: Yes.

MR DONALDSON: But the list of standard-type conditions is - well, it goes for pages, actually, in this legislation. So, again, this is - anyway, I think you - there is an extraordinary range of terms and conditions -

5 **DR DYER:** Yes, 7B and it's -

MR DONALDSON: Yes. 7B. Thank you for that. So the conditions. So these go on for some pages.

10 **DR DYER:** Yes.

MR DONALDSON: And we've seen for the purposes of this report or this inquiry examples of these sorts of orders that are made under the New South Wales scheme. And I think that it would - they are - if I can say without being critical,
15 extraordinarily complex and prescriptive. And something that concerns me is if the legislation provides that there are sort of general conditions and conditions relating to monitoring that include things like that the defendant allow a police officer to enter
premise, search the offender, search the residence or premises, search any other
premise and seize any item found during those searches.

20 **DR DYER:** Yes.

MR DONALDSON: That's a pretty extraordinary power, is it seems to me?

25 **DR DYER:** Yes, it is.

MR DONALDSON: This would be made without warrant or without really any basis for suspicion of anything occurring.

30 **DR DYER:** It is. And we say that that provision - subsection (3) of 7B, should be brought into line with the similar provision in Division 104, which, of course, concerns control orders. So we support what the Australian Human Rights
Commission has said about that. We also support what the Human Rights
Commission has said about the monitoring of offenders. Now, you've referred to
35 warrants. We are saying that they - if they are going to come into somebody's home like this, they should come in with actual consent or pursuant to a warrant that has been granted. Yes.

40 **MR DONALDSON:** Yes.

DR DYER: So we say that - you're right. These are extraordinary - this is an extraordinarily long list of conditions that can be imposed upon the person. And the restrictions on liberty can be very radical indeed. We say that it should not be - the state should not be capable of curtailing a person's liberty to the extent that it is
45 entitled to under 7B.

MR DONALDSON: Yes. I think we will be having a very - well, we will be having a very close look at these - if I can put it -- standard matters that are in the legislation. Because some of them, on the face of them, are quite extraordinary.

5 **DR DYER:** Yes.

MR DONALDSON: It seems to me. Probably shouldn't be considered as standard, rather - or in the way that they seem to be treating them in that way under the Act.

10 **DR DYER:** Yes.

MR DONALDSON: Now, Andrew, I think that's - 12.15 was the time we were going to stop with Andrew, wasn't it?

15 **MS LUU:** Yes.

MR MOONEY: Yes, we can - we have got a few minutes if you just want to deal -

20 **MR DONALDSON:** Andrew, I was only - there was - I was going to ask you some questions about the issues that you've raised in relation to the risk assessment process. But one - I've discussed those with others, and we are actually - I'm very happy to say that I'm going to hear from some people who actually know what they are talking about, as opposed to me, in relation to these matters very shortly. So I might spare you that, if I can. But perhaps ask you this - 105A.4 provides for the
25 terms of detention in prison.

DR DYER: Yes.

30 **MR DONALDSON:** Do you - do you accept - and, again, this is in conformity with international human rights norms in relation to these matters, that is, that people who are serving terms of continuing detention not be kept in the general prison population, as it were?

DR DYER: Yes.

35

MR DONALDSON: Is there any concern that you have as to whether there should be a means of ensuring or somebody being satisfied independent of the relevant Minister, for instance, that this condition is being satisfied?

40 **DR DYER:** Yes. And we supported the Australian Human Rights Commissions' recommendations concerning that. And we - and especially what they say about the supervision of these conditions of detention by international authorities. This is something that has happened in Europe, as was detailed in that case we were talking about before.

45

MR DONALDSON: In *M v Germany*?

5 **DR DYER:** Yes, that's right, Yes. And we say that it's very important that these sorts of protections are built into the scheme for people, and we also say, as I outlined before, that we support the submission of Legal Aid that these people, pursuant - who are in there pursuant to a continuing detention order, should not be serving their detention with sentenced prisoners under any circumstances, and certainly not for the good order of the prison, as is allowed under 105A.4(1)(a).

10 **MR DONALDSON:** Well, an irony, in fact - I have learned this from somebody who is going to be helping me shortly. One of the ironies of this is there is a thought about that, in fact, separating some of these prisoners from the general prison population, in fact, isolates them completely. That's not to say that there can't be then processes put in place to deal with that. But, as I said, there are currently two people who are serving continuing detention orders. If they are going to be isolated from - well, really anybody that they can see on a relatively free basis, it's going to be a pretty isolating existence for them.

DR DYER: I suppose I would agree with what you're suggesting there.

20 **MR DONALDSON:** Not to say they have to be in the prison population. It could be that there's an acceptance that they - the capacity for people to actually visit them be greater than it might otherwise be in a prison, for instance.

25 **DR DYER:** Yes. That's right. And, yes, I would - I would agree with that. The only - I should add too, the only doubt I had about what Legal Aid was saying about this issue was that if these people have made an autonomous decision, a truly autonomous decision to be housed with other prisoners, then I suppose there is an argument that that autonomous decision should be respected. So that's another possible qualification to what I've just outlined now.

30 **MR DONALDSON:** Yes. That's probably right. So, Andrew, we have come to the end of the time that I could allocate to you. As with everybody we have, we - there is much more that you could help me with. But, again I'm very grateful for both bodies that you represent for the written submissions that they have made and to you for coming along this morning. Thank you very much, Andrew.

35 **DR DYER:** Thank you very much.

SESSION 2: PHRONESIS CONSULTING AND TRAINING

40 **MR DONALDSON:** All right. So we are going straight on, aren't we, to Peta?

MR MOONEY: Yes.

45 **MR DONALDSON:** So are you ready to go?

MS LOWE: I am, yes.

