Law Council
OF AUSTRALIA

Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth)

Parliamentary Joint Committee on Intelligence and Security

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
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- Law Institute of Victoria
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra. The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions of the Law Institute of Victoria, the Victorian Bar, and the Law Society of the Australian Capital Territory in the preparation of this submission. It is also grateful for the assistance of its National Criminal Law Committee and its National Human Rights Committee.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee's**) review of post-sentence terrorism orders contained in Division 105A of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**).

2. The Committee is required to review Division 105A of the Criminal Code by paragraph 29(1)(bbaaa) of the *Intelligence Services Act 2001* (Cth) within twelve months of the completion of the Independent National Security Legislation Monitor's (the **INSLM's**) review of the same division. On 3 March 2023, the INSLM, Mr Grant Donaldson SC, provided the Attorney-General his review of the operation, effectiveness and implications of Division 105A of the Criminal Code and other relevant provisions (the **INSLM's Report**).[1]

3. The INSLM's Report contains persuasive recommendations which were shaped in response to detailed and iterative consultations with relevant government agencies, including the Attorney-General's Department, as well as a variety of civil society groups, academics and members of the public. For this reason, the INSLM's Report should serve as the starting point for the Committee's consideration of Division 105A.

4. The Law Council was pleased to assist the INSLM's review by providing extensive written submissions[2] and appearing at public hearings. The Law Council has also made significant contributions to several parliamentary reviews of Division 105A in the recent past,[3] since the Division was inserted into the Criminal Code in 2016.[4]

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[1] That report was then tabled in Parliament on 30 March 2023: Commonwealth of Australia, Independent National Security Legislation Monitor, Mr Grant Donaldson SC, Review of Division 105A (and related provisions of the Criminal Code (Report, 2022). ('the **INSLM's Report**')

[2] Law Council of Australia, Submission to INSLM, Review of Division 105A of the Criminal Code Act 1995 (Cth), Submission No. 13 (11 February 2022) ('***Law Council 2022 Submission to INSLM***'). That submission contained five attachments:

- **Attachment 1**: Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of Australian Federal Police Powers: Control Orders; Preventative Detention Orders; Stop, Search and Seizure powers; and Continuing Detention Orders (17 September 2020) ('***Law Council 2020 AFP Powers***')
- **Attachment 2**: Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (6 November 2020) ('***Law Council November 2020 HRTO Bill***')
- **Attachment 2A**: Law Council of Australia, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (27 November 2020) ***('Law Council Supp Sub 2020 HRTO Bill***')
- **Attachment 2B**: Law Council of Australia, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (22 June 2021) ('***Law Council Supp Sub June 2021 HRTO Bill***')
- **Attachment 3**: Law Council of Australia, Submission to Independent National Security Legislation Monitor–Responses to questions of 6 July 2021, Review of Division 105A of the Criminal Code Act 1995 (Cth) (11 February 2022) ('***Law Council 2022 Response to INSLM Questions***')

[3] At the time the Bill was introduced—Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (12 October 2016). More recently—Attachments 1-5 listed at supra n 2 responded to the following two related reviews conducted by the Committee:

- a statutory review of police powers in relation to terrorism, including the continuing detention order (CDO) regime in Division 105A of the Criminal Code (Attachment 1 responded to this review); and
- a concurrent review of the Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021 (HRTO Bill), which was passed and commenced in December 2021. The HRTO Bill sought to establish a regime of 'extended supervision orders' (ESOs) under Division 105A as less restrictive alternatives to CDOs (Attachments 2, 2A and 2B responded to this review).

[4] The scheme for CDOs was inserted into the Criminal Code by the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

5. Given that background, the Law Council's submission proceeds in three parts.

- **Part A**—statement of applicable general principles, including international law;
- **Part B**—comment on the INSLM's recommendations;
- **Part C**—positions relevant to the Committee's terms of reference, but not considered or recommended by the INSLM.

6. The Law Council's recommendations are:

- in line with recommendation 1 of the INSLM's Report, Division 105A should be amended to abolish Continuing Detention Orders (**CDOs**), or, alternatively, the CDO regime should not be renewed beyond its current sunset date of 7 December 2026;
- if the CDO regime is retained (which the Law Council strongly opposes):
  - Division 105A should be amended to provide for a limitation on the total length of time a person may be subject to continuing detention under a CDO;
  - a criminal standard of proof should be imposed in relation to a finding that a person would present an unacceptable risk of committing a serious terrorism offence if released, rather than the current standard of 'satisfaction to a high degree of probability'; and
  - the criminal rules for drawing inferences should apply to any findings of a person's future risk for the purpose of issuing an ESO or CDO;
- in line with recommendation 2 of the INSLM's Report, the objects of Division 105A should be amended to include, as an express object of the Division, rehabilitation and reintegration of the subjects back into the community;
- the funding of Commonwealth- and State-based support services administered under the High-Risk Terrorist Offenders Regime should be reviewed to ensure they are adequate to achieve these objects;
- recommendations 3, 5, 6, 7, 8, 9, 10, 11 and 12 of the INSLM's Report should be supported in full;
- in the first instance, recommendation 4 of the INSLM's Report should be supported—however, if this is not accepted:
  - the definition of a 'relevant expert' in section 105A.2 should be amended to remove the reference in paragraph (d) to 'any other expert', so that the persons in paragraphs (a)–(c) (namely, Australian-registered psychiatrists, psychologists and medical practitioners) are exhaustive of the persons who may be appointed as relevant experts. This is provided that they are competent to assess the risk to the community if the offender were to be released into the community; and
- recommendation 13 of the INSLM's Report should be supported, including the establishment of a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to that for Control Orders.

Part A—General Principles

7. Australia's international obligations to combat terrorism require it to do so in a manner that is compatible with its human rights obligations.[5] Australia's human rights obligations relevant to this review can be taken to be encapsulated in the *International Covenant on Civil and Political Rights*[6] (**ICCPR**). The principal restriction on human rights arising from Division 105A is the restriction in Article 9(1) of the ICCPR, which provides that:

> *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

8. In considering the application of Article 9(1) to Division 105A, the Law Council agrees with the emphasis placed by the INSLM on the United Nations Human Rights Committee report on state post-sentence detention regimes for sexual offenders in *Fardon,*[7] *Tillman,*[8] and General Comment No. 35 on Article 9.[9] The Law Council has previously considered the implications of these communications for the compatibility of Division 105A with Article 9(1) of the ICCPR.[10]

9. General Comment No. 35 illustrates the risk of post-sentence detention being arbitrary in the context of Article 9(1) of the ICCPR:[11]

> *When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified … The conditions in such [preventative] detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.*

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[5] See, for example: United Nations Global Counter-Terrorism Strategy (A/RES/60/288, 8 September 2006) at 9. ('IV—Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism'. See especially [2] which reaffirmed the commitment of UN member states to 'ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law'.)

[6] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[7] In Fardon, a majority of the UN Human Rights Committee observed that Article 9(1) may, in principle, be subject to permissible limitation, for example, in the case of immigration control or the institutionalised care of persons suffering from mental illness. However, 'limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties.' And that, the post-sentence detention scheme applicable to Mr Fardon was arbitrary because, among other reasons, 'this purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.' *Fardon v Australia* (1629/2007) (18 March 2010), [7.4]. The Law Council's Supplementary Submission to the INSLM considered the implications of these two communications: Law Council 2022 Response to INSLM Questions.

[8] The decision in *Tillman v Australia* (1635/2007) (18 March 2010) is to the same effect as *Fardon* set out above.

[9] UN Human Rights Committee, General comment No 35 on Article 9, liberty and security of person (2014).

[10] Law Council 2022 Response to INSLM Questions, 9 [18].

[11] General Comment No. 35, [12].

10. A key objective of the Law Council is the maintenance and promotion of the rule of law. The Law Council's *Policy Statement on Principles Applying to Detention in a Criminal Law Context*[12] distils the requirements of international human rights law and the rule of law as they apply to the arrest, detention and imprisonment of individuals in a criminal law context. These Principles provide in relation to preventative detention that:[13]

- No one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Therefore, beyond a brief investigative period following arrest, a person should not be detained in relation to a criminal matter without charge or trial.
- If the State seeks to impose restrictions on a person's liberty, not for punitive purposes but in order to pre-empt and prevent criminal activity, it may only do so where the detention or other restrictive measures have been ordered by a court.
- A court should only issue an order of this kind if:
  - the affected person or their legal adviser has had the opportunity to access and contest the evidence relied upon; adduce contrary evidence; and make submissions to the court in relation to both;
  - the court is satisfied, to a high degree of probability, that such an extraordinary measure is necessary and reasonable, for example to prevent the commission of a relevant serious offence in view of:
    - the seriousness of the harm to be averted, in relation to which the State bears the onus of proof;
    - the level of risk posed by the person sought to be detained or otherwise restrained; and
    - the absence of other available, less restrictive measures for achieving the same protective purpose.
- In the case of a preventive detention order made independently of, and unrelated to a conviction for a particular offence, the order should not authorise indefinite detention, but rather should expire after a specified time, in the absence of a fresh application for its renewal. Further, a person subject to such an order or other restrictive measures should be able to apply to court to revoke the order where new information, bearing on the necessity and appropriateness of the order, becomes available prior to its expiry.
- In the case of a preventive detention order in the form of an indeterminate order imposed on conviction for a serious offence, when the prescribed punitive term of imprisonment has been served: such detention should form a measure of last resort; the detention conditions should be non-punitive and be aimed at the detainees' rehabilitation; provision should be made for regular, and independent review of the reasonableness and necessity of ongoing detention; and such detention should be subject to judicial review.
- A preventative detention regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the due process guarantees that underpin a fair trial, including the prohibition on double punishment.
- In the absence of the above matters, preventative detention may become arbitrary and in breach of international law.

[12] Law Council of Australia, Policy Statement on Principles Applying to Detention in a Criminal Law Context (22 June 2013).
[13] Ibid, 6 para. 6.

Part B—Consideration of the INSLM's recommendations

Recommendation 1: abolition of Continuing Detention Orders

11. The INSLM recommended that Division 105A be amended to abolish CDOs.[14] The Law Council strongly supports this recommendation, which is consistent with the Law Council's longstanding advocacy.[15]

12. The Law Council's position remains that CDOs are neither a necessary nor proportionate response to the risk of the commission of serious Part 5.3 offences for the following reasons:

    (a) For the reasons outlined above in Part A, the rule of law and international law obligations require that any system designed to authorise detention or restrictive measures after the completion of a sentence imposed by a court with the aim to pre-empt and prevent criminal activity be subject to careful scrutiny.

    (b) Consideration of the extent and incidence of the commission of serious Part 5.3 offences, and the nature of the conduct that has founded prosecution and conviction, suggests that they are substantially associated with ancillary and preparatory conduct carrying a low level of harm. The INSLM found that the 'number of convictions for serious Pt 5.3 offences is minute'[16] and that 'since 2001, there have been a total of 102 convictions for terrorism offences'.[17] The INSLM found a significant proportion of these convictions to have been for offences under section 119 of the Criminal Code, dealing with foreign incursions and those who travelled to Syria to support the Islamic State.[18]

    (c) Detention based on a prediction of a person's future risk is a fraught exercise in the absence of an empirically validated risk assessment methodology. The Law Council has long held concerns that there is a lack of an established body of specialised knowledge on which to base predictions about a person's future risk of committing a terrorism offence.[19]

    (d) Terrorism offenders, as a discrete class of offenders of the kind captured by Part 5.3 of the Criminal Code, are associated with low recidivism rates. Studies generally suggest that 'reported recidivism is in the low single or double digits'.[20]

    (e) Among comparable jurisdictions such as the United Kingdom (**UK**) and New Zealand, there is no current reliance on exceptional mechanisms such as CDOs. Accordingly, the Law Council agrees with the INSLM's observation that 'Australia is an outlier in having a CDO mechanism as a response to the risk of terrorism'.[21]

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[14] INSLM's report, 11 [20] and Chapter 8 90-104.
[15] Law Council 2022 Submission to INSLM.
[16] INSLM's Report, 91 [303]
[17] Ibid, [304].
[18] Ibid.
[19] Law Council 2020 AFP Powers, 62-63 [247]; Law Council November 2020 HRTO Bill, 11-12 [25].
[20] O Hodwitz, 'The Terrorism Recidivism Study: an Update on Data Collection and Results' (2021) 15 Perspectives on Terrorism 27, 28 cited by INSLM's Report 96 [316].
[21] INSLM's Report, 94 [311].

(f) Because the objects of Division 105A do not include offender rehabilitation and reintegration into the community, when deciding whether to grant a CDO, a decision maker may be unable to strike an appropriate balance between protecting the community and upholding fundamental individual rights. The Law Council accepts the INSLM's finding that:

> *it is not credible that lengthy detention is a proportionate response to the risk of an offender committing further Pt 5.3 offences upon release if little is required to be done by way of rehabilitation while an offender is serving their sentence and nothing is required to be done while they are detained post-sentence.*[22]

(g) The statutory fetter on the ability of the issuing court to take into consideration any less restrictive measures under paragraph 105A.7(1)(c) is disproportionate because the court is limited to considering an Extended Supervision Order (**ESO**) or Control Order. In this regard, the Law Council has submitted that there should not be any such fetter on the ability of the issuing court to take into consideration any measures that it identifies as being less restrictive to a CDO, in the circumstances of the particular case.[23] This reflects that the assessment of the relative degree of restriction imposed by various measures is likely to be a highly fact-specific exercise, and courts should retain flexibility in these circumstances, with the assistance of submissions from the parties.

(h) The Law Council is concerned that after serving their sentence a person could be indefinitely detained, in three-year increments, under a CDO. This could potentially be well beyond their sentence of imprisonment for the relevant offence, and in excess of the maximum sentence of imprisonment for some serious terrorism offences.[24]

13. If the INSLM's recommendation to abolish CDOs is not accepted, the Law Council maintains its view that Division 105A requires amendment to restrict the total maximum duration of post-sentence detention under consecutive CDOs. To this end, the Law Council continues its support for consideration of an extended determinate sentencing framework, in the nature of the UK model under section 254 of the *Sentencing Act 2020* (UK), in preference to an indeterminate sentencing regime or a post-sentence detention regime. Under this model, a person is given a criminal sentence with a fixed end date which includes a discrete and additional protective component known as the 'extension period'.[25] The duration of the extension period is assessed at the time of sentencing, and not later, as a

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[22] INSLM's Report, 97 [318].
[23] Law Council of Australia, Supplementary Submission to the PJCIS Review of the HRTO Bill, (22 June 2021), 17-18 at [58]-[65]; Law Council of Australia 2021 INSLM, 13-15 [32] – [36].
[24] Law Council 2020 AFP Powers, 58 [220]-[224] and recommendation 28.
[25] The UK Sentencing Council summarise the operation of the extended determinate sentencing framework in the following terms:

> *Extended sentences are imposed in certain types of cases where the court has found that the offender is dangerous, and an extended licence period is required to protect the public from risk of serious harm. The judge decides how long the offender should stay in prison (the custodial term) and fixes the extended licence period up to a maximum of eight years.*
> *Two thirds of the way through their custodial term the offender can apply for parole (if parole is refused they can apply again after two years). If not released before, the offender will be automatically released at the end of their custodial term. In either case, following release, they will be subject to the licence where they will remain under supervision until the expiry of the extended period.*

Sentencing Council for England and Wales, 'How Sentencing Works – Extended Sentences' <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/extended-sentences/>

stand-alone application for a post-sentence order when the person is close to completing their sentence of imprisonment.

14. Additionally, if the INSLM's primary recommendation to abolish CDOs is not accepted, the Law Council renews its support for other recommendations discussed in **Part C**, including strengthening the applicable standard of proof.

Recommendations

- **Division 105A should be amended to abolish CDOs, or, alternatively, the CDO regime should not be renewed beyond its current sunset date of 7 December 2026.**
- **If the CDO regime is retained (which the Law Council strongly opposes):**
  - **Division 105A should be amended to provide for a limitation on the total length of time a person may be subject to continuing detention under a CDO;**
  - **a criminal standard of proof should be imposed in relation to a finding that a person would present an unacceptable risk of committing a serious terrorism offence if released, rather than the current standard of 'satisfaction to a high degree of probability'; and**
  - **the criminal rules for drawing inferences should apply to any findings of a person's future risk for the purpose of issuing an ESO or CDO.**

Recommendation 2: the objects of Division 105A and consequential amendments

15. The INSLM recommended that the objects of Division 105A be amended to include, as an express object of the Division, rehabilitation and reintegration of the subjects back into the community. The Law Council strongly supports this recommendation.

16. There is currently a singular 'object' for the entirety of Division 105A which provides:

> *The object of this Division is to protect the community from serious Part 5.3 offences by providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to:*
>
> *(a) a continuing detention order; or*
>
> *(b) an extended supervision order.*

17. The current object is significant in both the making of a post-sentence order, and the determination of conditions to be imposed on an offender under an ESO, due to:

- section 105A.6B setting out the matters that a Court must have regard to in making a post-sentence order, the first of which is 'the object of this Division'; and
- section 105A.7A regarding the making of an ESO. This states that, when determining whether conditions to be imposed on the offender by the order are reasonably necessary, and reasonably appropriate and adapted, the Court must take into account, as a paramount consideration in all cases, the object of this Division.

18. Recent decisions applying Division 105A have referred to the object in the manner described above[26] and have noted[27] the absence of explicit reference to rehabilitative aims in the object of the Division. Additionally, there are currently part-heard new proceedings in the Supreme Court of Victoria in relation to Mr Benbrika in which issues of statutory construction of Division 105A arise, including in relation to the object provision of Division 105A. (Those proceedings are *Abdul Nacer Benbrika v Attorney-General of the Commonwealth* (S ECI 2022 05118); and *Attorney-General of the Commonwealth v Abdul Nacer Benbrika* (No. S ECI 2023 00855)—**current Benbrika Proceedings**).

19. In the first instance, the Law Council agrees with the INSLM that amending the objects of the Division to include rehabilitation and reintegration of subjects into the community is necessary to avoid a breach of Australia's international human rights obligations in relation to freedom from arbitrary detention set out in Part A.

20. Beyond international law, the absence of a rehabilitative object in Division 105A contributes to punitive and disproportionate outcomes when courts are called upon to construe and apply the Division. Accordingly, the Law Council agrees with the INSLM that: 'logic, common sense and decency also require that an object of post-sentence orders be or include defendants' rehabilitation and reintegration into society'.[28]

21. The courts are accustomed to considering factors like rehabilitation and societal reintegration. They expect to hear submissions about relevant matters, including, for example, any steps taken by correctional services to test or evaluate the rehabilitative prospects of an offender, when considering whether a CDO or ESO should be granted.

22. The absence of any requirement for the scheme to promote the object of rehabilitation or reintegration, alongside the absence of a duty on the AFP Minister to make reasonable inquiries in relation to relevant information discussed in relation to recommendation 3 below, means that the decision maker may not be able to make an informed assessment about whether an offender poses an unacceptable risk to the community.

23. The Law Council notes that the INSLM considered, but did not recommend, prioritising an expanded list of objects for Division 105A because there is a practical conflict.[29] However, if the Committee does not agree with the INSLM's assessment, consideration could be given to analogous provisions in states and territories. For instance, section 1 of the *Serious Offenders Act* (2018) (Vic) specifies protection of the community as a primary purpose and treatment and rehabilitation as a secondary purpose.

24. The Law Council agrees with the view of Legal Aid New South Wales that any amendment to include rehabilitation as an object must be supported by adequate funding of Commonwealth- and State-based support services administered under the High-Risk Terrorist Offenders Regime.

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[26] See for example, *Minister for Home Affairs v Benbrika* [2020] VSC 888; *Minister for Home Affairs v Pender* [2021] NSWSC 1644.

[27] Justice Tinney in Benbrika stated: *'The stated purpose of the legislation is clear, and the safety and protection of the community is to be achieved, where appropriate, by the continuing detention of terrorist offenders who pose an unacceptable risk of reoffending. The question of whether an offender has rehabilitated is clearly relevant to the overall question whether he or she will pose an unacceptable risk, but the focus in s 105A.8(1)(a) is not on rehabilitation.' Minister for Home Affairs v Benbrika*, commencing at [408]. A similar point was made by Walton J: *Minister for Home Affairs v Pender*, [70].

[28] INSLM's Report, 66 [233].

[29] INSLM's Report, 122 [415].

Recommendations

- **The objects of Division 105A should be amended to include, as an express object of the Division, rehabilitation and reintegration of the subjects back into the community.**
- **The funding of Commonwealth- and State-based support services administered under the High-Risk Terrorist Offenders Regime should be reviewed to ensure they are adequate to achieve these objects.**

Recommendation 3: that division 105A.5 be amended

25. The INSLM recommended that Division 105A.5 be amended, and has proposed the following mechanism whereby:

    - the AFP Minister must inquire beyond Commonwealth law enforcement officers or intelligence or security officers. Those to whom inquiries are to be directed must include all departments and agencies of the Commonwealth that the AFP Minister believes may hold information relevant to supporting a finding that a post-sentence order should not be made. Where the AFP Minister believes that applicable material may be in the possession of a third party, the AFP Minister is to advise the defendant of this and provide details of the third party and the nature of the material;
    - the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under section 105A.5(2A);
    - one week prior to any final hearing of the application, the AFP Minister or a legal representative of the AFP Minister ought to file and serve on the defendant details of the inquiries made since the last affidavit to ensure compliance with the Minister's obligations under s 105A.5(2A);
    - there should be new provisions of Division 105A, to the following effect:
        - the Minister shall disclose to the defendant all information of which the Minister is aware that is in the form of an expert opinion, scientific evidence or research, which differs from such evidence to be relied upon by the Minister, or which in some way casts doubt on the opinions or evidence on which the Minister intends to rely;
        - in particular, the Minister shall disclose to the defendant all expert opinion, scientific evidence or research relevant to assessment of the risk of the defendant committing a serious Pt 5.3 offence in the future including research in respect of tools used by relevant experts in forming their opinions; and
        - the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under this new provision.

26. The Law Council holds grave concerns regarding the failure to disclose material that should have been disclosed in applications made under Division 105A. The Law Council agrees with the INSLM's assessment that these failures 'occurred with an awareness of the current legislative disclosure requirements' and that this 'compels legislative change.'[30] The Law Council strongly supports implementation of the INSLM's recommendation.

[30] INSLM's Report, 113-114 [381].

27. In *Minister for Home Affairs v Benbrika*, the High Court described the existing disclosure obligation of the AFP Minister under Division 105A.5 as one of the 'statutory safeguards' to the extraordinary power to detain a person under the Division.[31] However, there is evidence that those existing safeguards have not been realised in practice.

28. The INSLM's recommendation is intended to, among other things, address the circumstances surrounding the Department of Home Affairs' suppression of the report of Dr Emily Corner, which casts doubt on the validity and reliability of the central risk assessment tool: the VERA 2R.

29. Dr Corner's report entitled '*Testing the Reliability, Validity and Equity of Terrorism Risk Assessment Tools'* concluded that these risk assessment tools 'lack a strong theoretical and empirical foundation, and have poor inter-rater reliability and questionable predictive validity.'[32] It was referred to by officials at the INSLM's public hearing on 21 November 2022, but has not been produced to a court in any application made under Division 105A, and it was not disclosed to any defendant in such a proceeding (noting that Dr Corner's report was provided to the Department of Home Affairs in May 2020 before Mr Benbrika's matter was heard by Justice Tinney in December 2020).[33]

30. In light of the above, the Law Council agrees with the INSLM's finding that:

> *Dr Corner's report should have been provided to Mr Benbrika and produced to the Court in that application. Indeed, it should have been provided in all applications where relevant experts make a risk assessment using the VERA-2R tool. There is no excuse for not doing so.*[34]

31. The Law Council cautions that the efficacy of the additional obligations as set out above will be undermined if they are not coupled with comprehensive education and training for the staff of the Commonwealth Department of Public Prosecutions.

Recommendation 4: the definition of 'relevant expert' in section 105A.2 be repealed

32. Currently, section 105A.2 of the Criminal Code provides a non-exhaustive definition of a 'relevant expert', which includes certain categories of person who are 'competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if the offender is released into the community.'[35] These categories include, registered medical practitioners,[36] registered psychologists and 'any other expert.'[37]

33. The INSLM has recommend the definition of 'relevant expert' in section 105A.2 be repealed and replaced with the following:

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

34. The Law Council supports the INSLM's recommendation.

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[31] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [12] (Kiefel CJ, Bell, Keane and Steward JJ).
[32] INSLM's Report, 83 [280]
[33] INSLM's Report, 81 [271]
[34] INSLM's Report, 81 [273]
[35] Criminal Code, s 105A.2.
[36] Ibid, sub-paragraph (a) and (b) in the definition of 'relevant expert.'
[37] Ibid, sub-paragraph (c) in the definition of 'relevant expert.'

35. There are well-established common law principles, which are to some extent applied on a modified basis by statute,[38] for determining whether there is an appropriate or relevant field of expertise and whether expert opinion evidence should be admitted. These principles are encapsulated in the statement of Chief Justice King in *R v Boynthon*:[39]

> *Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: … (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.*

36. The Law Council has long maintained,[40] based on currently available evidence, that there is a lack of an established body of specialised knowledge on which to base predictions about a person's future risk of committing a terrorism offence. In this regard, the Law Council agrees with the INSLM's finding that 'it is not obvious'[41] that the field of risk assessment for violent extremist offending can be properly described as a body of knowledge or experience that is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.

37. More broadly, the Law Council shares the INSLM's view that there are compelling reasons that prevent the field of risk assessment for violent extremist offending from being described as a body of knowledge in the future. In this regard, the INSLM found:[42]

> *It is doubtful that there will ever be validated actuarial risk assessment instruments for the risk of a person engaging in extremist violence. There are a number of bases for this doubt. First, there will never be a large enough pool of offenders to enable valid statistical analyses of risk factors. Second, within the pool of offenders, the variety of extremist violence and its causes is so diffuse that prediction of future acts is impossible.*

38. The Law Council shares the INSLM's concern that these issues were not properly ventilated before Tinney J in *Benbrika*.[43]

39. If the INSLM's recommendation is not accepted, the Law Council renews its previous recommendations for greater statutory precision in prescribing the categories of persons who may be appointed as 'relevant experts'. In this regard, the Law Council reiterates its support for amendments directed to limiting the persons who are eligible to be appointed as 'relevant experts' under section 105A.2 to Australian-registered psychiatrists, psychologists and medical professionals, who

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[38] See for example, *Evidence Act 2008* (Vic), s 79.
[39] *R v Bonython* (1984) 38 SASR 45 at 46.
[40] Law Council 2020 AFP Powers, 62 [247].
[41] INSLM's Report, 72 [247].
[42] INSLM's Report, 74 [253].
[43] *Minister for Home Affairs v Benbrika* [2020] VSC 888. Tinney J said, 'In my view, there is no doubt that Ms Dewson and Dr Mischel are highly qualified and very experienced experts in the field of risk assessment for violent extremist offending. That there is such a field is clear enough, albeit that the particular field is a relatively new one' at [442]. The INSLM found 'Justice Tinney's observation that it is 'clear enough' that there exists a field of 'risk assessment for violent extremist offending' is not reasoned'; INSLM's Report, 71 [246]. See more generally, INSLM's Report, Chapter 7, 69-89.

are assessed by the court as being competent to assess an offender's future risk (not 'any other person').

Recommendations

- **The INSLM's recommendation 3 be implemented.**
- **If that recommendation is not accepted, the definition of a 'relevant expert' in section 105A.2 should be amended to remove the reference in paragraph (d) to 'any other expert' so that the persons in paragraphs (a)–(c) (namely, Australian-registered psychiatrists, psychologists and medical practitioners) are exhaustive of the persons who may be appointed as relevant experts, provided that they are competent to assess the risk to the community if the offender were to be released into the community.**

Recommendation 5: that subsection 105A.7A(1) be amended

40. The INSLM recommended that subsection 105A.7A(1) be amended and all other provisions of the Division consequentially so, to make plain that any reports or evidence of relevant experts can only be admitted into evidence if admissible under the applicable laws of evidence.[44]

41. The Law Council supports the INSLM's recommendation, and considers it axiomatic that the laws of evidence should regulate the admissibility of evidence.

Recommendation 6: removing any requirement for a court to have regard to any inadmissible opinion evidence

42. The INSLM has recommended that Division 105A be amended to remove the requirement for a court to have regard to any inadmissible opinion evidence of any witness.

43. The Law Council supports the INSLM's recommendation.

Recommendation 7: that section 105A.6B(1) be amended

44. The INSLM has recommended that subsection 105A.6B(1) be amended to provide that, in making a decision under subsection 105A.7A(1), the court must have regard to the objects of Division 105A and may have regard to the other matters provided for in paragraphs 105A.6B(1)(b)–(i).

45. The Law Council supports the INSLM's recommendation.

Recommendation 8: paragraph 105A.7A(1)(b) be amended

46. The INSLM has recommended that paragraph 105A.7A(1)(b) be amended to delete the words 'after having regard to matters in accordance with section 105A.6B'.

47. The Law Council supports the INSLM's recommendation noting that it is consequential to the INSLM's recommendation 7.

[44] INSLM's Report, 121 [409].

Recommendation 9: ensuring ESO conditions provide for rehabilitation and reintegration of the defendant into the community

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

49. The Law Council supports the INSLM's recommendation.

50. If the statutory prerequisites for an ESO in subsection 105A.7A(1) have been satisfied, the Law Council has previously described in detail the broader range of conditions that may be made under an ESO compared to Control Orders.[45] In this regard, Hollingworth J observed in *Benbrika*:[46]

> *Unlike control orders (which can only be made by the Federal Court), ESOs may be made by a Supreme Court, and may include any conditions the court is satisfied are 'reasonably necessary, and reasonably appropriate and adapted' for the purpose of protecting the community from the unacceptable risk. Without limiting the breadth of that provision, s 105A.7B(3) contains an extensive list of general conditions, and s 105A.7B(5) contains some specific conditions in relation to monitoring and enforcement, that may be included in an ESO. Although there is considerable similarity between many of the types of conditions the court may impose under an ESO and a control order, I accept that an ESO is potentially the more restrictive of the two measures. The conditions that may form part of an ESO are even broader than those that could form part of a control order; the only limitation on the court's power in relation to an ESO is that the court be satisfied that the conditions are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from unacceptable risk.*

51. The ESO power was considered in *Attorney-General v Sa'adat Khan (No 2)* [2022] VSC 687 at [41]–[43] where John Dixon J provided some guidance regarding what will be reasonably necessary, and appropriate and adapted, to address risk. See also his Honour's earlier reasons in *Attorney-General v Sa'adat Khan* [2022] VSC 507 at [48]–[56]). Whether particular conditions are in fact 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk' is the subject of contested evidence and submission in the current Benbrika Proceedings.

52. Given the extraordinary breadth of conditions that may be imposed under an ESO, it would be useful for the legislature to give further guidance, by requiring a court to consider whether they provide adequately for rehabilitation and reintegration of the defendant into the community.

[45] See for example, the table appended to Law Council Supp Sub 2020 HRTO Bill, Attachment 1 – Comparison of current CO and proposed ESO conditions, 17-20.
[46] *Minister for Home Affairs v Benbrika* [2022] VSC 169 at [494] (Hollingworth J) (footnotes omitted).

Recommendation 10: cumulative assessment of ESO conditions

53. The INSLM recommended that subsection 105A.7(2) be deleted, and that subsection 105A.7(1) be amended to reflect the following:

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

      to be imposed on the offender 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.

54. The Law Council supports the INSLM's recommendation, noting that the Law Council has previously made a substantially similar recommendation to the Committee in relation to its review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.[47]

Recommendation 11: section 105A.7E be repealed

55. The INSLM has recommended that section 105A.7E, which deals with the conditions that a court may order for an ESO, including obligations relating to monitoring devices for a person subject to an extended supervision order or interim supervision order, be repealed.[48]

56. The Law Council supports the INSLM's recommendation, noting that it has long argued that the range of conditions contemplated by section 105A.7E are unjustifiably broader than the range of conditions that can be imposed under Control Orders.[49]

Recommendation 12: independent statutory body—the ESO Authority

57. The INSLM recommends that, within the next three years, the Attorney-General's Department should publish a report responding to the INSLM's provisional recommendation that Division 105A be amended to give effect to the following:

    - An independent statutory body—the ESO Authority—be created.
    - The ESO Authority will comprise members with skills suited to its functions. One member should be a senior legal practitioner.
    - The ESO Authority will oversee specified authorities to ensure that ESOs are administered uniformly and consistently throughout the Commonwealth.
    - The ESO Authority will oversee the provision of services that are to assist subjects of ESOs with their rehabilitation and reintegration into their communities.

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[47] Law Council of Australia, Submission to PJCIS, Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, (6 November 2020), 14 recommendation 3. ('***Law Council of Australia PJCIS 2020***')
[48] INSLM's Report, 129 [447].
[49] Law Council of Australia PJCIS 2020, 18.

- At every review by the court of every ESO, the ESO Authority will report on the specified authority's exercise of delegated powers by the specified authority in respect of the person the subject of review.
- At every review by the court of every ESO, the ESO Authority will report on subjects' compliance with conditions of ESOs and on the provision of services that are to assist with rehabilitation and reintegration of the subject into their community.
- At every review by the court of every ESO, the ESO Authority will, if requested to do so by the court, provide any assistance requested, but in particular, about whether the ESO conditions are achieving their purpose and, if not, suggest changes.

58. The Law Council supports the INSLM's recommendation, noting that the current arrangements for administration of an ESO across the country involves AFP, and the Attorney-General's Department working with State and Territory agencies to ensure that ESO conditions are implemented appropriately. The Law Council shares the INSLM's concern that currently there is the potential for significant variance in the administration of ESOs across states and territories arising from, for example, differential resourcing of corrective services. In this respect, the Law Council agrees with the INSLM's finding that '[i]t is not acceptable that administration of ESOs, or the way in which ESOs practically operate, could vary from State to State'.[50]

59. Furthermore, the Law Council agrees with the INSLM that there is a need to ensure the day-to-day management of offenders on an ESO and the exercise of the significant discretions under Division 105A[51] are conducted independently, and should not continue to be exercised by law enforcement agencies. In this regard, the Law Council agrees with the INSLM's observation that:

> *[i]n this review I heard of the experiences of some, with State supervision schemes, who believe that some government bodies administering some schemes have a mindset of setting people up to fail. Extraordinarily complex conditions with a belligerent bureaucratic mindset make contravention inevitable and prosecution certain. If this occurs with ESOs, Div 105A will fail.*[52]

60. Confining the functions to a specific, independent authority should help to address many live issues with the administration and monitoring of ESOs. In particular, it should help to overcome some of the logistical concerns created by the differences in administration of CDOs and ESOs across the states and territories, and it provides a degree of objective independence in the administration of the scheme.

[50] INSLM's Report, 130 [451].
[51] For example, a court may include conditions on an ESO that delegate certain powers to a specified authority, for example, the power to permit exemptions from certain conditions. See more generally, Criminal Code, ss 105A.7B and 105A.7C.
[52] INSLM's Report, 130 [453]

Recommendation 13: defendant's costs of responding to applications under Division 105A

61. The INSLM recommended that section 105A.15A and regulation 9 of the *Criminal Code Regulations 2019* be repealed and replaced by provisions to the following effect:

- If a post-sentence order proceeding is before a Supreme Court of a State or Territory, the Commonwealth will bear the reasonable costs and expenses of the offender's legal representation for the proceeding which includes costs of engaging expert witnesses if required.
- Prior to the preliminary hearing to be held pursuant to section 105A.6, the Commonwealth and the defendant's solicitor or, if none has been appointed, the defendant will confer to agree the quantum or the bases for charging of such fees and expenses and the manner in which they will be paid by the Commonwealth.
- If at the preliminary hearing there is no agreement, the Court will convene a hearing to be held as soon as practicable thereafter to enable the Court to make orders as to the quantum or the bases for charging of such fees and expenses, and the manner in which they will be paid by the Commonwealth.

62. The Law Council supports the INSLM's finding that the Commonwealth has the obligation to fund the legal costs of defendants confronting these applications and must fund them in a timely and adequate manner. It is essential that defendants have, or be provided with, the capacity to respond to these applications in a manner consistent with their seriousness.

63. The Law Council reiterates its position that there should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to that for Control Orders.[53] Consideration should be given to delivering that assistance through State and Territory legal aid commissions, akin to existing arrangements for complex criminal cases. Accordingly, there is need for further consultation regarding the specific mechanism proposed by the INSLM especially with State and Territory legal aid commissions as well as National Legal Aid.

64. The Law Council has previously noted that there is a lack of clarity regarding funding availability, including from the Expensive Commonwealth Criminal Cases Fund (**ECCCF**), in relation to applications of control orders or continuing detention orders, despite their obvious connection to criminal process.[54] The Law Council understands that Legal Aid NSW, which has an in-house specialist high risk offender unit team, has been able to recover the money it has spent on these matters via the ECCCF. It encourages the Committee to enquire into this issue closely.

65. The Law Council acknowledges the difficulties[55] identified by Legal Aid NSW in its submission to the Committee that the INSLM's recommendation does not address existing issues arising from eligibility requirements approved by the Legal Aid NSW

[53] Law Council 2020 AFP Powers, [316] – [322] recommendation 47; Law Council of Australia Review of HRTO Bill November 2020, 23 [79] recommendation 7.
[54] Law Council of Australia, Review of the Expensive Commonwealth Criminal Cases Fund (30 October 2020) 11 [27].
[55] Legal Aid New South Wales, Submission to the Parliamentary Joint Committee on Intelligence and Security, Submission No. 9, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (June 2023) 16.

Board under the *Legal Aid Commission Act 1979* (NSW), which ensures appropriate use of limited public funds.[56] In this regard, Legal Aid NSW notes that:

> The requirement to determine eligibility for legal aid, or for a defendant to seek a court's decision on costs may be an impediment to effective legal representation. The time taken to process, determine and administer a grant of legal aid can mean valuable time to respond to an application is lost.[57]

66. More generally, there is a need to ensure equality of arms between the vast resources of the Commonwealth in bringing the application and the offender subject to a post-sentence order application.[58]

67. In the current Benbrika Proceedings, and the earlier litigation under Division 105A (which included interlocutory applications as well as trial and appeal proceedings), Mr Benbrika would not have had the necessary legal representation but for the making of a court order under section 105A.15A of the Criminal Code. However, in all but the current Benbrika Proceedings, the AFP Minister opposed orders for the funding of Mr Benbrika's legal representation which added material delays in the preparation and conduct of these complex proceedings.

68. Again, it must be noted that the payment of an offender's reasonable costs and expenses is one of the 'statutory safeguards'[59] that, in theory, ensure the constitutionality of the extraordinary power to detain a person under Division 105A of the Criminal Code. The Law Council considers it imperative that this safeguard is not adversely impacted, in practice, from case to case given the fundamental rights that are restricted by this Division.

Recommendation

- **There should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to that for Control Orders**

Part C—Other issues

Issuing and enforcement of CDOs

69. If the CDO regime is to remain in force the Law Council supports several additional safeguards. These additional safeguards are listed in order of priority below:

- **Standard of proof**—the imposition of a criminal standard of proof for CDOs (and, ideally, ESOs) in relation to the finding that the person would present an unacceptable risk of committing a serious terrorism offence if released, rather than the current standard of 'satisfaction to a high degree of probability'. This reflects the close connection of post-sentence orders with the criminal process, the grave consequences of the imposition of a post-sentence order, and the fraught nature of making predictions about a person's future risk of offending (especially in the absence of a settled and empirically verified risk-assessment methodology specific to terrorism).
- **Narrowing the gateway into the post-sentence regime**—Currently, section 105A.3(1) provides that post-sentence orders can only be made for

[56] Ibid.
[57] Ibid, 17.
[58] Ibid.
[59] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [12] (Kiefel CJ, Bell, Keane and Steward JJ).

defendants who have committed an identified offence, have been sentenced to imprisonment and remain in custody.[60] In the Law Council's view, the preferable approach to determining eligibility for a CDO or an ESO would be to consider the actual sentence imposed on the person, not the maximum penalty for the offence, nor its status as preparatory or ancillary to a principal offence (or some other categorisation of offences).[61] However, the Law Council acknowledges the difficulty in identifying precise cut-off points for a minimum qualifying term of sentence to engage the Division 105A regime.[62] In this regard, the INSLM noted '(i)f (Division) 105A were to require any minimum qualifying term of sentence, a degree of arbitrariness would be inevitable and it would be impossible to provide a compelling justification for any number'.[63] If the CDO regime is retained, these issues should be subject to further consultation.

- **Narrowing the scope of the unacceptable risk**–the Law Council agrees with the INSLM's observation that if CDOs are retained, a CDO should only be available where the relevant risk involves the commission of a terrorist act, or preparing or planning for one and should not be ordered having regard to the risk of committing any serious Part 5.3 offence.[64]
- **Rules for drawing inferences about future risk**—even if the criminal standard of proof is not adopted, the imposition of a rule providing that, if the issuing court is to draw an inference from a person's past conduct that they are an unacceptable risk of committing a serious terrorism offence in the future if released, this must be the only rational inference capable of being drawn from the evidence.

70. The Law Council's position regarding the need for a more stringent standard of proof has been echoed by other submissions to this review, including those made by the Australian Human Rights Commission[65] and Legal Aid NSW.[66]

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[60] Similarly, section 105A.3A(6)-(8) identifies others who may be subject to application for ESOs only.
[61] Law Council 2022 Response to INSLM Questions, 5-6 [3]-[8]; Law Council 2020 AFP Powers, 61-64, [238]-[253].
[62] In this respect, the INSLM noted concern regarding the arbitrariness of any particular cut-off point for a minimum qualifying sentence to engage Division 105A given that terms of imprisonment actually imposed on offenders convicted of 'precursor' offences with a low level of harm may be very lengthy:

> *I have considered all of the offenders who have been convicted and sentenced for committing serious Pt 5.3 offences or Pt 5.5 offences under the Criminal Code and offences against the repealed Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) who are currently eligible for post-sentence orders (a total of 57). No offender in this cohort has received a sentence of less than 2 years and 6 months. Of the 57 offenders convicted, only 4 have received a sentence of less than 5 years…*
> *Offenders who have been sentenced to terms of imprisonment of fewer than 6 years have generally been convicted of offences under s 119 of the Criminal Code dealing with foreign incursions and those who travelled to Syria supporting Islamic State.*
> *There have been very lengthy sentences, exceeding 15 years, imposed on offenders who have been convicted of what I have described above as 'precursor offences'. So even though, in such matters, no terrorist act occurred and planning had not reached an advanced stage, the courts have imposed very lengthy terms.*

INSLM's Report, 111-113 [368], [374]-[375].
[63] INSLM's Report, 111 [367].
[64] Ibid, 142 [489].
[65] The Australian Human Rights Commission recommend that the threshold for making an extended supervision order in s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court be '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': Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review into Division 105A of the Criminal Code (Post Sentence Orders) (23 June 2023), recommendation 6.
[66] Legal Aid New South Wales, Submission to the Parliamentary Joint Committee on Intelligence and Security, Submission No. 9, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (June 2023) 18

71. Additionally, the Law Council supports prompt implementation of the outstanding recommendations of the Committee in its report of October 2021 on AFP powers, as relevant to the CDO regime. In particular, the Committee called for:

- **appropriate rehabilitative accommodation**—the Government to prioritise work with States and Territories towards securing appropriate accommodation for persons who are subject to CDOs, consistent with the requirements in section 105A.4 to ensure that they are treated in a manner consistent with their status as persons who are not serving sentences of imprisonment for criminal offences (recommendation 18); and
- **enhanced public reporting on the operation of the CDO regime**—providing details of matters including the accommodation and rehabilitation programs provided to detainees, and associated costs (recommendation 19).

Issuing and enforcement of ESOs

72. The Law Council maintains its long-standing position[67] that, ideally, ESOs should be subject to the criminal standard of proof and criminal rules for drawing adverse inferences.

73. Currently, paragraph 105A.7A(1)(b) provides that an ESO may be issued if the issuing court is satisfied, on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence. Subsection 105A.7A(3) provides that the AFP Minister bears the onus of satisfying the Court of the above-mentioned risk.

74. Critically, the standard of proof for an ESO (balance of probabilities) is lower than the standard for a CDO (high degree of probability). This contradicts the recommendation of the third INSLM in his 2017 report, that the ESO regime should have the same standard of proof as the CDO regime.[68]

75. If the Law Council's position is not accepted, as a minimum, ESOs should be subject to the same (higher) standard of proof as for CDOs. However, as stated above, it would be preferable for CDOs to apply the criminal standard of proof (beyond reasonable doubt) and the criminal rules for drawing adverse inferences (the matter must be the only rational inference).

76. Subjecting ESOs to the criminal standard of proof and criminal rules for drawing inferences of future risk is appropriate for the following reasons:

- the close connection of post-sentence orders with the criminal process (a consideration that applies equally to ESOs and CDOs);
- the gravity of the consequences of an ESO for the individual, including:
  - the extremely onerous (and unlimited) conditions, restrictions, prohibitions and other obligations that can be imposed on a person who is subject to an ESO, under pain of criminal penalty for breach;
  - the imposition of significant criminal penalties (up to five years' imprisonment) for the offence of contravening the conditions of an ESO;
  - the potential exposure of a person to a further post-sentence order if they are convicted of breaching an ESO and are sentenced to imprisonment;

[67] For an extended discussion, see, Law Council of Australia 2022 INSLM, Attachment 2, 10-13 [17]-[25].
[68] The 'balance of probabilities' standard in the Criminal Code is contrary to the recommendation of the third INSLM, Dr James Renwick CSC SC, prior to the ESO regime being legislated:

- the exposure of a person who is subject to an ESO to highly intrusive search and surveillance powers, which do not require a suspicion of non-compliance with the conditions of an ESO in order to be exercised; and
- the possibility that an unlimited number of ESOs could be sought and issued in relation to a person (notwithstanding the three-year maximum duration of individual orders);

- the highly extraordinary and unusual nature of ESOs, in that they involve making predictions about a person's future risk, based on evidence of their past conduct. This raises difficult and complex issues, including:
  - the inherently difficult task of predicting a person's future conduct, for which there is no settled and empirically validated risk assessment framework. As the Law Council has observed previously,[69] the risk assessment framework favoured by the Government, the VERA-2R, appears to be in a formative stage of development;
  - in the absence of direct evidence of a person's preparation or planning to engage in a terrorist act, the task of predicting a person's future risk will generally rely upon the drawing of inferences based on their past conduct. Such inferences may need to be drawn in volatile and rapidly changing circumstances. This supports adopting the criminal rules for the drawing of adverse inferences. That is, the matter must be the only reasonable inference that is capable of being drawn;

- the threshold of 'unacceptable risk' is vague, fluid and subjective, especially when applied in the context of assessing a non-specific threat of re-offending at an unspecified point in the future, rather than a specific and imminent threat. If this threshold is to be used for any kind of post-sentence order, then the criminal standard of proof should be adopted to counterbalance the risks of arbitrariness and error that arise from its vagueness and subjectivity.

77. Additionally, the Law Council continues to call for the implementation of the outstanding recommendations of the Committee on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021[70] (**HRTO Bill**), which were not addressed in parliamentary amendments. These recommendations endorsed suggestions made by the Law Council in its submissions to the HRTO Bill review. These include the following:

- an issuing criterion which explicitly requires the court to ascertain whether the person is subject to a post-sentence order under a State or Territory law and, if so, to consider the combined impact of conditions under the State or Territory and proposed Commonwealth order, as part of assessing whether a proposed ESO would be proportionate to the terrorism risk presented by the person (recommendation 1);
- a review by relevant government agencies of the alternative risk assessment methodologies to the current preferred methodology, the VERA-2R (recommendation 2); and
- the amendment of section 9A of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), so that decisions about making applications for post-sentence orders under Division 105A of the Criminal Code are treated in a consistent manner to decisions about applications for warrants, and other decisions that are closely related to the criminal justice process (recommendation 3).

[69] Law Council 2020 AFP Powers, 62-63 [247]; Law Council November 2020 HRTO Bill, 11-12 [25].
[70] Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (Cth).

The risk of repechage

78. The Law Council remains concerned that the ESO regime in Division 105A contains no statutory safeguards against the risk that applications could be made for control orders in the Federal Court or Federal Circuit Court, as an effective 'repechage' for a failed ESO application that was previously made on the same basis, and was refused by the relevant State or Territory Supreme Court. For example, it should not be possible to effectively 'revive' a failed ESO application before a different court, by essentially 'rebranding' it as a Control Order application, where the proposed Control Order is based on the same or substantially similar grounds as was the unsuccessful ESO application; and seeking the same or substantially similar conditions as those in the unsuccessful ESO application.[71]

79. This concern is only partly alleviated by policy level commitments[72] made by federal and state authorities regarding the application and precedence of particular forms of post-sentence orders in relation to particular offenders, and requires statutory safeguarding.

Federal Parole Authority

80. If an independent ESO Authority is established and responsible for the independent and expert administration of ESOs, its functions would be complemented by an independent federal parole authority able to make independent determinations of when parole should be granted or revoked. For example, the INSLM noted the need for independent implementation of post-sentence orders: that is, the 'person actually liaising with a subject day to day to oversee compliance with conditions and to help with any difficulties that the person may be experiencing'[73] should be independent of law enforcement.

81. The Law Council recently released its Policy Paper—Principles underpinning a Federal Parole Authority,[74] which may be of general interest to the Committee. Currently, at the Commonwealth level, decisions to grant parole to terrorism offenders are made by the Commonwealth Parole Office, a unit within the Attorney-General's Department. The Law Council considers that the objectives of the parole system would be better achieved if the decision-making function applying the relevant statutory criteria to the facts of a federal offender were exercised by an independent parole authority. For example, drawing on a mix of legally qualified, inter-disciplinary expertise, and a broad range of perspectives across the community may better inform judgments regarding a particular offenders' prospects of rehabilitation.

82. In this regard, the Law Council acknowledges the evidence presented by Legal Aid NSW that there are significant limitations to the current process for monitoring and supervising terrorism offenders released into the community. Specifically, there is a risk that a risk-minimising approach to the management of post-sentence orders by law enforcement agencies may lead to a 'pattern of immediate breach and return to

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[71] Law Council November 2020 HRTO Bill, 26-27.
[72] See for example, the statement by the Australian Federal Police in its submission to the Committee: 'Since the CDO scheme commenced in June 2017 and till 15 June 2023, 20 Control Orders have been issued for 15 individuals. Of this number nine (9) offenders, have been arrested and charged for a breach or contravention of Control Orders. However, since ESOs commenced in December 2021, Control Orders have not been sought for PSO eligible offenders.' Australian Federal Police, Submission to Parliamentary Joint Committee on Intelligence and Security, Submission No. 12, Review of Post-Sentence Terrorism Orders: Division 105A of the Criminal Code Act 1995 (July 2023).
[73] INSLM's Report, 130 [450].
[74] Law Council of Australia, Position Paper – Principles underpinning a federal parole authority (November 2022).

custody by law enforcement'.[75] By way of contrast, in state criminal contexts a more balanced approach on parole is taken where discretion to warn is commonly exercised or recommended to State Parole Authority. Furthermore, the Law Council acknowledges the importance of ensuring 'a legislated hierarchy of sanctions and for breach (before criminal prosecution), an independent authority (such as a State Parole Authority or post-sentence authority), and a defence of reasonable excuse …'[76]

[75] Legal Aid New South Wales, Submission to the Parliamentary Joint Committee on Intelligence and Security, Submission No. 9, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995, 21
[76] Ibid.