



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

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, *Illseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018), [220]-[221] ('*Illseher*'), 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: *Inseher* (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.

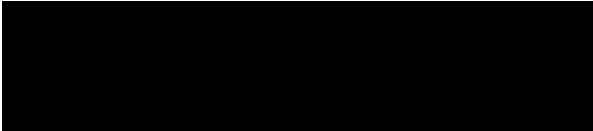
²¹¹ *Benbrika* (2021) 388 ALR 1, 57 [194].

²¹² *Ibid* [195].

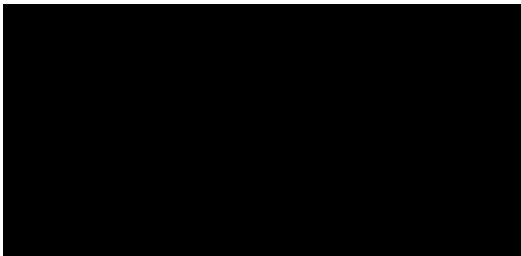
has heard evidence and received submissions and is presently in the process of drafting its report on the Bill. If such a scheme were enacted, it would provide yet another tool that the state could use to manager offenders at risk of committing serious terrorist offences in the community.

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