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

January 2022

Submission to the Independent National Security Legislation Monitor's Review into Division 105A of the Criminal Code

Independent National Security Legislation Monitor

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

Table of Contents

Introduction

1. The Department of Home Affairs and the Attorney-General's Department (the Departments) welcome the opportunity to provide a submission to the Independent National Security Legislation Monitor's (the INSLM) Review into Division 105A of the *Criminal Code Act 1995* (Cth) (the Criminal Code). The submission is divided into three parts. Part 1 of the submission outlines the policy rationale for the High Risk Terrorist Offenders (HRTO) regime under Division 105A of the Criminal Code. Part 2 provides an overview of the Division 105A legislative framework, including the continuing detention order (CDO) scheme and the extended supervision order (ESO) scheme. Part 3 discusses the operation and use of the CDO scheme. The submission incorporates responses to the specific questions that the INSLM provided for the Departments' consideration for this Review.

2. In addition to this public submission, the Department of Home Affairs (Home Affairs) is providing a confidential submission to the INSLM addressing operational questions.

3. In preparing these submissions, the Departments consulted the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). These agencies are also providing separate submissions to the INSLM's Review.

Part 1: Policy rationale

Threat environment

4. Australia's National Terrorism Threat Level is at Probable. This means that credible intelligence, assessed by our security agencies, indicates that individuals or groups have the intent and capability to conduct a terrorist attack in Australia.[1] Since September 2014, when the national terrorism threat level was raised, 146 people have been charged as a result of 73 counter-terrorism related operations around Australia. There have been nine attacks and 21 major counter-terrorism disruption operations in response to potential or imminent attack planning in Australia. From the 21 counter-terrorism disruptions, 19 were related to religiously motivated violent extremism and 2 related to ideologically motivated violent extremism.[2]

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

6. Australia has not experienced attacks by released offenders. However, the overseas experience highlights the importance of having effective measures in place to manage the risk posed by convicted terrorist offenders

[1] Please refer to the separate submissions of ASIO and AFP to the INSLM's Review for more detail on the threat.
[2] Figures accurate as at 4 January 2022.

returning to the community, who can be highly radicalised, motivated and capable of engaging in further offending or inspiring others to do so.

7. As a result of successful prosecutions over the past two decades, there is a substantial cohort of convicted terrorist offenders in Australia, some of whom may continue to pose a risk to the Australian community after they are released from prison. Since 2001, 96 people—including 7 who were juveniles when charged—have been convicted of terrorism-related offences. As at 4 January 2022, 55 of these people are currently serving custodial sentences for terrorism offences against the Criminal Code. Twenty-one offenders, including 2 individuals currently subject to a CDO, are due for release between 2022 and 2027 (Attachment A). A further 29 people are currently before courts on Commonwealth terrorism charges.

Policy intent to reduce avoidable risks

8. Australia has a robust national security and counter-terrorism framework, ensuring our agencies have the powers they need to prevent terrorist attacks and manage those who would seek to commit them. These laws are reviewed regularly to ensure Australia's legal frameworks remain appropriate and adapted to the evolving threat environment.

9. The Division 105A HRTO regime, which includes CDOs and, following the commencement of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) (the ESO Act), ESOs, is specifically designed to manage the ongoing threat posed by convicted high risk terrorist offenders.

10. The CDO scheme enables the continued detention of convicted terrorist offenders who a state or territory Supreme Court (the Court) is satisfied to a high degree of probability (based on admissible evidence), pose an unacceptable risk of committing a serious Part 5.3 terrorism offence if released into the community. A decision to grant a CDO also requires the Court to be satisfied that no other less restrictive measure under Part 5.3 of the Criminal Code —that is, an ESO (Division 105A) or control order (Division 104)—would be effective in preventing that unacceptable risk.

11. The ESO scheme complements the CDO scheme by enabling the Court to make an ESO as a less restrictive alternative to a CDO. Under an ESO, the Court may impose any conditions that it is satisfied, on the balance of probabilities (based on admissible evidence), are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.[3] ESOs enable the Court to impose a broad range of conditions that can be tailored to address the specific circumstances and specific risk that an offender poses.

Recommendations from previous reviews and inquiries

12. Both the INSLM and the Parliamentary Joint Committee on Intelligence and Security (PJCIS), recommended the creation of an ESO scheme as an addition to CDOs in Division 105A of the Criminal Code. This was primarily to address the lack of interoperability between CDOs and control orders.

[3] The Court's discretion in imposing conditions is limited by provisions such as subsection 105A.7B(2A) which provides that a condition must not require the offender to remain at specified premises for more than 12 hours within any 24 hours.

13. The INSLM found the CDO and control order schemes give rise to the need for different applicants to make separate applications in different courts, seeking to satisfy different tests for the same offender. The INSLM noted this is not in the interests of the applicants, the courts or the offender. The PJCIS similarly noted that the CDO and control order schemes create duplication in effort and noted the financial and time cost in running two separate proceedings.

14. The ESO Act is informed by: INSLM's 2017 report—*Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detentions Orders* (2017 INSLM report); and, PJCIS's 2018 report—*Review of Police Stop, Search and Seize Powers, the Control Order Regime, and the Preventative Detention Order Regime*. It also draws on the experience of Australian states and territories that have comparable regimes, and for this reason, departs from some of the INSLM and PJCIS recommendations about specific details of an ESO scheme.[4] Broadly, the ESO Act departs from the INSLM recommendations by:

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

    The reasons for these departures are outlined below.

Conditions under an ESO

15. The 2017 INSLM report recommended that the same controls be available for an ESO made under Division 105A as are available for a control order made under Division 104. As noted above, subsection 105A.7B(1), introduced by the ESO Act, provides that the Court may impose *any* condition that it is satisfied, on the balance of probabilities, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.[5]

16. This approach will allow the Court to consider the range of conditions that may be imposed under a control order when making an ESO, and also ensure that an ESO can be tailored to the specific risk posed by an individual high risk terrorist offender. This approach was informed by operational experience with post-sentence offender management, particularly with the New South Wales Terrorist High Risk Offenders (NSW THRO) scheme.

[4] Additional detail about departures from the INSLM and PJCIS recommendations are included in the Departments' Submission to the PJCIS review of the Counter Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (the ESO Bill) at page 6.

[5] As noted above, the Court's discretion in imposing conditions is limited by provisions such as subsection 105A.7B(2A), which provides that a condition must not require the offender to remain at specified premises for more than 12 hours within any 24 hours.

Threshold for making an ESO

17. The 2017 INSLM report recommended that in order to make an ESO, the Court should be satisfied to a 'high degree of probability' that the offender poses an unacceptable risk. This is the standard of proof that applies when the Court is considering an application for a CDO. However, section 105A.7A, introduced by the ESO Act, provides that the Court be satisfied 'on the balance of probabilities'.

18. The lower standard of proof in ESO proceedings ensures the interoperability of the CDO and ESO schemes and provides the Court with an alternative order (being an ESO) where it is not satisfied of the appropriately high thresholds for making a CDO. This also reflects the fact that these orders impose restrictions on an individual's personal liberties that fall short of ongoing detention.

19. The standard of proof for ESOs is consistent with the standard of proof that ordinarily applies in other civil proceedings. It is also the same standard of proof used for control orders, which similarly impose conditions on a person while in the community.

Ministerial consent for interim control orders

20. The 2017 INSLM report recommended that the Attorney-General (then responsible for exercising this power) be unable to give consent for an ICO while Division 105A proceedings are pending for either a CDO or an ESO. The ESO Act did not introduce a provision that would prevent consent from being provided in this circumstance. This departure guarantees access to all measures necessary to reduce the risk that high risk terrorist offenders are released into the community without any orders in place, while ensuring offenders cannot be subject to multiple orders simultaneously.

Examples of post-sentence schemes in states and territories

21. A majority of states and territories have established post-sentence schemes designed to manage the risk posed by certain high risk offenders. For example, New South Wales's *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act) provides for CDOs and ESOs in relation to NSW offenders who are in custody or under supervision while serving a sentence of imprisonment for a NSW indictable offence, or who are under an existing supervision order. Victoria's *Serious Offenders Act 2018* (Vic) provides for CDOs and ESOs in relation to serious sex and violent offenders. Further, Victoria's Terrorism (Community Protection) Amendment Bill 2021 (Vic) introduced support and engagement orders applicable in respect of persons who are radicalising towards violent extremism. South Australia's *Criminal Law (High Risk Offenders) Act 2015* (SA) provides for ESOs for 'terror suspects' who are serving a term of imprisonment for a state offence, as well as sex and violent offenders. However, a 'terror suspect' does not include a terrorist offender covered by the Commonwealth HRTO regime.

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

23. Please refer to Attachment B for further detail on post-sentence schemes in states and territories.

Examples of legislative schemes in likeminded countries

24. Many likeminded countries have legislated schemes that allow for the imposition of conditions as a means of addressing the risk posed by convicted terrorist offenders. For example, the UK's *Terrorism Prevention and Investigation Measures Act 2011* (UK) (the TPIM Act), permits UK authorities to impose almost identical restrictions to Australian control orders on an individual suspected of preparing to commit terrorism offences.[6] Canada's Criminal Code allows for 'terrorism peace bonds' to be imposed on individuals where it is considered necessary to prevent the commission of terrorism offences.[7] These restrictions may prohibit an individual from possessing certain weapons, restrict movements to certain parts of Canada or require them to surrender their passport.[8] New Zealand's *Terrorism Suppression (Control Orders) Act 2019* (NZ), as amended by the *Counter-Terrorism Legislation Act 2021* (NZ), authorises the imposition of a range of prohibitions and restrictions as part of a control order in respect to those having engaged in terrorism related activity overseas or those convicted of terrorism related offences in New Zealand.[9]

25. Some countries also have measures that allow for the detention of some categories of offenders beyond regular sentencing. For example, the UK can apply extended determinate sentences[10] or life sentences on persons convicted of terrorism offences, applied at the time of sentencing.[11] Further, legislation introduced in 2021 removed discretionary early release for the most serious terrorist offenders who receive an extended determinate sentence where the offence attracts a maximum penalty of life.[12] Canada and New Zealand have adopted 'dangerous offender'[13] and 'public protection order' regimes,[14] respectively, which allow for continued detention of serious sexual or violent offenders on a preventative basis. However, these schemes do not apply to terrorism offences. United States courts can order continued detention in a secure civil treatment facility for serious sexual offenders.[15]

[6] *Terrorism Prevention and Investigation Measures Act 2011* (UK) ss 2-3, Sch 1.
[7] *Criminal Code*, RSC, 1985, C-46, s 83.3.
[8] *Criminal Code*, RSC, 1985, C-46, s 83.3.
[9] *Terrorism Suppression (Control Orders) Act 2019* (NZ), Part 2.
[10] Determinate prison sentences involve the court setting a fixed length for a prison sentence, which includes time spent in custody and time released into the community on licence to serve the remainder of their sentence. UK courts can impose extended determinate sentences for certain offences, including terrorism, where the court has found an offender is dangerous and amended measures are required to protect the public from serious harm. These offenders spend a larger proportion of their sentence in prison, and once released into the community on licence, can be subject to restrictions and supervision to reduce the risk of them committing further offences. *UK Sentencing Council*
[11] *Counter-Terrorism and Sentencing Act 2021* (UK), Part 1.
[12] *Counter-Terrorism and Sentencing Act 2021* (UK), Part 2, ss 27-31.
[13] *Criminal Code*, RSC, 1985, C-46, ss 752-753.
[14] *Public Safety (Public Protection Orders) Act 2021* (NZ).
[15] 18 USC §4248 (2018).

Part 2: Division 105A legislative framework

Continuing detention orders

26. On 1 April 2016, the Council of Australian Governments (COAG) agreed that the Commonwealth should draft legislation to introduce a nationally consistent post-sentence preventative detention scheme, with appropriate protections, for high risk terrorist offenders who continue to pose an unacceptable risk to community safety if released.

27. In response, the Government introduced the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the CDO Bill) to create a CDO scheme for high risk terrorist offenders in Division 105A of the Criminal Code. The Parliament passed the Bill on 1 December 2016, and the scheme commenced on 7 June 2017. As at 14 December 2021, 2 CDOs have been granted: one each by the Supreme Courts of Victoria and NSW, respectively.

28. Section 105A.5 of the Criminal Code, as amended by the ESO Act, provides that the AFP Minister may apply to the Supreme Court of a State or Territory for a post-sentence order (a CDO or an ESO) in relation to an eligible offender. An offender is eligible for a post-sentence order where:

    - they have been convicted of a specified terrorism offence (paragraph 105A.3(1)(a))
    - the person will be at least 18 years old following the end of the sentence for the specified terrorism offence and the person is due to be released into the community, and
    - one of the circumstances described in section 105A.3A applies to that person, eg the person must be imprisoned for a specified terrorism offence or already subject to a CDO. See paragraph 39-40 for a full list of circumstances.

29. Section 105A.7 of the Criminal Code provides that the Court may impose a CDO for up to 3 years if satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence and there is no less restrictive measure that would be effective in preventing the unacceptable risk. [16] The Court retains discretion as to whether to make a CDO despite being satisfied that the offender poses an unacceptable risk and that there are no less restrictive measures that would be effective in preventing the unacceptable risk of the offender committing a serious Part 5.3 offence. While the State or Territory Court will be able to make an ESO as a less restrictive measure in the alternative to a CDO, only the Federal Court of Australia or the Federal Circuit Court of Australia can make a control order.

30. The AFP Minister may apply for an interim detention order (IDO) in relation to a terrorist offender if an application has been made to the Court for a CDO in relation to the offender. Before granting an IDO, the Court

[16] The Government introduced amendments to the ESO Bill to provide that ESOs and control orders are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a CDO that would be effective in preventing the unacceptable risk posed by an offender. These amendments were introduced and passed by the House of Representatives on 19 October 2021 and passed by the Senate on 22 November 2021. The Bill received Royal Assent on 8 December 2021.

must also be satisfied that there are reasonable grounds for considering that a CDO will be made in relation to the offender (section 105A.9).

31. To make a post-sentence order, the Court must be satisfied that the terrorist offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community. In determining this, the Court must have regard to the following matters outlined in section 105A.6B of the Criminal Code:

    - the safety and protection of the community from serious Part 5.3 offences
    - any reports by a relevant expert appointed by the Court in relation to the offender, and the level of the offender's participation in the assessment by the expert
    - 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
    - any reports from state or territory corrective services, or other relevant persons or bodies, relating to the extent to which the offender can reasonably and practicably be managed in the community
    - 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
    - the level of the offender's compliance with any obligations to which he/she is or has been subject while on parole or subject to a post-sentence order, interim post-sentence order or control order
    - the offender's history of any prior convictions for, and findings of guilt made in relation to, specified terrorism or foreign incursions offences
    - the views of the sentencing court at the time any sentence for specific offence was imposed on the offender
    - any state or territory order that is equivalent to a post-sentence order, that the offender is the subject of, and the conditions of that order, and
    - any other information as to the risk of the offender committing a serious Part 5.3 offence.

32. The rules of evidence and procedure for civil matters apply to CDO proceedings in accordance with section 105A.13 of the Criminal Code. A party to a CDO proceeding may adduce evidence, including by calling witnesses or producing material, or make submissions to the Court (section 105A.14). Section 105A.16 of the Criminal Code provides that the Court must state the reasons for its decision and provide a copy of those reasons to each party to the proceedings.

33. Section 105A.17 provides for a right of appeal by way of rehearing.

34. In accordance with section 105A.10 of the Criminal Code, the AFP Minister must apply to the Court for an annual review of a CDO that is in force in relation to an offender. In addition to the requirement of an annual review, section 105A.11 provides that the AFP Minister and the terrorist offender, or their legal representatives, in

relation to whom a CDO is in force may apply to the Court for review of the order. The Court may review the order if it is satisfied that there are new facts or circumstances which would justify reviewing the order; or it would be in the interest of justice, having regard to the purposes of the order and the manner and effect of its implementation, to review the order.

Extended supervision orders

35. The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (the ESO Bill) was introduced into Parliament on 3 September 2020 and referred to the PJCIS for review. The PJCIS released its report into the ESO Bill on 16 September 2021,[17] and the Government response was tabled on 19 October 2021.[18] In the report, the PJCIS made 11 recommendations. Ten recommendations were accepted (either in full, in part or in principle) by the Government of which five required legislative changes to the ESO Bill.

36. In addition to the amendments in response to the PJCIS report, the Government introduced additional Government amendments to the ESO Bill that:

    - clarify the operation of ESOs and control orders where a person is detained in non-prison custody (such as immigration detention), to ensure that orders commence and the conditions of these orders would remain enforceable against an offender who is detained in non-prison custody, and

    - provide that orders made under Part 5.3 of the Criminal Code, being ESOs and control orders, are the only measures that may be considered by the Court when deciding whether there is a 'less restrictive measure' to a CDO that would be effective in preventing the offender's unacceptable risk of committing a serious Part 5.3 offence.

37. The Bill received Royal Assent on 8 December 2021.

38. The ESO scheme provides that the Court may make an ESO in relation to an eligible offender, if

    - the AFP Minister has applied for an ESO

    - the AFP Minister has applied for a CDO but the Court is not satisfied that the thresholds for making a CDO are met, or

    - the Court has reviewed a CDO and decides not to affirm the CDO.

39. Under section 105A.3A, an offender is eligible for either a CDO or an ESO where they are:

    - serving a custodial sentence for a specified terrorism offence (subsection 105A.3A(1))

    - detained in custody pursuant to a CDO or an IDO (subsection 105A.3A(2))

[17] PJCIS Advisory Report on the ESO Bill, September 2021, available at: PJCIS Advisory Report on the ESO Bill.
[18] Government Response to the PJCIS Advisory Report on the ESO Bill, 19 October 2021, available at: Government Response to the PJCIS Report on the ESO Bill.

- serving a custodial sentence for an offence other than a specified terrorism offence, and they have been continuously detained in custody since being convicted of a specified terrorism offence, or since a CDO or IDO was in force in relation to the offender (subsection 105A.3A(3))

- serving a custodial sentence for breaching an ESO or ISO, and the Court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence as a result of the breach of the ESO or ISO (subsection 105A.3A(4)), or

- serving a custodial sentence for breaching a control order after serving a sentence for a specified terrorism offence, where the AFP Minister's consent to make an application for that control order was sought before the offender was released from custody in a prison. The Court must be satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence as a result of the breach of the control order (subsection 105A.3A(5)).

40. In addition, an offender may be eligible for an ESO (but not a CDO) where they are:

- subject to an ESO or ISO that is in force (subsection 105A.3A(6))

- serving a custodial sentence for an offence other than a specified terrorism offence, and an ESO or ISO was in force in relation to the person at the beginning of the person's detention in custody in a prison (subsection 105A.3A(7)), or

- subject to a control order, and the AFP Minister's consent to make an application for that control order was sought before the offender was released from custody in a prison, and before the ESO scheme commenced (subsection 105A.3A(8)).

41. The ESO scheme also establishes a transitional measure that provides that offenders who were released prior to the ESO scheme commencing, are eligible for an ESO, provided that certain criteria are met (subsection 105A.3A(8)). The Court would still need to be satisfied of the criteria for making an ESO, including that the offender poses an unacceptable risk of committing a serious Part 5.3 offence. This measure would only apply where the AFP had sought the Minister's consent to request an ICO before the offender was released from custody in a prison. Offenders who have been released into the community and are later subject to a control order (for example, one that is sought months after their release) would not be eligible for an ESO under this measure.

42. Subsection 105A.7B(1) provides that the Court may impose on an offender under an ESO any condition, or conditions, that the Court is satisfied is reasonably necessary and reasonably appropriate and adapted.[19] This provides the Court with the ability to consider a range of possible conditions that may address the specific risks posed by each offender. Without limiting the operation of subsection 105A.7B(1), subsection 105A.7B(3) lists a number of general conditions that the Court may impose on an offender, which have been informed by operational experience under the control order scheme and state and territory schemes.

[19] As noted above, the Court's discretion in imposing conditions is limited by provisions such as subsection 105A.7B(2A) which provides that a condition must not require the offender to remain at specified premises for more than 12 hours within any 24 hours.

43. It is unlikely that an offender would ever be subject to multiple orders. However, the provisions were amended in line with a recommendation from the PJCIS to require the Court, when making an ESO, to take into account whether the person is also subject to a state or territory post-sentence order, as well as the cumulative impact on the person of multiple orders (see paragraph 105A.6B(1)(ha) and subsection 105A.7B(1A)).

44. The Court must also assess the necessity and proportionality of each individual condition under an ESO, and the combined effect of all the proposed conditions of the ESO (paragraph 105A.7A(1)(c)).

45. Similar to control orders, ESOs are able to be monitored through a monitoring warrant, which provides for law enforcement agencies to monitor an offender's compliance with the conditions of an ESO. This ensures community safety, including by providing a strong disincentive to an offender to breach the conditions of their order.

46. Please refer to Attachment C for a comparative table on CDOs, ESOs and control orders.

Application of the legislative framework

47. The AFP Minister may apply to the Court for a CDO or ESO to be made in relation to an eligible offender within 12 months of the date they are due to be released into the community. The AFP Minister has an obligation to ensure reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer, or intelligence or security officer that would reasonably support a finding that an order should not be made.

48. The application for a CDO or an ESO must include:

- any report or document that the AFP Minister intends to rely on in relation to the application, at the time the application is made
- a copy of material and a statement of any facts that the AFP Minister is aware of, that would reasonably be regarded as supporting a finding that the order should not be made (subject to any claims for public interest immunity)
- information about the offender's age, and
- a request the order be in force for a specified period.

49. An application for an ESO must additionally include the following:

- a copy of the proposed conditions
- an explanation as to why each of the proposed conditions should be imposed on the offender
- if the AFP Minister is aware of any facts relating to why any of those conditions should not be imposed on the offender, a statement of those facts, except any facts that are likely to be protected by public interest immunity

- if the offender is subject to an order under a law of a state or territory that is equivalent to a post-sentence order, a copy of that order, and

- if a report was obtained under section 105A.18D in relation to the offender, a copy of that report.

50. The AFP Minister may request prescribed persons to provide the AFP Minister with information reasonably believed to be relevant to the administration or execution of the post-sentence orders. The AFP Minister may also disclose information acquired for the purposes of the post-sentence orders to a prescribed person if the AFP Minister reasonably believes it is necessary to enable the person to exercise their powers, functions or duties. Under section 105A.18D, the AFP Minister may direct persons who are eligible for a post-sentence order, or presently subject to such an order, to be subject to an expert assessment of the risk of the offender committing a serious Part 5.3 offence. The offender is required to attend an assessment, and the Court is to have regard to the expert's report and the level of the offender's participation in the assessment when making a post-sentence order.

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

52. The AFP Minister, the offender or their legal representative may call their own expert as a witness in the proceeding. A 'relevant expert' is defined in section 105A.2, and includes a suitably qualified expert with medical, psychiatric, psychological or other expertise to assess and report on the risk posed by the offender.

53. The Court may make a CDO or ESO in relation to the offender for a period of no more than 3 years. The Court may make successive CDOs or ESOs in relation to the offender. If the Court is not satisfied that a CDO should be made, then the Court must consider whether to make an ESO.

54. The AFP Minister and offender have the right to appeal the decision of the Court to either make or to not make a CDO or an ESO, and any appeal is to be by way of a rehearing. In the event an offender appeals against an order, such appeal does not stay the operation of the order.

55. If a CDO or ESO is made, the AFP Minister must apply to the Court to review the order within 12 months after the order came into force or within 12 months of when the most recent review ended. A terrorist offender or legal representative of a terrorist offender may also apply for review of a CDO or ESO and the Court may review the order in that instance if it is satisfied there are new facts or circumstances or it is in the interests of justice to review the order.

56. On a review of a CDO, the Court may either affirm or revoke the CDO or consider making an ESO as an alternative to a CDO. The Court may only affirm the CDO if, pursuant to subsection 105A.12(4), having regard to matters in section 105A.6B, the Court is satisfied that it could have made the order under section 105A.7. If affirming the order, the Court may also vary the duration if it is not satisfied that the period currently specified is reasonably necessary to prevent the unacceptable risk of the offender committing a serious Part 5.3 offence.

Similarly, on a review of an ESO, the Court may affirm the order if, having regard to matters in section 105A.6B, the Court is satisfied that it could have made:

- the order under section 105A.7A, or
- an ESO disregarding paragraph 105A.7A(1)(c) (meaning the Court must be satisfied the pre-conditions for making an ESO have been met without considering whether the conditions are reasonably necessary, and reasonably appropriate and adapted).

57. If affirming the order, the Court may also vary the period for a shorter period, or vary or remove conditions of the ESO.

58. Where a CDO is made in relation to a terrorist offender, the offender must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements necessary to maintaining the security and safety of the prison, the offender, any other prisoners and the community. The AFP Minister may arrange for an offender, against whom a CDO has been made, to be detained in a state or territory prison.

59. Please refer to Attachment D for a diagram of the post-sentence order litigation process.

HRTO regime implementation framework (the framework)

60. The Commonwealth is responsible for administering the national HRTO regime, supported by state and territory agencies in its implementation, for example, corrective services and police authorities. The Commonwealth, in collaboration with state and territory governments, has developed an implementation framework to support the effective operation of the HRTO regime. The framework contributes to effective coordination, national consistency and interoperability amongst and between jurisdictions and systems, including through an understanding of the capabilities, roles and responsibilities of the Commonwealth, state and territory agencies associated with HRTO regime implementation.

61. The framework establishes governance arrangements designed to ensure effective and timely decision making by officials, enabling coordination between state, territory and federal agencies in the pre- and post-release evaluation and management of high risk terrorist offenders. The national framework will be supplemented by state and territory specific plans.

62. The Commonwealth continues to engage closely with state and territory agencies to enhance clarity around stakeholder roles and responsibilities, and to develop national capability. The Commonwealth, states and territories are developing HRTO information sharing arrangements, exercising operational implementation of the framework, and developing necessary housing arrangements for offenders on post-sentence orders.

Procedural fairness and safeguards

63. There are a range of protections and safeguards in Division 105A, including the following:

- a CDO or ESO may only be made following a hearing between the parties at which the rules of evidence and procedure apply[20]
- the offender has the opportunity to lead evidence (including by, calling witnesses or producing material) or make submissions[21]
- the offender must be provided with certain documents to enable him or her to prepare for the Court's hearing of an application[22]
- the Court may stay proceedings or require the Commonwealth to pay all of part of an offender's legal costs if an offender is unable to obtain legal representation due to circumstances beyond their control[23]
- the AFP Minister bears the onus to satisfy the Court of the relevant thresholds for the making of the order[24]
- the AFP Minister has a number of particular 'disclosure' obligations[25]
- the Court retains a discretion as to whether to make the order and what the terms of the order are[26]
- the Court must give reasons for its decision,[27] and the offender has the right to appeal the decision by way of rehearing[28]
- the AFP Minister must apply to the Court to review the order on an annual basis,[29] or sooner on application of the offender, if the Court is satisfied there are new facts or circumstances to justify the review or it is otherwise in the interests of justice to review the CDO or ESO,[30] and
- the AFP Minister must, as soon as practicable after each 30 June, cause a report to be prepared and tabled before each House of the Parliament about the operation of Division 105A during the year ended on that 30 June.[31]

---

[20] S 105A.13.
[21] S 105A.14.
[22] S 105A.15
[23] S 105A.15A.
[24] S 105A.7(3) and 105A.7A(3).
[25] For example, s 105A(2A) and (3)(aa).
[26] S 105A.7(1) and 105A.7A(1).
[27] S 105A.16.
[28] S 105A.17.
[29] S 105A.10.
[30] S 105A.11.
[31] S 105A.22.

64. The particular disclosure obligations imposed on the AFP Minister by Division 105A provide an important safeguard. They oblige the AFP Minister to make reasonable enquiries of specific bodies; to produce documents and, importantly, a statement of any facts that the AFP Minister is aware of that would reasonably be regarded as supporting a finding that the CDO order should not be made or affirmed on review (see for example section subsections 105A.5(2A) and paragraph 105A.5(3)(aa) of the Criminal Code).

65. Additionally, the CDO Bill amended the *Independent National Security Legislation Monitor Act 2020* (Cth) to require the INSLM to undertake this review of the operation, effectiveness and implications of Division 105A. The *Intelligence Services Act 2001* (the Intelligence Services Act*)* was also amended to require the PJCIS to review Division 105A, before the end of 6 years after the day the Bill received Royal Assent. This requirement for the PJCIS to review the operation, effectiveness and implementation of Division 105A has been preserved in the *ESO Act* by a further amendment to the Intelligence Services Act. The PJCIS will now be required to commence a review within 12 months of the INSLM completing this review of Division 105A.

66. In addition to the safeguards outlined above, the ESO scheme has a number of other safeguards and accountability mechanisms, including:

- the Court must assess, and be satisfied of, the necessity and proportionality of each individual condition of an ESO application, as well as the combined effect of all the proposed conditions of the ESO[32]

- the Court must take into account whether the person is also subject to a post-sentence order under state or territory legislation, as well as the cumulative impact on the person of multiple orders. This includes any type of post-sentence order scheme within a state or territory and is not limited to those relating to counter-terrorism,[33] and

- the Court cannot order an offender to remain at a specified premises for more than 12 hours in a 24 hour period. This is to ensure that an ESO or ISO does not impose conditions akin to detention.[34]

67. The ESO scheme also provides that the AFP Commissioner must keep a record of each monitoring warrant issued, each instrument revoking a monitoring warrant and any order granting an extension to a monitoring warrant period. The AFP Commissioner must also notify the Commonwealth Ombudsman that a warrant has been issued, provide a copy of the warrant and notify the Ombudsman of any contravention of a provision of the monitoring warrant regime in Part IAAB of the *Crimes Act 1914* (Cth) by an AFP member. Furthermore, the Ombudsman must report annually to the AFP Minister on the compliance of members of the AFP with Part IAAB. The AFP Minister must report to the Parliament on the operation of the regime, including the number of warrants issued and executed.

68. Further, the monitoring warrant powers are subject to safeguards that ensure the use of these powers is reasonable and necessary. These measures require the monitoring warrant-issuing officer to be satisfied of thresholds, such as being satisfied that it is reasonably necessary to use the power for the purpose of the protection of the public from a terrorist attack. The issuing officer must also have regard to whether utilising this

[32] S 105A.7A(1)(c).
[33] S 105A.6B(1)(ha).
[34] S 105A.7B(1A).

power would be likely to have the least interference with any person's liberty and privacy that is necessary in the circumstances.

69. Consistent with the INSLM's recommendations, special advocates, which are available where court-only evidence is considered in control order proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), will also be available where court-only evidence is considered in ESO proceedings. This is important to ensure the offender receives a fair hearing by enabling a special advocate to be appointed to represent the offender's interests during the parts of a hearing in which the offender and their ordinary legal representative are excluded when the Court agrees to consider highly sensitive court-only evidence.

Additional questions not addressed above

70. This section provides information on specific questions provided to the Departments not addressed above.

[redacted]

71. The principle of 'equality of arms' requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

72. Given their unique nature, the CDO and ESO schemes include specific features to ensure that offenders have a reasonable opportunity to present their cases and are not otherwise at a disadvantage. These safeguards apply in addition to the usual rules of evidence and procedure applicable in civil matters, and section 105A.17 also provides for a right of appeal by way of rehearing.

73. One of those safeguards is section 105A.15A, which provides that if an offender is, due to circumstances beyond their control, unable to engage legal representation, the Court may make an order:

- staying the proceeding for such period and subject to such conditions as the Court thinks fit, and/or
- requiring the Commonwealth to bear, in accordance with the regulations (if any), all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding.

74. This provision ensures that an offender is appropriately represented during CDO provisions and ensures procedural fairness. Legal aid commissions may also apply for funding under the Expensive Commonwealth Criminal Cases Fund (ECCCF) in order to meet the costs of representing terrorist offenders in Division 105A matters. The ECCCF is administered by the Attorney-General's Department.

75. Providing for legal representation for a terrorist offender who is the subject of CDO proceedings is important to ensure that the terrorist offender may respond effectively to the matters raised by the Commonwealth. Providing for the staying of a proceeding, or requiring the Commonwealth to bear all or part of the costs of the offender's legal representation where the terrorist offender, through no fault of their own, has been unable to

[redacted]

obtain legal representation, provides an important safeguard and helps to ensure that the terrorist offender receives a fair hearing.

76. As discussed above, the particular disclosure obligations imposed on the AFP Minister by Division 105A, which go beyond usual prosecutorial disclosure obligations in criminal matters, provide an important safeguard in relation to Division 105A proceedings.

77. A further safeguard is the special advocate regime, discussed above, which balances the need to protect sensitive information while ensuring the terrorist offender's interests are represented. The Commonwealth will cover the cost of special advocates in recognition of the fact that the cost is incurred to allow the Commonwealth to protect sensitive national security information and to ensure that offenders are not at a disadvantage.

[redacted]

78. The Government does not consider it necessary to establish a Risk Management Monitor or a Public Interest Monitor in relation to the Division 105A orders, given the existing range of safeguards and accountability mechanisms. Further, the HRTO regime implementation framework, which has recently been finalised in consultation with states and territories, includes multi-agency governance mechanisms designed to ensure appropriate oversight of implementation of Division 105A orders.

79. As observed by the High Court plurality in *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [11], the Court's power to make a CDO is subject to the ordinary incidents of the exercise of judicial power. As discussed above, Division 105A includes a broad range of safeguards, including independent oversight by the PJCIS and the INSLM.

[redacted]

80. The CDO and ESO schemes apply to Commonwealth offenders. Subsection 105A.12(5A), provides that: '[t]he AFP Minister must ensure that reasonable inquiries are made 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 [CDO or ESO] order should not be affirmed'.

81. The safeguard that requires the AFP Minister to ascertain information that would support a finding that an order should not be made, is to ensure the AFP Minister's application for a CDO is not contrary to any information currently available to Commonwealth law enforcement and intelligence agencies, which broadly speaking, fall within the AFP Minister's responsibilities. Given the existing operational coordination and information-sharing arrangements within the Commonwealth, and with states and territories, it would be unnecessary and unreasonably burdensome to expand this obligation to information held by state, territory or Commonwealth officials other than Commonwealth law enforcement and security officers. It is also unclear how the AFP Minister could comply with an obligation that was so broad. That is, it would not be possible for the AFP Minister to discharge an obligation to make enquiries with every state, territory and Commonwealth official.

[redacted]

82. This obligation does not preclude a respondent's ordinary right to undertake discovery processes and procedures to ascertain information to support their case, which they will be well-placed to do given the CDO safeguards that already exist.

[redacted]

83. Legal aid commissions are funded by state and territory governments to provide legal assistance to individuals involved in state and territory law matters, including criminal and civil law matters. How funding is allocated in respect of any state or territory based post-sentence detention scheme is a matter for each jurisdiction. Further, legal aid commissions are independent statutory authorities, and are responsible for making decisions regarding eligibility for legal aid grants and resource allocation within their available funding.

84. Commonwealth funding arrangements for post-sentencing order matters exist under the ECCCF that provides for legal aid organisations to seek funding to meet the costs of representing terrorist offenders in Division 105A matters. The Government has committed additional funding to the ECCCF for the 2021-22 financial year, including to expand the scope of the scheme to support state and territory legal aid commissions to represent convicted offenders in Commonwealth matters involving post-sentence detention schemes. The Attorney-General's Department monitors demand on the ECCCF, which will help to inform Government's consideration of future funding needs.

85. Under the Commonwealth HRTO regime, when a terrorist offender is unable to engage legal representation, the Court may order staying the proceeding and/or order the Commonwealth to bear all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding.

Eligibility and thresholds

[redacted]

86. In *Minister for Home Affairs v Benbrika* [2021] HCA 4 Gageler and Gordon JJ gave dissenting judgments on this issue, which were addressed by the plurality (Kiefel CJ, Bell, Keane and Steward JJ) at [46] (see below). Gageler J considered that the breadth of serious Part 5.3 offences, which include preparatory offences, is too far removed from 'doing or supporting or facilitating any terrorist act' (at [92]-[93]) and that a distinction should be made between:

    - terrorist offences, where the risk of harm to the community arose straightforwardly from the prohibited conduct (e.g. engaging in a terrorist act), and

[redacted]

- 'prophylactic' offences, where the risk to the community would arise only if further steps were taken beyond the prohibited conduct (e.g. becoming a member of a terrorist organisation) (at [55]-[56], [93]).

87. Similarly, Gordon J considered that: '[b]ecause the range of serious Part 5.3 offences is so broad, the offences and the conduct underlying these offences are not restricted to offences or conduct having an immediate harm to persons or property' (at [169]). Further, Gordon J observed that: '[t]he concern is not of harm, but of the offender committing an offence regardless of the consequences of that offending to the community' (at [170]).

88. However, the plurality disagreed with the above dissents, observing at [46] that:

> It is difficult to envisage any circumstances in which a continuing detention order would be made to prevent the risk of the commission of a serious Pt. 5.3 offence where that offence is of a kind that could not be seen to pose a real threat of harm to the community. Even where the apprehended serious Pt. 5.3 offence does not involve as an element the inflicting, or having as an immediate purpose the actual inflicting, of personal injury on a person or persons, the advancement of a terrorist ideology can readily be seen to create a milieu which fosters the prospect that personal injury will be suffered by innocent members of the community. A law directed against the implementation of such an ideology (even by preparatory acts) does not lack the character of a law for the protection of the community from harm simply because the law does not include the immediate likelihood or purpose of inflicting personal injury as an element of the offence.

89. The Government continues to consider it appropriate that preparatory offences be included in the definition of a 'serious Part 5.3 offence' as part of the HRTO regime.

90. As stated by the Government in the context of the PJCIS Review of the CDO Bill:

> The policy rationale behind the Division 101 offences in the Criminal Code (other than the offence of engaging in a terrorist act) is the need to criminalise preparatory conduct. The general policy intent underlying the offences, being the need to disrupt the preparatory stages of a terrorist act, has been accepted by the Security Legislation Review Committee (Sheller Committee) and the Parliamentary Joint Committee on Intelligence and Security in 2006.[41]

91. A number of significant terrorism prosecutions have been based on preparatory offences in Division 101. The result of these prosecutions demonstrates the effectiveness of the offences in foiling serious terrorist attacks in Australia. Those prosecuted for preparatory offences have intended to cause serious harm or death, and serious damage to property and infrastructure.

92. The gravity of these offences is reflected in the maximum penalties that apply to the preparatory offences, which range from imprisonment for 10 years to imprisonment for life. It is appropriate that preparatory offences be included in the definition of a 'serious Part 5.3 offence' as part of the proposed scheme.

93. The Government considers that the rationale and policy for the inclusion of preparatory offences as 'serious Part 5.3 offences' has not changed since 2016. The Government does not consider the impact of preparatory offending to be 'limited' in light of the serious harm that can result if preparatory offending is not addressed as part of preventative measures.

---

[41] PJCIS Review of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the CDO Bill), Submission 9.2, Attorney-General's Response to Questions on Notice, pages 3-4, available at: sub009.2 (6).pdf (bcz.gov.au).

[redacted]

94. The object of the CDO scheme is the safety and protection of the community from serious Part 5.3 offences. It is not punitive. There are examples from Australia and like-minded countries of minors committing, or being involved in, serious terrorism offences. The Government considers it appropriate that such individuals, where they are at least 18 years of age at the end of their sentences, should be eligible for consideration for Division 105A post-sentence orders.

95. Crucially, the assessment of the risk that an offender poses is forward-looking and relates to the risk that a person is assessed as posing on their release (as persons aged 18 or over). Section 105A.6B of the Criminal Code, provides a broad range of matters that the Court must have regard to in considering whether or not to make a CDO. This includes reports of assessments by relevant experts as to the offender's risk of committing a serious Part 5.3 if released into the community, and reports relating to the extent that an offender can reasonably and practicably be managed in the community. As noted above, the Court may make an ESO as a less restrictive alternative to a CDO, if it is not satisfied that the level of risk the offender poses warrants the continued detention of the offender.

96. The minimum age of criminal responsibility for Commonwealth offences is 10 years.[43] A child over 10 years of age, but under 14 years, can only be criminally responsible for an offence if it can be shown that they know that their conduct is wrong.[44] The burden of proof lies on the prosecution to prove that the child knew their conduct was wrong.

97. To be convicted of a terrorism offence, the person must have capacity. Should a person be charged, convicted and sentenced for a terrorism offence, they have already been deemed, at law, to have understood the implications of committing that terrorist offence.

98. The HRTO regime differs from the criminal age of responsibility, in that applications may only be made for those above 18 years of age. Therefore, while a post-sentence order can be granted against an offender who was a minor when they committed the offence, the offender needs to be at least 18 years of age when their sentence ends. The Government considers this to be an important distinction. This appropriately limits the application of the regime against children.

[redacted]

99. In Minister for Home Affairs v Benbrika [2021] HCA 4 at [174], the plurality's reasoning was supportive of the unacceptable risk test (Kiefel CJ, Bell, Keane and Steward JJ at [46]). Gordon J, dissenting, observed that a problem with Division 105A is that it 'does not identify the amount of risk of a terrorist offender committing a

[redacted]

[43] *Criminal Code Act 1995* (Cth) s 7.1.

[44] *Criminal Code Act 1995* (Cth) s 7.2.

[redacted]

serious Part 5.3 offence that would be acceptable'. Her Honour considered 'that question must necessarily be answered before the Court can be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community'. Her Honour also considered that 'whether a terrorist offender poses an unacceptable risk of committing a serious Part 5.3 offence is not directed to the risk of harm to the community'.

100. The term 'unacceptable risk' is not defined in the Criminal Code and has been deliberately left open to the Court to apply on an individual basis.[46] However, as the plurality in *Minister for Home Affairs v Benbrika* [2021] HCA 4 said at [11], '[t]he criterion of 'unacceptable risk of committing a serious Part 5.3 offence' is capable of judicial application'.[47] To date it has been the subject of detailed judicial consideration in relation to the Commonwealth HRTO regime by the Supreme Court of Victoria in *Minister for Home Affairs v Benbrika* [2020] VSC 888 and more recently by the Victorian Court of Appeal in *Benbrika v Minister for Home Affairs* [2021] VSCA 303.

101. At first instance, Justice Tinney drew attention to the intent of leaving the concept of 'unacceptable risk' open, quoting the Victorian Court of Appeal judgment, *Nigro v Secretary to the Department of Justice* ('*Nigro*'):

> 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 the combination of these factors that will determine whether the risk of occurrence is of a sufficient order to make the risk unacceptable.[48]

102. In *Nigro,* the Victorian Court of Appeal explained this risk threshold as follows:

> 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 may result and any other relevant circumstances, makes the risk unacceptable. These matters must be established by acceptable and cogent evidence.[49]

103. The Victorian Court of Appeal further observed that:

> It is the gravity of the consequences of the offence which the offender is at risk of committing which will ordinarily be the critical factors in the assessment of whether that risk is 'unacceptable'. That gravity will depend upon the offender's likely conduct, which in turn depends upon an evaluation of the particular circumstances which pertain to that offender and not upon generalisations about the general character of the offence or the sentence which are attracted by the relevant offence.[50]

---

[46] Explanatory Memorandum to the CDO Bill at page 21 [124].
[47] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [22] per Gleeson CJ, 597 [34] per McHugh J, 616-617 [97]-[98] per Gummow J, 657 [225] per Callinan and Heydon JJ; *Thomas v Mowbray* (2007) 233 CLR 307 at 327-329 [15]-[16], 334 [28] per Gleeson CJ; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1251 [57], 1253-1254 [66]-[68], 1255 [73]-[75], 1258-1259 [84]-[89] per Bell, Keane, Nettle and Edelman JJ; 374 ALR 1 at 17, 20, 22, 26-28 cited in in *Minister for Home Affairs v Benbrika* [2021] HCA 4 at [11].
[48] (2013) 41 VR 359 [117] quoted in *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [401].
[49] (2013) 41 VR 359 [6] quoted in *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [402].
[50] (2013) 41 VR 359 [130] quoted in *Minister for Home Affairs v Benbrika* [2020] VSC at [403].

104. The Victorian Court of Appeal in *Benbrika v Minister for Home Affairs* [2021] VSCA 303, considered at [73] that the question of whether a particular terrorist offender poses an unacceptable risk of committing a serious Part 5.3 offence falls to be determined by reference to all of the evidence in a particular case. Further, the Court of Appeal noted it was the effect of the whole of the evidence that was important in determining whether the appellant posed an unacceptable risk of committing a serious Part 5.3 offence if released into the community at [100].

105. Similar views on the threshold of 'unacceptable risk' have been adopted by the Supreme Court of New South Wales, in relation to the THRO scheme. For example, in *NSW v Naaman (No 2)*, the New South Wales Court of Appeal stated that the test is 'forward looking' and that it is 'relevant to the assessment of that risk to consider both the likelihood of the offence being committed, and the relative seriousness of the offending conduct'.[51] As to whether a risk is or is not 'unacceptable' the Supreme Court of New South Wales opined that a risk may be unacceptable if the consequences of such an act would be serious, even if there is only a slim probability of the offender committing a terrorist act.[52]

106. As outlined above, in determining whether the offender poses an unacceptable risk of committing a serious Part 5.3 offence, the Court must have regard to a broad range of matters under section 105A.8 of the Criminal Code.

[redacted]

107. The Government does not consider that it is necessary to add a temporal requirement to the unacceptable risk test. As noted above, unacceptable risk is not defined in the Criminal Code. In the context of other protective post-sentence detention schemes, the Court has taken a flexible approach to the interpretation of this term. This allows for the concept to be 'calibrated to the nature and degree of the risk so that it can be adapted to the particular case'.[54]

108. No state or territory post-sentence detention scheme includes a temporal element in the legislative test of unacceptable risk.[55] In *Minister for Home Affairs v Benbrika* [2020] VSC 888, Tinney J noted that 'in no way is the Court's task to determine whether there is an unacceptable risk of the imminent commission by the defendant of a serious Part 5.3 offence if he is released. There is no temporal requirement to the finding' (at [458]).

109. The Departments agree with this statement and do not consider that there should be a temporal element specified in the test. The current test gives flexibility to the Court to have regard to a number of factors when assessing risk, including temporal aspects. Pursuant to paragraph 105A.8(1)(i) of the Criminal Code, the Court can have regard to any information as to the risk of the offender when making a CDO.

110. Additionally, the Court must be satisfied when making a CDO that the period of the order (limited to 3 years maximum) is reasonably necessary to prevent the unacceptable risk of the offender committing a serious

[51] [2018] NSWCA 328 cited in *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [405].
[52] *NSW v Naaman (No 2)* [2018] NSWCA 328 cited in *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [405].
[redacted]
[54] *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 at [165].
[55] The South Australian *Criminal Law (High Risk Offenders) Act 2015* refers to 'appreciable risk' rather than unacceptable risk.

Part 5.3 offence if they are released into the community (subsection 105A.7(5)). A CDO is also required to be reviewed annually with the possibility of review at any time should circumstances change.

[redacted]

111. The Government does not consider it necessary to have an additional, explicit public interest test included in the CDO scheme legislative framework. The object of the CDO scheme, being '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', is the key public interest consideration in the CDO scheme.

112. The Government is of the view that the public interest is adequately considered under subsection 105A.6B(1) of the Criminal Code, which provides that the Court must have regard to a broad range of matters, including the safety and protection of the community, in making a post-sentence order. Notably, subsection 105A.6B(2) clarifies that this list of matters is non-exhaustive and that the Court may have regard to any other matter that the Court considers relevant. The Court also retains discretion not to make a CDO even if the legislative elements have been met.

[redacted]

113. Subsection 105A.13(1) of the Criminal Code provides that, in any CDO proceeding, the Court must apply the rules of evidence and procedure for civil matters.

114. The PJCIS considered the nature of CDO proceedings in its Advisory Report on the CDO Bill. The PJCIS concluded that it is appropriate CDO proceedings be considered civil rather than criminal, as a CDO is not intended to re-punish past behaviour, but rather to protect the community from an unacceptable risk of future harm that may be caused by an unreformed convicted terrorist being released at the end of their prison sentence [at 3.32].

115. Under the CDO scheme, there is no trial by jury, no conclusion of guilt, no conviction for an offence and no sentence delivered. It is a civil proceeding in which the civil standard of proof and the rules of civil procedure apply, in which the Court determines whether an offender poses an unacceptable risk to community safety and whether or not continuing detention is required to address that risk to the community. The *Crimes (High Risk Offenders) Act 2006* (NSW) and *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) adopt a similar approach. The standard of proof for making a CDO is 'a high degree of probability' that reflects the seriousness of the restrictions imposed by the order on the person resulting in continued custody.

[redacted]

[redacted]

116. Paragraph 105A.7(1)(b) of the Criminal Code requires that, in order to make a CDO, the Court must be:

> Satisfied to a *high degree of probability* on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community (emphasis added).

117. This standard of proof requires the Court to be satisfied to a high degree of probability as to the risk posed by the offender. This is higher than the civil standard of proof 'on the balance of probabilities' that ordinarily applies in civil proceedings, including control order and ESO proceedings. The standard 'on the balance of probabilities' requires the Court to determine that it is more likely than not that the offender poses an unacceptable risk. This lower standard of proof applicable to control orders and ESOs reflects the fact that these are less restrictive measures than a CDO. The HRTO regime allows the Court to invoke the least restrictive measure available that would be effective in protecting the community.

118. Raising the standard of proof for CDOs to the standard of 'beyond reasonable doubt' would bring the required standard of proof to the criminal standard. The Government would consider this inappropriate because CDOs are civil orders that do not involve determinations of criminal guilt. CDOs are protective, rather than punitive, in nature. As confirmed by the High Court majority in *Minister for Home Affairs v Benbrika* [2021] HCA 4, the CDO scheme can be correctly understood as protective (e.g. at [39]). This standard is consistent with most state or territory preventative detention schemes, including NSW THRO scheme and Victoria's scheme under the *Serious Offenders Act 2018*. The Government is not aware of examples of civil proceedings that would apply the criminal standard of proof.

119. The AFP Minister's ability to satisfy a higher standard of proof would depend on the strength of all the admissible evidence available in respect of each eligible high risk terrorist offender. There is no specific category of evidence that would not meet the criminal standard, as this would depend on the facts of the case. The Court's satisfaction, in the event an application is brought, will be formed with regard to all of the admissible evidence adduced in the proceedings and those matters set out in section 105A.6B of the Criminal Code. The AFP Minister is unlikely to rely on one category of evidence, such as an expert opinion or other admissible information, in order to meet the requisite standard of proof, and the strength of the evidence would need to be assessed on case-by-case basis.

120. The Government views, that in the context of the CDO scheme and in light of the procedural rights available to an offender, the civil standard of proof on the AFP Minister to be satisfied to a 'high degree of probability', strikes the right balance between protection of the community and safeguarding the rights of the individual.

[redacted]

Consistency with Australia's international and human rights obligations

Consistency with international obligations

[redacted]

121. Australia's international obligations to combat terrorism stem from a range of sources. These include a variety of treaties ratified by Australia that are aimed at supressing specific forms of terrorism, as well as UN Security Council resolutions, which Australia is under an international obligation to 'accept and carry out' by virtue of Article 25 of the *UN Charter*.

122. Successive UN Security Council resolutions have given rise to obligations upon Australia to prevent acts of terrorism.[61] For example:

- *Resolution 1373 (2001)* requires that nation states take the necessary steps to prevent the commission of terrorist acts (para 2(b))

- *Resolution 1624 (2005)* requires that nation states adopt measures necessary and appropriate and in accordance with their obligations under international law to:

  - prohibit by law incitement to commit a terrorist act or acts, and

  - prevent such conduct.

- *Resolution 2178 (2014)* requires that nation states ensure their domestic laws and regulations establish serious criminal offences for those who travel to other countries for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training, and related offences. It also call on nation states to enhance countering violent extremism efforts and take steps to decrease the risk of radicalisation to terrorism in their societies.

- *Resolution 2396 (2017)* calls on nation states to assess and investigate suspected individuals whom they have *reasonable* grounds to believe are terrorists, including by employing comprehensive risk assessments for those individuals, and to then take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures.

123. The Government is satisfied that Division 105A is consistent with Australia's international obligations to combat terrorism as outlined in the Security Council resolutions. By providing a mechanism for the continued detention of offenders who pose an unacceptable risk of committing serious terrorism offences, Division 105A explicitly contributes to Australia's efforts in meeting its obligation to take necessary steps to prevent terrorist acts.

[redacted]

[61] For example, S/RES/1269 (1999), S/RES/1373 (2001), S/RES/1624 (2005), S/RES/2178 (2014), S/RES/2396 (2017), S/RES/1566 (2004), S/RES/2482 (2019).

124. The process of making a post-sentence order and provisions regarding expert assessment of the offender's risk to the community also ensures consistency with Australia's obligations in relation to rehabilitation and reintegration strategies under Resolution 2396. Further, the provisions under Division 105A contribute to efforts in meeting Australia's obligation to address the issue of foreign terrorist fighters, by providing that a post-sentence order may apply to a person who has been convicted of an offence relating to foreign incursions and recruitment.

Consistency with human rights obligations

125. As part of the development of both the CDO and ESO Bills, the Government carried out human rights compatibility assessments and prepared statements of compatibility in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In relation to both bills, it was concluded that, while they engage a range of human rights, they are compatible with human rights because they promote some rights, and to the extent that they limit other rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective. Both the CDO Bill[62] and the ESO Bill[63] (including the amendments to those Bills[64]) were scrutinised by the Parliamentary Joint Committee on Human Rights. The Government provided responses to these reports, as requested.

[redacted]

126. Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that no-one shall be subjected to arbitrary arrest or detention and that no-one shall be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. Division 105A sets out the procedure by which a person may be detained under a CDO or an ISO and is consistent with Article 9(1) of the ICCPR.

127. Article 9 regulates, rather than prohibits, detention; it is only 'arbitrary' detention that is prohibited. Arbitrariness includes the elements of inappropriateness, injustice and a lack of predictability. Detention will not be arbitrary where, in all the circumstances, it is appropriate, justifiable, reasonable, necessary and proportionate to a legitimate end. Detention may be arbitrary where there are less restrictive alternatives available. Preventative detention is not arbitrary, *per se*, and will be consistent with Article 9 if it is ordered by a court and is limited to a period during which it is justified by compelling reasons that are reviewable by a judicial authority.

128. The objective of the CDO scheme is legitimate and consistent with the purposes of the ICCPR. By continuing to detain terrorist offenders who pose an unacceptable risk of committing serious terrorism offences, the scheme protects and promotes the rights of people in the community whose life, liberty and property would be

[62] Parliamentary Joint Committee on Human Rights, Report 7 of 2016, available at: PJCHR Report 7 of 2016; Report 8 of 2016, available at: PJCHR Report 8 of 2016;
[63] Parliamentary Joint Committee on Human Rights, Report 11 of 2020, available at: PJCHR Report 11 of 2020; Report 13 of 2020, available at: PJCHR Report 13 of 2020
[64] PJCIS Advisory Report on the ESO Bill, available at: PJCIS Advisory Report on the ESO Bill
[redacted]

imperilled by the commission of serious terrorism offences. However, the scheme includes numerous features designed to ensure that detention is only authorised where it is non-arbitrary:

- only a limited class of persons can be subject to the scheme and the characteristic used to define that class (imprisonment for a terrorism-related offence) is rationally connected with the scheme's protective purpose

- only the AFP Minister, or their legal representative, can apply for a CDO or IDO

- the AFP Minister must ensure that reasonable inquiries are made 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 a CDO should not be made

- the terrorist offender must, subject to limited exceptions, be provided with certain documents to enable him or her to prepare for the Court's hearing of an application for a CDO, including a copy of any material and a statement of any facts that the AFP Minister is aware of that would reasonably be regarded as supporting a finding that a CDO should not be made

- the power to make a CDO or IDO lies with an independent judiciary (the Supreme Court of the relevant state or territory) bound to apply the rules of evidence and procedure applicable in civil matters

- the terrorist offender can adduce evidence and make submissions in Court proceedings

- the threshold for making a CDO is high: the Court must be 'satisfied to a high degree of probability, on the basis of admissible evidence' that the terrorist offender poses an 'unacceptable risk' of committing a serious terrorism offence with a maximum penalty of 7 years or more imprisonment

- when deciding an application for, or reviewing, a CDO, the Court must have regard to a range of matters rationally connected with the level of risk posed by the terrorist offender (for example, their degree of participation in rehabilitation programs), including the evidence of an independent expert competent to assess the risk posed by the terrorist offender

- the Court must not make a CDO if it is satisfied that a less restrictive Part 5.3 measure would be effective in preventing the unacceptable risk

- the AFP Minister bears the onus of satisfying the Court that a CDO should be made and, if reviewed, that a CDO should be affirmed

- the period of detention authorised by a CDO must be limited to a period that is reasonably necessary to prevent the unacceptable risk, and not exceed 3 years

- the period of detention authorised by an IDO must be limited to a period that is reasonably necessary to determine the application for a CDO and not exceed 28 days at a time. The total period of all IDOs made in relation to an offender must not be more than three months, unless the Court is satisfied there are exceptional circumstances

- detention under a CDO is subject to review by the Court annually, or sooner if the terrorist offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review, and

- the Court must provide reasons for decisions in an application for CDO or IDO, or in a review of a CDO, and these decisions can be appealed.

129. Article 9(4) of the ICCPR provides that persons deprived of their liberty must be able to challenge the legality of their detention in court. As outlined above, terrorist offenders can adduce evidence and make submissions in Court proceedings, and must, subject to limited exceptions, be provided with certain documents to enable them to prepare for the Court's hearing of an application for a CDO. Offenders may also appeal decisions of the Court (section 105A.17 provides for a right of appeal by way of rehearing), and CDOs are subject to annual review, or sooner if the terrorist offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review.

130. Finally, consistent with Article 10 of the ICCPR, section 105A.4 of the Criminal Code provides that a terrorist offender subject to a CDO must be treated in a way appropriate to their status as a person who is not serving a sentence of imprisonment. This includes not accommodating or detaining them in the same area or unit of a prison as persons serving sentences of imprisonment. However, exceptions are permitted to this requirement based on the management, security or good order of the prison; the safe custody or welfare of the terrorist offender or any prisoners; the safety and protection of the community; the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities; or at the offender's election. This section does not apply to offenders serving a sentence of imprisonment; for example, where an offender has been convicted of another offence and sentenced to a term of imprisonment.

131. By mandating appropriate standards of treatment and accommodation arrangements, the CDO scheme promotes the rights of offenders detained under the scheme to be treated with humanity and respect for the inherent dignity of the human person. The CDO scheme only permits deviation from these standards where necessary to protect the safety or welfare of the offender or others, or to reflect the offender's wishes.

[redacted]

132. Article 10(1) of the ICCPR provides that persons deprived of their liberty will be treated with humanity and with respect for the inherent dignity of the human person. The CDO scheme may be considered to engage this obligation as it involves detention. Offenders subject to a CDO are housed in a State or Territory facility.

133. As noted above, section 105A.4 of the Criminal Code sets out the minimum standards of treatment that must be afforded to an offender who is detained under a CDO. This includes that: the offender 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 (subsection 105A.4(1)); and, subject to certain exceptions, the offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment (subsection 105A.4(2)). As referred to above, the states and territories have enacted legislation

[redacted]

containing relevant requirements in their legislation including the *Corrections Act 1986* (Vic) and the *Crimes (Administration of Sentences) Act 1999* (NSW).

134. The Commonwealth monitors the detention conditions of an individual under a CDO through regular, periodic reporting, ad-hoc incident reporting from the relevant state authorities and ongoing engagement with states and territories through HRTO governance arrangements. CDOs are subject to annual review by the Court. As part of this review, the Court will be able to consider the detention conditions of an offender under a CDO.

Interaction between Divisions 105A and 104

135. As noted above, both a former INSLM and the PJCIS recommended the creation of an ESO scheme to complement CDOs in Division 105A of the Criminal Code, and to address the issues arising from the fact that CDOs and control orders are issued by different courts in separate proceedings.

136. The ESO Act creates ESOs as an additional measure in the Criminal Code for managing terrorist offenders at the end of their sentence. The HRTO regime now provides for CDOs as well as ESOs. Control orders remain as a risk mitigation measure, including for the management of individuals of counter-terrorism interest who in their current circumstances would not be eligible for a post-sentence (CDOs or ESOs). For example:

- individuals who have been convicted of terrorism offences but are not eligible for a CDO or an ESO, such as where a person is convicted of associating with a terrorist organisation that does not meet the threshold for a serious Part 5.3 offence; or individuals who are released shortly after sentencing for reasons that do not reflect their risk (for example, time served provisions)

- individuals who have previously been convicted of terrorism offences and subject to a post-sentence order, but who are assessed as posing a risk to the community at a future point in time following the expiry of their order

- individuals who have not been convicted of terrorism offences but are assessed as posing a terrorism-related risk, and

- individuals convicted of terrorism orders but not sentenced to a period of imprisonment, or taken to have served their sentence while on remand.

137. The ESO Act provides that the AFP Minister may consent to an ICO (and a Federal Court or Federal Circuit Court could make that ICO), while post-sentence order proceedings are on foot in a state or territory Supreme Court in relation to the same offender. This reflects the need to ensure that, for offenders posing a significant risk to the community or in other exceptional circumstances, there is an order in place to facilitate monitoring of the offender in the community. For example, where an offender has very recently been sentenced for an eligible offence but whose sentence expires in less than 12 months, the making of a post-sentence order application may be delayed and the proceedings may not be finalised before the offender's release. If this offender posed a risk of harm to the community warranting it, an application may also be made for an ICO.

138. Specifically, the ESO Act provides that:

- a control order cannot commence while an offender is detained in custody in a prison (serving a sentence or subject to a CDO), or while an ESO is in force – the control order would only commence when the person is released from custody and is not subject to an ESO, and

- if an offender is subject to a control order and a CDO or an ESO is made in relation to the offender, then the control order immediately ceases to be in force.

139. This ensures that, where necessary due to the risk posed to the community, an offender released into the community prior to the finalisation of proceedings may be subject to controls, but also ensures than an offender could only be subject to one order, and one set of obligations, at any point in time.

Interaction between Division 105A and other measures

140. The Government considers all avenues available to manage the risks posed by offenders, including Division 105A orders, control orders, citizenship cessation and visa cancellation and tailored intervention, to encourage and support offenders to disengage from their extreme ideologies.

141. The use of CT powers is underpinned by close working relationships across the Commonwealth and states and territories. Home Affairs works in partnership with relevant agencies across the Commonwealth, states and territories to consider all measures and options available to manage the risk posed by a particular terrorist offender. In particular, Home Affairs and the AFP work in close partnership in considering these matters. The consideration of information provided by the AFP, Commonwealth Parole Office, and relevant state or territory corrective services and police agencies forms part of this process.

142. The Government introduced amendments to the ESO Bill that provide that control orders and ESOs can commence and be enforced in non-prison custody, such as immigration detention. These amendments also ensure that when considering an application for an ESO, the Court also has regard to whether an offender is under an order equivalent to a post-sentence order of a state or territory scheme, and the cumulative impact of multiple orders on a person. These amendments were introduced and passed by the House of Representatives on 19 October 2021, and passed by the Senate on 22 November 2021. For details on the amendments, please see the Supplementary Explanatory Memorandum.[67]

[redacted]

143. While a broad range of conditions could be applied under the ESO scheme, the Government considers that the conditions that provide for the supervision of individuals in the community, fall short of the restrictiveness of continued detention of an individual in a correctional setting. For example, under an ESO, a person could be confined to home detention for no more than 12 hours out of a 24 hour period. Similar considerations apply in

[67] Supplementary Explanatory memorandum to the ESO Bill, available at: Supplementary EM to the ESO Bill.

[redacted]

the context of control orders. Further, under the ESO scheme, the Court must consider each individual condition of an ESO as well as the combined effect of all proposed conditions of the ESO to ensure the necessity and proportionality of those conditions (paragraph 105A.7A(1)(c)). These provisions ensure that conditions under an ESO are appropriate in response to the offender's risk, and do not impinge on the right to freedom from arbitrary detention.

144. Part 5.3 orders are designed to manage the full spectrum of risk that terrorist offenders pose to the community by enabling the Court to tailor an order according to the level of risk they pose. CDOs are one of a suite of measures available to manage terrorist offenders at the end of their custodial sentence. They are intended to apply to the highest risk category of convicted terrorist offender. The HRTO regime retains a number of safeguards to ensure that a CDO can only be made against the highest risk offenders, including:

- the Court must find to a high degree of probability that the offender poses an unacceptable risk of committing a serious Part 5.3 offence
- the AFP Minister must make reasonable inquiries to obtain and then disclose any reasons to why the order should not be made, and
- the Court retains the discretion to not impose an order, even if the threshold is met.

145. If the Court determines that an offender is at the lower end of the eligible risk spectrum, a less restrictive order may be imposed. For example, such an order could impose conditions focused on supporting reintegration. The ESO scheme provides a specifically designed, less restrictive alternative, to CDOs, which could be scaled up or down to be proportionate to the risk an offender poses to community safety.

[redacted]

146. The Government does not consider that any additional 'less restrictive measures' should be enacted in Division 105A. CDOs and ESOs, as well as control orders available under Division 104, provide for the management of terrorist offenders in custody and in the community. The Court's ability to impose a broad range of conditions through an ESO means that the order can be tailored to the specific risk posed by every offender. The ability to impose tailored conditions means that ESOs can impose a scalable range of restrictions and therefore be as minimally or highly restrictive that the circumstances require and that the Court considers to meet the thresholds. If an ESO is not sufficient to prevent the unacceptable risk posed by an offender, the Court may order the offender's continuing detention.

147. Section 105A.7 of the Criminal Code provides that, to make a CDO, the Court must be satisfied (among other things) that there is no other 'less restrictive measure' that would be effective in preventing the unacceptable risk of an eligible offender committing a serious Part 5.3 offence if the offender is released into the community. Prior to the ESO Act, the term 'less restrictive measure' was not defined in the Criminal Code. This meant that the Court could potentially consider any measure or action, or a combination of measures or actions, which it considered less restrictive. In *Minister for Home Affairs v Benbrika* [2020] VSC 888 (24 December 2020), the Supreme Court of Victoria considered 24-hour police monitoring, a control order, and the hypothetical cancellation of the offender's visa (and resulting immigration detention and removal from Australia) as alternative 'less restrictive measures'. The Court considered that none of these three measures would be

[redacted]

effective in preventing the risk posed by the defendant. Justice Tinney observed that: '[t]he prospect of 24 hour surveillance being carried out by the police upon the defendant, would be so inadequate and unworkable as not to warrant label of 'measure' [at 467].'

148. The ESO Act was amended to confine the 'less restrictive measures' provision to measures under Part 5.3 of the Criminal Code, in light of the possibility that the drafting of subsection 105A.7(1) potentially allowed for consideration of measures that are not designed to manage the risk posed by high risk terrorist offenders to the community.

Part 3: Operation and use of the CDO scheme

Benbrika proceedings

149. On 24 December 2020, the Supreme Court of Victoria made a CDO in relation to Mr Benbrika, under which he will remain in post-sentence detention for 3 years.[70] The CDO will expire on 23 December 2023 and is subject to a mandatory review pursuant to section 105A.10 of the Criminal Code, before the end of 12 months after the CDO was made or after it was last reviewed. The Minister has filed an application for a review of Mr Benbrika's CDO, and the matter is ongoing.

150. This was the first application made for a CDO since the HRTO regime was established in June 2017. Mr Benbrika challenged the constitutional validity of Division 105A of the Criminal Code. The matter was heard on 10 December 2020, before the full bench of the High Court. On 10 February 2021, the High Court held, by majority, that the power to make a CDO was not invalid under the Constitution.[71] On 21 January 2021, Mr Benbrika commenced an appeal in the Victorian Court of Appeal against the decision of Justice Tinney on 24 December 2020, to make a CDO. On 9 November 2021, the Victorian Court of Appeal unanimously dismissed all grounds of the appeal.[72]

Pender proceedings

151. On 9 November 2021, the Supreme Court of NSW made a CDO in relation to Mr Blake Pender under which he will remain in post-sentence detention for one year.[73] This CDO is the first to be made in the state of NSW and will expire on 12 September 2022. The Minister applied for a CDO for a period of 3 years, and was successful in obtaining an order for one year.

152. Mr Pender has 28 days, calculated at 7 December 2021, to appeal the CDO decision. The Minister also has a right to appeal (or cross-appeal any of Mr Pender's appeal points), which must also be filed by 7 December 2021. No appeal has been filed.

[70] *Minister for Home Affairs v Benbrika* [2020] VSC 888.
[71] *Minister for Home Affairs v Benbrika* [2021] HCA 4.
[72] *Benbrika v Minister for Home Affairs* [2021] VSCA 303.
[73] Judgment details not available at the time of writing.

153. The Government appreciates that the Supreme Court of Victoria possesses inherent powers to regulate its own proceedings and procedures and this includes the power to transfer CDO proceedings filed in the Common Law Division to the Criminal Division of the Court. The Government does not express a view about the Court's practice in this regard, in relation to either past or future matters. However, the Government notes that it is a longstanding practice for detention order applications under Victorian legislation (pursuant to the current *Serious Offenders Act 2018* (Vic) and former *Serious Sexual Offender (Detention and Supervision) Act* 2009 (Vic)) to proceed as civil matters in the criminal division.[75] The Government also notes that the stream to which a matter is referred, has no practical impact on how the proceedings must be conducted, as section 105A.13 specifies that civil rules of evidence and procedure must apply to proceedings.

154. The Government acknowledges that in the *Minister for Home Affairs v Benbrika* [2020] VSC 888, there were some practical benefits in having the proceedings in the criminal jurisdiction. In particular, having a presiding judge who was familiar with the process and strategy of trials of individuals, and the resources of the criminal division of the Court (including coordination with the prison for appearances by the offender via video link). However, subsection 104A.13(1) of the Criminal Code, requires that a court hearing a CDO proceeding to apply the rules of evidence and procedure for civil matters. Notwithstanding that the Benbrika CDO proceeding was transferred to the Criminal Division of the Supreme Court of Victoria for administrative convenience, those rules were applied. For example, evidence was given at trial by affidavit (see *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rule 40.04).

155. As His Honour Judge Tinney in the Benbrika CDO proceedings made clear in his judgment delivered on 24 December 2020, the civil standard of proof applied to the CDO proceeding, as set out in section 140 of the *Evidence Act 2008* (Vic) and subject to the reasoning in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour stated that the standard of proof in a CDO proceeding should in no way be viewed as being akin to the criminal standard: *Minister for Home Affairs v Benbrika* [2020] VSC 888, [292].

156. In *Minister for Home Affairs v Benbrika* [2021] HCA 4, Mr Benbrika argued that exceptional cases aside, the involuntary detention of a citizen in custody by the state is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt ("the Lim principle"). However, a majority of the High Court held that a scheme that is appropriately tailored to protecting the community from the singular threat posed by terrorist criminal activity, is capable of coming within an exception to the Lim principle. This was said to be analogous to other established exceptions that share a purpose of protection of the community from harm, such as detention of those suffering from mental illness or infectious disease. This is also in line with the reasons for designating CDO/IDO applications as civil proceedings.

[redacted]

[75] E.g. *DPP v JPH (No 2)* [2014] VSC 177; *DPP v CS* [2021] VSC 686.

[redacted]

157. The Attorney-General's Department convened a HRTO Implementation Working Group (IWG) in 2016 comprising legal, corrections and law enforcement representatives from each jurisdiction and various Commonwealth departments to progress outstanding implementation issues at the time that the CDO Bill was being progressed. Since the establishment of the CDO scheme in 2017, the Department of Home Affairs has continued HRTO regime implementation work through the Australia-New Zealand Counter-Terrorism Committee, more focused Commonwealth agency coordination groups, and regular bilateral engagement with states and territories. At the Commonwealth level, the key stakeholder forum is the HRTO Working Group. The membership of this forum includes Home Affairs, the AFP, ASIO, the Attorney-General's Department (including the Commonwealth Parole Office), and the Office of the Commonwealth Director of Public Prosecutions.

Rehabilitation and disengagement

158. The Government, through Home Affairs, supports state and territory correctional agencies to build their rehabilitation and disengagement capabilities by fostering collaboration, building the evidence base for effective practices in prison, and through providing funding to support programs. States and territories are responsible for managing federal offenders under section 120 of the Australian Constitution, including the management of offenders convicted of federal terrorist offences. States and territories are also responsible for the design and implementation of rehabilitation and disengagement programs in their own jurisdictions.

159. The Government will establish agreements with states and territories (on a case-by-case basis) to manage and treat high risk terrorist offenders subject to a CDO under Division 105A. The state or territory that the person subject to a CDO is detained within, is responsible for assessing that person's eligibility and suitability for participating in their rehabilitation or disengagement programs. Home Affairs notes the participation of a person subject to a CDO in any rehabilitation or deradicalisation initiative is voluntary. Home Affairs also supports the use of the Violent Extremist Risk Assessment Second Revision (VERA-2R) risk assessment tool by states and territories. The VERA-2R is an assessment tool used throughout the HRTO litigation process to support an expert's assessment of the risks posed by an offender of engaging in violent extremism.

160. Further, Home Affairs partnered with academia to develop an evidence base for best practice rehabilitation and deradicalisation initiatives. In 2018, Home Affairs worked with the Global Centre on Cooperative Security to produce the 'Compendium of Good Practices in the Rehabilitation and Reintegration of Violent Extremist Offenders'. This compendium presents good and promising practices in the rehabilitation and reintegration of violent extremist offenders in a correctional setting, while also discussing how practices related to prison regime, security, intelligence, and risk assessment can impact these two processes.

[redacted]

161. The Government does not consider the need for an additional object under section 105A.1 to refer to rehabilitation. The object of Division 105A is to protect the community from serious Part 5.3 offence by

[redacted]

providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to a CDO or ESO. Rehabilitation is an important part of the HRTO regime, as the rehabilitation of offenders will contribute to the safety and protection of the community in the longer term. To that end, the Court will be able to impose conditions requiring the offender to attend treatment, rehabilitation or intervention programmes or activities. The treatment and rehabilitation of the offender is also something the Court may consider as part of an expert assessment report when determining whether to make an ESO or CDO.

162. As stated by the Government in the revised Explanatory Memorandum of the CDO Bill [95]:

> The object of the scheme is preventative in nature and seeks to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders serving custodial sentences who pose an unacceptable risk of committing a serious terrorist offence if released into the community upon the expiry of their sentence.

163. The continuing detention scheme in the *Criminal Law (High Risk Offenders) Act 2015 (*SA) also only includes one object of protecting the community. However, the *Terrorism (High Risk Offenders) Act 2017* (NSW) includes a secondary object to encourage offenders to undertake rehabilitation, with the objective of encouraging offenders to participate in rehabilitation programs during their initial sentence. Other state post-sentence detention schemes that apply only to serious sexual offenders generally include a second object of explicitly facilitating rehabilitation of offenders.

Attachments

- **Attachment A:** 2022-2027 Eligible offenders
- **Attachment B:** State and territory continuing detention schemes (for sexual and other serious offenders)
- **Attachment C:** Comparison of orders
- **Attachment D:** Post-sentence order litigation flowchart