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INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

REVIEW INTO DIVISION 105A OF THE *CRIMINAL CODE ACT 1995* (CTH)

PUBLIC HEARING
DAY 1

WEDNESDAY, 22 JUNE 2022 AT 9:01 AM (AEST)
CANBERRA, ACT AUSTRALIA

BEFORE: **MR G. DONALDSON SC,** INSLM
MR M. MOONEY, PRINCIPAL ADVISER
MS H. LUU, COUNSEL ASSISTING

EXHIBIT LIST

DAY 1
Date: 22/06/2022

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THE PUBLIC HEARING COMMENCED AT 9:01 AM

ACKNOWLEDGEMENT OF COUNTRY AND OPENING STATEMENT BY GRANT DONALDSON SC

MR DONALDSON: Good morning, everybody. Both people who are in the room and people who may be watching this through the various facilities that we have made available. My name is Grant Donaldson and I am the Independent National Security Legislation Monitor. As we begin the hearing, I acknowledge the Ngunnawal People, who are the Traditional Custodians of the land on which we meet today. This is a public hearing conducted pursuant to section 21 of the Independent National Security Legislation Monitor Act 2010, as part of my statutory review into Division 105A of the Commonwealth Criminal Code and other provisions of legislation that relate to that Division.

This hearing is being transcribed and is also being live streamed, and a record of this public hearing will be maintained by my Office. So sitting next to me is Counsel Assisting from the South Australian Bar, Helen Luu, and my Principal Adviser, Mark Mooney.

In reviewing Division 105A of the Code, I'm required to consider whether that Division contains appropriate safeguards for protecting the rights of individuals, whether it is proportionate to any threat of terrorism or threat to national security and whether Division 105A remains necessary. It assists, then, to briefly state the current threat of terrorism and relevant threats to national security as they exist in Australia.

In the public submission from the Australian Security Intelligence Organisation, these threats were summarised and that review - or that report from ASIO is available.

Australia's national terrorism threat level is PROBABLE. That means that there are individuals and groups that have the capability and intent to conduct an act of terrorism in Australia. That threat level was raised in September 2014 to PROBABLE and that threat level has remained at that level since then. So for the purposes of this review, I accept that there is an ongoing threat of terrorism to the Australian community.

Division 105A of the Criminal Code and related provisions of the Code is legislation that balances the means of responding to the threats of terrorism and safeguards that seek to protect the rights of individuals. The Division empowers courts to make what I refer to as post-sentence orders. The people who can be subject to these orders are those who have been convicted of certain identified Commonwealth offences, who are currently serving terms of imprisonment, and who are determined by a court to be a person who would pose an unacceptable risk of committing a serious Part 5.3 offence, which are largely the terrorism offences under the Criminal Code, at the end of their sentence if they are released into the community.

Post-sentence orders constitute both continuing detention orders, or CDOs, which enable the detention of a person in prison following the completion of their custodial sentence, and includes extended supervision orders, the acronym of which is unsurprisingly ESOs, which provide for a person to be subject to conditions while they are living in the community following completion of their sentence.

Interim versions of both of these post-sentence orders are available for short periods under the Code, generally while post-sentence orders or applications for other post-sentence orders are on foot. There have been to date two continuing detention orders that have been made: one that was heard before the Supreme Court of Victoria and another before the Supreme Court of New South Wales. And, to date, there have been no extended supervision orders that have been directed by courts.
The explanation for that is partly a result of the fact that there were recent amendments to Division 105A of the Act which came into effect late last year.

This review was initially due to have been completed by December 2021. And as I've said, shortly before this, Division 105A was to be amended. As a result of those amendments and difficulties encountered by travel restrictions due to the COVID pandemic, the INSLM Act was amended to enable further work in relation to Division 105A to be undertaken. And this hearing is part of that process.

This hearing follows a number of private hearings and other discussions that my Office and I have held with a range of interested parties, and I thank all of those people for the provision of that assistance, but particularly I thank those who have provided written submissions to this review. And during the hearing today and tomorrow, we will hear from a number of those parties.

It would be fair to say that I have some well-developed views on some matters in relation to Division 105A, and in arriving at those views, I have been assisted enormously by the submissions that my Office has received, and, in particular, from the written submissions. But I am eager to hear more and to learn more about the practical operation of Division 105A, and to hear of implications of the Division that might not be obvious to me or to others. And so, I am hopeful but confident that the hearing today and tomorrow will contribute enormously to the report that I will ultimately make.

This public hearing is an opportunity for those appearing to address their issues of interest and to highlight matters of importance. Due to the number of submissions that I've received and the number of issues that have been raised in those submissions, it has not been possible to invite everybody who has assisted me thus far to appear at this hearing, nor will it be possible to address every issue that has been raised in written submissions and other discussions. But people can be assured that both people from my Office, Counsel Assisting and I have read everything that has been provided to us with great care and with enormous interest.

Many of the issues that are of particular concern or interest to me will arise in one way or another during the public sessions today and tomorrow. But it might assist if I

state briefly now, by way of foreshadowing, one or two of the matters that are likely to arise. The first of them arises from a number of submissions that I have received which question the need for a regime of continuing detention at all.

The discomfort that I think all people feel about detention other than as a direct response to conviction for crime is to be understood having regard to the prevalence of schemes for post-sentence detention in Australia. Legislation enabling the post-sentence detention of "dangerous sexual offenders" was first introduced in Queensland in 2003. Since then, legislative schemes such as this have proliferated in the states and territories, and Division 105A is the first Commonwealth scheme for post-sentence detention.

So, in Australia, Division 105A is not an outlier.

Secondly, the objects of Division 105A are critical, and they are critical in a number of respects. An example of this is section 105A.6B(1)(a), which requires a court, when considering whether to make a post-sentence order, to have regard to the object and objects of the Division. The object of Division 105A has recently been amended and is now limited to the following:

"...to protect the community from serious Part 5.3 offences by providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to post-sentence order."

Division 105A seemingly quite deliberately does not include - as an object - rehabilitation of offenders or their integration or reintegration into the community. This has important consequences and that these are not objects of the Division sits oddly with the relevance of rehabilitation in the sentencing of those convicted of a crime. So, I will be most interested in hearing parties' views in relation to what occurs to me to be that oddity.

Third, and as I've noted above, one of the things that I'm required to consider in this review is whether Division 105A contains appropriate safeguards for protecting the rights of individuals. This requires a consideration of Australia's international human rights obligations.

Many of the submissions that I have received deal with this and, in particular, the requirements of the International Covenant on Civil and Political Rights. I have reviewed the explanatory memoranda that accompanied the introduction of Division 105A, and I look forward to those who are responsible for administering Division 105A providing me with greater detail of the Government's view of the Division's compatibility with the Covenant and other international human rights norms.

It is of course the case that Australia has international obligations in respect of matters other than human rights. And, in particular, Australia has international obligations to combat terrorism. That obligation can be seen in, amongst other things, Resolution 1373 in 2001 of the UN Security Council. And I am very much

looking forward during the course of today and tomorrow to assistance in developing a better understanding not only of these obligations but, more importantly, the interaction of what might be seen as different international obligations.

The fourth matter to note by way of introduction is that which I'm always most interested in understanding in these reviews, and that is the practical operation of legislation and, in this case, Division 105A of the Code. The Division is complex and I will foreshadow one or two matters briefly that arise from the practical operation of the legislation that are of specific interest to me.

The following are some of the matters that no doubt will arise during these public hearings. The first of them is what I refer to as the gateway into the process. So, the people who are liable to be subject to an application for a post-sentence order are set out in section 105A.3 of the Division. The integer of the operation of Division 105A is that a defendant has committed an identified offence. Those identified offences are referred to generally as terrorism offences and, in large part, those which carry a particular maximum term. Most of the qualifying offences carry maximum terms of imprisonment for 25 years and a number provide for life terms.

But as commonly happens, a person can be convicted of an offence that carries a very long maximum term but receive a much shorter sentence. That Division 105A operates on the basis of the maximum term of offences is not essential to its operation. I am interested in whether there are different integers or gateways into Division 105A other than conviction of an identified crime. And I'm also interested in whether, for instance, there may be benefit in having different integers for applications for applications for continuing detention orders, as opposed to extended supervision orders.

I'm also interested in how applications are made and the timing of applications for post-sentence orders. Generally, post-sentence orders applications cannot be made more than 12 months before the end of a person's sentence. It is obvious that applications that are made late in the sense that there is insufficient time for the defendant to meet the case against them before their sentence ends risk a great injustice to a defendant. In respect of a person serving a lengthy sentence for, say, a serious Part 5.3 offence, it is not acceptable that hearings of applications for post-sentence orders occur after the expiration of the sentence. This has happened in both of the continuing detention order applications that have been made to date.

There are mechanisms in section 105A that enable interim orders to be made, but interim orders should not be the norm. I have views on how this can be avoided and look forward to hearing the views of others. I'm also interested in the process of commencement of applications and the provision of what are referred to in the Act as relevant expert reports. I have received many submissions concerning the role played in the 105A process of relevant experts. It is obvious that their role is central in this legislative process and obvious too that it is controversial.

It is controversial simply because what is required is for relevant experts to assist the court by assessing the risk of a defendant committing an offence in the future. That is an unusual and difficult thing, and it is inevitably problematic. The task presupposes that relevant experts can assess the risk of a defendant committing a serious Part 5.3 offence.

I have received, as I said, a number of very, very helpful submissions in relation to this matter, but I want to stress that this review is not a review into how relevant experts go about making these assessments. But there are many things about the way that the legislation deals with relevant experts' risk assessments that I will be considering in these public hearings, and I am delighted that I will be hearing from a number of people with particular expertise in these matters. So, these are some of the matters that I will be interested in but plainly not all. And I expect that those matters and others will arise during the course of these hearings.

I should also say that in the final session of this hearing tomorrow, representatives of the Australians Federal Police, the Attorney-General's Department, and the Department of Home Affairs will appear. I have received written submissions from all, though they represent, I think it's fair to say, the policy views of the previous government. All of those submissions were made prior to the recent federal election.

I accept that Commonwealth agencies have not had sufficient time to brief incoming ministers, and there is no point in my questions to relevant government officials, receiving redundant answers or most likely no answers at all. So, I will use the final session of these public hearings to outline some preliminary views that I expect I will hold by that time, on the understanding that later in the year there will be a further public hearing at which Commonwealth officers can appear and assist me further.

The effective departments and agencies will provide supplementary submissions to this review after the session tomorrow, and they will do so by 12 August. Those submissions will specifically and thoroughly address the issues that I raise tomorrow. Of course, those supplementary submissions will be placed on the INSLM website, and members of the public will be welcome to the next public session where Commonwealth officers will be available to assist this inquiry further. And that further hearing will occur on 31 August. So, they are my commencing remarks.

SESSION 1: AUSTRALIAN HUMAN RIGHTS COMMISSION

MR DONALDSON: The course of events for today is set out in a program which I think most people have available to them. And the first participant from whom I am going to hear today are representatives of the Australian Human Rights Commission. It is fair to say that the Australian Human Rights Commission has always provided enormous assistance to INSLM reviews, and so it's unsurprising that, again, the Australian Human Rights Commission has provided a very thorough and helpful written submission to this review, and I'm delighted that the Commissioner, Lorraine Finlay, is available to assist me today and also Graeme Edgerton, who is Deputy General Counsel of the Commission, is also here.

I think it would be fair to say that Graeme has not only assisted me enormously in the past, but predecessors in my office. So, I am delighted and very thankful, Lorraine and Graeme, that you have been able to come today. Now, unfortunately, I just foreshadow for everybody there are time limits so, unfortunately, I will have to - we will be able, with every person who appears, to speak forever I'm sure, but I will try and keep everybody to the time limit that we foreshadow. Lorraine, I think that you were wanting to make some preliminary observations and then perhaps respond to some questions that we might have?

MS FINLAY: That's correct.

MR DONALDSON: Thanks very much. Over to you, then, Lorraine.

MS FINLAY: Thank you. Well, firstly, thank you for the invitation to provide evidence here today. The Australian Human Rights Commission welcomes this review into Division 105 of the Criminal Code dealing with continuing detention orders and extended supervision orders for terrorist offenders. Australia has an important responsibility to protect the members of its community from terrorist acts. In doing so, it promotes and protects the human rights of all of us, including the right to life and the right to bodily integrity.

In seeking to carry out this goal, successive Australian Governments have passed a wide range of laws. Often, this legislation provides the authorities with extraordinary powers that would not otherwise be available to them with respect to the investigation of, and response to, ordinary criminal offences. It is important that this legislation is carefully scrutinised for two key reasons: First, at the level of principle, we demonstrate the strength of our values by showing that terrorism can be overcome in ways that don't undermine basic human rights standards. Secondly, at the level of an individual, we recognise that protecting human rights of people who are accused or suspected of involvement in terrorist acts is intrinsically important in a free and confident society.

Ensuring that laws in this area protect our national security, but also show a strong respect for human rights and freedoms, isn't a sign of weakness in a counter-terrorism response. Quite the opposite. It's a clear indication of the strength of our democracy and our values as a nation. Imposing restrictions on the liberty of offenders who have already served their sentence is, as you noted in your opening remarks, Mr Donaldson, an example of an extraordinary measure.

It can be justified under international human rights law, but only in limited circumstances. In particular, there must be strong evidence about the likelihood of the future risk. Preventative detention can only be used as a last resort. There must be regular periodic reviews to assess whether detention or other restrictions of liberty continue to be justified. And those subject to preventative detention must be separated from prisoners serving a sentence of imprisonment and treated in a way which is consistent with that distinct status.

As was noted already, the Commission has made a detailed written submission that includes a range of recommendations. I would in opening just like to highlight six brief points before we turn to questions. First, there are real concerns from the Commission's perspective about the reliability of the tools that are currently used to predict the risk of future terrorist activity. It is essential that courts hearing applications under Division 105A are made aware of the limitations of the expert evidence, so that orders are not made when they are not warranted. Our recommendation number 5 deals with this issue.

Secondly, the function of assessing risk should, in our view, be separated from the function of seeking post-sentence orders. There should be an independent risk management body that accredits experts, conducts research, and develops risk assessment tools. This would provide greater assurance that risk is being assessed in an objective and independent way. Our recommendations 7 through to 10 deal with these issues.

Thirdly, the test applied by the court in deciding whether to make a post-sentence order should be tied directly to the potential for harm to the community. Our recommendation 3 suggests an amended test to this respect that builds on comments by justices of the High Court, notably Gageler and Gordon JJ in the Benbrika case. Fourthly, the court must be able to take into account whether there are any less restrictive alternatives than detention. This assessment should not be limited to the alternatives provided by the Criminal Code. This forms the basis of our recommendation number 4.

Fifthly, we make a number of recommendations about the new extended supervision order regime. Many of these are designed to bring it closer to the regime recommended by your predecessor, Dr James Renwick, and to ensure that it can be applied in a flexible way that is tailored to the circumstances of individual offenders. Importantly, this also ensures that it is tailored more closely to the relevant international human rights standards.

Finally, now that an extended supervision order regime has been implemented, we submit that there is no longer any need for the control order regime and it should be repealed. I would refer to our written submissions for further details on each of these points and with respect to our remaining submissions. We are happy to answer any questions and to expand on any of those submissions as required.

MR DONALDSON: Thank you very much, Lorraine, for those observations. I might start by dealing with one or other of the six matters that you've identified in opening. Perhaps in relation to control orders - and, again, just for, perhaps, the benefit of people who are either present or listening in who may not be familiar precisely how the legislation operates - it might assist to note that under the Division 105A, there is provision for continuing detention orders but also supervision orders, but elsewhere in the Criminal Code provisions enabling what are referred to as control orders that are not in Division 105A, but exist.

And control orders can apply in various circumstances. One of the circumstances is a person who has been imprisoned for a terrorism-related offence. Any offence, really, but that is one circumstance. And the point which has been made in the Human Rights Commission report but also in other reports is it is difficult to see that there is an ongoing need for control orders to be available dealing with those who are subject to the post-sentence detention regime, along with extended supervision orders, and I think that there is some great strength in that. It's difficult for me to see why both are required, I must say. So, I think that you are walking through an open door in relation to that.

Could I also deal with your observation in relation to less restrictive alternatives? So the way in which the Act operates - and it's difficult to deal with some of these issues without looking at the legislation, I'm afraid, and some of what's going to occur in the next day or two might be difficult for some people to follow unless they have the legislation available. But it's unavoidable, I'm afraid. The way in which the legislation operates is that the court, when it comes to make a decision as to whether to make an order or a post-sentence order, approaches the task, really, in this way - and this is provided for in section 105A.7.

The court has regard to matters that are set out in the Act and then the court has to be satisfied to a high degree of probability on the basis of admissible evidence - and I will come to that in a moment - that the offender poses an unacceptable risk of committing a serious Part 5.3 offence, and the court has to be satisfied as well that there is no less restrictive measure available that would be effective in preventing the unacceptable risk.

And as Lorraine has indicated, the legislation currently provides that there is no less restrictive measure available under not only Division 105A but in the particular part of the Act, Part 5.3. And so, the obvious alternative to a continuing detention order is an extended supervision order and that is really the scheme of the Act as it's currently provided for.

But the way in which these applications are made interests me a great deal. Because the court has to be satisfied by the relevant Minister that there is an unacceptable risk, if the person is released, of committing an offence, and have to be satisfied that there is no less restrictive measure available. So, on the application that comes to the court for a continuing detention order, the court has to be satisfied first the (b) question, that the person poses an unacceptable risk of re-offending, effectively, and that an extended supervision order could not, let's say, ameliorate or prevent that risk.

So, the way in which these applications must logically be made is that the court has to be satisfied that there are no conditions, however - let's call them the maximum conditions that could be imposed on an extended supervision order, which would prevent the risk. Now, on the face of it, that that could be so might be thought to be extraordinary. Although, in the recent decision in Benbrika of Hollingworth J, her

Honour was satisfied of that, but, nonetheless, the court needs to be satisfied that no conditions could prevent that risk.

So that is, one would have thought, a high hurdle but a hurdle that obviously is capable of being overcome. But the court might be satisfied that - of the (b) question, that is, that the defendant poses an unacceptable risk of committing an offence, but not satisfied that an ESO could not ameliorate or prevent that risk, that is, in spite of the Minister seeking to convince the court that no ESO could ever do it. Then what happens, is there is a separate application in relation to the extended supervision order, and it must be a separate application.

And the way that the Act currently operates is that the Minister goes to the court and says, "Well, here are conditions that we think could prevent the risk". Now, it seems to me that there's a couple of things that are odd about that process. One is the Minister has to go to the court arguing against the proposition that it earlier put, that no conditions could deal with it. So, the Minister goes to the court and says, "Well, here are conditions that we think could prevent the risk."

By necessity, it is obvious that those conditions will be - I put it this way - at the upper end of conditions. It would necessarily follow, I think. And so the application - and the Act provides for that - it is the Minister that goes to the court with draft conditions. And so the court's consideration of the ESO conditions starts, as it were, at the maximum end. So that's an oddity, I think, and it's not inevitable that that is the case.

It may be that if the court is not satisfied - or it's satisfied that the defendant poses an unacceptable risk of offending, but not satisfied that an ESO couldn't deal with it. I would be interested in your view as to whether it might be then more appropriate for the defendant to come to the court with a set of conditions for a supervision order that the defendant contends could deal with whatever risk the court considers there to be.

Now, I've thrown that at you cold, but it is one thing that occurs to me that may be a possible way of dealing with it, bearing in mind, that at the initial hearing for a continuing detention order, the court is seeking to be persuaded by the Minister that no terms of an extended supervision order could prevent the risk. And so a defendant is really pushed to seek to convince the court that some terms of an extended supervision order may do so.

So it occurs to me that perhaps a more sensible way of dealing with that process is for the defendant to come back to the court with proposed terms of a supervision order if the court is satisfied that an extended supervision order is to be made. Now, as I said, I know I've thrown that at you cold, but do you see any insuperable difficulty with that?

MS FINLAY: If I can say as a first point that I think the series of procedures that you've just put to us and the way you've outlined things really does highlight the

interoperability of this framework. In fact, you can't consider one aspect in isolation; it really is important to look at how it operates as a whole. In principle, it would seem logical to allow for a broader consideration of what conditions might be available - and particularly from a defendant's perspective, it would be quite important for them to be able to put forward considerations that they think might assist them in not having a continuing detention order made against them.

The caution I would express in that regard is, of course, the underlying premise that these orders are extraordinary and it should not be for a defendant to have to prove the case for them to be released at the end of their sentence. That should be the ordinary course of things, and it should be for the state to make the case as to why continuing orders should apply to a person.

MR DONALDSON: Can I just interrupt there, Lorraine. I think that's a very important point, and it highlights a part of the difficulty with the regime as it currently exists. Because when the Commonwealth Minister has to establish that an ESO won't prevent the risk, it rather pushes a defendant into addressing the court on, "Oh, well, an extended supervision order would deal with the risk that I pose". And so, in a sense, it doesn't reverse the burden, but it, in a sense, switches the burden to the defendant to establish that an ESO would be sufficient.

MS FINLAY: I think that's correct. And I think the point we've made in our written submissions as well is that in the practical operation of this framework, the important thing to keep in mind is the overlying shadow, I suppose, of the fact that it is anti-terrorism legislation. And so whenever these hearings are occurring, you do always have that underlying premise that what you're dealing with is a potential for terrorism offences, which necessarily pushes you towards that maximum end of things from the beginning.

And I think that's a point we've made in practicality through our submissions, but particularly when you look at things like breaches of orders, there is a tendency to conflate the breach with the underlying context that can create a risk of viewing things from a starting point of the maximum end of seriousness, rather than actually assessing the risk that's present.

MR DONALDSON: All right. Well, thank you very much for that. Could I also address with you, although we are going to be hearing from several other people specifically in relation to this, something which relates to the reliability of the tools that are used for the risk assessment? So this is the prediction that relevant experts - well, not the prediction, but the assessment that relevant experts make as to the risk of the defendant committing a serious Part 5.3 offence in the future.

And, again, for the assistance of people who may not be as familiar with the legislation as some of us or have a copy of the Act in front of them, it might assist if I note this, that the court is - well, I think it's correct to say, as the legislation currently operates, the court is required to have regard, in considering the application for an order, a report of an assessment undertaken by relevant expert. Relevant

experts are defined in the Act, and that includes essentially - or to include, essentially, medical practitioners and psychologists, although there may be some others. So there's a general catch-all or other suitably qualified person.

So the task of risk assessment or assessment of the risk of future offending is undertaken by one or other of those classes of experts currently, and in all of the matters that have occurred in this Act, that assessment has been undertaken essentially by psychologists using particular tools that are available to them. And the tool that is used by the Minister under Division 105A or tool that is used by relevant experts used by the Minister under 105A is a tool referred to as VERA-2R. So throughout this hearing, people will hear of the VERA-2R tool. And there is some controversy as to that specific tool, and some controversy as to any tools that are used for that purpose.

Now, again, I'm not going to be able - I'm not going to be coming to any concluded view as to the efficacy of VERA-2R, because it's not a matter that specifically arises in the way the legislation operates and it's really a matter beyond my expertise. But you and others have some issue with the reliability of tools generally or VERA-2R in particular.

MS FINLAY: That's correct. And we've certainly prefaced that by saying we don't pretend to be experts in the tools, so our comments are made at the level of general principle rather than in relation to any one particular tool. But I think it is fair to say and not controversial to say that risk assessment is absolutely critical to the way this framework operates and the assessments the courts are asked to make. And to that regard, we accept there needs to be some way of assessing risk in order for this framework to operate, and we believe this framework is a legitimate one and certainly is available to Australia to meet its obligations with respect to protecting people from terrorism under the international human rights framework.

But what we would say in relation to the tools that are used is there have been concerns raised not only in the public submissions made to you already, but prior to that, and we've referenced, for example, recommendations or concerns that were highlighted by the PJCIS in their October 2021 inquiry report, and we would agree with its recommendations that an independent review is needed and that it would be useful to have a better understanding of how these tools are used how they can be improved.

To that end, we would simply make the point that when you look at how this framework operates, there really needs to be great caution in relying on any tool and that it's not enough to show that a particular tool or a particular methodology is better than comparable tools or methodologies. What we actually need to show is that the tool or methodology that is used produces objectively reliable evidence to a standard that's commensurate with the gravity of the decision-making. And in this context, we would say the standard needs to be high because the consequences where a CDO is wrongly made has obviously a severe impact of the rights of the individual affected.

But in that sense, we would say that our assessment of the way that risk is currently assessed and the way that experts are used would be that it really is a matter of weight rather than a matter of baseline admissibility, and we have made a number of recommendations, particularly recommendations 5, 6 and 7 specifically, that point to steps we say we could be taken to assist in that respect, in particular, ensuring that courts are simply made aware in reports they receive of any limitations there are to the assessment that's made, and that will assist the court in the weight that should be given to that assessment.

MR DONALDSON: Well, that, I think, highlights another interesting feature of the legislation. As you know, section 105A.6B requires the court to have regard to certain matters, that is, it says the court in approaching its task must have regard to particular matters. One of them is the objects of the Act, for instance. But another is the report of assessments received from relevant experts.

And the way it seems to me in which the court has approached that task in the matters that have come before it is to accept that it is required to have regard to the relevant expert assessment because of this provision. But then when it comes to the task, which is set by section 105A.7, of determining whether there is an unacceptable risk, of course, the provision provides that the court is to be satisfied to a high degree of probability on the basis of admissible evidence of these matters.

Now, we are going to be hearing throughout the hearings as to whether the risk assessment processes that are currently undertaken would be admissible as evidence in the usual course. I must say, it has surprised me a little that there has not been a greater focus on the admissibility of these sort of risk assessment process. Maybe because the courts have taken the view that, well, they must have regard to it, even if it is inadmissible or would otherwise be inadmissible.

Now, if that's right, then that becomes quite an interesting consequence, because the court is being required to have regard to, effectively, an expert opinion that would, in the ordinary course, otherwise be inadmissible. Which is (1) not always what courts - or not typically what courts do, but, of course, it requires a court to place - to put emphasis upon these expert assessments. And these expert assessments are, by their very nature - by the very nature of the legislation, it is the expert assessments that are going to be undertaken by the Minister that will be more thorough, if I can put it that way. And that's because the Minister can compel a defendant to participate in an assessment, and the Minister will have access to all of the information that might be relevant to that.

So, in a sense, the court is forced into having regard to those reports (1) even though they may not be strictly admissible and (2) even if it becomes a question of weight, which I think that you've put, it really relies upon the defendant to be bringing to the attention of the court any shortcomings that there might be in relation to the tool. Because in the ordinary course of things, the Minister who's relying upon the VERA-2R tool would not necessarily be obliged to bring the shortcomings to the court.

That could be fixed, and so one way of fixing it, is, again, if you look at, in the legislation, its section 105A.5(2A). I do apologise for how boring some of these section numbers are, but it's the way it's drafted, unfortunately. So 105A.5(2A), which requires the Minister to make reasonable inquires to ascertain any - what might be referred to as exculpatory facts and to provide those to the defendant.

Now, if, say, the Commonwealth or the Minister had access to research that was to the effect that there was some question as to the validity of the - let's say the VERA-2R tool, it may be that to ensure that that is brought to the attention of the court, that (2A) could be amended to require those matters to be provided to the defendant. Because it may be that the Minister takes the view in relation to section (2A) that, let's say, a research report that questions the efficacy of the VERA-2R tool is not a fact in those terms.

So that provision could be amended to include information, say. Because it would be - I think you would agree that it would be undesirable that if, say, the Minister had research or information at the Minister's disposal, that questioned the efficacy of the tool that the Minister were using, that that was not brought to the attention of the defendant and the court?

MS FINLAY: We would agree with that and we would actually go one step further and refer you to recommendation 5 and that one of the difficulties with these types of assessments is often it is the expert themselves that will have that technical information as opposed to anybody else who is part of the process. And we would see an important adjunct to that as being requiring that the expert report itself contain a reference to any limitations there might be in relation to the underlying validity of the tool and the expert's degree of confidence in the assessments that are being made.

Because at the end of the day, if you go back, again, to the objects of the Act, risk assessment is absolutely critical to the entire operation of this framework, and it simply can't operate without those risk assessments being undertaken. I would also just note, picking up on a few of the other points that you've made, in terms of the appointment of experts, we would point you to recommendations 9 and 10 that we've made about the possible duplication of mandatory expert assessment requirements and concerns that we do have about forced participation or compelled participation in terms of analogies that can be drawn to privileges against self-incrimination.

And, again, the extraordinary nature of this regime makes it particularly important that those protections are afforded to individuals who may be subject to these orders. And I might also just pass over to Mr Edgerton to see if there's anything that he wanted to add to those particular points.

MR EDGERTON: I think some of the points I was thinking about were exactly the ones that you have identified. Or it may be taking a step back and thinking about the kinds of risk assessments that we are doing in these cases. There is something about the nature of terrorism offenders that means it's very difficult to predict risk. So, as

you know, there are different kinds of risk assessment tools that have been used for different types of offenders. Some, with a very large body of offenders, allow you to build what is more commonly referred to as an actuarial tool because you can calculate the risk of offending across a large range of people.

Unfortunately, in the case of terrorism, the number of terrorist offenders is very small, but what that means is it's very difficult to build an actuarial tool that is accurate in terms of predicting risk. And we know there is sort of different types of risk prediction that experts can engage in. At one end, there is a clinical professional judgment, so an assessment by a psychologist about what their feeling about future risk is, but we know from evidence that usually those predictions are not much better than chance.

Actuarial tools can be quite useful in areas like sexual offenders where there is a large body of offenders. And the gold standard tool has been described as being a structured professional judgment which has a number of questions that guides an assessor based on evidence, combined with an expert professional opinion at the end of the day. VERA-2R has been described as an SPJ tool. We have some doubts about that, largely because of the question about whether the guidance provided to the expert has, at its core, an evidential base to it.

MR DONALDSON: Yes. Well, I think you are going to be assisted, Graeme, as we all are by hearing from actual practitioners in relation to these tools. Now, again, I want to stress that this is not an inquiry into the VERA-2R tool, but the issue as to the efficacy of tools or the efficacy of risk assessment is obviously central to what we are considering. But, yes, it is going to be very interesting to hear from practitioners who actually deal with the VERA-2R and other risk assessment tools as to those particular matters.

I should also say to you that - and this really gets, Lorraine, to your point about a body that accredits risk assessors, if I can put it that way - to perhaps outline this to you. VERA-2R at the moment is a tool which is licensed for use to the Department of Home Affairs. And the department operates the training programs in relation to VERA-2R accreditation and, in effect, accredits practitioners with the use of that tool in Australia.

Now, some people think that that's playing with a pretty loaded dice when you come to making these sorts of applications where the Minister puts on a relevant expert who says VERA-2R is an appropriate tool and the Department of Home Affairs, in a sense, administers that tool. And, again, there have been concerns expressed as to the capacity of people who are not accredited to have access to material that would enable research into not only VERA-2R but the use of these tools more generally.

So it would be a very real concern if there were restrictions on the capacity of researchers to conduct research into the efficacy of these tools. And that, I think, brings to the fore this notion of having a separate accrediting body. And that is a theme that has run through a number of the submissions that we have received. And

so, essentially, what you and others are recommending is that there would be a body that would be responsible for, in effect, stating for the purposes of, let's say, Australian law or this Division of the Act that a particular tool is an appropriate tool to be used for the risk assessment process and that particular individuals are sufficiently qualified to be expressing those views.

MS FINLAY: And beyond that, if I may add, that was able to develop better practice processes, guidelines and standards in risk assessment and risk management, and evaluating the operation of risk assessments tools by also providing education and training. So we would see an independent body as being helpful not only in ensuring the quality of the risk assessment tools that are used but, importantly, as providing that separation, as we mentioned, between the risk assessment process and the application by the Corrections system of those tools.

MR DONALDSON: And those further matters that you've identified in relation to risk assessment training and the like, I suppose they could all be rolled into an accreditation process?

MS FINLAY: Correct.

MR DONALDSON: That is, if particular processes don't exist or are not adequately catered for, then that affects the accreditation either of the tool or of the person.

MS FINLAY: And given the centrality - again, we keep coming back to the centrality of the risk assessment process to this framework - ensuring that there is that independence and there is no apprehension of bias is really critical to the operation of this regime.

MR DONALDSON: Yes.

MR EDGERTON: It think it would sort of act to improve public confidence in the process as well, if they can see that risk assessors are independent and separate from the authorities that are ultimately responsible for prosecuting, if I can put it in that term, an application for a CDO.

MR DONALDSON: Yes. Well, I think that that's a very important observation, Graeme, because I think that there may be a lack of understanding in the community generally as to, as Lorraine has indicated, the centrality of this assessment, but also the recognised shortcomings that there are in these sorts of risk assessments. I think those who are specialists in the field would accept that it is a far more problematic risk assessment to determine the risk of extremist violence as opposed to the risk of sexual offending in the future or even the risk of violent offending in the future - or violence in the future.

These are - it is very early days, as accepted by experts - and we will hear from them today, but it is my understanding that it is early days as to whether these sorts of

assessments using the currently available tools provide a degree of accuracy that is already understood to be available with sexual offenders and violent offenders.

MS FINLAY: But I think adding to that, if I may just briefly, the fact that the risk assessment is a process that feeds into what is an extraordinary framework. And I think the process need to be viewed in that way so that it isn't just providing a risk assessment and -- these orders are the automatic next step to be taken in any case that is potentially eligible under the framework.

MR DONALDSON: Yes.

MS FINLAY: There really needs to an opportunity to distinguish between cases where this will actually be suitable and cases where it isn't. So it does need to be a risk assessment that people can have confidence in and it does have that independence and objectivity to it.

MR DONALDSON: Well, the other thing that's interesting about that, is - again, if I can ask you to go back to the Act, just so that we are looking at the same thing. So it is 105A.7(1)(b). So the task for the court, of course, is to determine whether the offender poses an unacceptable risk of committing a serious Part 5.3 offence. And that is the matter to which the expert is also to direct their inquiry. But, of course, that's not really what psychologists - or even, it seems to me, those who are trained in the VERA-2R tool or any tool actually do.

A psychologist may not even know what a serious Part 5.3 offence is, for instance. It seems to me that a - when I say "psychologist", a relevant expert - can only really be expressing a view on the risk of the person committing what I might refer to as extremist violence. And then it's a separate question as to whether the risk of that then comes within any of the serious Part 5.3 offences. That's a separate inquiry, it seems to me, although I'm not sure it has been dealt with in that way thus far.

And then the other thing, again, that seem a separate inquiry for me is the (c) question, that the court is satisfied there is no less restrictive measure available. Again, it's not obvious to me that a relevant expert would have any relevant expertise in expressing an opinion on that, but it seems that they have been invited to in the matters that have been before the courts thus far.

So it's very important, I think, to understand the limitations of what relevant experts can do, not only within their own field of expertise, but to very carefully identify what the relevant experts are doing to assist the court in the decision that it's making.

MR EDGERTON: And we had recommended a change to that test, possibly to sort of align it more with the job the experts are required to do. So rather than having a two-step process of anticipating whether a particular kind of offence would be committed, potentially, with a particular kind of harm at the end of the day, we say it's better to focus directly on that harm. And we say that's more in line with the way

in which Gageler and Gordon JJ approached the constitutionality of the regime in Benbrika.

They said it would be much better if what court is trying to do is assess the risk of harm to the community from a terrorist act, or from supporting a terrorist act, rather than the risk of committing one of a very large number of offences that could be committed in a very large number of ways.

MR DONALDSON: Yes, there is always a difficulty with that. So the way I have formulated it in my own mind, it is, in a sense, two broad questions or two general questions on which the Division operates. One is, what's the way into the process? So how was a person eligible, if I can put it that way? And as we know, the current eligibility criterion is the person has been convicted of certain offences. It seems to me that a more sensible way of - or a more sensible criterion is to actually look at the sentence imposed. And I know this is your recommendation - or I can't remember whether it's your recommendation.

MR EDGERTON: We have put a recommendation about that, yes.

MR DONALDSON: It's dealt with within a number of the recommendations but, again, it seems to me actually to be a far more sensible way of dealing with a way into the process. I say that for a number of reasons. One of them is the legislation, even in the terminology that it uses, relates to serious offences or serious offending. And as you've said, Graeme, if you look at the definition of Part 5.3 or serious Part 5.3 offences, they deal with a vast range of behaviour, some of which could be, you know, very much at the lower end of the scale.

So a person may receive a relatively modest sentence for a serious Part 5.3 offence and if that is so, it seems to me that there's not even a need to have matters of discretion available to the Minister or the court in relation to dealing with those sort of people. They don't just get into the process. I will be interested on what your number is, though.

So that's the - that's the - everyone smiles at that. But that's the way in. And then the other question which is really the way out process, that is, what does the court - when the court looks to the risk of the future, what is the future? And I think the point that you're making, Graeme, based on Gageler and I think Gordon JJ's judgments in Benbrika is really if the risk is of relatively trivial conduct in the future, then that would be a factor that would obviously militate against making an order.

It seems to me one that, to a degree, that is already dealt with in the legislation by the notion of unacceptable risk and what unacceptable means. And before I saw you throw your head back, or both of you throw your heads back, and I will come back to that. But I think it's important also, in relation to Gageler and Gordon JJ's judgments in Benbrika, to have in mind that what their Honours were really referring to there is the consistency of the model with the objects of the Act as they then were. So

the - sorry, the objects of this Part. The objects of this Part were amended in the 2021 amendments.

So now the object of the Act is as I indicated earlier, which is a very narrow object. When Benbrika was heard, the objects were broader. And so I'm not sure that it's right to characterise, really, what Gageler and Gordon JJ were dealing - were referring to in those aspects of their judgments necessarily to the operation of the provisions.

MS FINLAY: The comment we would make there is, if you look at what they said in terms of general principles and certainly the application not only with the objects of this Act, which is important, but also with the compliance of this regime with our international human rights obligations, certainly, we would look, for example, to general comment number 34 by the United Nations Human Rights Committee that really does make the point about the need to tailor any regime such as this to the risk and to make sure that it's fully justified.

MR DONALDSON: Well, the other interesting thing about general comment 34 is that general comment 34 - so this is a publication of the UN Human Rights Committee, I think, of 2014. And if you go through the risk, the category of factors that are identified by the committee there, that really deal with, I suppose, the conformity of these sorts of schemes with international law norms, one of the - the final matter that is noted is the necessity for these processes of post-sentence detention to have as an object the reintegration of defendants into the community.

MS FINLAY: Correct.

MR DONALDSON: And that is missing in the objects of this part.

MS FINLAY: Yes.

MR DONALDSON: And I notice from your report that that would seem to be a matter in which - or that - that suggests that this regime is inconsistent with Australia's international human rights obligations, at least in that respect.

MS FINLAY: Certainly what we take from general comment number 34 is these types of regimes are able to be consistent with international human rights frameworks, that they are acceptable in the sense of there is obviously an obligation to protect against, in this case, terrorism, and so these types of frameworks can be applied consistently with our human rights obligations. But the comment makes quite clear that's done in limited and extraordinary circumstances.

And we have identified a number of recommendations in our written submissions where we say amendments could be made to more closely tailor the existing regime to those international human rights standards, and the matters that you've referred to would fall within that.

MR DONALDSON: Well, and part of that, I think, is the extended supervision order regime and that that operates adequately. And it's ensuring, I think, that the court has available to it information that it needs to determine the suitability of extended supervision orders and their conditions. Can I ask you something else about UN Human Rights Committee general comment 34? Because one of the other observations it made there is post-sentence detention regimes are required to provide for facilities that are separate from ordinary prison facilities.

Again, as we know, the Act in subsection (4) provides that those who are held in detention - so these are continuing detention orders - are held in facilities. Well, it says a person can be detained in custody in a prison. Now, that's a defined term, as it happens, but it shows that the regime accepts that a person who is the subject of a continuing detention order may be detained in a prison but provides the person 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.

Now, to some people, no doubt, it might seem odd that you could have that status or that consistent with that status is that a person is in a prison, but that's what the Act provides and I think that the human rights instruments that you've identified accept that as well.

MS FINLAY: Yes.

MR DONALDSON: But there is an issue as to - it seems to me, as to how the community can be satisfied that the conditions in which a person is kept is consistent with that status.

MS FINLAY: I think that's correct, and I think an additional point we would make is that the breadth of the exceptions that are provided for currently within the legislation are problematic in that respect. For example, the fact that exception can be made for reasonable requirements necessary for the management, security or good order of a prison. We would say that is an incredibly broad exception and that it wouldn't meet the threshold under Article 10.2(a) of the ICCPR which provides for separation, save in exceptional circumstances.

So, in our view, those exceptions will be narrowly tailored, and, as I say, currently drafted, we would have concerns as to whether they are meeting that standard. The second point that we would make in relation to -

MR DONALDSON: Well, can I just interrupt there and ask this? So if that is so, how - what would be the mechanism in the legislation that you would use to deal with the possibility that there would not be an appropriate or a means of detention appropriate to the status of the person? Because you can't really expect, I wouldn't have thought, that a person who is detained - so let's say Mr Benbrika. He's detained presently, pursuant to Division 105A.

I suppose he could bring on an application for judicial review to contend that his means of detention are not appropriate to his status, but I don't know. That would require him, I suppose, to be funded for such an application and to be able to bring an application. It's a fairly clumsy way of dealing with it. I'm not suggesting one way or the other that his conditions are appropriate or otherwise, but I'm just dealing as a matter of principle.

MR EDGERTON: I think one mechanism - and it might be the thing that the Commissioner is about to go on to - is making sure that the OPCAT mechanisms are sufficiently empowered to look at people who are detained under these circumstances. And maybe that also deals with the point that you raised, Mr Donaldson, about community satisfaction, that these things are being done properly.

MR DONALDSON: So that is having access to the Ombudsman and various other investigative bodies?

MR EDGERTON: That's right.

MS FINLAY: And, importantly, it's access to a national mechanism which again redresses some of the issues about ensuring national consistency in the way that individuals under these orders who may be accommodated in different states or territories can be treated in a manner that is consistent in accordance with that status.

MR DONALDSON: Well, again, that raises a general issue that applies not only in relation to this provision but other mechanisms under the Division. And, in a sense, the fact that a Victorian was the first person to be subject to this process was interesting in itself because this part of the - that is, subsection (4) of the legislation is based on the Victorian state model where a similar sort of provision exists. And that sort of provision doesn't exist in many of the other post-sentence detention regimes. And so Victoria has a facility available that it says satisfies that provision.

But I don't think that there is any other similar facility currently available in any other state. But there would have to be something that would be made available if somebody else was to be - well, there's Mr Pender, which is a slightly different circumstance. But the fact that there are regional differences with many of these things is a complicating factor. So, for instance, if a matter - if an application were brought in New South Wales or Victoria, then the Evidence Act would apply to the admissibility of expert evidence. And the requirements of section 79 of the Evidence Act, I think, are different to the common law requirements.

And so were the matter to be brought in, say, Western Australia there would be a different process gone through to get the admissibility of assessments of relevant expert, for instance, than there would be in New South Wales and Victoria. And that's largely a function of the fact that this process is brought before State Supreme Courts and not Federal Courts. But there would also be differences if you go to the

extended supervision order schemes. The bodies that would administer those provisions in different states would be very different.

Well, it's become clear that there are different ways - become clear to me that there are different ways in different states of dealing with people who are subject to orders similar to extended supervision orders. Different cultures amongst government authorities, different ways in which these sorts of orders have historically have been administered, different departments in different states that are responsible for these sorts of matters. Sometimes it's police; in other circumstances it's prison authorities, parole authorities.

So there is a very real risk of quite different results in different states. And that might give rise to a suggestion that there be an independent Commonwealth body or a Commonwealth body that actually is the - there is another term that's used here - that the body that is responsible for the administration of the extended supervision order regime - that's the specified authority. But, again, we will be hearing from the government parties in relation to that.

But the specified authority under the ESO scheme plays a central role. And, again, it may be that if there's to be a body - and let's call it an accrediting body - maybe that the same body could do more than one thing. Maybe.

MS FINLAY: Maybe. If I could add just a few comments in response to some of those points. The first is it is undoubtedly true that there are significant challenges in the practical implementation of this legislation. We would counteract that by noting that it is extraordinary legislation in terms of the impact it has on the individuals under these orders. So those challenges need to be considered, I think, with the extraordinary nature of the legislation being kept in mind.

Secondly, we have made some recommendations in relation to the public reporting of conditions and the way that might be done in terms of this particular scheme. And we think that they could be useful in terms of ensuring that those challenges are addressed and highlighted and that the public can then have confidence in the way this system is administered. And the third point would simply that we certainly would see the merit in an independent body that had a role to play in relation to this, particularly in terms of ensuring, then, that additional obligations Australia has through mechanisms like OPCAT are met, and we think that's an important adjunct to be considered.

MR DONALDSON: Yes. Thank you for that. Now, you both threw your head back when I referred to unacceptable risk.

MS FINLAY: I think the reason that we may both have done this - and Mr Edgerton will correct me if he had something else in mind - was based on our recommendation three, where we see the risk of "unacceptable" as needing to be tempered by the reference to the probable outcome and that, in our view, as you mentioned, an

unacceptable risk can be a risk that is highly unlikely to ever occur and, in our view, it would be useful for the threshold test to reflect that possibility.

MR DONALDSON: But I think cases like Nigro, a Victorian case, N-i-g-r-o, another Victorian case that deals with the Victorian scheme, when one looks at the unacceptability of a risk, I think it's accepted that that also - or regard in determining the unacceptability of the risk looks at the consequence of the offending. And if that's right, then it may be that that is a complete answer to the need for more prescription of the sort of offences, the risk of which the process is designed to protect the community from.

MR EDGERTON: Yes, I think in that case of Nigro, Edelman J also picked up in Benbrika the two elements to the unacceptability of the risk. There's the likelihood of something happening in the future and then there is a potential harm if that thing does occur.

MR DONALDSON: Yes. Well, that's what I had in mind and you're right, Edelman J referred to it in Benbrika as well.

MR EDGERTON: And I guess the difficulty with that is that - and this is the way that a lot of these tests have been interpreted at the state level, both in Victoria and in New South Wales. That you can have a very, very slim probability of something happening but it can still be an unacceptable risk if the potential consequences are very grave. We do have -

MR DONALDSON: Would you reject that?

MR EDGERTON: Well, I mean, I think that that is an accurate description of the concept of unacceptable risk.

MR DONALDSON: Yes.

MR EDGERTON: But that's why we think that the concept needing to be modified so that people aren't detained at the end of their sentence based on a risk that's very unlikely to occur.

MR DONALDSON: Yes.

MR EDGERTON: And so we say it should be not only unacceptable but also probable that a risk occurs that is unacceptable - that the particular outcome occurs. Now, in terms of probability, we don't say that should be more likely than not, but there should be some element in there that means that very unlikely occurrences aren't the basis for holding someone in detention at the end of their sentence.

MR DONALDSON: Well, the other thing I think that that highlights, which is made very powerfully in the submission that I have received from the Islamic Council of Victoria - I don't know if you have had an opportunity to look at that, and I'm

delighted that representatives of the Council are going to be coming along to this hearing, but what is sometimes, I think, overlooked in this process is - and it's largely because we no longer have a real objects provision in Division 105, because of the amendment.

One thing I think that is often overlooked is what is sought to be achieved by this scheme - is what is its object - and it must be that we are seeking to protect the community from extremist violence. So it's not violence; it's extremist violence. And the key word perhaps in that is "violence." So and the Islamic Council's submission, I think, makes a number of very good points, but one of them is this: That people can have extremist ideologies, but that doesn't necessarily manifest itself into a risk of extremist violence. Violence, I think, is the key, isn't it?

MR EDGERTON: I think that's right. And maybe that's also coming back to the other element of the test that the court applies that we think should be changed. So the court, in assessing whether a CDO or an ESO should be implemented, the, focus as we said before, is on the future occurrence of a Part 5.3 offence, but not necessarily a Part 5.3 offence that involves violence. And there are a lot of Part 5.3 offences that don't involve violence.

So one example that we have given in our submission was the case of Zainab Abdirahman-Khalif, the young woman from South Australia who was convicted of taking an intentional step to become a member of a terrorist organisation. And it was accepted by the prosecution at her trial - it was disavowed by the prosecution that she had been in any way involved in violence or had any intention to engage in violence in the future.

And yet the conduct that she had taken, which was going to the airport in Adelaide with $800 with an intention to go to Syria and maybe marry an Islamic State fighter or maybe act as a nurse was an act that fell within the broad definition of a terrorism offence. It's not an offence of violence, but it's an offence that coming within that broad 5.3 category. And so the amendment to the test that we suggest is it shouldn't just be an unacceptable risk of a Part 5.3 offence happening in the future, but an unacceptable risk of committing, providing support for or facilitating a terrorist act.

MR DONALDSON: Well, the other way of looking at that is - well, if I could make two points in relation to that. Of course, a person who is the primary participant in a violent act is not necessarily the only person who is involved in violence. And so when we talk with the risk of extremist violence, that can be something who is procures it, solicits it, counsels in respect of it, conspires to do it. So it's not only the primary participant in the violent act who would be a person who would fall within this.

The other thing I would say is - and the example you have used in the South Australian circumstance, those sorts of circumstances may well be dealt with in a practical way by change to the way into the process. I think the person you are referring to got a sentence of two years.

MR EDGERTON: Three years. It was low, yes.

MR DONALDSON: Which in the scheme of sentencing for Part 5.3 offences is a - well, is a low sentence. So if there were a change to the mechanism in, that may deal practically with many of the people that you were talking about, Graeme, in relation to, well, how do we amend the process out to accommodate those sorts of people. It may be that if we get the mechanism of how a person gets into the process - I'm not going to say right, but if that is changed, then these issues may not practically arise, particularly if we understand what an unacceptable risk is.

MS FINLAY: I would put the proviso on that, though, that the mechanism in is a tool based on past conduct.

MR DONALDSON: Yes.

MS FINLAY: Whereas the threshold question for the application of the order is a future risk assessment. And so, in our view, having that assessment of risk, not only in terms of unacceptability but probability, would actually be significant not just in terms of looking at that initial gateway in but at the point of making the order as well, given the nature of the judgment that's been formed.

MR DONALDSON: Yes.

MR EDGERTON: We have made recommendations and -- both of those -- the way --

MS FINLAY: In relation to both.

MR DONALDSON: I suppose the other point to be made about that is that you can have a person who is serving a relatively modest sentence for a Part 5.3 offence, but since committing the offence or being sentenced has - or their behaviour has changed dramatically such that they are a risk of committing a serious Part 5.3 offence if they are released. So perhaps changing the gateway in is not the only - wouldn't accommodate a person such as that.

MS FINLAY: And I suppose our view, given the nature of what this framework is trying to do, would be that the gateway in potentially has more latitude for breadth than that second threshold about the application of the orders. We have made recommendations in relation to both and how we think they could both be amended to be more closely tailored to risk, but we would certainly say that the recommendations we have made around the risk assessment for the application of the order are as important, in our perspective.

MR DONALDSON: Well, it's always going to be important. It's just what the - it's just identifying what the risk that's been assessed is. Or the risk of what that is being assessed, I think. And I think part of the difficulty with the legislation as it currently

operates is as a result of the amendment to the object provision, the court doesn't really have regard to matters to which it previously had regard that dealt with those sorts of issues.

MR EDGERTON: You asked -

MR DONALDSON: That's not a complete answer. I'm not saying that's the complete answer. But it - because of the change to the object provision, some of those considerations don't appear to be as important under the legislation now as they previously were. Perhaps. Sorry, Graeme, I think I cut you off.

MR EDGERTON: You asked us before about the way in and the setting of a threshold of the minimum degree of seriousness of past conduct to qualify for the regime. That is one of our recommendations. We didn't pick a particular threshold, but we think there are potentially some indicators that could point to a range of appropriate thresholds. One is looking at the kind of low-level offending and the sentences that have been imposed. So potentially the offender that we discussed previously. But also looking at other regimes where degrees of seriousness have been assessed and lines have been drawn by Parliament.

So one example of that, for example, is looking at the degree of seriousness of past criminal conduct that qualifies for someone to have their visa automatically cancelled under section 501 of the Migration Act. If someone has one or more offences that total two or more years imprisonment, then they qualify for an automatic cancellation of their visa.

MR DONALDSON: But those matters would all be taken into account in sentencing.

MR EDGERTON: They would, but I guess what I'm saying is -

MR DONALDSON: Previous offending would be taken into account in the sentence.

MR EDGERTON: Absolutely. I guess what I'm saying is that there are other legislative regimes that do have thresholds that have been applied. So it's possible to draw lines. It's for a different purpose, but, in a sense, it's also a quantification of degrees of seriousness.

MS FINLAY: What we have focused on more - and perhaps not highlighted in the written submissions so much is in addition to selecting a threshold, for us, one of the important considerations is the clarity of that threshold. Because we think it's obviously incredibly important that at the time somebody is initially convicted, they are able to easily understand whether or not this regime may be applicable to them, and it should be clear whether they fall inside or outside of the framework. So that would simply be one consideration that we would put to you as being important to consider.

MR DONALDSON: And, of course, just as a final observation, it's always seemed mildly ironic to me - ironic that the eligibility of a person to be brought into a post-sentence regime is not a matter that can be taken into account in sentencing - or is not generally taken into account in sentencing. So, yes, how the clarity of those matters prior to sentencing operates is a bit of a mystery, I suppose. Anyway, they are many of the things that we will be looking at.

Now, the time. We have reached our allocated time, I'm afraid. We could go on for hours, of course. But - and I've done all the talking, as usual. Is there anything dramatic that I've missed?

MS LUU: No.

MR MOONEY: Just one thing to clarify. We touched on control orders at the beginning, but your submission is that control orders per se should be repealed.

MS FINLAY: Yes, and that would be recommendation 26, and we recommend an alternative recommendation under recommendation 27 in terms of if they aren't repealed, there needs to be, in our view, a clear delineation between the role that they play versing the role of ESOs to make it clear when one or the other will be applicable.

MR MOONEY: Yes.

MR DONALDSON: Well, I think you are saying that they could only be for a person who is currently serving a term of imprisonment and comes out. They would only be dealt with under the ESO scheme.

MS FINLAY: Correct.

MR DONALDSON: As opposed to control orders. That's as I understood it.

MS FINLAY: Yes.

MR DONALDSON: Okay. Well, thank you very, very much, Lorraine and Graeme, for coming along, both for the Human Rights Commission's very helpful report but also the assistance that you have given me this morning. So thanks very much.

MS FINLAY: Thanks very much.

MR DONALDSON: And you are welcome back to the further session, of course, later in the year when we will hear the Government's response to a number of these matters.

MS FINLAY: Thank you.

SESSION 1: MR. JOSHUA ANDREWS

MR DONALDSON: All right. Thank you. So we are going straight on to the next person?

MR MOONEY: Yes. Joshua Andrews.

MR DONALDSON: Good. So the next person who is appearing today to assist us is Joshua Andrews. And Joshua is appearing via video link, and I can see you there, Joshua. So welcome. And thank you very much for your written submission. And your written submission deals with the relevant field of your expertise. You obviously have some of that in relation to - or a great deal of it in relation to some of the evidentiary issues that arise with these Division 105A applications.

And your paper was extremely helpful in directing us to some of the relevant matters there. So thank you both for your paper and also for making yourself available this morning, Joshua. Was there something that you wanted to say to us before we had some questions for you?

MR ANDREWS: Good morning. Yes, thank you for inviting me today. I would like to make a brief opening statement, if I may. Thank you. So the thrust of my submission was that the High Court has, in a number of cases, been fairly clear that continuing detention orders should be available in circumstances that it is demonstrably necessary to protect society from harm. And this reflects the severity of the abrogation of criminal law protections that are ordinarily provided and the Constitutional immunity against imprisonment without conviction.

My submission proposed that the exceptionally low thresholds demonstrated to the offender poses the risk contemplated in Division 105A requires a degree of certainty for the basis of the determination. Extremist risk assessments as they currently are, including VERA-2R, do not seem, however, capable of providing sufficient predictive reliability to meet the standard. So, having regard to the limitations, there seems to be two viable solutions.

The first is that as (1) extremist assessment tools presently do not seem capable of providing a credible evidentiary basis to predict a likelihood of the offender committing a Part 5.3 offence and (2) that the assessments are the primary basis for the order, the CDO scheme under Division 105A should repealed. It's also unclear why the ESO scheme does not provide an adequate safeguard.

In the alternative, the other proposal and submission is that if risk assessments are to be relied upon, the standards for demonstrating their efficacy should be introduced. The proposal made in my submission was a form of the recommendation of the England and Wales Law Commission that special rules ought to be introduced for the application of expert evidence such that the party proffering the evidence bear the onus to demonstrate that it is predicated on sound principles, techniques and assumptions. Thank you.

MR DONALDSON: Okay. Thanks very much for that, Joshua. So as I've understood your submission and the comment that you just made, that would, in effect, require, in this instance, the relevant Minister to prove that the risk assessment expert analysis, if I can put it that way, would be admissible in the ordinary course. Is that right?

MR ANDREWS: That is correct. So I considered a few options for this. One was the proposal that's been - that was initially put forward by Heydon J in Makita, which was a basis rule and that would be, I suppose, a common law weighting, or an expectation that there is a reasonable basis for the evidence. However, I didn't find it would be entirely reparative in these circumstances. The other was a legislative tool which would require that the evidence is predicated on the sound principles, techniques and assumptions and that the party that is proffering it, which would be the Attorney-General in this case, is required to demonstrate the efficacy and the validity of the tool. So, essentially, it would be required to demonstrate the VERA-2R is based on sound principles.

MR DONALDSON: Yes, so, as I think you've indicated, I'm not sure that the basis rule is really the issue here.

MR ANDREWS: That's right.

MR DONALDSON: It's really whether there is - and I think at common law, the question would be whether there's a recognised field of expertise in respect of which the opinion is expressed. That's as I've understood your submission. It really goes to that question.

MR ANDREWS: That's right. I think that there are some concerns around whether the weighting approach to the admissibility of evidence as it currently stands is sufficient to ensure that if a tool was put forward which didn't have sound - I suppose meta-analysis and validation behind it, that it was - that it should not be admissible as a statutory threshold.

MR DONALDSON: Yes. So that gives rise to one of the sorts of oddities in the legislation. Have you got a copy of the Act with you there?

MR ANDREWS: I do. Yes.

MR DONALDSON: So, again, one thing that has intrigued me a little bit about the Act is if you look at 105A.6B, this provides that in respect of certain matters - or the job that the court is to do, effectively, the court must have regard to certain matters, and one of which is any report of an assessment received from relevant experts. So the party is - or the court is - well, says must have regard to that. And then when one goes to 105A, subsection 7, to the task that is actually confronting the court, it is:

...the court is to be satisfied to a high degree of probability on the basis of admissible evidence that the offender poses an unacceptable risk."

And I think if you look at the decisions that - the small number of decisions that have dealt with this matter, I think it has been rather assumed that the expert assessments that have been put before the court either are admissible or that, whether admissible or not, the court is required to have regard to those reports in any event. And I think that the point that you're making is that there perhaps needs to be far greater focus on whether the expert analysis which is currently being put before the courts on these applications actually is admissible. Is that right?

MR ANDREWS: Yes. That's correct. I would say - sorry -- I would say - I would agree with that point, and I think that the decision - a few points in the decision in Benbrika - is a good example of that. So at first instance, I think there was a view that the evidence that was adduced by the prosecution was sufficient to fall within the scope of 105A.6, which was a risk assessment for extremist offenders.

MR DONALDSON: Yes.

MR ANDREWS: As the defence wasn't able - as the defence disagreed with that proposition that the evidence - that, essentially, the risk assessments could predict the likelihood of re-offending, they adduced evidence which was, I suppose, general risk assessments directed towards psychopathy or sort of the broader scalability tests. And that evidence wasn't available to be considered under 105A.6. It had to be considered under 105A.8 because it was relevant to other matters.

And so that provided a lower degree of weighting than the prosecution evidence, notwithstanding that both were risk assessments. One was directed towards extremist offender; one was directed towards a general population offender. So that's one example where there is a disparity between the weighting that is given. The other is that -

MR DONALDSON: Well, can I just pause there.

MR ANDREWS: Yes.

MR DONALDSON: I think there are two questions. One is the admissibility of the evidence at all and, secondly, is if - secondly, if it is admissible, then the weight which the court attaches to the opinions that are expressed in the report. And so if I could just ask you something further about admissibility? And I think if - in Tinney J's judgment in the first of the Benbrika matters, his Honour considered admissibility - and, again, it's at paragraphs 444 through to 446.

But I don't think that admissibility was put squarely in issue in the matter before Tinney J, and there was no matter to admissibility of the experts' assessments in the matter that went before Hollingworth J. And what I took of interest from your submission, Joshua, was really an obligation on the part of the Minister to establish

admissibility or to strictly establish admissibility even if no objection to the admissibility of the reports is made. I think that's one of the matters that you raised, isn't it?

MR ANDREWS: That's right.

MR DONALDSON: Could I ask you this - if a view was to be formed that these reports are not admissible, because they don't satisfy either the requirements of section 79 of the Evidence Act or the common law requirement for the admissibility of an expert opinion - and just pausing there, based on what you said, the issue as to admissibility there would be that there is currently no recognised field of expertise in relation to risk assessment of violence extremist offending.

There may be a field of expertise in relation to risk assessment of sexual offending, and may be a field of expertise in relation to risk assessment of violent offending, but not a recognised field of expertise in relation to violent extremist offending. So let's assume that the court is satisfied that there is no such field and then says, well, it's not admissible and, therefore, by reason the way the Act operates, even though I must have regard to it, it's not admissible.

So presumably that means if it's not admissible, the court would not have regard to it. What then happens, though? By that I mean, let's say the court forms the view that none of these risk assessment tools are admissible and, therefore, regard cannot be had to them? If you look at 106 - sorry, 105A, subsection 7, with the task that the court has, the court has to 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 3 offence. There would then be no expert evidence available to the court to form that view? And it would -

MR ANDREWS: Yes.

MR DONALDSON: It would follow, would it not, that the court could essentially never form that view, could it?

MR ANDREWS: Yes.

MR DONALDSON: How could a court go about forming that view if there was no expert opinion before it, do you think?

MR ANDREWS: Yes, I - sorry, I think I interrupted you there.

MR DONALDSON: No. What do you say to that?

MR ANDREWS: I would agree. I think one of the difficulties with the - with this - it is part of the judgment of Tinney J, that there is a circular logic here, where he found that he couldn't accept the proposition of the defence expert, that the VERA-2R did not provide a sufficient evidentiary basis to make an order, because to

accept that proposition would mean that he could not make the control order, and that couldn't be so.

And so there is a sort of circular logic, that if you don't accept the extremist risk assessments as they currently are sufficient evidentiary basis, then you essentially can't make - you can't make an order. I think the position that I put forward in the submission is that that - according to our ordinary kind of rules of criminal law proceedings in common law approaches, that that is not sufficient grounds to proceed. If you don't have a sufficient evidentiary basis to make an order of judgment, then you shouldn't rely upon that for that decision.

MR DONALDSON: So it does follow - so that is, if the court - you would accept that if the court forms a view that these sorts of assessments would not be admissible according - in terms of either section 79 of the Evidence Act or the common law rules of admissibility of expert opinion evidence, it would almost necessarily follow that an order would never be made. And if that is so - I think - I'm not disagreeing with you.

If that is so, that may explain why 105A.6B requires the court to have regard to those assessments, that is, the legislature is saying, well, there may be an issue as to the admissibility of this material or these assessments in relation to terrorist offenders because the assessment process has not reached a level of maturity that enables it to satisfy the requirements for admissibility of evidence. But, nonetheless, the legislature is requiring the court to have regard to those assessments. Now, if that's what -

MR ANDREWS: Yes.

MR DONALDSON: If that is what is being done by this Act - I'm not sure whether it is or it isn't, but if that is what is required by the Act, then that, I think, places an even greater focus upon the court being aware of perhaps the shortcomings of the risk assessments that are being undertaken, and there are one or other ways that the court could be assisted in understanding that. And perhaps the other way that it might - or another way that the matter may be addressed is that there is some form of independent accreditation of those who are in this unique position of being able to provide to the court otherwise inadmissible expert opinions to which the court must have regard. Would you agree with those two propositions?

MR ANDREWS: Yes. I do. I think, to a degree - and this goes back to your point previously, that there was - I suppose at the first trial, there weren't sufficient questions raised in the - around the admissibility of the evidence by counsel prior to the trial, and so this question would - the requirement that the onus is moved over or to demonstrate the efficacy, would take out some of that risk that the counsel demonstrates sufficiently that the assessments aren't - don't have a strong enough weighting to be admissible.

To the other point, I do think that there is value in an ongoing process of determining the validity of these assessment tools. And so the point that I made in the submission is that, right now, the key issues with respect to the assessment tools - and I think you have other experts that are speaking to this in more detail - are that you don't have, I suppose, a sufficiently large enough base for determining recidivism.

You don't have a large enough pool, you don't have predictive personality or psychopathy indicators to make it a tool which is - which would provide predictable reliability. But that's not to say that that might be the case at some point in the future. And so allowing the Attorney-General or the experts to provide evidence that further research has come to light which would provide a reasonable basis for that means that you could rely on that tool at some stage in the future.

But my view is that, right now, that is not the case and that we need to have mechanisms in place which would allow the court to clearly come to the view of - or have the evidence before them as to whether this is a sufficient evidentiary basis.

MR DONALDSON: And what is the mechanism you were talking about there?

MR ANDREWS: So the proposal was the - was based on the Law Commission recommendation which was the requirements that the - that the party proffering the demonstrate the basis - the evidence has a sound basis.

MR DONALDSON: But that's just the basis rule. So I think that would be satisfied as a matter of professional judgment. They would say well here are the facts to which - that were taken into account, the facts being essentially the responses and the VERA-2R tool. But it was more - as I understood your submission, it was for the Minister to have an obligation to satisfy the court really as to the admissibility of the evidence -

MR ANDREWS: Yes.

MR DONALDSON: - that we have gone through.

MR ANDREWS: So I think have you discovered -

MR DONALDSON: You have gone through the consequences of them failing to do that. So let's say that admissibility is not the issue. The issue is that the court is required to have regard to it because provision says the court must. So if the court must have regard to it, what is the mechanism for the court being appraised of the limitations of this - if there are limitations, of the opinions that are being expressed? In the ordinary course, you would rely upon the defendant to be raising those issues with the court. Would that ordinary course not be sufficient?

MR ANDREWS: I think that one of the concerns that I have from the Benbrika decision was that the obligation only upon the defendant to prove that is - makes it - reduces the likelihood it will be accepted. The obligation for the

Attorney-General to prove that it provides a sound basis I think means that you are more likely to have - you know, will be more compelling for the court. The other option is that the - is having an independent authority, or a risk management authority, provide recommendations on the adequacy of evidence broadly.

MR DONALDSON: And that risk management authority, which would, in the submissions that have been made, be responsible, really, for accrediting tools and accrediting practitioners in tools, if I can put it that way, the question then is what would the - what would they be accrediting? They would never - as it currently stands, they would - such an authority would never be able to say that any tool in relation to violent extremism is entirely accurate in making a prediction as to future conduct.

So what do you think such a body would be, in fact, accrediting? Because to say that it's accrediting that it's a valid tool doesn't mean very much because the question then is just what do they mean by "valid." So do you have any views on that?

MR ANDREWS: I think that there is a possibility to - there should be an expectation that they are validating, at least to the extent of validation that's available with violent offenders or sexual offenders with other SPJ tools. I mean, you are able to demonstrate with other tools a degree of predictive reliability and that is more certain than is currently the case with extremist risk assessment tools. The - I think that the -

MR DONALDSON: Can I just interrupt? Sorry, I don't mean to be rude, but if I can just say there - we will be hearing from a number of people who have, well, the greatest level of expertise that is currently available in relation to those matters. But my understanding of it is - at the moment is that nobody would say that assessment of violence extremism or extremist violence getting to a level of satisfaction that currently exists in relation to violent offenders or sexual offenders. So you would -

MR ANDREWS: That's right.

MR DONALDSON: So you would say then the consequence of that would be that there is no accreditation?

MR ANDREWS: Yeah.

MR DONALDSON: And that's fine. If that's the consequence of it.

MR ANDREWS: I think that's where we land. I think that where we - I think that as it currently stands, if this - if the CDO relies upon as its primary and only evidentiary basis a risk assessment - an extremist risk assessment and that extremist risk assessment is not capable of predicting the likelihood of committing a Part 5.3 offence, then either we need to, as you are considering, amend or build the legislation or it's - or we need to essentially put the making of these orders on hold under that legislation until such a time that the court can be satisfied that an extremist

risk assessment tool is developed which can provide that predictive reliability. I think that's an entirely reasonable position to land on.

MR DONALDSON: Yes. I understand that. All right. Now, Joshua we have time limits on - or I have time limits, unfortunately, and not - well, I have them as a necessity because with everybody who is going to be appearing at these hearings, we could go on all day because people's views are most interesting and these are most interesting topics. But we have reached the end of the time that we have been able to - we have been able to devote to hearing your views, but thank you very much, Joshua, not only for your written submission, but also your appearance this morning. And I should say that I understand that you are a young legal practitioner, and I was greatly assisted by the work that you have put in not only your written work but what you've done today and I'm very grateful for your help. So thank you very much.

MR ANDREWS: Thank you very much and thank you for the opportunity to appear.

MR DONALDSON: Not at all. All right. So now in the program we are going to have a short break and we will be back - I think that's right, isn't it?

MR MOONEY: Yes. Morning tea.

MR DONALDSON: Yes. So we are going to have a short break and we will be back in - yes, at 11.30. All right. So everything will be switched off for the time being. Thank you.

THE PUBLIC HEARING ADJOURNED 10:59 AM

THE PUBLIC HEARING RESUMED 11:30 AM

SESSION 2: NSW COUNCIL FOR CIVIL LIBERTIES AND THE SYDNEY INSTITUTE OF CRIMINOLOGY

MR DONALDSON: All right. Thank you very much. So this is the resumption of the first day of the public hearing into Division 105A of the Criminal Code. And so after the two groups that we have heard this morning, next we have Dr Andrew Dyer, who I am delighted and most grateful to see here today. And Andrew is an academic at Sydney University and is Director of the Sydney Institute of Criminology, and the Institute and the New South Wales Council for Civil Liberties have provided an extremely helpful written submission, and which are very graciously supplemented as well.

So I'm very thankful to both the council and to the Sydney Institute of Criminology for this report and very grateful to you, Andrew, for making yourself available today. And thanks for coming. So I think you've got an observation or two you wanted to make before we ask you some things?

DR DYER: Yes, I will just briefly set out our position at the start of my evidence. Just mainly because the extended supervision order scheme has come into play since we lodged our original written submission on 1 September last year. I will just set out briefly our six submissions to this review.

MR DONALDSON: Thank you.

DR DYER: The first of those submissions is that we think that serious consideration should be given to the abolition of the continuing detention order scheme, and we say that essentially because when you look at the range of restrictions that can be placed on a person's liberty pursuant to an extended supervision order and given also the doubtful quality of risk prediction, about which we have heard something this morning, we find it very difficult to imagine the circumstances where the state could prove that an extended supervision order does not remove the risk posed by the offender to a tolerable extent. And we come to what a "tolerable extent" is in just a moment.

Our second submission is that if the continuing detention order scheme created by Division 105A remains in force, various reforms should be made to that scheme to make sure that it complies as far as possible with the International Covenant on Civil and Political rights. First of all, we say that the test created by section 105A.7(1) should be amended in the same way as the Australian Human Rights Commission this morning said it should be amended.

We say that detention should only be an available option if the state can prove that it is more probable than not - that's the first part - that the person will commit a terrorist act or be responsible as a secondary or passive participant for such an act in the absence of such an order. Secondly, we say that the scheme should be made truly non-punitive or at least as non-punitive as possible and, in that regard, we support recommendations 11 to 17 that have been urged upon you by the Australian Human Rights Commission, and we also support recommendations 36 to 39 which have been urged upon you by the Law Council of Australia in its submission dated 17 September 2020 to the Parliamentary Joint Committee on Intelligence and Security which forms part of the submission to its review.

Thirdly, we say that two matters should be removed from the non-exhaustive list of considerations that are taken into account when the state - when a judge determines whether to make a continuing detention order or an extended supervision order: (A) the past terrorist offending and (B) the sentencing judge's statements about that terrorist offending at the time of sentence. We say they are backward-looking considerations that are out of place in a forward-looking exercise.

And, fourthly, though we did not mention this in our initial written submissions, we support the submission made by the Law Council of Australia and also by the Australian Human Rights Commission that there should be a minimum term of imprisonment that has been imposed on an offender before he or she is susceptible to having a continuing detention order or an extended supervision order imposed upon

him or her. This is the gateway point that you referred to this morning, Mr Donaldson. Also, we add that the objects of the Division should be widened - this is section 105A.1 to include rehabilitation.

Our third submission to this review is that we are - we consider extended supervision orders to be permissible; however, we support the Australian Human Rights Commission's recommendations 16 to 25 concerning extended supervision orders, with the very minor exception that section - recommendation 16 of the Australian Human Rights Commission has a high probability of unacceptable risk standard. We say it should be beyond reasonable doubt that an unacceptable risk exists of a terrorist act or support or facilitation for a terrorist act, and we think that is broadly in line with what is being urged upon you by both the Law Council of Australia and also Legal Aid New South Wales.

Our fourth submission is that control orders should be dispensed with, and, of course, this is a matter that has also been ventilated this morning. Our fifth submission is that we are concerned about interim detention orders and interim supervision orders. We are particularly concerned about the low standard of proof there. Somebody can be deprived of his or her liberty for three months or more in exceptional circumstances, merely upon reasonable grounds existing for believing that a final order will be made, and we associate ourselves with the concerns that you expressed this morning about that, Mr Donaldson.

And we also support in principle the recommendations of Legal Aid New South Wales at 12 to 13 of its written submissions concerning the amendment of that scheme. Our one doubt about what they have said is that there might be circumstances where it is necessary in the last six months a person's sentence to impose an IDO or an ISO on him or her if intelligence comes to light.

And our sixth and final submission concerns section 105A.15A, subsection (3) which creates a regulation-making power in a case where a person is unable to gain effective legal representation. We say this power is undemocratic and if this matter should be regulated, it should be regulated by Parliament, not the executive. So those are our submissions to you.

MR DONALDSON: Thank you very much for that, Andrew, and for - as I said, for the written submission that you provided. And I am very aware of the difficulty that parties face with the recent introduction of the amendment to the Act introducing the ESO scheme and that a great deal of work went into submissions even before that scheme was introduced. So thank you for clarifying those matters for me today.

Could I perhaps deal with the last of the issues that you raised first, which really deals with the process of engaging legal representation for defendants to these applications. And that, I think, marries in, to a degree, with your fifth observation about interim orders as well.

DR DYER: Yes.

MR DONALDSON: So and the recent - or circumstance of Mr Benbrika, I think, is perhaps illustrative of how the process - well, it's probably the only indication we've got of really how the process currently operates. But in relation to that matter, I think it was the - the application was commenced two months prior to the expiration of his term of imprisonment. I think, on any analysis, nobody could have thought that two months was going to be an adequate time to deal with that.

And so whether there is a prescription in the Act for applications to be brought at a particular time or not, I'm not sure about that, because I think there are things that can be done to ensure that these applications are brought at the correct time.

But if you start them two months before the term expires, almost necessarily, a person is - or the application is not going to be dealt with before the term expires. And so then, almost inevitably, gives rise to applications for interim orders.

DR DYER: Yes.

MR DONALDSON: And I think, as you've said, for the threshold for the making of interim orders presently is extremely low. It is, in effect, the court being satisfied that there's a reasonable prospect of a -

DR DYER: Yes -

MR DONALDSON: A permanent order being made and really nothing else. One thing that I would be interested in your view on - and it's a matter I've given some thought to - is whether the test for the making of interim orders should be that they - no interim order is made other than in exceptional circumstances? And you've indicated that the current process is that interim orders can be made for periods based on that lower standard until three months is reached and then can be extended, but only in exceptional circumstances.

It may inspire those who are making these applications to make them in a timely way if the test was that they would only get an extension in exceptional circumstances. Is there any other - is there any - and, of course, exceptional circumstances can mean - there's no clear definition of what they are. But it's certainly a much higher standard than the standard that currently exists. Is there any other way that you think that that problem might be dealt with?

And can I preface - sorry, can I also say this, Andrew? I believe it is a very real problem and issue that these applications are not being dealt with prior to the expiration of sentences. People should not be - there should not be an expectation that interim orders will be made because the Minister hasn't been organised enough to make it in a timely way, it seems to me.

DR DYER: Yes. And that's a point that we've made, as you would have seen in our first written submission

MR DONALDSON: Yes.

DR DYER: And has also been made articulately by Legal Aid New South Wales in its written submission, as you would be aware. I will say two things. The first thing is a response to your suggestion just now that an interim order only be available in exceptional circumstances. That, to me - it's the first time I've heard it - but that, to me, sounds like quite a sensible way of meeting the types of concerns that we and Legal Aid New South Wales have raised in our written submissions to this review.

As you say, exceptional circumstances is not a precise standard, but we say that it should only be in exceptional circumstances that an interim order is capable of being made. Now, your question just now - and this is the second thing I'm going to say - went to, well, are there any other available options? The options stated by Legal Aid New South Wales at 12 to 13 of its written submission, also seems to us to be a sensible way of dealing with this question.

And I outlined it just now. In other words, what they seem to be saying is that there should only be the prospect of - let's say - I withdraw that. The only circumstances in which an interim order is capable of being made is before the six months of the sentence has expired, except in exceptional circumstances, which is much the same sort of thing as you seem to be proposing. So we say that that is a sensible way of requiring the state to get its act into gear in these sorts of matters where personal liberty is at stake.

MR DONALDSON: Well, the other thing that troubles me a bit about the current scheme dealing with the interim orders is they have to - let's deal with an interim detention order. Well, if a court is going to be persuaded to make an interim detention order, then when you get to the final hearing, there are going to be issues as to whether there is a real prospect of a person not being subject to either order.

DR DYER: Yes.

MR DONALDSON: It seems to me.

DR DYER: Yes.

MR DONALDSON: And that's an undesirable decision for a court to have to make at that low standard, you know, for the making of interim orders, it seems. And then if there are interim supervision orders that are made, well, they would be made on terms and conditions. And again, the longer that goes on, that, if you like, sets the standard for what extended supervision orders might look like if the Crown or the Minister is able to convince the court to make it eventually. And, again, I just think that that's not a particularly desirable thing.

When one has regard to the fact of the seriousness of what we are dealing with here, which is - well, with interim detention orders, keeping people in incarceration

beyond the term of their sentence. So, you know, I think it has to be a better way of dealing with it than what seems to have been - well, it is hard to know, of course, because there's been a limited number of these applications, but there can't be a practice - a practice developing whereby the Minister thinks that, "I will make these applications late and just get interim orders, which will give us another three months at least". That's very undesirable.

DR DYER: Yes. I agree fully with those remarks, yes.

MR DONALDSON: And part of the other issue that arises there is the final of the six points that you made, which deals with legal representation. Because the process at the moment, as you know, under the Act and also under the regulations is that a person who is the subject of one of these applications in effect has to satisfy the Commonwealth that the person doesn't have independent means of paying for legal representation or has made applications to, in effect, state legal aid bodies and not been provided with adequate funding via those means.

Well, I think anybody who has had experience with making applications for legal aid funding will know is that there are delays in that process - necessarily so - and I think if you look at the amount of money that would be made available by, you know - so what I would apprehend to be a legal aid authority more making these - for defending such an application, it's unlikely to be adequate.
And in any - and further to that, somebody who has been inside prison for, inevitably, an extended period of time serving a sentence is very unlikely to have financial means to enable them to fund this.

And it seems to me - and all of these processes, as I'm sure you can imagine, just delay the process. Because until the person gets adequate legal representation, well, they can't start work. Now, that might take three months if they've got to go through steps of going to the legal aid commission seeking funding and those sorts of things. So a means of dealing with that issue, which would seem to me to perhaps deal with it completely, is that the provision in 15 simply be that the Commonwealth will provide adequate funding for these applications.

DR DYER: 15A, yes, yes. That's right, yes.

MR DONALDSON: Full stop. And, again, although the Commonwealth makes contributions, as I understand it, to state legal aid bodies which deals with providing legal aid funding for prosecution or Commonwealth offences, I think these - because of the extraordinary nature of these applications, it would not be unrealistic to simply say to the Commonwealth, "Well, you are going to bear the financial burden of ensuring that people are adequately represented rather than first having to going to legal aid commissions".

DR DYER: Yes.

MR DONALDSON: Because if you look at these applications, in both of the Benbrika applications, for instance, you know, there were very lengthy hearings. There was an enormous amount of work done by experts at - in both matters, plainly. If people can't get started on that work very early in the piece, there is absolutely no way that they are going to be dealt with within a realistic period of time. So it seems to me that a fairly easy way of dealing with that is to simply say to the Commonwealth, well, if you're going to bring on one of these applications - which, obviously, you are perfectly entitled to do - the defendant knows that their reasonable costs are going to be met.

DR DYER: Yes, well, we say given the liberty interests that are at play here, that that is a perfectly reasonable suggestion. And the only other thing that I can add to what you're saying is that when you read the Legal Aid submission, the comments that you have made about the Benbrika proceedings are equally applicable to the Pender proceedings.

MR DONALDSON: Yes. Oh, absolutely. No, I was just using Benbrika because it's been the most recent one.

DR DYER: Yes.

MR DONALDSON: But - and, again, I think it rather highlights that if an application is brought two months before the end of the sentence, there's just - it's difficult to see that there is a realistic prospect that that could ever be dealt with in that timeframe. And so delays in obtaining adequate funding - both for legal representation and other expert assistance that's required - can't be an excuse. There is an easy way to deal with it, it seems to me.

So I think that might be - well, I will be interested to hear - I will be interested to hear eventually what the Government's view is on any sort of recommendation along those lines. But that's something that you think might solve the problem?

DR DYER: Yes, I do, yes.

MR DONALDSON: All right. I was also very interested in your views in relation to the - as it were, broadening the objects of Division 105A. And, as you know, the provision or the Division prior to the recent amendments had much broader objects, and it was those objects, really, that was the focus of the judgments of Justices Gageler and Gordon in the Benbrika decision.

DR DYER: Yes.

MR DONALDSON: But now the objects have been narrowed, really, to the object is - or the object is simply to ensure the safety - protection and safety of the community by providing for continuing detention orders. So it effectively just reproduces the terms of the legislation. In many of the - or in a number of the human rights - the international human rights materials that we've looked at, they make plain

that processes of post-sentence detention should be geared, at least in part, to rehabilitation or reintegration of offenders into the community. I take it that you would accept that that should be an object of this part?

DR DYER: Yes, certainly, I do accept that. And your reference to international legal materials brings to mind a lot of European Court of Human Rights jurisprudence in particular that places heavy emphasis on reintegration and rehabilitation, and in the post-sentence preventative detention context, of course, the leading cases, as you would be aware, are M v Germany and Ilnseher v Germany decided in 2009 and 2018 respectively. But, yes, I agree with that, yes.

MR DONALDSON: Yes. So M v Germany is a most - is an interesting decision. And one of the matters that is of interest, I think, is that it does, well, I suppose, highlight that these schemes do exist in a number of European countries.

DR DYER: Yes.

MR DONALDSON: And that, I think, provides an interesting context to the - well, the desirability or availability of these sort of posting - post-sentence detention schemes in Australia because they are widespread now.

DR DYER: Yes, they are. And as we've said in our initial written submission to this review and as I heard the Australian Human Rights Commission saying this morning, we accept that, in very limited circumstances, post-sentence preventive detention is morally acceptable and compatible with human rights. However, if you come back to rehabilitation, one of the things that we say must be there, if this is to be human rights compliant, are non-punitive detention conditions or at least attempted conditions that are as non-punitive as possible. And so the focus, we say, has to be on the treatment of offenders, for example.

MR DONALDSON: And I would have thought another factor or an aspect of that is really that if you keep a person in - if you keep a person who at the end of a lengthy sentence poses a risk under the legislation, you keep them in detention and don't provide any sort of rehabilitation service or function or make any effort toward eventually reintegration of that person into the community, well, they are never going to get out.

DR DYER: That's exactly right.

MR DONALDSON: Logically.

DR DYER: Yes, and there are two European Court of Human Rights cases that make exactly that point, namely, you are no doubt aware of these cases, James v the United Kingdom and then there is also the life sentence case of Murray v the Netherlands where this bloke is just left in detention without any treatment, and, therefore, without any way of getting out of detention. So, yes, we agree.

MR DONALDSON: Yes. And I think in some of the submissions that I've received, there are suggestions that there should, in fact, be a limit on the number of continuing detention orders that can be made in respect of an individual. Now, there seems to be an obvious difficulty with that, that is, that a person may pose an extraordinary risk of committing a very serious offence if they are released, and if there is an arbitrary limitation on that, well, it's difficult to see how that risk could be accommodated.

So I'm not - I must say I'm not presently particularly enthused about that. But it may be that if there is no - if there is no process in place for rehabilitation or an attempted reintegration, the only option other than simply forgetting about these people in detention is to impose an arbitrary limit, perhaps.

DR DYER: Yes. I would have the same misgivings as you're indicating about that sort of an option because there are a small number of offenders, we would say, who are incorrigible, and there is the danger of arbitrariness that you suggest just now. We say that a better way of dealing with this problem is to have rehabilitation right from the start of the offender's sentence and also for any period of continuing detention to be focused on rehabilitation and reintegration into the community. And that would be the way in which we think the problem should be addressed. Yes.

MR DONALDSON: Yes. And even if a person has, say, served a lengthy term of imprisonment and still the view is formed that the person - I use this term in a non-pejorative way - has not been rehabilitated.

DR DYER: Yes.

MR DONALDSON: That's still no reason or excuse to then say, well, there's no point going forward with this during a period of non-punitive detention. In fact, probably all the more reason, I would have thought.

DR DYER: Yes, that's right. Well, one thing that stood out about the Benbrika decision was the statement by the court - and they are just saying what is the case about Division 105A - that is, that there's nothing in there that focuses on special rehabilitation measures for people in these detention facilities. And yet, as you're saying, they are not in there for retributive reasons and so the focus has got to be on getting them out into the community as soon as possible, and that's only going to happen if they are rehabilitated or if efforts are made to rehabilitate them, I should say.

MR DONALDSON: And I would have thought that that - if you think that the object of these provisions as it used to be is really protection of the community -

DR DYER: Yes.

MR DONALDSON: - I'm not sure that the community is being protected by providing - or making no effort of rehabilitation of people with a view that - with - a

defendant with a view that that defendant is likely to spend the rest of their life in this sort of detention. I'm not sure that that ultimately is a great protection to the community, because maybe if people know that that's what - that that's what confronts me if I'm convicted of some of these offences, well, offending might be more serious than it would otherwise be. Perhaps.

DR DYER: Yes. We would say that the best way of protecting the community is rehabilitating offenders. We agree with what you're saying there.

MR DONALDSON: Does it seem odd to you that it doesn't seem to be an object of the Division at all? It just seems odd to me.

DR DYER: Yeah, we think it is wrong. We think that given the Australian Government's casual approach to human rights protection recently - and it's - both - not making a partisan remark there, either. I think both sides of politics are guilty of this sort of indifference. We don't necessarily think it's odd in the sense of being unexpected, but we - yes, we think that certainly that should be in there. As it is in certain state legislation of this nature, off the top of my head, I am almost certain this is in the Dangerous Prisoners (Sexual Offenders) Act (Queensland), for example, and it should be there, in our submission.

MR DONALDSON: All right. Thank you for that. Can I just ask you some questions about some of the other opening observations you made today that are reflected in your submissions? Can you explain this - in it a little more detail if you can - this suggestion about imposing a standard of proof of beyond reasonable doubt? Now, I understand that to be the submission is in relation to the making of an extended supervision order.

DR DYER: Yes.

MS LUU: 105A.7A.

MR DONALDSON: Yes, 7A, isn't it? That what you said?

MS LUU: Yes.

MR DONALDSON: Yes, 7A. Sorry.

DR DYER: 7A is -

MR DONALDSON: That's why I can't find it, because I'm looking at the old version of the legislation. All right. So it's 7A. So where in 7A it would be inserted -

MS LUU: (1)(b).

DR DYER: (1)(b). That's the provision that relates to the standard of proof.

MR DONALDSON: So the way that this would operate is - so this would be in relation to an application simply made for an extended supervision order or also in the alternative?

DR DYER: Also in the alternative. Wherever an extended supervision order is in prospect, we say the state should have to prove beyond reasonable doubt that an unacceptable risk of a terrorist act or the support or facilitation of a terrorist act must exist.

MR DONALDSON: So that would follow, then, that if an application was brought for a continuing detention order, now there can be an extended supervision order made in the alternative?

DR DYER: Yes.

MR DONALDSON: Well, you don't even have to make it in the alternative; it's available to be made.

DR DYER: Yes.

MR DONALDSON: So the Minister makes an application for a continuing detention order under the terms of 105A.7, the court has to be satisfied that - satisfied to a high degree of probability that the offender poses an unacceptable risk of committing the offence and then has to be satisfied that there is no less restrictive measure. So you have a standard of proof of less than beyond reasonable doubt for the making of a detention order. Let's say the court accepts (b), that is, satisfied that the offender poses an unacceptable risk but is not satisfied in terms of (c), that is, is satisfied that there would be less restrictive means available.

DR DYER: Yes

MR DONALDSON: So that's an extended supervision order.

DR DYER: Yes.

MR DONALDSON: So then the parties come back to argue about here are the terms of the extended supervision order. And the task for the court then would be to be satisfied beyond reasonable doubt, what, in (b).

DR DYER: Yes. Now, this submission that I'm making has to be read with or considered with our proposals for the standard of proof in continuing detention order proceedings. What we are saying the standard should be in continuing detention order proceedings is proof to a high degree - sorry, proof on the balance of probabilities that there is a more likely than not risk of terrorist offending, a terrorist act or support or facilitation of a terrorist act, in the absence of the order. So that's a little bit different from the standard that we find currently in Division 105A for continuing detention orders.

MR DONALDSON: I see. So -

DR DYER: So -

MR DONALDSON: Sorry to interrupt.

DR DYER: No, not at all.

MR DONALDSON: Does it then follow that when you look at 7A(1)(b), you are not actually suggesting any change to the terms that the offender - or the defendant poses an unacceptable risk of committing -

DR DYER: That's right, yes.

MR DONALDSON: I see.

DR DYER: Yes. What we are saying is that when it comes to extended supervision orders, we accept that a lower -

MR DONALDSON: I see.

DR DYER: - threshold may exist, unacceptable risk rather than a greater than 50 per cent chance, but that this should be proved beyond reasonable doubt. And we are saying this essentially because there's sometimes some confusion about this high probability standard, in our submission. People look at this high probability and think, oh, well, there's got to be high probability of the final outcome. It's not right, of course, because there only has to be a high probability of an unacceptable risk.

We are saying you should be sure - state the courts have to be sure there is an unacceptable risk of a terrorist act or support or facilitation of a terrorist act if an extended supervision order is to be made. So to be sure of an unacceptable risk is not to be sure in our submission.

MR DONALDSON: I now understand, because I wasn't aware that you were actually proposing - or that there was a differentiation between what the ultimate risk is of.

DR DYER: Yes, that's right, yes.

MR DONALDSON: I do understand that now. But I suppose that that highlights the other - or another issue, which is if you go back to continuing detention orders, if you are going to replace risk of committing a serious Part 5.3 offence with something else, it has to be a very clear definition of what that something else is, (1), and (2) a very clear, principled understanding of why it is that formulation and not as it currently exists.

DR DYER: Yes.

MR DONALDSON: And I have read very carefully what you have suggested there. But it's premised on a differentiation between the nature of offending in serious Part 5.3 offences, obviously.

DR DYER: Yes.

MR DONALDSON: And is the criterion of the differentiation the actual commission of an act of violence?

DR DYER: Yes, it is.

MR DONALDSON: The criterion of differentiation in a nutshell.

DR DYER: Yes. Oh, I think - I'm not sure that --

MR DONALDSON: Or extremist violence, if I can put it that way?

DR DYER: I might not be understanding you correctly. But we say that the difference between extended supervision orders and -

MR DONALDSON: No, no. Sorry, I think I have misled you there.

DR DYER: Okay.

MR DONALDSON: If you just look at CDOs -

DR DYER: Yes.

MR DONALDSON: - you say that the criterion in (b), 7(1)(b), on what the court has got to be satisfied about.

DR DYER: Yes.

MR DONALDSON: So the court has to be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious Part 5.3 offence. You are saying those words should be amended.

DR DYER: Yes, we are. Yes. We are saying the offender poses a greater than 50 per cent chance of committing a terrorist act or being responsible as a secondary or passive participant for those acts. Something along those lines, yes.

MR DONALDSON: Yes. And so what that is saying is that there is a difference between that formulation and commission of a serious Part 5.3 offence.

DR DYER: Yes.

MR DONALDSON: And so there's a distinction drawn. And what I'm trying to - and I understand that and a number of people have made a similar observation. And, in many instances, it derives from - perhaps not derives, but consistent with what Gageler J said, for instance, in Benbrika.

DR DYER: It is, yes.

MR DONALDSON: But what I'm trying to understand is what is the - is there a precise criterion that differentiates what should be in there from what is currently in there, which is committing a serious Part 5.3 offence? And is the criterion of difference between what you're putting forward and what is currently there that it focuses on the risk of commission of a violent act?

DR DYER: We say that the fact that this applies to part - all serious Part 5.3 offences, is a matter of concern and that it should just apply to terrorist acts. And we would say that we also - we are also saying that the terrorist act should be more likely than not, roughly for the reasons given by the Australian Human Rights Commission this morning, that if you have this unacceptable risk test, then it might be a five or a 10 per cent chance, ultimately, of a terrorist act occurring.

Now, in the alternative we would say that an unacceptable risk standard, unacceptable risk of a terrorist act or a support or facilitation of a terrorist act is a better standard than the one at the moment, and that, of course, brings into play what was said by Gageler and Gordon JJ in Benbrika in their respective dissents on this issue.

MR DONALDSON: So, again, if I can - sorry to seem dull, but if I can just go back to (b). So you would be saying that the way the provision would operate is the court is satisfied to a higher degree of probability that the offender poses a more likely than not risk of committing -

DR DYER: No, just satisfied that the person poses a greater than 50 per cent chance. So we are not --

MR DONALDSON: More probable than not.

DR DYER: Yes.

MR DONALDSON: Anyway, greater - so poses a greater than 50 per cent chance of committing X.

DR DYER: Yes.

MR DONALDSON: And so the court then decides whether it's satisfied to a high degree of probability as to another probability, that is, whether it is greater than 50 per cent.

DR DYER: No, we don't think that the high degree of probability should be in there as well.

MR DONALDSON: That comes out as well.

DR DYER: Yes, that comes out. Yes. That's right.

MR DONALDSON: I just want to clarify that.

DR DYER: Yes.

MR DONALDSON: So you are saying - right. So it is satisfied that the offender poses - let's just say greater than 50 per cent chance, greater than 50 per cent risk of committing X.

DR DYER: Yes, that's right. Yeah. And we say that an added benefit of that is that it is - it's simpler than the current formulation, as you've just suggested now. In other words, it's not a risk of a risk anymore; it's a straightforward -

MR DONALDSON: No, I understand. Yes. So there's only one risk assessment.

DR DYER: Yes.

MR DONALDSON: And would that still apply in relation to ESOs under 7A(1)(b) or would you say there - well, again, you've really got that - satisfied on balance of probability that -

DR DYER: Well, what we say -

MR DONALDSON: That they will commit a serious Part 5.3 offence.

DR DYER: What we would say when it comes to ESOs is that given that they place fewer restrictions on an individual's liberty than detention, a more relaxed standard of proof is warranted. And so the state should be required to prove beyond reasonable doubt that an unacceptable risk of a terrorist act exists. So we say that unacceptable risk is enough there. On balance, we say this, because we don't have detention in prospect. You've just got these restrictions, however extensive, on a person's liberty.

MR DONALDSON: I understand that. Thank you, Andrew. Can I just touch on this that arose out of your last answer there, which is that extended supervision orders by their nature pose fewer restrictions than detention? That's logically correct and obvious, I suppose?

DR DYER: Yes.

MR DONALDSON: But the list of standard-type conditions is - well, it goes for pages, actually, in this legislation. So, again, this is - anyway, I think you - there is an extraordinary range of terms and conditions -

DR DYER: Yes, 7B and it's -

MR DONALDSON: Yes. 7B. Thank you for that. So the conditions. So these go on for some pages.

DR DYER: Yes.

MR DONALDSON: And we've seen for the purposes of this report or this inquiry examples of these sorts of orders that are made under the New South Wales scheme. And I think that it would - they are - if I can say without being critical, extraordinarily complex and prescriptive. And something that concerns me is if the legislation provides that there are sort of general conditions and conditions relating to monitoring that include things like that the defendant allow a police officer to enter premises, search the offender, search the residence or premises, search any other premises and seize any item found during those searches.

DR DYER: Yes.

MR DONALDSON: That's a pretty extraordinary power, is it seems to me?

DR DYER: Yes, it is.

MR DONALDSON: This would be made without warrant or without really any basis for suspicion of anything occurring.

DR DYER: It is. And we say that that provision - subsection (3) of 7B, should be brought into line with the similar provision in Division 104, which, of course, concerns control orders. So we support what the Australian Human Rights Commission has said about that. We also support what the Human Rights Commission has said about the monitoring of offenders. Now, you've referred to warrants. We are saying that they - if they are going to come into somebody's home like this, they should come in with actual consent or pursuant to a warrant that has been granted. Yes.

MR DONALDSON: Yes.

DR DYER: So we say that - you're right. These are extraordinary - this is an extraordinarily long list of conditions that can be imposed upon the person. And the restrictions on liberty can be very radical indeed. We say that it should not be - the state should not be capable of curtailing a person's liberty to the extent that it is entitled to under 7B.

MR DONALDSON: Yes. I think we will be having a very - well, we will be having a very close look at these - if I can put it -- standard matters that are in the legislation. Because some of them, on the face of them, are quite extraordinary.

DR DYER: Yes.

MR DONALDSON: It seems to me. Probably shouldn't be considered as standard, rather - or in the way that they seem to be treating them in that way under the Act.

DR DYER: Yes.

MR DONALDSON: Now, Andrew, I think that's - 12.15 was the time we were going to stop with Andrew, wasn't it?

MS LUU: Yes.

MR MOONEY: Yes, we can - we have got a few minutes if you just want to deal -

MR DONALDSON: Andrew, I was only - there was - I was going to ask you some questions about the issues that you've raised in relation to the risk assessment process. But one - I've discussed those with others, and we are actually - I'm very happy to say that I'm going to hear from some people who actually know what they are talking about, as opposed to me, in relation to these matters very shortly. So I might spare you that, if I can. But perhaps ask you this - 105A.4 provides for the terms of detention in prison.

DR DYER: Yes.

MR DONALDSON: Do you - do you accept - and, again, this is in conformity with international human rights norms in relation to these matters, that is, that people who are serving terms of continuing detention not be kept in the general prison population, as it were?

DR DYER: Yes.

MR DONALDSON: Is there any concern that you have as to whether there should be a means of ensuring or somebody being satisfied independent of the relevant Minister, for instance, that this condition is being satisfied?

DR DYER: Yes. And we supported the Australian Human Rights Commissions' recommendations concerning that. And we - and especially what they say about the supervision of these conditions of detention by international authorities. This is something that has happened in Europe, as was detailed in that case we were talking about before.

MR DONALDSON: In M v Germany?

DR DYER: Yes, that's right, Yes. And we say that it's very important that these sorts of protections are built into the scheme for people, and we also say, as I outlined before, that we support the submission of Legal Aid that these people, pursuant - who are in there pursuant to a continuing detention order, should not be serving their detention with sentenced prisoners under any circumstances, and certainly not for the good order of the prison, as is allowed under 105A.4(1)(a).

MR DONALDSON: Well, an irony, in fact - I have learned this from somebody who is going to be helping me shortly. One of the ironies of this is there is a thought about that, in fact, separating some of these prisoners from the general prison population, in fact, isolates them completely. That's not to say that there can't be then processes put in place to deal with that. But, as I said, there are currently two people who are serving continuing detention orders. If they are going to be isolated from - well, really anybody that they can see on a relatively free basis, it's going to be a pretty isolating existence for them.

DR DYER: I suppose I would agree with what you're suggesting there.

MR DONALDSON: Not to say they have to be in the prison population. It could be that there's an acceptance that they - the capacity for people to actually visit them be greater than it might otherwise be in a prison, for instance.

DR DYER: Yes. That's right. And, yes, I would - I would agree with that. The only - I should add too, the only doubt I had about what Legal Aid was saying about this issue was that if these people have made an autonomous decision, a truly autonomous decision to be housed with other prisoners, then I suppose there is an argument that that autonomous decision should be respected. So that's another possible qualification to what I've just outlined now.

MR DONALDSON: Yes. That's probably right. So, Andrew, we have come to the end of the time that I could allocate to you. As with everybody we have, we - there is much more that you could help me with. But, again I'm very grateful for both bodies that you represent for the written submissions that they have made and to you for coming along this morning. Thank you very much, Andrew.

DR DYER: Thank you very much.

SESSION 2: PHRONESIS CONSULTING AND TRAINING

MR DONALDSON: All right. So we are going straight on, aren't we, to Peta?

MR MOONEY: Yes.

MR DONALDSON:. So are you ready to go?

MS LOWE: I am, yes.

MR DONALDSON: The next person who is going to help us is Peta Lowe. So Peta is a person who has considerable experience in the risk assessment process, not only in relation to people who fall within Division 105A, but more generally in relation to people who are subject to post-sentence detention and, as part of that, as to various risk assessment processes that are gone through. So, Peta, I'm very grateful that you've made the time available to speak to us today. And particularly grateful because as you know I'm not - I'm a lawyer, and most of the people - or all of the people who have - we have heard from so far have been lawyers.

And I think that what lawyers can understand or what anybody who looks at this process understands is how critical to the process the risk assessment process is. It is really the centrepiece of how the entire scheme operates.

MS LOWE: Yes.

MR DONALDSON: And I think that there is a great deal of misunderstanding amongst lawyers as to what risk assessment is -, I will just go back a step. Misunderstanding amongst lawyers who don't have a really thorough exposure to these matters, anyway.

MS LOWE: Yes.

MR DONALDSON: I think there is a misunderstanding - well, a lack of understanding as to the whole risk assessment process and what shortcomings there might be and what strengths there might be in it. And I suspect that you were perhaps squirming in your seat earlier today when you were hearing some of the things that have been said about that. So it's very important for me to have an understanding of how the process actually works within the legislative scheme.

But what - and I think you have probably heard me say this before, because I know you've been here. This is not an inquiry into VERA-2R or into any other - or into how particular people go about the process. But what I'm hoping to do is, both for myself but I think the community more generally through this process, to have an understanding of how the risk assessment process actually operates.

MS LOWE: Yes.

MR DONALDSON: Specifically, here. So I would be very grateful for anything that you're able to contribute to that. And, in particular, whether there are shortcomings in the way that things are done under this Act presently and how they might be able to be dealt with.

MS LOWE: Thank you. Yes, I agree with you. I think it's incredibly important, and I appreciate the opportunity from a practitioner perspective to have a voice in this. I'm not a lawyer, nor am I an academic. So I understand that those are valid positions and they are considering it from their own perspective, but from a practitioner, it's an interesting position to see it in a legal framework.

MR DONALDSON: So when you say practitioner - sorry, I don't mean to interrupt.

MR DONALDSON: When you say practitioner, are you saying you are a practitioner of - or a person who deals with the risk assessment process?

MS LOWE: Correct.

MR DONALDSON: Not only in relation to offenders who would fall under 105A but more generally.

MS LOWE: Somewhat more generally, but I take the point - I think the Human Rights Commission made it earlier today around, you know, there isn't necessarily a registered considered expertise in violent extremism assessment and/or intervention, where we might accept a level of structure around what expertise looks like in other spaces. Violent offending and sex offending were some that were given, and general offending more globally. And so I think it's also a point around what does an expert look like in a violent extremist space and is that an expert necessarily in risk assessment and what does that look like as well.

MR DONALDSON: Yes, are you going to tell us that?

MS LOWE: So - I'm going to make some suggestions. I guess I wanted to start by saying one of the things that I find missing in a lot of this conversation is what happens to young people in this space. I raised that point because the very first person in Australia who was eligible to be considered under this scheme was a young person. So - convicted under the age of 18.

And it was definitely an interesting process to go through in terms of what are the additional kind of implications for considerations of people who have been convicted. And we have a number of them in New South Wales who are under the age of 18 at conviction - 14, some of them - what does continuing detention look like for them? What does risk look like for them at the end of what are quite lengthy sentences? And you've raised the point a few times about rehabilitation, what is rehabilitation and what does that look like in the space?

And I think the Benbrika case, you know, highlights that when the judge made the comment, we agree there has been progress but just potentially not enough progress. What does "enough progress" look like in this space? So when we are looking at a risk assessment, we are not necessarily projecting into the future about exactly what will happen. It's about looking at the past and identifying what risk factors that contributed to them engaging in the first place are still present? What have been mitigated or managed in some way? And what context is occurring around that?

So it's really important when you are doing a risk assessment to be considering, firstly, risk of what? And, secondly, what are the factors that contribute to risk and

how are those factors being addressed? Because if they are being addressed then the risk will necessarily change. So -

MR DONALDSON: Can I ask you something that arises from that. One thing that troubles me or a scenario that troubles me a little bit with some of the things I've been thinking about in the Act, is a person who is serving a term of imprisonment for one of the relevant offences, but it's - if I can put it - at the very minor end of offending. But that person develops further risk factors while they are incarcerated, for whatever reason it might be. Is that a scenario that is possible?

MS LOWE: Absolutely. It's not just possibly; it's plausible and it's occurred in various contexts. I think it's really interesting, when we talk about particularly this space, when we look at the lower end of offending and trying to understand exactly what we mean by that. Because if we are talking about community safety, what's sometimes considered the lower end of offending is actually riskier to community safety, if you consider things like recruitment and, you know, propaganda as being an ability to impact on community safety much more broadly than one person who may have an individual intent.

MR DONALDSON: That's interesting. So what you're saying there is, in fact, a sentence might not necessarily reflect the risk to the community.

MS LOWE: The potential risk it could cause. Correct. Yes. And some of the most, I guess, prestigious positions in some extremist organisations are those people who can recruit. And that creates a far greater risk to community safety because you are actually recruiting more people who want to do harm.
So I think we also have to think about this context is not the same as general offending. It's not the same as sex offending, and it's not the same as pure violent offending. And that's why none of the tools that are used in the violent offending or sex offending space are appropriate for considering risk in violent extremism. There are different factors that contribute to an individual's risk.

MR DONALDSON: Yes. Can I just, for my purposes - well, probably all for my purposes, but you've identified it there, that the process is really an assessment of risk of extremist violence?

MS LOWE: Yes correct, yes.

MR DONALDSON: And extremist violence has a meaning?

MS LOWE: Correct.

MR DONALDSON: So it's not violence and it's not holding an extremist ideology?

MS LOWE: Absolutely not.

MR DONALDSON: It is extremist violence.

MS LOWE: Correct, yes. And it's the intention to do violence in a number of ways. Even just the support of the use of violence is violence. So it's thinking about it in a far more broad term than we have legislated against in violence in any other form. So you can think about killing someone in another space, and it's not an offence until you actually undertake that act or prepare for that act. But even holding those views in this space can be considered an offence. So we are broadening our understanding -

MR DONALDSON: Well, it can be considered extremist and would it be considered extremist violence for the administration of the tools and various other processes that have gone through?

MS LOWE: Yeah, supporting an organisation, a terrorist organisation is considered an offence. Yes. And so it's interesting, then, to think about - you know, and some of the things that come out for me of this review - as you say, it's not a review into the tool, but the tool is quite heavily considered in most submissions around its effectiveness and its reliability and its ability to be used.

MR DONALDSON: You are talking about VERA-2R here?

MS LOWE: Absolutely. Its admissibility. And the reality is, well, I would hope as a practitioner in the space, we never have an actuarial tool because what that means is that far too many people have committed terrorist offences so that we have a dataset that allows us to say it has predictive validity. We want that in this space. And we also don't want it because in this space -

MR DONALDSON: Can I also just clarify one thing about that, because I think there's a bit of a misunderstanding amongst the non-lawyers, if I can put it that way. It's unthinkable that a court would impose an order on somebody because there is either statistical or actuarial evidence that is presented to a court that there is a recidivism rate of 90 per cent, for instance.

MS LOWE: Correct.

MR DONALDSON: A court is never going to say, "Well, you are going to be subject to an order because there's 90 per cent instance of recidivism." A court just would never do that. So -

MS LOWE: Correct.

MR DONALDSON: And I think there's a bit of a misunderstanding as to how courts operate in some in relation to that. So an actuarial tool will never of itself be something that will determine an application for a post-sentence order.

MS LOWE: Yes, but it seems to me that we are chasing this notion that an actuarial tool will give us some firmer sense of risk in the space.

MR DONALDSON: Yes.

MS LOWE: And, I mean, in the violent and sex offending space, we obviously have actuarial tools. We have larger datasets and so we are able to get those statistics. But they don't tell you specifically about the individual. They tell you statistically, based on someone who presents this way, that there is a high or very high probability that that will occur. They are not definitive. And so the other reason that I think predictive validity in this space is probably not desirable because we know that someone's pathway into and, therefore, out of violent extremism is incredibly individual.

And while people may present with very similar backgrounds, similar experiences, they are going to have very different beliefs about that. It's an incredibly individual process. And I think to rely on a tool that's based on statistics disregards individual process. So it very much is a structured professional judgment is the best process. The question then is how do you make sure that that structured professional judgment is as efficable [sic] as it can be.

And some of the questions around particular risk management authorities, so external bodies to kind of make a determination about what an expert looks like in space is what's required to manage that risk. So being trained in the use of the VERA-2R tool does not make you an expert. You know, there are other areas that you might need to have specific expertise or understanding, not least of which is in the risk assessment process itself.

MR DONALDSON: Well, as I understand it, the training to be accredited as having - or to be able to use the VERA-2R tool is a 3-day course.

MS LOWE: Correct, yes.

It comes with the understanding - well, it certainly did when I was part of the process, that that person has some level of exposure, understanding, experience and knowledge in both violent extremism and in structured professional judgment tools and the use of them and how they are constructed and how they are best used. I mean, I guess my concern about this is this notion that we can have an expert.

I don't think there is one expert in the space, and, in actual fact, you need a multitude of experts to understand what's going on for an individual. So, for example, if I'm doing an assessment of an individual, and that - and this has happened for me - and that individual is a right-wing extremist, I'm not an expert in right-wing ideology.

MR DONALDSON: So can I ask you that, then. Let's use that example. So a right-wing extremist and you're trying to make an assessment of the risk of that person committing a terrorist offence?

MS LOWE: Yes.

MR DONALDSON: So what - the process you go through there is you use a tool or a structure?

MS LOWE: Yes.

MR DONALDSON: Which is VERA-2R, say. So that's, if you like, the structure?

MS LOWE: Correct.

MR DONALDSON: And then from the tool or the structure, a professional judgment is made, applying what was learned by the application of that tool?

MS LOWE: Correct. The tool is only one part of that assessment, though. The tool is only one part of an overall expert's assessment and outcome. It should not be the only thing that's relied upon for making the assessment in this space.

MR DONALDSON: Yes. So what else is relied upon? So what's the professional judgment when you use structured professional judgment? So the person who's doing the assessment applies the tool, learns whatever they can learn from the tool.

MS LOWE: Correct.

MR DONALDSON: What else is there, then, to coming into decision about risk assessment?

MS LOWE: Yes. That's a great question. It depends on the individual you might be assessing as to what might be relevant for making that assessment. So the VERA-2R allows you to understand the things specific to consider for violent extremist risk. What it doesn't necessarily give you, though, and you have to seek as the expert in this space is the understanding of how that works. So, for example, and I know the ICV raised it in their submission around a focus on religion and this notion between what is a religious belief and what an extremist belief, and that is absolutely correct.

I mean, as an expert administering the risk assessment tool, you would need to understand there is a difference between those things. Now, I don't necessarily have to understand what that difference is, but I need to know that I need to speak to someone who does. Because I need to understand that if I'm going to apply the tool correctly. So there are lots of sources of information that you might use in an assessment. And the VERA-2R is one of them. There have been assessments where I've used multiple tools. So TRAP-18, for example, if that's been relevant to the individual that I'm assessing.

So the notion that there is one particular expert - and I think that that's probably one area for the legislation to consider how it's going to manage the risk of that. Being a psychologist doesn't make you an expert, being a psychiatrist doesn't make you an expert in violent extremism.

MR DONALDSON: Yes, well, that's something that I've learnt during this process. So, as you say, the relevant expert is defined as, effectively, a medical practitioner or a psychologist or somebody else. And you are none of those.

MS LOWE: Or any person - I'm none of those.

MR DONALDSON: And that's what I want to try to understand, is that what - let's say a psychologist is making the risk assessment. They apply the tool or tools.

MS LOWE: Yes.

MR DONALDSON: Which provides information to them. What is it, then, that a psychologist has that enables that person to make a structured professional judgment which forms a risk assessment of the prospect of future offending? As opposed to a social worker, say.

MS LOWE: Correct. Yes. And I think it is interesting. I don't think there is anything that makes a psychologist per se in terms of the general use of the word "psychology" an expert to make that judgment. And, in fact, they could apply the tool and still not really understand what it is that the tool is telling them if they don't understand the information that's going into the assessment of the tool. So I think it is far more - and this is kind of where, you know, my recommendation really is for an external body that can define what it is to be an expert in violent extremism, and that may or may not include the psychology or other - insert other degree.

There are people from a variety of different backgrounds who could be considered experts in this space because of the information, experience and skills they hold in making these assessments. I think really, primarily for me, the best assessments are made when they are multi-dimensional, when they include a number of people with different perspectives and different understanding because there is no one - I have yet to find internationally even one expert in the space of terrorism.

MR DONALDSON: So I understand that. So are you saying that to conduct a risk assessment of an individual, it is desirable to have a group involved in the assessment.

MS LOWE: Absolutely. Definitely when we first did assessments in Juvenile Justice in New South Wales, it was a team approach, including psychologists, including intelligence analysts, including social workers and case workers in order to consider the relevant factors for what is the risk -- of violent extremism.

MR DONALDSON: And so just pausing there. Let's use VERA-2R as an example. If I say VERA, I'm talking about VERA-2R.

MS LOWE: Yes.

MR DONALDSON: So there would be a group - a group who would administer VERA-2R. They would be present while the responses are obtained.

MS LOWE: Yes.

MR DONALDSON: Who would then take that information, share any other relevant information and then come to a - is it a group decision on what the risk is?

MS LOWE: Yes, so it was a group-facilitated application of the VERA-2R. That then becomes a source of information for the individual, whoever it might be. In some cases it was a psychologist; in some cases it was a case worker in the team, who then provided their professional judgment based on the VERA-2R assessment which was contributed to by a variety of perspectives and people with different information.

I understand that one of the ways they mitigate the kind of risk and try and improve inter-rater reliability currently is that they have blind scoring. So the person who undertakes the VERA-2R assessment sends it to someone else, it's de-identified, sends it to someone else with their evidence sheet and that other person scores it also. Looking at the same evidence that that individual had. And I think that is also – it adds value to the process when we are understanding that this is quite a dynamic space to do assessment in.

One of the limitations of that approach is the second person, the blind scorer, only has access to the information that the first scorer deemed was relevant to include in their evidence sheet. And that's not necessarily all the evidence that was presented to that individual. So you also get that potential for confirmation bias around "I selected these pieces of investigation because of what they told me" and the other person doesn't necessarily get to see the -- so all they are doing is saying have you scored the tool right based on the information you have looked at, not necessarily that the risk assessment is ethical.

So I think there are different levels, I guess, obviously, of managing the risks around the structured professional judgment. I think the first step is to really have some authority or some body that considers who is an expert in this space and accredits people as such. As it's not just accreditation in the use of the tool.

MR DONALDSON: Yes.

MS LOWE: There have been a lot of people - and I have trained some - who were not psychologists and not going to be using the tool for the purposes of risk assessment for court, who are trained in the use of the tool and considered to be accredited. That does not make them an expert in violent extremist risk assessment. It just means that they have been trained in the use of the tool.

MR DONALDSON: No. And, again, as I understand it, the tool or some of the people who undergo the training to use the VERA-2R tool are obtaining that training and that expertise for the purposes that are completely unrelated to this process.

MS LOWE: Correct.

MR DONALDSON: So prison authorities use it for assessing risk of behaviour within a prison, for instance.

MS LOWE: Yes. Police have been using it to identify who they might target for investigation, for example.

MR DONALDSON: Yes. So if I could just get back to what you said about a risk management authority, let's call it because the Scots do. So a risk management authority's task, as you see it, would be to accredit those who have sufficient expertise to make a risk assessment of the - an assessment of the risk of the person engaging in acts of violent extremism if out in the community.

MS LOWE: Correct.

MR DONALDSON: Because I think you would accept that if you look at the way - you know, that - it's not necessary for you look at the legislation but the task which is before the court is to determine the risk of committing a serious Part 5.3 offence. Now, you are not an expert in what they are, for instance and so the expert there is actually using a tool or tools and making from that a professional judgment on the risk of the person committing an act of violent extremism.

MS LOWE: Correct. Although, I guess the question is the definitions of terrorism and violent extremism. And when you are considering, from a risk perspective and you're asking risk of what, you are necessarily relying on - you know, I mean, what it is that is defined to be that act of violent extremism is defined in legislation as a terrorism act.

MR DONALDSON: And doesn't the - wouldn't the structured professional judgment enable to you say, this is the risk - this is the thing that's going to happen? This is the risk of the thing that is going to happen. It's not defined in -

MS LOWE: It depends on the context in which you are using that assessment tool. So the risk assessment tool can be used for intervention purposes to identify risk and, therefore, what intervention needs an individual has to reduce that risk, for example. So for rehabilitation purposes, it doesn't always get used in the context of is this person likely to go on and commit another terrorism offence. But when that's the purpose of your risk assessment, then you do need to consider what is a violent extremist act as defined by the legislation which makes it a terrorism offence.

MR DONALDSON: So the structured professional judgment would be or could be adequately administered to assess the risk of committing a serious Part 5.3 offence.

MS LOWE: Yes, because you are considering the factors that might contribute to someone engaging in those behaviours. And those behaviours as such are defined in the legislation.

MR DONALDSON: That is. So it might not be the risk of personally being the primary act or in an act of violent - extremist violence.

MS LOWE: Correct.

MR DONALDSON: But it might be soliciting, procuring, inspiring.

MS LOWE: Yes, all of which are gained as terrorism acts and therefore would be violent extremist acts for the purpose of that assessment. Yes. And that's - one of the things about the VERA-2R is that obviously it's able to cope with the differences in the definitions across the world. Because it's used in various countries. So it's not definitive about what violent extremism is. It allows that to be quite contextual to the place it is being administered.

MR DONALDSON: So the reason I'm asking this question is - so in relation to an accrediting body, what is the task of the accrediting body? I suppose the task you would say of the accrediting body is to accredit those who are qualified to assess the relevant risk for the purpose of Division 105A?

MS LOWE: Correct.

MR DONALDSON: And you don't think that that is beyond the capacity of a body to determine those matters?

MS LOWE: Well, I think there are various bodies that determine whether someone is able to conduct all kinds of different purposes. Not just -

MR DONALDSON: Well, yes, there is, you know, psychologist registration boards, for instance. There is an accrediting body for VERA-2R.

MS LOWE: Correct.

MR DONALDSON: We are not talking about either of those.

MS LOWE: No.

MR DONALDSON: We are talking about somebody something else.

MS LOWE: Yes. Well, that's because my belief is just being accredited in the use of the VERA-2R doesn't make you an expert for the purposes of this.

MR DONALDSON: Yes.

MS LOWE: So you can be accredited in the use of the tool, meaning you've completed - successfully completed that training program, but it doesn't necessarily mean then that you can be considered an expert for the purposes of being able to assess someone's risk.

MR DONALDSON: So I'm sitting on this accrediting body and somebody comes to me, says I want to be accredited to do this task. I assume one of the things I ask is, well, have you had any training in any of the tools?

MS LOWE: Absolutely.

MR DONALDSON: Yes, I've had all of those.

MS LOWE: Yes.

MR DONALDSON: Okay, well that's not enough. What else have you got for me? What else am I going to get?

MS LOWE: Well, it is interesting, because do you have skills and experience and knowledge? So it's a combination of all of those things. And I think in New South Wales, judges have made commentary about people's experience, skills or knowledge in other cases in terrorism matters about whether or not having a graduate certificate makes you an expert in terrorism, for example. So I think it's a combination of all of those things, and that would be something that an authority would determine on the basis of what, in this space, could someone considered an expert and an expert of what?

Because, you know, you can be - and there are experts around the world who are experts at specific things: gender engagement and violent extremism, the use of social media for recruitment. That doesn't mean that they are an expert in making a risk assessment for the purposes of considering who might go on to commit the terrorist act. So I think there does need to be some consideration for what is an expert for the purposes of this legislation, and who would then be able to determine who meets the criteria to be an expert and manage that as an accreditation body.

MR DONALDSON: Well, you could either do it that way or the court determines it.

MS LOWE: Correct. And the court is in some ways doing that when they consider experts who are being -

MR DONALDSON: Yes, I think, what - and, again, there is a few nuances in the legislation as to whether the court has to have regard to certain things or not. But a court is never likely to be in the position of an accrediting body, that is, have the material available to it that an accrediting body would, to make a fulsome assessment as to the capability of a person who appears in front of them.

MS LOWE: Yeah. It also - I guess at the moment that process of the accreditation for the VERA-2R sits with Home Affairs who are the licensees in this country to deliver that training. And that means, then - and it was raised very eloquently before, around the potential even the perception of bias and who gets accredited through the same sort of body that might be making an application, for example.

MR DONALDSON: The other thing that concerns me - that I'm aware of that and other things about that involvement of Home Affairs in that process, but what actually concerns me most about that is at least a perception that there may be then limitations upon the capacity to undertake research in relation to, let's say, the validity of the VERA-2R report.

MS LOWE: Yes. And it's influenced, then, politically. What research is undertaken and how that research is undertaken and by whom. And that will depend very much on the politics and Ministers and Ministers' will.

MR DONALDSON: Not only that, it's - and, again, the perception. I'm putting it as a perception issue, that Home Affairs has accepted that the VERA-2R tool is the tool that it is going to use, and does use. So, in a sense, there's an incentive on Home Affairs to, you know, want research that validates the tool and be less interested in -

MS LOWE: Independent research.

MR DONALDSON: Well, you can call it independent research, but research that is perhaps inconsistent with the validity of the tool.

MS LOWE: Yes. And at least the perception of that bias exists, and if we are talking about something like continuing detention orders as the ultimate outcome, which ultimately is - and it's not just around the impact that that has on the individual, which is - you know, it is a notable concern. It is also the impact that that has on community safety, but the impact it has more broadly in the space of violent extremism and terrorism about the narrative that can continue to be used in our - just simply in our approach managing that.

I think ICV raised it a number of times in their submission around the potential bias for that when you've got the same organisation, you know, deeming who can and can't use the tool as being the organisation who is responsible, then, at least for the implementation of not only the funding in the space but also the policy direction of that funding in the space.

MR DONALDSON: When you say "funding", funding of research.

MS LOWE: Funding of research, funding of intervention, funding of training. Yeah. And an independent body is someone who, you know, should reasonably consider all of the information that's available in this space and, as you say, in terms of research, research across the entire spectrum as well.

MR DONALDSON: Yes. And would it - it would appear to me that research is particularly important in relation to these matters because really rather a nascent state at the moment.

MS LOWE: Yes.

MR DONALDSON: It's developing.

MS LOWE: It is.

MR DONALDSON: And so research is perhaps even more important in relation to these matters than it might be in other matters, for example sexual offenders where it seems that there is much more solid research base or research that has been going on for much longer.

MS LOWE: Correct, for a longer period of time and with a larger dataset as well. We have many more violent and sex and general offenders than we do terrorism offenders. So there will always be that limitation around this research, as it should be hopefully, yes.

MR DONALDSON: Now, I've kept jumping in. I'm not sure you have got through your preliminary observations yet. I've kept jumping in as you've gone.

MS LOWE: I think I got through a few of them. I did just want to touch on in the submissions, I have read around the notion of structured professional judgment and talking about actuarial tools. And I think Mr Edgerton before gave a really great overview of SPJ tools. But I did just want to make the point that actuarial tools also get it wrong sometimes. And we need to be mindful of what are we actually hoping for and what is good enough, so the VERA-2R tool is not an actuarial - a lot was brought about should judicial officers understand that.

And with all risk assessment tools when practitioners are administering, they do necessarily caveat those tools with the limitations. So that is brought to the attention of the courts, and certainly having been involved in a number of these matters, judges are interacting and engaging in that space with what do tools look like and what do they tell us and what are the limitations.

MR DONALDSON: Yes.

MS LOWE: As part of the training that I delivered in 2019 on behalf of Home Affairs, we did information case sessions, sonot training in the use of VERA-2R, but education sessions for judicial officers and yeah, training can be given for people in the space to understand what the tool is, what its limitations are, what it can tell you and how it can tell you that. So I think that is another area for development, is making sure that, you know, regularly that I guess practitioners, legal practitioners in the space are aware of these things as well.

MR DONALDSON: So are those courses still offered, do you know, to legal practitioners?

MS LOWE: I'm not sure if they were offered in the same form that they were in 2019. I know I've done a number of presentations at different legal conferences about it. It's certainly an area that's growing in terms of understanding the use of the tool and understanding risk assessment in the space. But I have also worked with different firms and different individual lawyers who haven't had exposure and they are picking these cases up.

I think that was the other point that I would want to make about a risk management authority as well. In terms of who's accredited in the use of the tool, and therefore who defence counsel can reach out to in terms of also conducting risk assessments, Home Affairs also are responsible for the accreditation of private practitioners who are available for, you know, defence counsels to use in space and I think that it's really important that there is some independence about making the decision about who's an expert, not just from the position of within government, corrections officers and psychologists, but also external to government as well.

MR DONALDSON: When you say who is an expert, who is accredited to use the tool?

MS LOWE: Correct. And hopefully a risk management authority will be able to determine who is actually an expert in that space as well.

MR DONALDSON: I think you said earlier that the actual perception in relation to these matters - in relation to Home Affairs, that within professional circles with whom you mix, there is an actual perception of issues in relation to Home Affairs' role, is there?

MS LOWE: Yes, I think it's not just in the practitioner space as well. I know a lot of the submissions from researchers have raised issues around, you know, access to the tool as well and being able to understand it to actually conduct research on the tool too. And so I think, you know, a - I believe that there's - whether it is actually bias, whether there is a perception of bias, to have the same organisation or government organisation responsible for bringing the application as is responsible for determining who can be accredited in the private sector as well, is problematic.

MR DONALDSON: Well, the Department of Home Affairs, I think, has undertaken at the end of last year - before the Parliamentary Joint Committee, that there would be a report commissioned.

MR MOONEY: Yes, from the Institute of Criminology in relation to VERA-2R.

MR DONALDSON: From the Institute of Criminology into - specifically into VERA-2R. I think, not more generally. So, well, I would have an expectation that that work is - well, commenced or ongoing.

MR MOONEY: Yes, the report is due at the end of this month --

MR DONALDSON: The report is due at the end of this month. So that will be interesting. I might even get access to that myself. So that will be interesting.. So, yes, it's an interesting time in relation to these things. But can I ask you this because one of the issues - I don't know if you saw one of the earlier people who appeared here was a lawyer, and he and I were really discussing the sort of arcane minutiae of the admissibility of expert opinion evidence.

MS LOWE: Yes.

MR DONALDSON: So would it be your position that there are people who can provide assistance to courts in relation to the assessment of risk of these things occurring?

MS LOWE: Yes, definitely. Yes. And I think that that is where a risk management authority could assist the court, by having a register, if you like, of people that would be readily available for different matters to provide that expertise.

MR DONALDSON: That is - so the research and the expertise in relation to risk assessment of violent extremism has reached a level of maturity by which you think that there are people who can express opinions on those matters that would assist a court?

MS LOWE: Can and are.

MR DONALDSON: I know there are.

MS LOWE: Yes, yes. And I think - you know, I mean, again, in a lot of those matters, the expertise of the individuals providing that advice to the court is relevant. And I think they have relevant risk assessment commentary and recommendations to the court and advice to the court around what are the particular factors that indicate risk and where that risk might emanate from.

MR DONALDSON: And so how does a person actually develop that level of expertise? So you are trained in tools. Not necessarily a psychologist so you don't bring whatever psychologists bring or medical practitioners.

MS LOWE: Yes.

MR DONALDSON: How does one - how does a person actually develop the expertise - the necessary expertise over and above what the capacity to administer the tools is?

MS LOWE: Well, I think the same way anyone develops the expertise in any space. It's having the skills, the knowledge - so the education, whatever that might look like, and the experience, being able to have experience in this space around engaging with different assessments and using different assessment tools.

MR DONALDSON: So what skills are there over and above the capacity or ability to administer the tool?

MS LOWE: Well, I mean basic skills, for example, in interviewing. So being able to interview someone, being able to gather and discern relevant information. So investigative skills as well.

MR DONALDSON: Yes.

MS LOWE: And I think, you know, there are some authorities, there is a Society for Risk Analysis which is specifically focused on the skills around proper risk assessment processes. Because that's another skill as well. So being able to do a risk assessment requires you to consider certain factors. So having experience or exposure to that kind of knowledge as well allows you to develop that expertise.

MR DONALDSON: Yes. See the reason I'm asking these questions is it's all well and good to say, oh, let's have a risk assessment authority, but the question is, what are they going to do?

MS LOWE: Yes.

MR DONALDSON: And so it's important for me to understand things that might seem basic to you, but aren't necessarily so basic.

MS LOWE: I think to make it very simple, in most other spaces, when we consider experts - and let's say we are considering an expert in the medical field, for example - there are certain practices, processes, procedures that that individual has had to do through to be considered an expert and -

MR DONALDSON: Being a member of a college, for instance.

MS LOWE: Absolutely. Have some experience, have particular knowledge and skills.

MR DONALDSON: Conducted research in relation - yes.

MS LOWE: Absolutely, for them to have been considered an expert. There doesn't - there isn't that same level of rigour around who is an expert in this space. Literally anyone can call themselves an expert because we haven't defined what an expert looks like. What does that mean? What does that mean when I go to someone

and they are an expert that I can understand is their base level of skills, knowledge, experience?

MR DONALDSON: Could you do this for me, because we are going to have to finish up. Could you send me a note that defines an expert for this purpose, please?

MS LOWE: Certainly.

MR DONALDSON: Just because I would be very interested in seeing, from someone who is very experienced in this area, what the words actually look like.

MS LOWE: Yes, yes.

MR DONALDSON: That would help me enormously.

MS LOWE: Thank you, yes.

MR DONALDSON: Was there anything else, Peta, that you wanted to specifically raise? I jumped in very early with you.

MS LOWE: No, that's okay. I much prefer the question and answer style. So -

MR DONALDSON: Yes, yes.

MS LOWE: No, I really just wanted to raise that the few things were the reliance on risk assessments of expert - in expert reports within the Division is necessary. And I don't think you want to lose that level of rigour around understanding in this space.

MR DONALDSON: Do you think the cross-examination process, you know, the court cross-examination process is a valid way of testing that?

MS LOWE: So I would say, from my experience -

MR DONALDSON: Yes, from your experience.

MS LOWE: - there needs to be more education and support for judicial officers in actually - in the process of interrogating and understanding the assessment so that they can do an effective cross-examination, if you like. So you know, a lot of -

MR DONALDSON: You mean the lawyers?

MS LOWE: Correct, yeah. I think if you are constructing a cross-examination, you need to understand what it is that you are examining. And so a lot of the time that's kind of the step that's missing to make that process as rigorous as it needs to be in these cases.

MR DONALDSON: Yes. So perhaps if there's going to be some sort of authority, it might offer a service to -

MS LOWE: Yeah.

MR DONALDSON: - the legal profession, for instance.

MS LOWE: Yeah, correct. Some level of certification, if you like, that you've been - that you understand these things and you have been through the process of education and developing the skills necessary, and, you know, certification in terms of who is an expert as well. Deemed as such by an authority that's independent.

MR DONALDSON: Lawyers don't like certification.

MS LOWE: Probably not.

MR DONALDSON: Not themselves. It's all right with everybody else. All right. Well, Peta, that's -

MS LOWE: I think that's all, yes.

MR DONALDSON: Yes. Well, I think we have come to the end of the time, unfortunately, that we could allocate to these discussions with you, but I'm very grateful that you have come along. And we had a previous meeting where you were also very, very generous with your time. So, again, thank you very much for coming along, and if you could give me that note in due course that would be - that would be a great help.

MS LOWE: Definitely.

MR DONALDSON: And if there's anything else that arises, I'm sure you will be happy to help us out down the track.

MS LOWE: Absolutely. I'm grateful for the opportunity.

MR DONALDSON: Okay. Thank you very much, Peta. Thank you. So now, I think we are going to pause for an hour or so.

MR MOONEY: For lunch, yes.

MR DONALDSON: For lunch. So -

MR MOONEY: Back at 2.15.

MR DONALDSON: So the next session we have commences at 2.15, which, again, will be most interesting because we have, again, some people who are very skilled in the matters that Peta has been discussing with us. So we look forward to that with

great interest. So, we will then pause until 2.15.

MR MOONEY: Yes.

MR DONALDSON: Okay. Thank you.

THE PUBLIC HEARING ADJOURNED 1:03 PM

THE PUBLIC HEARING RESUMED 2:14 PM

SESSION 3: ACADEMIC FORUM – RISK ASSESSMENT/RESEARCH

MR DONALDSON: Welcome back, everybody. So this is a resumed hearing in relation to the reference that I'm dealing with in relation to Division 105A of the Criminal Code. And the first session this afternoon involves three participants.

Firstly, we have - in no particular order, we have Professor Mark Nolan. Mark is the Director of the Centre for Law and Justice Studies at Charles Sturt University, who has a particular expertise in matters relevant to this. We also have Dr Kristy Campion, who's present.

Kristy is a lecturer at Charles Sturt University and lectures, I think, right to say broadly in relation to terrorism studies. And in addition to that we have Professor Adrian Cherney, who has travelled for Queensland. I'm very grateful to him for that, Adrian, who is a Professor at the University of Queensland and the School of Social Science, Anthropology, Archaeology, Criminology and Sociology, who has vast experience in researching radicalisation and de-radicalisation programs, along with other matters that are relevant to this inquiry.

So I'm very grateful that we have all three of the people here who will no doubt be able to give us a perspective on some of the issues that are different from what might be thought of as a straight legal analysis of some of the issues that confront us. Now, I think, Adrian, you were wanting to or proposing to make a couple of introductory observations?

PROFESSOR CHERNEY: Does Mark have something to say as well?

MR DONALDSON: Mark does as well.

PROFESSOR NOLAN: Yes.

PROFESSOR CHERNEY: Does he want to go first?

MR DONALDSON: But I don't think there is any particular order. Okay.

PROFESSOR NOLAN: Sure, I'm happy to, Adrian. Well, thank you for involving us. I want to explain that in the contemporary threats to Australian security research

group that I'm the deputy research director for, which includes Dr Campion and other colleagues from Chart Sturt University, we have recently been working on projects to do with right-wing extremism. In other research that I've been doing at ANU, I've been working on social cohesion. But I've been teaching and researching federal criminal law since 2002 at ANU, and teaching and researching the interface between law and psychology since that time as well to law students and to psychology students and post-grads.

I just want to explain that I'm not a registered forensic psychiatrist or psychologist. My doctorate is in social psychology. And I work in a professional association called ANZAPPL, the Australian and New Zealand Association of Psychiatry, Psychology and Law. I'm the editor in chief of their journal, Psychiatry, Psychology and Law, and that work in a range of ways exposes me to the experiences of colleagues who are forensic psychiatrists and forensic psychologists making risk assessments in the various sex, violence and terrorism post-sentence detention regimes in both the states and the Commonwealth.

I myself have not done risk assessment or given expert testimony on risk assessment. I have no training or accreditation in any research assessment tool that's currently used in Australia or elsewhere. So that was the introduction I wanted to give to my expertise and the contextualisation I wanted to give as well.

MR DONALDSON: Thanks very much, Mark. Yes, so, Adrian, you had -

PROFESSOR CHERNEY:. I would just like to make three points that go to some of the issues this inquiry is looking at. Point one is that we really need to be mindful that schemes like HRTO, THRO and control orders, while in some circumstances may be necessary, are a fairly blunt instrument by which to address the problem of residual risk, that is, the ongoing risk that terrorists or extremist offenders may present to the community.

Addressing and managing residual risk of extremists re-offending is about understanding change over time and whether an extremist or terrorist offender has disengaged and is on a pathway towards desisting. A key consideration is whether schemes like HRTO, etcetera, undermine this process and what other responses are better suited to ensuring community safety by facilitating disengagement and thus reducing residual risk.

The second point is, while I agree with some but not all comments in submissions relating to the VERA-2R, we must be very careful - and I stress this, we must be very careful in not confusing and over-conflating questions about the utility and value of the VERA-2R with its ability to predict or not predict the risk of future offending. The more fundamental question about addressing and managing extremist risk is ensuring that a variety of information sources inform decision-making, of which the VERA-2R can be one informative source but not the only source.

My final point. The structured professional judgment is central to violent extremist risk assessment. You need a flexible approach, given the nature of the cohort being dealt with and the variability and risks, needs and vulnerabilities that they present. SPJ is essential to appropriately addressing residual risk, so their ability in extremist and terrorist risk can be dealt with and tailored responses developed.

MR DONALDSON:. Thanks for that. So this is going to be, hopefully, an interactive discussion. So if anybody has a point that they wish to make during the course of this session, please just jump into assist or add to whatever we are discussing at a particular point of time. But, Adrian, perhaps if I could ask you, following on from the observations that you just made, where you said that the current scheme is a blunt instrument in dealing with these matters.

I'm, of course, reviewing the legislation to see whether it is - if I can put it broadly, appropriate in one means or another. If there is a better way of dealing with the risk posed by those who may commit particular offences in the future, other than the current scheme, what are they?

PROFESSOR CHERNEY: - I'm not saying the current scheme shouldn't exist or the legislative framework shouldn't exist. The question is what is the consequences of that, in the context of the question you've raised in other sessions about rehabilitation being a goal.

MR DONALDSON: Yes. So the consequence to rehabilitation or reintroduction.

PROFESSOR CHERNEY: To rehabilitation and promoting disengagement, yes.

MR DONALDSON: So HRTO could be a negative to that.

PROFESSOR CHERNEY: That is a possibility, exactly, yes.

MR DONALDSON: Any - sorry, that is a possibility.

PROFESSOR CHERNEY: That is a possibility, yes.

MR DONALDSON: And I would take it that that possibility becomes more likely if there is no emphasis upon rehabilitation or reintegration as part of the post-sentence detention.

PROFESSOR CHERNEY: Yes, that's correct. I don't - I don't see - the promotion of community safety is - and rehabilitation to me goes hand in hand. They are not mutually exclusive. Because that's the ultimate goal we want. You know, we want these - we want to release individuals that can reintegrate and return to society as functioning, pro-social people. So we need - so there is an onus of responsibility on the state to provide the capability for that to occur.

MR DONALDSON: And can I ask this, because that - of everybody, please, who has experience, and you all have far more experience than me, but many, if not all, of the people who will become subject to this scheme will have spent - or would have served extensive or lengthy terms of imprisonment in the first instance. And the fact that a post-sentence detention order is made in effect presupposes that the risk of the future re-offending is considered to be unacceptable. Let's say somebody spent 10 years in prison for an offence, had has had access to rehabilitation programs and the like. Is it realistic or unrealistic to think that a further emphasis upon rehabilitation is productive?

PROFESSOR CHERNEY: Does Mark want to comment?

PROFESSOR NOLAN: Yes. That was the way in which a former INSLM Bret Walker introduced the idea of post-sentence detention in the terrorism regime and promoted it in one of his public reports, that, for some people, rehabilitation doesn't seem to work initially during a term of imprisonment. During the term of a continuing detention order, the question in my mind would be what responsivity approaches and how is the responsivity to rehabilitation being managed during sentence and how does that need to change during the continuing detention order.

So I'm a believer, as has been said, in adding rehabilitation as a goal to as many sections of Division 105A as possible to make true that legislative promise to offenders and also to the community that we are going to, as Adrian suggests, approach rehabilitation as part of promoting community safety. I think if we throw away the key, if you like, and say we stop doing rehabilitation during a continuing detention order, I think that is to ignore what may have worked better or differently if responsivity to rehabilitative attempts was managed better during incarceration.

So that's what I would say about that. If I were to agree with the reintroduction of rehabilitation as a goal, I just point back to my own and joint submission with Dr Campion, my own view that during the UN Human Rights Committee's evaluation of the Queensland sex post-detention regime, in the Tillman and Fardon communications to the United Nations Human Rights Committee, the response that the Australian Government gave to persisting with continuing detention regimes was a dual reason, from providing community safety but also making good on the promise to offenders that a period of imprisonment was a chance for rehabilitation.

So I think there's a human rights reason, a government promise reason, and also some other reasons as to why legislative review of Division 105A needs to introduce the concept of rehabilitation back in and also not give up on rehabilitation attempts but to realise that there are different approaches that have to be taken at different stages of an offender's reintegration.

MR DONALDSON: And so does that introduce a notion of - because it - as you know, this is a Commonwealth scheme, but is largely administered through state institutions. And so the specified authority that will be responsible for extended supervision orders - I think as it's presently contemplated would be a state-based

institution. And it would be a state-based institution that has been responsible for the incarceration of these individuals during their sentence. And I think it would be fair to say there are differences between the states as to how rehabilitation programs might be administered. We have seen that already in some of the work that we have done.

PROFESSOR CHERNEY: Can I just comment on the issue of rehabilitation? So - and you mentioned about the length of time an individual can serve in prison. So rehabilitation or what we call disengagement or desistance for an extremist offender, whether in juvenile space or the adult space, is a long, drawn-out process. It is an iterative process. There can be significant resistance to begin with, but over time there can be gradual change. And there will be huge variability across individuals.

So, you know, it is even difficult to say at a particular end point someone is rehabilitated. Okay. And, yes, you are correct in saying that the delivery of disengagement programs or rehabilitation programs targeting radicalised individuals is a state-based responsibility. You have the prison intervention in New South Wales. You have different case managed interventions delivered by the police and by justice departments. You have the Assist program in Victoria.

So in, say, New South Wales and Victoria you have targeted programs. In Queensland, there's no targeted programs for extremist offenders. They are given the suite of interventions. But, yeah, the responsibility for rehabilitation would lie with the state, and in some states there are targeted programs and in others there are not. That is because of the size of the cohort that some states are dealing with.

So New South Wales and Victoria have a larger group of individuals, so have a tailored program. But for us in Queensland, we are talking about a handful. So they are just given the general rehabilitation offerings.

PROFESSOR NOLAN: To add to that -

MR DONALDSON: Yes., Mark.

PROFESSOR NOLAN:. To add to that, you only have to go back to the Australian Law Reform Commission's Same Crime, Same Time report some time ago in federal criminal law to get an understanding of this dilemma. What is the experience of Commonwealth offenders in state prisons, how is that similar or different, and those issues were agitated in the ALRC's report. And, of course we are not a country that has federal correctional institutions. We are not a country that treats our federal prisoners in dedicated federal prisons.

But I will note that both the HRTO and the THRO legislation does have the aspiration that people on continuing detention orders will not be housed with sentenced and remand prisoners - I think the language is "where practicable". And that has never been achieved in either the New South Wales prisons under THRO or

the New South Wales prisons and other state territory prisons under HRTO. And I wonder when -

MR DONALDSON: It's think it's more than an aspiration, actually. It is a statutory obligation. But you're right. Yes.

PROFESSOR NOLAN: A statutory obligation with some wriggle room, if you like, according to the practicability of that separation. And, for me, rehabilitation is facilitated by that separation. We know that both the New South Wales and the Commonwealth regime has been resilient to Chapter III constitutional challenge, but what strengthens the Chapter III case is that separation, would it not, because you do have administrative detention in a separate facility, rather than administrative detention that's not punitive, etcetera, in a state prison, maybe in a supermax facility in which the prisoner had served their sentence to expiry.

So I will just make those comments about the tension between Commonwealth and state forces here. I do in the joint submission that we've provided from Charles Sturt make some other comments about the silence in the Commonwealth Criminal Code of there being a state regime, a THRO regime, as well as a HRTO regime. And I will just leave it at that.

MR DONALDSON: All right. Thank you. I think one thing that flows from that, though, is that there may be some sort of understanding that while an offender is in prison in a state institution, they, in effect, are the responsibility of the state of corrective service even though they are imprisoned for breach of a Commonwealth offence. But when they come into this scheme, they are plainly a Commonwealth responsibility, it occurs to me, and to say in relation to ESOs or extended supervision orders, for instance, that the relevant authority there will, in effect, delegate its responsibilities in relation to supervision of - extended supervision orders to state institutions is a matter that troubles me, unless there is similarity between the mechanisms in place in different states.

But, equally, there are - because I think as you say, Mark, the vagary, to a degree, of section 4, which deals with the detention of these people, there are likely to be very different detention regimes and experiences that are put in place. Mr Benbrika, for instance, is housed within the jail in which he served his sentence, and I understand that New South Wales doesn't have a similar facility to that. I don't think any other state has a similar facility, although the Commonwealth Government will have to ensure something along those lines, were an offender to be in such a facility.

So I am concerned about what would be or may well be a lack of uniformity about how people are treated if they are subject to post-sentence detention orders. And it's particularly concerning for me when one looks at rehabilitation, because it would be a very, very unsatisfactory circumstance if the sorts of services that would be required to provide rehabilitation services to defendants were just simply not available in a state and the Commonwealth in effect considered itself not really responsible for those sorts of matters. So - yes, Mark.

PROFESSOR NOLAN: Just going back to a point that you had raised earlier, even though, in our federation, the frontline work is done in state and territory prisons, whether it be rehabilitative work and other work during the incarceration of a terrorist offender, I go back to the fact when the UN Human Rights Committee found breaches of the International Covenant on Civil and Political Rights and the Australian Government tolerated those breaches by saying we are going to focus on community safety and rehabilitation in this scheme, is a promise the Commonwealth Government has made over wherever these CDO internees reside in whichever state or territory.

And we are talking about the Tillman and Fardon communications which is about the much earlier sex offender regime in Queensland. So there is a promise that's been made to uphold our human rights promises to the UN by the Federal Government, and it is the Federal Government's responsibility to get this right and as comparable as possible across the different incarceration venues as they can to achieve that rehabilitative and community safety goal.

MR DONALDSON: Yes, well, I'm sure that's - I'm sure that is so. Can I just mention something else about dealing with prisoners separately? We have heard in earlier sessions from - well, it was Peta, actually, in an earlier discussion in relation to these matters - Peta Lowe, that is - that it's very careful to ensure that people who are detained under these regimes are not isolated, and not having people isolated doesn't necessarily mean that they are released into a prison population, even on a periodic basis.

It may mean that there simply have to be systems in place by which people - by which detainees are able to mix with other members of the public more readily than they are as prisoners, it seems to me. Because, again, it seems to me, without knowing necessarily a huge amount about it, but if a person was confined in a facility within a prison and was the only person in that facility and actually interacted with nobody other than prison wardens, for instance, that would necessarily be a negative thing. Do you have a view?

PROFESSOR CHERNEY: Two comments,. One is, for the individuals, for some, you have to ask the question whether rehabilitation is better served in the community.

MR DONALDSON: Yes.

PROFESSOR CHERNEY: Because there is loads of research that shows that it actually can be, in some circumstances, for other types of offenders. So for these - particularly when you consider some of the individuals are quite young that are subject to this legislation. The second point is, you're right, is that, for example, if someone is kept in a maximum-security environment, they will be subject to particular security regimes which will curtail certain things they can do.

And one thing we know is that from loads of research on the issue of rehabilitation and community integration, that family contact, the amount of family contact an offender has and the ability of an offender to maintain family relationships when inside the prison environment is highly predictive of their rate of reoffending. So it goes to your point -

. They are less likely to re-offend if there is ongoing family contact within the prison environment. So - because it assists their rehabilitation. It will assist in the process of reintegration when they are released. It's that the same sort of argument here can apply, that we need to be providing opportunities for individuals who are detained to prepare them for release, which include mixing with other inmates, which includes frequent family contact, which includes access to vocational educational training, etcetera, within these sorts of high security correctional environments.

MR DONALDSON: Well, something that flows from that - because, again, I know some people have been here all day and are probably sick of me saying this again, but my role is to review the legislation to see whether the legislation should be amended to improve it, if I can put it that way. And one thing that's occurred to me during that answer, Adrian, is that if rehabilitation were to be a goal, perhaps an object of the Division to which the court has to have regard when it's making an order either for a continuing detention order or an extended supervision order, it may be relevant to also include as a requirement of having regard to rehabilitation a specific requirement to consider whether rehabilitation would best be facilitated in the community, rather than in a detention facility.

PROFESSOR CHERNEY: Yes, if they subject to continuing detention, absolutely. But that may not be appropriate for all offenders.

MR DONALDSON:.. But if it's in the legislation or something which the court has to have regard - well, not only the court but also others who are providing evidence to the court, courts tend not to focus on things if they are not required in these matters. And so if these are matters that are dealt with expressly in the legislation, that may be of some assistance there. Sorry, Kristy, you were going to help?

DR CAMPION: Yes. I was just going to briefly highlight that there is research that exists within the ambit of right-wing extremism from European contexts, in which it has been found that, with some offenders, actually their family were part of the normative environment in which they engaged with the ideology. So the family actually sustained the ideological beliefs rather than necessarily separating them. So I just wanted to re-emphasise Professor Cherney's statement there, that it definitely is important for some offenders, but for others, and particularly specific threats, it might not necessarily be the best fit.

MR DONALDSON: Yes.

PROFESSOR NOLAN: If I could add there, if it's appropriate, recent case law in the HRTO regime I think has thrown up other issues. Is rehabilitation, if that was elevated to an object, which is flow-on statutory interpretation consequences, etcetera, is rehabilitation and community safety, if that were to be what we end up with, for an offender whose sentence is about to expire better served in the community, would be one question.

But I think the case law also throws up other issue, doesn't it? Better served in the mental health regime under a mental health order and, you know, Pender is a really good case example of where there was explicit discussion of whether a community treatment order was more appropriate than a continuing detention order. And they are two regimes of community rehabilitation, care and protection. I suppose what hasn't been part of that debate - and it may not easily be part of that debate, but whether an involuntary detention, mental health order or psychiatric treatment order as it's sometimes called in some jurisdictions, is an option rather than prison CDO incarceration.

So, in my mind, if you bring that rehabilitation limb into the objects section and you have got rehabilitation and community safety both being what has to be considered, you are thinking of about alternatives in the community to achieve rehabilitation and protection. You are also thinking about other regimes like the mental health regime, whether it be community treatment orders or involuntary inpatient detention, for example. So that's what those cases such as Pender throw up in my mind.

MR DONALDSON: Well, and I think - thank you for that. And I think that what that highlights, Mark, is having regard to section 105A.7, which is really the order or the section of the Act which provides for the order, it is notable that the process that the court goes through is determining whether the defendant is an unacceptable risk of committing an offence and also whether the court is satisfied there is no less restrictive measure available under this part. So that's only actually an ESO or a control order that would be effective in preventing the unacceptable risk. And some of the -

PROFESSOR NOLAN: It's as if the other regimes don't exist outside of that Division.

MR DONALDSON: Well, except that, using your example, if a less restrictive measure that would be effective in preventing the risk was treatment over a mental health regime in a state-based mental health facility, say, that's not actually a restrictive measure that is available under this part, oddly. But then again - and I don't want do get bogged down too much in the detail of the legislation - it may be that the availability of that goes to whether there is an unacceptable risk of committing offence - if a person is subject to various restrictions under mental health legislation.

But it is an oddity in the legislation that the only thing though to which the court expressly has regard in determining whether the unacceptable risk can be prevented

or ameliorated is whether there are other measures available under this part of the Act. So it may be - and whether that particular provision should be amended to expand the other processes that might be available is something that I will certainly be considering.

But then you get to the circumstance in Pender's case, of course, although that was dealt with prior to the changes that introduced the ESO. So the position was a bit different under the Act prior to it being amended. But, again, I think what that highlights is what should be before the court is every option that is available to the court to seek to reduce the risk of re-offending, but also to seek to rehabilitate or reintegrate defendants into the community. All right. Now, Kristy, you are looking at me as if you've got something important to say?

DR CAMPION: No, I was listening closely.

MR DONALDSON: No? All right. I did want to have a discussion about risk assessment or consideration of risk assessment. Because we had a very, very useful session prior to lunch with Peta Lowe in relation to VERA-2R and the task - well, not only in relation to VERA-2R but the task which is before the relevant experts and the court in assessing -- effectively committing one of these offences.

Does anybody want to start off with some observations about that before I ask some questions about it? Because it is a regime or a process that is central to the operation of the Act, that is, that there is a risk assessment that is undertaken by relevant expert and the court have regard to that. So, in a sense, that is pretty much the central integer upon which the power exercised by the court is exercised.

So it's very important for me to understand firstly how that actually operates, but also whether there can be any improvements made to the system as it currently exists. Does anybody have any views on either how the process is currently operating or whether it can be improved?

PROFESSOR NOLAN: I will just quickly say that, of course, this regime, like many regimes that have ended up using risk assessment tools, this regime does not prescribe one or a number of sanctioned risk assessment tools or instruments. The legislation is neutral on its face as to how that risk assessment is to be done. It says the qualifications of the assessor and what they need to be, but it doesn't say that that assessor has to use one or even a number of prescribed risk assessment instruments.

MR DONALDSON: Sorry, are you referring there to the definition of "relevant expert", are you?

PROFESSOR NOLAN: Yes, I'm just saying there is nothing in the legislation that says a certain risk assessment tool will be used.

MR DONALDSON: Yes.

PROFESSOR NOLAN: But in the sex and violence regimes in the states, as precursors to what we have got in HRTO and THRO regimes, of course core practice and professional practice leads to - and other factors leads to some risk assessment instruments being expected, sometimes, I would say, and used more commonly, and this opens up a range of evidence law issues and other issues about the way experts are giving their opinions in these matters, and what is the basis for their opinion and issues of admissibility and weight, I suppose.

So that's where I would start. I agree. I support the fact that there is no prescribed one or two risk assessment tools or more that have to be used in this assessment, and that's a decision for the relevant assessor to make and to argue as an expert -

MR DONALDSON: Can I just pause there, Mark, and perhaps ask this question? The way in which the legislation practically operates is that the Minister puts up a risk assessment report undertaken by a person appointed by the Minister. Although, there is provision in the Act for parties to approach the court for a court-appointed expert, in reality, a review is undertaken by an assessor appointed by the Minister in the first instance.

And that will currently be - or the risk assessment tool that is used for that process is presently a matter which is determined by the Minister or by the Department of Home Affairs, and there is a preferred tool that is used in those processes. So the court may, in fact, not have any - not have any professional opinion expressed other than in the context of that tool, and even if the court does, it will almost inevitably - well, it will certainly have before it a risk assessment undertaken, having regard to the tool that is preferred by the Minister. That's your understanding of it, isn't it?

PROFESSOR NOLAN: Yes, that's correct. It's a practice decision.

MR DONALDSON:, But I think that's right. So the Minister does determine, because the Minister is the applicant for these in the first instance, what tool and the expert it will put before the court in relation to the risk assessment process.

PROFESSOR NOLAN: And that's a practice-based governmental decision that prefers a particular tool, and that's working underneath the legislative provision. How the rest of the matters and proceedings unfold from that point and which tools - which experts in which part of the process use, and how they discuss the limitations, the strengths of those tools and the mixture of tools and the combination of those risk assessments in combination with other opinions and the basis for other opinions that they make, then can become, as it does - and it has in state and territory regimes for some decades - quite complicated quite quickly, in terms of the number of experts, the number of tools, the way in which those assessments have to be synthesised.

All I'm saying is that I think that legislative status quo should continue, and what has resulted in the courts is not caused by the way the legislation is drafted, in my view.

MR DONALDSON: Well -

PROFESSOR NOLAN: It's other decisions made by the Minister and delegates who have the power to make choices over tools.

MR DONALDSON: Yes.

PROFESSOR NOLAN: If that makes sense.

MR DONALDSON: Yes, well, I think that's right. But that also presupposes that it is accepted that there can be a valid assessment - I use "valid" in a broad sense - a valid assessment of the risk of an offender committing a serious Part 5.3 offence in the future, that is, because the legislation as it has been applied is that that is - any report dealing with that is a matter to which the court must have regard.

So even if there were a body of scientific evidence that established, say, that VERA-2R was a tool that was inappropriate, let's say, that structured professional judgment was not the most appropriate means by which the question can be addressed, say, an assessment that was based on a structured professional judgment applying the VERA-2R tool would be an assessment to which the court must have regard. Now, that seems pretty odd to me, if that's the case. But - does it seem odd to anybody else?

PROFESSOR NOLAN: Well, I'm sure that Kristy and Adrian have strong views there.

MR DONALDSON: Yes. And I suppose that what that highlights is the way in which the Act operates which seems to require the court to have regard to a particular - or a number of particular matters, but, relevantly, a risk assessment report and the Minister will always put a risk assessment report on so the court must have regard and will always have to have regard to that. And the court would have to have regard to that even if that report would not otherwise have been admissible as expert evidence in the customary or usual way.

Now, again, that seems to be a legislative choice that has been made by the legislature in enacting this, but it certainly puts the Minister - if that analysis of the Act is right, it puts the Minister in a position in which litigants seeking to rely on expert evidence in a judicial proceeding are not normally in.

PROFESSOR NOLAN: I understand the point you're making, that there is a requirement to use a risk assessment tool, whichever one it is, and therefore, the admissibility of decision is different than it would be otherwise, for example, under the Uniform Evidence Law under section 79, etcetera. So I see the point that you're making.

MR DONALDSON: So do you accept - do you accept that - and I understand it's not your specific field of relevant expertise, but do you accept that there are people who can validly - can I use that term in a broad sense - validly make an assessment of the risk of a person committing a serious Part 5.3 offence in the future?

PROFESSOR NOLAN: You have a number of submissions before you that discuss these issues of predictive validity. And I am quite heartened by the fact that there seems to be, in some parts of the country, some funded research on increasing studies that can determine predictive validity of these tools. I would say that the best ways in which I see forensic psychiatrists, forensic psychologists or other assessors using tools introduce - whether it be the VERA-2R or other tools - is to explicitly - irrespective of what you've said before about the way in which those risk assessment reports come in and whether that's similar or different to existing evidence law.

I think the best way they are introduced is that people say what are the strengths and weaknesses of them. How they are used in conjunction with other sources of - for the opinion, and, therefore, in my mind, that question becomes a question of basis. Importantly, I suppose, in evidence law terms, how have you used a tool or a range of tools in combination, under a structured professional judgment approach, which has led you to the assessment that you are making.

And what I would say is that is better practice, best practice, if that type of honesty about the predictive validity is - is described by the person relying on the tool. And I'm sure that Adrian and I'm not sure that Kristy have very interesting views on this too.

MR DONALDSON: Yes, I will get to them. I'm not going to let you get away that easily, though. Because I just wanted to ask this. I understand everything that you are saying there, but perhaps the only issue that is relevant there is of course the task which is given to the relevant expert is to make an assessment of the risk of the offender committing a serious Part 5.3 offence.. And the first task for the court is to determine whether there is an unacceptable risk of committing a serious Part 5.3 offence.

So the court gets a report that says this is the risk. Now, there may be limitations in that, but in the absence of any other evidence in relation to risk, courts are likely to proceed on the basis of those opinions, even if there are limitations in those opinions, I would have thought.

And then the question of unacceptability of the risk is plainly a question for the court. But because the opinion being expressed by the expert is a very large part of what the court has to actually determine, in the absence of anything else, the court is likely to be persuaded by it, even if there are express limitations on it. Would you accept that?

PROFESSOR NOLAN: I think it's weighty, yes. And it's about the way you actually express your conclusions and your findings which are important there. There are a range of approaches being taken in other jurisdictions to try and change language from low, medium and high risk that comes out of a tool such as the VERA-2R or other tools to other types of language. I'm thinking of the guidance by the Risk Management Authority in Scotland there.

But you only have to look at the Benbrika decision and some disputes between forensic psychologists and psychiatrists about the way in which "high risk" is assessed and described and predictive validity issues and issues of whether there's enough information there to answer the question as an expert as to whether you think the relevant offence is to be committed otherwise, or there is risk of it being committed otherwise.

And, you know, again, what's really important there, to remember, is that very rarely - or hardly ever - would you have a risk assessor as an expert only basing their views on the outcome of a good or of any structured professional judgment tool. That is one of many sources of information which forms the basis of their professional opinion, and if you read the HRTO cases or the THRO cases, there is a lot more evidence than just the risk assessment that goes to the professional's final opinion.

And as I said before, best practice is to admit the limitations and strengths, as the author of many tools do often describe in published literature or otherwise.

MR DONALDSON: Adrian or Kristy, are you able to or wanting to say anything about that?

DR CAMPION: Yes, I just wanted to briefly highlight a point raised there by Professor Nolan, which is that there is a - what I would call a strong recognition in the academic literature of the limitation of these tools. So much so that a recent study from 2021 by a team actually suggests that not only are the tools to be handled with caution, but that the entire field of risk assessment with relation to extremism is - and I quote "still in its infancy". So that would just be my point of emphasis on Professor Nolan's comments.

MR DONALDSON: And what flows from that - because I'm familiar there's a book that's been published actually by NATO just this year which deals with a number of papers that have been presented in relation to that very matter. And what it highlights, I think, is the issue that has troubled or excited a number of the lawyers here, is that the court being required to have regard to a matter that might not otherwise satisfy the legal requirements for the admissibility of expert evidence or expert opinion.

Now, that might just be the way it has to operate, and it seems as though a deliberate choice has been made by the legislature, that the court is to have regard to these reports even if they are inadmissible. Now, if that's what's happened, that's what's

happened and whether that's a good or a bad thing is something that I will be commenting on. Sorry, did you want to say something?

PROFESSOR CHERNEY: I think that's correct; there has to be an acceptance of that. I'm not an expert on evidence - admissibility of evidence. Because there is an inherent uncertainty around risk assessment. And like Peta said, they will never reach a level of predictive validity like they do in other fields. Because you just - you are just not dealing with the same size of the cohort. We have huge variability in risks and needs and vulnerabilities. There is no terrorist profile.

So you are never going to reach that standard of predictive validity in the field. So that there has to be an acceptance of uncertainty in this area. But when a risk assessment is done, when a VERA-2R is done, it's about the totality of the case formulation. It's not about one each individual high, medium or low across its five, six domains, okay? It's the totality of the case formulation that matters, not an individual rating of a particular indicator. And this is why we have to - this is why it's important that it is true that the VERA can only be one source of information to make a decision how best to manage residual risk.

MR DONALDSON: Yes. Yes, sorry, go ahead.

PROFESSOR CHERNEY: And the point - I know, you know, it is a - the reason that VERA has emerged as the primary tool is because the Government, Home Affairs has chosen it. But there are other tools. You could use ERG. You could use TRAP-18. But we would still be having the same discussion. It wouldn't matter what tool you chose.

MR DONALDSON: Please don't misunderstand. This is not an inquiry into VERA-2R.

PROFESSOR CHERNEY: So the VERA - the emergence of VERA is a quirk of choice within the Government.

MR DONALDSON: I know. I well understand and I'm not criticising the VERA-2R tool at all. I'm actually trying to explore, really, the risk assessment process rather than the VERA-2R.

PROFESSOR CHERNEY: And the issue of the risk assessment is about how best to manage risk. That's the ultimate question. Not the prediction of - or likelihood that someone will go on to commit an offence. It's about how best do you manage this person's individual risk, given what they have done, given what they are currently doing and what supports may exist for them to help them on that pathway.

MR MOONEY: And that's what VERA-2R was aimed at, to assist people manage and plan interventions to manage the risk that it identifies.

PROFESSOR CHERNEY: That's correct, yes.

MR MOONEY: But in this context, it's being used primarily as a predictive -

PROFESSOR CHERNEY: Some would argue, very differently.

MR DONALDSON: So that's interesting, Adrian - sorry - that's interesting, Adrian, because the task which is before the court under the Act is to determine whether there is unacceptable risk of a -

MR MOONEY: Future event.

MR DONALDSON: Future offence. And then the court has to determine whether there are no less restrictive measures available to prevent that unacceptable risk. And one thing that has not necessarily occurred to me is the role that the risk assessor plays in that second aspect of the inquiry. And so you're saying - and could you please expand on the importance, if there is any, of the risk assessment process there?

PROFESSOR CHERNEY: So everyone - so I understand why lawyers and etcetera, you know, would make criticisms of risk assessment. Because, in this space, it has huge consequences for the individual - their ongoing, continued detention. So it's implied that risk assessment is always negative. But in actual fact, risk assessment can be a positive thing for the individual in track their change over time and the designing ways of supporting them to better disengage.

It's an opportunity for the individual to demonstrate that they have changed, or they are signalling their willingness to desist. It doesn't always have to be an inherently negative task or have an inherently negative outcome. I can understand why people would criticise it in this context because the outcome is the deprivation of liberty, but the use of risk assessment is not always inherently negative. It is always - it is - it can flow into that second part you are exactly talking about and how you tailor rehabilitation.

MR DONALDSON: Well, again, just be clear, I'm not sure that it necessarily follows that every risk assessment is negative, to use your term. You could get a risk assessment, for instance -

PROFESSOR CHERNEY: And they have negative consequences.

MR DONALDSON: - that says this person is not a risk, and the process doesn't apply to them on that basis. You can also have a risk assessment that says, "Well, if this person is released unrestrained or unrestricted into the community there is a risk of particular offence occurring." And what - but what I'm interested in is you say, well, then there is an important role for the risk assessor to play, to say, well, here are conditions that might apply that would sensibly eliminate the risk of offending.

PROFESSOR CHERNEY: Offending, yes.

MR DONALDSON: Because it's not entirely clear under the Act whether the risk assessor plays a role - they have practically, but actually plays a role in assisting the court in that second stage. But from what I understand you to be saying, Adrian, you think it's absolutely - I don't want to put words in your mouth, but it's critical that the risk assessment process also involve those issues as to whether there are other means by which that risk could be managed. Other than detention.

PROFESSOR CHERNEY: Well - other than detention, for sure, because surely risk assessment is not only about predicting the threat in an individual phase, but surely it's also about what are the packages of support that can be tailored to this individual to ultimately assist them to reintegrate that would have an effect on reducing future risk.

MR DONALDSON: Yes. Can you help me with this? We have a recent decision under the Act as it currently exists where an extended supervision order was available where the court was satisfied that an extended supervision order would not be effective in preventing the risk of re-offending. Just as a general proposition, would you think that that would be a rare circumstance? That there is - the only means by which you could deal with or appropriately respond to the risk of a person committing a Part 5.3 offence is to detain them?

PROFESSOR CHERNEY: It's hard to answer that question.

MR DONALDSON: Okay. That's fair enough. Okay. So another issue that has arisen - and I know that you addressed it, Adrian, in your submission to us, is - again deals with risk assessment. But involves, I think - well, emerges out of the current circumstance in Australia where the VERA-2R is the tool which is used by Home Affairs in - as forming part of the risk assessment that occurs under Division 105A. And it in effect administers the VERA-2R tool in Australia.

So it is the accredited provider of training for that scheme; it's the body which is responsible for accrediting people in that scheme; and there has been some disquiet expressed about that process. And one of the issues that has arisen is whether = there would be or may be benefit in having an independent body that is involved in accrediting people who, in effect, will be qualified to provide risk assessment reports for the purpose of part 105A of the Code. Do you have - I have read the view in your report. Is that still your position? That is, you're not in favour of such a body?

PROFESSOR CHERNEY: My answer to that question about establishment of an independent body is mainly influenced by pragmatics and economies of scale. So the model of the Scottish authority, I mean, my understanding is that the Scottish authority has responsibility for all types of risk assessment, not just extremist risk assessment. And I can - I accept the argument about the benefits of having an independent body. I accept that.

And, yeah, the argument could be made - could be made - that there is an issue of optics here when you have the body that is administering the tool is the same body that accredits people and trains people, that is, Home Affairs. However, my position is that in establishing such a body, there's a whole raft of tricky considerations. I will just give you two examples. So one is you asked Peta in the previous session about what constitutes an expert in risk assessment.

So one of the critical characteristics is they actually have experience in doing risk assessment. Now, you are shrinking the pool there of individuals who have been trained in the VERA and experienced in engaging in this cohort, developing case formulations and making risk assessments. They lie within state-based agencies. That's where the dominant expertise lies.

MR DONALDSON: Just pause there. Everybody has got to start somewhere.

PROFESSOR CHERNEY: True,. So - but you want to define what an expert is, that's obviously - that's an important picture of it. So does that mean you would actually second people into the independent - those sorts of people into independent agency, which then may create problems for their own intervention work? You have still got the issue there is a small number of psychs who are trained in VERA. They have their own private practices. Are they part of the independent body? The other issue is that the ability to do risk assessment is that you have got to access to a whole raft of information.

You might do a clinical interview with the individual, you might start collecting information from other agencies. But then you've got to be able to do that, there might be agencies like AFP, Home Affairs that have relevant information, but you might not have security clearance to access that information. That's another requirement. So you are shrinking the pool even further. So there's this whole issue of how you would staff the agency.

And the other thing is that an independent agency - I mean, I hate to be flippant here, all right. We are not talking about a large number of offenders. It wouldn't be very busy. Like, you know. So there's that issue around resourcing, etcetera. The other issue is around training, licensing. So there's a whole range of pragmatic issues that are driving my answer to that question. I don't think it's inconceivable that you could still have Home Affairs - you would have to ask Home Affairs this question of how it actually operates.

I mean, you know, where you could have experts seconded in or Home Affairs engaging individuals and still have the same process apply. Yeah, I would agree that there are benefits in an independent authority, but there is a whole raft of those - these other pragmatic considerations I've just mentioned.

MR DONALDSON: Yes.

PROFESSOR CHERNEY: How it would operate, etcetera.

MR DONALDSON: I think as I said in the earlier session - and I think you were here, Adrian - the thing that actually concerns me most really about these matters is really the extent to which there is or is perceived to be any limitation upon the capacity of researchers to consider the - let's use an example, the validity of the VERA-2R tool. Now, if there is a - well, if there is the reality that there is a restriction on the capacity of researchers to engage, that is a very real problem. But even a perception of it would be an issue of it as well, I think.

PROFESSOR CHERNEY: Yes. So there is a problem -

MR DONALDSON: Yes -

PROFESSOR CHERNEY: Yes, when you look VERA, there is a problem around the amount of research that's been conducted on it compared to other tools like TRAP, okay. ERG, again, it is pretty limited. And to do research in VERA, yes, it would be - it's important to have access to the tool itself. And there are some limitations around accessing that tool. In my own case, luckily enough, we have a project with the Australian Institute of Criminology funded project into the VERA tool itself and, yes, Home Affairs has agreed to provide us with training in the tool as well. And we are going to do some other work around that.

So, for me, it hasn't been so much of a problem but the open accessibility and the public accessibility of the tool is an issue when you compare it to what's available when it comes to other types of risk assessment tools and the academic literature.

MR DONALDSON: I see. So that's a limitation specific to VERA-2R at the moment, is it?

PROFESSOR CHERNEY: Yeah, within the actual research literature. Yeah. So most of - there's no - there's - well, most of the studies on the applications of the VERA are published by the authors.

MR DONALDSON: Yes.

PROFESSOR CHERNEY: There has been one small study done years ago, where they did some case studies, but there's been no independent - like, an attempt to do a validation study. I won't call what we're doing a validation study yet. Let's watch this space because we don't know how the data is going to fall. But we are - that's one of our goals, is to do some testing around the validity of VERA. But, yeah, within the academic literature there's not a lot of independent scrutiny of the VERA tool because of this inability to access it. But that's - I have to say, you know, that's a problem, but I'm not making - I'm not pointing criticism at anyone in particular --

MR DONALDSON: No, I understand. But it's obviously a problem, I would have thought.

PROFESSOR CHERNEY: Yeah. You want TRAP, you contact the TRAP - Meloy. You can get access to it. This is not the same level of - yeah.

MR DONALDSON: Yes.

MR MOONEY: And, of course, it comes to a head a bit in HRTO because the defence is reduced to cross-examining the VERA expert, but it's not in a position to put up their own VERA assessment and Hollingsworth J actually made that comment that, "Yes, I've had the benefit of the cross-examination but I don't have another assessment based on the tool to judge it again". So there is -

MR DONALDSON: Not only that, there are limitations on the extent to which independent researchers can undertake research.

MR MOONEY: Can undertake it themselves, yes.

MR DONALDSON: So when one talks about the court being made aware of the limitations of the tool, say, that really relies upon those who are trained in the tool to bring them to the attention of the court themselves, which - with good experts, it happens.

PROFESSOR CHERNEY: With research on VERA, it's not just about identifying its limitations; it's also identifying how its application can be enhanced.

MR DONALDSON: Of course, of course. Yeah. I was just using limitations as an example of what may come out of research. But the research may show that it's the best thing since sliced bread. Can I ask you something else, Adrian, but I will be interested in everybody else's views as well? As you know, under the Act at present, relevant experts - they are not defined but there is a provision that states that, essentially, medical practitioners and psychologists can be relevant experts, and there is a broad catch-all of others.

But what I want to try and understand, and Peta gave some very helpful evidence earlier, is this: A person is undertaking a risk assessment exercise in relation to a defendant and relies upon various tools. VERA-2R might be one. There may be others as well. So that's a tool that is used. But then the person applies to that or the assessor applies to that their professional judgment or other skills. Is there anything that is intrinsic to medical practitioners or psychologists that qualifies them to do what else is required to be done as opposed to a social worker, say, or anybody else? Do you understand what I'm saying?

PROFESSOR CHERNEY: Yes, let's hear what Mark -

MR DONALDSON: Were you going to jump in there, were you, Mark?

PROFESSOR NOLAN: I will if Adrian wants me to. The - one point I would make is whatever is the expert evidence there, it's more than just describing that there is an

expression of ideology or there is an expression of beliefs that's triggering aspects of the VERA-2R or any other tool. It's also about whether that expression is assessed by an expert with clinical or other experience of working with offenders will be - and these types of offenders - will translate into engaged behaviour.

And that's the crucial part of this. It's an expert that needs to talk about what's being expressed, what is being said, what do I assess that to be. How close does that come, in my mind, to translating into engaged behaviour. And to do that, the relevant expert is more than just an assessor of the ideology or an assessor of risk of offending using the VERA-2R, for example. There's a more holistic judgment has to be made about the path that someone is on and the way that that engaged behaviour may or may not change over time.

These are questions that clinicians are asked in bail applications. These are - and bail orders. And these are questions that clinicians are asked in terms of a range of other law and psychiatry, law and psychology questions, whether it be to do with mental impairment or not. You know, there are reasons why clinicians have ended up doing this work, because they are looking at the way in which an offender is going move throughout time with support or without support to manage an ideology and whether it ends up in engaged behaviour.

So when I look at this, I don't see that this is particularly surprising, that a clinician is part of the recommended experts. If you look at the way in which relevant experts were defined in very early state sex and violence regimes, they were like this. Medical practitioners, GPs were added in some regimes. The "any other expert" has been added in the terrorism regimes and, you know, that's a little bit different to what you see in some of the sex and violence regimes as well, and the actual prevalence of the use of the "any other expert" is a bit different too. So I will stop there.

MR DONALDSON: I suppose the only thing about that is, although this is not an unfamiliar formulation in dangerous sexual offender legislation, for instance, I think that the explanation for that is that there are recognised psychiatric conditions that predispose a person to sexual offending. There are psychological factors that are well understood as predisposing a person to sexual offending as well.

But what I don't quite understand in here - and I think it diverts attention - is the definition of relevant expert is a person who is competent to assess the risk of a terrorist offender committing a Part 5.3 offence, who is a person who's a medical practitioner or a psychologist, effectively. I'm just not sure why we need that. Like, it might sound a little prosaic, but I think it diverts attention, actually, from the real question that the person is a person who is competent to assess the risk. Whether they are a psychologist or anybody else doesn't seem to me to be particularly important.

PROFESSOR CHERNEY: Assess extremist risk. That's what's important -

MR DONALDSON: The risk a terrorist offender committing a serious Part 3 offence.

PROFESSOR CHERNEY: Yes, so - and that requires understanding of radicalisation, etcetera.

MR DONALDSON:. Quite so.

PROFESSOR CHERNEY: The issue of who is the more appropriate expert, I have no position or opinion on. What is interesting is that if you read the coronial inquest into the Usman Khan case in the UK, which is the London bombing case, the Fishmonger Hall individual who - there were arguments he was deceiving whether he was disengaged, one of the key recommendations from the coronial inquest into that Usman Khan case was that the appropriate individual to administer an ERG is a trained psychologist.

Okay, whether it is administered in the community, whether it's undertaken in the community or the correctional context. Because, in that case, that - prior to Usman Khan's release, an ERG was done by a trained psychologist, and then an ERG was done by someone in the community by someone who was not a psychologist and they actually rated his risk much lower than what the psychologist did. And so one of the key recommendations from that coronial inquest is that trained psychologists in risk assessments must be doing ERG evaluations of individuals, whether - particularly when they are released into the community.

MR DONALDSON: Sorry, I haven't read that coronial report but why - do you say why the coronial recommendation -

PROFESSOR CHERNEY: Because they were the most appropriately trained individuals and experienced individuals to do that.

MR DONALDSON: And experienced not only in relation to risk assessment, if I can put it that way, but experienced in dealing with - well, experienced in what?

PROFESSOR CHERNEY: Experience in risk assessment, in risk assessment more broadly, but also because a lot of their individual - the psychologists who are doing ERGs are trained in extremist-related research and practice, etcetera, as well.

MR DONALDSON: But is that adding much more to - you want somebody who's trained and experienced and competent in dealing with risk assessment? My question is, whether there's - I'm not having a go at the psychologist, by the way. Is there anything independent of that that is added by specifying that a medical practitioner or a psychologist might be the appropriate person? Or the best person?

PROFESSOR CHERNEY: Well, as I said, I'm just saying that I don't have a particular position on who is most appropriately - should serve as an expert, but that's one way of - that reference is one way it's being dealt with it, the recommendation.

MR DONALDSON: That's very helpful. Thank you for that, Adrian. Sorry, Mark, are you just bouncing on your feet, are you?

PROFESSOR NOLAN: Sorry, I'm curious as to whether Kristy has got a view here too and any views about the risk management authority that Kristy might have. And I can add to that, if you want.

DR CAMPION: Yes, look, I - I hold the view that to be held as competent may not necessarily be enough, that maybe they should also be expert in the matter in which they are assessing. One of the issues I hold with our current system is that there appears to be a slight gap in the process that leads someone from point A of wanting to get accredited, wanting to get training, to then being in the position where they are holding this incredible privilege and power.

So my concern is that, essentially, when you are looking at the existing tool, we had the creator of the tool testify to the AFP Review of Powers in 2020 that they are actually not responsible for vetting who gets trained in the tool and that that responsibility actually lies with the accreditors. And with the accreditors, it's simply relevant experience. And so that, to me, strikes me as, well, that's just relevant experience; that's not necessarily demonstrated expertise in this matter. So I guess my concern is that the threshold may in fact be quite low.

To sort of refer to what Mark was just saying about the Scottish authority, one of the benefits, I think, that that brings into this is greater scrutiny of the tools in question, but also an open and honest debate about who's using them and whether or not they are actually qualified to do so. And when I say "qualified", I don't just mean they did three-day course. When it comes to the study of terrorism extremism, three days is - you know, you can spend a lifetime doing this sort of research before you can truly consider yourself to be an expert.

So I think that more debate, more discussion, more transparency over the tools, who uses them, and the people who are put in positions to operate them, would work towards, I think, a greater understanding and appreciation of the strengths and limitations, yes, but also moving towards a more transparent discussion within our greater community of practice, but also with the communities who feel targeted by this tool.

So I see it as something that moves towards efforts of social cohesion as well, which I know is quite beyond the bounds of what you're looking at here.

MR DONALDSON: No, but equally - can I make it clear, I'm not wedded one way or the other - at this stage, anyway - to any notion of an independent authority. But there may be other ways of dealing with the issue, and that may be by ensuring that the court is made aware of information that is not brought to the court's attention in relation to the limitations of the tool. And, of course, one possible aspect of having an authority is that some of the information about who is accredited and not accredited and why and who is a competent expert and who is not a competent expert

may not be as clear in that process than having people exposed to fulsome cross-examination before a court.

So there may be other ways of dealing with the perception that there are issues with these risk assessments - if there are any issues with these risk assessments. I think the point that Adrian made as well was a very important one, and, again, it's consistent with what Peta was saying earlier. Because the reality of it is, when you are looking - when you are talking about people who are competent to be expressing these sorts of opinions, they are not only people who have had a three-day training course in VERA-2R.

These are people who have had a wide relevant experience in dealing with these matters. Well, I think as Adrian says, the people who are doing that are people who are working for prison authorities or various other government bodies that is responsible for these matters. I'm not saying that's the complete answer, but they are, as I understand it, the people who have the most experience dealing with these issues.

DR CAMPION: So I would make a distinction between - and this was as stated by Pressman as well - between people who are trained in the use of these things who do exist within government apparatus, so in one way, shape or another, and they do go on to list not just correction officers, of course, who do have wide experience, but also social workers, psychologists and so on. What I'm referring to is independent bodies - independent or private businesses that gain these qualifications.

From the point of accreditation, there's a three-year gap, right, before they need to reaccredit. My issue with that - and there's - this is something we have come across in our research with the Domestic Threats Team at Charles Sturt University, is that the field - the rapidity of research at the moment into various threat natures, specifically the extreme right, indicates that after three years, your knowledge of what might constitute an extreme right-wing ideology is going to be extremely limited.

And so that's why I question competency, because so many things change. But also to build on that, the actual website for this existing tool incorrectly defines right-wing extremism. So that leads me to question so much more about this, particularly because there have not been rigorous academic studies testing its application to right-wing extremist offenders. There have been applications of TRAP-18 to anti-government offenders but, to my knowledge, not VERA-2R. So -

PROFESSOR CHERNEY: That's a really good point. It is - the area of violent extremism is a very quick and changing field, and you may have an individual who are trained in VERA who are mainly applying it in the Islamist and jihadist space. That's their experience. But now you have got, you know, emerging of far right, incels, accelarist movements, and that's a completely different scene and ideology. And so there is a requirement for experts to really be being kept up to date with the

nature of the changing field of violent extremism which will allow them to actually do accurate risk assessment tools, given the nature of the threat is changing.

Like, even ASIO says that a significant amount of its case work is now far right. And that's a different - that's a kettle of fish to, you know, Islamists - in the past, the main threat has emerged from Islamists and jihadists. And now you're seeing a shift. And I think the risk assessment, the risk assessment practices, training has to change as well.

MR DONALDSON: Well, that would rather suggest that rather than the notion that the people who are best qualified to do this are the people who are just doing it day in day out - that might be right, but there are plenty of people who do things day in day out without having regard to changes that are takes place in their field. So we really are talking about some form of, I suppose, accreditation of people who are competent to be expressing their - or to be undertaking these risk assessments.

It might not be an authority, but some form of accreditation perhaps, or other means of ensuring that the court is aware of the strengths and weaknesses of what's before them. Because I think it is - defendants are in a difficult position at the moment in trying to respond to these risk assessments that are put up by the relevant Minister that are undertaking them. All right.
. Can I thank you, Mark; you, Kristy; and you, Adrian, very much for not only the written submissions that you have provided, both of which have been - there was a joint one, but both of submissions are very helpful, but the session this afternoon has been very insightful and has been of great assistance to me.

So thank you very much -. And I don't know if any of you were here when we started today, but there's going to be a further session later on 31 August at which the various government departments who are involved in this process will be appearing. Because since the provision of their written submissions to this review and now, there has been a change of government, and so they are going to go away and seek further instructions or having regard to - they are going to be briefing Ministers and coming back, possibly, with something else.

But, in any event, they are also going to be assisted by me telling them tomorrow things that I'm specifically interested in so they will be able to respond to that. So, please, if you're interested - and I'm sure you are - you will see further submissions that are made by the government parties by 16 August and then we are - is it 16 August? 12 August. And then we are back again on -

MR MOONEY: 31st.

MR DONALDSON: - 31 August for that further session. Thank you very much for the assistance of all three of you. That was very helpful. Thank you, Mark.

PROFESSOR NOLAN: Thank you very much.

THE PUBLIC HEARING ADJOURNED 3:36 PM

THE PUBLIC HEARING RESUMED 3:56 PM

SESSION 4: ISLAMIC COUNCIL OF VICTORIA

MR DONALDSON: Now, there we are. I can see people on the screen. So that's Mr Salman, Ms Haque and Ms McKenzie. I hope you can all hear me?

MR SALMAN: Yes. Yes.

MR DONALDSON: Good. Thank you. My name is Grant Donaldson. I'm the Independent National Security Legislation Monitor and this is a public session that we are conducting in relation to Division 105A of the Commonwealth Criminal Code.

Can I firstly thank the Islamic Council of Victoria very, very much for providing me with a written submission in relation to these matters. It was very important for me that the council has provided that submission, and it's been extremely useful to me thus far to have read that submission and to also have the opportunity to speak with you all today again. And I'm also very, very pleased that you are able to appear at this open session today, and I'm very grateful for your attendance and your assistance so far.

And can I say, that there are - and I urge you to - I would urge you to take the opportunity to speak publicly about these matters, if you could. But there are many matters that are addressed in your report that I think should be aired publicly and that should be much more widely known and understood than they currently are. And so I'm very grateful that you put that in writing and very grateful that you've taken up the opportunity to be able to make those points and others openly today. So thank you very, very much for everything that you've done so far. And I think that we were going to start with somebody making some - or more than one person, as many as you like, making some opening observations today?

MR SALMAN: Yes, good afternoon, Mr Donaldson, and to your colleagues. Yes, I will - I might make the opening statement, if that's okay. And then we can go into questions. Let me first introduce myself. My name is Adel Salman. I'm the president of the Islamic Council of Victoria, and my colleagues online are Amirah Haque and Bridget McKenzie who are joining me today. Just by way of very brief introduction to the Islamic Council of Victoria, we are the peak representative body for Victoria's, you know, 250,000-odd Muslim community, and there are - we are a grassroots organisation.

In that sense, we have member societies throughout metropolitan Melbourne and regional Victoria, which really advantages us because it makes us aware of what's actually happening in the community at the grassroots level, and we are aware of the

concerns and the issues confronting the Muslim community. Demographically, we cover all the different cultural groups within the Muslim community, which is very diverse. All the different age groups as well. And those born overseas, those born here, refugees, etcetera. So we are quite well placed to be able to make submissions of this nature. I just wanted to make that point initially, because I think it is important for you and your committee to understand that.

MR DONALDSON: Thank you.

MR SALMAN: Which is why we've made this submission, because we are very concerned about countering violent extremism and the way it has been applied and also the utilisation of some of these tools like VERA-2R. And that's why we've actually made a submission, and we welcome your comments as well that we should air our concerns publicly, and we have been doing that and we will continue to do that, and so thank you for that encouragement.

We have had, the ICV - and I will use the sort of the ICV to refer to the Islamic Council. The ICV, we have had direct experience in the past, years ago, with de-radicalisation programs. You may not be aware that we were actually engaged by the police, Victoria Police, to actually run their primary de-radicalisation program, which is still running today. And that was focused specifically on the prison system. So those convicted of terrorism. It was a de-radicalisation within the prison system.

So the ICV, we were engaged to work with the police in that regard. Then a number of years ago, it was decided that it would - the scope of the de-radicalisation program would actually broaden into areas in the community well before a crime has been committed, and that's when we said, no, we don't want to be involved in this anymore. Because we could see the risk that it would actually unfairly target the Muslim community by doing so. And, in fact, that is the case and more generally with CVE, as we have said in our submission.

So we have had direct experience with that, with these de-radicalisation or these CVE programs. We have seen the harmful effects of that, including the laws and the way they impact particularly young Muslim men and the way that they are, I guess, targeted by these laws and some of their civil liberties are restricted. And some of the common, you know, legal concepts are actually withheld in the case of terrorism cases, and it predominantly impacts Muslims and young Muslim men in particular.

We are also very concerned about some of the harmful police tactics that have also arisen over the years under the framework of counter-terrorism and national security. And, you know, we have actually written a submission in regards to harmful police tactics which includes things like encouragement, inducement and entrapment of people, which is very concerning, and then more broadly, CVE. We have a general concern with Countering Violent Extremism, which we've explained in our submission.

In our view, CVE is not a neutral framework. It is based on the flawed assumption that whole communities are more suspect - or more prone, I should say, are more susceptible to becoming radicalised to the point of committing violence, or a violent act, or committing violent extremism than others. And, to be frank - I think we can be frank and I think that the evidence that supports this - it is primarily the Muslim community that is seen as more at risk and more prone to being radicalised towards violent extremism.

And, in that way, CVE and the thinking behind CVE - because it does permeate in all aspects, if you like - it does actually contribute to anti-Muslim sentiment and Islamophobia. And there is discrimination and anti-Muslim sentiment within the security services, within the police, because they are conditioned to think of Muslims and somehow as being more suspect than other communities. We don't accept - and this is one of the issues we have with some of these tools like VERA-2R.

We don't accept that religious cause or - and religious ideology is valid. We don't believe that Islam as a religion is a cause of terrorism. We do not believe that. However, we accept that people will use religion to justify a political ideology. And that's very important because when you use the term "Islamic terrorism" or "Islamist terrorism", that basically means that if you are too Muslim or too religiously devout, somehow your risk increases of becoming a terrorist. We reject that.

Islam does not call for terrorism, as I think everyone would know, or most people would know. And to use the label of Islamic terrorism is very problematic, because it does actually frame Muslim identity as somehow at more risk of being - you know, more likely to commit terrorism and violence.

MR DONALDSON: Can I just interrupt? I don't want to appear rude, but can I just interrupt to say, you will never hear me using a term like "Islamic terrorism", I can assure you, and I think the thing that comes out most clearly out of your written submission - which was very helpful to everybody who reading your submission - is the extent to which you focus on the world "violent" in "violent extremism", which I think is a very important point for people to remember, and also that "extremism" should never be used as another term for religion or another term for any sort of religion or even a term for strongly held religious views.

MR SALMAN: Yes.

MR DONALDSON: So I think these are very important points that you have made and should be heard.

MR SALMAN: Yes, thank you. I mean, that's a very important point. And I think it has led to a number of - and this is not only Australia but around particularly the western world and more broadly, led to false positives. Individuals, children have been suspected of, you know, that they could become radicalised towards violent extremism because they have said certain things, they dress in certain way, they say

certain things, they are asking particular questions, and that's all because that somehow Islam is being conflated with violent extremism.

But we accept that people will use religious reasons to justify a political ideology. And that's really important for us you to understand. The development and the use of these risk assessment tools like VERA-2R needs to be analysed in the context of that broader framework, that broader CVE framework. We have got a number of concerns with these tools, including that there's - in our view, there is no real empirical evidence to support that they are - they actually work, they actually can predict.

And, you know, we believe they are very subjective and there's huge ambiguity there. And if you look at the results between different assessors, you will actually understand, you will actually see that there are huge differences of opinion about the same individual. And we have heard this from experts. We have engaged experts. And I think Amirah and Bridget will talk about that in their answers.

MR DONALDSON: So are you saying there that can be different results using the same tool -

MR SALMAN: Yes, absolutely.

MR DONALDSON: - depending upon the -

MR SALMAN: For the same person, yes, absolutely. Yes. And we've heard that from experts. We are not expert. We don't claim to be experts. That's why we have consulted with experts who have actually told us this. We - the use of the - the tools like VERA-2R in the space that's outside of the prison system, so if it's being used by people to actually predict someone within the community that may be, in their view, more at risk of committing a violent extremist act, that's even more problematic because the tool was never designed for that purpose. So the I think the tool is being used incorrectly. It is flawed - it is fundamentally flawed - but further problematic because it's being used for a purpose it was never designed for.

I have already spoken about religious cause. We don't believe it's a primary factor. And I think some - well, I joined to listen in earlier. Someone was talking about - I think the preceding submission was talking about these tools are being used by people who actually aren't properly trained. And that's a fundamental issue. You've got people who are not properly trained and they are being asked, and given very short training, inadequate training, and they are being asked to actually form a risk assessment when people who have a lot more training will actually differ between amongst themselves about the level of risk. So how could a person who hasn't got that deep experience and training be expected to provide an accurate assessment?

So that's by way of opening statement. Thank you for that opportunity. Obviously, we are happy to take any questions that you may have.

MR DONALDSON:. Well, thank you very much for that. Were either of Ms Haque or Ms McKenzie wanting to say anything by way of introduction? If you do, you are most welcome and please take the opportunity.

MS HAQUE: Thank you so much, Mr Donaldson. I believe Mr Salman has mentioned all the points for our opening statement. So happy to go into questions.

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MR DONALDSON: Thanks very much. Right. Well, thank you very much for those opening observations and I will come back and ask you some questions more specifically related to VERA-2R - well, risk assessment more generally. Because I think it's wrong to equate risk assessment precisely with VERA-2R. Because it's - as I think we have learned today is - it's only part of a risk assessment of course, VERA-2R or whatever tool is used.

But one thing that I would be very interested in hearing from you about - and it may be a bit unfair because it's not a matter that's dealt with in your submission, but I would be really assisted by this matter, if I can, is one of the - or a thing that is not dealt with within the objects of Division 105A of the Code, which sets out this is the purpose of this part of the legislation, but one of the matters that doesn't appear as an object of this legislation is the rehabilitation or reintegration into the community of people who would otherwise qualify for - for this scheme.

Do you have - does the Council have experience of being involved in - more specifically, in rehabilitation programs and reintegration programs with people who have been in detention?. Are you able to say anything about that?

MR SALMAN: Yes, happy to speak to that. I mean, as mentioned, we were involved with a de-radicalisation program. It's a police program a number of years ago. It is - it still continues, and that is the police's primary de-radicalisation program within the prison system, and, yes, it does have that element of rehabilitation. However, we are aware of issues with that program, and I don't - I'm not proposing to go into the specifics of that now, but it is important that people understand that people have been convicted of terrorism who are being - are required to undertake this de-radicalisation program will, if you like - and I'm using sort of slang, so pardon me for that, Mr Donaldson.

They will game it. They will game the system. They know what people want to hear and they will game the system. So - and also people who - I know people. So let me very clearly, I know someone who is in the prison system, who has been convicted of terrorism - unjustly, mind you. Unjustly, in my view. They are required to do these de-radicalisation programs. They are in no way a risk of being a violent extremist. In no way, shape or form, but they are required to do that because that's a condition of their sentence.

So I think that leads to injustice as well. So I think there are problems there. We also - the ICV currently runs another program, which is not about de-radicalisation, but it is about specifically reintegrating prisoners back in society. But it's not specifically targeted at people convicted of terrorism. They can be convicted of all sorts of crimes.

MR DONALDSON: So do you have a view on the best way that rehabilitation services or reintegration - or processes or reintegration process or rehabilitation processes could best be done if there are - if there are shortcomings in the way it's presently done, do you have a view on how that might best be done? With what we are talking about, which is people who have been convicted of terrorism offences, and my question is, really related to people who are part of the Islamic community because they are matters with which you have particular expertise. So is there anything that could be done better than is being done at the moment?

MR SALMAN: Look, I think so, Mr Donaldson. I think the problem with these de-radicalisation programs is that the only focus is ideology or, specifically, religion. So it's about, you know, tackling religious, you know, ideas that, you know, in the view of the police and others are contributing to someone become becoming a violent extremist. But all the other factors are ignored. If we are going to do a proper - you know, a proper reintegration of someone who has been convicted, we actually need to look at all of the causes of why they actually were involved in that in the first place.

And people will find that religion or ideology is only one contributing factor and maybe a small contributing factor. There are probably other factors that also need to be tackled. So I think a holistic approach to reintegrating somebody is required. But, unfortunately, at the moment, it is all focused on religion and religious ideology. And that's, I think, a fundamental issue that has not been addressed.

MR DONALDSON: So that is that - perhaps the opposite of what many people would think, that there is a focus in rehabilitation on religion, which many people might think is - well, that's a good idea, but, of course, religion is not the issue in relation to these matters.

MR DONALDSON: No. And, in fact, we argue - and I think my colleague Amirah will add to this, but just before I hand over to Amirah, I just want to say, that actually religion itself is actually a protective factor.

MR DONALDSON: Yes.

MR SALMAN: It actually protects people from becoming violent and committing violent acts. That's overlooked. And so people becoming more religious, we would say actually it's a good thing because it will actually divert them away from a path of criminality that may lead them to commit some sort of violent act in the future. Amirah, you wanted to say something, I think.

MS HAQUE: Absolutely. Thank you, Adel. So I just wanted to add as well to have a bit more context to the rehabilitation stage, but, essentially, we are saying that there is such a high prioritisation or focus on ideology in order to reduce the risks of re-offending or offending even. I think we have to understand this through the backdrop that Adel mentioned earlier about the CVE program itself, how there is such a high focus on ideology.

What we can see - this is even reflected in the Criminal Code Act Division 101, in the definitions of what terrorism is and what motivates it. We can see there is three factors which is political, religious and ideology. So we can see that within there as well, we have such a high focus on (1) ideology and also (2) how religion is almost used synonymously with politics and also ideology, which --

MR DONALDSON: Well, I would understand you e saying that actually religion shouldn't appear in that definition at all.

MR SALMAN: Yes.

MS HAQUE: Absolutely, absolutely. We would definitely agree with that. And, in that sense, how - what we can see is that programs themselves, and even VERA-2R has - there has been an overemphasis in a lot of assessments on ideology, and since there is that conflation with ideology and religion, typically, you could say the probability of a Muslim scoring a high risk for certain ideological risk factors is probably likely because they may show that they have, you know, a commitment to an ideology or a commitment to a faith; right?

But what we are saying is that increase of religiosity does not equate to an increase in risk for violence; right? So essentially what we are saying, to answer your question, Mr Donaldson, about what can we do better, essentially, what we are doing wrong is that we are misdiagnosing people by we're saying it's purely their ideology, hence why we created the problem, that the problem is religion. Hence, whatever solution we are doing is more focused on religion. However, we need to redefine what the problem is and actually look at what are violent indicators, right, in a sense that - on a fair basis with people, whether they are identifying as Muslim or not.

So I believe, yes, we need to look at their socioeconomic factors, which I understand are definitely looked at in other risk assessment tools beyond VERA. However, when we realise that someone is Muslim, all of a sudden we have risk assessors already thinking we should prioritise ideology because they are Muslim potentially. So I think a really big part of the solution is redefining - understanding the real problem.

MR DONALDSON: That's very helpful, thank you. And I think the other thing that comes out of that is - and we had a very helpful session earlier today with one of the VERA-2R practitioners who was very open on some of the positives but some of the difficulties with VERA-2R, but even to say that what this Division of the Act should be focusing on is - you know, is violence.

That also introduces notions, though, of those who incite violence or encourage violence or are involved in acts that precede violence. And sometimes with, let's say, a proselytising Christian sect, there can be a thin line sometimes between, you know, exuberant proselytising and what might be seen as encouraging a violent act. You can conceive of circumstances in which those two might be conflated. That's a very important line to draw between the two of them, I think, which is sometimes overlooked in some of these matters.

MR SALMAN: Yes, absolutely, Mr Donaldson. As I said, in my opening statement, we completely accept that religion and, you know, religious - people who claim to know about religion are using religion to justify particular violent acts. I mean, there is no question about that and people calling for it and giving it a religious, you know, justification, and, you know, that you are seen as somehow religiously a better person, a better Muslim, if you actually commit some of these acts. There's no question that actually happens. I mean, the evidence is there. To deny it will mean that we are denying reality.

MR DONALDSON: But you would say - but you would say falsely doing so.

MR SALMAN: Falsely. And in that - and when they do that, it's to justify a political ideology. It's not religion. Religion does not call for terrorism. And that's - that's the point that we are making.

MR DONALDSON: All right. Well, that came through very clearly in your paper, I must say, which was - the first part of your paper, I think, is something that should be read widely. But you've clarified that very helpfully today as well. Can I then - unfortunately, we have got time limits or I've got time limits on this hearing today, and we are coming, unfortunately, near to the end of the time. But can I just ask you specific - some questions specifically - or ask for your responses specifically about VERA or VERA-2R because you have made some observations about VERA-2R.

Could you perhaps explain to me in as much detail as you can what precisely you consider to be the shortcomings of VERA-2R as they apply to - and I think you would say the Muslim community generally, that is, what is the - I think are you saying there's an inherent distortion in the way that the tool operates in relation to the Muslim community? Could you perhaps try and help me understand that a bit better? If that is what you are saying. I hope I'm not mischaracterising what you are saying.

MR SALMAN: Yes, it is. And I want to ask, then, Amirah because I think, Amirah, you sort of touched on that in your previous response. And then maybe, Bridget, you can add to that, if you would like to.

MS HAQUE: Fantastic. Thank you so much, Mr Donaldson, for your question. So essentially focusing on VERA-2R itself, we have identified there is four key shortcomings that we see. So, essentially, the first one is what Adel already mentioned at the start, which is that there is zero - there's lack of evidence that there

is predictive validity in the post-sentencing space. So as soon as you take it to a pre-sentencing space, again, we are exacerbating possible inaccuracies; right? So, essentially, that's our first issue, which we mentioned earlier.

The second one - again, which we mentioned a bit earlier - was the way assessors which can overemphasis the constant ideology, and, again, part of that problem is due to a misunderstanding of the relationship between religion and ideology.

MR DONALDSON: And why do you think that - why is it intrinsic or inherent in VERA-2R that there is that confusion about ideology, do you say?

MS HAQUE: Yeah. So that actually moves on to my third point, which is the actual implementation of the tool is done by a plethora of people; right? We can have different experts in this field, whether it's psychologists or law enforcement. And, essentially, what we can see here is that particularly when we are assessing ideology as a factor, there is a clear lack of people who understand the Islamic theology who were actually involved in this risk assessment process; right?

So, essentially, what we can see is that there can be a big misunderstanding of what a suspected individual might have and misunderstanding of whether their religious commitment to a belief, whether that actually poses a risk or not. So, for example, we mentioned in our submission that even the word "jihad" - I heard earlier today, the concept of jihadist terrorists. Even that word jihad has layers and layers of meaning, and some of those meanings do not incite violence at all.

In some of those meanings, for example, there is an internal struggle of, you know, going towards what - you know, what was pleasing to God; right? Or a second aspect which we mentioned in our submission was that the concept of jihad is, you know, there might be a belief in, you know, a certain method of, you know, potential violence or something, but it isn't even a risk at the moment because those certain factors, contextual factors aren't even present today.

So even though someone might internally have, you know, a belief in the justification of X, Y, Z, there is zero risk of that even eventuating in a context of these types. So what we need is that people who are experts in theology, whether that's, you know, religious leaders, but also experts in psychology and things like that, trained counsellors, to be in this process in order for them to actually dissect and understand what is this suspected person that we are assessing - what is their understanding of, you know, this practice; right?

I think that's a really big missing piece, because we have heard from our interviews with certain experts that sometimes people even do the VERA-2R assessment by themselves - an individual person without, you know, consulting different people. So I think that in combination with the sort of context of Islamophobia that we currently live in, that there is studies, as we mentioned in our submission, that about 80 per cent of people in Australia have mentioned they have a less than reasonable

understanding of what Islam is. So that's just exacerbated when we can misunderstand what the actual risk is, yes.

MR DONALDSON: Well, that is very helpful and I think a matter that derives from what you have said is I think that there is a tendency in the community to think of the Islamic community as a monolithic singular thing. Whereas it would seem to me that there would be cultural differences between a Muslim who may come from Jordan for instance, as opposed to - or to be - or considered against a Muslim person who came from Indonesia. It's not - being a Muslim or a member of the Islamic community is not a singular or a monolithic thing.

And what flows out of that, relevantly to this, is we heard from earlier in the day from a person very experienced in the use of the VERA-2R tool, who said that her background is not dealing with, for instance, white extremist violence. And so if she came to administer the VERA-2R tool to somebody who had been convicted of terrorist offences but came from a - you know, from a white supremacist view point, she wouldn't really feel qualified to be singularly responsible for that assessment, and that often the VERA-2R tool is best used by a group of people who have different experiences and different capabilities. And it sounds as though that is very consistent with what you're saying about - or raising with some of the matters there.

So if you haven't looked at it already, if you look at some of the earlier - they will go online shortly - some of the earlier sessions from today, I think, are very consistent with what you've been saying there. And I'm very sorry, but we are getting near to the time limit, I'm afraid. But can I just make this observation as well. For the purposes of this review, a very important focus of this review is the role of the risk assessment mechanism or risk assessment in the mechanism under the Act.

And there have been sessions today dealing specifically with that risk assessment method and other sessions dealing with how the courts deal with this risk assessment in the process that they have to undertake. And although this is not an inquiry into the VERA-2R tool, certainly, there will be some things that will be said in our review as to this risk assessment process that is undertaken.

And certainly what you have provided in your written submission and what you have helped me with today has been very important in me understanding those issues further. So I hope you don't think me impolite in having to finish the session now, but we have got other things that we've got to get on to, I'm afraid. But can I thank can I thank all three of you, although I don't think we ended up hearing from Ms McKenzie, ultimately, but we are very grateful to all of you for the help that you've given us, and some of the insights in your report will certainly find their way into some of the work that we end up doing. So thank you very, very much indeed for your assistance.

MR SALMAN: Thank you. Thank you very much for the opportunity.

SESSION 4: QUESTIONS AND ANSWERS

MR DONALDSON: Okay. All right, so that is the final session today. There are further sessions on tomorrow, and as I indicated earlier in the morning there will be a final session dealing with representatives of the government agencies who I will be outlining to them some of the views that I have, and asking them ultimately to respond to those.. We have a question and answer session.. So there is a question and answer session. - I'm not sure - are there any people here who want to ask any questions or make any observations? Well, Peta, we have heard from you pretty much today, are there any observations or questions that you wanted to raise or statements you wanted to make?

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MS LOWE: Other than the observations that everyone has made about the predictive validity of the tool, I think it was an important point raised by ICV just then, and it goes to the point around a lot of the criticisms are not necessarily about the tool, it's about the application of the tool.

MR DONALDSON: Yes.

MS LOWE: And that speaks to also then the role of an authority around best practice and what are the particular standards that need to be met, and how is it best administered. Because the tool has inter-rater reliability to a level, provided that it's being administered to a certain standard by people. And so I think that also speaks to the fact that it's not necessarily the tool that's causing a lot of these issues, it's the way it's being used and who is using it. So I think there that has to be more consistency.

MR DONALDSON: Yes. And I think the point that came out of your session earlier today is that the tools - it's really the professional judgment that goes with the tool that is actually the issue, as opposed to the tool itself necessarily.

MS LOWE: Yes. And an expert in the space, when administering the tool, should know what they don't have expertise in and who to seek that expertise from.

MR DONALDSON: Yes. And so the issues that were raised by the representatives from the Islamic Council just then, which are very powerfully stated in their written submission, are they matters that would be addressed in the ordinary course, you would say, by a skilled practitioner with the VERA-2R tool?

MS LOWE: Absolutely. And I - I won't undertake assessments where there is that conflation between ideology and religion without seeking guidance from an expert in that space. And I think that that's best practice because I'm not an expert in specific ideologies and I do need guidance on that in order to be able to administer the tool effectively. And my role in that as an expert is doing the risk assessment process. Not in knowing every piece of information that needs to be known in order to apply

the tool, but knowing where I need to go to get the information to apply the tool effectively.

MR DONALDSON: I think it's a very important insight that's been made by the Council as to the conflation of extremism with Islam or extremism with religion or ideology with religion. You know, these are terms that need to be used carefully.

MS LOWE: Yes, and it goes to the point that they made about, you know, a three-day training doesn't make you an expert. And Dr Campion made it earlier. You know, it's not enough to say I've been trained in the use of the tool, you must understand the space. And I think Dr Cherney also stated how quickly the space moves. Experts in this space need to spend a lot of time staying up to date with those things, and it's not something that you can do once every three years. And Dr Pressman, the author of the tool, will also say it's not a tool that you can put on the shelf and never engage with and still be able to use effectively 12 months later. That's not the case.

MR DONALDSON: And is that why we had VERA, VERA-2 and then VERA-2R? Or have they been different changes to the tool?

MS LOWE: So there have been reviews and adaptations. The very last one was actually adapted in consultation with Dr Pressman because a lot of the indicators were not relevant for use with young people. So on that feedback that VERA-2R was revised again, and indicators were changed to be reflective of necessary things to consider for use with young people. It had never been used with young people before. So - but I think the other point that I just wanted to make, and it was talking to Dr Cherney before that reminded me, is that we don't need to train more people to use the tool. We need to properly skill, supervise and provide expertise to those who are already trained. And because we don't have large numbers of terrorism offenders in Australia, if we train more and more professionals in the use of the tool we are just going to end up with more people who aren't using it. And that's not effective either. We are better with a small number of people who actually have expertise in use of the tool and that means they are applying it often.

MR DONALDSON: Yes, I think that's a really important insight. And again, I think I've expressed this many times, this is not an inquiry into VERA-2R. When we are talking about these matters we are actually focusing on the risk assessment process under this part of the Act. That's what we are concerned with. But I think they have been very, very useful sessions today in relation to that risk assessment process. I think people have a much clearer - or I certainly have much clearer understanding then I did before as to the different roles that are played - or the different parts of the process in any event.

Now, Graeme, I think you're the only other outsider, if I can put it that way. Is there anything you wanted to say, Graeme, or any comments or questions that you had?

MR EDGERTON: Maybe there is one thing I can say that just picks up on some of the evidence given by Professor Nolan earlier on.

MR DONALDSON: Yes.

MR EDGERTON: Which was the idea of other alternatives to detention. So one thing that he had pointed to was a further less restrictive alternative, if I can put it that way, might be making a mental health order. It's not an alternative that's currently contemplated by the Act, but I think from the Commission's point of view we think that all less restrictive alternatives should be on the table. So whether that's something that's able to be imposed under the Act, a control order or an extended supervision order, or something that can't be imposed under Act like a mental health order or potentially a different migration outcome, which was something that was raised in the Benbrika proceeding, should be on the table. If only because that better fulfils our human rights obligations to make sure that detention really is a last resort. And if there are other things that can adequately deal with risk that they are properly considered.

MR DONALDSON: Yes. It is quite interesting that, because the Pender circumstance is, now whether - and again it's in the form of judgments - where there were mental health issues involving him and how that's actually dealt with under the - or would be dealt under the legislation now is interesting. But what flows - or one thing that flows from that, that occurred to me in the earlier session, is if you put an obligation upon the Minister to effectively prove that no other form of intervention would be adequate to ameliorate the risk, well, that could be a pretty big task if there is any sort of intervention. I'm not saying it's - I'm not saying they should necessarily have to do it, but that's potentially a large universe to think about before you embark upon that part of the exercise.

MR EDGERTON: I mean, it might flow into a comment that you made earlier, which is courts tend not to think about things that they are not required to think about.

MR DONALDSON: Yes, that's right.

MR EDGERTON: But it might be that if alternatives are put up by the person who might be subject to an order, they are alternatives that should be actively considered, and, you know, discard if they need to be discarded.

MR DONALDSON: Well, maybe you could have an ESO that had conditions that are customarily found in mental health supervision-type orders, I suppose. That could be done. Then one of the - an issue then becomes one of mental competence, I suppose. But, again, you just have to have a best friend appearing for the person in that circumstance. But maybe the short answer to it is that there's nothing that you could get under a - sort of a mental health intervention order that would not be able to be incorporated into an ESO. Maybe.

MR EDGERTON: I mean, if that is the case then that would deal with the issue. It might not deal with the issue that was raised in the Benbrika proceeding, which is potentially a less restrictive alternative is cancelling someone's visa and removing them from Australia. That might not be an alternative that you could obtain under an ESO.

MR DONALDSON: Yes, well, I think the other thing about that is the Federal Government could do that anyway, couldn't they? So if they wanted to do that in relation to say Mr Benbrika, they could do that tomorrow if they wanted to, couldn't they?

MR EDGERTON: They absolutely could. But the court hearing an application for a CDO wouldn't be able to take that into account.

MR DONALDSON: That they could or would?

MR EDGERTON: That they could as a less restrictive alternative.

MR DONALDSON: Well, because it's not put before them, you mean?

MR EDGERTON: Because it's not put before them, but also because the less restrictive alternatives that can be considered are those that are limited to -

MR DONALDSON: That part.

MR EDGERTON: - the alternatives in that part.

MR DONALDSON: That part. Yes, and then I suppose - well, I suppose that's - and that particular matter is specific to somebody who's not - well, who is subject to a 501, really. Yes. Yes. Yes, well, again, I will have to think about that - like the point has been made in some of the submissions as to the limitation of other alternatives available under the part. We will hear from the government agencies, but I suspect that the answer to that is that perhaps subject to deportation it's been assumed that everything else could be dealt with either by a control order or by an ESO. Maybe. And, again, I think if you are throwing in, you know, effectively cancellation of a visa and deportation - or are you talking about immigration detention? So were you referring earlier to permanent immigration detention or were you really talking about deportation?

MR EDGERTON: I was really talking about removal from Australia.
MR DONALDSON:. That's something to think about. Okay. Was that the only other comment or observation you had Graeme?

MR EDGERTON: Yes, thank you.

MR DONALDSON: Can I thank you again, Graeme, and you, Peta, for your help today. And I don't think - if anybody else wants to ask me something then can do so

in the conference room later, I suppose. All right. Well, thank you very much for your help today and for everyone's participation. We will be back tomorrow.

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