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INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

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

PUBLIC HEARING
DAY 2

THURSDAY, 23 JUNE 2022 AT 9:16 AM (AEST)
CANBERRA, ACT AUSTRALIA

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

EXHIBIT LIST

DAY 2
Date: 23/06/2022

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THE PUBLIC HEARING RESUMED AT 9:16 AM

ACKNOWLEDGEMENT OF COUNTRY BY GRANT DONALDSON SC

5 **MR DONALDSON:** Thank you very much. This is a resumption of the public hearings being held into Division 105A of the Criminal Code. As we begin this resumed hearing, I acknowledge the Ngunnawal people, the Traditional Custodians on the land on which we meet today.

10 **SESSION 1: LAW COUNCIL OF AUSTRALIA**

After yesterday's most interesting sessions, we have, again, two sessions today, in a traditional form, if I can put it that way. First the Law Council of Australia and, after that, Legal Aid New South Wales. After that, as I indicated yesterday, there will be 15 appearances from various representatives of the Commonwealth Government, which will be less of an iterative process than the other sessions.

But the first session this morning is with representatives of the Law Council of Australia. All of the Law Council representatives are appearing remotely, and if we 20 could just try and make sure that they appear on that screen as well. Sorry, we seem to have a technical issue because the Law Council people are all appearing remotely. There we are. Excellent. All right. So we have, from the Law Council, three representatives. So I think Mr Liveris is there? Tass?

25 **MR LIVERIS:** Yes, I am here.

MR DONALDSON: Yes, thank you. So Mr Tass Liveris, who is the president of the Law Council of Australia. We also have Mr Richard Wilson SC there.

30 **MR WILSON:** That's correct

MR DONALDSON: Hello, Richard. And Richard is a co-chair of the Law Council National Criminal Law Committee. And we also have Christina Raymond, I can see there, who is a senior policy officer with the Law Council and is well-known to this 35 office for her past efforts on various reviews. So welcome to you all. It may be that we will be joined by another representative of the Law Council at some stage in the future. I think there's been a technical issue with somebody. And so if that happens, that will be good. But otherwise we will just bat on with three representatives rather than four.

40

All right. So was anybody from the Law Council wanting to make some sort of opening or preparatory statement to get us going today?

MR LIVERIS: Thank you, sir. I do. I would, as the President, like to deliver an 45 opening statement summarises the Law Council's position. And I firstly extend my gratitude for the opportunity to appear at this public hearing of your statutory review into Division 105A of the Criminal Code. Thank you for permitting our appearances

to be made virtually. As you know, the Law Council, as you touched on, has made extensive submissions on the post-sentence regime for high-risk terrorist offenders as part of the enactment of that regime and its subsequent reviews.

5 I would like to take this opportunity to briefly highlight our key policy positions and recommendations on both the continuing detention order and extended supervision order regimes in Division 105A. The Law Council's long-standing position as you know, sir, is that detention should be imposed only as a criminal sentence following a person's conviction for an offence. It should not be available based on a prediction
10 of a person's future risk, which is a fraught exercise in the absence of an empirically validated risk assessment methodology.

Accordingly, our primary position remains that CDOs are not a necessary or proportionate response to the threat of terrorism and should not be renewed beyond
15 their sunset date of 7 December 2026. Consideration could instead be given to an extended determinate sentencing regime as is the case in the United Kingdom, that is, a person is given a criminal sentence with a fixed end date which includes a discrete and additional protective component known as the extension period. The duration of the extension period is determined by the court at the time of sentencing
20 and not later as a stand-alone application for a post-sentence order when a person is close to completing their sentence of imprisonment.

However, if there is an appetite to retain the CDO regime, then we make several alternative recommendations to address what we think are its most problematic
25 aspects. The most crucial of these is the adoption of the criminal standard of proof in relation to the finding that a person would present an unacceptable risk of committing a serious terrorism offence if released. This is preferable to the current standard of satisfaction to a high degree of probability. The criminal standard would reflect the close connection of post-sentence orders with the criminal process, the
30 grave consequences of the post-sentence order, and the fraught nature of making predictions about a person's future risk of offending.

This reform would ideally be complemented by several other of the Law Council's recommendations, including tighter rules about the drawing of inferences of future
35 risk, the repeal of current statutory limitations on the ability of the court to consider alternatives to continuing detention to manage a person's risk in the community, and the availability of timely legal assistance funding, potentially through the Expensive Commonwealth Criminal Cases Fund or a dedicated funding stream with transparent criteria.
40

In relation to ESOs, the Law Council has no in-principal opposition to such a regime; however, this is provided that it accords strictly with the design principles that were outlined by your predecessor, the third INSLM, Dr James Renwick SC in 2017. Dr Renwick recommended that the ESO regime should have the same higher
45 standard of proof as the CDO regime. This has not been adopted in the current ESO regime, which utilises the lower civil standard of proof. Dr Renwick also recommended that ESOs should be subject to the same conditions which apply to

control orders as at 2017. In contrast, ESOs can be subject to a considerably broader range of conditions, many of which devolve significant discretion about the exercise of intrusive powers to the specified authorities nominated in individual orders.

5 Finally, sir, the Law Council is also concerned about issues of interaction between different types of preventive orders and the absence of clear statutory parameters. In particular, we note the potential for control orders to be sought in the Federal Court or the Federal Circuit Court as an effective repechage for a failed ESO application that was made on the same basis and was refused by the relevant state or territory
10 Supreme Court.

Thank you again for the opportunity to appear. I am joined, as you touched on, sir, by a number of eminent experts and volunteers in this field, as well as significant expertise within the Law Council secretariat, and we are happy to answer your
15 questions.

MR DONALDSON: Well, thank you very much for that, Tass. Anybody else, were Richard or Christina wanting to say anything before I ask a few questions? If you do, you are most welcome, of course, but otherwise - all right. Thanks very much. I
20 should have also said, Tass, and I was going to deal with it at the end rather than at the start, but I am, as always, very grateful to the Law Council of Australia for the submissions that they have made to this inquiry already.

It is of enormous benefit to this office that bodies like the Law Council of Australia
25 are actively involved in the reviews that are undertaken, and it is obvious that a great deal of effort goes into the written submissions of the Law Council, but also the Law Council officers have always been very generous in making themselves available for public hearings and other interactions that assist me with this most important work.

30 So thank you very much for that.

Could I perhaps start by dealing with some of the issues that are of particular concern to me and just get a response,. One of the issues that is stark to me, when I look at Division 105A is the objects of the Division. And they were recently - or they were, I
35 think, substantially amended in the amendments to the Division that occurred late last year.

And the amendments to the objects provision seem to me to be a response to the judgments of Gageler and Gordon JJ in the Benbrika case. But even putting the
40 objects provision as it previously existed to one side, what seems to me to be stark about the objects provision is that there's nothing in the objects of the Division or really anywhere in the operation of the Division that deals with any attempts being made to rehabilitate defendants or to seek to reintegrate defendants into the community.
45

So it's a matter to which the court must have regard when it's considering making an order of the objects of the Act or the objects of the Division, and there is no object of

the Division dealing with the rehabilitation of defendants or any attempt to reintegrate them into the community. Does that absence in the objects provision of the division seem an oddity to anybody there?

5 **MR LIVERIS:** Sir, I might just say this and then - and defer to my colleagues. Certainly, Mr Wilson and others at the National Criminal Law Committee will say, of course, rightly, that rehabilitation should start at the time of sentence rather than at post-sentence detention. But whilst the Law Council doesn't have a fixed policy position on the question that you asked and we have not made submissions about it, 10 certainly, we consider the issue of including objects of the kind you referred to to have some merit. I say that as a broad response. Mr Wilson and Ms Raymond might have something more to say.

MR WILSON: If I can just jump in at this point. It's the objects as they are currently 15 drafted to protect the community from serious Part 5.3 offences, it begs the question - the timeframe of that protection, whether it's long-term protection or just immediate protection in the timeframe of the maximum length of a particular order. And leaving it as it is and the object being protecting by effectively these two methods tends towards that much narrower view, that it's really immediate protection 20 and -

MR DONALDSON: Well, it seems to me to be largely meaningless the object provision, actually. It simply says the object of the Division is to do what the Division does.

25

MR WILSON: Well, it also tends to if there's any ambiguity in purpose or in where a court's considering whether a particular condition is necessary, then it tends towards the short-term and containment of an immediate risk - rather than any amelioration of a longer-term risk by rehabilitation. So I think it's positively 30 detrimental, potentially, in certain cases to be as it is currently framed.

MR DONALDSON: Yes. And I think responding to that, Richard, and also to the observation that Tass made, although it is plainly correct and seems to me obvious that attempts at rehabilitation should be starting during the sentence of any of these 35 defendants, necessarily, because we are talking about a post-sentence detention regime, by the time we are considering the regime, whatever efforts have been made in relation to rehabilitation or reintegration have not resulted in a person being released into the community. A view has been formed that some sort of post-detention sentence, or post-detention order, is required.

40

But it seems to me that it is important, nonetheless, that there be a focus on further attempts at rehabilitation or reintegration during the post-sentence regime. And not only with detention, but also if there's an ESO ordered. And I understand that that seems to be a sentiment that's shared by the representatives of the Law Council.

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MS RAYMOND: Mr Donaldson, if I could just make an additional set of remarks just on that point in relation to the expression of subjective policy intent that was in

the joint departmental submission to your review. I do recall reading in that document that I think the intention was that the reference to community protection was intended to encompass rehabilitation among other matters. But I guess the counter to that is, given the centrality of objects clause to the making of the orders, the fact the court has to have regard to the objects of the Division in determining whether to make an order, I guess a higher degree of precision in drafting might be beneficial so that it's directing not only the court to have specific regard to rehabilitation as part of community protection, but also at the stage of making decisions about whether to apply for an order and the terms on which an order should be sought. I think that would potentially be a very useful degree of guidance to all parties.

MR DONALDSON: Yes, I think that's right, Christina. Community protection can mean different things to different people. And if rehabilitation and reintegration of defendants into the community is something everybody accepts should be an object of this part, then there's no reason why that's not stated expressly and clearly, it seems to me. All right. Well, thank you for that. Could I just ask one question, then, that follows on from the primary position of the Law Council, which is that a regime of continuing detention orders should not be maintained.

It seems to be a deal of the submissions that we have received that deal with international human rights norms and obligations in relation to post-sentence detention seem to be now at the stage, and I'm referring here specifically to the UN Human Rights Committee general comment number 35 from 2014, that, in effect, there are circumstances in which such regimes are consistent with or permissible pursuant to international human rights obligations.

But the limitations on that appear to be, or are stated to be amongst other things, that detention or such detention be used only as a last resort and there be periodic reviews by an independent body - well, there are reviews under this regime of course. Further, it's said that the conditions of detention must be distinct from the conditions for convicted prisoners. I will come back to ask you some questions about that in a moment because that deals with section 105A.4.

But also, and importantly, it's said that those conditions must be distinct and must be aimed at the detainee's rehabilitation and reintegration into the community. So it is a very strong emphasis, pursuant to this instrument anyway, upon rehabilitation and reintegration of defendants into the community. So There are a number of regimes for post-sentence detention that exist in jurisdictions other than in Australia. A number of European countries, as you know, have these sorts of regimes.

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Okay. Thank you. So we are also joined by Lloyd Babb SC, and Lloyd is the chair of the National Security Working Group of the Law Council of Australia. And thank you for making yourself available, Lloyd.

MR BABB: My pleasure.

MR DONALDSON: So far as the Law Council's primary position is concerned, it might assist me to understand, is that also the Law Council's principal position in relation to post-sentence detention regimes for, say, serious or so-called serious sex offenders and the like? That is, the Law Council doesn't view that there are any circumstances in which post-sentence detention regimes are appropriate?

MR LIVERIS: Sir, we have made the point that we have concurred with the reasoning of the United Nations Human Rights Committee using the communications in Fardon where it's been pointed out that such regimes are incompatible with the prohibition on arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights. And that's the position that we have developed in our submissions.

MR DONALDSON: Yes. Thank you for that.

MR BABB: Lloyd here. I was going to say that I think our submission is partly based on the realities of the Australian situation too. We are failing to meet those requirements that would enable preventative detention to really fit in with a human rights lens. And the fact that people are being kept in mainstream prisons for the various forms of preventative detention, and the fact that rehabilitation is sometimes not the primary object, really impacts on the Law Council's position.

MR DONALDSON: Yes. Thank you for that. I understand that. It is of interest that section 105A.44, which deals with these issues, is a provision that's really based on the Victorian legislative scheme. So that provides for, well, it's quite an interesting formulation. So it refers to a defendant who is detained in custody in a prison under a CDO. Now, the term "detained in custody in a prison" is a defined term and it doesn't connote that a person could be detained in custody other than in a prison, but, in any event, it provides that a person who is detained in custody in a prison under a CDO 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, pausing there to make one observation, that presupposes that it can be consistent with a person's status as not serving a term of imprisonment, that they can be held or detained in custody in a prison, but that's the way the legislation operates. But it then goes on to provide that there are substantial carve-outs to that. So the person must be accommodated or detained - or must not be accommodated or detained in the same area of the prison as the general prison population.

So that is a requirement of the section, although it is subject to a number of carve-outs as well. So that provision exists in the legislation. And it exists in the Victorian legislation which deals with serious offenders in the Victorian state-based scheme. A similar provision doesn't exist in I think any of the other state-base schemes, and if they are in some, it's not in very many.

One thing that is of concern to me or interest to me, however, is how that is actually regulated. So the decision as to when it says a person must not be accommodated or detained in the same area of the prison as others, that could mean that there simply be an area within the prison that in all other respects looks exactly like prison conditions, but a person is separately housed in that facility. And that would seem to me to be inconsistent with the way in which the section was intended to operate.

And then the issue becomes, well, if that is the case and if the requirements of section 4 are not, in fact, being met, what is the best way of, first, determining that, and, secondly, dealing with it. Is that a concern that anybody from the Law Council would share? That is, it's all well and good to say that people have to be detained consistent with their status, which is different from a convicted person. But there needs to be some basis upon which that can be confirmed or reviewed.

MR WILSON: That is a concern and I think when you look at the carve-outs, they are the sort of carve-outs that would be made as far down the chain of decision-making as the governor of a particular prison.

MR DONALDSON: Yes.

MR WILSON: And at the highest level, perhaps, at a Commissioner for Corrective Services who may be dealing - and I can't - I don't know exactly what's happening in New South Wales with these offenders, but I know there's a particular classification of a high-risk national security-type classification. I can follow that up in a written note with the precise definition. But there are not all that many of them and they are considered a particularly high risk and they are dealt with in a particular way and kept in a particular place.

And it would be very easy to say that the security manager - management or good order of a prison, if there was a part of a prison was designated in this way, could justify them being in with those offenders. Or if it was reasonably necessary for the purposes of rehabilitation, et cetera, if that's where the courses for counter-terrorism-type rehabilitation were being held. So there's a high likelihood of these carve-outs occurring and being seen to be necessary, given it's a relatively small number of offenders in the scheme of things.

MR DONALDSON: Yes.

MR WILSON: And I'm not aware of any stand-alone facilities having been built or maintained. They really seem to be integrated into the system and dealt with within the system but in the same way that we have remandees and I guess we have remandees and convicted people under the same roof. But technically in a different place, in a different part of the same roof.

MR DONALDSON: Yes. Well, the only example, really, I know there's a New South Wales case, but the circumstances of Mr Benbrika are probably the best indicia. And in Victoria there are bespoke facilities that deal with - because the

Victorians have this same provision - that deal with dangerous sexual offenders, for instance. But the facility in which Mr Benbrika is housed is contained within a prison, and so it's not correct to think of it as a cottage, as some of these things have sometimes been described.

The one in Victoria is within the confines of a maximum-security prison. And I think as you've indicated, Richard, if you look at the carve-outs in section 105A.4, a carve-out is that a change is necessary to the management, security or good order of the prison. Well, that is a fairly substantial carve-out, it seems to me, to the practical operation of the section.

MR WILSON: And even broader, the last one, the safety and protection of the community.

MR DONALDSON: Yes. Well, yes, we can have a lengthy and very dull argument, or conversation, I suspect, as to whether (a) or (c) is more troublesome. But they both provide an enormous scope to the limitation to the operation of subsection 4, it seems to me.

MR WILSON: Yes.

MR DONALDSON: And then the question is, well, if that's right how can that be dealt with? And there are various means, I suppose, by which that could happen. There could be compulsory, I suppose, reviews that are undertaken by a body. There could be a requirement for reports to be submitted from time to time by the detaining authority as to precisely what is going on.

One matter that has been agitated in some of the submissions, which would be an unusual process, but would require the applicant Minister to satisfy the court in seeking an order for a continuing detention order that an adequate facility in terms of section 4 was available. But there are a number of means, it seems to me, by which section 4 could be given a practical operation consistent with what's intended, and they're matters that I'll be considering as things go on.

Okay. Well, that's very helpful, then. Could I just ask, and I apologise in advance to people who are watching this on the live feed who don't have a copy of the Act available to them, because this is a complicated piece of legislation and, unfortunately, it's impossible to deal with it coherently without referring to some of the detail of the provision. I am concerned, and I'm really talking here about section 105A.7, and this is the process for actually making the order.

And so, as we know, the Act essentially proceeds on a premise that there can be an application for a continuing detention order. In an application for a continuing detention order, the court has power to either order that or, in the alternative, an extended supervision order. Or separate from that, there can be an application by the Minister simply for an extended supervision order. But in the matters that have come

before the courts already - or to date - they have been applications for continuing detention orders.

And so the interaction of how the court deals with a continuing detention order or an application for a CDO when it also has power to grant an ESO is something that interests me. So the task which is before the court is the application is brought; we will come back to what the court has before it actually comes to make its decision. But the court in making its decision under 105A.7(1)(b) and (c), the court has to first:

"...be satisfied to a high degree of probability -"

And pausing there. I understand the Law Council's submission in relation to the standard of proof. But just as the section operates:

"...the court is satisfied to a high degree of probability, on the basis of admissible evidence -"

I will come back to that as well in a moment, if I might. Anyway:

"...satisfied to a high degree of probability, on the basis of admissible evidence, that the offender possesses an unacceptable risk of committing a serious Part 3 offence."

So that's the first task before the court and then in (c):

"the court is satisfied that there is no less restrictive measure available under this Part that would be effective in preventing the unacceptable risk."

So in the application for the CDO, the court has to first consider whether the circumstances of the defendant are such that he or she poses an unacceptable risk of committing a serious Part 3 offence, if released into the community. And, secondly, whether there are no less restrictive measures available, and that, in effect, means either an extended supervision order or a control order under the Act.

So the forensic task that is before the court - and on the part of the minister - is to prove to the requisite standard that the defendant poses this risk and that an extended supervision order on any terms, it seems, could not prevent that risk. That is, it seems to me that the court has to be satisfied, before it can make a continuing detention order, that no ESO on any terms, even, if I can put it this way, on the most restrictive terms that could be imagined, would prevent the risk. So that's the task before the court, and that that is not an impossible hurdle to be overcome is rather proved, I suppose, by the Benbrika decision where that was the task before Hollingworth J.

But then what happens - and this hasn't happened yet, under the Act - but if a court decides that, well, there is an unacceptable risk of the person committing an offence, but the court is not satisfied that - let's put it bluntly - that an ESO could not prevent the risk, what then happens under the Act is you go to subsection (2). So if the court

is not satisfied, as mentioned in paragraph (c), then the court must seek the following material from the minister. And that's a copy of the proposed conditions of an ESO.

So the way it works is the Minister has to argue that no ESO would ever be suitable to deal with this risk, and if the court is not persuaded of that, the Minister then goes to the court and says, "Well, here are conditions which we say would." Now, in one sense, that's just putting a case in the alternative. But what, in fact - well, what in effect must happen is that the Minister, when the Minister puts up the proposed conditions for the ESO, would presumably, again, be putting before the court - if I can put it this way again - the most restrictive terms conceivable in relation to an extended supervision order.

Now, I think that's inevitable, the way the Act operates. If that's the case, then what happens in the application before the court in relation to the extended supervision orders is everybody is starting from the most restrictive, the most restrictive orders that can be imagined and trying to argue down from that, if I can put it that way. Now, it seems to me that the forensic consequence of that is pretty obvious. That is, you are going to end up with fairly restrictive conditions as a practical matter.

There's a possible alternative to that, and that is that if the court is satisfied that the defendant poses an unacceptable risk but is not satisfied that that an ESO could not deal with that risk, rather than the Minister then come to the court with the proposed terms of an ESO, that the defendant could at that point go to the court with a proposal as to the terms of a supervision order that the defendant considers would deal with or would provide the necessary restrictions to deal with the risk that has been exposed.

So rather than start, as it were, from a premise of the maximum restrictions, the court would be starting from a different starting point. That's a rather long-winded way of stating something that's pretty simple, really, but does anybody have any intuitive response to that?

MR BABB: One response might be that it's the state that is best aware of the various restrictive measures and that the respondent has a greater challenge in packaging something because the resources necessarily are state resources.

MR DONALDSON: Yes.

MR BABB: But -- now.

MR DONALDSON: Yes, I think that's one issue, but I would have thought that that could be brought to bear in the response by the state to whatever is put up by a defendant.

MR BABB: Sure.

MR DONALDSON: The other concern, which I don't think is correct but may be articulated to that, is it might be thought that it rather reverses the onus of proof there. That a defendant is, in effect, bearing a practical onus to establish those terms, whereas the onus in all of these matters is correctly on the defendant. But it just seems to me in the way that this provision must practically operate is, in the first application or the first hearing seeking a CDO, what's before the court is the minister saying, (b) is satisfied and there is an unacceptable risk and no ESO on any terms could prevent that risk.

And another thing that emerges out of that is, it would be just very difficult, one would expect, for a court to be satisfied that if the state is contending both (b) and (c) that it's really ever going to be failing in that circumstance of establishing that there's an unacceptable risk of committing a serious Part 5.3 offence. Because these hearings would - you would think - really then be about a defendant trying to satisfy the court that there may be terms of an ESO that could deal with the risk.

So - although, interestingly, in the Benbrika matter, that actually didn't seem to happen. There seemed to be discussions about terms of extended supervision. Well, it did happen in the sense that there were discussions about possible terms of an extended supervision order at the hearing before Hollingworth J. But I am concerned that the way in which this provision, 105A.7, operates, that what is going to be before the court when the court comes to consider whether an ESO would be a - let's just say - an acceptable alternative, that the court is always, as this scheme operates, going to be proceeding from a consideration of the most restrictive terms. And an offender would come down from that rather than another starting point.

MR WILSON: Well, the reality in New South Wales is that we don't have an equivalent of a subsection (2) that positively requires those conditions. But that's what the applicant for the order and the ESO in the alternative is going to do anyway. And if the applicant is applying for a continuing detention order, then that's what they are aiming for. And it is a case in the alternative if we can't get this absolute protection of the community by literal physical containment, then we go for a highly restrictive set of conditions.

And, really, the interplay - it depends on how far off the mark the court finds them to be, and sometimes they find the applicants to be far or the mark and it's a completely misguided application for a continuing detention order. Occasionally, that has been found to be the case.

MR DONALDSON: Well, I know that has happened in practice in at least one case, anyway.

MR WILSON: Certainly, in state matters, it sometimes happens. But there is this issue where there's a suite of potential orders which, virtually, you need to get permission to change the way that you walk to the shops and at the time you get the paper, or you will be committing a criminal offence. So I think no matter whether subsection (2) is there or not, that's going to be the reality in a lot of cases where the

application - the primary application is for a CDO with a back-up application, as it were, for an ESO.

MR DONALDSON: Yes.

5

MR WILSON: And it does create a forensic problem if you are appearing for an offender because, of course, you don't want a CDO, so perhaps it's better that, in this way, the question is at 105A.7 when had the question about CDO does have to include any conceivable ESO and that once you've passed that threshold, well, now
10 we are applying a completely different test in 105A.7A.

MR DONALDSON: Yes.

MR WILSON: But it is a major problem and I guess it's the definition of
15 "unacceptability of risk" is likely to be what's being followed in the state ones which doesn't include any aspect of the liberty of the person or any rights of presumption of liberty. So – unacceptability completely relates to protection of the community and safety.

20 **MR DONALDSON:** Yes. Well, could I just ask you about that, because the first issue really in this formulation is in (b). So this is in relation to continuing detention orders. And perhaps before I get to ask you a question or two about that, perhaps I can preface it by this: The first question or set of questions, which we haven't got on to yet, is how a person gets into the process in the first place. And at present, of
25 course, as you know, it's that a person has been convicted of various offences, one of the offences that are set out or serious part 5.3 offences.

MR WILSON: Ones that aren't terrorist offences but are --

30 **MR DONALDSON:** Yes, well, it's not only that. It can be Part 5.5 as well. But it's one of those offences. And so the gateway in is that a person has been convicted of one of those offences, and the person's in - theoretically in the process or is eligible, if I can put it that way, for an order, even if they've been sentenced to a relatively modest sentence.

35

MR WILSON: Yes.

MR DONALDSON: And it may be that the gateway into the process that is currently there is not the inevitable gateway. But once a person is in the process, then
40 the question becomes whether - for the court is whether on the basis of the evidence put before them the offender poses an unacceptable risk of committing a serious Part 5.3 offence. Now, a number of the submissions that I have received deal with a reformulation of that, and you may have seen the Human Rights Commission report. And it's the recommendation 3 of the Human Rights Commission report which
45 suggests a substitution of terms here.

So rather than "the offender poses an unacceptable risk of committing a serious Part 5.3 offence", I think it's adapting what Gageler J said in Benbrika, that the offender poses an unacceptable – I'll just paraphrase it - an unacceptable risk of committing, providing support for or facilitating a terrorist act. So the matter which is before the court is not the risk of committing a serious Part 3 offence, but is the risk of - and formulation here, committing, providing support for or facilitating a terrorist act.

And what that highlights is the risk that is being considered is not or may be something different from the risk of committing a serious Part 3 offence. So that is one issue. And then an issue - or the issue is, is there a matter different from the risk of committing an offence - committing such an offence that is more appropriate than what is in subsection B at the moment. Does anybody have a view on that? And perhaps if I can assist you further by telling you what concerns me.

Although it is correct to say that when one looks at all of the Part 5.3 - well, offences, or the serious Part 5.3 offences, they cover a broad range of conduct. And that is plainly so. And a person can offend against one of those provisions and, as has happened, receive a relatively minor sentence, that is, the level of offending is, in the scheme of things, relatively minor. And if that is so, then when one looks at the risk of committing a serious Part 3 offence, that could include, theoretically, the risk of committing an offence that in the scheme of things is relatively trivial.

And if that is so, and I've received submissions to this effect, that there should be a different formulation of what the risk is of, that is, rather than simply be committing a serious Part 3 offence, it be limited in some other way. And I've just provided to you the Law Council - sorry, what the Human Rights Commission said in relation to that. I'm a little troubled, I've got to say, by any formulation such as the Human Rights Commission formulation, because I think it is quite difficult, in an a priori way, to limit that criterion in the way that's proposed.

And what occurs to me to be perhaps a preferable way of doing it is to give more meaning by express provision in the Act of what is meant by "unacceptable." And as I'm sure you know, there's a Victorian case called Nigro, and I think Edelman J dealt with it in Benbrika as well, that the notion of an unacceptable risk brings within it a consideration not only of the risk that the conduct will occur that would give rise to an offence, but also a consideration of the - if I can put it this way, the inherent seriousness of the foreshadowed conduct and the consequence that that conduct would have on the community more generally.

So rather than - and so I'm sorry if I'm being very long-winded about this, but I find these very difficult matters, I must say. But so rather than changing the last operative part of that provision, that is, the risk of committing a serious Part 3 offence, more work is given to "unacceptable" along the manner in which I've suggested there.

So that would, or that could, deal with circumstance of a person in respect of whom the evidence shows, well, there is a risk that they would engage in conduct that could constitute an offence, but where that conduct is, if I can put it this way, very much on

the lower end of the scale rather than on the high end of the scale. And the Act shouldn't operate in relation to those matters, which seems to me to be so. The best means of addressing that problem is by perhaps changing or giving greater detail to the notion of what is an unacceptable risk. Do you follow what I'm saying there? I'm sorry it was so long-winded.

MR WILSON: If I can just say this, leaving it as is, in the way the New South Wales courts have understood unacceptable risk, they look at the likelihood of what might happen - so a catastrophic terrorism event where multiple people are killed.

MR DONALDSON: Yes.

MR WILSON: Compared with the likelihood of the risk of it actually happening. So a very small risk of a catastrophic event may be unacceptable. But a very small risk of a minor offence may be acceptable.

MR DONALDSON: Yes.

MR WILSON: And then it's a very high risk of a minor offence may be acceptable. But I think it's likely that it still will catch or - I withdraw that. Because a lot of these inchoate terrorism offences, it's difficult to say they are isolated, especially if somebody has had a prior conviction. So sending one text message saying, "Go ISIS" and another one five years later just saying the same thing might be seen as something that's unacceptable. It's very difficult.

MR DONALDSON: And it seems to me, Richard, that the best way of dealing with that range of possibilities is rather than limiting what you are actually looking at as the risk of committing a serious Part 3 offence, it's really,the work needs to be done by the notion of unacceptability there, and it may be that perhaps more definition can be provided to that in this formulation?

MR WILSON: Either that - or what "serious" means. That "serious" may need to mean having actual likely consequences. A risk of not just an inchoate or -

MR DONALDSON: Yes, well, it could be done that way but the difficulty with that is, as it's currently formulated, "serious" is just a part of a definition.

MR WILSON: That's right.

MR DONALDSON: It doesn't have any meaning in itself.

MR WILSON: No, but it could be. It could be. I'm not speaking on behalf of the Law Council here.

MR DONALDSON: Yes, you're quite right.

MR WILSON: I'm just saying there is two ways that it could be done.

MR DONALDSON: Yes.

MR WILSON: But I certainly agree, it could be done in terms of what is
5 unacceptable, what an unacceptability could be by reference to the actual risk of
serious harm to people

MR DONALDSON: Yes. Okay. Well, thank you for that. That is very helpful. I
keep looking at my watch because we have a time limit or time limits on these
10 hearings, unfortunately, and I can go on talking all day to everybody who has
appeared here. And so I have to show some discipline, I'm afraid. But we still have
plenty of time left. Can I ask you something else for your view on this? aA matter
that - which deals with the same provision, but a matter that has always been of
interest to me in this legislation is that it provides that, this is 105A.6B.

15

So it is headed "Matters a Court must have regard to in making a post-sentence
order." So these are, in administrative law terms, you know, mandatory conditions or
matters that the court must, pursuant to a mandatory provision, take into account.
And one of those is effectively risk assessment reports or a risk assessment analyses
20 that are undertaken by relevant expert. And, again, I won't take you through all of
this, but also important to an understanding of how this works is subsection (3) in
105A.6B, which also points to 105A, section 13, which, again, when people look at
it, has an interesting operation in here.

25 But, in effect, this provision - or this section provides that the court must have regard
to a risk assessment report. And then you go over to 105A.7(1)(b) to the question
which is before the court and so the court must be satisfied to a high degree of
probability on the basis of admissible evidence that (a), (b) and (c) follow. I'm not
entirely sure, as a matter of construction, what would happen if a court formed the
30 view that a risk assessment report was not admissible.

And I must say, from my part, when one has regard to the state of development of
risk assessment of extremist violence, there is, in my mind, a question as to whether
any of these risk assessment reports would, in fact, satisfy common law requirements
35 for admissibility of expert opinion evidence. But that doesn't seem to have arisen in
really any of the cases.

I would be assisted if you could tell me whether this is your understanding of it, that
even if a risk assessment report would not otherwise be admissible, nonetheless, the
40 court is required to have regard to it by reason of 6B. Is that your understanding of
how the provision operates?

MR LIVERIS: Sir, it seems to have been that way. The Law Council's overarching
position on this, though, is that only reports that satisfy conditions of admissibility,
45 as you say, that admissibility as a matter of evidence should be received and taken
into account.

MR DONALDSON: Yes.

MR LIVERIS: And we are otherwise supportive of there being removals of the provisions of the power of the minister, for example, to appoint someone as a relevant expert and the mandatory obligation of the court to consider that material. So we have an overarching concern in that respect as well. There are, as you touch on, considerable evidentiary complexities in these hearings, that they are not happily resolved, but in broad terms, that's the way we would suggest that the - that that issue be resolved.

MR DONALDSON: That is, that's how it should operate even if it - it's not operating like that at the moment?

MR LIVERIS: Admissible, yes. That it ought be admissible.

MR DONALDSON: Yes. And the other -

MR BABB: --

MR WILSON: --

MR DONALDSON: Sorry, was that you, Richard or Lloyd? It was Richard, was it? Sorry.

MR BABB: Both of us.

MR DONALDSON: It was Lloyd, was it? Sorry. What were you going to say?

MR BABB: It was Richard.

MR DONALDSON: It was - whomever it was.

MR BABB: Both.

MR DONALDSON: Both. All right. Well, Richard if you could go first. I will referee. If you could go first.

MR WILSON: It is complicated, I think, by the specific definition of "relevant expert."

MR DONALDSON: Yes, I will come to that in a second if I can, Richard, because I was going to move on to that next. So, Lloyd, were you going to say something about what we were just discussing?

MR BABB: Yes, exactly the same point. Really, I think there is work to be done by the definition of "relevant expert". One could exclude a report on the basis that it was not provided by relevant expert.

MR DONALDSON: Well, the interesting thing about "relevant expert" of course, there's a definition of relevant expert, but large parts of that definition seem to me to be completely redundant. So if you go to the - so that's in 105A - it's probably 1, is it - 2 in the definition provision. So "relevant expert" means:

"...any of the following persons who is -"

Grammatical issue there but anyway:

"...a person who is competent to assess the risk of a terrorist offender committing a serious Part 3 offence."

Then it goes out to list medical practitioners, psychologists, or any other expert. Now, I think actually this definition confuses, and I think actually distorts the issue. What the court is assisted by is a person who is competent to assess the risk of a terrorist offender committing a serious Part 3 offence. Whether they are a psychologist, social worker, medical practitioner doesn't seem to me to be relevant really at all. And, in fact, that seems to me to distort or distract attention from what is the central question, which is, is the person being proffered by the minister as a relevant expert? A person who is competent to assess the risk of a terrorist offender. That's the only question, it seems to me. And that has to be established by evidence in the usual way. So I think that's one issue.

But the other issue that arises out of this is what the relevant expert expresses an opinion in respect of. So the way it operates at the moment is the relevant expert expresses an opinion in relation to the risk of a person committing a serious Part 5.3 offence. Everybody who has done any of these risk assessments will say, well, that's actually not what we do. What we do is, the tools that are applied and the judgments that are made are in relation to the risk of a person doing an act of a particular kind, that is, engaging in an act of extremist violence or doing something, you know, act A, in the future.

Then the question as to whether act A would constitute or could constitute a serious Part 3 - Part 5.3 – offence, that's a different question. And it doesn't seem to me that a relevant expert is necessarily competent to actually do that. Or a psychologist, for instance, would not necessarily be competent to do that. A psychologist, sorry, a person who is a relevant expert, may be able to say that if this person is released into the community, there is a risk that the offender or the defendant will do A, B or C.

And it's then a separate question whether to A, whether as to whether A, B and/or C would constitute the commission of what is defined as a serious Part 5.3 offence, but that doesn't seem to me to be a question necessarily for relevant expert. That seems to me to be more a question that should be answered by lawyers rather than relevant experts. Am I missing something in that, do you think?

MR LIVERIS: No, sir.

MR DONALDSON: And if that's right, then that should probably be made very clear in the legislation rather than relevant experts really being asked to express opinions on matters that they are plainly not competent to express opinions on. I think everyone is nodding in agreement.

MR LIVERIS: Yes, sir. I - yes.

MR DONALDSON: And part of the issue with that, of course, is some of these offences, Part 5.3 offences, they are pretty tricky to work out how they are, or understand how they are, in fact, operating. And all that a risk assessment can do, well, let's use the VERA-2R tool. The VERA-2R tool is not designed to assess a risk of whether a person is going to commit what is defined as a serious Part 5.3 offence. They are designed to make an assessment of whether certain conduct is going to or behaviour is going to occur in the future.

All right. Well, thank you. So that - that is very helpful as well. And you may or may not know that we've had a number of very valuable written submissions and also some submissions yesterday - or some appearances yesterday from people who are very involved in the risk assessment process that has given a great deal of context to how those difficulties or how those processes occur.

I think you said, Tass, in your opening, that there were concerns - there were some concerns about the risk assessment. If you didn't say it, I think you hinted that concerns that the Law Council has about the risk assessment process?

MR LIVERIS: Yes, sir. It really was to highlight that post-sentence detention really shouldn't be available on that fraught exercise of assessing or predicting a person's future risk as it currently stands, in the absence of a clear, empirically-based assessment methodology in place in order to make that assessment and that's the concern that we have as it currently stands.

MR DONALDSON: And if I could perhaps put that in, say, terms in relation to the admissibility of expert evidence, the Law Council has a concern that there is a relevant field of expertise, if I can put it that way, in relation to risk assessment of the future violent extremist, or extremist violence?

MR LIVERIS: Yes, sir. Yes.

MR DONALDSON: And so if I can go back one step, I think that there are a number of people who would say that in relation to the risk assessment of future sexual offending, for instance, there is a relevant field of expertise that exists in relation to that matter and maybe even with the future risk of violent offending, which, of course, exists under state preventative detention regimes. But it's the position of the Law Council that at the present time, at least, in relation to risk assessment of violent extremism or extremist violence - is the term that is used - that

that field expertise is not yet sufficiently developed for the process to operate as it should?

MR LIVERIS: That's right, sir. My colleagues may be better placed to speak to
5 perhaps how that position interacts with the position in relation to sexual offences and the kind that you mentioned. But certainly, in relation to this kind of offending, no, our position is that those difficulties remain and presently are real insurmountable issues in the way this regime operates.

10 **MR DONALDSON:** And so if that's the case - I'm sure Richard and Lloyd will speak up if I'm wrong what I say about sexual offenders, for instance, but the consequence of what you said there, Tass, is if, applying either section 79 of the Evidence Act or common - the common law in relation to the admissibility of expert opinion - depending on which state you're in, of course, what the Law Council's
15 position is that there should be a determination by the court as to whether the risk assessment opinions are admissible.

And if they are not admissible, well, the court does not have regard to it. So the consequence of that presently would be that the court would have no - in effect, no
20 expert's opinion before it to assist the court in the function that it has under 105A.7(1)(b).

MR LIVERIS: That's right.

25 **MR DONALDSON:** I'm not suggesting there is anything wrong with that, but, in fact, what would flow from that is if a court took that view, then you would assume that, well, inevitably, that would have a consequence on the enthusiasm of the minister to bring future applications under this legislation.

30 **MR LIVERIS:** Well, that question aside, sir, it would ensure most fundamentally that applications were made on the basis of admissible evidence, and that is the nub of the concern that we have in relation to this. To ensure that applications do proceed on the basis of in the first part, admissible evidence.

35 **MR DONALDSON:** And that applies both to applications for continuing detention orders and for ESOs or extended supervision orders, because 105A.7A(1)(b) also operates on an integer of admissible evidence.

MR WILSON: Yes. That's right. And admissible evidence and relevant expertise
40 also comes into play as to whether particular conditions are actually relevant to mitigating the risk of the particular individual.

MR DONALDSON: Well, that's interesting, Richard, and you're right; that is what has happened in these matters or in the Benbrika matter anyway, that is, the relevant
45 expert did express opinions as to, really, the (c) inquiry, that is, whether less restrictive measures would be effective in preventing the risk.

MR WILSON: Yes.

MR DONALDSON: So the relevant expert was expressing opinions in relation to that. But I'm a bit intrigued to that as well, because we'll go back to my earlier question. The way that the provision operates is the court has to be satisfied that in relation to the defendant, the defendant poses an unacceptable risk of committing a serious Part 3 offence and that an ESO, for instance, would not prevent that unacceptable risk.

Now, if you've got a relevant expert who is giving evidence in relation to that, because of the way that the provision operates, that relevant expert must be saying or expressing an opinion that no conditions under an ESO would be sufficient to prevent the risk. So that's that expert's opinion. And if that is so, it doesn't seem to me that that same expert could then go on to say if the court is not satisfied by that, well, here are conditions that would prevent the risk.

MR WILSON: I guess, though, the answer to that might be that it's for the judge to make, to answer the ultimate question of unacceptability. The expert could say that this handful of conditions will significantly mitigate the risk for the following reasons. And then the judge might or might not consider that that level of mitigation is enough to render the risk no longer unacceptable. So I think that (b) probably needs to be answered,105A.7(1)(b), about whether they pose an unacceptable risk. That effectively has to be answered on the basis of a theoretical release with absolutely no supervision at all.

MR DONALDSON: Yes.

MR WILSON: And then if the answer to that is yes, then is there any form of less restrictive measure which could be effective in effectively making the risk no longer unacceptable. That's how I would understand it.

MR DONALDSON: Yes, but if the expert gives an opinion on that and the expert says, "Well, there is an unacceptable risk and there are no less restrictive measures that would prevent that risk" -

MR WILSON: They can say that.

MR DONALDSON: - and the court doesn't accept that, and says, "All right. Well, you are an unacceptable risk, but I'm not satisfied that the risk can't be ameliorated by a ESO ."

MR WILSON: Yes.

MR DONALDSON: It's hard to see that that opinion - that relevant expert could then go on to assist the court in relation to what terms or conditions of an ESO would in fact ameliorate the risk, if I can put it that way.

MR BABB: I tend to agree with Richard, in that I don't think that the expert has to answer the question in terms of ameliorating - sufficiently ameliorating the risk. The expert can give evidence as to conditions that would mitigate some risk and it remains a matter for the court. So I think the right expert can, you know, give expert evidence in relation to risk mitigation without necessarily accepting that it would sufficiently mitigate all risk.

MR DONALDSON: Yes. I see. Yes. That's very helpful. And I think that what that highlights, particularly from your observation, Richard, is that a great deal of the work in this regime is done by the word "unacceptable."

MR WILSON: Yes. It is.

MR DONALDSON: And it may be a benefit if more meaning is given expressly to that.

MR WILSON: And also often times that, as you've hinted at, that the rigour of requiring admissible evidence to establish something is not necessarily always applied carefully in all of these cases. So that the rigour of having admissible evidence to prove that a particular condition is actually necessary to as there is an opening gambit which is effectively what was foreshadowed before, when the ESO is an alternative, that the Minister will turn up with a list of every conceivable condition that they've got on their books.

MR DONALDSON: Yes.

MR WILSON: And, "We need all of these." And then there's an issue of whether there is a body of expertise about certain types of conditions and what they do. Whether requiring someone to write out what they are going to do by the hour for the next week doesn't does actually mitigate risk or not or, in fact, increases risk by making them more resentful of the system. Especially in these types of matters.

MR DONALDSON: Yes. Well, I think, you know, I have read carefully all of the decisions that have been made, not only under this part but also the equivalent New South Wales provisions. And there doesn't seem to be a great concentration in many of the cases on what is admissible evidence and what is not, and what the field of relevant expertise is in relation to particular matters. And it seems to me that the courts have proceeded on the basis that, looking at a section like 105A.6B, the court is required to have regard to those reports, and they do.

MR WILSON: Yes.

MR DONALDSON: And I understand the Law Council's position very clearly in relation to that. So I am most grateful. Can I move on to one or two other matters that I'm interested in as well, if I may. And these are, in a sense, practical matters of the process. One of the issues that has been raised with me is that there are acute timing considerations in the making of these applications. So, for instance, I think it was the

first matter involving Mr Benbrika, the application was commenced two months prior to his sentence expiring. And there were then issues as to whether funding would be made available to Mr Benbrika to fund his legal representation, but also other forms of assistance that he would require.

5

And you're aware, I know, from your submission with the provision of the Act that deals with that. And if applications are made late, if I can use that term, it's almost inevitable but they will not be dealt with prior to the expiration of the sentence. And it seems to me that that is, if that occurs, and it should be understood by everybody in
10 the process, that it is a failure of the system if these matters are not resolved prior to the expiration of a sentence.

And it cannot be the case that those who are making these applications think that they will necessarily get interim orders that will deal with the fact that applications
15 were brought late. So I'm very alive to those concerns. And one way in which an aspect of possible delay can be dealt with is to simply have an obligation on the Minister to provide funding for these applications. So if you look at 105A.15A - and there is a regulation that deals with this as well, there is essentially an onus placed on the defendant to establish that he or she doesn't have resources available to them and
20 can't obtain legal aid funding for this matter or to be represented in these applications.

Now, I come from Western Australia, and I have an incomplete understanding of how long the average legal aid application makes, but there would necessarily be
25 delays if legal aid has to be sought for these applications. And they might be substantial delays. And, again, there would, I would expect, be limitations in the budgets of Legal Aid Commissions to be providing really adequate funding for these sorts of applications, and that is to the effect of the submissions that we have received.

30

So one thing that is occurring to me is simply there be an obligation on the minister to provide funding to cover the reasonable costs and expenses, including legal costs and expenses, in defending these applications. Does anyone have any difficulty with that?

35

MR LIVERIS: We support it, sir. A point to make. Your question touches on a number of concepts, but on the question of legal assistance funding, the Law Council considers, of course, the legal assistance sector to have been neglected and grossly underfunded as a broad proposition over many decades. But certainly in terms of the
40 impact of the law upon specific services, we have made the point repeatedly that justice impact tests, that is, if the Parliament is going to enact laws that are going to create the need for obvious legal demand, then an assessment should be made at the time of the likely downstream impact on resources, not only legal assistance resources but court resources and on the broader justice sector resources, and
45 adequately cater and build in resourcing allocations for those, rather than an expectation or a position that increased demand should just be subsumed within

existing resource basis, which, as I said, are already overstretched. So we are very supportive of that as a general proposition.

In relation to these matters specifically, given, as you touch upon the time in question, the very grave consequences for a person when an application of this kind is made in any event, but particularly when it's made very close to the end of their sentence and what we have discussed is the fraught nature of the future risk assessment and the predictions that are made about someone's risk of re-offending or of offending in matters of this kind, we support there being a much tighter control over the obligation to provide funding, that, is the removal of the ability of regulations to prescribe additional factors that need to be considered. Perhaps the legislating of the dedicated establishment of a fund. The ability of a person to have legal representation of their choosing. Those types of things, we strongly support in these - in this review.

MR DONALDSON: Yes, I'm very grateful for that, Tass, for you pointing out some of the those matters. And the other thing I think that is relevant to this inquiry is if you look at 105A.15A, subsection (2), of course, the fact that the court has power to stay an application is not going to be much comfort to a defendant if all that means is that they stay incarcerated pursuant to interim orders that may be applied for.

MR WILSON: No, that's right.

MR DONALDSON: But, equally, interim orders can't - there should never be an expectation that interim orders are going to be made as a matter of course if the reason why extra time is required is simply that the application was commenced unrealistically late. And the current regime under the Act is that there is a very low standard, I think everyone accepts that, for the making of interim orders, at least for three months.

And after that there is then a requirement for the applicant to show, I think it's extraordinary circumstances, for any further continuation of interim orders. One thing that has occurred to me is whether the standard should be that interim orders are made during the course of a pending application. The test to be applied is that there are extraordinary circumstances why an interim order is required at all and you would think that that might ensure that people don't proceed on an understanding that they will get those sorts of interim orders as a matter of course.

But I'm going to be hearing from people from the Legal Aid Commission in New South Wales who I think have some very intense experience of those matters shortly, and I'm sure they have some views on the best way of dealing with those issues as well. But what can't happen, I'm sure you would agree, is that, in effect, everybody proceeds on understanding that, well, we are going to get three months' worth of interim orders and so we sort of tack that on to the process.

MR LIVERIS: Certainly, sir. And this touches on to a degree the issue of the standard that I mentioned in the opening. Which is why we say the criminal standard

of proof needs to comply as well, because when you balance, as I said, the significant to grave dire consequences for a person subject to one of these orders against these procedural matters and the availability and accessibility of legal resources, legal representation, we think that that needs to be looked at.

MR DONALDSON: Yes. Now, if I can, because we are quickly running out of time and as I said, we could spend much more time and you could help me much more, but we will have to move on. I'm very interested, though, in the Law Council's view on this issue. As I said, we've spent a lot of time on risk assessment processes during the course of this inquiry - and properly so, because really a central plank of this regime. And everybody - everybody, I think, has expressed concerns as to the risk assessment process and who is undertaking risk assessments.

And one proposal that has been put to us is that there be some sort of independent body that accredits those who are, in fact, relevant experts. So even if you look at the definition of "relevant expert" that I was discussing with you before, that is a person who is competent to assess the risk of a terrorist offender, let's say engaging in violent extremism, that there be a body independent of the Department of Home Affairs or the relevant minister who accredits people who are relevant experts in that respect. Does anybody have a view on that?

MR LIVERIS: Sir, trust and confidence, community and public trust and confidence in the system, does require there to be the distance between those functions being performed. So we are very supportive of there being an arm's-length reviewer. Some sort of oversight, a body overseeing. That is currently not the case.

MR DONALDSON: Yes, and the reason I asked you specifically that question is it seems to me that there are really two ways of dealing with this. One is your primary position, I think, the court actually applies the rules of evidence to this. And if it's not admissible, say, because there's not yet a recognised field of expertise, then the evidence simply doesn't get in. So it doesn't really matter whether somebody's accredited by an independent body or not.

But if the way that this act is going to operate is that regard must be had to these reports, or these assessments, then perhaps there is some scope for accrediting of relevant experts. Because if you look at, you know, how a typical medical expert would give evidence, they are not likely to qualify as an expert,if it's a question of haematology, for instance, unless they are a member of the college, unless they have specialist training, and unless they have publications, say, in relation to a particular area.

And in the absence of something like that, the way the Act currently operates is it's basically, if the rules of evidence don't apply, it's left up to the minister to make that decision.

MR WILSON: That's right. I suggest it lacks that independence, and what's paramount, of course, I think is that public trust and confidence in this regime can be enhanced and that would enhance it.

5 **MR DONALDSON:** Now, I think that's time, isn't it?

MR MOONEY: It is.

MR DONALDSON: Okay. Well, I'm very sorry, but I've taken up so much time
10 talking myself. And the session has been really extremely helpful to me and, again, can I not only thank you all for appearing today but, again, acknowledge the really important work that the Law Council does in supporting my Office in relation to not only this review but reviews generally. It is of great assistance that I have the Law Council being engaged and that the Law Council comes along with people who have
15 great experience and interest in these relevant issues. So I am really most grateful. So if I could thank you all for appearing this morning, and we will move on to the next session. So thank you very much.

MR LIVERIS: Thank you.

20

MR WILSON: Thank you.

MR MOONEY: Thank you.

25 **MR DONALDSON:** Thank you. Now, we are having a short break, are we?

MR MOONEY: Yes, morning tea.

MR DONALDSON: All right. So we are going to have a short break now and then
30 we will come back, and we have representatives of the New South Wales Legal Aid Commission. You probably call yourself something different to that now but the Legal Aid body in New South Wales. So we are resuming at?

MR MOONEY: Quarter past.

35

MR DONALDSON: 11.15. Thank you.

THE PUBLIC HEARING ADJOURNED AT 10:47 AM

40 **THE PUBLIC HEARING RESUMED AT 11:16 AM**

SESSION 2: LEGAL AID NSW

MR DONALDSON: This is the resumption of the public hearing, and this session,
45 I'm delighted to have representatives from Legal Aid New South Wales who have already provided a very helpful and thoughtful written submission, but also I've had the opportunity to meet with representatives of Legal Aid prior to today who have

already given me great assistance. So, again, I'm very grateful to Legal Aid for the assistance it’s given already to me, but also for making many of its senior people available.

So at the table we have Harriet Ketley, who is a senior project officer in the criminal division at Legal Aid, and we have Claire Stimpson and Olivia Freeman, who are senior solicitors in the high-risk offender unit. And I'm sure it will come out, but Legal Aid New South Wales has a very well-developed expertise in these matters under the New South Wales Act and a very dedicated team of people internally who deal with these matters. So I'm really looking forward to hearing what you're able to say.

And I should also say that Christine Hall from Legal Aid New South Wales is also here, and I've met with Christine before, and, again, Christine's provided great assistance. So welcome, Christine. All right. So thanks again. Is somebody going to or wanting to say something to start off? Okay. Thanks, Harriet.

MS KETLEY: Yes, sir. We do have a brief opening statement. At the outset, we acknowledge the Ngunnawal people as the traditional owners and custodians of the land on which we appear today, and we pay our respects to their elders past and present. Thank you for the opportunity for representatives of Legal Aid New South Wales to appear at the inquiry today. We have made a written submission to this review which draws on the experience of our high-risk offender unit, who advise and appear on behalf of individuals in proceedings under the New South Wales Crimes (High-Risk Offenders) Act and the Terrorism (High Risk Offenders) Act.

The New South Wales original post-sentence order scheme, the CRO Act, was originally intended to cover only a handful of high-risk, hardcore offenders who had not made any attempt to rehabilitate while in prison. And by the time the New South Wales Supreme Court in 2020 established its dedicated high-risk offender list, for the past three years at that point, it had determined approximately 130 high-risk offender applications. And Legal Aid's duty lawyers appear regularly in local court breach extended supervision order proceedings across the state.

Legal Aid is funded by the Commonwealth Government to advise and appear in proceedings under Division 105A of the Criminal Code, and in 2021 solicitors from the high-risk offender unit appeared on behalf of the first respondent to an application in New South Wales under Division 105A, and that was brought against Mr Blake Pender an Aboriginal man from the south coast of New South Wales. And I'm sitting next to Mr Pender's solicitors here today.

We consider that greater legislated safeguards are needed to ensure that proceedings under the Commonwealth scheme are conducted fairly and that individuals facing post-sentence detention, or supervision, have a proper opportunity to respond to the application. Greater safeguards are also needed to ensure that the scheme is appropriately targeted to meet its intended objective as a preventative rather than

punitive measure, and that monitoring of ESO offenders supports their rehabilitation and integration into the community so as to promote community safety.

And without greater safeguards, we are concerned that the Commonwealth scheme may impact disproportionately and harshly on offenders with mental and/or cognitive impairment and on First Nations people, as has occurred to date in New South Wales. We are happy to take questions, sir.

MR DONALDSON: Thanks very much, Harriet. Does anybody else want to some opening observations? Thank you. And, again, the great benefit that Legal Aid New South Wales brings to this inquiry, of course, is you have practical experience - intense practical experience of the New South Wales scheme but also, of course, from Mr Pender's matter as well. I was intrigued that Legal Aid New South Wales is - did you say specifically funded by the Commonwealth in relation to 105A matters?

MS KETLEY: Sir, as with all legal aid commissions we are able to apply through the Expensive Commonwealth Criminal Cases Fund which, as of September last year now has been expanded to include as an eligible matter a post-sentence matter under Division 105A. -

MR DONALDSON: So that's what you were referring to.

MS KETLEY: Yes, we are not uniquely funded, but we are able to apply on an annual basis for what we anticipate will be a certain volume of post-sentence order matters.

MR DONALDSON: So is that how that fund operates, is it?

MS KETLEY: That's right.

MR DONALDSON: It's an annual allocation .

MS KETLEY: Yeah, it's an annual where one provides estimates in advance.

MR DONALDSON: I see.

MS KETLEY: It's funded as a per-matter scheme. You're not funded for a whole program for a period of ongoing funding which would enable you to establish actual positions in a unit.

MR DONALDSON: Yes.

MS KETLEY: Which is how other schemes are funded. That's how the state scheme is funded, for example. Rather, a legal aid commission is required to provide an estimate as to what they will spend in the next financial year.

MR DONALDSON: What if you run out of money?

MS KETLEY: And - well, the difficulty is, of course, is not knowing in advance -

5 **MR DONALDSON:** Yes.

MS KETLEY: - exactly how many post-sentence orders will be made and the timing of them.

10 **MR DONALDSON:** Yes.

MS KETLEY: We may be given an indication as to when a certain cohort of offenders' post-sentences will expire, but that doesn't necessarily mean (a) that they will all be subject to a post-sentence order application, or (b) that they will all seek
15 legal aid.

MR DONALDSON: So if you have made an application in advance, you'll have a pool of money made available to you and you have access to that, and if it adequately covers all the necessary expenses, then that doesn't give rise to any delay
20 at all, obviously?

MS KETLEY: Well, there still has to be the processing of an application for legal aid, though that, with the ECCCF guidelines and with our own now, we have a lump sum fee scale that the board has determined that applies to a standard post-sentence
25 sort of matter. That can expedite things. But there is still a certain amount of information that needs to be obtained.

MR DONALDSON: I can understand there's delays in the initial application, but if the application is granted, presumably, you can access those funds if required.
30
MS KETLEY: Yes. Yes. That is correct.

MR DONALDSON: What would happen if you incorrectly predicted, and you had more matters on than not? What would you do then?
35
MS KETLEY: We would go back to the ECCCF - and we can - you know, we can foreshadow in advance if we are aware that it looks like there will be a funding shortfall.

40 **MR DONALDSON:** Yes.

MS KETLEY: But there is no cap. There was for trial matters. So for expensive Commonwealth trials, there's a cap of $40,000. A minimum spend, if you like. There is not that under the post-sentence order funding guidelines, and we welcome that
45 change. The guidelines have only been in place for post-sentence orders since September last year, so we haven't even had one year yet -

MR DONALDSON: No.

MS KETLEY: - in relation to them.

5 **MR DONALDSON:** No.

MS KETLEY: But certainly there is provision to go back to the funders.

MR DONALDSON: Yes. I would expect that that may result in time being taken to
10 make that application, have it considered and granted?

MS KETLEY: Yes, but we do keep a close track of what grants are being made on
these matters. One of the real difficulties we have, though, is because it's funded on a
per-matter basis, there's no explicit funding guideline around being able to develop a
15 community of practice, being able to continue professional development training of
lawyers, both in-house but also training of private practitioners to be able to foster a
sort of development of a specialised practice, which we think is really important for
these sorts of matters.

20 **MR DONALDSON:** Yes.

MS KETLEY: Because they do require a high level of skill and experience.

MR DONALDSON: Yes, well, that's an interesting matter, because, of course, that
25 may be able to be developed in New South Wales because there's a state scheme
which had already existed for some time. But that's not likely to be the position in
many other states. Victoria might be different. In Victoria, for instance, there's only
one person whose currently in the scheme yet. So it may not be possible to develop
that expertise in some of the other states but that's the inherent nature of a federation.
30

MS KETLEY: Yes, look, I mean, we think that the development of that
specialisation and sharing of resources, information sharing for those that represent
offenders and respondents is actually ultimately something that would save the court
time, other parties time and ultimately support efficiency in the conduct of these
35 proceedings, rather than each one starting out with a new set of practitioners who
haven't necessarily practised.

MR DONALDSON: I'm sure that's right. But it is interesting -

40 **MS KETLEY:** - in that area.

MR DONALDSON: It is interesting, Harriet, that the Commonwealth seems to have
accepted in New South Wales that it has an obligation to provide funding in relation
to these matters and if that is - and I think correctly so, and if that is so, then there
45 should not be delays in providing funding that would affect an application. And in
New South Wales, it doesn't because it's the legal aid commission has a dedicated
team who can deal with it.

MS KETLEY: That's right.

MR DONALDSON: But that may not be the case elsewhere, and so one thing I'm
5 considering in relation to the legislation is the provision that deals with funding to suggest that that be substantially amended to simply provide that the Commonwealth will be responsible for providing necessary reasonable funding to people in the system.

10 **MS KETLEY:** Yes.

MR DONALDSON: Because what has happened in relation to Mr Benbrika's matter is that there were delays seeking to obtain funding to represent him in Victoria, which gave rise to inevitable delays in the application to be dealt with. And that's just
15 not acceptable. The Commonwealth has accepted that it has an obligation, which it fulfils in New South Wales to provide this funding. So it's interesting and important to know.

MS KETLEY: Yes. Though we have listened to other evidence before you and your
20 comments, sir, in relation to that proposal. And, in our view, the issues of delays actually should be dealt with at the earlier stage, which is that these matters should be filed earlier and that there should be that window period of at least six months before sentence expiry.

25 **MR DONALDSON:** Yes.

MS KETLEY: Because as with whatever funding assistance is involved, ultimately, there needs to be an assessment of the volume of the material, the nature of the materials, what legal assistance is going to be needed, what counsel, who needs to be
30 engaged, who's available, what experts may need to be engaged, and just without having a meaningful lead time to do that, I think, yes, funding is important, but the core issue is actually the timing of the application there. The Commonwealth is likely to have someone on their radar for a lengthy time.

35 **MR DONALDSON:** Yes, well, that's important to know, because one thing that has occurred to me is that, I think in all of the Commonwealth matters, or both of the Commonwealth matters to date, they have not been resolved prior to the expiration of the sentence so there have been interim orders that have been made. And, as you know, the standard applicable to getting an interim, or the first three interim orders is
40 relatively low, and then it becomes more onerous. And one matter that had occurred to me was to require that it only be in exceptional circumstances that any interim order is made, which would have seemed to me to would provide an incentive to the Commonwealth to commence these matters earlier rather than later, if I can put it that way.
45

Now, I know from speaking to, I think it was Olivia and Claire, actually, outside, you have views on what a silly idea that is. So perhaps if you could tell everyone

publicly. But perhaps expand on that a bit more and why the issue that Harriet identified, which is more clearly identifying the starting time, is a better way of dealing with that?

MS FREEMAN: I can jump in first. As set out in our submission, as a primary position, given there have only been two applications to date and given the introduction of the ESO scheme, Legal Aid's position is that interim orders should be retained, and this matter reassessed in 12 to 18 months' time when there has been more of an opportunity and more matters before the court to see the role of interim orders. Speaking from our experience in state matters, interim orders can actually serve to be somewhat of a safeguard for defendants in responding to these applications because it ensures that where matters are filed close to the sentence expiry, that a defendant isn't left with a month or weeks to respond to what would be a final application for either a CDO or an ESO and, rather, does provide a bit more of a buffer time to make sure that a defendant can properly respond to an application.

It can also, practically speaking for detention order applications, provide an opportunity as well for the defendant and legal representatives to explore options in the community that might support the position taken that a person shouldn't be subject to a detention order, and with respect to ESOs in the state legislation, certainly being on an interim supervision order really provides an opportunity, if I can call it, to road test the conditions on a temporary basis that a person may be subject to on a final order, to ensure they are appropriately tailored to the personal circumstances of a defendant and also their risk. And then provides the opportunity at a final hearing to put forward alternative suggestions or provide examples of how the conditions can be more appropriately tailored to those circumstances.

MR DONALDSON: Yes, that's very helpful to know and understand, because what occurred to me is we wouldn't want to have a system where interim orders are being used as a matter of course necessarily. But, as you've said, they serve functions that are important to the defendant's position as well, or may do. So it's given me a different perspective on how interim orders are used.

MS FREEMAN: Yes. And I think, sorry, to cut you off, but just building on that, having a window period or a date upon which an application has to be filed will provide that opportunity for that work to be done within that period of time. And in Mr Pender's case as well, the court ultimately backdated the commencement of his detention order to take account of the time that he was subject to an interim order. So whilst he received a 12-month CDO, it wasn't a 12-month plus three-month interim order. It was 12 months collectively.

MR DONALDSON: So nine months on top of the three.

MS FREEMAN: Indeed, yes.

MR DONALDSON: Yes. And so you - you think that a provision or an amendment of the legislation which provided that applications for CDOs or ESOs must be

commenced not less than six months before the expiration of the sentence, that would adequately deal with these issues? Or those issues that you've identified?

MS FREEMAN: Provide that safeguard, yes.

MR DONALDSON: With the safeguard.

MS FREEMAN: Yes.

MR DONALDSON: And I suppose the other thing that that does is that it gives not only the defendant and the Minister time to get all their ducks in a row, but getting counsel engaged, getting sufficient listing time in front of the courts as well. I'm sure that they are matters in New South Wales as much as they are matters in other states as well.

MS FREEMAN: Yes.

MR DONALDSON: That would be another advantage, I assume, of that sort of regime.

MS FREEMAN: And I might even just add, in terms of the volume of material and the amount of work that is required. I understand we might touch on, you know, what was involved in Mr Pender's case shortly, it can be very intensive, high volume and a lot of material that need to be digested and then, on top of that, forensic decisions made and strategy developed in terms of how a matter will run. By having a date upon which an application must be filed ensures that there is that appropriate window for all of that work, prep work to be done, given that when a matter is filed, that work is already being done by the Commonwealth's legal representatives.

MR DONALDSON: Yes. Well, they would have had a risk assessment done by that stage in the ordinary course.

MS FREEMAN: Yes

MR DONALDSON: Well, that's very helpful. Thank you for that. Yes. Now, I think it will be useful to me, because I don't know, if you give me a practical example of how the process was followed in Mr Pender's case.

MS FREEMAN: Sure.

MR DONALDSON: So you are going to be the best person for that, Claire.

MS FREEMAN: I will hand over to Claire for that one.

MR DONALDSON: Good.

MS STIMPSON: So the summons for Mr Pender's continuing detention order was filed in the Supreme Court on 5 July 2021. And Mr Pender had a sentence expiry of 13 September 2021. The summons was seeking a three-year CDO, which is the maximum length, as we know. On 23 July, the preliminary hearing was held in the
5 Supreme Court.

MR DONALDSON: Yes.

MS STIMSON: And orders -

10

MR DONALDSON: Can I just ask you something about that.

MS STIMSON: Sure.

15 **MR DONALDSON:** So the preliminary hearing, the legislation now provides, I should say, that that is really for a specific purpose, which is to determine whether there will be a court-appointed risk assessor.

MS STIMPSON: Yes.

20

MR DONALDSON: But I assume that other matters can and are dealt with at that first hearing?

MS STIMPSON: Look, because the previous legislation applied, it's hard to know
25 exactly what they will look like going forward. But certainly, at the preliminary hearing last year, it was focused on the appointment of experts. But there were orders around non-publication orders, I think, were made at that stage as well.

MR DONALDSON: I see. Okay. Sorry. I interrupted you.

30

MS STIMPSON: Not at all. So in a directions hearing, the final hearing was listed for two days on 13 and 14 October. The first interim detention order for Mr Pender was made on 26 August, running from sentence expiry in September to 11 October.

35 **MR DONALDSON:** Yes.

MS STIMPSON: In August, the Commonwealth also notified us that they were waiting for instructions regarding a control order application.

40 **MR DONALDSON:** This was prior -

MS STIMPSON: So that was waiting in the wings.

MR DONALDSON: This was prior to the amendment to the Act where ESOs were
45 introduced, of course.

MS STIMSON: Yes. So then on 23 September 2021, the control order proceedings were filed in the Federal Court. On 7 October, the interim control order hearing was held in the Federal Court and a interim control order was made. And that was consented to by us. So that was in the week before the final hearing in the Supreme Court. So then on 13 and 14 October, the final hearing was held. Two days weren't enough time, so there were directions the following day, on 15 October, and then the matter was listed for a further half day of hearing on 19 October.

Then on 9 November, Walton J made orders for a 12-month continuing detention order. And as Olivia just said, that was backdated, essentially, to the sentence expiry date, and then the reasons were provided just over a month later on 15 December. So that's the timeline, at least in terms of court dates.

MR DONALDSON: That's helpful. And I would have thought that timing is actually not very different between commencements and expiry of sentence, which is two months. That's consistent with the position of Mr Benbrika, as it pans out.

MS STIMPSON: Yes.

MR DONALDSON: And I wouldn't have thought that anybody would think that these matters are going to be resolved in two months, are they?

MS STIMPSON: No, and our concern as well in relation to the potential abolition of interim orders is that -

MR DONALDSON: I'm not looking at abolishing, just making them harder to get.

MS STIMPSON: Yes. Our concern is that, perhaps, there might always be an exceptional reason in the terrorism space. There's obviously a lot of concern and community safety is obviously very much a paramount consideration. And so just be -

MR DONALDSON: -- exceptional shouldn't be exceptional, though. And, of course, I wouldn't be envisaging that there couldn't be consent orders, for instance.

MS STIMSON: No, absolutely. We would just be very concerned to make sure that any amendment that might seem to put pressure on applicant might end up putting pressure, in fact, on the respondent.

MR DONALDSON: I understand, yes. And one thing that emerges from that, which again emerged from your submission but also the submissions of others - which I'm sure comes as a surprise to some people - but, ordinarily, a CDO doesn't run from the time of the expiration of the sentence in the ordinary course unless there's a specific order. It's actually the time of the order. So somebody could be spending an extra, let's say, three months in incarceration, which has been brought about perhaps simply by delay by somebody not doing what they should have done at a particular time. It seems to me that that's pretty unsatisfactory, that that's the starting position anyway.

It seems to me that the starting position should probably be that they run from the date of the expiration of sentence, unless there's some good reason why it should be a different time.

5

MS STIMPSON: Yes, we would agree.

MR DONALDSON: Okay. So that's very helpful. One thing I wanted to ask the New South Wales people, or you and others from New South Wales who have had experience in these matters, concerns the way that ESOs might operate. And we don't have them yet, so we don't really know how they're going to operate under the Commonwealth scheme. But there is an equivalent, of course, in New South Wales. And I suspect that anybody who has looked at the legislation that deals with the extended supervision orders will be perhaps as surprised as me as to how prescriptive these provisions look in relation to extended supervision orders.

10

15

Can you give me some assistance as to how extended supervision orders under the New South Wales scheme actually operate? Like, are they prescriptive to this sort of degree in New South Wales?

20

MS FREEMAN: I will jump in. I will start off. If we just look at the THRO legislation, which is the Terrorism (High Risk Offender) Act legislation, the wording under that legislation is not in the same terms as what has been drafted under the Code. However, there are a lot of similarities in terms of the types of conditions and I guess the obligations and prohibitions on a person, but how they are framed and worded is different in particular, in relation to, I think under the Code, where they're dealing with exemptions and issues like that. But that equivalent doesn't exist under the THRO Act.

25

30 **MR DONALDSON:** Yes.

MS FREEMAN: So, yes, I mean, without having anyone on a Commonwealth ESO to know how it will be enforced, it's difficult to hypothesise, I envisage there will be quite a bit of similarity and overlap with the types of conditions and enforcement under the THRO Act in New South Wales.

35

MR DONALDSON: I would have expected so. But it will be interesting to see, because I have some understanding of how the scheme ESOs in New South Wales actually operate. They are very prescriptive, and they are in fact, if you look at some of them, even though they say there are, you know, 38 conditions, there are, in fact, you know, 150.

40

MS FREEMAN: Yes. So how -

45 **MR DONALDSON:** By the time you actually look at it.

MS FREEMAN: Yes.

MR DONALDSON: And it would seem to me to be pretty easy for a person to contravene some of those conditions quite innocently.

5 **MS STIMPSON:** Absolutely.

MS FREEMAN: Yes, that's certainly our experience and just going back to the conditions in New South Wales, generally, a person may be subject to anywhere between I would say 30 to 60, I guess, conditions made by the court, and then within
10 that there is discretion built into the conditions and also a condition that allows their supervisor to issue directions.

MR DONALDSON: Yes.

15 **MR FREEMAN:** Which essentially operate akin to a condition on the order.

MR DONALDSON: Yes, that's what I've seen, yes.

MS FREEMAN: Yes. And so what might on its face be 45 conditions, they may
20 have an additional 20 directions on top of that that provide further information or further restrictions on how a condition may be enforced under the Supreme Court order.

MR DONALDSON: Yes. And in New South Wales, a contravention of one of the
25 conditions goes back to the Supreme Court of New South Wales, no?

MS FREEMAN: No, to the Local Court.

MR DONALDSON: It goes to the Local Court.

30

MS FREEMAN: Yes.

MR DONALDSON: Well, some of the submissions we've received suggest that those sorts of matters should go back to the Supreme Court.

35

MS FREEMAN: Yes.

MR DONALDSON: Rather than the Local Court. Is that -

40 **MS FREEMAN:** That's Legal Aid's position as well, yes.

MR DONALDSON: Yes, and what - and I have read your submission and sort of understand it, but why, well sort of understand it. Why would that be a good idea rather than them being dealt with in the Local Court?

45

MS STIMPSON: So one of the concerns that we have when they are dealt with in the Local Court is, probably general time pressures that the Local Court face.

MR DONALDSON: I see.

MS STIMPSON: They don't necessarily have access or time to digest and
5 understand the reason that order was made in the first place.

MR DONALDSON: Yes.

MS STIMPSON: They also - the court that made the order is privy to that but has an
10 awareness of the process and what's involved. I think in the Local Court,
understandably, magistrates are trying to deal with matters very quickly, and it can
be difficult for the bench and the - both prosecutor and defence to be able to confine
what is - you know, 50 conditions, lengthy judgments, to a short matter like that.

15 **MR DONALDSON:** Yes.

MS STIMPSON: We also just think the Supreme Court as the place that made the
order, that considered, that weighed up the expert reports, and considered, – usually,
the evidence -

20

MR DONALDSON: I think that's important, that they are seized of the matter.

MS STIMSON: Absolutely. And knew the reasons for making each condition.
Because a breach is obviously a breach of a specific condition which can, on its face,
25 be seen to be either particularly serious, because it's a Supreme Court order. So, the
Local Court is dealing with a matter that's been, you know, ordered by a superior
court and is dealt with very seriously. In a way that perhaps, if it was dealt with in
the Supreme Court, it may be more easily --

30 **MR DONALDSON:** Would appreciate the triviality of it.

MS STIMPSON: Perhaps, or at least that it's maybe linked to the risk it, because
there are some conditions which are very closely aligned with what someone's risk
might be seen to be -

35

MR DONALDSON: Yes.

MS STIMPSON: - and then perhaps in circles moving out, there would be
conditions that are less and less related to risk as well.

40

MR DONALDSON: Yes. Yes. Well, there's an interesting experience - I'm from
Western Australia and there's an interesting experience some years ago with the
terms and conditions of dangerous sexual offender conditions. So these were
dangerous sexual offenders who were released into the community on conditions,
45 and there was a practice, seemingly, that had developed in Western Australia of even
the most trivial contraventions would be taken to the Local Court to be dealt with
there, and that was until the Chief Magistrate decided that he was going to deal with

all of these matters and, on the first occasion, made it very plain that he was extremely unhappy to be receiving trivial or applications in relation to trivial breaches. And that basically straightened the process up.

5 But I think it is right to say that particularly in relation to what we will refer to as terrorist offenders, because of the amount of material that would have to be relevant to - and a full of appreciation of these matters, plainly, the best best forum to be dealing with those is the Supreme Court rather than the Local Court. And you would think that appearing before a Supreme Court judge in relation to these matters would 10 discourage the bringing on of really trivial matters, I would have thought.

MS KETLEY: I mean, tied in with that recommendation, we also recommend greater discretion be exercised by the supervising agencies in relation to a breach. Our experience -

15

MR DONALDSON: Well, they have always got discretion, though. Like, they have got discretion to bring on the application or say, "We are disappointed, and we don't want to see this continue." So they have got discretion to either bring it on or not. And I would have thought, as you have suggested, perhaps the best way of dealing 20 with, you know, overzealousness in these matters is to have them back before the Supreme Court, as you would expect that the Supreme Court judges would be pretty unimpressed if they are sitting there dealing with matters that they shouldn't be dealing with.

25 **MS KETLEY:** That's right. And an overarching framework and some guidelines around how that discretion should be exercised would also support that.

MR DONALDSON: Yes, I think the best test of that is how they go in front of a Supreme Court judge, actually.

30

MS KETLEY: Yes, yes.

MR DONALDSON: Rather than having perhaps further guidelines that they have to satisfy themselves on. I suppose that that would give some understanding to 35 defendants as to how these things are going to be administered. But we all hope and expect that common sense is used by everybody in the process.

MS STIMPSON: Absolutely. What I would add to that perhaps, though, is often a charged breach of ESO will result in a refusal of bail, and so the concern would be 40 perhaps - we would think that maybe some further guidelines and discretion might mean that over time, perhaps, the agencies might make decisions in line with what you were saying, about exercising discretion in mind of what a Supreme Court judge might say. But we would just be concerned in the meantime that people are perhaps in custody, bail refused, without that guidance.

45

MR DONALDSON: I assume that would only occur in New South Wales if there was a finding of the contravention of the order, they have to be brought on, wouldn't they?

5 **MS FREEMAN:** Yes.

MR DONALDSON: So it wouldn't be relevant to bail unless there was a determination by a court that the provisions of the ESO had been breached?

10 **MS FREEMAN:** In New South Wales, in my experience dealing with breach matters under the New South Wales legislation is that clients are often bail refused by police and won't get bail necessarily in the Local Court for a breach ESO offence. And at times, I've had matters go to the Supreme Court to get Supreme Court bail for breaching an ESO.

15

MR DONALDSON: So there's been, in effect, a prosecution for a breach, has there? A breach has been found?

MS FREEMAN: A charge, yes.

20

MR DONALDSON: Oh, a charge. So this is before determination. A charge --

MS FREEMAN: This is just when someone is charged with a breach. They are often times bail refused. It's a show-cause offence in New South Wales.

25

MR DONALDSON: I see.

MS KETLEY: Yes, and there is a helpful body of common law in relation to the New South Wales high-risk offender schemes about the undermining of
30 rehabilitation prospects of an offender when you've got them repeatedly breached for technical matters on the ESO -

MR DONALDSON: It's obviously unsatisfactory.

35 **MS KETLEY:** cycling in and out of custody and how that can ultimately destabilise any otherwise good progress -

MR DONALDSON: Yes.

40 **MS KETLEY:** - in terms of community-based treatment.

MR DONALDSON: Is rehabilitation and reintegration in the community, are they objects of the New South Wales? My understanding is -

45 **MS KETLEY:** Yes, they are. They are. So this whole question is tied in with the other key consideration, the objects.

MR DONALDSON: And one would expect that if that's the case, when a court comes to consider what are appropriate terms of an ESO, say, either on a direct application for an ESO or in the alternative to a CDO, that there is a focus then not only on protective conditions, if I can put it that way, but conditions that are specifically directed to rehabilitation.

MS KETLEY: That's right. But the other part of that equation is coming back to the discretion of the supervising agency to have regard to those objects as well and to the need to exercise sensible discretion and in responding to a breach.

MR DONALDSON: This might be a very unfair question, and if it can't be answered, it can't be answered. But in relation to this class of offenders in New South Wales, are the rehabilitation schemes that exist, have they been found to be generally beneficial or worked well or otherwise?

MS KETLEY: I think, from our understanding, the prison scheme in New South Wales, is the only scheme available in custody, at the Goulburn Correctional Centre, the Supermax, that's the only scheme, and that hasn't yet been formally evaluated, is our understanding.

MR DONALDSON: I see. But if a person is out on the equivalent of an ESO under the New South Wales scheme, they would have access to services relevant to rehabilitation. Are there adequate services in,, or relevant services in New South Wales?

MS FREEMAN: For people on terrorism orders?

MR DONALDSON: Yes.

MS FREEMAN: They have CVE, Countering Violent Extremism, programs in their community that a person can participate in.

MR DONALDSON: Yes.

MS FREEMAN: In terms of how extensive that is, I don't have a lot of information on that. But there are programs.

MR DONALDSON: Who administers that scheme, do you know?

MS FREEMAN: It's part of Corrective Services New South Wales. The program is called, the acronym is ESP, but for the life of me I can't remember what the full -

MR DONALDSON: Can you just bear with me for a minute. We are actually going to be seeing Corrective Services New South Wales at some stage. So they run it.

MS FREEMAN: There you go. Yes. So there is a program. It's the ESP program.

MR DONALDSON: All right. Now, unfortunately, we have time limits in these matters, and as with pretty much everyone who has appeared, I could sit here all day and go through these matters because they are so interesting. But is there anything that I've missed out on in my questions? Because there were other things I was hoping to raise but if -

MR MOONEY: Just one issue. Just in relation to rehabilitation, we talked about, you know, your submission is that it should be an object, and I just thought it would be worth here noting at the hearing that that was quite critical in the Pender case, because the evidence from the experts, from all of the experts, was that detaining him under a CDO for another 12 months, there was no guarantee that he would be in any better position than he was the day he was before the court.

MS STIMPSON: Absolutely. And, in fact, the Commonwealth is seeking a three-year order. So no evidence that any further time in custody would have assisted the community or Mr Pender.

MR MOONEY: And I think Walton J actually said:

"I accept the submission from the plaintiff, which is that 105A.8 is not concerned with whether Mr Pender's rehabilitation in the future would benefit from detention or treatment in the community. In particular, the question of whether Mr Pender's ongoing rehabilitation will be better served by his removal from custody is not a consideration bearing upon whether he poses an unacceptable risk."

MR DONALDSON: And that may well be the way in which the Act currently operates.

MS STIMPSON: Yes.

MS FREEMAN: Yes.

MR DONALDSON: Even after the amendments. And it's difficult to see that that's a sensible policy position. Now, was there anything else? Was there anything else that arising out of what I've raised that you wanted to help me further with or you think I should know? I do know that Legal Aid New South Wales has always made people such as yourselves available to respond to other inquiries. So I'm sure that if anything else occurs, you will be able to help me further.

But I really am very grateful that you have come along today and, again, thank you very much for your written material and also the help that have you given me prior to today. It's been very, very useful. So thank you all very much.

MS STIMPSON: Thank you.

MS KETLEY: Thanks.

MR DONALDSON: Right. Now, we are moving into -

MR MOONEY: We have the Commonwealth agencies.

5 **MR DONALDSON:** Yes. So we are moving into a session now with the relevant Commonwealth agencies. So if the people who are going to appear could come. We might just take a minute or so while that's occurring.

THE PUBLIC HEARING ADJOURNED AT 12:00 PM

10

THE PUBLIC HEARING RESUMED AT 12:04 PM

SESSION 2: DEPARTMENT OF HOME AFFAIRS, ATTORNEY-GENERAL'S DEPARTMENT, AUSTRALIAN FEDERAL POLICE

15

MR DONALDSON: Thanks very much. This is the resumption of the hearing. And as I indicated at the opening remarks that I made at the commencement of these hearings yesterday, the position in relation to government parties whom I have asked to appear before this hearing is that very extensive written submissions have been
20 provided by a number of government agencies to this inquiry, and they were provided prior to the election.

And it's been made plain to me that relevant ministers now have not had an opportunity necessarily to consider all of the relevant matters. And that is inevitable,
25 and it is sensible, then, that both the agencies and the relevant ministers be given an opportunity to consider these matters afresh. And so that is going to happen. And so, as I explained yesterday, rather than perhaps have a question and answer session, if I can put it that way, what I was proposing to do in this session was to perhaps outline some preliminary views that I had or questions that I would like to be addressed.

30

And then, as the people here know, there will be a further session later on in the year, and hopefully I will get some, well, I will get responses to the matters that I'm raising today. So I'm very grateful to you all for coming along and, as I said a moment or two ago, unfortunately for you, you may be doing more listening than talking. But
35 it's just the nature of it, I'm afraid. So it's probably easier to you could each identify yourselves for the purposes of this and where you're from. I know it all, but if you could perhaps just state that so that everybody who's in the audience here today and online understands who everyone is.

40 **MR O'FARRELL:** Thank you, Mr Donaldson. My name is Robert O'Farrell. I'm Acting First Assistant Secretary in the Counter-Terrorism Coordination Centre within the Department of Home Affairs.

MR DONALDSON: Thank you, Robert.

45

MS NAWAZ: Ayesha Nawaz. I'm the Assistant Secretary of the Security, Law and Policy Branch in the Attorney-General's Department.

MR DONALDSON: Thank you, Ayesha.

MR McCARTNEY: Hi, Mr Donaldson. It is Ian McCartney. I'm the Deputy
5 Commissioner of Investigations from the Australian Federal Police.

MR LEE: Afternoon, Mr Donaldson, Scott Lee. Assistant Commissioner for Counter-Terrorism and Special Investigations for the AFP.

10 **MR DONALDSON:** Thanks very much, Ian and Scott. And also here we have Richard Johnson who is from the Department of Home Affairs as well, who is a senior officer of the department who has responsibility for these matters as well. So thank you for coming along as well, Richard. And, again, can I thank the departments for the written work that's been done already. I'm sure that it won't be all
15 wholly or completely wasted, but there have been some very interesting insights into various matters in those written submissions already.

And not only that, but departments have given assistance to me already in responding to requests for information and providing insights on an informal basis on some
20 matters that I've asked to be addressed. So I'm, again, grateful for that assistance so far. All right. So some of the issues that I'm interested in, in relation to the legislation.

MR McCARTNEY: Mr Donaldson, before we start, we do have a very, very short
25 opening statement.

MR DONALDSON: I'm very sorry. Yes, anybody who wants to start off with some preliminary observations, please do.

30 **MR McCARTNEY:** I think it's just myself, on behalf of my colleagues. Again, thank you very much for the invitation today to attend this public hearing. I intend to make only brief remarks. As we've discussed, we understand you intend to provide some initial assessments or your initial assessments on the legislation, and, from our collective perspective, that will be very instructive in terms of how we progress.
35

I think I speak for all Commonwealth representatives here today in stating that we strongly support the work you are undertaking in this review, of post-sentence orders under Division 105A of the Criminal Code. The importance and accountability of transparency in a scheme such as this cannot be overstated. We welcome your
40 insights and oversight in regard. We are pleased to see such significant engagement in this review from important community representatives.

As an operational agency, the AFP is tasked with protecting the Australian community from the threat of terrorism. Unfortunately, in our experience, certain
45 terrorist offenders continue to hold extremist beliefs, even after having served their sentence. From the AFP's perspective, while it's still a relatively new framework,

post-sentence orders serve an important function in managing the compounding risk posed by high-risk terrorist offenders to the Australian community.

Your review will ensure the framework of post-sentence orders remains fit for purpose going forward. I note Home Affairs and Attorney-Generals Department have provided a joint written submission to this review early in 2022, and more recently, the AFP formally responded to a series of questions from your office, both of which are now publicly available on your website. We value your views and comments today and we look forward to continue assisting with you and office with your review, including answering additional questions on behalf of us in a written submission or in a future public hearing. Thank you, Mr Donaldson.

MR DONALDSON: Thanks very much, Ian, for that. So the first issue that, in due course, I would be very interested in people's views on, and please don't feel obliged to write all this stuff down, there will be a transcript of this that will be made available to you, if that helps. The first matter that I am interested in, which has been the subject of a number of submissions that I've received, are the objects of Division 105A of the Act.

I'm aware that the objects were amended in the recent amendments to the Act in 2021 to, in effect, remove certain matters from the objects. I don't want to get into an argument about that, but the objects are now shorter. What is absent from the objects of the Act,the division, and I think really absent from the intended operation of the Act(I will be interested in hearing that as well)is rehabilitation of defendants or reintegration of defendants into the community either at the expiration of a continuing detention order or the relevance of reintegration into community as a relevant goal or object of extended supervision orders and particular conditions there.

Now, you know, rehabilitation and reintegration, can be dealt with in a number of ways in the division. One of them is in the objects. They can be dealt with otherwise. And I say it can be dealt with in the objects because the Act currently provides that the court, in making orders for either a CDO or an ESO, are required to have regard to the obvious. So that seems to me to be the obvious place for it, but if it should be sensibly somewhere else, if it should sensibly be there, then I would be grateful for your views on that in due course.

Next, because the executive government is peculiarly,well, responsible but also has the relevant expertise in relation to Australia's international human rights obligations, I would be greatly assisted by some specific submissions that deal specifically with whether the regime as it currently exists in Division 105A is understood by the government to conform to Australia's international human rights obligations. And specifically, there, I'm interested in the observations that were made by the UN Human Rights Committee in its Fardon reference in 2009, but more recently the UN Human Rights Committee general comment number 35 that dealt with Article 9 of the Covenant which was published in December 2014.

And if I could just outline what I'm specifically interested in most, is the 2014 UN Human Rights Committee reference is the statement by the committee that states:

"*...should only use such post-sentence detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.*"

Well, we have judicial reviews of that, I understand:

"State parties must exercise caution and provide appropriate guarantees in evaluating future dangers."

I will come back to that because that's risk assessment notions:

"And the conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence, and it must be aimed at the detainee's rehabilitation and reintegration into society."

So I will be interested in understanding the government's view as to whether the current regime conforms to that standard, and international human rights standards more generally. And I make that request largely because it occurs to me, without expressing any disrespect to anybody, that the statements that deal with those matters in paragraphs 37 to 40 of the explanatory memorandum that accompany the introduction of Division 105A in 2016 is rather crisp, if I can put it that way, in relation to those matters. So I would be assisted if those matters could be perhaps more fulsomely addressed.

The next matter that I'm interested in, and, again, has been raised by a number of people who have participated in this inquiry, is what has been referred to as the gate way into the process. So the way into the process at the moment is that a person is serving a sentence of imprisonment, having been convicted of one or other of various offences. And most of these matters are inevitably going to be what are referred to as serious Part 5.3 offences. And some of the offences in Part 5.3 are not serious Part 5.3 offences. It is essentially any offence that carries a maximum sentence that exceeds seven years. So there's one offence that doesn't qualify.

So the way into the process is dealt with conviction of an offence that carries a particular maximum term, and that might not be the only way in which a person, or necessarily the best way that qualifies a person, as it were, to come within the scheme. And one thing that I am considering is whether a more appropriate integer providing for a person being. I use the word "eligible" in an odd way, but I'm sure you know what I mean. A more appropriate integer is conviction of one of these identified offences and a sentence beyond a particular level.

And that really arises from the fact that a lot of the Part 5.3 offences, although they can be extremely serious and as serious as any offending. Because of the way in which some of these provisions are drafted, it's conceivable there could be people

convicted of certain Part 5.3 offences that are, if I can put it this way, relatively trivial. And if that's the case, then it may be that a better way of the Minister being obliged to determine whether an application should be made is looking at people who have been given a sentence over a particular amount.

So I would be interested in any views that the relevant departments have in relation to that matter. And, again, I I think the current scheme applies fairly clearly in that respect. So I understand that, and it may be that you disagree with that.

I would be assisted with is whether there is any benefit in perhaps having a different integer for the commencement of a CDO process a as opposed to the commencement of an ESO process. Now, we don't know much about ESOs yet, and there have been no applications specifically made yet for an ESO. But - there may be a different way into the process depending on whether a CDO is sought or an ESO is sought. So I would be assisted by that.

Other matters that I would be assisted with are really very practical matters, if I can put it. I haven't finished with the more theoretical matters, but there are some more practical matters as well. I don't know if any of you were here with the people from the New South Wales Legal Aid, which was very helpful. It provided some really extremely helpful insights into the process. But one of the issues that has arisen in the small number of matters that have been made under the legislation is that they are often commenced not long prior to the expiration of the sentence.

So in both Pender and Benbrika, the applications were commenced effectively two months prior to the sentence concluding. And inevitably, it seems to me, if applications are commenced that close to the expiration of sentence, they are not going to be concluded prior to the sentence expiring. And this process is really premised upon the determination of post-sentence detention being determined prior to sentence expiring.

And one suggestion that has been made is that there be a requirement in the Act that these applications, if they are to be made, be commenced no less than six months prior to the expiration of sentence. So, again, I'm assuming that everybody shares the goal that these applications should be made and completed prior to the expiration of sentence. That's not happened yet, and so I'm interested in ways that might ensure that that does happen.

Allied to that, although not inevitably so, are the use of interim post-sentence orders and particularly interim detention orders. Currently, the Act has, as it were, a low standard for the making of the first three monthly interim orders. I say the first three, if there are to be three, but the first interim orders that are sought and two repeats of those. It would be unsatisfactory if any participant in the process thought that they could proceed on an assumption that those sorts of interim orders would be made as a matter of course, because that will simply give rise to delay. And so I am considering whether a higher standard might be required for, say, the Minister to

establish that an interim order should be made, pending the resolution of a final application.

I'm also interested in what seems to be a quirk of the legislation that, in the event that a continuing detention order is made after the expiration of sentence, the order runs from that date rather than the date of the end of the sentence. So a person - let's say the continuing detention application is not concluded until three months after the sentence had expired, that period - and if a person is in interim detention during that period, that period of time is not taken into account, as it were, in relation to the running of the CDO. And it seems to me that that's just a quirk of the legislation and the obvious time for any continuing detention order to commence is the end of the sentence period.

Again, in relation to a practical matter, there have been issues raised in relation to the likelihood of avoidable delays in the process being caused by ensuring that defendants receive adequate legal representation and other assistance. So the provision in Division 105A at present requires, and the regulation that's made pursuant to it, requires that a defendant establish that they don't have funds available to them to pay their own fees, as it were, and that they have made application to state legal aid bodies seeking funding.

And having regard to material that I've seen in relation to Mr Benbrika's matter, for instance, that resulted in significant delays. And if the position is that the Commonwealth accepts that it has an obligation to fund and ensure that defendants in this process are adequately funded, then they should simply, it seems to me, provide that funding. And, interestingly, in New South Wales, I learned earlier today, a grant is made by the Commonwealth to the legal aid commission to deal with those matters. And they are done in advance.

So, in New South Wales, if the prediction as to how much funding required is accurate, there would be no delays in New South Wales, but that is certainly not the case, for instance, in Victoria. So I'm interested in ways that that might be simplified, if I can put it that way.

Now, another suite of matters that have been the subject of many submissions to me, but also that have troubled me from the start deal with the notion of risk assessment. And you are all aware, obviously, of the role that risk assessment plays under the relevant legislation. And in relation to the definition of "relevant expert", it is a definition that includes, for instance, medical practitioners, psychologists, and the like.

But I would be interested in the relevant department's views in due course as to the definition simply being limited to mean and to specifically - to relate specifically to persons who are competent to assess the risk of a terrorist offender - let's just use the term committing a serious Part 5.3 3 offence. And I say that because I'm interested in that, and it is related to another matter, or other matters that arise under the Act, because it occurs to me that there is a very real issue as to whether these forms of

assessments, which are really expert opinion evidence for the purposes of the court, would in the ordinary course be admissible.

And, as you know, 105A.7(1)(b), which is the job for the court, what is the court to do, the court is to make a decision to a high degree of probability on the basis of admissible evidence that the offender poses an unacceptable risk of committing an offence. Now I'm also aware of the provision that provides the court must have regard to certain matters, one of which is relevant assessors' reports.

Now, I must say, for my part, I don't actually know whether the Act intended to operate on the basis that risk assessors' reports under this Division of the Act, that the court must have regard to that, even if they would otherwise be inadmissible or whether there is a requirement under the Act for the court to consider the admissibility of this material. And part of the reason I raise this issue is because, and I'm sure the AFP officers would understand this, in some areas of law, particularly, say, dangerous sexual offenders, I think it's well understood that there are various tools and various areas of expertise which particular experts can predict with some degree of confidence whether a person is likely to be committing a sexual offence if released.

But in relation to violent extremism, I think it's also equally clear that that field of expertise is nascent and comparatively undeveloped. And it may be, I don't know this, it may be that the policy decision that has been made in relation to this legislation is that, "Well, we understand it's nascent and it may not be admissible in a court, but we are going to require the court to have regard to these reports anyway."

Now, if that's the policy decision that has been made, I would appreciate being told that. And if it's not, and the Law Council of Australia, for instance, has recommended that the process be that those reports must be legally admissible, and that they doubt that they are admissible which would have the consequence that there would be no expert evidence before the court when it makes an assessment. Now, that might be a good thing or a bad thing, but that's the consequence of it. So I am interested in the Commonwealth's view of how it actually operates and whether it's intended to operate that way or differently and what are the advantages or disadvantages of both.

Another thing that I am interested in - and, again, I will just briefly deal with the issue, but it's been the subject of quite a deal of discourse during this hearing, which we can provide to you the relevant bits of it, if need be, but again relates to section 105A.7(1)(b), which is the critical provision in relation to the court making an assessment. And so that requires the court 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 Part 5.3 serious offence.

Now, there have been many positions to this review that have largely, I think, been prompted by observations of Gageler and Gordon JJ in the Benbrika case, that because serious Part 5.3 offences or cover such a wide range of offending, the focus

of the legislation should not be on the risk of that wide range of offending, but offending that is otherwise more tightly prescribed. And, again, you will see in particular from the submission of the Australian Human Rights Commission in their recommendation 3, that they posit a way in which that can be limited.

5

I would be interested in government's view, when I say the government, you know what I mean, the view on that question, and I should also foreshadow to you that I'm more interested, actually, in whether the same goal or object can be affected by giving greater definition to the term "unacceptable" in relation to "unacceptable risk"
10 where it appears in that particular provision. What is actually intended to be encompassed by the notion of an unacceptable risk is, well, could be more precisely explained, it seems to me.

15 Another matter that I'm interested in, and, again, I would be hoping, Scott, that when we come back next time, you will be available, because I know you've given evidence in the Benbrika matter.

MR LEE: Of course.

20

MR DONALDSON: But is the way that relevant expert evidence is really commissioned and what use is made of it. And I say it for this reason: The person who is conducting a risk assessment of a qualifying person will almost certainly not be a lawyer, and it seems to me to ask a lot of a qualified expert to say, "Please give
25 me a report that deals or assesses the risk of a person committing a serious Part 5.3 offence." Because that's not very easy to understand what all of those offences necessarily encompass.

A risk assessment, it seems to me, and if you look at the way that risk assessments
30 generally are done and the purposes for which they are undertaken, they are to assess the risk of certain behaviour occurring in the future, or certain conduct. It then, seems to me to be a separate question of whether that behaviour or conduct constitutes, or would constitute, an offence under Part 5.3, and then, this might be where the notion of unacceptability comes in, what may emerge from that that, for
35 instance, there is a high risk of very low-level offending which might not be unacceptable, say.

But what I think is important is for those who undertake a risk assessment, to actually be focusing on is what the risk assessment tools and their structured
40 professional judgment are actually designed to do, which is predict conduct. And conduct might be A, B or C, and A, B or C may be conduct that falls within one of the offence provisions in the division, or it might not. But it seems to me that it is asking an awful lot of an expert to say, "And also give me a legal opinion on whether it falls within one of these provisions." And I know, Scott, that you have given some
45 evidence about that, so I will be very interested in your insights of that in due course.

MR LEE: Absolutely.

MR DONALDSON: And, equally, I will be interested in the extent to which, I think I've got an answer for this, but the extent to which those experts risk assessments should also deal with the efficacy of conditions to deal with the risk. So, as we know, there's the qualifying under (b). This is relevant offender, and the court is satisfied that there is no less restrictive measure available. And I know - and you know, Scott, obviously, that expert evidence by the risk assessors has been led in relation to the availability or utility of those alternative means, and I would be interested in understanding better the importance of that, if it is viewed to be important. Thank you.

Then, again, looking at section 105A.7, another matter that has occurred to me is this. If you look at the way the first application for a CDO operates, so the minister goes to the court, seeks to persuade the court that the person poses an unacceptable risk of committing an offence, and that there is no less restrictive measure available under this part that would prevent that unacceptable risk.

If the court's persuaded of (b), but not persuaded of (c), then the question becomes, well, what terms of the ESO would deal with that risk? And the way that the legislation currently operates is that the minister then approaches the court with a suite of ESO conditions that the minister says will respond to that, and adequately, if I can put it this way, ameliorate that risk.

It seems to me that an inevitable consequence of that is that the starting point of analysis for an ESO will always be conditions that are, if you like, at the high end and you work down from that. Another way of doing it would be if the court is convinced that the person poses an unacceptable risk but is not persuaded that no ESO on any terms could deal with it, to then say, "Well, I am going to order an ESO." And rather than have the Minister start with the term that the Minister contends, that the defendant put before the court perhaps the starting position terms which the defendant says will be able to ameliorate the risk.

And one practical consequence of that, and I'm not saying this is a good thing or a bad thing, but one practical consequence of that would be that the court's consideration of the matter would not start from, if I can put it this way, the high end, but would be starting from a different starting position. So I would be interested in anybody's views as to whether that would be a good idea or not.

There have been a number of issues that have been raised in these hearings but also in written submissions in relation to the VERA-2R model. Now, I've made it very clear to everybody on several occasions that this is not an inquiry into the efficacy of VERA-2R or any other risk assessment tool. And I understand acutely the distinction between a tool that is used in the risk assessment process and that there is more to it than simply application of the tool.

But the tool is important, and there are concerns that have been expressed in a number of submissions that we have received that there are circumstances

surrounding the use of that tool that are of concern, and they include the fact that Home Affairs is the licensee of that tool in Australia, Home Affairs conducts or is responsible for the training and accreditation in the tool, and there have been suggestions that there is at least a perception that there are impediments to research in this country in relation to the efficacy of the tool. Not necessarily as a result of the matters that I've earlier indicated, but, in any event, there are concerns as to whether research can be undertaken here.

Now, if that is the case, that seems to me to be a very unsatisfactory circumstance that the tool that is used by the government and put before the government to the court as the basis of risk assessment is not a tool the efficacy of which can be adequately the subject or properly the subject of research.

So I will be interested in your response. And I'm really looking to Home Affairs. This is what's been put. This is what's been put. I don't need it today, obviously, but this is what has been put. But I am very interested in the issue that, as opposed to other risk assessment tools, it is difficult for there to be proper research into VERA-2R. And I do understand some of the intellectual property reasons that exist for that, but, well, if that's the answer, then I suspect government might have to do a bit better than that.

All right. Again, I might arrange for Mark or somebody from my office to provide to Home Affairs in the first instance, but to all the parties, the evidence that we've heard in the last couple of days concerning these matters. Please have regard to that in responding to this issue. All right. Thank you.

Another matter which has been raised during the hearing, which is allied to that, is whether in relation to relevant experts there ought to be a body that is responsible for the accrediting of relevant experts to be, in effect, qualified to express opinions in relation to the 105A matters. As many of you know, I'm sure, there is a body in Scotland that deals with the accreditation of risk management matters, not only in relation to extremist violence but more generally.

And submissions have been received, and I think they largely emerge from concerns about the way in which VERA-2R operates, but I have received submissions that an independent body that would accredit experts for the purpose of the division would be a positive thing. I should perhaps foreshadow to you that my preliminary view is that if the Act were to be clear that relevant expert opinions had to satisfy the rules of evidence, that is, it had to be admissible, it may not be necessary to have any sort of independent risk management authenticator, if I can put it that way. But, again, I will be interested in the relevant department's views as to that.

There has been a common theme, in fact, it's been a submission made by virtually everybody who has appeared both in the hearings here but also in writing that there seems little point in having control orders still available in relation to those who are serving a sentence of imprisonment. That is, somebody coming out of a term of

imprisonment, they either get a continuing detention order or they get an ESO. And there doesn't seem to be much role left for control orders as an immediate tool.

So somebody may come out of detention, not be subject to either a CDO or an ESO, and three months later there's a reason for concern. Well, that may be what control orders deal with. But control orders, it is put, should not be available as an alternative in the immediate post-sentence period.

There have also been concerns that have been raised and I am most interested in the way in which section 105A(4)4 operates. So that's the provision of the Act that deals with the circumstances in which those the subject of continuing detention orders will be housed, if I can put it that way, or detained. And currently the Act operates on the basis that a person can be, obviously, detained in custody but they must be on conditions that are appropriate to that person's state, being a person who is not serving a term of imprisonment.

And although the section provides that the offender must not be accommodated or detained in the same area or a unit of a prison as others, there are very substantial exceptions to that in terms of 105A.4(1)(a), (b) and (c). That is, it wouldn't be too difficult to move out of that bespoke environment. And another issue that's arisen is there is a facility in Victoria which I have seen that deals, for instance, with Mr Benbrika, because he went before the Supreme Court of Victoria.

But there is a a concern on my part as to how this provision is able to be policed, if I can put it that way. How can the community be assured that this is actually what is happening? Now, there are any number of ways that that can be done, but one way that it could be done is, for instance, there are various reviewers of custodial services in each of the states. It may be that they can be required or asked to do reports or reviews on these matters. But the way in which the Act operates and it's designed is that a person who is the subject of a CDO is not in the general prison community and is dealt with quite separately, and in a means appropriate to the status of that person not being a prisoner. Well, how is everybody satisfied that that's actually what happens? So, again, I would be most interested in people's views as to that.

Another matter that I am interested in, although I am in a difficult position, and that is ESOs. And I say I'm in a difficult position because central to the role that I perform is to have specific and I think overriding regard to the practical operation of things. And we don't actually have an ESO yet, so it's a bit difficult to know how they are going to practically operate. And so, yes, we just don't know yet. And, in fact, I know that the Benbrika matter, for instance, there was some consideration of alternative ESOs but not really. The matter simply didn't get to that. And Pender occurred prior to the introduction of ESOs.

But I must say that the provisions of the Act which deal with the conditions that can be imposed do seem lengthy and prescriptive. Maybe not the only way it can be done. But I suppose it clarifies things for people. And again, it may simply not be known yet what processes are going to be in place in the different states for dealing

with the actual management or implementation of these orders when they come to be made and whether the same services are available in all of the states.

And I'm pretty sure in some, I can almost guarantee that at least one state doesn't
5 have the same facilities that New South Wales has available, for instance, for dealing with these sorts of issues, because New South Wales has a history of dealing with them because of their own state scheme. But how the Commonwealth is going to deal with that and it would plainly be unsatisfactory if people were dealt with differently in different states simply because resources weren't available.
10
But that might be a resource, or, in part, be a resource matter and it may be that there's no finalised view on all of these matters. But I would be assisted to know that the legislation is intended or will practically operate on the basis that it won't matter where a person is in Australia; if they are subject to an ESO, they will still have the
15 same facilities available to them. And that would include, if the objects of the Act are changed, to include rehabilitation and reintegration. That would include those services available in each of the states and territories.

And I think the final matter, I know it's been a very long list, and I don't know why
20 you have all been sitting there writing everything because you can just look at the transcript, but I know some people get great comfort from writing stuff down.

MS NAWAZ: It's a good way to take it in.

25 **MR DONALDSON:** Yes, that's right. You probably like me: You can't think unless you are either writing or typing. There is an obligation in the Act for the AFP Minister in applications to make inquiries to determine whether there are facts known. These are essentially exculpatory facts and to disclose those matters. And I have seen nothing to suggest that that obligation is not being fulfilled in the scheme
30 as it currently operates.

But arising out of the close affinity of Home Affairs with the VERA-2R tool, it may be, well, this is also tied into whether there is going to be an application of legal admissibility to these reports or not, but I am interested in the view as to whether,
35 say, a Commonwealth agency holds information as opposed to a fact that, say, is relevant to the efficacy of the VERA-2R tool, that that should be disclosed as well during the course of an application.

And I would be very interested to understand whether if this provision, say, was
40 going to be expanded to deal with not only facts but, say, information, whether that would likely give rise to complex interlocutory issues involving, say, public interest immunity or privilege or something of that nature. But what I'm getting is really a theoretical issue which is let us say that Home Affairs, which has a close affinity with the VERA-2R tool, had in its possession a paper that was highly critical of the
45 efficacy of the VERA-2R tool, let's say.

Would the Commonwealth be under an obligation, or, should the Commonwealth be under an obligation to disclose that to an applicant during the course of this process?

I did pretty well for time there. Right. Now, that's my list. Has anybody else got anything else?

MR MOONEY: Wouldn't dare.

MR DONALDSON: Well, as I said, I don't expect any response to any of those matters now, but I'm very grateful that have you come along to hear those matters. But could I also urge you, if are you able to look at the written submissions that have been provided by others and also to what's happened over the last day and a half, that would give not only texture to these matters but also others. And if you could have regard to that information when you are providing your responses, that would be very much appreciated. Now, are there any questions that you want to raise arising out of that? Like, I don't expect in a substantive way, but was there anything that anybody wanted to say?

MS NAWAZ: I just had two clarifying questions, Grant, if I may. In relation to your second-last question, did you also want to look at the treatment of offenders under a CDO in all jurisdictions as well as ESOs? I think your question was geared at ESOs because the range of conditions can be so broad, but did you want to look at CDOs as well?

MR DONALDSON: I'm not so interested, that’s a very good question, but I'm not so interested for this reason: that I know what the position is in Victoria. There isn't anybody in New South Wales, well, Mr Pender is relevant in New South Wales, and there will be some people who may come within the scheme next year in New South Wales. But I am aware that there are discussions that are taking place between the Commonwealth Government and the NSW Government in relation to how is 150A.4 is to be dealt with, and so I am aware that the Commonwealth is aware that they are going to have to do something. So I don't need to know the detail of that.

I think it's pretty obvious to everybody that there are going to have to be investments made in relation to these matters in other states because the 105A.4 provision comes from the Victorian Dangerous Sexual Offenders Act. I don't think other states or territories has an equivalent to that. I know in Western Australia; dangerous sexual offenders are kept in the general prison population. So I know the Commonwealth's aware that it has to do something, and it hasn't arrived at that position in relation to the other states yet. And I've seen what exists in Victoria.

And I think the issue might really be wrapped up in how the community can be satisfied that 105A.4 is being implemented and done. So, yes, don't waste too much time on that, Ayesha. And there was another question, was there?

MS NAWAZ: Yes, I did have another question. Thank you again for drawing our attention to all the submissions. We've been reading them, following the hearing very

closely. In your survey of state and territory schemes, is there anything else that you would be interested in us looking at that you think would transfer across? After all, CDOs, ESOs are based on those state and territory schemes to the extent they are looking at post-sentence orders.

MR DONALDSON: Well, can I make this general observation. I don't think that there's very much to be learned out of most of those schemes. In my experience, I can say that this - as a piece of legislation, this is a much clearer piece of legislation than certainly the West Australian provision, I can say, with which I'm quite familiar. But, no, I'm not going to be putting to you, "Here is something that would be a good idea that's in the Queensland Act", for instance. I'm really focusing pretty much on how this works.

But I think it would be fair to say that I am extremely interested on whether there is any focus on rehabilitation and reintegration, and, if there is not, whether there should be and, if there's going to be, how that might best be done. But I will reflect on your question and if there is anything that I think is relevant to this arising out of the state schemes, then I will drop you a note. Is that it? Was there anything from you?

All right. Thanks very much. Actually, two minutes. On time. Which is pretty unusual for me, I've got to say. But there you go. Now, now, please be clear on this. After yesterday's sessions, and this is the last session we have had today, I've invited any member of the public who is here or anybody else who have any questions to ask questions. That is not you. They are asking questions of me. I'm not wanting to expose you of that, and if you want to have a conversation with somebody about those matters, then you are obviously free to do it outside, but this is not a session to be directed at anybody who's here.

Perhaps, though, before I do that, I'm looking at who is here. Is there anybody here who - who does have questions or comments or observations they want to make? Because I think I pretty much know everybody who's here and some of the others of you who I don't know look like people where I can predict where you're from. So I'm not sure that you would have many questions. I didn't expect so. Was there anyone else that you wanted to raise, Mark or Helen?

MR MOONEY: No.

MR DONALDSON: Well, that, then, is the conclusion of these hearings. Again, could I thank you for all coming along. I think it was a useful process for you to hear these matters, these issues from me, and I'm very much looking forward to your help in due course. And particularly, Scott, if I could make a specific request that next time, if you could come along as well, because I know you have a great deal of experience in these -

MR LEE: I will definitely be here.

MR DONALDSON: Practical experience in these matters, which will be of great help.

MR LEE: Yes.

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MR DONALDSON: So, again, thank you all for coming. Thank you for the work you have done so far, and I'm looking forward to hearing the product of that on August 31.

10 That is the end of these hearings. Can I thank everybody who has participated in these hearings, not only providing us with their wisdom, but also those who have shown interest in attending this hearing, but also have had access to it through the live feed. So that is the conclusion of these hearings. Thank you very much.

15 **THE PUBLIC HEARING ADJOURNED AT 1:01 PM TO WEDNESDAY, 31 AUGUST 2022.**